

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 39 and 190

RIN 3038–AF16

Derivatives Clearing Organizations Recovery and Orderly Wind-Down Plans; Information for Resolution Planning

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing amendments to certain regulations applicable to systemically important derivatives clearing organizations (SIDCOs) and derivatives clearing organizations (DCOs) that elect to be subject to the provisions in the Commission's regulations (Subpart C DCOs). These proposed amendments would, among other things, address certain risk management obligations, modify definitions, and codify existing staff guidance. The Commission is also proposing to amend certain regulations to require DCOs that are not designated as systemically important, and which have not elected to be covered by our regulations, to submit orderly Wind-Down plans. In addition, the Commission is proposing to make conforming amendments to certain provisions, revise the Subpart C Election Form and Form DCO, and remove stale provisions.

DATES: Comments must be received by September 26, 2023.

ADDRESSES: You may submit comments, identified by “Derivatives Clearing Organizations Recovery and Orderly Wind-Down Plans; Information for Resolution Planning” and RIN 3038–AF16, by any of the following methods:

- *CFTC Comments Portal:* <https://comments.cftc.gov>. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.

- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged. All comments must be submitted in

English, or if not, accompanied by an English translation. Comments will be posted as received to <https://comments.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.¹ The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <https://comments.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

FOR FURTHER INFORMATION CONTACT:

Robert Wasserman, Chief Counsel and Senior Advisor, 202–418–5092, rwasserman@cftc.gov; Megan Wallace, Senior Special Counsel, 202–418–5150, mwallace@cftc.gov; Eric Schmelzer, Special Counsel, eschmelzer@cftc.gov, 202–418–5967; Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background
 - A. The CEA and DCO Core Principles
 - B. Regulatory Framework for DCOs
 - C. Recovery and Orderly Wind-Down for SIDCOs and Subpart C DCOs—Regulation 39.39
 - D. 2014 International Standards and Guidance on Recovery and Resolution of Financial Market Infrastructures
 - E. CFTC Letter No. 16–61
 - F. Additional International Standards and Guidance
 - G. Requirement To Submit Recovery and Orderly Wind-Down Plans to the Commission—§ 39.19(c)(4)(xxiv)
- II. Amendments to Regulation 39.39—Recovery and Orderly Wind-Down for SIDCOs and Subpart C DCOs; Information for Resolution Planning
 - A. Definitions—§ 39.39(a), § 39.2

¹ 17 CFR 145.9. Commission regulations referred to herein are found at 17 CFR chapter I (2020), and are accessible on the Commission's website at <https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm>.

- B. Recovery Plan and Orderly Wind-Down Plan—§ 39.39(b)
- C. Recovery Plan and Orderly Wind-Down Plan: Required Elements—§ 39.39(c)
- D. Information for Resolution Planning—§ 39.39(f)
- E. Renaming Regulation 39.39
- III. Orderly Wind-Down Plan for DCOs That Are Not SIDCOs or Subpart C DCOs
 - A. Requirement to Maintain and Submit an Orderly Wind-Down Plan—§ 39.13(k)(1)(i)
 - B. Notice of the Initiation of Pending Orderly Wind-Down—§ 39.13(k)(1)(ii)
 - C. Orderly Wind-Down Plan: Required Elements—§ 39.13(k)(2)–(6)
 - D. Conforming Changes to Bankruptcy Provisions—Part 190
- IV. Establishment of Time to File Orderly Wind-Down Plan—§ 39.19(c)(4)(xxiv)
- V. Amendment to Regulation 39.34(d)
- VI. Amendments to Appendix B to Part 39—Subpart C Election Form
- VII. Amendments to Appendix A to Part 39—Form DCO
- VIII. Related Matters
 - A. Regulatory Flexibility Act
 - B. Antitrust Considerations
 - C. Paperwork Reduction Act
 - D. Cost-Benefit Considerations

I. Background

A. The CEA, Dodd-Frank Act, and DCO Core Principles

Section 3(b) of the Commodity Exchange Act (CEA) sets forth the purposes of that Act; among these is to ensure the financial integrity of all transactions subject to this act and the avoidance of systemic risk. Section 5b(c)(2) of the CEA, as amended in 2010 by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),² sets forth eighteen core principles with which a DCO must comply in order to be registered with the Commission and maintain its registration (DCO Core Principles).³ Together, the DCO Core Principles serve to reduce risk, increase transparency and promote market integrity within the financial system.⁴

Title VII of the Dodd-Frank Act grants the Commission explicit authority to promulgate rules, pursuant to section 8a(5) of the CEA, regarding the DCO Core Principles that govern the activities of all DCOs in clearing and settling swaps and futures.⁵ Section 8a(5), in turn, authorizes the Commission to

² Title VII, Wall Street Transparency and Accountability Act of 2010, Public Law 111–203, 124 Stat. 1376, 1641 (2010).

³ Section 5b(c)(2) of the CEA, 7 U.S.C. 7a–1(c)(2).

⁴ *Derivatives Clearing Organization Gen. Provisions and Core Principles*, 76 FR 69334, 69334 (Nov. 8, 2011); *Customer Clearing Documentation, Timing of Acceptance for Clearing, & Clearing Member Risk Mgmt.*, 77 FR 21278, 21279 (Apr. 9, 2012) (further amending § 39.12).

⁵ Section 725(c) of Title VII of the Dodd-Frank Act, 124 Stat. at 1687 (2010), 7 U.S.C. 7a–1(c)(2)(A)(i).

make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

For SIDCOs in particular, Title VIII of the Dodd-Frank Act grants the Commission explicit authority to prescribe risk management standards, taking into consideration relevant international standards and existing prudential requirements governing operations related to payment, clearing and settlement activities and the conduct of designated activities by such financial institutions.⁶ Under Title VIII, the objectives and principles for those risk management standards are to (1) promote risk management; (2) promote safety and soundness; (3) reduce systemic risks; and (4) support the stability of the broader financial system.⁷ Combined, Titles VII and VIII of the Dodd-Frank Act address one of Dodd-Frank's fundamental goals: to reduce systemic risk through properly regulated central clearing.⁸

DCOs are subject to a number of risks that could threaten their viability and financial strength, including risks from the default of one or more clearing members (including credit and liquidity risk) as well as non-default risk (including general business risk, operational risk, custody risk, investment risk, and legal risk). The realization of these risks has the potential to result in the DCO's financial failure.⁹

In light of the central role DCOs perform in the markets that they serve, the disorderly failure of a DCO would likely cause significant disruption in such markets. In particular, SIDCOs play an essential role in the financial system, and thus the disorderly failure of such a DCO could lead to severe systemic disruptions if it caused the markets it serves to cease to operate effectively. Ensuring that DCOs can continue to provide critical operations and services as expected, even in times of extreme stress, is therefore central to financial stability. Maintaining provision of the critical operations and services that clearing members and

others depend upon should allow DCOs to serve as a source of strength and continuity for the financial markets they serve.¹⁰

Core Principle D requires each DCO to ensure that it possesses the ability to manage the risks associated with discharging its responsibilities through the use of appropriate tools and procedures.¹¹ Recovery planning is inherently integrated into that risk management, and concerns those aspects of risk management and contingency planning which address the extreme circumstances that could threaten the DCO's viability and financial strength. To manage these risks as required by Core Principle D, a DCO needs to identify in advance, to the extent possible, such extreme circumstances and maintain an effective plan to enable it to continue to provide its critical operations and services if these circumstances were to occur. The recovery plan needs to address circumstances that may give rise to any default loss, including uncovered credit losses, liquidity shortfalls or capital inadequacy, as well as any structural weaknesses that these circumstances reveal. Similarly, the recovery plan needs to address DCOs' potential non-default losses. The recovery plan also needs to address the need to replenish any depleted pre-funded financial resources and liquidity arrangements so that the DCO can remain viable as a going concern and continue to provide its critical operations and services. The existence of the recovery plan further enhances the resilience of the DCO, and will provide market participants with confidence that the DCO will be able to function effectively even in extreme circumstances.¹²

Given the systemic importance of SIDCOs, each SIDCO must have a comprehensive and effective recovery plan designed to permit the SIDCO to continue to provide its critical operations and services. Subpart C DCOs, being held to similar standards as SIDCOs, also need to have such recovery plans. However, where a recovery plan proves, in a particular circumstance, to be ineffective, it is important that the DCO have a plan to wind down in an orderly manner. A plan for an orderly wind-down is not a substitute for having a comprehensive and effective recovery plan.¹³

The purpose of a recovery plan is to provide, with the benefit of thorough planning during business-as-usual

operations, such information and procedures that will allow a DCO to effect recovery such that it can continue to provide its critical operations and services when its viability as a going concern is threatened. A recovery plan enables the DCO, its clearing members, their clients, and other relevant stakeholders, to prepare for such extreme circumstances, increases the probability that the most effective tools to deal with a specific stress will be used and reduces the risk that the effectiveness of recovery actions will be hindered by uncertainty about which tools will be used. The recovery plan will also assist the Federal Deposit Insurance Corporation (FDIC) as resolution authority under Dodd-Frank Title II¹⁴ in preparing and executing their resolution plans for a DCO.¹⁵

While the implementation of the recovery plan is the responsibility of the DCO itself, which accordingly also has to have the power to make decisions and take action in accordance with its rules, under Title II resolution, that responsibility and power will pass to the FDIC as receiver instead. Many recovery tools will also be relevant to a DCO under Title II resolution, not least because FDIC would "step into the shoes" of the DCO¹⁶ and accordingly would be able to enforce implementation of contractual loss or liquidity shortfall allocation rules, to the extent that any such rules exist, and have not been exhausted before entry into resolution.¹⁷

To accomplish these ends, this Notice of Proposed Rulemaking (NPRM) is proposing, among other things: (1) for SIDCOs and Subpart C DCOs, that they should incorporate certain subjects and analyses in their viable plans for recovery and orderly wind-down; and (2) for all other DCOs, that they should maintain viable plans for orderly wind-down that incorporate substantially similar subjects and analyses as the proposed requirements for SIDCOs and Subpart C DCOs.

B. Regulatory Framework for DCOs

Part 39 of the Commission's regulations implements the DCO Core Principles, including Core Principles D

⁶ Title VIII, Payment, Clearing, and Settlement Supervision Act of 2010, Section 805, 124 Stat. 1802, 1809, 12 U.S.C. 5464(a)(2)(A), (B).

⁷ *Enhanced Risk Management Standards for Systemically Important Derivatives Clearing Organizations*, 78 FR 49663, 49665 (Aug. 15, 2013).

⁸ See *Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management*, 77 FR 21278, 21278 (Apr. 9, 2012).

⁹ CPMI-IOSCO, *Recovery of financial market infrastructures* (July 5, 2017) (hereinafter CPMI-IOSCO Recovery Guidance) at ¶ 2.1.1.

¹⁰ *Id.* at ¶ 2.1.2.

¹¹ 7 U.S.C. 7a-1(c)(2)(D)(i).

¹² CPMI-IOSCO Recovery Guidance, at ¶ 2.2.1.

¹³ *Id.* at ¶ 2.2.2.

¹⁴ 12 U.S.C. 5381 *et. seq.* ("Orderly Liquidation Authority"). While orderly wind-down as discussed here proceeds under the authority of the DCO, FDIC would act as receiver in conducting an orderly liquidation under Title II.

¹⁵ CPMI-IOSCO Recovery Guidance at ¶ 2.3.1.

¹⁶ 12 U.S.C. 5390(a)(1)(A)(i) (upon appointment as receiver for a covered financial company, FDIC succeeds to all rights, titles, powers, and privileges of the covered financial company and its assets, and of any stockholder, member, officer, or director of such company).

¹⁷ CPMI-IOSCO Recovery Guidance at ¶ 2.2.3.

and R, which require that the DCO possesses the ability to manage the risks associated with discharging the responsibilities of the DCO through the use of appropriate tools and procedures,¹⁸ and a well-founded, transparent, and enforceable legal framework for each aspect of the DCO.¹⁹ Subpart B of part 39 establishes standards for compliance with the DCO Core Principles for all DCOs.²⁰ Subpart C of part 39 establishes additional standards for compliance with the DCO Core Principles for SIDCOs,²¹ *i.e.*, DCOs designated systemically important by the Financial Stability Oversight Council (FSOC) for which the Commission acts as the Supervisory Agency.²² The Subpart C regulations also apply to DCOs that elect to be subject to the requirements in Subpart C.²³

¹⁸ Section 5b(c)(2)(D) of the CEA, 7 U.S.C. 7a–1(c)(2)(D) (“Core Principle D—Risk Management”).

¹⁹ Section 5b(c)(2)(R) of the CEA, 7 U.S.C. 7a–1(c)(2)(R) (“Core Principle R—Legal Risk”).

²⁰ 17 CFR 39.9–39.27.

²¹ 17 CFR 39.30–39.42. Subpart C flows from Title VIII of the Dodd-Frank Act, which Congress enacted to mitigate systemic risk in the financial system and to promote financial stability. Section 802(b) of the Dodd-Frank Act.

The term “systemically important” means a situation where the failure of or a disruption to the functioning of a financial market utility could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States. Section 803(9) of the Dodd-Frank Act; *see also* 12 CFR 1320.2 (Definitions—Systemically important and systemic importance). A “financial market utility” (FMU) includes any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person. Section 803(6)(A) of the Dodd-Frank Act; *see also* 12 CFR 1320.2 (Definitions—Financial market utility).

Section 804 of the Dodd-Frank Act requires the FSOC to designate those FMUs that FSOC determines are, or are likely to become, systemically important. Three CFTC-registered DCOs, Chicago Mercantile Exchange, Inc. (CME), ICE Clear Credit LLC (ICC), and Options Clearing Corporation (OCC), were designated as systemically important by the FSOC in 2012. Press Release, Financial Stability Oversight Council Makes First Designations in Effort to Protect Against Future Financial Crises (Jul. 18, 2012), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/tg1645.aspx>. The bases for the designations are available at <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/designations>. The Commission is the Supervisory Agency for CME and ICC; the U.S. Securities and Exchange Commission is the Supervisory Agency for OCC. *See* 12 CFR 1320.2 (Definition of Supervisory Agency).

²² 17 CFR 39.2.

²³ In the Commission’s experience, DCOs based in the United States that have banks as clearing members have elected to be subject to Subpart C in order to achieve status as a qualified central counterparty (QCCP), while U.S.-based DCOs that do not have banks as clearing members have not made that election.

Section 805 of the Dodd-Frank Act directs the Commission to consider relevant international standards and existing prudential requirements when prescribing risk management standards for SIDCOs.²⁴ In 2013 the Commission determined that, for purposes of meeting the Commission’s statutory obligation pursuant to Section 805(a)(2)(A) of the Dodd-Frank Act, the

In July 2012, the Basel Committee on Banking Supervision, the international body that sets standards for the regulation of banks, published the “Capital Requirements for Bank Exposures to Central Counterparties” (Basel CCP Capital Requirements), which describes standards for capital charges arising from bank exposures to central counterparties (CCPs) related to over-the-counter derivatives, exchange-traded derivatives, and securities financing transactions. (DCOs are referred to as CCPs in international standards and guidance.) The Basel CCP Capital Requirements create financial incentives for banks, including their subsidiaries and affiliates, to clear financial derivatives with CCPs that are prudentially supervised in a jurisdiction where the relevant regulator has adopted rules or regulations that are consistent with the standards set forth in the Principles for Financial Market Infrastructures (PFMI), published in April 2012 by the Bank for International Settlements’ (BIS) Committee on Payment and Settlement Systems (renamed the Committee on Payments and Market Infrastructures (CPMI)) and the Technical Committee of the International Organization of Securities Commissions (IOSCO) (collectively referred to as CPMI–IOSCO). The PFMI is available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD377.pdf>.

A QCCP is defined as an entity that (i) is licensed to operate as a CCP and is permitted by the appropriate regulator to operate as such, and (ii) is prudentially supervised in a jurisdiction where the relevant regulator has established and publicly indicated that it applies to the CCP, on an ongoing basis, domestic rules and regulations that are consistent with the PFMI. *See* Basel Committee on Banking Supervision, Credit Risk Framework at section 50.3, available at https://www.bis.org/basel_framework/chapter/CRE/50.htm?inforce=20191215&published=20191215. The failure of a CCP to achieve QCCP status could result in significant costs to its bank clearing members (or banks that are customers of its clearing members).

The U.S. banking regulators, including the Board of Governors of the Federal Reserve (Federal Reserve), FDIC, and the Office of the Comptroller of the Currency, have adopted capital standards that are consistent with the Basel Committee’s standards. For example, under the FDIC’s regulations, the capital requirement for a clearing member’s prefunded default fund contribution to a qualifying CCP can be as low as 0.16% of that default fund contribution. 12 CFR 324.133(d)(4). By contrast, the capital requirement for a clearing member’s prefunded default fund contribution to a non-qualifying CCP is 100% of that default fund contribution. 12 CFR 324.10(a)(1)(iii), (b)(3) (requiring capital of 8% of risk-weighted asset amount), 12 CFR 324.133(d)(2) (setting risk-weighted asset amount for default fund contributions to non-qualifying CCP at 1,250% of the contribution (1,250% * 8% = 100%)). *See also* 12 CFR 324.133(c)(3) (applying a risk weight of 2% to transactions with a QCCP).

The Federal Reserve and Office of the Comptroller of the Currency have similar regulations.

²⁴ Section 805(a)(2) of the Dodd-Frank Act, 12 U.S.C. 5464(a)(2)(A).

international standards most relevant to the risk management of SIDCOs are the PFMI.²⁵

C. Recovery and Orderly Wind-Down for SIDCOs and Subpart C DCOs—§ 39.39

The Commission established regulations for the recovery and wind-down of a SIDCO and Subpart C DCO in 2013 with the promulgation of § 39.39.²⁶ Regulation 39.39²⁷ was codified to protect the members of a SIDCO or Subpart C DCO, as well as their customers, and the financial system more broadly, from the consequences of a disorderly failure of a DCO consistent with Principles 3 and 15 of the PFMI.²⁸ Regulation 39.39 also promotes the concepts in Core Principles B (Financial Resources), D (Risk Management), G (Default Rules and Procedures), I (System Safeguards), L (Public Information), O (Governance Fitness Standards), and R (Legal Risk) of Section 5b(c)(2) of the CEA.²⁹

Regulation 39.39(a) defines the terms “general business risk,” “wind-down,” “recovery,” “operational risk,” and “unencumbered liquid financial assets.”³⁰

Regulation 39.39(b) requires SIDCOs and Subpart C DCOs to maintain viable plans for (1) recovery or orderly wind-down, necessitated by uncovered credit losses or liquidity shortfalls; and separately, (2) recovery or orderly wind-down necessitated by general business risk, operational risk, or any other risk

²⁵ 78 FR 49663 at 49666. The PFMI consist of twenty-four principles addressing the risk management and efficiency of a financial market infrastructure’s (FMI’s) operations. Subpart C reflects the following PFMI principles: Principle 2 (Governance); Principle 3 (Framework for the comprehensive management of risks); Principle 4 (Credit risk); Principle 6 (Margin); Principle 7 (Liquidity risk); Principle 9 (Money settlements); Principle 14 (Segregation and portability); Principle 15 (General business risk); Principle 16 (Custody and investment risks); Principle 17 (Operational risk); Principle 21 (Efficiency and effectiveness); Principle 22 (Communication procedures and standards); and Principle 23 (Disclosure of rules, key procedures, and market data).

²⁶ *Derivatives Clearing Organizations and International Standards*, 78 FR 72476, 72494 (Dec. 2, 2013).

²⁷ 17 CFR 39.39. References in the remainder of this section are to the existing regulations.

²⁸ *See* 78 FR 72476 at 72494–95. Principle 3 of the PFMI requires an FMI to have a sound risk management framework “for comprehensively managing legal, credit, liquidity, operational, and other risks.” PFMI Principle 3, at 32. Principle 15 of the PFMI requires an FMI to “identify, monitor, and manage its general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize. Further, liquid net assets should at all times be sufficient to ensure a recovery or orderly wind-down of critical operations and services.” PFMI Principle 15, at 88.

²⁹ *See generally* 78 FR 72476.

³⁰ 17 CFR 39.39(a)(1)–(5).

that threatens the DCO's viability as a going concern.³¹

Regulation 39.39(c)(1) requires a SIDCO or Subpart C DCO to identify scenarios that may potentially prevent it from being able to meet its obligations, provide its critical operations and services as a going concern and assess the effectiveness of a full range of options for recovery and orderly wind-down.³² Regulation 39.39(c)(1) further requires the plans to include procedures for informing the Commission when the recovery plan is initiated or wind-down is pending.³³

Regulation 39.39(c)(2) requires a SIDCO or Subpart C DCO to have procedures for providing the Commission and the FDIC with information needed for resolution planning.³⁴

Regulation 39.39(d) requires that the recovery and wind-down plans of SIDCOs and Subpart C DCOs be supported by resources sufficient to implement those recovery or wind-down plans. This paragraph is not being amended.³⁵

Regulation 39.39(e) requires SIDCOs and Subpart C DCOs to maintain viable plans, approved by the SIDCO's or Subpart C DCO's board of directors and updated regularly, for raising additional financial resources in a scenario in which it is unable to comply with any financial resource requirements set forth in part 39.³⁶ This paragraph is not being amended.

Regulation 39.39(f) allows the Commission, upon request, to grant a SIDCO and Subpart C DCO up to one year to comply with any provision of § 39.39 or of § 39.35 (default rules and procedures for uncovered credit losses or liquidity shortfalls).³⁷

For DCOs that neither have been designated systemically important nor elected to become Subpart C DCOs, no regulation currently requires that they maintain viable recovery plans or orderly wind-down plans. This NPRM is proposing that all DCOs be required to

maintain viable orderly wind-down plans.

D. 2014 International Standards and Guidance on Recovery and Resolution of Financial Market Infrastructures

In 2014, CPMI-IOSCO published guidance for financial market infrastructures (FMIs) on the recovery planning process and the content of the recovery plans.³⁸ The 2014 CPMI-IOSCO Recovery Guidance interpreted the principles and key considerations under the PFMI relevant to recovery and orderly wind-down plans and planning, in particular PFMI Principles 3 and 15. The guidance also provided a menu of recovery tools separated into five categories: tools to allocate uncovered losses caused by participant default; tools to address uncovered liquidity shortfalls; tools to replenish financial resources; tools for a CCP to re-establish a matched book; and tools to allocate losses not related to participant default.³⁹

The Financial Stability Board (FSB) had, in 2011, published a set of Key Attributes of Effective Resolution Regimes for Financial Institutions,⁴⁰ and enhanced those standards with, as relevant here, an Annex on Resolution of Financial Market Infrastructures, in 2014.⁴¹ The Key Attributes FMI Annex calls for ongoing recovery and resolution planning for systemically important FMIs (a category that includes SIDCOs).⁴² The Key Attributes FMI Annex also calls for such FMIs "to maintain information systems and controls that can promptly produce and make available, both in normal times and during resolution, relevant data and information needed by the authorities for the purposes of timely resolution planning and resolution."⁴³

³⁸ CPMI-IOSCO, Recovery of financial market infrastructures (Oct. 15, 2014) (hereinafter 2014 CPMI-IOSCO Recovery Guidance). FMIs as a category include DCOs, CCPs, central securities depositories, payment systems, and trade repositories. SIDCOs are thus systemically important FMIs.

³⁹ *Id.* at 12–16.

⁴⁰ FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions (Oct. 2011).

⁴¹ FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, Appendix II—Annex I: Resolution of Financial Market Infrastructures (FMIs) and FMI Participants (Oct. 15, 2014) (hereinafter Key Attributes FMI Annex). The Key Attributes FMI Annex is "to be read alongside [the] PFMI which require systemically important FMIs to have a comprehensive and effective recovery plan." *Id.* at 57.

⁴² *Id.* ¶ 11.1, at 68 (stating "FMIs that are systemically important should be subject to a requirement for ongoing recovery and resolution planning").

⁴³ *Id.* ¶ 12.1, at 70 (listing 7 areas of information that should be made available to authorities, including: FMI rules, default fund, and loss

E. CFTC Letter No. 16–61

In July 2016, the staff of the Division of Clearing and Risk (DCR) issued an advisory letter, described therein as "guidance," regarding the content of a SIDCO's and Subpart C DCO's recovery and orderly wind-down plans, consistent with Subpart C, in particular § 39.39, and the accompanying rule submissions designed to effectuate those plans.⁴⁴ CFTC Letter No. 16–61 highlighted subjects that staff believed these DCOs should analyze in developing a recovery plan and wind-down plan, including: the range of scenarios that may prevent the DCO from being able to meet its obligations and to provide its critical operations and services; recovery tools; wind-down scenarios and options; interconnections and interdependencies; agreements to be maintained during recovery and wind-down; financial resources; governance; notifications; assumptions; updates; and testing.⁴⁵ The advisory letter also recommended questions that a DCO should consider, and the analysis of those questions that a DCO should undertake and provide to the Commission, in instances where a DCO concludes that a rule should be changed.⁴⁶

F. Additional International Guidance on Standards

In July 2017, CPMI-IOSCO issued further guidance on the PFMI related to the development of recovery plans for CCPs.⁴⁷ The (2017) CPMI-IOSCO

allocation rules; stakeholders; data and information for effective and timely risk control during resolution; the status of obligations of participants; links and interoperability arrangements with other FMIs; participant collateral; and netting arrangements).

⁴⁴ CFTC Letter No. 16–61, Recovery Plans and Wind-down Plans Maintained by Derivatives Clearing Organizations and Tools for the Recovery and Orderly Wind-down of Derivatives Clearing Organizations, (July 16, 2016) (hereinafter CFTC Letter No. 16–61), available at: <https://www.cftc.gov/csl/16-61/download>. DCR staff was responding to requests from DCOs for guidance and clarification on the types of information and analysis that should be included in the requisite plans. The advisory letter explains staff's expectations following its preliminary reviews of submitted recovery plans, wind-down plans, and proposed rule changes, and issues addressed at a DCR-sponsored public roundtable. The transcript of the roundtable is available at https://www.cftc.gov/PressRoom/Events/opaevent_cftcstaff031915.

⁴⁵ CFTC Letter No. 16–61, at 4. The guidance was not intended to be an exhaustive checklist of information and analysis, and did not address resolution planning. *Id.* at 3 n.11.

⁴⁶ *Id.* at 15–19.

⁴⁷ *Supra* fn. 9. The guidance as revised in 2017 is referred to herein as the CPMI-IOSCO Recovery Guidance. CPMI-IOSCO also issued guidance on the resilience of CCPs. CPMI-IOSCO, Resilience of central counterparties: further guidance on the PFMI (July 5, 2017) (providing guidance on

Recovery Guidance updated the 2014 CPMI-IOSCO Recovery Guidance to provide clarification on the implementation of recovery plans, replenishment of financial resources, non-default related losses, and transparency with respect to recovery tools and their application. Similarly, the FSB issued further guidance on CCP resolution and resolution planning.⁴⁸ The 2017 FSB Resolution Guidance sets out recommended powers for resolution authorities to maintain the continuity of critical CCP functions, details on the use of loss allocation tools, and provides steps that resolution authorities should take to implement crisis management groups and develop resolution plans. In August 2022, CPMI-IOSCO published a discussion paper on CCP practices to address non-default losses in which the paper noted positively, among other things, the practice of testing and reviewing a CCP's recovery plan at least annually.⁴⁹

G. Requirement To Submit Recovery and Wind-Down Plans to the Commission—§ 39.19(c)(4)(xxiv)

In 2020, the Commission amended its reporting requirements under § 39.19 to require a DCO that is required to maintain recovery and wind-down plans pursuant to § 39.39(b) to submit its plans to the Commission no later than the date on which it is required to have the plans.⁵⁰ The rule also permits a DCO that is not required to maintain recovery and wind-down plans, but which nonetheless maintains such plans, to submit the plans to the Commission.⁵¹ Additionally, if a DCO revises its plans, the DCO must submit the revised plans to the Commission along with a description of the changes and the reason for the changes.⁵²

II. Amendments to Regulation 39.39—Recovery and Orderly Wind-Down for SIDCOs and Subpart C DCOs; Information for Resolution Planning

In 2013, the Commission promulgated broad rules for a SIDCO's and Subpart C DCO's recovery and wind-down plans, including a rule that each SIDCO and Subpart C DCO must have

procedures for providing the Commission and the FDIC with information needed for purposes of resolution planning.⁵³ At that time, practice with respect to recovery and wind-down planning was in a nascent state of development, and the relevant global standard-setting bodies, CPMI-IOSCO and the FSB, had not completed work establishing guidance for implementing international standards addressing recovery and resolution for FMIs.⁵⁴

The Commission is proposing to further align the rules under § 39.39 with the international standards and guidance promulgated since 2013,⁵⁵ and to codify certain of the related guidance in CFTC Letter No. 16–61. The proposed amendments to § 39.39 include specifying the required elements of a SIDCO's or Subpart C DCO's recovery and orderly wind-down plans, amending the requirement to have procedures to provide information needed for purposes of resolution planning, and specifying the types of information that should be provided to the Commission for resolution planning. Additionally, the Commission proposes to change the title of the regulation, amend and add definitions, and to delete certain provisions.

These proposed revisions and amendments to § 39.39 are consistent with the Commission's obligation under § 805(a) of the Dodd-Frank Act to consider international standards in prescribing risk management standards pursuant to its authority under that provision with respect to SIDCOs.⁵⁶ Moreover, the Commission views the relevant international standards under the PFMI, as well as the related guidance, including the CPMI-IOSCO Recovery Guidance, as helpful in

informing its approach with respect to other DCOs in the context of recovery and orderly wind-down. These proposed revisions and amendments are reasonably necessary to effectuate Core Principle D⁵⁷ (Risk Management) and to accomplish the purposes of the CEA, in particular, to ensure the financial integrity of all transactions subject to [the CEA] and the avoidance of systemic risk.⁵⁸ The proposed changes also respond to comments received from SIDCOs and Subpart C DCOs over time.

As set forth in section III, the Commission is additionally proposing to require that all other DCOs maintain and submit to the Commission an orderly wind-down plan that incorporates substantially similar information and procedures. With respect to DCOs broadly, these proposed revisions and amendments should lead to more effective DCO compliance and risk management, provide greater clarity and transparency for registered DCOs and DCO applicants, and increase overall confidence and efficiency in the swaps and futures markets.⁵⁹ Among the risks associated with discharging the risk management responsibilities of a DCO⁶⁰ is the risk that, due to either default losses or non-default losses, the DCO will be unable to meet its obligations or provide its critical functions and will need to wind down. In such an event, an effective orderly wind-down plan should facilitate timely decision-making and the continuation of critical operations and services so that the orderly wind-down may occur in an orderly and expeditious manner.

A DCO needs to prepare for circumstances—especially those that are sudden, unexpected, and on too large a scale for the DCO to timely recover—for which a DCO may not have the resources to continue as a going concern. A viable orderly wind-down plan promotes the goal of ensuring, at a minimum, that the DCO has sufficient resources, capabilities and legal authority to implement the tools and procedures for orderly wind-down activities. To the extent that the Commission's bankruptcy regulations look to a DCO's orderly wind-down

⁵³ 78 FR 72476, 72494 (codifying § 39.39(c)(2)).

⁵⁴ See, e.g., CPMI-IOSCO, Consultative report, Recovery of financial market infrastructures, at ¶ 1.2.1 (Aug. 2013) (distinguishing recovery planning from resolution planning and noting that “[a]spects of the consultation report concerning FMI resolution have been included in a new draft annex and will be included in an assessment methodology for the [FSB's] Key Attributes”). CPMI-IOSCO, Consultative report, Recovery and resolution of financial market infrastructures, at ¶ 1.4 (July 2012) (outlining the features for effective recovery and resolution regimes for FMIs in accordance with the FSB's “Key Attributes for Effective Resolution Regimes for Financial Institutions”).

⁵⁵ The Commission actively participated in the development of those standards and guidance in its role as a member of the relevant working groups (the CPMI-IOSCO Policy Standing Group and Steering Group and the Financial Stability Board Financial Market Infrastructure Cross-Border Crisis Management Group and Resolution Steering Group), and of the Board of IOSCO, one of the parent committees of CPMI-IOSCO.

⁵⁶ See Section 805(a) of the Dodd-Frank Act, 12 U.S.C. 5464(a).

⁵⁷ Section 5b(c)(2)(D)(i) of the CEA, 7 U.S.C. 7a–1(c)(2)(D)(i).

⁵⁸ Section 3(b) of the CEA, 7 U.S.C. 5(b).

⁵⁹ See 76 FR at 69334–35 (a legally enforceable regulatory framework “provides assurance to market participants and the public that DCOs are meeting minimum risk standards” which “can serve to increase market confidence,” free up resources that market participants might otherwise hold,” and “reduce search costs that market participants would otherwise incur).

⁶⁰ See Core Principle D(i), Section 5b(c)(2)(D)(i) of the CEA, 7 U.S.C. 7a–1(c)(2)(D)(i).

governance, stress testing for both credit and liquidity exposures, coverage, margin, and a CCP's contribution of its financial resources to losses).

⁴⁸ FSB, Guidance on Central Counterparty Resolution and Resolution Planning (July 5, 2017) (hereinafter 2017 FSB Resolution Guidance).

⁴⁹ CPMI-IOSCO, A discussion paper on central counterparty practices to address non-default losses (Aug. 4, 2022) (NDL Discussion Paper).

⁵⁰ *Derivatives Clearing Organizations General Provisions and Core Principles*, 85 FR 4800, 4822 (Jan. 27, 2020); 17 CFR 39.19(c)(4)(xxiv).

⁵¹ *Id.*

⁵² *Id.*

plan,⁶¹ an effective orderly wind-down plan will allow for the efficient management of events.

To advance the DCO Core Principles' aims of, among other things, strengthening the risk management practices of DCOs, enhancing legal certainty for DCOs, clearing members and market participants, and safeguarding the public, the Commission is proposing to require that all DCOs maintain and submit orderly wind-down plans with the subjects and analyses included herein. Additionally, the Commission is proposing revised subjects and analyses for the recovery plans that SIDCOs and Subpart C DCOs must maintain.

A. Definitions—§ 39.39(a), § 39.2

Currently, the definitions relevant to recovery and orderly wind-down planning are contained in § 39.39(a). The Commission is proposing to move two of those definitions, “wind-down” and “recovery,” to § 39.2, as orderly wind-down will apply to all DCOs, and recovery is thematically linked to orderly wind-down. Because these definitions would apply to all DCOs, the Commission is proposing technical corrections to eliminate the references to SIDCOs and Subpart C DCOs in both.

The Commission is changing the term “wind-down” to “orderly wind-down”⁶² and is defining it as a DCO's actions to effect the permanent cessation, sale, or transfer, of one or more of its critical operations or services, in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system.⁶³ The Commission intends the amended definition to focus the attention of DCOs on issues of financial stability in planning for and executing an orderly

wind-down.⁶⁴ Given the financial crisis that preceded and informed Dodd-Frank's passage, and the purpose of the CEA to ensure the avoidance of systemic risk, the Commission believes an important goal of an orderly wind-down should be to avoid an increased risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets.

The Commission is also proposing to amend the definition of “recovery” by replacing the reference to “capital inadequacy” with “inadequacy of financial resources” in order to tie the definition of “recovery” more closely to the framework of Part 39,⁶⁵ and to move that definition, as revised, to § 39.2, in alphabetical order. Neither the recovery plan nor the orderly wind-down plan may assume government intervention or support.

The Commission is proposing to delete the definitions of “general business risk” and “operational risk,” and instead to import those definitions, as modified, as part of the definition of the term “non-default losses.” The Commission is also proposing to add a definition of the term “default losses.” Recovery plans and orderly wind-down plans are required to address both default losses and non-default losses.

The Commission is proposing to define default losses to include both uncovered credit losses or liquidity shortfalls created by the default of a clearing member in respect of its obligations with respect to cleared transactions. In this context, uncovered credit losses arise from the DCO's holding an insufficient value of resources to meet its obligations. For example, the DCO is obligated to pay, today, variation margin of \$10 billion in U.S. dollar cash, but only has \$8 billion of resources available. Similarly, in this context, a liquidity shortfalls arise from the DCO holding resources that are not in the correct form to meet its obligations. For example, the DCO is obligated to pay, today, variation margin of \$10 billion in U.S. dollar cash, but only has \$8 billion of U.S. dollar cash available, even though it may additionally have more than \$2 billion (worth, at present market value) of

securities that it is unable to convert promptly into U.S. dollar cash.⁶⁶ The definition also focuses on the clearing member's obligations with respect to cleared transactions. Thus, if the clearing member defaults on its obligations for facilities rental, or in its obligations in its role as a service provider to the DCO, those would not be “default losses” for this purpose.

The Commission is proposing to define non-default losses to mean losses from any cause, other than default losses, that may threaten the DCO's viability as a going concern. This portion of the definition is derived from former § 39.39(b)(2), which required SIDCOs and Subpart C DCOs to “maintain viable plans for” (1) Recovery or orderly wind-down necessitated by” the risks that are currently proposed to be included in “default losses” (*i.e.*, uncovered credit losses or liquidity shortfalls as well as (2) Recovery or orderly wind-down necessitated by general business risk, operational risk, or any other risk that threatens the DCO's viability as a going concern (emphasis added).

The former definition specifically included, as potential sources of loss, “general business risk” and “operational risk.” The definitions in § 39.39 will now apply to all DCOs, and thus are being moved to § 39.2. In order to ensure that DCOs consider, as part of their planning process, the full set of potential non-default losses, the definition of non-default losses is proposed to explicitly include, though not be limited to, losses arising from risks often referred to as (1) general business risk, (2) custody risk, (3) investment risk, (4) legal risk, and (5) operational risk.⁶⁷ To avoid unnecessary questions of taxonomy, however, these terms are not proposed to be separately defined, rather, the substance of these definitions are being included as instances of non-default losses.

Under the first group, losses arising from general business risk, the Commission proposes to import the previous definition of “general business

⁶¹ See, e.g., 17 CFR 190.15(c) (In administering a proceeding under this subpart, the trustee shall, in consultation with the Commission, take actions in accordance with any recovery and wind-down plans maintained by the debtor and filed with the Commission pursuant to § 39.39 of this chapter, to the extent reasonable and practicable, and consistent with the protection of customers.)

⁶² The definition also provides for the use of the term “wind-down” as a shorter form of “orderly wind-down.”

⁶³ This definition of “orderly wind-down” would align more closely with the corresponding definition in the Federal Reserve's Regulation HH (Designated Financial Market Utilities), 12 CFR 234.2(g), but would additionally address operational problems spreading among financial institutions or markets, consistent with the U.S. Securities and Exchange Commission's recent rule proposal. Covered Clearing Agency Resilience and Recovery and Wind-Down Plans, 88 FR 34708, 34717 (May 30, 2023).

⁶⁴ DCOs must already consider issues of financial stability in their governance arrangements. 17 CFR 39.24(a)(1)(iv) (requiring that a DCO's governance arrangements explicitly support the stability of the broader financial system and other relevant public interest considerations).

⁶⁵ See, e.g., § 39.11 (enumerating the requirements for financial resources a DCO must maintain to discharge its responsibilities); § 39.39(d) (enumerating the requirements for financial resources a SIDCO and Subpart C DCO must maintain to support its recovery plan and wind-down plan).

⁶⁶ Another example of a liquidity shortfall is a currency mismatch. For example, assume that the U.S. dollar to Euro exchange rate is \$1.10/€1.00. The DCO has a variation margin obligation, today, of €1 billion, and only has resources available for the purpose of making payment of \$1.1 billion. That would also be a liquidity shortfall.

⁶⁷ See NDL Discussion Paper section 2.1 (“Generally, CCPs consider a range of NDL scenarios that may arise from risks relevant to their business activities, including general business risk, operational risk, investment risk, custody risk and legal risk.”). See also Guidance on Financial Resources to Support CCP Resolution and on the Treatment of CCP Equity in Resolution (FSB 2020) at section 1.2 (“Hypothetical non-default loss scenarios”).

risk” in § 39.39(a)(1), deleting references to SIDCOs or subpart C DCOs as surplusage. This results in (1) any potential impairment of a derivatives clearing organization’s financial position, as a business concern, as a consequence of a decline in its revenues or an increase in its expenses, such that expenses exceed revenues and result in a loss that the derivatives clearing organization must charge against capital.

Under the second group, losses arising from custody risk, the Commission proposes to adopt substantially the discussion of custody risk in the CPMI-IOSCO Recovery Guidance.⁶⁸ This results in (2) losses incurred by the derivatives clearing organization on assets held in custody or on deposit in the event of a custodian’s (or sub-custodian’s or depository’s) insolvency, negligence, fraud, poor administration or inadequate record-keeping.

Under the third group, losses arising from investment risk, the Commission proposes to adapt the discussion of investment risk in the CPMI-IOSCO Recovery Guidance.⁶⁹ This adaptation results in (3) losses incurred by the derivatives clearing organization from diminution of the value of investments of its own or its participants’ resources, including cash or other collateral.

Under the fourth group, losses arising from legal risk, the international guidance is less helpful. The CPMI-IOSCO Recovery Guidance does not define “legal risk;” the FSB guidance simply notes that “legal, regulatory or contractual penalties could lead to significant losses or uncertainty for the CCP and can take a long time to materialise fully.” Losses from legal risk can arise from causes other than “penalties”: For example, in the realm of contract or tort, a DCO may be responsible for compensating a plaintiff for the DCO’s breach of contract, or for the plaintiff’s damages caused by, *e.g.*, the DCO’s negligence. In the realm of regulatory litigation, there may be remedies other than penalties, including, *e.g.*, restitution or disgorgement. Accordingly, the Commission is proposing to broadly include (4) losses from adverse judgments, or other losses, arising from

legal, regulatory, or contractual obligations, including damages or penalties, and the possibility that contracts that the derivatives clearing organization relies upon are wholly or partly unenforceable.

Finally, under the fifth group, losses arising from operational risk, the Commission is proposing to draw from the prior definition of operational risk, adding a few additional important categories. Specifically, the Commission is proposing to add references to (1) the actions of malicious actors and (2) the possibility of disruption from internal events. Cyber risk is increasing, and organizations’ operations are exposed to risk from malicious (threat) actors, who might include employees and third-party providers, criminals, terrorists, and nation-states. Thus, the Commission proposes to recognize explicitly the peril from what has been described as malicious action by third parties intent on creating systemic harm or disruption, with concomitant financial losses.⁷⁰ Including a reference to “malicious actions (whether by internal or external threat actors)” should help protect market participants and the public by potentially improving the DCO’s ability to identify vulnerabilities from malicious actors, safeguard its systems from such actors, and address possible losses that might occur if, despite the DCO’s system safeguards, malicious actors detect and act upon any cyber vulnerabilities.

The Commission is also proposing to add a reference to the possibility of disruption from internal events (the current definition of operational risk refers only to “disruptions from external events”). Examples of these internal events include fire as well as flooding (due to, *e.g.*, malfunctions of sprinkler systems). This expansion to the definition should also help protect market participants and the public, by potentially improving the DCO’s ability to identify vulnerabilities to its systems and operations from internal events, mitigate those vulnerabilities, and address possible losses that might occur if, despite the DCO’s efforts, such vulnerabilities disrupt its systems or operations.

Accordingly, the Commission is proposing to refer specifically to non-default losses (5) as occasioned by

deficiencies in information systems or internal processes, human errors, management failures, malicious actions (whether by internal or external threat actors), disruptions to services provided by third parties, or disruptions from internal or external events that result in the reduction, deterioration, or breakdown of services provided by the derivatives clearing organization.

B. Recovery Plan and Orderly Wind-Down Plan—§ 39.39(b)

Regulation 39.39(b) currently requires each SIDCO and Subpart C DCO to maintain viable plans for (1) recovery or orderly wind-down, necessitated by uncovered credit losses or liquidity shortfalls; and, separately, (2) recovery or orderly wind-down necessitated by general business risk, operational risk, or any other risk that threatens the DCO’s viability as a going concern.⁷¹ Regulation 39.19(c)(4)(xxiv) currently requires a SIDCO or Subpart C DCO that is required to maintain recovery and wind-down plans pursuant to § 39.39(b) to submit those plans to the Commission no later than the date on which the DCO is required to have the plans.⁷² The Commission is proposing amendments to these provisions as set forth below.

The Commission is maintaining existing § 39.39(d) and (e).⁷³ Accordingly, the recovery and orderly wind-down plans of SIDCOs and Subpart C DCOs must continue to include evidence and analysis to support the conclusion that they have sufficient financial resources—as set forth in § 39.39(d)(2)—to implement their recovery and wind-down plans. Should this proposed rulemaking be adopted, that analysis would be informed by the analyses SIDCOs and Subpart C DCOs would be required to engage in under proposed § 39.39(c). Consistent with § 39.39(e), moreover, SIDCOs and Subpart C DCOs must continue to maintain viable plans for

⁷¹ 17 CFR 39.39(b)(1) and (2).

⁷² 17 CFR 39.19(c)(4)(xxiv).

⁷³ Regulation 39.39(d)(2) provides, in part that each SIDCO and Subpart C DCO shall maintain sufficient unencumbered liquid financial assets, funded by the equity of its owners, to implement its recovery or wind-down plans. The SIDCO or Subpart C DCO shall analyze its particular circumstances and risks and maintain any additional resources that may be necessary to implement the plans. The plan shall include evidence and analysis to support the conclusion that the amount considered necessary is, in fact, sufficient to implement the plans.

Regulation 39.39(e) provides, in part that all SIDCOs and Subpart C DCOs shall maintain viable plans for raising additional financial resources, including, where appropriate, capital, in a scenario in which the SIDCO or Subpart C DCO is unable, or virtually unable, to comply with any financial resources requirements set forth in this part.

⁶⁸ See CPMI-IOSCO Recovery Guidance ¶ 3.2.5 (“[A]n FMI can be exposed to custody risk and could suffer losses on assets held in custody in the event of a custodian’s (or subcustodian’s) insolvency, negligence, fraud, poor administration or inadequate record-keeping.”)

⁶⁹ See *id.* (“Investment risk is the financial risk faced by an FMI when it invests its own or its participants’ resources, such as cash or other collateral.”)

⁷⁰ CPMI, Cyber resilience in financial market infrastructures, at 7 (Nov. 2014); see also CPMI-IOSCO, Guidance on cyber resilience for financial market infrastructures (June 2016). See generally Executive Order No. 14028, Improving the Nation’s Cybersecurity, 86 FR 26633 (May 12, 2021), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/12/executive-order-on-improving-the-nations-cybersecurity/>.

raising additional financial resources where they are unable to comply with any financial resources requirements provided in Part 39.

1. Submission of Plans for Recovery and Orderly Wind-Down—§ 39.39(b)(1)

The Commission is proposing to amend § 39.39(b)(1) and (2) by combining the paragraphs into one paragraph, § 39.39(b)(1), and cross-referencing the reporting requirement in § 39.19(c)(4)(xxiv). Proposed § 39.39(b)(1) would require each SIDCO and Subpart C DCO to maintain and, consistent with § 39.19(c)(4)(xxiv), submit to the Commission, viable plans for recovery and orderly wind-down, and supporting information, due to, in each case, default losses and non-default losses.⁷⁴ The Commission is not proposing to require that the recovery plan and orderly wind-down plan be submitted as separate documents. However, the analysis for the recovery portion and wind-down portion must be set forth clearly.

The Commission requests comment on these proposed revisions.

2. Notice of Initiation of the Recovery Plan and of Pending Orderly Wind-Down—§ 39.39(b)(2), § 39.13(k)(1), and § 39.19(c)(4)(xxv)

Current § 39.39(c)(1) includes, in part, the requirement that recovery plans and wind-down plans include procedures for informing the Commission, as soon as practicable, when the recovery plan is initiated or wind-down is pending.⁷⁵ The Commission proposes to move this requirement to § 39.39(b)(2) and to amend the requirement to state explicitly that in addition to having procedures in place for informing the Commission that the recovery plan is initiated or that orderly wind-down is pending, the SIDCO or Subpart C DCO must notify the Commission, as soon as practicable, when the recovery plan is initiated or orderly wind-down is pending. This is not a substantive change since the requirement to have procedures in place to provide notice necessarily implies that such notice to the Commission will occur; however, the Commission believes that explicitly stating this requirement will ensure that the SIDCO or Subpart C DCO understands this requirement.

Additionally, the Commission proposes to require that these DCOs' notice that the recovery plan is initiated or orderly wind-down is pending also

be provided to clearing members.⁷⁶ Timely notification of events to clearing members is essential to enable them to prepare for a transition by the DCO into recovery or orderly wind-down. The Commission proposes that each SIDCO and Subpart C DCO that files a recovery plan and orderly wind-down plan under this section must notify clearing members (in addition to the Commission) that recovery is initiated or that orderly wind-down is pending as soon as practicable. As discussed below in Section III, the Commission proposes that DCOs that are neither SIDCOs nor Subpart C DCOs notify the Commission and clearing members as soon as practicable when recovery⁷⁷ is initiated or orderly wind-down is pending.

The Commission proposes to add new § 39.19(c)(4)(xxv) to require that each DCO notify the Commission and clearing members as soon as practicable when the DCO has initiated its recovery plan or orderly wind-down is pending.

The Commission requests comment on these proposed changes.

3. Establishment of Time To File Recovery Plan and Orderly Wind-Down Plan—§ 39.39(b)(3)

The Commission is proposing to establish the timing of the filing of recovery plans and orderly wind-down plans. In 2013, the Commission acknowledged commenters' concerns that additional time may be required to comply with § 39.39 because relevant global standards were still in the consultative phase. The Commission promulgated § 39.39(f) to allow a SIDCO or Subpart C DCO to apply for up to one year to comply with § 39.39. Regulation 39.39(f) therefore created various dates for SIDCOs and Subpart C DCOs to file the plans required by § 39.39(b).

Commenters again requested a specific date to submit recovery plans and wind-down plans in response to the May 2019 notice of proposed rulemaking codifying § 39.19(c)(4)(xxiv).⁷⁸ In the January 2020

final rule, the Commission noted the date by which a SIDCO or new Subpart C DCO is required to maintain a recovery plan and wind-down plan depends upon when the DCO is designated as systemically important or elects Subpart C status, whether it requests relief under § 39.39(f), and whether the Commission grants such relief.⁷⁹ The Commission determined that § 39.39(f) prevented the establishment of a date certain for submitting plans to the Commission.⁸⁰ This proposal will, if adopted and finalized by the Commission, codify the elements of a recovery plan and wind-down plan required under paragraph (b) of § 39.39, and remove the uncertainty concerning the filing deadline. The need to request an extension of time for up to one year to comply with the requirements of § 39.39 (and § 39.35) will be obviated by the fixed deadline for newly designated SIDCOs to develop and maintain a recovery plan and a wind-down plan.⁸¹ The Commission is proposing to require a DCO to submit a recovery plan and orderly wind-down plan and supporting information (to the extent it has not already done so) as required by proposed § 39.39(b) within six months of the date the DCO is designated as a SIDCO, or as part of its election to become subject to the provisions of Subpart C set forth in § 39.31, and annually thereafter.⁸²

The Commission has preliminarily determined to require that a newly designated SIDCO should file a complete recovery plan and (to the extent it has not already done so) orderly wind-down plan consistent with part 39 within six months of the date of designation for the following reasons. First, in order to be designated as a SIDCO, the DCO must be a DCO registered with the CFTC. All DCOs must comply with, and demonstrate compliance as requested by the Commission, applicable provisions of the CEA and the Commission's regulations, including Subparts A and B

⁷⁶ CFTC Letter No. 16–61, at 14 (referencing § 39.21, “Public information,” which requires a DCO to make information concerning the rules and the operating and default procedures governing the clearing and settlement systems of the DCO available to market participants).

⁷⁷ While, under the proposal, a DCO that is neither a SIDCO nor a subpart C DCO is not required to have a recovery plan, if such a DCO does initiate recovery, it will be required to notify the Commission and clearing members.

⁷⁸ See, e.g., Comment letter filed by the Futures Industry Association and the International Swaps and Derivatives Association (ISDA), at 21 (Sept. 13, 2019), available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2985&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=2.

⁷⁹ 85 FR at 4822.

⁸⁰ *Id.*

⁸¹ Regulation 39.35 covers the default rules and procedures for uncovered credit losses or liquidity shortfalls (recovery) for SIDCOs and Subpart C DCOs.

⁸² As discussed in section III below, it is being proposed that all DCOs will be required to maintain orderly wind-down plans on and after the effective date of this rule with respect to that requirement. As discussed further below, it is proposed that the effective date of that orderly wind-down plan requirement will be six months after this rule may be finalized. To address the possibility that a DCO may be designated a SIDCO or may elect Subpart C status during that intervening period, such a DCO will be required to maintain and file an orderly wind-down plan to the extent it has not already done so.

⁷⁴ In Section IV below, discussing the reporting requirement in § 39.19(c)(4)(xxiv), the Commission explains the reason for adding the term “and supporting information.”

⁷⁵ 17 CFR 39.39(c)(1).

of part 39, in order to be registered. Second, the Commission expects that most of the larger DCOs for which future designation may be forthcoming have elected to be subject to Subpart C, and therefore, have recovery plans in place. Among those DCOs that are not currently subject to Subpart C, most are foreign-based DCOs that are subject to standards in their home jurisdictions that are consistent with the PFMI, and thus such foreign-based DCOs are required to have both recovery and orderly wind-down plans.⁸³ Third, upon notification that the FSOC is considering whether to designate a DCO systemically important, the DCO will be aware of the enhanced regulatory requirements for SIDCOs included in subpart C of part 39 of the Commission's regulations.⁸⁴ Finally, staff issued CFTC Letter No. 16–61 and its non-binding guidance in 2016. DCOs registered with the Commission and the clearing industry in general are likely familiar with the staff letter and have probably been following developments related to this proposal; hence, the Commission has preliminarily determined not to require a longer delay.

The Commission is clarifying that a DCO that elects to be subject to Subpart C of the Commission's regulations must file a recovery plan and (in the event it has not already done so) an orderly wind-down plan, and supporting information, as part of its election to be subject to the provisions of Subpart C.⁸⁵ The Commission continues to expect that a DCO will not elect status as a Subpart C DCO before it is in full compliance with the regulations in Subpart C.

The Commission is proposing § 39.39(b)(3) to require a SIDCO to file a recovery plan, and supporting information, within six months of its designation as systemically important by the FSOC. The Commission is also proposing to require that a DCO that elects to be subject to the provisions of Subpart C must file a recovery plan and (to the extent it has not already done so) an orderly wind-down plan, and supporting information for these plans, as part of the DCO's election to be subject to the provisions of Subpart C. The Commission is proposing that such

plans be updated thereafter on an annual basis.

The Commission requests comment on this aspect of the proposal.

C. Recovery Plan and Orderly Wind-Down Plan: Required Elements—§ 39.39(c)

Regulation 39.39(c)(1) currently requires that a SIDCO and Subpart C DCO develop a recovery plan and orderly wind-down plan that includes scenarios that may potentially prevent it from being able to meet its obligations, provide its critical operations and services as a going concern, and assess the effectiveness of a full range of options for recovery or orderly wind-down. At the time the Commission was promulgating current § 39.39(c)(1), commenters had requested specificity regarding the required elements of a recovery plan.⁸⁶ The Commission declined to provide that specificity because the international guidance relevant to such plans was not final when § 39.39 was adopted in 2013. After the international guidance was finalized, staff issued CFTC Letter No. 16–61, which provides informal guidance from DCR concerning those elements. Supervisory experience shows that the recovery plans and orderly wind-down plans of SIDCOs and Subpart C DCOs are generally consistent with the staff guidance in Letter No. 16–61; thus, most, if not all, of the requirements described below are already incorporated into the plans submitted by the DCOs currently subject to § 39.39. The Commission has preliminarily determined to codify the staff guidance into the Commission's part 39 regulations. The Commission has preliminarily determined to specify the required elements that a SIDCO or Subpart C DCO must include in its recovery plan and orderly wind-down plan at this time.

The Commission proposes to replace § 39.39(c) in its entirety. Proposed § 39.39(c) would reflect, to the extent the Commission considers appropriate, the guidance on international standards related to recovery plans and orderly wind-down plans adopted by the global standard-setting bodies since 2013,⁸⁷ and certain of the DCR staff guidance set forth in CFTC Letter No. 16–61.⁸⁸

As a general matter, the Commission believes that a DCO's recovery plan and orderly wind-down plan required by § 39.39(b) should include summaries that provide an overview of the plans, and descriptions of how the plans will be implemented, in order to enhance both the understanding of the persons who need to use the plans and the Commission's ability to evaluate the plans as part of its supervisory program. Proposed § 39.39(c) would also require that the description of each plan include the identification and description of the DCO's critical operations and services, interconnections and interdependencies, resilient staffing arrangements, obstacles to success, stress scenario analyses, potential triggers for recovery and orderly wind-down, available recovery and orderly wind-down tools, analysis of the effect of any tools identified, lists of agreements to be maintained during recovery and orderly wind-down, descriptions of governance arrangements, and testing. These proposed plan requirements are necessary for the plan to be viable, *i.e.*, capable of working successfully, are consistent with the international guidance discussed above, and should be considered the minimum that a SIDCO or Subpart C DCO must include in its recovery plan and orderly wind-down plan. The Commission proposes to add these requirements as new proposed § 39.39(c). For clarity and completeness, specific requirements will be set forth in paragraphs (c)(1) through (c)(8), as discussed below.

The Commission requests comment on this approach, and on each of the proposed specific requirements.

1. Critical Operations and Services, Interconnections and Interdependencies, and Resilient Staffing—§ 39.39(c)(1)

The Commission is proposing to add new § 39.39(c)(1) requiring recovery plans and orderly wind-down plans to identify and describe the SIDCO's and Subpart C DCO's critical operations and services, including internal and external service providers; ancillary services providers; financial and operational interconnections and interdependencies; aggregate cost estimates for the continuation of services; plans for resilient staffing arrangements for continuity of operations into recovery or orderly wind-down; plans to address the risks that the failure of each critical operation and service poses to the DCO, and a description of how such failures would be addressed; and a description of how the SIDCO and Subpart C DCO will

⁸³ See text accompanying fn. 207, *infra*.

⁸⁴ 12 CFR 1320.11(a), 1320.12(a); *Authority to Designate Financial Market Utilities as Systemically Important*, 76 FR 44763 (Jul. 27, 2011).

⁸⁵ The Commission is proposing to amend Exhibit F–1 to the Subpart C election form to require the submission of the recovery and orderly wind-down plans, and supporting information, as well as a demonstration of how those plans comply with the requirements of Subpart C.

⁸⁶ See, e.g., Comment letter of ISDA at 2–3 (Sept. 16, 2013), filed in response to the Notice of Proposed Rulemaking, *Derivatives Clearing Organizations and International Standards*, 78 FR 50260 (Aug. 16, 2013), available at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1391>.

⁸⁷ E.g., CPMI–IOSCO Recovery Guidance.

⁸⁸ See 17 CFR 39.39(c)(1).

ensure that the services continue through recovery and orderly wind-down.

In developing a viable plan, both the CPMI-IOSCO Recovery Guidance and CFTC Letter No. 16–61 stress the importance of identifying the critical operations and services that the DCO provides, and the financial and operational interconnections and interdependencies among the DCO and its relevant affiliates, internal and external service providers, and other relevant stakeholders.⁸⁹ The Commission agrees that each recovery plan and orderly wind-down plan should identify and describe the critical operations and services that the DCO provides to clearing members and other financial market participants. As CPMI-IOSCO stated in its guidance, “[t]he purpose of identifying critical services is to focus the recovery plan on the FMI’s ability to continue to provide these services on an ongoing basis, even when it comes under extreme stress.”⁹⁰ The Commission agrees that for purposes of recovery planning in § 39.39, when determining whether a service is “critical,” the DCO must consider “the importance of the service to the [DCO]’s participants and other FMIs, and to the smooth functioning of the markets the [DCO] serves and, in particular, the maintenance of financial stability.”⁹¹

The Commission anticipates that the DCO’s ability to provide critical services may also be affected by issues relating to certain services that are ancillary to the critical service, and thus issues relating to these ancillary services should be included in the recovery and orderly wind-down plan. The Commission agrees with the analysis in the CPMI-IOSCO Recovery Guidance that, “even if a specific service is judged not to be critical, a systemically important FMI needs to take account of the possibility that losses or liquidity shortfalls relating to the provision of that noncritical service could threaten its viability and thus necessitate implementation of its recovery plan so that it can continue to provide those services that are judged to be critical. An FMI needs to have a recovery plan that covers all the scenarios that could threaten its viability.”⁹²

The Commission believes that a DCO’s recovery plan and orderly wind-down plan should identify and analyze

a DCO’s financial and operational interconnections and interdependencies. Such an analysis is important to foster, and to provide transparency into, the ability of the DCO to implement each of its recovery plan and orderly wind-down plan. For instance, the recovery plan should account for the possibility that an affiliated entity in the financial sector may fail, resulting in a cascade of failures and resultant defaults on all obligations to the DCO, including with respect to services that the DCO depends upon to complete its operations. A DCO’s recovery plan and orderly wind-down plan should also identify the DCO’s critical internal and external service providers, the risks that the failure of each provider poses to the DCO, how such failures would be addressed, and how the DCO would ensure that the services would continue into recovery and orderly wind-down.⁹³ Similarly, the DCO should consider the impact of any disruption in services or operations it provides to clearing members and financial market participants. In this regard, CFTC Letter No. 16–61 recommended that a DCO’s recovery plan include the identification and analysis of “the financial and operational interconnections and interdependencies among the DCO and its relevant affiliates, internal and external service providers and other relevant stakeholders.”⁹⁴

In considering and analyzing the magnitude of the costs that it needs to plan for associated with recovery or orderly wind-down, the DCO should consider the likely increase in certain of its expenses compared to its business-as-usual operating budget, including, for example, legal fees, accounting fees, financial advisor fees, the costs associated with employee retention programs, and other incentives in order to maintain critical staff. Other costs, such as marketing or those associated with the development of new products, may decrease. For purposes of orderly wind-down planning in particular, the DCO shall proceed under the conservative assumption that any resources consumed during recovery will not be available to fund critical operations and services in wind-down.

The DCO’s analysis of its critical operations and services should also describe the impact of the multiple roles and relationships that a single financial entity may have with respect to the DCO including affiliated entities and external entities.⁹⁵ For instance, a single external

entity (including a set of affiliated entities) may act as a clearing member, a settlement bank, custodian or depository bank, liquidity provider or counterparty. If such a single external entity defaults in one of its roles *e.g.*, as a clearing member, it will likely default in all of them.⁹⁶ An entity affiliated with the DCO may be relied upon for a variety of services, such as those related to information technology, human resources, or facilities. In order to support the viability of its recovery or orderly wind-down plan, the DCO should address the contingency that its affiliate may not be able to perform those services.

Consistent with the CPMI-IOSCO Recovery Guidance, the Commission believes that a DCO’s recovery plan should consider how its design and implementation may affect another FMI, and coordinate the relevant aspects of their plans.⁹⁷ Given the interconnected nature of the financial services ecosystem, supporting financial stability requires the recovery plan and orderly wind-down plan of each DCO to identify and address contingencies and consequences.

Recovery and orderly wind-down planning must also identify potential risks that may arise in recovery and orderly wind-down if financial weakness or failure in one of the DCO’s business lines or affiliated legal entities spreads to others. The recovery and orderly wind-down plans must describe how the DCO has planned for resilient staffing arrangements for continuity of operations since it is not feasible to maintain a critical service without the concomitant personnel. As part of planning for recovery, each SIDCO and Subpart C DCO should also explain how the DCO will retain, and address the potential loss of, the services of personnel filling mission-critical roles during extreme stress. The DCO may additionally be vulnerable to key person risk; accordingly, plans for resilient staffing arrangements should identify, to the extent applicable, key person risk within the DCO or (as relevant) affiliated legal entities that the DCO relies upon to provide its critical

⁹⁶ A financial conglomerate/bank holding company structure may operate through a set of legal entities (*e.g.*, a broker-dealer/futures commission merchant separate from a bank separate from an information technology service provider), each of which has different relationships with the DCO. Based on past experience with insolvencies of financial firms (*e.g.*, Refco, Lehman, MF Global), once one of these affiliates fails, the others are likely to follow it into bankruptcy or receivership proceedings quickly.

⁹⁷ CPMI-IOSCO Recovery Guidance, at section 2.4.14.

⁸⁹ CPMI-IOSCO Recovery Guidance, at section 2.4; CFTC Letter No. 16–61, at 10–11.

⁹⁰ CPMI-IOSCO Recovery Guidance, at section 2.4.2.

⁹¹ *Id.*

⁹² *Id.* at section 2.4.4. n.13.

⁹³ *Id.*

⁹⁴ CFTC Letter No. 16–61, at 10.

⁹⁵ *Id.*

operations and services, and how the DCO has planned for this risk.

The Commission requests comment on this aspect of the proposal.

2. Recovery Scenarios and Analysis—§ 39.39(c)(2)

The Commission is proposing to add new § 39.39(c)(2) to specify scenarios that must be addressed in the SIDCO's or Subpart C DCO's recovery plan, to the extent, in each case, that such scenario is possible. The Commission believes that the current requirement that a SIDCO or Subpart C DCO shall identify scenarios that may potentially prevent it from being able to meet its obligations is too broad and allows for planning gaps.

To support a systematic planning process that will foster these DCOs' ability to recover effectively from situations of unprecedented stress, the Commission is proposing to adopt portions of CFTC Letter No. 16–61 describing the analysis that should take place for each scenario considered in the recovery plan; namely: (1) a description of the scenario; (2) the events that are likely to trigger the scenario; (3) the DCO's process for monitoring events triggering the scenario; (4) the market conditions, operational and financial difficulties and other relevant circumstances that are likely to result from the scenario; (5) the potential financial and operational impact of the scenario on the DCO and on its clearing members, internal and external service providers and relevant affiliated companies, both in an orderly market and in a disorderly market; and (6) the specific steps the DCO would anticipate taking when the scenario occurs or appears likely to occur including, without limitation, any governance or other procedures in order to implement the relevant recovery tools and to ensure that such implementation occurs in sufficient time for the recovery tools to achieve their intended effect.⁹⁸ The Commission believes that this six-part analysis is integral to viability of a SIDCO's and Subpart C DCO's recovery plan and orderly wind-down plan. The Commission expects that each of these DCOs will undertake such analysis for each scenario described in its recovery plan and its orderly wind-down plan. The Commission is proposing in § 39.39(c)(2) that each recovery plan and orderly wind-down plan contain the described analysis.

In order to promote the comprehensiveness of these DCOs' recovery plans, the Commission is also proposing to require that each recovery

plan describe certain “commonly applicable scenarios,” most of which are described in CFTC Letter No. 16–61, to the extent such scenarios are possible in light of the DCO's activities.⁹⁹ Those scenarios include: (1) settlement bank failure; (2) custodian or depository bank failure; (3) scenarios resulting from investment risk; (4) poor business results; (5) the financial effects from cybersecurity events; (6) fraud (internal, external, and/or actions of criminals or of public enemies); (7) legal liabilities, including liabilities related to the DCO's obligations with respect to cleared transactions and those not specific to its business as a DCO (e.g., tort liability); (8) losses resulting from interconnections and interdependencies among the DCO and its parent, affiliates, and/or internal or external service providers (e.g., the financial effects of the inability of a service provider to provide key systems or services);¹⁰⁰ and (9) any other risks relevant to the DCO's activities. In addition to these scenarios, the Commission is proposing to require SIDCOs and Subpart C DCOs to include in their recovery plan the following additional scenarios: (1) credit losses or liquidity shortfalls created by single and multiple clearing member defaults in excess of prefunded resources required by law; (2) liquidity shortfall created by a combination of clearing member

⁹⁹ *Id.* at 5–6. These scenarios are described as “commonly applicable” because, in the Commission's judgment, all DCOs will plausibly be vulnerable to most of these scenarios occurring, that is, most scenarios will be possible and, if such a scenario occurs, it may damage the DCO's financial position sufficiently to require recovery or orderly wind-down.

The reference to scenarios that are “possible” should not be confused with a reference to scenarios that are “likely.” Thus, if a DCO deposits all relevant funds as cash with a federally regulated and insured depository institution, and in no circumstances invests them, then a scenario of losses resulting from *investment* risk would not be possible. On the other hand, while regulation of depository institutions and FDIC insurance makes a loss due to failure of such a depository bank extraordinarily unlikely, it is not impossible, and thus is a scenario that should be addressed in the recovery and orderly wind-down plans. *See, e.g.,* NDL Discussion Paper at section 2.1 (“[L]ow risk is not zero risk, and consequently, CCPs should have a plan to address [non-default losses (NDL)] from these scenarios should they materialize. Some CCPs, however, do not include certain types of NDL scenario[s] in their planning because these CCPs seem to assume that regulated financial institutions or central securities depositories pose zero custody [or depository] risk, or that legal risk cannot cause an NDL (because Principle 1 of the PFMI requires a legal basis with ‘a high degree of certainty’). These approaches appear to be inconsistent with the standards set forth in the PFMI.”)

¹⁰⁰ For loss scenarios resulting from interconnections and interdependencies among the DCO and its parent or affiliates, the DCO should consider, to the extent applicable, how its organizational structure may impact the specific steps it would anticipate taking.

default and a failure of a liquidity provider to perform; (3) depository bank failure; and (4) losses resulting from interconnections and interdependencies with other CCPs (whether or not those CCPs are registered with the Commission as DCOs). For any of those scenarios enumerated above that the DCO determines are not possible in light of its activities, the DCO should provide its reasoning for not considering it. Finally, the Commission is proposing that a DCO must include at least two scenarios involving multiple failures (e.g., a member default occurring simultaneously, or nearly so, with a failure of a service provider) that, in the judgment of the DCO, are particularly relevant to the DCO's business.¹⁰¹ The Commission believes that a DCO should describe how it is prepared for these additional exigencies in order to demonstrate to the market and its clearing members that it is prepared to meet the demands of possible market stresses.

The Commission requests comment on this aspect of the proposal.

3. Recovery and Orderly Wind-Down Triggers—§ 39.39(c)(3)

Thorough planning also requires that a SIDCO or Subpart C DCO be prepared to determine when recovery or orderly wind-down is necessary, that is, when the recovery plan or orderly wind-down plan should be “triggered.” Some triggers might be automatic (e.g., because the DCO is insolvent) while others may not be obvious, and many will necessarily involve the exercise of judgment and discretion (e.g., the DCO is suffering ongoing business losses that appear likely to lead to insolvency, or an adverse legal judgment that involves large financial liability appears likely).

The CPMI-IOSCO Recovery Guidance and CFTC Letter No. 16–61 each advise that a SIDCO's and Subpart C DCO's recovery plan and wind-down plan should define the criteria, both quantitative and qualitative, that they would use to determine, or to guide its discretion in determining, when to implement the recovery plan and the wind-down plan, *i.e.*, the trigger(s).¹⁰² The Commission believes that defining those criteria (including conducting the

¹⁰¹ The term “in the judgment of the DCO, are particularly relevant” is being used rather than “are most relevant” to avoid the implication that it would be necessary to conduct an analysis ranking with precision the relevance of different combinations. Rather, staff of the DCO should exercise their professional judgement in selecting at least two particularly relevant combination scenarios. It is highly unlikely that no such combinations (or only one) would be possible.

¹⁰² *See* CPMI-IOSCO Recovery Guidance, at sections 2.4.6–2.4.8; CFTC Letter No. 16–61, at 7.

⁹⁸ CFTC Letter No. 16–61, at 6–7.

analysis necessary to do so) would materially aid these DCOs both in developing effective plans, and in preparing to address events that lead to such triggers. While the CPMI-IOSCO Recovery Guidance references only recovery plans, the Commission believes that a similar analysis should apply to planning for consideration of orderly wind-down. The Commission also believes that the identification of possible triggers would project confidence to the public that these DCOs will continue to function in extreme circumstances (such as recovery), and convey that these DCOs have a plan to consider wind-down in an orderly manner if recovery is ineffective.

The CPMI-IOSCO Recovery Guidance states that there may be some triggers that “should lead to a pre-determined information-sharing and escalation process within the FMI’s senior management and its board of directors and to careful consideration of what action should be taken.”¹⁰³ The Commission agrees that planning for such an information-sharing and escalation process as part of the DCO’s governance is an important part of ensuring that the DCO is prepared to deal with contingencies. Accordingly, the Commission is proposing new § 39.39(c)(3)(i) to require that a SIDCO’s or Subpart C DCO’s recovery plan discuss the criteria that may trigger both implementation and consideration of implementation of the recovery plan, and the process that these DCOs have in place for monitoring for events that are likely to trigger the recovery plan. With respect to the orderly wind-down plan, the DCO must discuss the criteria that may trigger *consideration of* implementation of the plan, realizing the importance of discretion in determining whether to *implement* orderly wind-down (in contrast to recovery, a terminal process), and the process that the DCO has in place for monitoring for events that may trigger consideration of implementation of the orderly wind-down plan.

For similar reasons, the Commission is proposing § 39.39(c)(3)(ii) to require the recovery plan and orderly wind-down plan each to include a description of the information-sharing and escalation process within the SIDCO’s and Subpart C DCO’s senior management and the board of directors. These DCOs must have a defined process that will include the factors the DCO considers most important in guiding the board of directors’ exercise

of judgment and discretion with respect to recovery and orderly wind-down plans in light of the relevant triggers and that process.

The Commission requests comment on this aspect of the proposal.

4. Recovery Tools—§ 39.39(c)(4)

By the end of 2013, CPMI-IOSCO had not completed their consultative work establishing guidance for use in implementing the PFMI. Their final guidance was published in October 2014 and amended in July 2017. The CPMI-IOSCO Recovery Guidance does not advise authorities to prescribe specific recovery tools; rather the guidance “provides an overview of some of the tools that an FMI may include in its recovery plan, including a discussion of scenarios that may trigger the use of recovery tools and characteristics of appropriate recovery tools in the context of such scenarios.”¹⁰⁴ CFTC Letter No. 16–61 adopts a similar approach in that it does not prescribe the tools that a DCO should use during recovery. Rather, the letter sets forth a detailed analysis that staff expects a DCO should undertake in its recovery plan to meet its obligations or provide its critical operations and services as a going concern.¹⁰⁵

The Commission declines to prescribe specific tools that SIDCOs and Subpart C DCOs must include in their recovery plans. Each DCO is different, and a variety of tools may be available to a particular DCO in each specific scenario. Rather, these DCOs should have discretion to decide on which tools to include, so long as the set of tools chosen meets standards designed to protect indirect participants (e.g., clients, end users), direct participants (i.e., clearing members), the DCO itself, and other relevant stakeholders (including, in the case of SIDCOs, the financial system more broadly): (1) the set of tools should comprehensively address how the DCO would continue to provide critical operations and services in all relevant scenarios; (2) each tool should be reliable, timely, and have a strong legal basis; (3) the tools should be transparent and designed to allow those who would bear losses and liquidity shortfalls to measure, manage and control their exposure to losses and liquidity shortfalls; (4) the tools should create appropriate incentives for the DCO’s owners, direct and indirect participants, and other relevant stakeholders; and (5) the tools should be designed to minimize the negative

impact on direct and indirect participants and the financial system more broadly.¹⁰⁶

The Commission expects that each SIDCO and Subpart C DCO will consider in its planning process tools that meet the full scope of financial deficits that the DCO may need to remediate: (1) tools to allocate uncovered losses by a clearing member default: e.g., the DCO’s own capital (sometimes referred to as “skin-in-the-game”), cash calls (sometimes referred to as assessments), and gains-based haircutting (sometimes referred to as variation margin gains haircutting); (2) tools to address uncovered liquidity shortfalls: e.g., liquidity from third-party institutions and non-defaulting clearing members; (3) tools to replenish financial resources: e.g., cash calls and recapitalization;¹⁰⁸ (4) tools to establish a matched book: e.g., auctions and tear-ups; and (5) tools to allocate losses not covered by a clearing member default: e.g., capital, recapitalization, and insurance.

To provide these DCOs with some flexibility, the Commission is proposing to require that each DCO’s recovery plan include a complete description and analysis of the tools it proposes to use to cover shortfalls from the stress scenarios identified by the DCO that are not covered by pre-funded financial resources, or where the DCO does not have sufficient liquid resources or liquidity arrangements to meet its obligations in the correct form and in a timely manner. Additionally, the Commission expects each DCO will be prepared to implement tools to deal with other losses or liquidity shortfalls, including those from non-default risks that may materialize more slowly, and tools to increase the DCO’s financial resources where necessary in order to implement its plans. Finally, to support the planning process, the description of recovery tools in the recovery plan should include, at a minimum, any discretion the DCO has in the use of the tool, whether the tool is mandatory or voluntary, and the governance processes and arrangements for determining which tools to use, and to what extent.

Accordingly, the Commission is proposing § 39.39(c)(4) to require a SIDCO or Subpart C DCO to have a

¹⁰⁶ See CPMI-IOSCO Recovery Guidance, at section 3.3.1.

¹⁰⁷ In the context of default losses, the defaulting participants cannot be relied upon to provide any resources. In the context of non-default losses, all participants are, at least in the first instance, non-defaulting participants.

¹⁰⁸ Cf. *id.* at section 2.4.9. While the CPMI-IOSCO Recovery Guidance refers to capital, section 39.11(b) recognizes that financial resources include, but are not limited to, capital.

¹⁰³ CPMI-IOSCO Recovery Guidance, at section 2.4.8.

¹⁰⁴ *Id.* at 1; see also *id.* at section 4.1 (summarizing specific recovery tools).

¹⁰⁵ CFTC Letter No. 16–61, at 7–8.

recovery plan that includes the following: (i) a description of the tools that the DCO would expect to use in each scenario required by proposed paragraph (b) of this section that comprehensively addresses how the DCO would continue to provide critical operations and services; (ii) the order in which each such tool would be expected to be used; (iii) the time frame within which each such tool would be expected to be used; (iv) a description of the governance and approval processes and arrangements within the DCO for the use of each tool available, including the exercise of any available discretion; (v) the processes to obtain any approvals external to the DCO (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained;¹⁰⁹ (vi) the steps necessary to implement each such tool; (vii) a description of the roles and responsibilities of all parties, including non-defaulting clearing members, in the use of each such tool; (viii) whether the tool is mandatory or voluntary; (ix) an assessment of the likelihood that the tools, individually and taken together, would result in recovery; and (x) an assessment of the associated risks from the use of each such tool to non-defaulting clearing members and those clearing members' customers with respect to transactions cleared on the DCO, linked financial market infrastructures, and the financial system more broadly. For those scenarios involving non-default losses, all clearing members are non-defaulting.

The Commission requests comment on this aspect of the proposal. With respect to the types of recovery tools in particular, the Commission welcomes comment on whether DCOs use, or would anticipate using, any tools not identified above in order to meet the full scope of financial deficits a DCO in recovery may need to remediate.

5. Orderly Wind-Down Scenarios and Tools—§ 39.39(c)(5)

As discussed further below, planning for orderly wind-down overlaps significantly, though not totally, with planning for recovery. There may be circumstances where the SIDCO or Subpart C DCO attempts to recover but fails, upon which it should have a plan, as well as sufficient capital, to transition

to and execute an orderly wind-down. SIDCOs and Subpart C DCOs must therefore plan for both recovery and orderly wind-down.

Proposed § 39.39(c)(5) would require a SIDCO's or a Subpart C DCO's orderly wind-down plan to identify scenarios that could prevent it from being able to meet its obligations, and to identify tools which may be used in the orderly wind-down of the DCO. CFTC Letter No. 16–61 states that a DCO's analysis of its wind-down options “should contain many of the elements of a DCO's analysis of its recovery tools.”¹¹⁰ The letter calls for the wind-down plan to identify and analyze in detail, with respect to each scenario, nine required elements as well as “the manner in which liquidity requirements would be managed during service closure” and how essential support services would be maintained during the wind-down period.¹¹¹ The letter also calls for the wind-down plan to address obstacles to each option, and the viability of the options in light of the obstacles.

The Commission recognizes that, to plan effectively for orderly wind-down, considering the scenarios and recovery tools described in the DCO's recovery plan must precede the DCO's analysis of the events that would trigger consideration of implementation of the orderly wind-down plan, and the use of the DCO's orderly wind-down options.¹¹² A DCO's orderly wind-down plan should therefore include a description of the point or points in the recovery plan, for each scenario, where recovery efforts would likely be deemed to have failed and consideration of implementing the orderly wind-down plan would be triggered. The orderly wind-down plan should then describe at what point the DCO will no longer be able to meet its obligations or provide its critical services as a going concern. Once these scenarios are identified, the plan should describe the tools available to the DCO to effectuate an orderly wind-down. The DCO should, therefore, explain in its wind-down plan how it would plan to accomplish an orderly wind-down, taking into account the time it anticipates it would take to implement the plan. The orderly wind-down plan should include a complete analysis of the wind-down tools the DCO would anticipate using, both individually and together. In order to support a thorough planning process that is consistent with the international standards, the Commission has preliminarily determined that for each

wind-down tool, the DCO should describe any discretion it has in the use or sequencing of the wind-down tool for each scenario, any obstacles to the use of a particular tool, the governance and approval processes for the tools available, and how the DCO is planning for the viability of the tools in light of any identified obstacles.

To support a systematic planning process that will foster the DCO's ability to wind-down in an orderly manner in situations of unprecedented stress, where recovery is infeasible, proposed § 39.39(c)(5) incorporates certain of the staff guidance included in CFTC Letter No. 16–61, as well as international standards and guidance issued since the 2013 rulemaking. Proposed § 39.39(c)(5) would require each SIDCO and Subpart C DCO to identify scenarios that may prevent it from meeting its obligations or providing its critical services as a going concern, describe the tools that it would expect to use in an orderly wind-down that comprehensively address how the DCO would continue to provide critical operations and services, describe the order in which each such tool would be expected to be used,¹¹³ establish the time frame within which each such tool would be expected to be used, describe the governance and approval processes and arrangements within the DCO for the use of each of the tools available, including the exercise of any available discretion, describe the processes to obtain any approvals external to the DCO (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained, set forth the steps necessary to implement each such tool, describe the roles and responsibilities of all parties, including non-defaulting clearing members, in the use of each such tool, provide an assessment of the likelihood that the tools, individually and taken together, would result in orderly wind-down, and provide an assessment of the associated risks to non-defaulting clearing members and those clearing members' customers with respect to transactions cleared on the DCO, linked financial market infrastructures, and the financial system more broadly.

The Commission requests comment on this aspect of the proposal. The Commission specifically requests comment on whether the scope of clearing member customers that are focused upon (*i.e.*, “those clearing members' customers with respect to transactions cleared on the” DCO) is

¹⁰⁹ Thus, while (iv) focuses on internal governance and approval processes such as among DCO officers and committees, (v) focuses on external approval processes, if any, such as approvals by a regulator with the legal authority or practical power to require approval of the use of a tool.

¹¹⁰ CFTC Letter No. 16–61, at 9.

¹¹¹ *Id.* at 10.

¹¹² *See id.* at 9.

¹¹³ It may be the case that certain tools may be used concurrently.

appropriately broad, and appropriately framed.

6. Agreements To Be Maintained During Recovery and Orderly Wind-Down—§ 39.39(c)(6)

A DCO has a variety of contractual arrangements that must be maintained during business as usual, in times of stress, and recovery and orderly wind-down, such as those with clearing members, affiliates, linked central counterparties, counterparties, external service providers, and other third parties.¹¹⁴ These contractual arrangements include the DCO's rules and procedures, agreements to provide operational, administrative and staffing services, intercompany loan agreements, mutual offset agreements or cross-margining agreements, and credit agreements.¹¹⁵ Also, a DCO's recovery plan and orderly wind-down plan should identify and analyze the implications of the various contractual arrangements that the DCO maintains and describe the actions that the DCO has taken to ensure that its operations can continue during recovery and orderly wind-down despite the termination or alteration of relevant contracts.¹¹⁶

Contracts may contain covenants, material adverse change clauses, or other provisions that could subject such contracts to alteration or termination as a result of the implementation of the recovery plan or orderly wind-down plan, and thus render the continuation of the DCO's critical operations and services difficult or impracticable. Therefore, the Commission believes that each DCO's recovery plan and orderly wind-down plan should be supported by the DCO's review and analysis of the DCO's contracts associated with the provision of those critical operations or services to determine if those contracts contain such provisions. Where such contractual provisions are present and enforceable against the DCO, it will need to have alternative methods to continue those critical operations and services. The DCO's recovery plan and orderly wind-down plan should describe the actions that the DCO has taken to ensure that its operations can continue during recovery and orderly wind-down despite these contractual provisions. The orderly wind-down

plan should also consider whether the contractual relationships the DCO relies upon to perform its critical operations and services would transfer to a new entity in the event of the creation of a new entity or the sale or transfer of the business to another entity in an orderly wind-down. Furthermore, the Commission believes that a requirement that a DCO have plans in place to ensure that its critical operations and services will continue into recovery and orderly wind-down is consistent with the PFMI and is crucial to providing "a high degree of confidence" that the DCO will continue its operations and "serve as a source of financial stability even in extreme market conditions."¹¹⁷

The DCO's recovery plan and orderly wind-down plan must also identify and describe any licenses, and contracts in which the DCO is the licensee, upon which the DCO may rely to provide its critical operations and services. Such licenses should be included in the DCO's analysis of its contractual arrangements that must continue into recovery and wind-down.

The Commission is proposing § 39.39(c)(6) to provide that a SIDCO or Subpart C DCO must determine which of its contracts, arrangements, agreements, and licenses associated with the provision of its critical operations and services as a DCO are subject to alteration or termination as a result of implementation of the recovery plan or orderly wind-down plan. The recovery plan and orderly wind-down plan must describe the actions that the DCO has taken to ensure that its critical operations and services will continue during recovery and wind-down despite such alteration or termination.

The Commission requests comments on this aspect of the proposal.

7. Governance—§ 39.39(c)(7)

While current § 39.39 does not explicitly address the need for a DCO to have an effective governance structure to implement its recovery or orderly wind-down plans, the Commission has preliminarily determined to require an effective governance structure in order to enable the DCO to implement such plans effectively. The CPMI-IOSCO Recovery Guidance supports the Commission's determination, and recommends that the DCO's board of directors or equivalent governing body formally endorse the recovery plan.¹¹⁸ In addition, the guidance calls for "an effective governance structure and

sufficient resources to support the recovery planning process and implementation of its recovery plan, including any decision-making processes."¹¹⁹ According to the CPMI-IOSCO Recovery Guidance, an "effective governance structure" includes "clearly defining the responsibilities of board members, senior executives and business units, and identifying a senior executive responsible for ensuring that the FMI observes recovery planning requirements and that recovery planning is integrated into the FMI's overall governance process."¹²⁰ The guidance also states that the FMI's board should consider the interests of all stakeholders who are likely to be affected by the recovery plan when developing and implementing it, and the FMI "should have clear processes for identifying and appropriately managing the diversity of stakeholder views and any conflicts of interest between stakeholders and the FMI."¹²¹

CFTC Letter No. 16–61 provided guidance to align the regulation promulgated in 2013 with the 2014 CPMI-IOSCO Recovery Guidance. CFTC Letter No. 16–61 advised that a DCO's recovery plan and wind-down plan should set forth all relevant governance arrangements and recommends that a DCO's recovery plan and wind-down plan: (1) Identify the persons responsible for the development, review, approval, and ongoing monitoring and updating of the DCO's recovery plan and wind-down plan; (2) describe the involvement of the DCO's clearing members in the development, review, and updating of the recovery plan and wind-down plan, and in assessing the effects of the recovery plan on clearing members; (3) describe how the costs and benefits of various recovery tools are taken into account during the decision-making process; (4) describe the recovery plan and wind-down plan approval and amendment process; (5) describe the specific roles and responsibilities of the DCO's Board of Directors, relevant committees, and other employees and clearing members in activating the recovery plan and wind-down plan and in implementing various aspects thereof including, without limitation, the use of recovery tools and wind-down options; and (6) the discretion of such persons and entities in activating the recovery plan and wind-down plan, the parameters for exercise of such discretion, where such discretion may be exercised, and the

¹¹⁴ *Id.* at 11.

¹¹⁵ *Id.*

¹¹⁶ *Id.* Note that CFTC Letter No. 16–61 calls for the same, *i.e.*, determine whether any contractual arrangements include covenants, material adverse change clauses or other provisions that would permit a counterparty to alter or terminate the agreement as a result of the implementation of the DCO's recovery plan or wind-down plan.

¹¹⁷ PFMI at 36 (section on credit and liquidity risk management).

¹¹⁸ CPMI-IOSCO Recovery Guidance, at section 2.3.3.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at section 2.3.4.

governance processes for the exercise of such discretion.¹²²

The Commission believes that, in order to develop thorough plans, and to be prepared to implement those plans effectively, a SIDCO or Subpart C DCO must implement and maintain transparent governance arrangements related to recovery and wind-down that are consistent with the above standards and that recognize “one size does not fit all.” DCOs are required to have governance rules and arrangements in place both for business-as-usual operations and in times of extreme stress in order to meet DCO Core Principle O.¹²³ DCO Core Principle O requires a DCO to establish governance arrangements that are transparent to fulfill public interest requirements and to permit the consideration of the views of owners and participants.¹²⁴

In furtherance of Core Principle O, and to support the effectiveness of these plans and ensure their formal review, the Commission is proposing new § 39.39(c)(7) to require each SIDCO’s and Subpart C DCO’s recovery plan and orderly wind-down plan to be annually reviewed and formally approved by the board of directors, and to describe an effective governance structure that clearly defines the responsibilities of the board of directors, board members, senior executives, and business units. Each plan must also describe the processes that the DCO will use to guide its discretionary decision-making relevant to each plan, including those processes for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the DCO.

The Commission requests comment on this aspect of the proposal.

8. Testing—§ 39.39(c)(8)

In CFTC Letter No. 16–61, staff recommended that SIDCOs and Subpart C DCOs include in their recovery and wind-down plans procedures for regularly testing the viability of such plans and that testing, where applicable, be conducted with the participation of clearing members.¹²⁵ Additionally, the recovery plan and wind-down plan should identify the types of testing that will be performed, the frequency with which the plans will be tested, to whom the findings will be reported, and the procedures for updating the recovery plan and wind-down plan in light of the testings’ findings.¹²⁶ Likewise, the

CPMI–IOSCO Recovery Guidance provides that FMIs should, for the purpose of “ensur[ing] that the recovery plan can be implemented effectively,” test and review the recovery plan at least annually as well as following changes materially affecting the recovery plan.¹²⁷ As an example, it states that testing may be conducted through periodic simulation and scenario exercises.¹²⁸ The CPMI–IOSCO Recovery Guidance also states that an “FMI should update its recovery plan as needed following the completion of each test and review.”¹²⁹

In 2022, CPMI–IOSCO issued a discussion paper building on PFMI Principles 3 (Framework for the Comprehensive Management of Risks) and 15 (General Business Risk), the purpose of which was “to facilitate the sharing of existing practices to advance industry efforts and foster dialogue on [CCPs’] management of potential losses arising from non-default events . . . in particular in the context of recovery or orderly wind-down.”¹³⁰ Summarizing the responses of CCPs, the discussion paper observes, “In general, responding CCPs perform annual reviews of their recovery plans” and “[a]lmost all responding CCPs conduct crisis management drills.”¹³¹ The responding CCPs also informed CPMI–IOSCO that they “use crisis management drills to improve their decision-making capabilities and their capacity to address potential [non-default losses] by improving their understanding of scenarios and tools, and testing assumptions about the effectiveness of specific tools.”¹³² The discussion paper quotes one CCP’s response in particular explaining that crisis management exercises helped improve its operational readiness and identify the need for higher insurance coverage.¹³³

In addition, the discussion paper highlights that CCPs engage in discussion-based exercises involving the internal governance structure and external partners and stakeholders, which “appears to facilitate a better understanding of roles and responsibilities before a crisis occurs” and “serve[s] to reduce the likelihood of purely ad hoc decision-making on the allocation of [non-default losses] in a crisis, while still giving decision-makers the flexibility to respond to the unique circumstances of any particular

crisis.”¹³⁴ The responding CCPs reported that testing typically involves a wide range of internal stakeholders and, in some cases, external stakeholders as well.¹³⁵ This greater involvement in testing “enhances the quality of such exercises by strengthening the tie between the exercise and reality of how stakeholders will react.”¹³⁶

According to the discussion paper, testing “may permit CCPs to enhance the tools and resources for identifying, measuring, monitoring and managing [non-default loss] risks” and has “the potential to increase participants’ understanding of the types of scenario[s] that could generate [non-default losses], the range of magnitudes of such losses and their roles and responsibilities in addressing [nondefault losses],”¹³⁷ which could result in an “increase [in] the operational effectiveness” of the CCPs’ plans.¹³⁸

The Commission believes that the testing and reviewing practices described in the foregoing paragraphs will materially contribute to the effectiveness of recovery and orderly wind-down plans. Although the CPMI–IOSCO discussion paper focused on existing practices with respect to non-default losses, the reasoning will also apply to default losses. Periodic testing has the potential to demonstrate whether a SIDCO’s or Subpart C DCO’s tools and resources will sufficiently cover financial losses resulting both from participant defaults and non-default losses and whether these DCOs’ rules, procedures, and governance facilitate a viable recovery or orderly wind-down. Further, testing the DCO’s infrastructure is an effective means of revealing deficiencies or weaknesses which could hamper recovery or wind-down efforts, and providing an opportunity to remediate them in advance.

Thus, the Commission is proposing new § 39.39(c)(8) to require that the recovery plan and orderly wind-down plan of each SIDCO and Subpart C DCO include procedures for testing the viability of the plans, including testing of the DCO’s ability to implement the tools that each plan relies upon. The recovery plan and the orderly wind-down plan must include the types of testing that will be performed, to whom the findings of such tests are reported, and the procedures for updating the recovery plan and orderly wind-down plan in light of the findings resulting

¹²² CFTC Letter No. 16–61, at 13.

¹²³ Section 5b(c)(2)(O)(i) of the CEA, 7 U.S.C. 7a–1(c)(2)(O).

¹²⁴ *Id.*

¹²⁵ CFTC Letter No. 16–61, at 15.

¹²⁶ *Id.*

¹²⁷ CPMI–IOSCO Recovery Guidance, at ¶ 2.3.8.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ NDL Discussion Paper, at 2 (Executive Summary).

¹³¹ *Id.* at section 4.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

from such tests. The testing must be conducted with the participation of clearing members, where the plan depends on their participation, and the DCO must consider including external stakeholders that the plan relies upon, such as service providers, to the extent practicable and appropriate.

Testing must occur following any material change to the recovery plan or orderly wind-down plan, but in any event not less than once annually. The plans shall be updated in light of the findings of such tests.

The Commission requests comment on this aspect of the proposal. The Commission specifically requests comment as to whether the rule should require that the SIDCO or Subpart C DCO include (rather than simply consider including) external stakeholders that the plan relies upon in the testing. The Commission also specifically requests comment on the proposed requirement that tests be conducted not less than annually: would a different minimum frequency be more appropriate?

D. Information for Resolution Planning—§ 39.39(f)

As discussed above,¹³⁹ when the Commission adopted regulations for recovery and wind-down plans in 2013, CPMI-IOSCO and the FSB were in the initial phase of drafting guidance for resolution planning consistent with PFMI Principle 3, Key Consideration 4, which states that “an FMI should also provide relevant authorities with the information needed for purposes of resolution planning.”¹⁴⁰ Consistent with that standard, current § 39.39(c)(2) requires a SIDCO or Subpart C DCO to have procedures for providing the Commission and the FDIC with information needed for purposes of resolution planning.¹⁴¹

The Commission proposes to update its regulations to align § 39.39(c)(2), as new § 39.39(f), with the additional standards and guidance applicable to resolution planning for systemically important FMIs adopted since 2013.¹⁴² As stated in the 2017 FSB Resolution

Guidance, “[a]uthorities should ensure that CCPs have in place adequate processes and information management systems to provide the authorities with the necessary data and information required for undertaking” an assessment of the financial resources and tools that the resolution authority can reasonably expect to be available under the resolution regime).¹⁴³ In the United States, upon the completion of the statutory appointment process set forth in Title II of the Dodd-Frank Act, the FDIC would be appointed the receiver of a failing SIDCO (or other covered financial company).¹⁴⁴ The supervision of a DCO rests with the Commission under the CEA, and, in particular, the supervision of a SIDCO rests with the Commission as the supervisory agency under Title VIII of the Dodd-Frank Act.¹⁴⁵ The statutory bifurcation of responsibilities between the FDIC and the Commission creates important challenges. Under Title II of the Dodd-Frank Act, it is the role of the FDIC to act as receiver for a failed covered financial company if the requirements of Title II have been met. The FDIC’s ability to carry out its responsibilities as receiver would benefit from advance preparation to ensure that, in the unlikely event that resolution becomes necessary, there will be an effective and efficient transition of the SIDCO to the FDIC receivership, thereby fostering the success of a Title II resolution.¹⁴⁶

Pursuant to section 8a(5) of the CEA,¹⁴⁷ the Commission has authority to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA. One of those purposes is the avoidance of systemic risk.¹⁴⁸ As further described in the following paragraphs, it would appear that a reporting requirement that would enable the

Commission to aid the FDIC in its preparations for the resolution under Title II of a DCO—where placing the DCO into resolution requires a finding by the Secretary of the Treasury, in consultation with the President, that, *inter alia*, the failure of the DCO and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States¹⁴⁹—is reasonably necessary to foster the avoidance of systemic risk.

Moreover, under Title VIII of the Dodd-Frank Act, the Commission may, in consultation with the FSOC and the Board of Governors of the Federal Reserve, prescribe regulations containing risk management standards, taking into consideration relevant international standards and existing prudential requirements, for SIDCOs governing: (i) the operations related to payment, clearing, and settlement activities of SIDCOs; and (ii) the conduct of designated activities by SIDCOs.¹⁵⁰ Under Section 805(b) of the Dodd-Frank Act, the objectives and principles for such risk management standards shall be to: (1) promote robust risk management; (2) promote safety and soundness; (3) reduce systemic risks, and (4) support the stability of the broader financial system.¹⁵¹ Additionally, Section 805(c) of the Dodd-Frank Act states that the standards prescribed may address areas such as: (1) risk management policies and procedures; (2) margin and collateral requirements; (3) participant or counterparty default policies and procedures; (4) the ability to complete timely clearing and settlement of financial transactions; (5) capital and financial resources requirements for the SIDCO; and (6) other areas that are necessary to achieve the objectives and principles in Section 805(b).¹⁵²

Similar to the context of recovery and orderly wind-down planning, thorough preparation *ex ante* is crucial for successfully managing, on an inherently abbreviated timeline, matters relating to resolution, in aid of mitigating serious adverse effects on financial stability in the United States. This thorough preparation for resolution is also crucial for establishing market confidence, and the confidence of foreign counterparts to the United States agencies. While the Commission remains persuaded that the likelihood of a SIDCO requiring

¹⁴³ 2017 FSB Resolution Guidance, at section 6.4.

¹⁴⁴ Section 202(a) of the Dodd-Frank Act; 12 U.S.C. 5382(a).

¹⁴⁵ Sections 803(8)(A)(ii) and 807(a) of the Dodd-Frank Act, 12 U.S.C. 5462(8)(A)(ii) and 5466(a); *see also* Section 2(12)(C) of the Dodd-Frank Act, 12 U.S.C. 5301(12)(C).

¹⁴⁶ This involves coordinated planning and information sharing to enable a smooth transition into resolution. As the supervisory agency for SIDCOs, the Commission provides information for resolution planning to the FDIC under the auspices of a Memorandum of Understanding (MOU). The current MOU is the “Memorandum of Understanding Between The Federal Deposit Insurance Corporation And The Commodity Futures Trading Commission Concerning The Sharing Of Information In Connection With Resolution Planning For Derivatives Clearing Organizations,” dated June 26, 2015.

¹⁴⁷ 7 U.S.C. 12a(5).

¹⁴⁸ Section 3(b) of the CEA, 7 U.S.C. 5(b).

¹⁴⁹ Section 203(b)(2) of the Dodd-Frank Act, 12 U.S.C. 5383(b)(2).

¹⁵⁰ Section 805(a)(2)(A) of the Dodd-Frank Act, 12 U.S.C. 5464(a)(2)(A).

¹⁵¹ 12 U.S.C. 5464(b).

¹⁵² 12 U.S.C. 5464(c).

¹³⁹ *See* text accompanying fn. 54, *supra*.

¹⁴⁰ PFMI Principle 3, Key Consideration 4, at 32. The Commission notes that resolution is distinct from orderly wind-down in that the latter rests within the control of the DCO.

¹⁴¹ 17 CFR 39.39(c)(2).

¹⁴² *See, e.g.*, 2017 FSB Resolution Guidance, at section 6.4 (noting that “[a]uthorities should ensure that CCPs have in place adequate processes and information management systems to provide the authorities with the necessary data and information required for undertaking” an assessment of the financial resources and tools that the resolution authority can reasonably expect to be available under the resolution regime).

resolution under Title II of the Dodd-Frank Act is “extraordinarily unlikely,”¹⁵³ thorough planning for such an exigency is essential.¹⁵⁴

While less likely, it remains possible that similar information may also be required from Subpart C DCOs in times of extreme market stress, if it appears at the time that the failure of such a DCO might meet the requirements set forth in section 203(b) of the Dodd-Frank Act.¹⁵⁵ Thus, while the Commission anticipates that the intensity of resolution planning for Subpart C DCOs will be significantly less than that for SIDCOs, in order to promote the goal of assuring that Subpart C DCOs will, if necessary, remain capable of effectively being resolved under Title II, including during times of extreme stress, § 39.39(f) would apply equally to SIDCOs and Subpart C DCOs.¹⁵⁶

The Commission’s DCR staff has been working with FDIC staff on resolution planning for the two SIDCOs. This joint work has revealed that the Commission does not receive certain information from the SIDCOs that the FDIC may need to plan for resolution. The Commission therefore has determined to update its reporting requirements for SIDCOs and Subpart C DCOs to reflect

additional information that may be used for resolution planning consistent with the international standards set forth in the PFMI and related guidance.¹⁵⁷

Most of the global standards and guidance relating to planning for resolution (including for CCPs) apply to resolution authorities, in cooperation with supervisory authorities (where the resolution authority is separate from the supervisory authority).¹⁵⁸ Because of the nature of principle-based regulation for DCOs, there may be information in the possession of a DCO that is required for resolution planning but may not ordinarily be reported to the Commission and may not be available publicly. Moreover, while the recovery and orderly wind-down plans described above should be comprehensive in themselves, there may be additional information that the Commission may require to plan for the resolution of a SIDCO or Subpart C DCO. The Commission therefore proposes to specify the types of information a SIDCO or Subpart C DCO may be required to provide for resolution planning in light of international standards and guidance established since 2013.

1. Planning for Resolution Under Title II of the Dodd-Frank Act—§ 39.39(f)

Current § 39.39(c)(2) requires SIDCOs and Subpart C DCOs to have procedures in place to provide the Commission and the FDIC with information for purposes of resolution planning. This rule is consistent with the Key Attributes FMI Annex: “In order to facilitate the implementation of resolution measures, FMIs should be required to maintain information systems and controls that can promptly produce and make available, both in normal times and during resolution, relevant data and information needed by the authorities for purposes of timely resolution planning and resolution”¹⁵⁹ The Commission is proposing in new § 39.39(f) to clarify that the requirement that a DCO have procedures in place to provide information directly to the Commission and the FDIC for resolution planning purposes means that the DCO must provide such information to the Commission. The Commission would no longer be requiring DCOs to provide information related to resolution planning directly to the FDIC. The Commission provides such information

related to resolution planning to the FDIC under the MOU.

The Commission is also proposing, consistent with the Key Attributes FMI Annex, to require that SIDCOs and Subpart C DCOs maintain information systems and controls that can promptly produce and make available data and information requested by the Commission for purposes of resolution planning and resolution in the form and manner specified by the Commission. The Commission expects that the form and manner would be designed to facilitate the Commission’s ability to share the information with the FDIC. Such systems and controls are, for the most part, already in place during business as usual between each DCO and the Commission. The explicit requirement that a SIDCO and Subpart C DCO ensure that its systems will continue to be able to provide information to the Commission during resolution is sound public policy, as it will ensure the Commission receives critical information during this transitional period. The requirements of the CEA apply to any DCO as long as it is doing business, and the affirmation that a DCO’s systems will be designed to be able to continue to function should help to provide assurances to stakeholders and market participants that clearing services will continue through all potential exigencies.

Accordingly, the Commission is proposing new § 39.39(f) to require that a SIDCO or Subpart C DCO maintain information systems and controls to provide to the Commission any data and information requested for purposes of resolution planning and resolution, and that each must supply such information and data electronically, in the form and manner specified by the Commission.

2. Required Information—§ 39.39(f)(1)–(7)

It is sound regulatory policy for the Commission to be transparent about the types of information that a SIDCO or Subpart C DCO might anticipate providing to the Commission, upon request, in order to enable the Commission to aid the FDIC in planning for resolution under Title II of the Dodd-Frank Act. This transparency is sound public policy because it would help assure stakeholders that, in the extraordinarily unlikely event that resolution of a SIDCO or Subpart C DCO under Title II becomes necessary, there will be an effective and efficient transition of the DCO to the FDIC receivership, and a successful resolution under Title II would be forthcoming. Thorough preparation is also helpful in supporting market confidence, and the

¹⁵³ See *Bankruptcy Regulations*, 86 FR 19324, 19386 (Apr. 13, 2021).

¹⁵⁴ Key Attributes ¶ 11.1, FSB CCP Resolution Planning Guidance at section 7.

¹⁵⁵ 12 U.S.C. 5383(b). While the determination under Title II is made at the time when the entity (here a DCO) is under stress (see 12 U.S.C. 5383(b)(1) (determination that the financial company is in default or in danger of default, emphasis added), the determination under Title VIII is made during business as usual, after a detailed process including notice to the proposed systemically important financial market utility, and the standards for the determination are different than those for the designation. See generally Section 804 of the Dodd-Frank Act, 12 U.S.C. 5463; 12 CFR Part 1320 (Designation of Financial Market Utilities). Thus, an entity not designated in advance under Title VIII may nonetheless in particular circumstances be determined to meet the standards for resolution under Title II, similarly, an entity designated in advance under Title VIII may not, even in the event of its failure, be determined to meet the standards under Title II.

Nonetheless, it would appear that the failure of a DCO that has been determined during business as usual to have met the criteria for designation pursuant to 12 U.S.C. 5463 is more likely to have such adverse effects on financial stability than the failure of a DCO that has not been determined to have met those criteria.

¹⁵⁶ The Commission does not at this time believe that it is likely that the failure of a U.S.-based DCO that is neither a SIDCO nor a Subpart C DCO would meet the requirements set forth in Section 203(b) of the Dodd-Frank Act, 12 U.S.C. 5383(b), given the generally smaller size of such DCOs and the fact that such DCOs do not have banks as clearing members (see *supra* fn. 23). For foreign-based DCOs, the relevant resolution authority would be the resolution authority in the home jurisdiction. Accordingly, the Commission is not proposing to extend this requirement to DCOs that are neither SIDCOs nor Subpart C DCOs.

¹⁵⁷ See Sections 805(a)(1)(A)–(B) of the Dodd-Frank Act, 12 U.S.C. 5464(a)(1)(A)–(B).

¹⁵⁸ E.g., FSB CCP Resolution Planning Guidance at section 7.

¹⁵⁹ Key Attributes FMI Annex, at section 12.1.

confidence of foreign counterparts to the United States agencies.¹⁶⁰

Resolution planning necessarily involves assessing a number of types of information: information that is publicly available, information that is otherwise reported to the Commission under part 39, and information that is in the possession of the DCOs but that is not otherwise reported to the Commission.

Over past years, Commission staff has worked with staff from the FDIC and the SIDCOs to identify and obtain information for the purpose of planning for the highly unlikely event of a SIDCO entering into resolution.¹⁶¹ Global guidance on standards for resolution planning developed since 2013 have informed these information requests.

Under Core Principle J, the Commission may request any information from a DCO that the Commission determines to be necessary to conduct oversight of the DCO.¹⁶² The Commission believes that certain information for resolution planning that goes beyond the information usually obtained during business as usual under the Core Principles and associated Part 39 regulations should be available when a DCO is systemically important to the financial system, may be approaching such systemic importance, or has opted into Subpart C.¹⁶³ As noted above, the FDIC must be ready to step in as receiver of a failing DCO on very short notice and work to achieve a resolution that mitigates risks to financial stability created by the DCO's failure, including by restoring market confidence and preventing contagion. The information proposed to be requested will assist in planning for resolution, thereby helping the FDIC to fulfill its role and accomplish its objectives, which in turn helps accomplish one of the purposes of the CEA, the avoidance of systemic risk.

Proposed subparts (1) through (7) describe seven types of information that are relevant to planning for resolution under Title II of the Dodd-Frank Act. The frequency with which information may be requested may vary over time, with some information requested only once, while other information may be requested multiple times (e.g., annually, or upon significant changes to the structure of the DCO's business arrangements). The Commission expects that, in the latter case, the frequency of

the requests may change over time, as the Commission gains more knowledge.

i. Structure and Activities—§ 39.39(f)(1)

As part of planning for resolution, the FDIC develops resolution options that are underpinned by an understanding of the structure of the SIDCO or Subpart C DCO. Proposed § 39.39(f)(1) would cover information related to the SIDCO's and Subpart C DCO's structure and activities and would include, among other things, documents and information about the SIDCO's and Subpart C DCO's legal structure and hierarchy. The Commission anticipates that this information would include current comprehensive organizational charts (including all direct and indirect subsidiaries where the SIDCO directly or indirectly owns more than a fifty percent controlling interest), governing documents and arrangements, rights and powers of shareholders, and current organizational documents (including by-laws, articles of incorporation or association/organization, and committees). The Commission acknowledges that some of this information may be publicly available on a SIDCO's website, may be included in recovery plans, or may otherwise be reported to the Commission under part 39. In the event that information is required that is not readily available through the ordinary course of regulatory oversight, a SIDCO and Subpart C DCO must be prepared to provide current information under the umbrella of "structure and activities" upon request.¹⁶⁴

Proposed § 39.39(f)(1) would request information related to the SIDCO's or Subpart C DCO's organizational structure and corporate structure, activities, governing documents and arrangements, rights and powers of shareholders, committee members and responsibilities.

The Commission requests comment on this aspect of the proposal.

ii. Information About Clearing Members—§ 39.39(f)(2)

Another aspect of resolution planning is developing an understanding of the risks that may trigger consideration of orderly wind-down and the implications for resolution should that orderly wind-down fail. In order to understand these risks, certain information about a SIDCO's or Subpart C DCO's clearing members may be instructive. Generalized or anonymized

information about clearing members such as types and amounts of collateral posted (for both house and customer accounts), variation margin, and contributions to default and guaranty funds may be instructive, both for *ex ante* planning and in the runway to resolution. Such information may provide insight into the risks that clearing members and the markets would be exposed to in the event of a systemic failure, and of the potential interplay between those risks.

The information requested in the category may also include general information regarding exposures or other measures of business risk with respect to all or a subset of clearing members. This type of information may assist in the planning for potential triggers for resolution and for understanding potential challenges in executing a resolution. The Commission recognizes that this type of information changes over time; accordingly, the Commission anticipates that it may request such information on an annual basis or more frequently in the run-up to resolution. Proposed § 39.39(f)(2) would permit requests for information on clearing members generally, including (for both house and customer accounts) information regarding collateral, variation margin, and contributions to default and guaranty funds.

The Commission requests comment on this aspect of the proposal.

iii. Arrangements With Other Clearing Entities—§ 39.39(f)(3)

In order to plan for continuity of operations in resolution, the Commission and FDIC must understand how the SIDCO or Subpart C DCO interacts with the operations of other DCOs and financial market infrastructures.¹⁶⁵ In particular, the Commission and FDIC must understand the SIDCO's or Subpart C DCO's cross-margining or mutual offset arrangements. These agreements and arrangements may require additional handling in resolution, both because of the exposures and obligations the SIDCO may be subject to, as well as the resources and tools they may provide.

The Commission proposes to require that SIDCOs and Subpart C DCOs provide to the Commission upon request copies of the most current versions of mutual offsetting

¹⁶⁰ To date, the Commission has requested information for resolution planning only from SIDCOs.

¹⁶¹ This is consistent with section 6.4 of the 2017 FSB Resolution Guidance.

¹⁶² Section 5b(c)(2)(j) of the CEA, 7 U.S.C. 7a-1(c)(2)(j). See also 17 CFR 39.19(c)(5)(i) (a DCO shall provide upon request any information related to its business as a clearing organization.)

¹⁶⁴ In some cases, the response may include cross-references to specific places where the information is already available, or has previously been provided, and assurance that the information remains current.

¹⁶⁵ For example, these relationships may be between DCOs registered with the Commission, e.g., Chicago Mercantile Exchange (CME) and Options Clearing Corporation, or between a DCO registered with the Commission and another CCP supervised by an agency other than the CFTC, e.g., CME and the Fixed Income Clearing Corporation.

arrangements or agreements for cross-margining arrangements with external entities. Additionally, for each such arrangement or agreement, the SIDCO or Subpart C DCO should be prepared to provide data concerning the recent scope of the relationship, such as information related to amounts of daily initial margin. The Commission proposes to require that SIDCOs and Subpart C DCOs update such information upon request by the Commission.

Proposed § 39.39(f)(3) would request information on arrangements and agreements with other clearing entities relating to clearing operations, including offset and cross-margin arrangements.

The Commission requests comment on this aspect of the proposal.

iv. Financial Schedules and Supporting Details—§ 39.39(f)(4)

In order to prepare for receivership operations in resolution, and to develop resolution strategy options, there needs to be a clear understanding of the SIDCO's or Subpart C DCO's financial position and capital structure, which may include some combination of assets, liabilities, revenues and expenses, in advance of an extreme event. A DCO's financial statements and exhibits reported to the Commission contain relevant information that will assist the Commission and FDIC in forming a detailed understanding of the potential resources and financial exposures of the SIDCO or Subpart C DCO that would be important to the success of a Title II receivership. To prepare for resolution, the Commission and FDIC require a detailed understanding of the potential supports for and impediments to potential resolution strategies, including sources and uses of funds in resolution.

In order to form this understanding, it would be useful for the DCO to identify potential creditor claims and the potential resources available to satisfy such claims. There may be information in possession of the DCO that may not be available in public filings, on a DCO's website, or in financial reports and schedules required to be filed under other provisions of part 39, including off-balance sheet obligations or contingent liabilities.

The type of information requested under proposed § 39.39(f)(4) would include requests for information on off-balance sheet obligations or contingent liabilities, and obligations to creditors, shareholders, or affiliates not otherwise reported under Part 39.

The Commission requests comment on this aspect of the proposal.

v. Interconnections and Interdependencies With Internal and External Service Providers—§ 39.39(f)(5)

The evaluation of possible obstacles to the continuation of essential services provided by internal and external service providers (including affiliates and other third parties), and the use of software, information, and other tools provided under license, is integral to resolution planning. While the recovery plans required under § 39.39(b) should include much of this information, effective planning for receivership may include the need for a more detailed understanding of the requirements to continue making use of identified services (and thus understanding of the steps to meet such requirements).

Each SIDCO or Subpart C DCO must provide the Commission, upon request, copies of external or inter-affiliate contracts or agreements that permit the SIDCO or Subpart C DCO to perform its critical functions (including third-party or affiliate service agreements, building or equipment leases, etc.). In the case of inter-affiliate arrangements, the DCO should identify which entity in the group is the contracting party and, where relevant, whether there are any inter-affiliate service agreements that address provision of services. This type of information should inform the resolution plan by revealing any dependencies on affiliates for essential support functions provided to the SIDCO or Subpart C DCO. It may also foster planning for alternatives where required. The Commission may also request copies of inter-affiliate contracts or agreements, where the SIDCO or Subpart C DCO provides essential support to other affiliates.

Additionally, where some of the contracts and agreements for services would grant the service provider the option to terminate the contract in the event of assignment to a bridge financial company (*i.e.*, may not be “resolution resilient”), the resolution plan may need to identify alternatives. Thus, providing CFTC (and, ultimately, FDIC) with information that could help identify those contracts and agreements for services that are not resolution resilient would assist planning in advance of entry into resolution.

Further, because application of the FDIC's authority under Title II with respect to continuation of pre-receivership contracts¹⁶⁶ in the case of a non-U.S. contracting party may be less straightforward than with respect to a U.S.-based contracting party, the

Commission may request that a SIDCO or Subpart C DCO provide a list of critical interconnections or interdependencies that are subject to material contracts/agreements governed in whole or in part by non-U.S. law.

Lastly, the resolution plan may need to maintain important tools and capabilities provided under license arrangements. For instance, the resolution plan may need to cover the transfer of licenses to the bridge financial company for products or indices underlying the contracts cleared by the SIDCO or Subpart C DCO. To accomplish this, the Commission may request that a SIDCO or Subpart C DCO provide a copy of such licenses and licensing agreements.

The Commission anticipates that the type of information described above would be requested on a one-time basis, with updates to be provided upon significant changes to the structure of the DCO's business arrangements (including change to the agreements), or when new agreements are executed. Proposed § 39.39(f)(5) would require SIDCOs and Subpart C DCOs to provide information regarding interconnections and interdependencies with internal and external service providers, licensors, and licensees, including information regarding services provided by or to affiliates and other third parties and related agreements, upon request by the Commission.

The Commission requests comment on this aspect of the proposal.

vi. Information Concerning Critical Personnel—§ 39.39(f)(6)

While the recovery and orderly wind-down plans contain information related to critical positions and resilient staffing, in order to plan for resolution, a DCO may have to take steps to ensure that those positions remain filled. This includes steps to ensure that there is an adequate pool of financial resources readily available to ensure that during times of stress, there is staff in place. During times of extreme stress, people in critical positions may have terminated (or may terminate) their association with the DCO, or their association may have been terminated (or may be terminated). Proposed § 39.39(f)(6) would require a SIDCO or Subpart C DCO to provide information for all critical positions described in the recovery and orderly wind-down plans.¹⁶⁷ The Commission believes that this information is essential if the FDIC is to succeed in a Title II receivership,

¹⁶⁶ See Section 210(c)(13) of the Dodd-Frank Act (“Authority to Enforce Contracts”), 12 U.S.C. 5390(c)(13).

¹⁶⁷ As in all cases, such information would be provided and obtained under security arrangements appropriate to the sensitivity of the information.

as they will need qualified personnel to fill these positions in order to manage and operate the entity.

The Commission requests comment on this aspect of the proposal.

vii. Other Required Information—
§ 39.39(f)(7)

Proposed § 39.39(f)(7) would recognize that resolution planning is a complex, ongoing, and developing process, and that information requirements may change over time as the Commission and the FDIC gain experience with resolution planning for DCOs, and as information needs and business models change. Thus, certain information requirements may not be covered by the specific items listed in proposed § 39.39(f)(1)–(6). In that regard, proposed § 39.39(f)(7) would include a broad provision to encompass information which the Commission requires for this purpose, but not covered by the specific categories of information in proposed § 39.39(f)(1)–(6).

The Commission requests comment on this aspect of the proposal.

3. Requested Reporting—
§ 39.19(c)(5)(iii)

The Commission proposes to add a new requested reporting requirement to § 39.19 to reflect updates to the information requested in proposed § 39.39(f)(1)–(7). Proposed § 39.19(c)(5)(iii) would require a SIDCO or Subpart C DCO that submits information pursuant to § 39.39(f) to update the information upon request by the Commission. The Commission needs timely and an accurate information to monitor a SIDCO or Subpart C DCO, especially during stressful times. Depending upon the nature of the change and the information previously submitted, the response may be a confirmation that the information previously submitted remains accurate.

The Commission requests comment on this aspect of the proposal.

D. Renaming § 39.39

When codified in 2013, § 39.39 covered the Commission's expectations regarding a SIDCO's or Subpart C DCO's obligations with regard to recovery and orderly wind-down plans. The Commission proposes to change the title of § 39.39 to reflect that the proposed regulations, if adopted by the Commission, will encompass recovery and orderly wind-down planning for SIDCOs and Subpart C DCOs, as well as information required to plan for resolution.

The Commission requests comment on this aspect of the proposal.

III. Orderly Wind-Down Plans for DCOs That Are Not SIDCOs or Subpart C DCOs

The Commission is proposing, as reasonably necessary to effectuate Core Principle D(i),¹⁶⁸ to require DCOs that are neither SIDCOs nor Subpart C DCOs to maintain and submit to the Commission plans for orderly wind-down, with requirements that are substantially similar to the proposed requirements for the orderly wind-down plans to be submitted by SIDCOs and Subpart C DCOs.¹⁶⁹ Given that the failure of one of these DCOs is much less likely to have serious adverse effects on financial stability in the United States,¹⁷⁰ the Commission is not proposing to require these DCOs to maintain recovery plans.¹⁷¹

*A. Requirement To Maintain and Submit an Orderly Wind-Down Plan—
§ 39.13(k)(1)(i)*

The Commission is proposing to require that a DCO that is neither a SIDCO nor a Subpart C DCO must nevertheless maintain and submit to the Commission viable plans for orderly wind-down necessitated by default losses and non-default losses. The possibility that such losses may render the DCO unable to meet its obligations or to continue its critical functions to the point it must wind down is inherently one of the risks associated with the discharging of the DCO's responsibilities.¹⁷² Additionally, the point at which a DCO must wind down may arise suddenly, in a manner that does not allow for time to plan. Wind-down plans are essential to help facilitate an orderly and expeditious wind-down; moreover, planning for an

orderly wind-down—including, for example, considering the circumstances that may trigger a wind-down, the tools the DCO would implement to help ensure an orderly wind-down (along with the likely effects on clearing members and the financial markets from implementing such tools), and the governance arrangements to guide decision-making during an orderly wind-down—can strengthen the risk management practices of the DCO (including by identifying vulnerabilities that can be mitigated), enhance legal certainty for the DCO, its clearing members and market participants, and increase market confidence, three pillars of the DCO Core Principles' aims. As discussed below, the subjects and analyses the Commission is proposing for inclusion in a DCO's orderly wind-down plan overlap with many of the analyses DCOs must otherwise undertake to ensure compliance with the DCO Core Principles.

In order to facilitate accomplishment of these goals, the Commission proposes to add new § 39.13(k)(1)(i) to require that a DCO that is not a SIDCO or Subpart C DCO maintain and, consistent with the proposed revisions to § 39.19(c)(4)(xxiv), submit to the Commission, a viable plan for orderly wind down necessitated by default losses and non-default losses, and supporting information.¹⁷³ In additional support of these goals, and as discussed further below, the Commission is proposing to add other provisions under § 39.13(k).

The Commission requests comment on the proposed changes. In particular, the Commission requests comment on the extent to which the proposed requirements concerning orderly wind-down plans for DCOs that are neither SIDCOs nor Subpart C DCOs appropriately balance seeking to ensure that such DCOs are prepared to wind-down in an orderly manner and mitigating the costs of preparing plans for such a wind-down. To the extent a better balance can be achieved, please discuss both the requirements that should be deleted or modified and the basis for the conclusion that the regulatory goal of orderly wind-down would reliably be achieved in light of such changes.

B. Notice of the Initiation of Pending Wind-Down—§ 39.13(k)(1)(ii)

Along the same lines—and consistent with the requirement for SIDCOs and

¹⁶⁸ Section 5b(c)(2)(D)(i) of the CEA, 7 U.S.C. 7a–1(c)(2)(D)(i); see Section 8a(5) of the CEA, 7 U.S.C. 12a(5).

¹⁶⁹ For orderly wind-down planning involving insolvency or default of a DCO member or participant, the Commission also grounds this proposed rulemaking in Core Principle G(i), which requires that a DCO have “rules and procedures designed for the efficient, fair, and safe management of events” during such scenarios. Section 5b(c)(2)(G)(i) of the CEA, 7 U.S.C. 7a–1(c)(2)(G)(i).

¹⁷⁰ Section 203(b)(2) of the Dodd-Frank Act, 12 U.S.C. 5383(b)(2).

¹⁷¹ For U.S.-based DCOs that are neither SIDCOs nor Subpart C DCOs, see discussion at *supra* fn. 156. Separately, foreign-based central counterparties registered with the Commission as DCOs are required to maintain recovery and wind-down plans by their home-country regulators. See *infra* fn. 207 and accompanying text. Thus, even if one of these were in future to be designated as systemically important under Title VIII, they would already maintain a recovery plan.

¹⁷² Section 5b(c)(2)(D)(i) of the CEA, 7 U.S.C. 7a–1(c)(2)(D)(i).

¹⁷³ In Section IV below, discussing the reporting requirement in § 39.19(c)(4)(xxiv), the Commission explains the reason for including the term “and supporting information.”

Subpart C DCOs—the Commission is proposing to require that a DCO have procedures in place to notify the Commission and clearing members, as soon as practicable, when orderly wind-down is pending, and to provide such notification in such circumstances. Timely notification of events is essential for helping the Commission and clearing members effectively to address the issues raised by the DCO's transition into wind-down and that having the proper procedures in place beforehand will facilitate such timely notification.

The requirement that DCOs notify the Commission and clearing members of a pending orderly wind-down is reasonably necessary to effectuate Core Principle J, under which a DCO shall provide to the Commission all information that the Commission determines to be necessary to conduct oversight of the DCO,¹⁷⁴ and Core Principle L, under which a DCO shall provide to market participants sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the services of the DCO and disclose publicly and to the Commission information concerning any other matter relevant to participation in the settlement and clearing activities of the DCO.¹⁷⁵

Accordingly, the Commission proposes to add new § 39.13(k)(1)(ii) to require that each DCO shall have procedures for informing the Commission and clearing members, as soon as practicable, when orderly wind-down is pending, and shall notify the Commission and clearing members consistent with proposed § 39.19(c)(4)(xxv).

The Commission requests comment on these proposed changes.

C. Orderly Wind-Down Plan: Required Elements—§ 39.13(k)(2)–(6)

As is the case for SIDCOs and Subpart C DCOs, the Commission believes, as a general matter, that the orderly wind-down plan of a DCO that is not a SIDCO or a Subpart C DCO should include a summary providing an overview of the plan followed by a detailed description of how the DCO will implement the plan. The description of how the DCO will implement its plans shall include an identification and description of the critical operations and services the DCO provides to clearing members and financial market participants, the service providers upon which the DCO

relies to provide these critical operations and services, interconnections and interdependencies, and staffing arrangements (including how they are resilient), obstacles to success of the orderly wind-down plan, aggregate cost estimates for the continuation of services during orderly wind-down, and how the DCO will ensure that its services continue through orderly wind-down. The plan shall also include a stress scenario analysis addressing the failure of each critical operation and service, a description of the criteria the DCO would consider in determining whether and when to trigger orderly wind-down and the process for monitoring for events that may trigger the wind-down; a description of the information-sharing and escalation processes within the DCO's senior management and board of directors following an event triggering consideration of orderly wind-down and identification of the factors the board of directors would consider in exercising judgment or discretion with respect to any decision-making during wind down; an identification of scenarios that may trigger orderly wind-down and analysis of the tools the DCO would use following the occurrence of each scenario; an identification and review of agreements to be maintained during orderly wind-down; a description of the DCO's governance with respect to planning for orderly wind-down and during the orderly wind-down; and testing. The Commission believes these subjects and analyses are the minimum elements that DCOs should incorporate in their orderly wind-down plans pursuant to their obligation to manage the risks associated with discharging their responsibilities under Core Principle D.¹⁷⁶

Accordingly, the Commission is proposing new § 39.13(k)(2) to require a DCO to include in its orderly wind-down plans a summary providing an overview of the plan followed by a detailed description of how the DCO will implement the plan.

The Commission requests comment on this aspect of the proposal. Each required element of the orderly wind-down plan is discussed in more detail below.

1. Critical Operations and Services, Interconnections and Interdependencies, and Resilient Staffing—§ 39.13(k)(2)(i)

In Section II, the Commission highlighted the importance of incorporating into recovery and orderly wind-down plans an identification and description of the critical operations and services that the SIDCO or Subpart C DCO provides to clearing members and financial market participants, the service providers upon which the DCO relies upon to provide these critical operations and services, financial and operational interconnections and interdependencies, and resilient staffing arrangements. As set forth below, the same is true for the orderly wind-down plans for DCOs that are not SIDCOs or Subpart C DCOs.

i. Critical Operations and Services Provided by and to DCOs

Limiting the operational disruption and financial harm to a DCO's clearing members and other financial market participants during an orderly wind-down, turns on the DCO's understanding of the critical operations and services that the DCO performs for clearing members and other financial market participants, and, in turn, operations and services performed by others that are critical to the DCO performing those critical functions. Thus, the Commission is proposing to require that a DCO's orderly wind-down plan include an identification and description of the critical operations and services that the DCO provides to clearing members and other financial market participants. For any critical (to the DCO) operations or services that the DCO relies upon that are performed by internal or external service providers, the plan should identify those providers and describe the critical operations or services they perform. Likewise, to the extent the DCO's ability to discharge its functions may be affected by the performance of ancillary service providers, the plan should identify those ancillary service providers and describe the operations or services they perform. By requiring the identification and description of the DCO's critical operations and services, including those performed by internal or external service providers, and any ancillary service providers, the Commission seeks to ensure, to the extent practicable, that the DCO's ability to perform the critical operations and services that others depend upon continues during the orderly wind-down process.

In the same vein, the Commission is proposing to require that a DCO's

¹⁷⁴ Section 5b(c)(2)(J) of the CEA, 7 U.S.C. 7a–1(c)(2)(J).

¹⁷⁵ Section 5b(c)(2)(L) of the CEA, 7 U.S.C. 7a–1(c)(2)(L).

¹⁷⁶ To the extent foreign CCPs are subject to home jurisdiction regulation with different requirements for the subjects and analyses that must be included in their wind-down plans, the Commission welcomes comments describing those requirements, and including suggestions on how to achieve the goals of this regulation in a manner that appropriately addresses possible inefficiencies.

orderly wind-down plan identify and describe the obstacles to success of the plan, and the DCO's plan to address the risks associated with the failure of each such critical operation and service. A stress scenario analysis (or similar undertaking) addressing the failure of each critical operation and service while the DCO is still a going concern should highlight whether and how the operation or service can continue in orderly wind-down. The Commission expects the DCO's orderly wind-down plan to address the full range of options in order to ensure that operations and services critical to the DCO continue in the orderly wind-down process. In considering and analyzing the magnitude of the costs associated with an orderly wind-down, certain of the DCO's expenses will likely increase, including, for example, legal fees, accounting fees, financial advisor fees, the costs associated with employee retention programs, and other incentives that may be necessary to maintain critical staff. Other costs, such as marketing or those for developing new products, may decrease as a result of wind-down. Further, a DCO shall proceed under the conservative assumption that any resources it may have consumed as part of its recovery efforts, if any, will not be available to fund critical operations and services in an orderly wind-down.

ii. Interconnections and Interdependencies

The Commission is additionally proposing to require that the orderly wind-down plan identify and describe the DCO's financial and operational interconnections and interdependencies. Given the web of relationships that may exist among the DCO and its relevant affiliates, internal and external service providers, and other relevant stakeholders, identifying and describing the interconnections and interdependencies could provide much-needed transparency and clarity for purposes of developing and implementing an orderly wind-down plan. For instance, the financial resources available to a DCO during wind-down may be limited when one financial entity serves multiple roles and relationships with respect to the DCO or when multiple affiliates of the DCO depend upon the same intercompany loan agreement or insurance policy with group coverage limits. Interconnections and interdependencies may also adversely impact the value of the DCO's assets, which can be crucial in wind-down where a DCO is trying to meet costs associated with preserving critical

operations and services and meeting liquidity needs. Accordingly, a DCO's orderly wind-down plan should identify and describe any interconnections and interdependencies and address the effect such relationships may have on the DCO's ability to continue performing its functions during the wind-down process.

iii. Resilient Staffing and Support Services Arrangements

As noted in section II, a DCO in wind-down cannot maintain critical operations and services without both essential personnel and support services. Accordingly, the Commission is proposing to require that the orderly wind-down plan identify and describe plans for resilient staffing arrangements under which personnel essential for critical operations and services would be maintained and services supporting the DCO's critical operations and services would continue. To the extent the DCO relies upon contractors as personnel providing critical operations and services, the DCO should have staffing arrangements and agreements in place for such contracting work to continue in wind-down. Similarly, to the extent the DCO relies upon third-party service providers to provide critical operations and services, including facilities, utilities, and communication technologies, the DCO should have arrangements and agreements in place for such third-party services to continue in wind-down. Further, to promote its ability to ensure the success of the plan, the DCO should identify obstacles to that success. Additionally, as part of the DCO's responsibility to maintain critical operations and services, the Commission is proposing to require that the orderly wind-down plan include aggregate cost estimates for essential personnel and support services, and address the manner in which the DCO will meet the associated costs. Just as the case may be for SIDCOs and Subpart C DCOs, other DCOs may be vulnerable to key person risk; accordingly, plans for resilient staffing arrangements should identify, to the extent applicable, key person risk within the DCO or (as relevant) affiliated legal entities that the DCO relies upon to provide its critical operations and services, and how the DCO has planned to address such risk.

Accordingly, the Commission is proposing new § 39.13(k)(2)(i) to require that the DCO's orderly wind-down plan include the identification and description of the DCO's critical operations and services, interconnections and interdependencies, and resilient staffing

arrangements, obstacles to success of the orderly wind-down plan, as well as a stress scenario analysis addressing the failure of each identified critical operation or service. Additionally, the orderly wind-down plan must include aggregate cost estimates for the continuation of critical operations and services and a description of how the DCO will ensure that such operations and services continue through orderly wind-down.

The Commission requests comment on this aspect of the proposal.

2. Triggers for Consideration of Orderly Wind-Down and Processes for Information-Sharing and Decision-Making—§ 39.13(k)(2)(ii)–(iii)

The Commission is proposing to require that orderly wind-down plans for DCOs include a description of the criteria that would guide the DCO in considering whether and when to implement wind-down, and the process for monitoring for events that may trigger consideration of orderly wind-down. As noted in section II, any viable orderly wind-down plan must establish and define criteria (which may be in the alternative) that the DCO would consider in triggering consideration of wind-down. The criteria may be quantitative, such as the case where the DCO does not have the financial resources to continue as a going concern, or qualitative, such as the case where judgment may be needed (for instance, in circumstances involving litigation that is proceeding in a manner that suggests that a large, adverse finding is likely). Predefined criteria should help avoid undue delays in deciding whether to wind-down, which, in turn, should help increase the opportunity for an orderly wind-down. By monitoring for events that may trigger the consideration of wind-down, moreover, a DCO will be better situated to make a timely decision regarding wind-down. Further, predefined criteria will provide confidence to market participants and the public that the DCO has proper plans in place to monitor for and manage situations that may require an orderly wind-down.

Additionally, the Commission is proposing to require that the orderly wind-down plan include a description of the information-sharing and escalation processes within the DCO's senior management and board of directors following an event triggering consideration of an orderly wind-down. By establishing automatic procedures under which the relevant decision-makers may obtain the necessary information, the DCO may avoid undue

delays in ultimately deciding whether to wind-down.

Similarly, the Commission is proposing to require that orderly wind-down plans include the factors that the board of directors anticipates that it would consider in any decision-making regarding wind-down where judgment or discretion is required. The Commission believes that the factors enumerated in the orderly wind-down plan should be those that the DCO considers most important in guiding the discretion of the board of directors. A predefined framework within which the board may exercise judgment and discretion should facilitate a timely decision regarding wind-down.

Accordingly, the Commission is proposing new § 39.13(k)(2)(ii)–(iii) to require that the DCO's orderly wind-down plan include a description of the criteria that the DCO would consider in determining whether to implement wind-down and, relatedly, the process for monitoring for events that may trigger consideration of an orderly wind-down; a description of the information-sharing and escalation processes within the DCO's senior management and board of directors following an event triggering consideration of an orderly wind-down; and the identification of the factors that the DCO considers most important in guiding the board of directors' judgment or discretion with respect to any decision-making during the wind-down.

The Commission requests comment on this aspect of the proposal.

3. Orderly Wind-Down Scenarios and Tools—§ 39.13(k)(3)

The Commission is proposing to require that a DCO's orderly wind-down plan (i) identify the scenarios that may lead to an orderly wind-down, *i.e.*, those scenarios that may prevent the DCO from meeting its obligations or providing its critical operations and services as a going concern, and (ii) analyze the tools the DCO would use following the occurrence of each scenario. Specifically, the Commission is proposing to require that the analysis describe the tools the DCO would expect to use in an orderly wind-down that comprehensively address how the derivatives clearing organization would continue to provide critical operations and services; describe the order in which the DCO would expect to implement any identified tools; describe the governance and approval processes and arrangements that will guide the exercise of any available discretion in the use of each tool; describe the processes to obtain any approvals external to derivatives clearing

organization (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained; establish the time frame within which the DCO may use each tool; set out the steps necessary to implement each tool; describe the roles and responsibilities of all parties in the use of each tool; provide an assessment of the likelihood that the tools, individually and taken together, would result in orderly wind-down; and provide an assessment of the associated risks to non-defaulting clearing members and those clearing members' customers with respect to transactions cleared on the DCO, and linked financial market infrastructures.

As may be the case for SIDCOs and Subpart C DCOs, the scenarios that may trigger consideration for wind-down are typically those where recovery efforts (if any) are deemed to have failed. At that point, the DCO will no longer be able to meet its obligations or provide its critical operations and services as a going concern. For each scenario where the DCO may reach such a point, the Commission is proposing to require that the orderly wind-down plan analyze the tools available to effectuate an orderly wind-down.

The DCO's tools—*i.e.*, the wind-down options available to the DCO in each particular scenario—comprise those actions it may take to effect, in an orderly manner, the sale or transfer, or if necessary in extreme circumstances, permanent cessation, of its clearing and other services. The Commission intends that the proposed analysis will require the DCO to assess the effectiveness of a full range of actions for orderly wind-down.

Among other things, an effective set of wind-down tools enables the DCO to manage liquidity requirements in a manner in which critical operations and services would be maintained during the orderly wind-down period. Various factors may prevent an action from being effective, including, for instance, the number of steps required to implement the action (*e.g.*, disclosure, risk reduction, trade reduction, transfer or close-out of positions, and liquidation of investments), the time required to complete each step (*e.g.*, contract termination and other relevant requirements following disclosure), the discretion of various parties affecting the use or sequence of the action (including non-defaulting parties), and any legal limits regarding the action (*e.g.*, the relevant DCO rules or rule amendments necessary to support the use of the action and the roles,

obligations and responsibilities of the various parties in the use of the action).

Additionally, any action involving a proposed transfer may turn out to be difficult to achieve due to the financial and operational capacity that would be required of a transferee or the status of the DCO as a distressed seller. Further, the action may have adverse consequences on clearing members or other financial market participants. The Commission proposes to require this analysis in order to assist the DCO in determining which actions may effectuate an orderly wind-down where critical operations and services would be maintained throughout the orderly wind-down period while minimizing public harm.

Accordingly, the Commission is proposing new § 39.13(k)(3) to require that a DCO's orderly wind-down plan include, following a thorough analysis, the set of scenarios that may trigger consideration of orderly wind-down and an analysis of the tools the DCO would use in each scenario. The Commission is proposing to require that the analysis describe the tools the DCO would expect to use in an orderly wind-down; describe the order in which the DCO would expect to implement any identified tools; describe the governance, approval processes and arrangements that will guide the exercise of any available discretion in the use of each tool; establish the time frame within which the DCO may use each tool; set out the steps necessary to implement each tool; describe the roles and responsibilities of all parties in the use of each tool; provide an assessment of the likelihood that the tool would result in orderly wind-down; and provide an assessment of the associated risks to non-defaulting clearing members and their customers, linked financial market infrastructures, and the financial system more broadly, from the use of each tool.

The Commission requests comment on this aspect of the proposal.

4. Agreements To Be Maintained During Orderly Wind-Down—§ 39.13(k)(4)

The Commission is proposing to require that a DCO's orderly wind-down plan identify any agreements associated with the provision of its critical services and operations that are subject to alteration or termination as a result of winding down and describe the actions the DCO has taken to ensure such operations and services will continue during wind-down. Similar to SIDCOs and Subpart C DCOs, the DCO may have a variety of contractual agreements with clearing members, affiliates, linked central counterparties, counterparties,

external service providers, and other third parties. The contractual agreements may take the form of contracts, arrangements, agreements, and licenses associated with the provision of its services as a DCO, and may cover the DCO's rules and procedures, agreements for the provision of operational, administrative and staffing services, intercompany loan agreements, mutual offset agreements or cross-margining agreements, and credit agreements. Under the Commission's proposed requirement, the DCO's orderly wind-down plan must review and analyze its agreements to determine if they contain covenants, material adverse change clauses, or other provisions that may render the continuation of the DCO's critical operations and services difficult or impracticable upon implementation of the orderly wind-down plan. The Commission is proposing to require that the DCO take proactive steps to ensure that its critical operations and services would continue in an orderly wind-down, notwithstanding any contractual provision to the contrary.

As is the case for SIDCOs and Subpart C DCOs, a requirement ensuring that the DCO's agreements do not hinder its ability to continue critical operations and services in an orderly wind-down, or, if they do, that the orderly wind-down plan provides viable strategies to address the situation, is important to an orderly wind-down. Additionally, this requirement will aid in providing a higher degree of confidence with respect to this group of DCOs in the public markets even in extreme market conditions with the potential to trigger the consideration of implementation of orderly wind-down plans. In addition to Core Principle D(i), this proposed requirement is supported by Core Principle R, requiring that the DCO have an enforceable legal framework for each aspect of its activities.¹⁷⁷ To the extent any agreement prohibits the DCO from continuing its critical operations and services in an orderly wind-down, a DCO may not have an enforceable legal framework within which to carry out all of its activities, specifically those associated with an orderly wind-down.

Accordingly, the Commission is proposing new § 39.13(k)(4) to require that a DCO's orderly wind-down plan identify any contracts, arrangements, agreements, and licenses associated with the provision of its critical services and operations that are subject to alteration or termination as a result of the implementation of the orderly wind-

down plan. The orderly wind-down plan shall describe the actions the DCO has taken to ensure such operations and services can continue during orderly wind-down, despite such potential alteration or termination.

5. Governance—§ 39.13(k)(5)

The Commission is proposing to require that a DCO's orderly wind-down plan include predefined governance arrangements with respect to wind-down planning and orderly wind-down that set forth the responsibilities of the board of directors, board members, senior executives and business units, describe the processes that the DCO will use to guide its discretionary decision-making relevant to the orderly wind-down plan, and describe the DCO's process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the DCO. Additionally, the Commission is proposing to require that the DCO's board of directors formally approve and annually review the orderly wind-down plan.

An effective governance arrangement will assist DCOs in reacting quickly to adverse scenarios, provide transparency to the orderly wind-down process, and help ensure that DCOs properly vet wind-down decisions with consideration of the interests of all relevant parties. Further, the proposed requirements with respect to governance are supported by Core Principle O, which requires that DCOs establish transparent governance arrangements to fulfill public interest requirements and permit the consideration of the views of owners and participants,¹⁷⁸ and Core Principle P, which requires that DCOs establish both rules to minimize conflicts of interest in the decision making-process and a process for resolving conflicts of interest.¹⁷⁹

Accordingly, the Commission is proposing new § 39.13(k)(5) to require that a DCO's orderly wind-down plan describe an effective governance structure that clearly defines the responsibilities of the board of directors, board members, senior executives and business units, describe the processes that the DCO will use to guide its discretionary decision-making relevant to the orderly wind-down plan, and describe the DCO's process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the DCO. Additionally, the Commission is

proposing to require that a DCO's board of directors formally approve and annually review the orderly wind-down plan.

The Commission requests comment on this aspect of the proposal.

6. Testing—§ 39.13(k)(6)

For DCOs that are neither SIDCOs nor Subpart C DCOs, the Commission is proposing a testing requirement as part of the orderly wind-down plan that is similar, but not identical, to proposed new § 39.39(c)(8). Specifically, the Commission is proposing new § 39.13(k)(6) to require that the orderly wind-down plan for these DCOs include procedures for testing the DCO's ability to implement the tools upon which the orderly wind-down plan relies. The orderly wind-down plan must include the types of testing that will be performed, to whom the findings of such tests will be reported, and the procedures for updating the plan in light of the findings resulting from such tests. Such testing must occur following any material change to the orderly wind-down plan, but in any event not less frequently than once annually.

The testing requirement for DCOs that are neither SIDCOs nor Subpart C DCOs should emphasize the reliable operability of the tools that potentially would be implemented in a wind-down; as such, the Commission is not proposing to require these DCOs to conduct crisis management drills or similar exercises as part of the testing requirement. Moreover, because of the wide range of possible types of clearing members, the Commission is not proposing to require these DCOs to conduct testing with the participation of clearing members.¹⁸⁰ Nonetheless, where the plan relies upon the performance of clearing members and other internal stakeholders, or external stakeholders such as service providers, such DCOs should consider whether involving such parties is practical.

As discussed above, however, testing the orderly wind-down plan—through assessing the operation and sufficiency of tools and resources to address losses—and updating the plan accordingly is a critical part of a DCO's risk management practice. Testing can reveal deficiencies in the effectiveness of specific tools. It can also enhance the tools and resources for identifying, measuring, monitoring, and managing risk in general. Periodic testing, moreover may reveal any deficiencies or

¹⁷⁸ Section 5b(c)(2)(O) of the CEA, 7 U.S.C. 7a-1(c)(2)(O).

¹⁷⁹ Section 5b(c)(2)(P) of the CEA, 7 U.S.C. 7a-1(c)(2)(P).

¹⁸⁰ Such DCOs that are subject to regulation by other authorities may be subject to more stringent requirements with respect to testing by those authorities.

¹⁷⁷ Section 5b(c)(2)(R) of the CEA, 7 U.S.C. 7a-1(c)(2)(R).

weaknesses in a DCO's infrastructure which may hamper wind-down efforts.

The Commission requests comment on this aspect of the proposal. The Commission specifically requests comment on the proposed requirement that tests be conducted not less than annually: would a different minimum frequency be more appropriate for DCOs other than SIDCOs or Subpart C DCOs?

D. Conforming Changes to Bankruptcy Provisions—Part 190

The Commission is proposing several conforming changes to Part 190's bankruptcy provisions that follow from the proposed requirement that all DCOs maintain viable plans for orderly wind-down. First, current § 190.12(b)(1) requires that a DCO in a Chapter 7 proceeding provide to the trustee copies of, among other things, the wind-down plan it must maintain pursuant to § 39.39(b).¹⁸¹ The Commission is proposing that the regulation be amended to include orderly wind-down plans that DCOs must maintain pursuant to proposed new § 39.13(k) in addition to § 39.39(b).

Second, current § 190.15(a) requires that the trustee not avoid or prohibit certain actions taken by the DCO either reasonably within the scope of, or provided for in, any wind-down plan maintained by the DCO and filed with the Commission pursuant to § 39.39.¹⁸² The Commission is proposing that the regulation be amended to include orderly wind-downs plans maintained by DCOs and filed with the Commission pursuant to proposed new § 39.13(k) in addition to § 39.39.

Third, current § 190.15(c) requires that the trustee act in accordance with any wind-down plan maintained by the debtor and filed with the Commission pursuant to § 39.39 in administering the bankruptcy proceeding.¹⁸³ The Commission is proposing that the regulation be amended to include orderly wind-downs plans maintained by DCOs and filed with the Commission pursuant to proposed new § 39.13(k) in addition to § 39.39.

Last, current § 190.19(b)(1) requires that a shortfall in certain funds be supplemented in accordance with the wind-down plan maintained by the DCO pursuant to § 39.39 and submitted pursuant to § 39.19.¹⁸⁴ The Commission is proposing that the paragraph be amended to include orderly wind-downs plans maintained by DCOs

pursuant to proposed new § 39.13(k) in addition to § 39.39.

The Commission requests comment on this aspect of the proposal.

IV. Establishment of Time To File Orderly Wind-Down Plan— § 39.19(c)(4)(xxiv)

In light of the proposed requirement that all DCOs maintain and submit to the Commission viable plans for orderly wind down and supporting information, the Commission is proposing to establish the timing for submitting orderly wind-down plans and supporting information for DCOs currently registered with the Commission. As the Commission is proposing to amend § 39.19(c)(4)(xxiv) to establish the time for SIDCOs and Subpart C DCOs to file a recovery plan and an orderly wind-down plan, the Commission proposes to amend the same section to establish a fixed deadline for DCOs currently registered with the Commission to file orderly wind-down plans. Under the proposed rule, DCOs currently registered with the Commission must complete and submit orderly wind-down plans and supporting information within six months from the effective date of the rule (if it is adopted). Pursuant to Core Principle D(i), all DCOs must already ensure they possess the ability to manage the risks associated with discharging their responsibilities through the use of appropriate tools and procedures. A potential wind down, due either to default or non-default losses, is always a latent risk for any DCO engaged in clearing and settlement activities; accordingly, DCOs should already have some plans in place for implementing tools and procedures to manage an orderly wind-down.

The Commission proposes to require that any DCO that submits an application for registration with the Commission six months or more after the effective date of this rulemaking (if it is adopted), must submit its orderly wind-down plans and supporting information at the time it submits an application for registration with the Commission under § 39.3.¹⁸⁵ The Commission is also requiring that all DCOs, upon revising their plans, but in any event no less frequently than annually, submit the current plan(s) and

supporting information to the Commission, along with a description of any changes and the reason(s) for such changes.¹⁸⁶

In § 39.19(c)(4)(xxiv), as well as in § 39.13(k) and § 39.39(b), the Commission is proposing to add the words “and supporting information” to references to submitting recovery and/or orderly wind-down plans. DCOs may, in some instances, include supporting information within their plans, or may organize the documentation with supporting information kept separately, e.g., as an appendix or annex. To avoid confusion as to whether such separately kept information is required to be submitted to the Commission, and to ensure that the Commission has timely access to such supporting information, the Commission is proposing to amend §§ 39.19(c)(4)(xxiv), 39.13(k) and 39.39(b) to require its submission explicitly.

Accordingly, the Commission proposes to amend § 39.19(c)(4)(xxiv). Specifically, the Commission proposes to require that any DCO not currently registered with the Commission submit its viable plans for orderly wind-down and supporting information at the time it files its application for registration with the Commission under § 39.3. Because the Commission is proposing to require that all DCOs must maintain and submit plans for orderly-wind down and supporting information, the Commission proposes to remove the current language from § 39.19(c)(4)(xxiv) suggesting or providing that DCOs that are not SIDCOs or Subpart C DCOs *may* maintain and submit orderly wind-down plans to the Commission. For DCOs that are currently registered with the Commission and are not SIDCOs or Subpart C DCOs, the Commission is proposing to require that they submit their viable plans for orderly wind-down and supporting information no later than six months after this rulemaking, if finalized, is published. Upon revising their plans, moreover, but in any event no less frequently than annually, all DCOs shall submit the current plan(s) and supporting information to the Commission, along with a description of any changes and the reason(s) for such changes.

The Commission requests comment on this aspect of the proposal. The Commission specifically requests comment concerning whether a DCO should additionally be required to update its recovery and orderly wind-

¹⁸⁵ For any DCO that submits (or has submitted) an application for registration with the Commission before the date that is six months after the effective date of this rulemaking, if it is adopted, the Commission is proposing to require that the DCO have until the date that is six months after the effective date of this rulemaking to submit its orderly wind-down plan and supporting information.

¹⁸⁶ See Section 5b(c)(2)(J) of the CEA, 7 U.S.C. 7a-1(c)(2)(J) (“Core Principle J—Reporting”) (requiring that DCOs provide to the Commission all information that the Commission determines to be necessary to conduct oversight of the DCO).

¹⁸¹ 17 CFR 190.12(b)(1).

¹⁸² 17 CFR 190.15(a).

¹⁸³ 17 CFR 190.15(c).

¹⁸⁴ 17 CFR 190.19(b)(1).

down plans upon changes to the DCO's business model, operations, or the environment in which it operates, to the extent such changes significantly affect the viability or execution of the recovery and orderly wind-down plans. The Commission also specifically requests comment concerning whether six months is sufficient time to develop these plans, or if a longer time (*e.g.*, one year) would be more appropriate.

V. Amendment to § 39.34(d)

As discussed in the context of recovery plans and orderly wind-down plans, the Commission proposes to discontinue the process by which the Commission could grant, upon request of a SIDCO or DCO that is electing to become subject to subpart C, up to one year to comply with §§ 39.39 and 39.35.¹⁸⁷ The Commission is proposing to remove a similar provision in § 39.34(d) wherein a SIDCO or Subpart C DCO could request, and the Commission may grant, up to one year to comply with any provision of § 39.34 (System safeguards for SIDCOs and Subpart C DCOs) because granting such requests would be inconsistent with the system safeguard rules for SIDCOs and Subpart C DCOs that have been in effect for years.¹⁸⁸ The Commission is therefore proposing to remove § 39.34(d) in its entirety.

The Commission requests comment on this aspect of the proposal.

VI. Amendments to Appendix B to Part 39—Subpart C Election Form

The Commission is proposing to amend the Subpart C Election Form to reflect the above proposed changes to Part 39. One of these amendments will reflect the elimination of the request for an extension of up to one year to comply with any of the provisions of §§ 39.34, 39.35, or 39.39. The “General Instructions” and “Elections and Certifications” portions of the Subpart C Election Form are proposed to be amended to delete the references to requests for relief of up to one year for those sections of part 39. Another amendment will modify Exhibit F–1 to include the DCO's recovery plan, orderly wind-down plan, supporting information for these plans, and a demonstration that the plans comply with the requirements of § 39.39(c).

The Commission requests comment on this aspect of the proposal.

VII. Amendments to Appendix A to Part 39—Form DCO

The Commission is proposing to amend Form DCO, in particular, Exhibit D—Risk Management to reflect the above proposed changes to Part 39. The amendment will add an Exhibit D–5 to include the DCO's orderly wind-down plan, and a demonstration that the plan complies with the requirements of proposed § 39.13(k).

The Commission requests comment on this aspect of the proposal.

VIII. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.¹⁸⁹ The regulations proposed by the Commission will affect only DCOs. The Commission has previously established certain definitions of “small entities” to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.¹⁹⁰ The Commission has previously determined that DCOs are not small entities for the purposes of the RFA.¹⁹¹ Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed regulations will not have a significant impact on a substantial number of small entities.

B. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation.¹⁹²

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the proposed rules implicate any other specific public interest to be protected by the antitrust laws.

The Commission has considered the proposed rulemaking to determine whether it is anticompetitive and has

identified no anticompetitive effects. The Commission requests comment on whether the proposed rulemaking is anticompetitive and, if it is, what the anticompetitive effects are.

Because the Commission has preliminarily determined that the proposed rules are not anticompetitive and have no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the proposed rules.

C. Paperwork Reduction Act

The Paperwork Reduction Act (PRA)¹⁹³ provides that Federal agencies, including the Commission, may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number from the Officer of Management and Budget (OMB). The PRA is intended, in part, to minimize the paperwork burden created for individuals, businesses, and other persons as a result of the collection of information by federal agencies, and to ensure the greatest possible benefit and utility of information created, collected, maintained, used, shared, and disseminated by or for the Federal Government.¹⁹⁴ The PRA applies to all information, regardless of form or format, whenever the Federal Government is obtaining, causing to be obtained, or soliciting information, and includes required disclosure to third parties or the public, of facts or opinion, when the information collection calls for answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.¹⁹⁵ This proposed rulemaking contains reporting and recordkeeping requirements that are collections of information within the meaning of the PRA. This section addresses the impact of the proposal on existing information collection requirements associated with part 39 of the Commission's regulations. Changes to the existing information requirements as a result of this proposal are set forth below. OMB has assigned Control No 3038–006, “Requirements for Derivatives Clearing Organizations,” to the information collections associated

¹⁸⁹ 5 U.S.C. 601–612.

¹⁹⁰ *Policy Statement and Establishment of Definitions of “Small Entities” for Purposes of the Regulatory Flexibility Act*, 47 FR 18618 (Apr. 30, 1982).

¹⁹¹ *See A New Regulatory Framework for Clearing Organizations*, 66 FR 45604, 45609 (Aug. 29, 2001).

¹⁹² Section 15(b) of the CEA, 7 U.S.C. 19(b).

¹⁸⁷ See 17 CFR 39.39(f).

¹⁸⁸ *See System Safeguards Testing Requirements for Derivatives Clearing Organizations*, 81 FR 64322 (Sept. 19, 2016).

¹⁹³ 44 U.S.C. 3501 *et seq.*

¹⁹⁴ 44 U.S.C. 3501.

¹⁹⁵ 44 U.S.C. 3502(3).

with these regulations.¹⁹⁶ The Commission is revising its total burden estimates for this clearance to reflect the proposed amendments.

The Commission therefore is submitting this proposal to the OMB for its review in accordance with the PRA.¹⁹⁷ Responses to this collection of information would be mandatory. The Commission will protect any proprietary information according to the Freedom of Information Act and part 145 of the Commission's regulations.¹⁹⁸ In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public any "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." ¹⁹⁹ Finally, the Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.²⁰⁰

1. Event-Specific Reporting— § 39.19(c)(4)

Proposed § 39.39(b) would require a SIDCO or Subpart C DCO to submit written recovery plans and orderly wind-down plans within six months of designation as a SIDCO or upon a DCO's election as a Subpart C DCO (in each case, if this happens subsequent to the effective date), consistent with current § 39.19(c)(4)(xxiv). This reporting requirement is already included in the information collection burden associated with the collection of information titled "Requirements for Derivatives Clearing Organizations, OMB Control No. 3038–0076." The Commission has previously estimated that this requirement entails an estimated 4,320 burden hours for all covered DCOs along with an associated annual cost burden of \$341,280.²⁰¹ While the timing for this reporting requirement has changed, there is no change in frequency, and the Commission does not anticipate any other change to this reporting requirement caused by this change to

the timing for the report to be submitted. However, because of enhancements to the requirements for these plans, the Commission anticipates an increase in the reporting burden from the proposed subjects and analyses that SIDCOs and Subpart C DCOs would be required to include in their recovery and orderly wind-down plans from 480 hours to 600 hours. The Commission will use a blended rate of 50% financial examiners (\$237/hour) and 50% lawyers (\$499/hour) resulting in \$368/hour.²⁰²

The Commission specifically invites public comment on the accuracy of its estimates that the proposed regulations will not impose a new reporting burden but increase the reporting burden estimate to 600 hours.

The Commission's burden estimate for § 39.19(b), including drafting or updating, approving, and testing the wind-plan, is as follows:

Estimated number of respondents: 6.

Estimated number of reports per respondent: 1.

Average number of hours per report: 600.

Estimated annual hours burden: 3,600.

Estimated gross annual reporting burden: \$1,324,800.

Proposed § 39.13(k)(1)(i) would require a DCO that is neither a SIDCO nor a Subpart C DCO to submit, pursuant to § 39.19(c)(4)(xxiv), a written orderly wind-down plan. Given the similarities between the recovery plan and orderly wind-down plan, and the consequent efficiencies in preparing both plans, the Commission estimates that the orderly wind-down plan would require 400 hours to develop for non-SIDCO and non-Subpart C DCOs and 100 hours/year to update. The estimated 400 hours represents a reduction of one-third the amount of time that the Commission estimates is required for SIDCOs and Subpart C DCOs to develop both the recovery plan and orderly wind-down plan. This proposed

amendment, if adopted, would increase the existing annual burden for this clearance by 3,600 hours.²⁰³ The Commission will use the same blended rate of \$368/hour. The Commission specifically invites public comment on the accuracy of its estimates.

The Commission's burden estimate for § 39.19(c)(4)(xxiv), including drafting or updating, approving, and testing the wind-plan, is as follows:

Estimated number of respondents: 9.

Estimated number of reports per respondent: 1.

Average number of hours per report: 400.

Estimated annual hours burden: 3,600.

Estimated gross annual reporting burden: \$1,324,800.

The Commission is proposing to add new § 39.19(c)(4)(xxv) to require that each SIDCO or Subpart C DCO that is required to have a procedure for informing the Commission when the recovery plan is initiated or that orderly wind-down is pending pursuant to either § 39.39(b)(2) or § 39.13(k)(1) shall notify the Commission and clearing members as soon as practicable when the DCO has initiated its recovery plan or that orderly wind-down is pending. SIDCOs and Subpart C DCOs are currently required under § 39.39(c)(1) to have procedures in place to notify the Commission when a recovery plan or orderly wind-down was initiated and the Commission is now proposing to codify this as a formal notification requirement, thus, the Commission does not view this aspect of the proposed regulation as a new reporting requirement under OMB Control No. 3038–0076. However, the requirement to notify clearing members was set out in CFTC Letter No. 16–61 but was not codified, and may therefore be considered a new event-specific reporting requirement. The Commission anticipates that, if adopted, the notification to the Commission and to clearing members will be drafted by a lawyer (and thus involve a cost/hour of \$308) and will be an electronic notification. The current regulation requires procedures be in place to notify the Commission, and the proposed regulation requires that the notification be sent to the Commission and to clearing members. The Commission anticipates that proposed §§ 39.39(b)(2), 39.13(k)(1)(ii), and 39.19(c)(4)(xxv)

¹⁹⁶ For the previously approved estimates, see ICR Reference No. 202303–3038–001, available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202303-3038-001.

¹⁹⁷ 44 U.S.C. 3507(d); 5 CFR 1320.11.

¹⁹⁸ 5 U.S.C. 552; 17 CFR part 145 (Commission Records and Information).

¹⁹⁹ 7 U.S.C. 12(a)(1).

²⁰⁰ 5 U.S.C. 552a.

²⁰¹ This is based on the Commission's estimate that nine covered DCOs will be required to submit one written recovery plan and wind-down plan annually. The Commission had estimated that covered DCOs will require 480 hours on average to draft the required plans at a previously estimated \$79 per hour.

²⁰² According to the May 2021 National Occupational Employment and Wage Estimates Report produced by the U.S. Bureau of Labor Statistics, available at https://www.bls.gov/oes/current/oes_nat.htm, the mean salary for category 23–1011, "Lawyers," is \$198,900. This number is (a) divided by 1800 work hours in a year to account for sick leave and vacations, (b) multiplied by 4.0 to account for retirement, health, and other benefits or compensation, as well as for office space, computer equipment support, and human resources support, and (c) in light of recent high inflation, further multiplied by 1.1294 to account for the change in the Consumer Price Index for Urban Wage-Earners and Clerical Workers from 263.612 in May of 2021 to 297.730 in April of 2023, all of which yields an hourly rate of \$499. Using a similar analysis, category 13–2061, "Financial Examiners," under business and financial services occupations, has a mean annual salary of \$94,270, yielding an hourly rate of \$237.

²⁰³ In an effort to adequately estimate the potential burden, the Commission will ignore the fact that, as discussed elsewhere in this NPRM, some DCOs have developed, and regularly update, their orderly wind-down plans pursuant to regulations imposed by non-U.S. regulators.

would increase the event-specific reporting burden estimate marginally.

Since notifications of this type are accomplished by electronic means, the existing procedure will have to be updated to include notice to the DCO's clearing members. Since this can be accomplished using methods and tools that the DCO currently uses to provide notices to members of, e.g., changes in DCO rules or procedures, it is unlikely that the DCO will need to design and implement new tools.

While no DCO (and no CFTC-regulated clearinghouse prior to the amendments to the CEA that provided for regulation of DCOs) has ever initiated recovery, several have (due to a paucity of business) made the decision to wind-down operations. The Commission conservatively estimates that one notification (total) under § 39.19(c)(4)(xxv) would occur every four years.

The Commission's burden estimate for § 39.19(c)(4)(xxv) is as follows:

- Estimated number of respondents:* 1.
- Estimated number of reports per respondent:* 0.25.
- Average number of hours per report:* 1.
- Estimated annual hours burden:* 0.25.
- Estimated gross annual reporting burden:* \$125.

2. Requested Reporting—§ 39.19(c)(5)

The Commission is proposing to add a new requested reporting requirement for SIDCOs and Subpart C DCOs that submit information to the Commission pursuant to § 39.39(f)(2). Proposed § 39.19(c)(5)(iii) would require a SIDCO or Subpart C DCO that submits information for resolution planning purposes to update the information upon request of the Commission. The Commission believes this is a new requested reporting requirement, which will be performed by lawyers at a cost of \$499/hour. This proposed amendment, if adopted, would increase the existing annual burden for this clearance by an estimated 600 hours. The Commission's burden estimate for this new reporting requirement under § 39.39(c)(5) is as follows:

- Estimated number of respondents:* 6.
- Estimated number of reports per respondent:* 1.
- Average number of hours per report:* 100.
- Estimated annual hours burden:* 600.
- Estimated gross annual reporting burden:* \$299,400.

These proposed information collection requirements would result in an incremental increase in the annual hours burden associated with OMB Clearance No. 3038–0076. The

Commission estimates the proposed amendments, if adopted, would yield the following incremental totals:

- Estimated number of annual responses for all respondents:* 15.25.
- Estimated total annual burden hours for all respondents:* 4,920.25.
- Estimated gross annual reporting burden:* \$1,889,285.
- Request for comment*

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussion above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission will consider public comments on this proposed collection of information in:

- (1) Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
 - (2) Evaluating the accuracy of the estimated burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;
 - (3) Enhancing the quality, utility, and clarity of the information proposed to be collected; and
 - (4) Minimizing the burden of the proposed information collection requirements on registered entities, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, e.g., permitting electronic submission of responses.
- Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;
- (202)395–6566 (fax); or
- OIRAsubmissions@omb.eop.gov (email).

Please provide the Commission with a copy of submitted comments so that, if the Commission determined to promulgate a final rule, all comments can be summarized and addressed in the final rule preamble. Please refer to the **ADDRESSES** section of this rulemaking for instructions on submitting comments to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting RegInfo.gov. OMB is

required to make a decision concerning the proposed information collection requirements between thirty (30) and sixty (60) days after the publication of the Notice of Proposed Rulemaking in the **Federal Register**. Therefore, a comment to OMB is best assured of receiving full consideration if OMB receives it within 30 calendar days of publication of this NPRM. Nothing in the foregoing affects the deadline enumerated above for public comments to the Commission on the proposed rules.

D. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.²⁰⁴ Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five specific considerations identified in section 15(a) of the CEA (collectively referred to as section 15(a) factors) addressed below.

The Commission recognizes that the proposed amendments may impose costs. The Commission has endeavored to assess the expected costs and benefits of the proposed amendments in quantitative terms, including PRA-related costs, where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable proposed amendments in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of the proposed amendments, in that they will require DCOs to undertake analyses that are specific to the characteristics of each DCO, including the specifics of the DCO's business model, services and operations provided by the DCO to clearing members and other financial market participants, products cleared (and the DCO's role in the financial sector), services and operations provided by others that the DCO relies upon to provide its services and operations to others, infrastructure, and governance arrangements. Both the initial costs, and any initial and recurring compliance costs, will also depend on the size, existing infrastructure, practices, and cost structure of each DCO.

The Commission generally requests comment on all aspects of its cost-benefit considerations, including the identification and assessment of any

²⁰⁴ Section 15(a) of the CEA, 7 U.S.C. 19(a).

costs and benefits not discussed herein; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualitatively describe the costs and benefits of the proposed amendments; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's discussion. The Commission welcomes comment on such costs, particularly from existing SIDCOs and Subpart C DCOs that can provide quantitative cost data based on their respective experiences. Commenters may also suggest other alternatives to the proposed approach.

2. Baseline

The baseline for the Commission's consideration of the costs and benefits of this proposed rulemaking are: (1) the DCO Core Principles set forth in section 5b(c)(2) of the CEA; (2) the Commission's regulations in Subpart C of part 39, which establish additional standards for compliance with the core principles for those DCOs that are designated as SIDCOs or have elected to opt-in to the Subpart C requirements in order to achieve status as a QCCP; and (3) the subpart C Election Form in appendix B to part 39.

Some of the proposed revisions and amendments to § 39.39 would codify staff guidance and international standards. To the extent that market participants have relied upon the staff guidance that is proposed to be codified, the actual costs and benefits of the proposed rules, as discussed in this section of the proposal, may not be as significant. Additionally, the proposed changes to § 39.39 would not apply to all fifteen DCOs currently registered with the Commission. Rather, the proposed amendments to § 39.39 apply to SIDCOs and Subpart C DCOs. There are currently two SIDCOs,²⁰⁵ and four Subpart C DCOs.²⁰⁶ All SIDCOs and Subpart C DCOs have recovery plans and orderly wind-down plans on file with the Commission which may generally be consistent with the staff guidance issued in CFTC Letter No. 16–61 and current § 39.39(b). Additionally, the SIDCOs have already provided information related to resolution planning which may fulfill requests for information under current § 39.39(c)(2), which is proposed to be revised as § 39.39(f).

As discussed further below, the Commission is proposing to require that DCOs that are neither SIDCOs nor electors into Subpart C to develop and

maintain plans for orderly wind-down. This would be a new requirement. However, of the nine such DCOs that are currently registered, five are based in jurisdictions that implement regulatory requirements that are consistent with the PFMI.²⁰⁷ These include standards that require both recovery and orderly wind-down plans. Accordingly, to the extent that these five DCOs have already designed and maintain plans for orderly wind-down that are consistent with the proposed rules, the actual costs and benefits of the proposed rules, as discussed in this section of the proposal, may be reduced.²⁰⁸ These standards will be new, however, for the remaining four non-Subpart C DCOs (and for any new DCOs that are similarly situated).²⁰⁹

The Commission's analysis below compares the proposed amendments to the regulations in effect today; however, it then takes into account current industry practices that may mitigate some of the costs and benefits set out in each section. The Commission seeks comment on all aspects of the baseline.

3. Recovery Plan and Orderly Wind-Down Plan—§ 39.39(b)

The Commission is clarifying that each SIDCO and Subpart C DCO must submit its recovery plan and orderly wind-down plan to the Commission consistent with existing § 39.19(c)(4)(xxiv). The Commission is further proposing in § 39.39(b)(2) to require that a SIDCO or Subpart C DCO notify the Commission and clearing members when the recovery plan is initiated or orderly wind-down is pending, and to add a corresponding event-specific reporting requirement in § 39.19(c)(4)(xxv). Proposed § 39.39(b)(3) would also establish that a SIDCO must file its recovery plan and (to the extent it has not already filed one) orderly wind-down plan within six months of designation as a SIDCO, and a DCO electing to be subject to Subpart C of the Commission's regulations must file its recovery plan and (to the extent it has not already filed one) orderly

wind-down plan on the effective date of its election.

i. Benefits

Proposed § 39.39(b)(1) explicitly requires that a SIDCO and a Subpart C DCO must have plans for recovery and orderly wind-down, and that these plans must each cover both default losses and non-default losses. This has the benefit of enhancing the resilience of these DCOs, and reducing the risk that they pose to clearing members and other financial market participants (and, in some cases, to the financial system), by requiring these plans to cover the full range of risks.

Proposed § 39.39(b)(2) requires that SIDCOs and Subpart C DCOs have procedures to notify the Commission and clearing members that recovery is initiated or orderly wind-down is pending as soon as practicable, and that such notice is provided to the Commission and clearing members. The requirement to notify the Commission is not a new requirement, and the requirement to notify clearing members, which was explicit in the staff guidance, will aid clearing members in protecting their interests.

Finally, establishing a date for the filing of recovery plans and orderly wind-down plans in proposed § 39.39(b)(3),²¹⁰ is responsive to commenters' requests made over time for date certainty, and choosing six months as that certain date takes into account both resilience and practicality. Requiring that a newly-designated SIDCO submit its plans no later than six months after designation and that a DCO submit its plans at the time of making the election to become subject to Subpart C (if it has not already done so) fosters the objectives of promoting resiliency and prepares SIDCOs and Subpart C DCOs to meet the challenges of recovery or orderly wind-down in the event that they are necessary. Further, allowing newly designated SIDCOs six months to submit their plans should provide enough time to develop the plans. The Commission believes that these regulations will benefit registrants and market participants.

ii. Costs

The current regulations require a SIDCO or Subpart C DCO to maintain viable plans for recovery and orderly wind-down, and to submit such plans to the Commission. DCOs already have systems in place to notify clearing

²⁰⁷ These are ICE NGX Canada, Inc. (Canada), LCH SA (France), Eurex Clearing AG (Germany), as well as ICE Clear Europe and LCH Ltd (United Kingdom). Each of these jurisdictions has reported that they have fully implemented the standards in the PFMI. See https://www.bis.org/cpmi/level1_status_report.htm.

²⁰⁸ To the extent foreign CCPs are subject to home jurisdiction regulation with different requirements for the subjects and analyses that must be included in their orderly wind-down plans, the Commission welcomes comments describing those requirements, and including suggestions on how to achieve the goals of this regulation in a manner that appropriately addresses possible inefficiencies.

²⁰⁹ CBOE Clear Digital, LLC, CX Clearinghouse, L.P., LedgerX LLC, and North American Derivatives Exchange, Inc.

²¹⁰ With respect to orderly wind-down plans, the Commission notes that this requirement would be applicable only to the extent the DCO does not have an orderly wind-down plan on file at the Commission.

²⁰⁵ CME and ICC.

²⁰⁶ ICE Clear US, Inc.; Minneapolis Grain Exchange, LLC; Nodal Clear, LLC; and OCC.

members when specific actions are taken, and the Commission believes that these existing systems can be used to notify clearing members when the recovery plan is initiated or orderly wind-down is pending. Thus, the costs involved would be the effort involved in preparing to use these existing systems to notify clearing members when the recovery plan is initiated or orderly wind-down is pending (including testing), and, if and when necessary, using them to make such notifications. Moreover, it does not appear that establishing the specified periods for filing the will cause additional costs above those involved in developing the recovery and orderly wind-down plans.

iii. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits in light of the specific considerations identified in section 15(a) of the CEA. In consideration of sections 15(a)(2)(A), (B), (D), and (E) of the CEA, the proposed amendments will protect market participants, enhance the financial integrity of futures markets, reflect sound risk management practices, and enhance the public interest, by ensuring that the Commission and clearing members are notified when the recovery plan is initiated or orderly wind-down is pending, thereby aiding the Commission in taking action to protect markets and the broader financial system, and enabling clearing members to protect their own interests.

Section 15(a)(2)(C), price discovery, is not implicated by the proposed amendments.

4. Recovery Plan and Orderly Wind-Down Plan: Required Elements—§ 39.39(c)

Proposed § 39.39(c) would establish the required content of a SIDCO's or Subpart C DCO's recovery plan and orderly wind-down plan consistent with the guidance set forth in CFTC Letter No. 16–61. Proposed § 39.39(c)(1)–(8) would require that each plan's description include the identification and description of the critical operations and services the DCO provides to clearing members and other financial market participants, the service providers the DCO relies upon to provide these critical operations and services, interconnections and interdependencies, resilient staffing arrangements, obstacles to success of the plan, stress scenario analyses, potential triggers for recovery and orderly wind-down, available recovery and orderly wind-down tools, analyses of the effect of the tools on each scenario, lists of

agreements to be maintained during recovery and orderly wind-down, and governance arrangements.

i. Benefits

Current § 39.39 does not provide explicit regulations governing the required elements of a SIDCO's or Subpart C DCO's recovery plan and orderly wind-down plan. At the time the 2013 rule was promulgated, the international standards and guidance covering such elements (with which a SIDCO and Subpart C DCO must comply) were consultative and not finalized. CFTC Letter No. 16–61 provided SIDCOs and Subpart C DCOs with comprehensive guidance related to the elements of acceptable recovery plans and orderly wind-down plans. Proposed § 39.39(c) would codify elements for a recovery plan and orderly wind-down plan that are, in general, drawn from the guidance on international standards related to recovery plans and orderly wind-down plans adopted by international standards-setting bodies since 2013, and described in detail in CFTC Letter No. 16–61.

Codifying the guidance set out in CFTC Letter No. 16–61, and enhancing the set of elements discussed in that guidance through proposed § 39.39(c)(1)–(8) should benefit market participants, including both DCOs and their members, by establishing specific regulatory requirements for well-designed and effective recovery and orderly wind-down plans. The requirements of proposed § 39.39(c)(1)–(8) should contribute to DCOs achieving a better *ex ante* understanding of, the critical services and operations that it provides clearing members and other financial market participants, the services and operations provided by others (including internal staff) upon which it depends to provide those services and operations (and contractual arrangements with such others that might be altered or terminated as a result of the circumstances that lead to the need for recovery or orderly wind-down), the scenarios that might lead to recovery or orderly wind-down, of the challenges a DCO would face in a recovery or wind-down scenario, the tools that the DCO would rely upon to meet those challenges, and the challenges and complexities in using those tools, and the DCO's governance arrangements for recovery and orderly wind-down. This understanding will be significantly enhanced if the DCO engages in annual testing of its plans, and modifies those plans in light of the results of such testing.

Thus, the DCOs, clearing members, and other financial market participants will benefit through the DCO being better prepared to meet those challenges successfully (and thus being more likely to continue to provide those critical services and operations upon which clearing members and other financial market participants depend, and to avoid the potential harms to clearing members, other financial market participants, and the financial system more broadly, from a disorderly cessation of those services and operations).

Including these explicit and specific requirements for recovery plans and orderly wind-down plans should significantly enhance the DCO's ability to implement its recovery plan (or, if necessary, orderly wind-down plan) promptly and effectively. Additionally, the information will better enable a newly designated SIDCO, or a DCO that is electing subpart C status, to understand the requirements for well-developed and effective plans, and to consider relevant issues including the tools it intends to activate, its process for monitoring for triggers, the sequencing of tools, impediments to the timely or successful use of its tools, its governance arrangements, internal and external approval processes, and whether contractual agreements will continue during recovery and orderly wind-down; moreover, it will have a plan in place to handle exigencies in a manner that mitigates the risk of financial instability or contagion.

ii. Costs

The specific requirements for a recovery plan's and orderly wind-down plan's description, analysis, and testing set forth in this regulation will require substantial time to be spent on analytical effort by DCO staff, including attorneys, compliance staff, and other subject matter experts. DCO staff will spend time to review existing plans and supporting arrangements, compare them to the proposed rules (to the extent that they are ultimately adopted), and make modifications or additions to those plans, in light of, *inter alia*, the specifics of each DCO's business model, services and operations provided by the DCO to clearing members and other financial market participants, products cleared (and the DCO's role in the financial sector), services and operations provided by others that the DCO relies upon to provide its services and operations to others, infrastructure, and governance arrangements. The revised plans will then need to be reviewed, first by senior management and then by the board of directors, at the cost of the

time of those persons, and potentially further amended in light of the results of such reviews (resulting in the further expenditure of time).

All of these DCOs will need to incur the cost of staff time to undertake additional analysis to (a) ensure that their recovery and orderly wind-down plans meet those portions of the proposed requirements that represent codification of staff guidance, and (b) meet those portions of the proposed requirements that represent enhancements to the staff guidance (this includes enhancements resulting from changes to definitions, *e.g.*, calling for considerations of non-default losses due to the actions of malicious actors, including internal, external, and nation-states).

This additional analysis includes developing an overview of each plan and describing how the plan will be implemented, ensuring that each plan identifies and describes (i) the critical operations and services that the DCO provides to clearing members and other financial market participants, (ii) the service providers upon which the DCO relies to provide these operations and services, (iii) plans for resilient staffing arrangements for continuity of operations, (iv) obstacles to success of the plans, (v) plans to address the risks associated with the failure of each critical operation and service, (vi) how the DCO will ensure that the identified operations and services continue thorough recovery and orderly wind-down.

Further, the DCO will need to ensure that the analysis of scenarios for its recovery plan includes each of the scenarios specified in § 39.39(c)(2)(ii)(A)–(K) and (iii), or that the analysis documents why such scenario is not possible in light of the DCO's structure and activities, and that, for each possible scenario, the analysis includes the elements specified in § 39.39(c)(2)(i)(A)–(F). The DCO will need to ensure that the analysis establishes triggers for recovery or consideration of orderly wind-down, and the information-sharing and governance process within senior management and board of directors. The DCO will also need to ensure that the plans describe the tools that it would use to meet the full scope of financial deficits that the DCO might need to remediate, and, for each set of tools, provides the additional analysis described in § 39.39(c)(4)(ii)–(ix) (for the recovery plan) and § 39.39(c)(5)(iii)–(x) (for the orderly wind-down plan).

Additionally, the DCO will need to ensure that its plans include determinations of which of the

contracts, etc. associated with the provision of its services as a DCO are subject to alteration or termination as a result of the implementation of recovery or orderly wind-down, and the actions that the DCO has taken to ensure that its critical operations and services will continue during recovery and orderly wind-down despite such alteration or termination. The DCO will also need to ensure that the plans are formally approved, and annually reviewed, by the board of directors, describe effective governance structures and processes to guide discretionary decision-making relevant to each plan, and describe the DCO's process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the DCO.

Moreover, the DCO will need to ensure that its plans include procedures for testing their viability, including the DCO's ability to implement the tools that each plan relies upon. This also includes the types of testing to be performed, to whom the results are reported, and procedures for updating the plans in light of the findings resulting from such tests. The tests need to include the participation of clearing members, where the plans rely upon their participation. The tests must be repeated following any material change to the recovery plan or orderly wind-down plan, but in any event not less than once annually.

If the foregoing recovery or orderly wind-down planning identifies vulnerabilities that need to be improved upon, the DCO will incur the cost of remediating such vulnerabilities.

As noted earlier in this section, plans revised in light of the foregoing analysis will then need to be reviewed, first by senior management and then by the board of directors, at the cost of the time of those persons, and potentially further amended in light of the results of such reviews (resulting in the further expenditure of time).

It is impracticable to quantify these costs, because they depend on the specific design and other circumstances of each DCO, including the specific services and operations that the DCO provides to clearing members and other financial participants, the services and operations provided by others that the DCO relies upon to provide those services, the contractual arrangements between and those service providers, and the DCO's current recovery and orderly wind-down plans. It seems likely that these requirements will require hundreds of hours of the effort of skilled professionals, at a cost of tens of (perhaps more than a hundred) thousands of dollars.

For DCOs that are currently SIDCOs or Subpart C DCOs, or other DCOs that may currently maintain recovery and orderly wind-down plans, the amount of time required for each DCO to initially amend its recovery plan and orderly wind-down plan may vary depending on the extent to which the DCO already addressed the foregoing requirements in its existing plans. The analysis and plan preparation that a SIDCO or Subpart C DCO will undertake to comply with this regulation, including designing and implementing changes to existing plans, was, to a significant extent, established in the 2016 staff guidance, and, based on staff's experience, SIDCOs and Subpart C DCOs generally already follow those standards. To that extent, for these DCOs, those costs may be reduced.

The Commission requests comment from existing SIDCOs and Subpart C DCOs concerning their estimates of the time, and corresponding costs, they would expect to incur in ensuring that their existing plans meet the requirements of the proposed rule, along with supporting data concerning the amount of effort expended on preparing existing plans, and the extent to which additional time may need to be spent to conform such plans to the proposed rules. The Commission also seeks comment from the public more generally as to estimates, along with supporting data, of the time, and corresponding costs that might be incurred in developing recovery and orderly wind-down plans that meet those requirements.

Additionally, to what extent are existing SIDCOs and Subpart C DCOs following the staff guidance in CFTC Letter No. 16–61? What is the impact of current practice among existing SIDCOs and Subpart C DCOs with respect to that staff guidance on the costs and benefits that would result from implementation of the proposed rules?

iii. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits in light of the section 15(a) factors. In consideration of sections 15(a)(2)(A), (B), (D), and (E) of the CEA, the Commission believes the proposed amendments to § 39.39(c)(1)–(8) would enhance existing protection of market participants and the public and the financial integrity of futures markets, and the regulations should aid in sound risk management practices by ensuring that the DCO considers in advance the impact that recovery and orderly wind-down would have on its operations and customers. Moreover, specifying the contents of the plans in the regulation

should increase the possibility that a DCO could continue to provide the critical services and operations upon which its clearing members and other financial market participants depend, and reduce the possibility that a DCO would fail in a disorganized fashion. The proposed rule should reduce the likelihood of a DCO's failure to meet its obligations to its members, thereby enhancing protection for a DCO's members and their customers, and should help to avoid the systemic effects of a DCO failure. Having the requisite plans in place, moreover, should allow DCOs to handle exigencies in a manner that mitigates the risk of financial instability or contagion. These benefits favor the public interest. Section 15(a)(2)(C), price discovery, does not appear to be implicated by the proposed amendments.

5. Information for Resolution Planning—§ 39.39(f)

The Commission is proposing in § 39.39(f) to require that a SIDCO and Subpart C DCO maintain information systems and controls to provide data and information necessary for the purposes of resolution planning to the Commission, and upon request provide such data and information to the Commission, electronically, in the form and manner specified by the Commission. Proposed § 39.39(f)(1)–(7) describes the types of information deemed pertinent to planning for resolution of a SIDCO or Subpart C DCO under Title II of the Dodd-Frank Act. Much of this information may already be provided to the Commission, and thus may not be requested. The proposed regulation expands on current § 39.39(c)(2) and lists explicitly the types of information that SIDCOs and Subpart C DCOs may be required to provide upon request because they are relevant to resolution planning, but which may not ordinarily be required to be provided under other sections of part 39.

i. Benefits

Proposed § 39.39(f)(1)–(7) describes the types of information that the Commission proposes to require for resolution planning under Title II of the Dodd-Frank Act. Thorough preparation *ex ante* is crucial for successfully managing matters relating to the resolution of a SIDCO or Subpart C DCO, as well as for establishing market confidence and the confidence of foreign counterparts to the Commission and to the United States agencies responsible for resolution of a SIDCO or Subpart C DCO. Because of the nature of principles-based regulation, there is

some information in the possession of the DCO that, while important for resolution planning purposes, may not ordinarily be reported to the Commission and may not be publicly available. Thus, the primary benefit from this regulation is that the type of information to be requested will be available to the DCO, and upon request, the Commission may obtain the information in order to assist the Commission in planning and preparing for the resolution of a distressed DCO. There is also considerable public benefit in enhancing preparedness for resolution by making available to FDIC, as the resolution authority, information relevant to planning for the resolution of a SIDCO or Subpart C DCO.

ii. Costs

The proposal assumes that there is information relevant to resolution planning that is not ordinarily reported to the Commission under § 39.19, but which is in the possession of the DCO. As such, SIDCOs and Subpart C DCOs will face certain incremental costs (from gathering the information, reviewing it for accuracy, and transmitting it to the Commission) to produce this information upon request as required by proposed § 39.39(f)(1)–(7). Gathering the information and transmitting it would likely be accomplished by paraprofessionals, while review may require the work of paraprofessionals or professionals. The time that would be required to accomplish these tasks would depend on the information requested and the DCO's information system architecture. A crude estimate of the time required might be 10–20 hours, at a cost of \$3,000–\$6,000, once or twice a year for a SIDCO, and once every five years for a Subpart C DCO.

To the extent that some of this information requires analyses by the DCO that are not currently conducted, such incremental costs may be more significant. Here, the DCO would need to develop tools to analyze its information (which may involve new uses for existing tools, or may in some cases require the development of new tools), gather the underlying data, use the tools, review the results, and then transmit those results to the Commission. This may also involve effort in working with Commission staff to clarify and/or to sharpen the request. While some of this effort might be accomplished by paraprofessionals, the proportion that would need the effort of professionals would likely be greater than in the previous paragraph. A crude estimate of the time required might be 30–60 hours, at a cost of \$12,000–\$24,000, once a year for a SIDCO, and

once every ten years for a Subpart C DCO.

It should be noted that the Commission does not anticipate asking Subpart C DCOs for information for resolution planning in the near term. This is because, even in the highly unlikely event that a Subpart C DCO would enter recovery, and that such recovery would fail, the likelihood of such a DCO qualifying for resolution under Title II is fairly low.

The Commission seeks comments, in particular from SIDCOs and Subpart C DCOs, on the accuracy of these estimates (with respect to both time required and cost), and on how they may be improved. In particular, SIDCOs that have responded to similar requests in the past are invited to discuss the costs that they incurred in doing so (both in building tools where necessary and in gathering and reviewing the information), and to provide insight into expected costs to do so in the future.

iii. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits in light of the specified considerations identified in section 15(a) of the CEA. In consideration of sections 15(a)(2)(A), (B), (D), and (E) of the CEA, the Commission preliminarily believes that proposed § 39.39(f)(1)–(7) would protect market participants and the public, and support the financial integrity of futures markets, by enhancing preparation for resolution of DCO in advance of systemic failure, and thus increasing the likelihood that resolution would be successful. Furthermore, advance planning may identify issues that should and can be corrected in advance of market failure, thereby providing an opportunity to improve DCO risk management practices and further enhance the protection of market participants and the public, and the financial integrity of the derivatives markets. Finally, there is a strong public interest in holding CFTC-registered SIDCOs and Subpart C DCOs to regulations that incorporate international standards and guidance. Section 15(a)(2)(C), price discovery, does not appear to be implicated by this proposal.

6. Requested Reporting—§ 39.19(c)(5)(iii)

Proposed § 39.39(f)(1)–(7) requires a corresponding amendment to § 39.19(c)(5) regarding requested reporting. Proposed § 39.19(c)(5)(iii) would require that a SIDCO or Subpart C DCO that submits information related to resolution planning to the Commission pursuant to § 39.39(f)(1)–

(7), shall update the information upon request.

i. Benefits

The Commission is proposing an additional requirement to clarify that the information for resolution planning requested under proposed § 39.39(f) would be updated upon request. By requesting (and then providing to the FDIC) current, accurate, and pertinent information for resolution planning, the Commission may be able to assist in resolution planning more effectively. The financial system benefits as a whole when the FDIC can obtain, with the aid of the Commission, current, accurate, and pertinent information for resolution planning related to a SIDCO's or Subpart C DCO's structure and activities (§ 39.39(f)(1)), clearing members (§ 39.39(f)(2)), arrangements with other DCOs (§ 39.39(f)(3)), financial schedules and supporting details (§ 39.39(f)(4)), interconnections and interdependencies with internal and external service providers (§ 39.39(f)(5)), information concerning critical personnel (§ 39.39(f)(6)), and other necessary information (§ 39.39(f)(7)).

ii. Costs

The Commission anticipates that proposed § 39.19(c)(5) would add incremental costs to the business-as-usual activities of the DCOs. For information that is regularly maintained by the DCO, this would involve repeating the efforts described above in Section VIII.D.5(ii) of gathering, reviewing, and transmitting the information. For information that requires analyses that are not currently conducted by the DCO, the corresponding efforts described above in Section VIII.D.5(ii) would be called for, but some may be reduced or eliminated: the DCO would once again need to gather the information, but would presumably be able to use the tools that it repurposed (or newly developed) when it responded to the information request for the first time. Moreover, there may not be a need to clarify or sharpen the request, to the extent that the request is identical (except for time-period) to the first request. The DCO would still need to review the results, and transmit them to the Commission.

iii. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits in light of the specified considerations identified in section 15(a) of the CEA. In consideration of sections 15(a)(2)(A), (B), (D), and (E) of the CEA, the Commission believes that § 39.39(f)(1)–(7) protects market

participants and the public, and promotes the financial integrity of futures markets, by ensuring that resolution plans are based on current, accurate, and pertinent information. Further, planning for resolution is a pillar of sound risk management principles, and supports the public interest. Section 15(a)(2)(C), price discovery, does not appear to be implicated by this proposal.

7. Viable Plans for Orderly Wind-Down for DCOs That Are Neither SIDCOs Nor Subpart C DCOs—§ 39.13(k)

Proposed § 39.19(k)(1)(a) would require that DCOs that are neither SIDCOs nor Subpart C DCOs maintain and submit to the Commission viable plans for orderly wind down necessitated by default losses and non-default losses. As discussed above, proposed § 39.19(k)(2)–(6) would enumerate the information required to be incorporated in an orderly wind-down plan.

i. Benefits

Requiring DCOs that are neither SIDCOs nor Subpart C DCOs to maintain viable plans for orderly wind-down should contribute to a better *ex ante* understanding by such DCOs of the critical services and operations that clearing members and other financial market participants depend upon them to provide, and of the challenges the DCO would face in doing so. DCOs will benefit through better preparation to meet those challenges; moreover, by enumerating certain subjects, analyses, and testing that all DCOs must include in their orderly wind-down plans, a DCO's ability to wind-down promptly and in an orderly manner during any exigency should be significantly enhanced. To the extent that this analysis identifies vulnerabilities, the DCO will have the opportunity to remediate them.²¹¹

Importantly, an orderly and expeditious wind-down will help mitigate the damage to the DCO's participants (and their customers, if any) by facilitating either the continuation of the DCO's services (potentially through another DCO) or the prompt return of their participants' collateral.

ii. Costs

The Commission anticipates that some DCOs may bear a significant cost burden, as described further below, due

to the proposed regulation, because of the various analyses and testing these DCOs would be required to conduct.

The specific requirements for an orderly wind-down plan's description, analysis, and testing set forth in this regulation will require substantial time to be spent on analytical effort by DCO staff, including attorneys, compliance staff, and other subject matter experts. DCO staff will need to draft plans and supporting arrangements that meet the standards set in the proposed rules (to the extent that they are ultimately adopted) in light of, *inter alia*, the specifics of each DCO's business model, services and operations provided by the DCO to clearing members and other financial market participants, products cleared (and the DCO's role in the financial sector), services and operations provided by others that the DCO relies upon to provide its services and operations to others, infrastructure, and governance arrangements. The plans will then need to be reviewed, first by senior management and then by the board of directors, at the cost of the time of those persons, and potentially further amended in light of the results of such reviews (resulting in the further expenditure of time).

These analyses include developing an overview of the orderly wind-down plan and describing how the plan will be implemented, ensuring that the orderly wind-down plan identifies and describes (i) the critical operations and services that the DCO provides to clearing members and other financial market participants, (ii) the service providers upon which the DCO relies to provide these operations and services, (iii) plans for resilient staffing arrangements for continuity of operation, (iv) obstacles to success of the plan, (v) plans to address the risks associated with the failure of each critical operation and service, (vi) how the DCO will ensure that the identified operations and services continue thorough orderly wind-down.

Further, the DCO will need to ensure that the analysis of scenarios for its orderly wind-down plan identifies scenarios that may prevent the DCO from meeting its obligations or providing critical operations and services as a going concern. The DCO will need to ensure that the analysis establishes triggers for consideration of orderly wind-down, and the information-sharing and governance process within senior management and board of directors. The DCO will also need to ensure that the plan describes the tools that it would use in an orderly wind-down that comprehensively address how the DCO would continue to

²¹¹ To the extent that a foreign-based DCO already maintains an orderly wind-down plan, pursuant to the regulations of its home-country regulator, that meets the standards set in the proposed regulation, these benefits would be reduced or eliminated.

provide critical services, the governance and approval processes and arrangements that will guide the exercise of any available discretion, the steps necessary to implement each tool, the roles and responsibilities of all parties in the use of each tool, an assessment of the likelihood that the tools, individually and taken together, would result in an orderly wind-down, and an assessment of the risks to non-defaulting clearing members and their customers, and linked financial market infrastructures.

Additionally, the DCO will need to ensure that its plan includes determinations of which of the contracts, etc. associated with the provision of its services as a DCO are subject to alteration or termination as a result of the implementation of the orderly wind-down plan, and the actions that the DCO has taken to ensure that its critical operations and services will continue during orderly wind-down despite such alteration or termination. The DCO will also need to ensure that the plans are formally approved, and annually reviewed, by the board of directors, describe effective governance structures and processes to guide discretionary decision-making relevant to the plan, and describe the DCO's process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the DCO.

Moreover, the DCO will need to ensure that its plan includes procedures for testing the DCO's ability to implement the tools that the orderly wind-down plan relies upon. This also includes describing the types of testing to be performed, to whom the results are reported, and procedures for updating the plans in light of the findings resulting from such tests. The tests must be repeated following any material change to the orderly wind-down plan, but in any event not less than once annually.

If the foregoing wind-down planning identifies vulnerabilities that need to be improved upon, the DCO will incur the cost of remediating such vulnerabilities.

As noted earlier in this section, plans revised in light of the foregoing analysis will then need to be reviewed, first by senior management and then by the board of directors, at the cost of the time of those persons, and potentially further amended in light of the results of such reviews.

While it is impracticable to quantify these costs, because they depend on the specific design and other circumstances of each DCO, it seems likely that these requirements will require less effort than the corresponding requirements for

both recovery plans and orderly wind-down plans for SIDCOs and Subpart C DCOs, because these DCOs are required only to prepare, and meet the standards for, an orderly wind-down plan. Moreover, in many cases, the business structure and operations of these DCOs may be less complex than those of SIDCOs or Subpart C DCOs. Nonetheless, the Commission estimates that an orderly wind-down plan will require hundreds of hours of the effort of skilled professionals, at a cost of tens of thousands of dollars.

For those DCOs that are based in jurisdictions that, pursuant to a legal framework that is consistent with the PFMI, already require them to maintain orderly wind-down plans, the cost should be substantially less, as the requirements for orderly wind-down plans are likely to be comparable to the requirements applicable in those other jurisdictions (and thus these DCOs would, for the most part, be able to rely upon their existing plans).²¹² For other DCOs that are not required to have orderly wind-down plans pursuant to regulations of either the CFTC or other regulators, these costs would be larger while the orderly wind-down plans are first being developed, although there will be additional (albeit reduced) costs in reviewing, testing, and updating these plans on an ongoing basis. The initial costs may be mitigated to the extent that such DCOs may already have some form of a wind-down plan in place as part of their general risk management strategy. Additionally, DCOs may already have performed some of the proposed analyses as part of their existing regulatory compliance programs.

iii. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits in light of the specific considerations identified in section 15(a) of the CEA. In consideration of section 15(a)(2)(A) of the CEA, the Commission believes that the proposed regulations should protect market participants and the public. At the outset, a viable plan for orderly wind down reduces uncertainty in times of market stress, since its existence enhances legal certainty for the DCO's clearing members and market

participants, and increases the likelihood of an orderly and expeditious wind-down that will mitigate the harm to their interests from the closing of the DCO. Further, a viable plan for orderly wind-down should increase market confidence, because clearing members and their customers would know beforehand that the DCO is well prepared to undertake an orderly wind-down, if necessary. Importantly, the proposed regulations should enhance protection for a DCO's members and their customers by reducing the likelihood that a DCO would fail to meet certain obligations to its members and other market participants in orderly wind-down.

In consideration of section 15(a)(2)(B) of the CEA, with respect to the efficiency, competitiveness, and financial integrity of markets, plans for orderly wind-down (and for determining when orderly wind-down might be necessary) would enhance financial integrity of markets, by enhancing the likelihood that any wind-down would be orderly, and the existence of these standards might enhance market participants confidence in (and thus the competitiveness of) DCOs.

In consideration of section 15(a)(2)(D) of the CEA, the proposed regulations would aid in sound risk management practices. The requirement to maintain and submit to the Commission viable plans for orderly wind-down provides greater clarity and transparency before wind-down and facilitates timely decision-making and the continuation of critical operations and services during orderly wind-down. Wind-down planning—including, for example, considering the circumstances that may trigger an orderly wind-down, the tools the DCO would implement to help ensure an orderly wind-down (along with the likely effects on clearing members and the financial markets from implementing such tools), and the governance arrangements to guide decision-making during a wind-down—also would strengthen the risk management practices of the DCO by, among other things, identifying vulnerabilities that can be mitigated and preparing for multiple exigencies. Having an orderly wind-down plan in place, moreover, should allow the DCO to handle exigencies in a manner that mitigates the risk of financial instability or contagion. Moreover, in consideration of section 15(a)(2)(E), having an orderly wind-down plan in place would promote the public interest. However, section 15(a)(2)(C), price discovery, is not implicated by the proposed amendments.

²¹² To the extent that this assumption is incorrect, and the proposal would require foreign-based DCOs to comply with overly burdensome additional requirements, the Commission seeks comments that set forth inconsistencies between the proposed requirements and the requirements in the relevant foreign jurisdictions, and recommendations as to how those inconsistencies can and should be mitigated through amendments to the proposed requirements.

8. Notification Requirement for DCOs That Are Neither SIDCOs Nor Subpart C DCOs of Pending Orderly Wind-Down—§§ 39.19(k)(1)(b) and 39.19(c)(4)(xxv)

The Commission is proposing in new § 39.19(k)(1)(b) that DCOs that are neither SIDCOs nor Subpart C DCOs have procedures in place for informing the Commission and clearing members, as soon as practicable, when orderly wind-down is pending, consistent with the requirements of proposed new paragraph § 39.19(c)(4)(xxv).²¹³

i. Benefit

A DCO should notify the Commission as soon as practicable of a pending orderly wind-down so that the Commission may promptly take appropriate steps to monitor the wind-down process, and to protect the interests of clearing members and other market participants. Likewise, a DCO should notify its clearing members as soon as practicable as well, so that they may promptly take steps to protect themselves (including, *e.g.*, by seeking to replace hedge positions). Such information-sharing fosters market transparency, which can serve to increase confidence and enhance market participants' abilities to protect their own interests.

ii. Costs

DCOs should already have tools and procedures in place for notifying the Commission and clearing members of other circumstances or events triggering notification; Thus, the only costs involved would be the effort involved in preparing to use these existing tools and procedures to notify the Commission and clearing members when orderly wind-down is pending (including testing), and, if and when necessary, using them to make such notifications.

iii. Section 15(a) Factors

The proposed regulations should protect market participants and the public under section 15(a)(2)(A) of the CEA, enhance efficiency, competitiveness, and financial integrity of futures markets under section 15(a)(2)(B) of the CEA, aid in sound risk management practices under section 15(a)(2)(D) of the CEA, and promote the public interest under section 15(a)(2)(E) of the CEA. Clearing members and their customers cannot accurately evaluate the risks and costs associated with using a DCO's services if they do not have sufficient information, including when

the DCO is no longer a going concern. A requirement that clearing members be notified as soon as practicable of a pending winding-down also allows market participants time to take action to protect their own interests. Likewise, market participants can use a DCO's services with the confidence that the DCO will not delay in notifying them of a pending orderly wind-down, which should enhance competitiveness. The requirement also reduces risk by providing DCO's stakeholders sufficient notice to help ensure an orderly wind-down. However, section 15(a)(2)(C), price discovery, is not implicated by the proposed amendments.

9. Timing for DCOs' Submission of Recovery and Orderly Wind-Down Plans—§ 39.19(c)(4)(xxiv)

Proposed § 39.19(c)(4)(xxiv) would continue to require that a DCO that is required to maintain recovery and orderly wind-down plans pursuant to § 39.39(b) shall submit its plans to the Commission no later than the date the DCO is required to have the plans. It would add an explicit requirement that those plans be accompanied by supporting information, and would newly require that a DCO that is required to maintain orderly wind-down plans pursuant to § 39.13(k) shall submit its plans and supporting information at the time it files its application for registration under § 39.3.²¹⁴ The Commission is proposing a deadline of six months from the effective date of the rule (if adopted) for those DCOs currently registered with the Commission to complete and submit the orderly wind-down plans and supporting information. Moreover, this proposed rule would continue to require that a SIDCO or Subpart C DCO, upon revising the plan(s), submit the current (formerly, "revised") plan(s) to the Commission, along with a description of any changes and the reason(s) for such changes. This requirement would be new for other DCOs. The proposal would add requirements that the plans, including any supporting information, must be submitted at least annually.

i. Benefits

DCOs seeking registration with the Commission will promptly have orderly wind-down plans and supporting information available upon registration.

²¹⁴ As previously noted, for any DCO that submits (or has submitted) an application for registration with the Commission before the date that is six months after the effective date of this rulemaking, if it is adopted, the Commission is proposing to require that the DCO have until the date that is six months after the effective date of this rulemaking to submit its orderly wind-down plans.

Clearing members and potential customers, moreover, will immediately benefit from orderly wind-down planning that has already taken place. For those DCOs currently registered with the Commission, the Commission believes six months is sufficient with respect to both the time and resources necessary for orderly wind-down planning, and takes into account the need to prepare promptly viable plans for orderly wind-down, given that a disorderly wind-down poses risks to clearing members and other financial market participants, and potentially, in some cases, risk to the financial system, especially in turbulent and uncertain market environments.

Requiring that current plans be submitted at least annually would help to ensure that the plans available to the Commission for review remain reasonably current (given the possibility that some minor changes or updates to the plans may be considered as not meeting the threshold of "revisions"), thereby aiding the Commission's exercise of its supervisory responsibilities both in its ongoing risk-based examination program and in case of financial distress at the DCO.

As discussed above in Section IV, DCOs may, in some instances, include supporting information within their plans, or may organize the documentation with supporting information kept separately, *e.g.*, as an appendix or annex. Adding the term "and supporting information" would have the benefit of ensuring that the Commission has timely access to such supporting information.

ii. Costs

The Commission anticipates that the costs for DCOs to submit the viable plans for orderly wind-down that they are otherwise required to maintain would be limited to the cost of transmission using DCOs' already established systems and procedures to submit documents to the Commission. Similarly, re-submitting current plans with supporting information should involve only the costs of gathering that information together and transmitting it, as the information must be at hand in order to plan adequately. As discussed above, some DCOs will already have orderly wind-down plans in place; others may already have considered at least some of the subjects and analyses as part of their efforts to comply with the DCO Core Principles.

iii. Section 15(a) Factors

For the same reasons as previously noted above, the Commission believes the proposed regulations would protect

²¹³ Proposed new § 39.19(c)(4)(xxv) would provide that each DCO shall notify the Commission and clearing members as soon as practicable when, among other things, orderly wind-down is pending.

market participants and the public under section 15(a)(2)(A) of the CEA, enhance competitiveness of futures markets under section 15(a)(2)(B) of the CEA, and aid in sound risk management practices under section 15(a)(2)(D) of the CEA. Ensuring the prompt availability of viable plans for orderly wind down would reduce uncertainty in times of market stress, increase market confidence, and provide assurance to market participants and the public that DCOs are meeting minimum risk standards. Likewise, orderly wind-down plans enhance protection for a DCO's members and their customers. Having viable plans for orderly wind-down already in place additionally provides greater clarity and transparency before wind-down, assists the DCO in identifying vulnerabilities and preparing for multiple exigencies, and facilitates timely decision-making and the continuation of critical operations and services during orderly wind-down. Given its benefits, the Commission believes that new DCOs should have viable plans for orderly wind-down in place at the time they seek registration and before market participants come to rely upon them. The Commission has considered the other section 15(a) factors and believes they are not implicated by the proposed amendments.

10. Conforming Changes to Bankruptcy Provisions—Part 190.

Based upon the proposed requirement that all DCOs maintain viable plans for orderly wind-down, the Commission is proposing several conforming changes to Part 190's bankruptcy provisions. Specifically, current § 190.12(b)(1) would be amended so that a DCO in a Chapter 7 proceeding provide to the trustee copies of, among other things, orderly wind-down plans it must maintain pursuant to new § 39.13(k) in addition to § 39.39(b). Current § 190.15(a) would be amended so that the trustee not avoid or prohibit certain actions taken by the DCO either reasonably within the scope of, or provided for in, any orderly wind-down plans maintained by the DCO and filed with the Commission pursuant to new § 39.13(k) in addition to § 39.39. Current § 190.15(c) would be amended so that the trustee act in accordance with any orderly wind-down plans maintained by the debtor and filed with the Commission pursuant to new § 39.13(k) in addition to § 39.39 in administering the bankruptcy proceeding. Current § 190.19(b)(1) would be amended so that a shortfall in certain funds be supplemented in accordance with orderly wind-down plans maintained by

the DCO pursuant to new § 39.19(k) in addition to § 39.39.

i. Benefits

In promulgating the current Part 190 bankruptcy rules for DCOs in 2021, the Commission found that “directing a trustee to implement the DCO's own default rules and procedures, and recovery and orderly wind-down plans, would benefit the estate by providing the trustee with a menu of purpose-built rules, procedures and plans to liquidate a DCO, which rules, procedures and plans the DCO has developed subject to the requirements of the Commission's regulations and supervision of the Commission. Adding concepts of reasonability and practicability will give the trustee the discretion to modify those rules, procedures, and plans where and to the extent appropriate.”²¹⁵ Adding the orderly wind-down plans required under proposed § 39.13(k) for DCOs other than SIDCOs and Subpart C DCOs should further achieve these benefits, by providing such a menu in an additional context, namely the bankruptcy of these DCOs.

ii. Costs

The Commission does not anticipate additional costs from the proposed regulations. The amendments are conforming changes so that the orderly wind-down plan of a DCO that is neither a SIDCO nor a Subpart C DCO is given the same weight as a SIDCO's or Subpart C DCO's orderly wind-down plan would be given in bankruptcy.

iii. Section 15(a) Factors

The proposed regulations should enhance protection for market participants and the public under section 15(a)(2)(A) of the CEA, enhance the competitiveness and financial integrity of futures markets under section 15(a)(2)(B) of the CEA, aid in sound risk management practices under section 15(a)(2)(D) of the CEA, and promote the public interest under section 15(a)(2)(E) of the CEA. The assurance that the orderly wind-down plan, to the extent reasonable and practicable, and consistent with the protection of customers, will be followed in a bankruptcy proceeding should instill confidence in a DCO's clearing members and customers, who can make certain decisions without fear that a trustee will inappropriately diverge from the orderly wind-down plan in bankruptcy. Moreover, market participants in general can be assured

that the DCO's pre-bankruptcy actions will not be voided by the trustee; likewise, the DCO's clearing members and customers can anticipate that a shortfall will be supplemented in the manner provided for in the orderly wind-down plan. The Commission also believes that a viable plan for orderly wind-down should also reduce the risk of disorderly events in bankruptcy. All of these factors would also promote the public interest. However, section 15(a)(2)(C), price discovery, is not implicated by the proposed amendments.

11. Requests for Up to One Year To Comply With §§ 39.34(d), 39.35, and 39.39(f)

Conforming to the approach of setting a six-month deadline discussed in section VIII(D)(4) above, the Commission is proposing to discontinue the process currently provided in subpart C pursuant to which the Commission may grant, upon request of a SIDCO or DCO that is electing to become subject to Subpart C, up to one year to comply with §§ 39.34, 39.35, and 39.39. The costs and benefits, and the application of the CEA Section 15(a) factors, for this approach were discussed there.

12. Amendments to Appendix A and Appendix B to Part 39

The Commission is proposing to amend Exhibit D to Form DCO. The proposal would add a requirement to provide as Exhibit D–5, the DCO's orderly wind-down plan, and a demonstration that the plan complies with the requirements of § 39.13(k).

This proposed change would implement the proposal to require the submission of the orderly wind-down plan. The Commission has considered the section 15(a) of the CEA factors and believes that they are not implicated by the proposed change to Form DCO.

The Commission is also proposing to amend the “General Instructions” and “Elections and Certifications” portions of the Subpart C Election Form. The proposal would remove the sections of the forms that reference requests for an extension of time to comply with any of the provisions of §§ 39.34, 39.35, and 39.39. Similarly, the Commission is proposing to amend the requirements for Exhibit F–1 to call for the attachment of the applicant's recovery plan and orderly wind-down plan, supporting information for these plans, and a demonstration that the plans comply with § 39.39(c).

These proposed changes would implement the proposal to delete the provision for making such requests for

²¹⁵ *Bankruptcy Regulations*, 86 FR 19324, 19412 (Apr. 13, 2021).

an extension of time, and the proposal to require the submission of the plans. The Commission does not anticipate that these proposed changes would impose any costs on SIDCOs or Subpart C DCOs. The Commission has considered the factors called for in section 15(a) of the CEA and believes that they are not implicated by the proposed changes to the Subpart C Election Form.

List of Subjects

17 CFR Part 39

Default rules and procedures, Definitions, Reporting requirements, Risk management, Recovery and Orderly wind-down, System safeguards.

17 CFR Part 190

Bankruptcy, Brokers, Reporting and recordkeeping requirements.

For the reasons stated in the preamble the Commodity Futures Trading Commission proposes to amend 17 CFR Chapter I as follows:

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 7 U.S.C. 2, 6(c), 7a–1, and 12a(5); 12 U.S.C. 5464; 15 U.S.C. 8325; Section 752 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, title VII, sec. 752, July 21, 2010, 124 Stat. 1749.

■ 2. Amend § 39.2 by adding the definitions of “Default losses,” “Nondefault losses,” “Orderly wind-down or wind-down,” and “Recovery” in alphabetical order to read as follows:

§ 39.2 Definitions.

Default losses means credit losses or liquidity shortfalls created by the default of a clearing member in respect of its obligations with respect to cleared transactions.

Non-default losses means losses from any cause, other than default losses, that may threaten the derivative clearing organization’s viability as a going concern. These include, but are not limited to,

(1) any potential impairment of a derivatives clearing organization’s financial position, as a business concern, as a consequence of a decline in its revenues or an increase in its expenses, such that expenses exceed revenues and result in a loss that the derivatives clearing organization must charge against capital,

(2) losses incurred by the derivatives clearing organization on assets held in

custody or on deposit in the event of a custodian’s (or subcustodian’s or depository’s) insolvency, negligence, fraud, poor administration or inadequate record-keeping,

(3) losses incurred by the derivatives clearing organization from diminution of the value of investments of its own or its participants’ resources, including cash or other collateral,

(4) losses from adverse judgments, or other losses, arising from legal, regulatory, or contractual obligations, including damages or penalties, and the possibility that contracts that the derivatives clearing organization relies upon are wholly or partly unenforceable, and

(5) losses occasioned by deficiencies in information systems or internal processes, human errors, management failures, malicious actions (whether by internal or external threat actors), disruptions to services provided by third parties, or disruptions from internal or external events that result in the reduction, deterioration, or breakdown of services provided by the derivatives clearing organization.

Orderly wind-down or wind-down means the actions of a derivatives clearing organization to effect the permanent cessation, sale, or transfer, of one or more of its critical operations or services, in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system.

Recovery means the actions of a derivatives clearing organization, consistent with its rules, procedures, and other *ex-ante* contractual arrangements, to address any uncovered credit loss, liquidity shortfall, inadequacy of financial resources, or business, operational or other structural weakness, including the replenishment of any depleted pre-funded financial resources and liquidity arrangements, as necessary to maintain the derivatives clearing organization’s viability as a going concern.

■ 3. In 39.13, add and reserve paragraph (j), and add paragraph (k) to read as follows:

§ 39.13 Risk management.

(j) [Reserved].

(k) *Orderly wind-down plan.* (1) *Orderly wind-down plan required.* Each derivative clearing organization that is not a systemically important derivatives

clearing organization or a subpart C derivatives clearing organization shall:

(i) Maintain and, consistent with § 39.19(c)(4)(xxiv), submit to the Commission, a viable plan for orderly wind-down that may be necessitated by default losses and by non-default losses, including supporting information for that plan.

(ii) Have procedures for informing the Commission and clearing members, as soon as practicable, when orderly wind-down is pending, and shall notify the Commission and clearing members consistent with § 39.19(c)(4)(xxv).

(2) *Orderly wind-down plan description.* The orderly wind-down plan required by paragraph (k)(1) of this section shall include an overview of the plan and a description of how the plan will be implemented. The description of the plan shall include the identification and description of the derivatives clearing organization’s critical operations and services, interconnections and interdependencies, resilient staffing arrangements, stress scenario analyses, potential triggers for consideration of implementing the orderly wind-down plan, available wind-down tools, analyses of the effect of the tools on each scenario, lists of agreements to be maintained during orderly wind-down, and governance arrangements.

(i) *Critical operations and services, interconnections and interdependencies, and resilient staffing arrangements.* The orderly wind-down plan shall identify and describe the critical operations and services the derivatives clearing organization provides to clearing members and other financial market participants, the service providers upon which the derivatives clearing organization relies to provide these critical operations and services, including internal and external service providers and ancillary services providers, financial and operational interconnections and interdependencies, aggregate cost estimates for the continuation of services during orderly wind-down, plans for resilient staffing arrangements for continuity of operations, obstacles to success of the orderly wind-down plan, plans to address the risks associated with the failure of each critical operation and service, and how the derivatives clearing organization will ensure that each identified operation and service continues through orderly wind-down.

(ii) *Orderly wind-down triggers.* The orderly wind-down plan shall establish the criteria that may trigger consideration of implementation of that plan, and the process the derivatives

clearing organization has in place for monitoring for events that may trigger implementation of the plan.

(iii) *Governance description.* The orderly wind-down plan shall include a description of the pre-determined information-sharing and escalation process within the derivatives clearing organization's senior management and the board of directors. The derivatives clearing organization must have a defined process that will be used that will include the factors the derivatives clearing organization considers most important in guiding the board of directors' exercise of judgment and discretion with respect to its orderly wind-down plan in light of those triggers and that process.

(3) *Orderly wind-down scenarios and tools.* The orderly wind-down plan shall:

(i) identify scenarios that may prevent the derivatives clearing organization from meeting its obligations or providing critical operations and services as a going concern;

(ii) describe the tools that the derivatives clearing organization would expect to use in an orderly wind-down that comprehensively address how the derivatives clearing organization would continue to provide critical operations and services;

(iii) describe the order in which each such tool would be expected to be used;

(iv) describe the governance and approval processes and arrangements within the derivatives clearing organization for the use of each of the tools available, including the exercise of any available discretion;

(v) describe the processes to obtain any approvals external to derivatives clearing organization (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained;

(vi) establish the time frame within which each such tool could be used;

(vii) set out the steps necessary to implement each such tool;

(viii) describe the roles and responsibilities of all parties in the use of each such tool;

(ix) provide an assessment of the likelihood that the tools, individually and taken together, would result in orderly wind-down; and

(x) provide an assessment of the associated risks from the use of each such tool to non-defaulting clearing members and those clearing members' customers with respect to transactions cleared on the derivatives clearing organization, and linked financial market infrastructures.

(4) *Agreements to be maintained during orderly wind-down.* The derivatives clearing organization shall determine which of its contracts, arrangements, agreements, and licenses associated with the provision of its critical operations and services as a derivatives clearing organization are subject to alteration or termination as a result of implementation of the orderly wind-down plan. The orderly wind-down plan shall describe the actions that the derivatives clearing organization has taken to ensure that its critical operations and services will continue during orderly wind-down, despite such potential alteration or termination.

(5) *Governance.* The derivatives clearing organization's orderly wind-down plan shall:

(i) Be formally approved, and annually reviewed, by the board of directors;

(ii) Describe an effective governance structure that clearly defines the responsibilities of the board of directors, board members, senior executives and business units;

(iii) Describe the processes that the derivatives clearing organization will use to guide its discretionary decision-making relevant to the orderly wind-down plan; and

(iv) Describe the derivatives clearing organization's process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the derivatives clearing organization.

(6) *Testing.* Each derivatives clearing organization's orderly wind-down plan shall include procedures for testing the derivatives clearing organization's ability to implement the tools that the orderly wind-down plan relies upon. The orderly wind-down plan shall include the types of testing that will be performed, to whom the findings of such tests are reported, and the procedures for updating the orderly wind-down plan in light of the findings resulting from such tests. Such testing shall occur following any material change to the orderly wind-down plan, but in any event not less than once annually, and the plan shall be promptly updated in light of the findings resulting from such testing.

■ 4. In § 39.19, revise paragraph (c)(4)(xxiv) and add paragraphs (xxv) and (c)(5)(iii) to read as follows:

§ 39.19 Reporting.

* * * * *

(c) * * *

(4) * * *

(xxiv) A derivatives clearing organization that is required to maintain recovery and orderly wind-down plans pursuant to § 39.39(b) shall submit its plans and supporting information to the Commission no later than the date on which the derivatives clearing organization is required to have the plans. A derivatives clearing organization that is required to maintain an orderly wind-down plan pursuant to § 39.13(k) shall submit its plan and supporting information to the Commission at the time it files its application for registration under § 39.3. A derivatives clearing organization shall, upon revising its recovery plan or orderly wind-down plan, but in any event no less frequently than annually, submit the current plan(s) and supporting information to the Commission, along with a description of any changes and the reason(s) for such changes.

(xxv) Each derivatives clearing organization shall notify the Commission and clearing members as soon as practicable when the derivatives clearing organization has initiated its recovery or when orderly wind-down is pending.

* * * * *

(5) * * *

(iii) *Information for resolution planning.* A systemically important derivatives clearing organization or subpart C derivatives clearing organization that submits information to the Commission pursuant to § 39.39(f)(2) shall update such information upon request.

* * * * *

■ 5. In § 39.34, remove and reserve paragraph (d) to read as follows:

§ 39.34 System safeguards for systemically important derivatives clearing organizations and subpart C derivatives clearing organizations.

* * * * *

(d) [Reserved].

* * * * *

■ 6. In § 39.39, revise the section heading and paragraphs (a), (b), (c), and (f) to read as follows:

§ 39.39 Recovery and orderly wind-down for systemically important derivatives clearing organizations and subpart C derivatives clearing organizations; Information for resolution planning.

* * * * *

(a) *Definitions.* For the purposes of this section: *Unencumbered liquid financial assets* include cash and highly liquid securities.

* * * * *

(b) *Recovery plan and orderly wind-down plan.* (1) Each systemically

important derivatives clearing organization and subpart C derivatives clearing organization shall maintain and, consistent with § 39.19(c)(4)(xxiv), submit to the Commission, viable plans for recovery and orderly wind-down that may be necessitated, in each case, by default losses and by non-default losses, including supporting information for such plans.

(2) Each systemically important derivatives clearing organization and subpart C derivatives clearing organization shall have procedures for informing the Commission and clearing members, as soon as practicable, when the recovery plan is initiated or orderly wind-down is pending, and shall notify the Commission and clearing members consistent with § 39.19(c)(4)(xxv).

(3) Each systemically important derivatives clearing organization shall file a recovery plan and (to the extent it has not already done so) an orderly wind-down plan, and supporting information for these plans, within 6 months of designation as systemically important by the Financial Stability Oversight Council. Each derivatives clearing organization electing to become subject to the provisions of Subpart C of this chapter shall file a recovery plan and (to the extent it has not already done so) an orderly wind-down plan, and supporting information for these plans, as part of its election. Each recovery plan and orderly wind-down plan shall be updated annually.

(c) *Requirements for recovery plan and orderly wind-down plan.* The recovery plan and orderly wind-down plan required by paragraph (b) of this section shall include an overview of each plan and a description of how each plan will be implemented. The description of each plan shall include the identification and description of the derivatives clearing organization's critical operations and services, interconnections and interdependencies, resilient staffing arrangements, stress scenario analyses, potential triggers for recovery and orderly wind-down, available recovery and wind-down tools, analyses of the effect of the tools on each scenario, lists of agreements to be maintained during recovery and orderly wind-down, and governance arrangements.

(1) *Critical operations and services, interconnections and interdependencies, and resilient staffing arrangements.* The recovery plan and orderly wind-down plan shall identify and describe the critical operations and services the derivatives clearing organization provides to clearing members and other financial market participants, the service providers upon

which the derivatives clearing organization relies to provide these critical operations and services, including internal and external service providers and ancillary services providers, financial and operational interconnections and interdependencies, aggregate cost estimates for the continuation of services during recovery and orderly wind-down, plans for resilient staffing arrangements for continuity of operations, obstacles to success of the recovery plan and orderly wind-down plan, plans to address the risks associated with the failure of each critical operation or service, and how the derivatives clearing organization will ensure that each identified operation or service continues through recovery and orderly wind-down.

(2) *Recovery scenarios and analysis.* Each systemically important derivatives clearing organization and subpart C derivatives clearing organization shall identify scenarios that may prevent it from meeting its obligations or providing its critical services as a going concern.

(i) For each scenario, the recovery plan shall provide an analysis that includes:

- (A) a description of the scenario;
- (B) the events that are likely to trigger the scenario;
- (C) the derivatives clearing organization's process for monitoring for such events;
- (D) the market conditions and other relevant circumstances that are likely to result from the scenario;
- (E) the potential financial and operational impact of the scenario on the derivatives clearing organization and on its clearing members, internal and external service providers and relevant affiliated companies, both in an orderly market and in a disorderly market; and
- (F) the specific steps the derivatives clearing organization would expect to take when the scenario occurs, or appears likely to occur, including, without limitation, any governance or other procedures that may be necessary to implement the relevant recovery tools and to ensure that such implementation occurs in sufficient time for the recovery tools to achieve their intended effect.

(ii) The derivatives clearing organization's recovery plan scenarios should also address the default risks and non-default risks to which the derivatives clearing organization is exposed, and shall include at least the scenarios listed in paragraphs (c)(2)(ii)(A) through (K) of this section, to the extent such a scenario is possible in light of the derivatives clearing

organization's structure and activities. For any scenario enumerated in paragraphs (c)(2)(ii)(A) through (K) of this section that the derivatives clearing organization determines is not possible in light of its structure and activities, the derivatives clearing organization should document its reasoning.

(A) Credit losses or liquidity shortfalls created by single and multiple clearing member defaults;

(B) Liquidity shortfall created by a combination of clearing member default and a failure of a liquidity provider to perform;

(C) Settlement bank failure;

(D) Custodian or depository bank failure;

(E) Losses resulting from investment risk;

(F) Losses from poor business results;

(G) Financial effects from cybersecurity events;

(H) Fraud (internal, external, and/or actions of criminals or of public enemies);

(I) Legal liabilities, including liabilities related to the derivatives clearing organization's obligations with respect to cleared transactions and those not specific to the derivatives clearing organization's business as a derivatives clearing organization;

(J) Losses resulting from interconnections and interdependencies among the derivatives clearing organization and its parent, affiliates, and/or internal or third-party service providers; and

(K) Losses resulting from interconnections and interdependencies with other derivatives clearing organizations.

(iii) The recovery plan shall also consider any combination of at least two scenarios involving multiple failures (e.g., a member default occurring simultaneously, or nearly so, with a failure of a service provider) that, in the judgment of the derivatives clearing organization, are particularly relevant to the derivatives clearing organization's business. The derivatives clearing organization shall document the reasons why the selected scenarios are particularly relevant.

(3) *Recovery and orderly wind-down triggers.*

(i) A systemically important derivatives clearing organization's or subpart C derivatives clearing organization's:

(A) recovery plan shall establish the criteria that may trigger implementation or consideration of implementation of that plan, and the process the derivatives clearing organization has in place for monitoring for events that are

likely to trigger the scenarios identified in paragraph (c)(2) of this section; and

(B) orderly wind-down plan shall establish the criteria that may trigger consideration of implementation of that plan, and the process the derivatives clearing organization has in place for monitoring for events that may trigger implementation of the plan.

(ii) The recovery plan and orderly wind-down plan shall include a description of the pre-determined information-sharing and escalation process within the derivatives clearing organization's senior management and the board of directors. The derivatives clearing organization must have a defined governance process that will be used that will include the factors the derivatives clearing organization considers most important in guiding the board of directors' exercise of judgment and discretion with respect to recovery and orderly wind-down plans in light of those triggers and that process.

(4) *Recovery tools.* A derivatives clearing organization or subpart C derivatives clearing organization shall have a recovery plan that includes the following:

(i) a description of the tools that the derivatives clearing organization would expect to use in each scenario required by paragraph (b) of this section that meet the full scope of financial deficits the derivatives clearing organization may need to remediate and comprehensively address how the derivatives clearing organization would continue to provide critical operations and services;

(ii) the order in which each such tool would be expected to be used;

(iii) the time frame within which each such tool would be expected to be used;

(iv) a description of the governance and approval processes and arrangements within the derivatives clearing organization for the use of each of the tools available, including the exercise of any available discretion;

(v) the processes to obtain any approvals external to the derivatives clearing organization (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained;

(vi) the steps necessary to implement each such tool;

(vii) a description of the roles and responsibilities of all parties, including non-defaulting clearing members, in the use of each such tool;

(viii) whether the tool is mandatory or voluntary;

(ix) an assessment of the likelihood that the tools, individually and taken together, would result in recovery; and

(x) an assessment of the associated risks from the use of each such tool to non-defaulting clearing members and those clearing members' customers with respect to transactions cleared on the derivatives clearing organization, linked financial market infrastructures, and the financial system more broadly.

(5) *Orderly wind-down scenarios and tools.* Each systemically important derivatives clearing organization and Subpart C derivatives clearing organization shall:

(i) identify scenarios that may prevent it from meeting its obligations or providing critical operations and services as a going concern;

(ii) describe the tools that it would expect to use in an orderly wind-down that comprehensively address how the derivatives clearing organization would continue to provide critical operations and services;

(iii) describe the order in which each such tool would be expected to be used;

(iv) establish the time frame within which each such tool would be expected to be used;

(v) describe the governance and approval processes and arrangements within the derivatives clearing organization for the use of each of the tools available, including the exercise of any available discretion;

(vi) describe the processes to obtain any approvals external to the derivatives clearing organization (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained;

(vii) set out the steps necessary to implement each such tool;

(viii) describe the roles and responsibilities of all parties, including non-defaulting clearing members, in the use of each such tool;

(ix) provide an assessment of the likelihood that the tools, individually and taken together, would result in orderly wind-down; and

(x) provide an assessment of the associated risks from the use of each such tool to non-defaulting clearing members and those clearing members' customers with respect to transactions cleared on the derivatives clearing organization, linked financial market infrastructures, and the financial system more broadly.

(6) *Agreements to be maintained during recovery and orderly wind-down.*

A systemically important derivatives clearing organization and subpart C derivatives clearing organization shall determine which of its contracts, arrangements, agreements, and licenses associated with the provision of its critical operations and services as a

derivatives clearing organization are subject to alteration or termination as a result of implementation of the recovery plan or orderly wind-down plan. The recovery plan and orderly wind-down plan shall describe the actions that the derivatives clearing organization has taken to ensure that its critical operations and services will continue during recovery and orderly wind-down despite such alteration or termination.

(7) *Governance.* Each systemically important derivatives clearing organization and Subpart C derivatives clearing organization's recovery plan and orderly wind-down plan shall, in each case,

(i) Be formally approved, and annually reviewed, by the board of directors;

(ii) Describe an effective governance structure that clearly defines the responsibilities of the board of directors, board members, senior executives, and business units;

(iii) Describe the processes that the derivatives clearing organization will use to guide its discretionary decision-making relevant to each plan; and

(iv) Describe the derivatives clearing organization's process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the derivatives clearing organization.

(8) *Testing.* The recovery plan and orderly wind-down plan of each systemically important derivatives clearing organization and Subpart C derivatives clearing organization shall include procedures for testing the viability of the recovery plan and orderly wind-down plan, including testing of the derivatives clearing organization's ability to implement the tools that each plan relies upon. The recovery plan and the orderly wind-down plan shall include the types of testing that will be performed, to whom the findings of such tests are reported, and the procedures for updating the recovery plan and orderly wind-down plan in light of the findings resulting from such tests. A systemically important derivatives clearing organization and Subpart C derivatives clearing organization shall conduct the testing described in this paragraph with the participation of their clearing members, where the plan depends on their participation, and the derivatives clearing organization shall consider including external stakeholders that the plan relies upon, such as service providers, to the extent practicable and appropriate. Such testing shall occur following any material change to the recovery plan or orderly wind-down plan, but in any event not less than once

annually, and the plan shall be promptly updated in light of the findings resulting from such testing.

* * * * *

(f) *Information for resolution planning.* To the extent not already provided pursuant to paragraph (b) of this section, or required by § 39.19, a systemically important derivatives clearing organization or subpart C derivatives clearing organization shall maintain information systems and controls that are designed to enable the derivatives clearing organization to provide data and information electronically, as requested by the Commission for purposes of resolution planning and during resolution under Title II of the Dodd-Frank Act, and shall provide such information and data in the form and manner specified by the

Commission. This includes the following:

(1) Information regarding the derivatives clearing organization’s organizational structure and corporate structure, activities, governing documents and arrangements, rights and powers of shareholders, and committee members and their responsibilities.

(2) Information concerning clearing members, including (for both house and customer accounts) information regarding collateral, variation margin, and contributions to default and guaranty funds.

(3) Arrangements and agreements with other derivatives clearing organizations, including offset and cross-margin arrangements.

(4) Off-balance sheet obligations or contingent liabilities, and obligations to

creditors, shareholders, or affiliates not otherwise reported under part 39.

(5) Information regarding interconnections and interdependencies with internal and external service providers, licensors, and licensees, including information regarding services provided by or to affiliates and other third parties and related agreements.

(6) Information concerning critical personnel.

(7) Any other information deemed appropriate to plan for resolution under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

■ 7. Revise Appendix A to Part 39—Form DCO Derivatives Clearing Organization Application for Registration to read as follows:

BILLING CODE 6351-01-P

OMB No. 3038-0076

COMMODITY FUTURES TRADING COMMISSION

FORM DCO
DERIVATIVES CLEARING ORGANIZATION
APPLICATION FOR REGISTRATIONGENERAL INSTRUCTIONS

Intentional misstatements or omissions of fact may constitute federal criminal violations (7 U.S.C. 13 and 18 U.S.C. 1001) or grounds for disqualification from registration.

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form DCO have the same meaning as in the Commodity Exchange Act ("Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder. All references to Commission regulations are found at 17 CFR Ch. I.

For the purposes of this Form DCO, the term "Applicant" shall include any applicant for registration as a derivatives clearing organization.

GENERAL INSTRUCTIONS

1. This Form DCO, which includes a Cover Sheet and required Exhibits (together, "Form DCO" or "application"), is to be filed with the Commission by all applicants for registration as a derivatives clearing organization, including applicants when amending a pending application, pursuant to Section 5b of the Act and the Commission's regulations thereunder. Upon the filing of an application for registration or an amendment to an application in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and comments concerning such application. No application for registration will be effective unless the Commission, by order, grants such registration.
2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).
3. With respect to the executing signature, it must be manually signed by a duly authorized representative of the Applicant as follows: If the Form DCO is filed by a corporation, it must be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it must be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it must be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it must be signed in the name of such organization or association by the managing agent, *i.e.*, a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.

4. If this Form DCO is being filed as an application for registration, all applicable items must be answered in full. If any item or Exhibit is inapplicable, this response must be affirmatively indicated by the designation “none,” “not applicable,” or “N/A,” as appropriate.
5. Under section 5b of the Act and the Commission’s regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Form DCO from any Applicant seeking registration as a derivatives clearing organization and from any registered derivatives clearing organization. Disclosure by the Applicant of the information specified in this Form DCO is mandatory prior to the start of the processing of an application for registration as a derivatives clearing organization. The information provided in this Form DCO will be used for the principal purpose of determining whether the Commission should grant or deny registration to an Applicant.

The Commission may determine that additional information is required from the Applicant in order to process its application. An Applicant is therefore encouraged to supplement this Form DCO with any additional information that may be significant to its operation as a derivatives clearing organization and to the Commission’s review of its application. A Form DCO which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form DCO, however, shall not constitute a finding that the Form DCO has been filed as required or that the information submitted is true, current or complete.
6. As provided in 17 CFR 39.3(a)(5), except in cases where the Applicant submits a request for confidential treatment with the Secretary of the Commission pursuant to the Freedom of Information Act and 17 CFR 145.9, information supplied in this application will be included routinely in the public files of the Commission and will be available for inspection by any interested person.

APPLICATION AMENDMENTS

1. 17 CFR 39.3(a)(4) requires an Applicant to promptly amend its application if it discovers a material omission or error in the application, or if there is a material change in the information contained in the application, including any supplement or amendment thereto.
2. Applicants, when filing this Form DCO for purposes of amending a pending application, must re-file an entire Cover Sheet, amended if necessary and including an executing signature, and attach thereto revised Exhibits or other materials marked to show changes, as applicable. The submission of an amendment to a pending application represents that the remaining items and Exhibits that are not amended remain true, current, and complete as previously filed.

WHERE TO FILE

This Form DCO must be filed with the Commission in the format and manner specified by the Commission.

COMMODITY FUTURES TRADING COMMISSION

FORM DCO

**DERIVATIVES CLEARING ORGANIZATION
APPLICATION FOR REGISTRATION**COVER SHEET

Exact name of Applicant as specified in charter

Address of principal executive offices

- ☐ If this is an **APPLICATION** for registration, complete in full and check here.
- ☐ If this is an **AMENDMENT** to a pending application, list below all items that are being amended and check here.

GENERAL INFORMATION

1. Name under which business is or will be conducted, if different than name specified above (include acronyms, if any):

2. If name of derivatives clearing organization is being amended, state previous derivatives clearing organization name:

3. Additional contact information:

Website URL

Main Phone Number

4. List of principal office(s) and address(es) where derivatives clearing organization activities are/will be conducted:

Office

Address

BUSINESS ORGANIZATION

5. If Applicant is a successor to a previously registered derivatives clearing organization, please complete the following:

a. Date of succession

b. Full name and address of predecessor registrant

Name

Street Address

City

State

Country

Zip Code

6. Applicant is a:

☐ Corporation

☐ Partnership (specify whether general or limited)

☐ Limited Liability Company

☐ Other form of organization (specify)

7. Date of formation:

8. Jurisdiction of organization:

List all other jurisdictions in which Applicant is qualified to do business (including non-US jurisdictions):

List all other regulatory licenses or registrations of Applicant (or exemptions from any licensing requirement) including with non-US regulators:

9. FEIN or other Tax ID#: _____

10. Fiscal Year End: _____

11. Provide contact information specifying name, title, phone numbers, mailing address and e-mail address for the following individuals:

- Name and Title

Office Phone Number

Mobile Phone Number

Mailing address

E-mail Address

- Name and Title

Office Phone Number

Mobile Phone Number

Mailing address

E-mail Address

- Name and Title

Office Phone Number

Mobile Phone Number

Mailing address

E-mail Address

- Name and Title

Office Phone Number

Mobile Phone Number

Mailing address	E-mail Address
e. The individual responsible for serving as the chief legal officer of the Applicant	
Name and Title	
Office Phone Number	Mobile Phone Number
Mailing address	E-mail Address
12. <u>Outside Service Providers</u> : Provide contact information specifying name, title, phone numbers, mailing address and e-mail address for any outside service provider retained by the Applicant as follows:	
a. Certified Public Accountant	
Name and Title	
Office Phone Number	Mobile Phone Number
Mailing address	E-mail Address
b. Legal Counsel	
Name and Title	
Office Phone Number	Mobile Phone Number
Mailing address	E-mail Address
c. Records Storage or Management	
Name and Title	
Office Phone Number	Mobile Phone Number

Mailing address		E-mail Address	
d. Business Continuity/Disaster Recovery			
Name and Title			
Office Phone Number		Mobile Phone Number	
Mailing address		E-mail Address	
e. Professional consultants providing services related to this application			
Name and Title			
Office Phone Number		Mobile Phone Number	
Mailing address		E-mail Address	
13. Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.			
Print Name and Title			
Street Address			
City	State	Country	Zip Code
SIGNATURE/REPRESENTATION			
14. Applicant has duly caused this application to be signed on its behalf by its duly authorized representative as of the _____ day of _____, 20____. Applicant and the undersigned each			

represent hereby that, to the best of their knowledge, all information contained herein is true, current and complete in all material respects. It is understood that all required items and Exhibits are considered integral parts of this Form DCO and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

Name of Applicant

By: _____

Manual Signature of Duly Authorized Person

Print Name and Title of Signatory

COMMODITY FUTURES TRADING COMMISSION**FORM DCO****DERIVATIVES CLEARING ORGANIZATION
APPLICATION FOR REGISTRATION****EXHIBIT INSTRUCTIONS**

1. The following Exhibits must be filed with the Commission by each Applicant seeking registration as a derivatives clearing organization pursuant to section 5b of the Act and the Commission's regulations thereunder.
2. The application must include a Table of Contents listing each Exhibit required by this Form DCO and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify "none," "not applicable," or "N/A," as appropriate.
3. The Exhibits must be labeled as specified in this Form DCO. If any Exhibit requires information that is related to, or may be duplicative of, information required to be included in another Exhibit, Applicant may summarize such information and provide a cross-reference to the Exhibit that contains the required information.
4. If the information required in an Exhibit involves computerized programs or systems, Applicant must submit descriptions of system test procedures, tests conducted, or test results in sufficient detail to demonstrate the Applicant's ability to comply with the core principles specified in section 5b of the Act and the Commission's regulations thereunder (the "Core Principles"). With respect to each system test, Applicant must identify the methodology used and provide the computer software, programs, and data necessary to enable the Commission to duplicate each system test as it relates to the applicable Core Principle.
5. If Applicant seeks confidential treatment of any Exhibit or a portion of any Exhibit, Applicant must mark such Exhibit with a prominent stamp, typed legend, or other suitable form of notice on each page or portion of each page stating "Confidential Treatment Requested by [Applicant]." If such marking is impractical under the circumstances, a cover sheet prominently marked "Confidential Treatment Requested by [Applicant]" should be provided for each group of records submitted for which confidential treatment is requested. Each of the records transmitted in this matter shall be individually marked with an identifying number and code so that they are separately identifiable. Applicant must also file a confidentiality request with the Secretary of the Commission in accordance with 17 CFR 145.9.

DESCRIPTION OF EXHIBITS**EXHIBIT A — GENERAL INFORMATION/COMPLIANCE**

- ☐ Attach as **Exhibit A-1**, a regulatory compliance chart setting forth each Core Principle and providing citations to the Applicant's relevant rules, policies, and procedures that address each Core Principle, and a brief summary of the manner in which Applicant will comply with each Core Principle.
- ☐ Attach as **Exhibit A-2**, a copy of Applicant's rulebook. The rulebook must consist of all the rules necessary to carry out Applicant's role as a derivatives clearing organization. Applicant must certify that its rules constitute a binding agreement between Applicant and its clearing members and, in addition to any separate clearing member agreements, establish rights and obligations between Applicant and its clearing members.
- ☐ Attach as **Exhibit A-3**, a narrative summary of Applicant's proposed clearing activities including (i) the anticipated start date of clearing products (or, if Applicant is already clearing products, the anticipated start date of activities for which Applicant is seeking an amendment to its registration), and (ii) a description of the scope of Applicant's proposed clearing activities (e.g., clearing for a designated contract market; clearing for a swap execution facility; clearing bilaterally executed products).
- ☐ Attach as **Exhibit A-4**, a detailed business plan setting forth, at a minimum, the nature of and rationale for Applicant's activities as a derivatives clearing organization, the context in which it is beginning or expanding its activities, and the nature, terms, and conditions of the products it will clear.
- ☐ Attach as **Exhibit A-5**, a list of the names of any person (i) who owns 5% or more of Applicant's stock or other ownership or equity interests; or (ii) who, either directly or indirectly, through agreement or otherwise, may control or direct the management or policies of Applicant. Provide as part of **Exhibit A-5** the full name and address of each such person, indicate the person's ownership percentage, and attach a copy of the agreement or, if there is no agreement, an explanation of the basis upon which such person exercises or may exercise such control or direction.
- ☐ Attach as **Exhibit A-6**, a list of Applicant's current officers, directors, governors, general partners, LLC managers, and members of all standing committees, as applicable, or persons performing functions similar to any of the foregoing, indicating for each:
 - a. Name and Title (with respect to a director, such title must include participation on any committee of Applicant);
 - b. Dates of commencement and, if appropriate, termination of present term of office or position;
 - c. Length of time each such person has held the same office or position;
 - d. Brief description of the business experience of each person over the last ten years;
 - e. Any other current business affiliations in the financial services industry;
 - f. If such person is not an employee of Applicant, list any compensation paid to the person as a result of his or her position at Applicant. For a director, describe any performance-based compensation;
 - g. A certification for each such person that the individual would not be disqualified under section 8a(2) of the Act or § 1.63; and
 - h. With respect to a director, indicate whether such director is an independent director, and whether such director is a market participant, and the basis for such a determination as to the director's status.

If another entity will operate or control the day-to-day business operations of the Applicant, attach for such entity all of the items indicated in **Exhibit A-6**.

- ☐ Attach as **Exhibit A-7**, a diagram of the entire corporate organizational structure of Applicant including the legal name of all entities within the organizational structure and the applicable percentage ownership among affiliated entities. Additionally, provide (i) a list of all jurisdictions in which Applicant or its affiliated entities are doing business; (ii) the registration status of Applicant and its affiliated entities, including pending applications or exemption requests and whether any applications or exemptions have been denied (*e.g.*, country, regulator, registration category, date of registration or request for exemption, date of denial, if applicable); and (iii) the address for legal service of process for Applicant (which cannot be a post office box) for each applicable jurisdiction.
- ☐ Attach as **Exhibit A-8**, a copy of the constituent documents, articles of incorporation or association with all amendments thereto, partnership or limited liability agreements, and existing bylaws, operating agreement, or instruments corresponding thereto, of Applicant. Provide a certificate of good standing or its equivalent for Applicant for each jurisdiction in which Applicant is doing business, including any foreign jurisdiction, dated within one month of the date of the Form DCO.
- ☐ Attach as **Exhibit A-9**, a brief description of any material pending legal proceeding(s) or governmental investigation(s) to which Applicant or any of its affiliates is a party or is subject, or to which any of its or their property is at issue. Include the name of the court or agency where the proceeding(s) is pending, the date(s) instituted, the principal parties involved, a description of the factual allegations in the complaint(s), the laws that were allegedly violated, and the relief sought. Include similar information as to any such proceeding(s) or any investigation known to be contemplated by any governmental agency.
- ☐ If Applicant intends to use the services of an outside service provider (including services of its clearing members or market participants), to enable Applicant to comply with any of the Core Principles, Applicant must submit as **Exhibit A-10** all agreements entered into or to be entered into between Applicant and the outside service provider, and identify (1) the services that will be provided; (2) the staff of the outside service provider who will provide the services (specifying (i) in which department or unit of the outside service provider they are employed, (ii) title, and (iii) if known, level of expertise); and (3) the Core Principles addressed by such arrangement. Each submitted agreement must include all attachments cited therein. If a submitted agreement is not final and executed, the Applicant must submit evidence that constitutes reasonable assurance that such services will be provided as soon as operations require.
- ☐ Attach as **Exhibit A-11**, documentation that demonstrates compliance with the Chief Compliance Officer (“CCO”) requirements set forth in § 39.10(c), including but not limited to:
 - a. Evidence of the designation of an individual to serve as Applicant’s CCO with full responsibility and authority to develop and enforce appropriate compliance policies and procedures;
 - b. A description of the background and skills of the person designated as the CCO and a certification that the individual would not be disqualified under section 8a(2) or 8a(3) of the Act;
 - c. Identification of to whom the CCO reports (*i.e.*, the senior officer of the derivatives clearing organization, the senior officer responsible for the derivative clearing organization’s clearing activities, or the Board of Directors of the derivatives clearing organization);
 - d. Any plan of communication or regular or special meetings between the CCO and the Board of Directors or senior officer as appropriate;
 - e. A job description setting forth the CCO’s duties;
 - f. Procedures for the remediation of noncompliance issues; and

- g. A copy of Applicant's written compliance policies and procedures (including a code of ethics and conflict of interest policy).
- ☐ Attach as **Exhibit A-12**, a description of Applicant's enterprise risk management program, and how it complies with the requirements set forth in § 39.10(d).

EXHIBIT B — FINANCIAL RESOURCES

- ☐ Attach as **Exhibit B**, documents that demonstrate compliance with the financial resources requirements set forth in § 39.11 of the Commission's regulations, including but not limited to:
 - a. General – Provide as **Exhibit B-1**:
 - (1) The most recent year-end audited financial statements of Applicant calculated in accordance with U.S. generally accepted accounting principles ("U.S. GAAP"), including the balance sheet, income statement, statement of cash flows, notes to the financial statements, and an independent auditor's report issued by a certified public accountant, dated as of the end of Applicant's last fiscal year-end prior to the date of filing the Form DCO. If Applicant does not have its own year-end audited financial statements, it may submit the audited financial statements of its direct parent company, dated as of the end of the direct parent company's last fiscal year-end prior to the date of filing the Form DCO. Applicant should be aware that once it is registered as a derivatives clearing organization it must submit its own year-end audited financial statements, as required by § 39.11(f)(2)(i), and the cost of such audit must be included in Applicant's calculation of its total projected operating costs in Exhibit B-3, as described in paragraph c(5) below;
 - (2) If Applicant is unable to submit a copy of its own audited financial statements or the audited financial statements of its direct parent company, as required by paragraph a(1) above, Applicant must provide its year-end financial statements calculated in accordance with U.S. GAAP, including the balance sheet, income statement, statement of cash flows, and notes to the financial statements, dated as of the end of Applicant's last fiscal year-end prior to the date of filing the Form DCO. These year-end financial statements must be accompanied by an independent accountant's review report issued by a certified public accountant;
 - (3) If the audited or reviewed financial statements submitted in accordance with either paragraph a(1) or paragraph a(2) above are not dated as of the end of Applicant's last fiscal quarter prior to the date of filing the Form DCO, Applicant must also provide a set of Applicant's quarterly unaudited financial statements, dated as of the end of Applicant's last fiscal quarter prior to the date of filing the Form DCO;
 - (4) If Applicant is incorporated or organized under the laws of any foreign country, it may submit the financial statements described above prepared in accordance with either U.S.GAAP or the International Financial Reporting Standards ("IFRS") issued by the International Accounting Standards Board. Applicant should be aware that once it is registered as a derivatives clearing organization it must submit financial statements prepared in accordance with U.S. GAAP or IFRS, as required by § 39.11(f)(1) and (f)(2);
 - (5) If Applicant is a start-up or will commence operations after it is registered as a derivatives clearing organization, Applicant must submit a set of pro-forma financial statements, including the balance sheet, income statement, and statement of cash flows, dated as of the first month-end after Applicant's expected start date. The set of pro-forma statements must include a narrative description of how the estimates were determined;

- (6) A narrative description of how Applicant will fund its financial resources obligations on the first day of its operation as a registered derivatives clearing organization; and
 - (7) Applicant must complete the form that is used by registered derivatives clearing organizations for quarterly reports under § 39.11(f)(1), as of the date of the most recent financial statements provided in Exhibit B-1. If Applicant is a start-up, Applicant must complete the form using estimated figures and must provide a narrative description of how the estimates were determined. The Division of Clearing and Risk will provide the current form to Applicant, upon request.
- b. **Default Resources** – Provide as **Exhibit B-2**:
 - (1) A calculation of the financial resources needed to enable Applicant to meet its requirements under § 39.11(a)(1), as of the date of the most recent financial statements provided in Exhibit B-1. Applicant must provide hypothetical default scenarios designed to reflect a variety of market conditions, and the assumptions and variables underlying the scenarios must be explained. All results of the analysis must be included. This calculation requires a start-up enterprise to estimate its largest anticipated financial exposure and explain the basis for such estimate;
 - (2) Evidence of unencumbered assets sufficient to satisfy § 39.11(a)(1), as of the date of the most recent financial statements provided in Exhibit B-1. For example, this may be demonstrated by audited financial statements or a copy of a bank balance statement(s), custodian statement(s), or statement(s) from any other institution holding such assets for each type of financial resource. A start-up enterprise may not make this demonstration through audited financial statements. If relying on § 39.11(b)(1)(v), such other resources must be thoroughly explained. If Applicant intends to use a committed line of credit or similar facility to meet the liquidity requirement pursuant to § 39.11(e)(1)(iii), Applicant must provide a copy of the applicable credit agreement(s). If relying on § 39.11(b)(1)(i) and/or (v), Applicant cannot also count these assets when demonstrating its compliance with its operating resources requirement under § 39.11(a)(2) and Applicant must detail the amounts or percentages of such assets that apply to each financial resource requirement;
 - (3) A demonstration that Applicant can perform the monthly calculations required by § 39.11(c)(1);
 - (4) A demonstration that Applicant's financial resources are sufficiently liquid as required by § 39.11(e)(1), as of the date of the most recent financial statements provided in Exhibit B-1;
 - (5) A demonstration of how Applicant will be able to maintain, at all times, the level of resources required by § 39.11(a)(1); and
 - (6) A demonstration of how default resources financial information will be updated and reported to clearing members and the public under § 39.21, and to the Commission as required by § 39.11(f)(1) and § 39.19.
- c. **Operating Resources** – Provide as **Exhibit B-3**:
 - (1) A calculation of the financial resources needed to enable Applicant to meet its requirements under § 39.11(a)(2), as of the date of the most recent financial statements provided in Exhibit B-1;
 - (2) Evidence of assets sufficient to satisfy the amount required under § 39.11(a)(2), as of the date of the most recent financial statements provided in Exhibit B-1. For example, this

may be demonstrated by audited financial statements or a copy of a bank balance statement(s), custodian statement(s), or statement(s) from any other institution holding such assets, in the name of Applicant, for each type of financial resource. A start-up enterprise may not make this demonstration through audited financial statements. If relying on § 39.11(b)(2)(ii), such other resources must be thoroughly explained. If Applicant intends to use a committed line of credit or similar facility to meet the liquidity requirement pursuant to § 39.11(e)(2), Applicant must provide a copy of the applicable credit agreement(s). If relying on § 39.11(b)(2)(i) or (ii), Applicant cannot also count these assets when demonstrating its compliance with meeting its default resources requirement under § 39.11(a)(1) and Applicant must detail the amounts or percentages of such assets that apply to each financial resource requirement;

- (3) A narrative statement demonstrating the adequacy of Applicant's physical infrastructure to carry out business operations, which includes a principal executive office (separate from any personal dwelling) with a street address (not merely a post office box number). For its principal executive office and other facilities Applicant plans to occupy in carrying out its functions as a derivatives clearing organization, a description of the space (*e.g.*, location and square footage), use of the space (*e.g.*, executive office, data center), and the basis for Applicant's right to occupy the space (*e.g.*, lease, agreement with parent company to share leased space);
- (4) A narrative statement demonstrating the adequacy of the technological systems necessary to carry out Applicant's business operations, including a description of Applicant's information technology and telecommunications systems and a timetable for full operability;
- (5) A calculation pursuant to § 39.11(c)(2), including the total projected operating costs for Applicant's first year of operation as a derivatives clearing organization, calculated on a monthly basis with an explanation of the basis for calculating each cost and a discussion of the type, nature, and number of the various costs included;
- (6) A demonstration that Applicant's financial resources are sufficiently liquid and unencumbered, as required by § 39.11(e)(2), as of the date of the most recent financial statements provided in Exhibit B-1;
- (7) A demonstration of how Applicant will maintain, at all times, the level of resources required by § 39.11(a)(2) with an explanation of asset valuation methodology and calculation of projected revenue, if applicable; and
- (8) A demonstration of how financial information for operating resources will be updated and reported to clearing members and the public under § 39.21, and to the Commission as required by § 39.11(f)(1) and § 39.19.

d. Human Resources – Provide as **Exhibit B-4**:

- (1) An organizational chart showing Applicant's current and planned staff by position and title, including key personnel (as such term is defined in § 39.2) and, if applicable, managerial staff reporting to key personnel.
- (2) A discussion and description of the staffing requirements needed to fulfill all operations and associated functions, tasks, services, and areas of supervision necessary to operate Applicant on a day-to-day basis; and
- (3) The names and qualifications of individuals who are key personnel or other managerial staff who will carry out the operations and associated functions, tasks, services, and

supervision needed to run the Applicant on day-to-day basis. In particular, Applicant must identify such individuals who are responsible for risk management, treasury, clearing operations and compliance (and specify whether each such person is an employee or consultant/agent).

EXHIBIT C — PARTICIPANT AND PRODUCT ELIGIBILITY

- Attach as **Exhibit C**, documents that demonstrate compliance with the participant and product eligibility requirements set forth in § 39.12 of the Commission's regulations, including but not limited to:
 - a. Participant Eligibility – Provide as **Exhibit C-1**, an explanation of the requirements for becoming a clearing member and how those requirements satisfy § 39.12 and, where applicable, support Applicant's compliance with other Core Principles. Applicant must address how its participant eligibility requirements comply with the core principles and regulations thereunder for financial resources, risk management, and operational capacity. The explanation also must include:
 - (1) A final version of the membership agreement between Applicant and its clearing members that sets forth the full scope of respective rights and obligations;
 - (2) A discussion of how Applicant will monitor for and enforce compliance with its eligibility criteria, especially minimum financial requirements;
 - (3) An explanation of how the eligibility criteria are objective and allow for fair and open access to Applicant. Applicant must include an explanation of the differences between various classes of membership or participation that might be based on different levels of capital and/or creditworthiness. Applicant must also include information about whether any differences exist in how Applicant will monitor and enforce the obligations of its various clearing members including any differences in access, privilege, margin levels, position limits, or other controls;
 - (4) If Applicant allows intermediation, Applicant must describe the requirements applicable to those who may act as intermediaries on behalf of customers or other market participants;
 - (5) A description of the program for monitoring the financial status of the clearing members on an ongoing basis;
 - (6) The procedures that Applicant will follow in the event of the bankruptcy or insolvency of a clearing member, which did not result in a default to Applicant;
 - (7) A description of whether and how Applicant would adjust clearing member participation under continuing eligibility criteria based on the financial, risk, or operational status of a clearing member;
 - (8) A discussion of whether Applicant's clearing members will be required to be registered with the Commission; and
 - (9) A list of current or prospective clearing members. If a current or prospective clearing member is a Commission registrant, Applicant must identify the member's designated self-regulatory organization.
 - b. Product Eligibility – Provide as **Exhibit C-2**, an explanation of the criteria used to determine the eligibility of products submitted for clearing, including:

- (1) The regulatory status of each market on which a contract to be cleared by Applicant is traded (*e.g.*, designated contract market, swap execution facility, not a registered market), and whether the market for which Applicant clears intends to join the Joint Audit Committee. For bilaterally executed agreements, contracts, or transactions not traded on a registered market, Applicant must describe the nature of the related market and its interest in having the particular bilaterally executed agreement, contract, or transaction cleared;
- (2) The criteria, and the factors considered in establishing the criteria, for determining the types of products that will be cleared;
- (3) An explanation of how the criteria for deciding what products to clear take into account the different risks inherent in clearing different agreements, contracts, or transactions and how those criteria affect maintenance of assets to support the guarantee function in varying risk environments;
- (4) A precise list of all the agreements, contracts, or transactions to be covered by Applicant's registration order, including the terms and conditions of all agreements, contracts, or transactions;
- (5) A forecast of expected volume and open interest at the outset of clearing operations as a derivatives clearing organization, after six months, and after one year of operation as a derivatives clearing organization; and
- (6) The mechanics of clearing each contract, such as reliance on exchange for physical, exchange for swap, or other substitution activity; whether the contracts are matched prior to submission for clearing or after submission; and other aspects of clearing mechanics that are relevant to understanding the products that would be eligible for clearing.

EXHIBIT D — RISK MANAGEMENT

- ☐ Attach as **Exhibit D**, documents that demonstrate compliance with the risk management requirements set forth in § 39.13 of the Commission's regulations, including but not limited to:
 - a. Risk Management Framework – Provide as **Exhibit D-1**, a copy of Applicant's written policies, procedures, and controls, as approved by Applicant's Board of Directors, that establish Applicant's risk management framework as required by § 39.13(b). Applicant must also provide a description of the composition and responsibilities of Applicant's Risk Management Committee.
 - b. Measuring Risk – Provide as **Exhibit D-2**, a narrative explanation of how Applicant has projected and will continue to measure its counterparty risk exposure, including:
 - (1) A description of the risk-based margin calculation methodology;
 - (2) The assumptions upon which the methodology was designed, including the risk analysis tools and procedures employed in the design process;
 - (3) An explanation as to whether other margining methodologies were considered and, if so, why they were not chosen;
 - (4) A demonstration of the margin methodology as applied to real or hypothetical clearing scenarios;

- (5) A description of the data sources for inputs used in the methodology, *e.g.*, historical price data reflecting market volatility over various periods of time;
 - (6) A description of the sources of price data for the measurement of current exposures and the valuation models for addressing circumstances where pricing data is not readily available or reliable;
 - (7) The frequency and circumstances under which the margin methodology will be reviewed and the criteria for deciding how often to review and whether to modify a margin methodology;
 - (8) An independent validation of Applicant's systems for generating initial margin requirements, including its theoretical models;
 - (9) The frequency of measuring counterparty risk exposures (mark to market), whether counterparty risk exposures are routinely measured on an intraday basis, whether Applicant has the operational capacity to measure counterparty risk exposures on an intraday basis, and the circumstances under which Applicant would conduct a non-routine intraday measurement of counterparty risk exposures;
 - (10) Preliminary forecasts regarding future counterparty risk exposure and assumptions upon which such forecasts of exposure are based;
 - (11) A description of any systems or software that Applicant will require clearing members to use in order to margin their positions in their internal bookkeeping systems, and whether and under what terms and conditions Applicant will provide such systems or software to clearing members; and
 - (12) A description of the extent to which counterparty risk can be offset through the clearing process (*i.e.*, the limitations, if any, on Applicant's duty to fulfill its obligations as the buyer to every seller and the seller to every buyer).
- c. Limiting Risk – Provide as **Exhibit D-3**, a narrative discussion addressing the specifics of Applicant's clearing activities, including:
- (1) How Applicant will collect financial information about its clearing members and other traders or market participants, monitor price movements, and mark to market, on a daily basis, the products and/or portfolios it clears;
 - (2) How Applicant will monitor accounts carried by clearing members, the accumulation of positions by clearing members and other market participants, and compliance with risk limits; and how it will use large trader information;
 - (3) How Applicant will determine variation margin levels and outstanding initial margin due;
 - (4) How Applicant will identify unusually large pays on a proactive basis before they occur;
 - (5) Whether and how Applicant will compare price moves and position information to historical patterns and to the financial information collected from its clearing members; and how it will identify unusually large pays on a daily basis;
 - (6) How Applicant will use various risk tools and procedures such as: (i) value-at-risk calculations; (ii) stress testing; (iii) back testing; and/or (iv) other risk management tools and procedures. If Applicant is currently clearing products for which it is seeking registration as a derivatives clearing organization, provide back testing results for actual

portfolios containing each such product, which demonstrate margin coverage at least at the 99 percent confidence level over the previous 252 trading days;

- (7) How Applicant will communicate with clearing members, settlement banks, other derivatives clearing organizations, designated contract markets, swap execution facilities, major swap participants, swap data repositories, and other entities in emergency situations or circumstances that might require immediate action by the Applicant;
 - (8) How Applicant will monitor risk outside of its business hours;
 - (9) How Applicant will review its clearing members' risk management practices;
 - (10) Whether Applicant will impose credit limits and/or employ other risk filters (such as automatic system denial of entry of trades under certain conditions);
 - (11) Plans for handling "extreme market volatility" and how Applicant defines that term;
 - (12) An explanation of how Applicant will be able to offset positions in order to manage risk including: (i) ensuring both Applicant and clearing members have the operational capacity to do so; and (ii) liquidity of the relevant market, especially with regard to bilaterally executed products;
 - (13) Plans for managing accounts that are "too big" to liquidate and for conducting "what if" analyses on these accounts;
 - (14) If options are involved, how Applicant will manage the different and more complex risk presented by these products;
 - (15) If Applicant intends to clear swaps, whether and how often Applicant will offer multilateral portfolio compression exercises for its clearing members; and
 - (16) If Applicant intends to clear credit default swaps, credit default futures, and any derivatives that reference either credit default swaps or credit default futures, how Applicant will manage the unique risks associated with clearing these products, including but not limited to liquidity risk, currency risk, seasonable risk, compounding risk, jump-to-default risk or similar jump risk.
- d. Existence of collateral (funds and assets) to apply to losses resulting from realized risk – Provide as **Exhibit D-4**:
- (1) An explanation of the factors, process, and methodology used for calculating and setting required collateral levels, the required inputs, the appropriateness of those inputs, and an illustrative example;
 - (2) An analysis supporting the sufficiency of Applicant's collateral levels for capturing all or most price moves that may take place in one settlement cycle;
 - (3) A description of how Applicant will value open positions and collateral assets;
 - (4) A description and explanation of the forms of assets allowed as collateral, why they are acceptable, and whether there are any haircuts or concentration limits or charges on certain kinds of assets, including how often any such haircuts and concentration limits or charges are reviewed;
 - (5) An explanation of how and when Applicant will collect collateral, whether and under what circumstances it will collect collateral on an intraday basis, and what will happen

if collateral is not received in a timely manner. Include a proposed collateral collection schedule based on changes in market positions and collateral values; and

- (6) If options are involved, a full explanation of how Applicant will manage the associated risk through the use of collateral including, if applicable, a discussion of Applicant's option pricing model, how it establishes its implied volatility scan range, and other matters related to the complex matter of managing the risk associated with the clearing of option contracts.
- e. Orderly wind-down plan – Provide as **Exhibit D-5**, the derivatives clearing organization's orderly wind-down plan, and a demonstration that the plan complies with the requirements of § 39.13(k).

EXHIBIT E — SETTLEMENT PROCEDURES

- Attach as **Exhibit E**, documents that demonstrate compliance with the settlement procedures requirements set forth in § 39.14 of the Commission's regulations, including but not limited to:
 - a. Settlement – Provide as **Exhibit E-1**, a full description of the daily process of settling financial obligations on all open positions being cleared. This must include:
 - (1) Procedures for completing settlements on a timely basis during normal market conditions (and no less frequently than once each business day);
 - (2) Procedures for completing settlements on a timely basis in varying market circumstances including in the event of a default by the clearing member creating the largest financial exposure for Applicant in extreme but plausible market conditions;
 - (3) A description of how contracts will be marked to market on at least a daily basis;
 - (4) Identification of the settlement banks used by Applicant (including identification of the lead settlement bank, if applicable) and a copy of Applicant's settlement bank agreement(s). Such settlement bank agreements must (i) outline daily cash settlement procedures, (ii) state clearly when settlement fund transfers will occur, (iii) provide procedures for settlements on bank holidays when the markets are open, and (iv) ensure that settlements are final when effected;
 - (5) Identification of settlement banks that Applicant will allow its clearing members to use for margin calls and variation settlements;
 - (6) A description of the criteria and review process used by Applicant when selecting settlement banks to be used by the Applicant or its clearing members, including criteria addressing the capitalization, creditworthiness, access to liquidity, operational reliability, and regulation or supervision of such settlement banks;
 - (7) Procedures for monitoring the continued appropriateness of each approved settlement bank, including a description of how Applicant monitors the full range and concentration of its exposures to each settlement bank;
 - (8) The specific means by which settlement instructions are communicated from Applicant to the settlement bank(s);
 - (9) A timetable showing the flow of funds associated with the settlement of financial obligations with respect to all cleared products for a 24-hour period or such other

settlement timeframe specified with respect to a particular product; this may be presented in the form of a chart, as in the following example:

FORM DCO - SAMPLE SETTLEMENT CYCLE CHART [Specify U.S. Dollar or other currency as applicable]	
TRADE DATE = T [INSERT TIME ZONE] [INSERT EXACT TIMES BELOW]	EXAMPLE OF SETTLEMENT ACTIVITY FOR WHICH TIMES SHOULD BE PROVIDED
T: ____ pm	Last market closes (end of regular trading hours).
T: Approx. ____ pm	DCO/DCM/SEF establishes daily settlement price for each product based on information generated by its [INSERT NAME OF APPLICABLE CLEARING SYSTEM].
T: By ____ pm	Clearing members' position information for intraday settlement is obtained from DCO's clearing system.
T+1: Approx. ____ am	DCO provides daily initial margin (IM) and settlement variation/option premium (SVOP) amounts to clearing members and banks.
T+1: By ____ am	Banks commit to pay daily IM and SVOP amounts.
T+1: Approx. ____ am	Banks pay daily IM and SVOP amounts from clearing members to DCO.
T+1: Approx. ____ am	Banks pay daily IM and SVOP amounts from DCO to clearing members.
T: Approx. ____ pm	DCO/DCM/SEF determines prices for intraday settlement.
T: Approx. ____ pm	Clearing members' position information for intraday settlement is obtained from DCO's clearing system.
T: By approx. ____ pm	DCO provides intraday IM and SVOP amounts to banks and clearing members.
T: By ____ pm	Banks commit to pay intraday IM and SVOP amounts.
T: Approx. ____ pm	Banks pay intraday IM and SVOP amounts from clearing members to DCO.
T: Approx. ____ pm	Banks pay intraday IM and SVOP amounts from DCO to clearing members.

- (10) A description of what happens in the event that there are insufficient funds in a clearing member's settlement account;
- (11) An explanation of how and when Applicant will collect variation margin, whether and under what circumstances it will collect variation margin on an intraday basis, what will

happen if variation margin is not received in a timely manner, and a proposed variation margin collection schedule based on changes in market prices;

- (12) All the information above, to the extent relevant, for any products cleared that may be denominated in a foreign currency; and
 - (13) With respect to physical settlements, identify Applicant's rules that clearly state each obligation of Applicant with respect to physical deliveries, and explain how Applicant intends to identify and manage risks arising from physical settlement.
- b. Recordkeeping – Provide as **Exhibit E-2**, a full description of the following:
- (1) The nature and quality of the information collected concerning the flow of funds involved in clearing and settlement; and
 - (2) How such information will be recorded, maintained, and accessed.
- c. Relationships with other clearing organizations – Provide as **Exhibit E-3**, a description of Applicant's relationships with other derivatives clearing organizations, clearing agencies, financial market utilities, or foreign entities that perform similar functions, including how compliance with the terms and conditions of agreements or arrangements with such other entities will be satisfied, *e.g.*, any netting or offset arrangements, cross-margining, portfolio margining, linkage, common banking, common clearing programs or limited guaranty agreements or arrangements.

EXHIBIT F — TREATMENT OF FUNDS

- ☐ Attach as **Exhibit F**, documents that demonstrate compliance with the treatment of funds requirements set forth in § 39.15 of the Commission's regulations, including but not limited to:
 - a. Safe custody – Provide as **Exhibit F-1**, documents that demonstrate:
 - (1) How Applicant will ensure the safekeeping of funds and assets belonging to clearing members and their customers in depositories and how Applicant will minimize the risk of loss or of delay in accessing such funds and assets;
 - (2) The depositories that will hold such funds and assets and any written agreements between or among such depositories, Applicant, or its clearing members regarding the legal status of the funds and assets and the specific conditions or prerequisites for movement of the funds and assets; and
 - (3) How Applicant will limit the concentration of risk in depositories where such funds and assets are deposited.
 - b. Segregation of customer and proprietary funds and assets – Provide as **Exhibit F-2**, documents that demonstrate:
 - (1) The appropriate segregation of customer funds and assets and associated acknowledgment documentation, including the acknowledgment letters required under §§ 1.20 and/or 22.5, as applicable, for each bank or trust company that Applicant will use for the deposit of customer funds and assets; and
 - (2) Requirements or restrictions regarding commingling customer funds and assets with proprietary funds and assets, obligating customer funds and assets for any purpose other than to purchase, clear, and settle the products Applicant is clearing, procedures regarding customer funds and assets which are subject to cross-margin or similar agreements, and any other aspects of the segregation of customer funds and assets.

- c. Investment standards – Provide as **Exhibit F-3**, documents that demonstrate:
- (1) Policies and procedures to ensure that funds and assets belonging to clearing members and their customers would only be invested in instruments with minimal credit, market, and liquidity risks, and that any investment of customer funds or assets would comply with the requirements of § 1.25; and
 - (2) How Applicant will obtain and keep associated records and data regarding the details of such investments.

EXHIBIT G — DEFAULT RULES AND PROCEDURES

- ☐ Attach as **Exhibit G**, documents that demonstrate compliance with the default rules and procedures requirements set forth in § 39.16 of the Commission's regulations, including but not limited to:
- a. Default Management Plan – Applicant must provide a copy of its written default management plan which must contain all of the information required by § 39.16(b), along with Applicant's most recently documented results of a test of its default management plan.
 - b. Definition of default – Applicant must describe or otherwise document:
 - (1) The events (activities, lapses, or situations) that will constitute a clearing member default;
 - (2) What action Applicant can take upon a default and how Applicant will otherwise enforce the rules applicable in the event of default, including the steps and the sequence of the steps that will be followed. Identify whether a Default Management Committee exists and, if so, its role in the default process; and
 - (3) An example of a hypothetical default scenario and the results of the default management process used in the scenario.
 - c. Remedial action – Applicant must describe or otherwise document:
 - (1) The authority and methods by which Applicant may take appropriate action in the event of the default of a clearing member which may include, among other things, liquidating positions, hedging, auctioning, allocating (including any obligations of clearing members to participate in auctions or to accept allocations), and transferring of customer accounts to another clearing member (including an explanation of the movement of positions and collateral on deposit); and
 - (2) Actions taken by a clearing member or other events that would put a clearing member on Applicant's "watch list" or similar device.
 - d. Process to address shortfalls – Applicant must describe or otherwise document:
 - (1) Procedures for the prompt application of Applicant and/or clearing member financial resources to address monetary shortfalls resulting from a default;
 - (2) How Applicant will make publicly available its default rules including a description of the priority of application of financial resources in the event of default (*i.e.*, the "waterfall"); and
 - (3) How Applicant will take timely action to contain losses and liquidity pressures and to continue to meet each obligation of Applicant.

- e. Use of cross-margin programs – Describe or otherwise document, as applicable, how cross-margining programs will provide for fair and efficient means of covering losses in the event of a default of any clearing member participating in the program.
- f. Customer priority rule – Describe or otherwise document rules and procedures regarding priority of customer accounts over proprietary accounts of defaulting clearing members and, where applicable, specifically in the context of specialized margin reduction programs such as cross-margining or common banking arrangements with other derivatives clearing organizations, clearing agencies, financial market utilities, or foreign entities that perform similar functions.

EXHIBIT H — RULE ENFORCEMENT

- Attach as **Exhibit H**, documents that demonstrate compliance with the rule enforcement requirements set forth in § 39.17 of the Commission's regulations, including but not limited to:
 - a. Surveillance – Describe or otherwise document arrangements and resources for the effective monitoring of compliance with Applicant's rules.
 - b. Enforcement – Describe or otherwise document:
 - (1) Arrangements and resources for enforcing compliance with Applicant's rules and addressing instances of non-compliance, including disciplinary tools such as limiting, suspending, or terminating a clearing member's access or member privileges; and
 - (2) The standards and any procedural protections Applicant will follow in imposing any such enforcement measure.
 - c. Dispute resolution – Describe or otherwise document arrangements and resources for resolution of disputes between clearing members and Applicant.

EXHIBIT I — SYSTEM SAFEGUARDS

- Attach as **Exhibit I**, documents that demonstrate compliance with the system safeguards requirements set forth in § 39.18 of the Commission's regulations, including but not limited to:
 - a. A description of Applicant's program of risk analysis and oversight with respect to its operations and automated systems. This program must be designed to ensure daily processing, clearing, and settlement of transactions and address each of the following categories of risk:
 - (1) Information security;
 - (2) Business continuity-disaster recovery planning and resources;
 - (3) Capacity and performance planning;
 - (4) Systems operations;
 - (5) Systems development and quality assurance; and
 - (6) Physical security and environmental controls.
 - b. An explanation of how Applicant will establish and maintain resources that allow for the fulfillment of its program of risk analysis and oversight with respect to its operations and automated systems, and a description of such resources, including:
 - (1) A description of how Applicant will periodically verify that its resources are adequate to ensure daily processing, clearing, and, settlement;

- (2) A demonstration that Applicant's automated systems are reliable, secure, and have (and will continue to have) adequate scalable capacity;
 - (3) A description of the physical, technological and personnel resources and procedures used by Applicant as part of its business continuity and disaster recovery plan, and support for the conclusion that these resources are sufficient to enable the Applicant to resume daily processing, clearing, and settlement no later than the next business day following a disruption; and
 - (4) A statement identifying which such resources are Applicant's own resources and which are provided by a service provider (outsourced). For resources that are outsourced, provide (i) all contracts governing the outsourcing arrangements, including all schedules and other supplemental materials, and (ii) a demonstration that Applicant employs personnel with the expertise necessary to enable them to supervise the service provider's delivery of the services.
- c. An explanation of how Applicant will ensure the proper functioning of its systems, including its program for the periodic objective testing and review of its systems and back-up facilities (including all of its own and outsourced resources), and verification that all such resources will work effectively together;
 - d. Identification of the persons conducting the testing, including information as to their qualifications and independence;
 - e. A description of Applicant's emergency procedures, including a copy of its written plan for business continuity and disaster recovery and a description of how Applicant will coordinate its business continuity and disaster recovery plan (including testing) with its clearing members and providers of essential services such as telecommunications, power, and water; and
 - f. A description of how Applicant will report exceptional events and planned changes to the Commission as required by §§ 39.18(g) and 39.18(h).

EXHIBIT J — REPORTING

- ☐ Attach as **Exhibit J**, documents that demonstrate compliance with the reporting requirements set forth in § 39.19 of the Commission's regulations, including but not limited to:
 - a. A description of how Applicant will make available to Commission staff all the information Commission staff needs in order to carry out effective oversight, *e.g.*, the internal staff procedures Applicant will follow to provide such information. If the laws or regulations of any foreign country in which Applicant is incorporated or organized require any approval(s) by a foreign regulatory authority with respect to the provision of any information to the Commission, Applicant must submit evidence that such approval(s) have been obtained.
 - b. A representation that the Applicant will submit the information required to satisfy the daily, quarterly, annual, event-specific, and requested reporting requirements specified in § 39.19(c) of the Commission's regulations, in the format and manner and within the time specified by the Commission.

EXHIBIT K — RECORDKEEPING

- ☐ Attach as **Exhibit K**, documents that demonstrate compliance with the recordkeeping requirements set forth in § 39.20 of the Commission's regulations, including but not limited to:
 - a. Applicant's recordkeeping and record retention policies and procedures;

- b. The different activities related to the entity as a derivatives clearing organization for which it must maintain records;
- c. The manner in which records relating to swaps and swap data are gathered and maintained; and
- d. How Applicant will satisfy the performance standards of § 1.31 as applicable to derivatives clearing organizations, including:
 - (1) What “full” or “complete” will encompass with respect to each type of book or record that will be maintained;
 - (2) The form and manner in which books or records will be compiled and maintained with respect to each type of activity for which such books or records will be kept;
 - (3) Confirmation that books and records will be open to inspection by any representative of the Commission or of the U.S. Department of Justice;
 - (4) How long books and records will be readily available and how they will be made readily available during the first two years; and
- e. How long books and records will be maintained (and confirmation that, in any event, they will be maintained as required in § 1.31).

EXHIBIT L — PUBLIC INFORMATION

- ☐ Attach as **Exhibit L**, documents that demonstrate compliance with the public information requirements set forth in § 39.21 of the Commission’s regulations, including but not limited to:
 - a. Applicant’s procedures for making its rulebook, a list of all current clearing members, and all other information listed in § 39.21(c) readily available to the general public, in a timely manner, by posting such information on Applicant’s website;
 - b. The URLs for Applicant’s website for each item listed in § 39.21(c)(1) through (c)(9).
 - c. Any other information routinely made available to the public by Applicant;
 - d. How Applicant will make information available to clearing members and market participants in order to allow such persons to become familiar with Applicant’s procedures before participating in clearing operations; and
 - e. How clearing members will be informed of their specific rights and obligations preceding a default and upon a default, and of the specific rights, options, and obligations of Applicant preceding and upon a clearing member’s default.

EXHIBIT M — INFORMATION SHARING

- ☐ Attach as **Exhibit M**, documents that demonstrate compliance with the information sharing requirements set forth in § 39.22 of the Commission’s regulations, including but not limited to:
 - a. The appropriate and applicable information sharing agreements to which Applicant is, or intends to be, a party including any domestic or international information-sharing agreements or arrangements, whether formal or informal, which involve or relate to Applicant’s operations, especially as it relates to measuring and addressing counterparty risk;
 - b. A description of the types of information expected to be shared and how that information will be shared;

- c. An explanation as to how information obtained pursuant to any information-sharing agreements or arrangements would be used to further the objectives of Applicant's risk management program and any of its surveillance programs including financial surveillance and continuing eligibility of its clearing members; and
- d. An explanation as to how Applicant expects to obtain accurate information pursuant to the information-sharing agreement or arrangement and the mechanisms or procedures which would allow for timely use and application of all information.

EXHIBIT N — ANTITRUST CONSIDERATIONS

- ☐ Attach as **Exhibit N**, documents that demonstrate compliance with the antitrust considerations requirements set forth in § 39.23 of the Commission's regulations, including but not limited to policies or procedures to ensure compliance with the antitrust considerations requirements.

EXHIBIT O — GOVERNANCE

- ☐ Attach as **Exhibit O**, documents that demonstrate compliance with the governance fitness standards requirements set forth in § 39.24 of the Commission's regulations, including but not limited to:
 - a. A copy of:
 - (1) The charter (or mission statement) of Applicant (if not attached as **Exhibit A-8**);
 - (2) The charter (or mission statement) of Applicant's Board of Directors, each committee composed entirely or in part of members of the Board of Directors (including any Executive Committee), as well as each other committee that has the authority to amend or constrain actions of Applicant's Board of Directors (if not attached as **Exhibit A-8**);
 - (3) If another entity "operates" the Applicant, the charter (or mission statement) of such entity's Board of Directors (if not attached as **Exhibit A-8**); and a description of the manner in which the Applicant will ensure that such entity's officers, directors, employees, and agents and such entity's books and records shall be subject to the authority of the Commission pursuant to the Act and the Commission's regulations thereunder; and
 - (4) An internal organizational chart showing the lines of responsibility and accountability for each operational unit.
 - b. A description of how Applicant's governance arrangements place a high priority on Applicant's safety and efficiency and explicitly support the stability of the broader financial system and other relevant public interest considerations of clearing members, customers of clearing members, and other relevant stakeholders;
 - c. A description of how the Board of Directors makes certain that Applicant's design, rules, overall strategy, and major decisions appropriately reflect the legitimate interests of clearing members, customers of clearing members, and other relevant stakeholders;
 - d. A description of how major decisions of the Board of Directors are clearly disclosed to clearing members and other relevant stakeholders, and will be disclosed to the Commission, and how major decisions of the Board of Directors having a broad market impact are clearly disclosed to the public, to the extent consistent with other statutory and regulatory requirements on confidentiality and disclosure;
 - e. A description of how Applicant's governance arrangements are disclosed, as appropriate, to clearing members, customers of clearing members, Applicant's owners, and the public, and will

be disclosed to the Commission, to the extent consistent with other statutory and regulatory requirements on confidentiality and disclosure;

- f. A description of how Applicant's governance arrangements: (1) describe the structure pursuant to which the Board of Directors, committees, and management operate; (2) include clear and direct lines of responsibility and accountability; (3) clearly specify the roles and responsibilities of the Board of Directors and its committees, including the establishment of a clear and documented risk management framework; and (4) clearly specify the roles and responsibilities of management;
- g. A description of the procedures pursuant to which Applicant's Board of Directors oversees Applicant's chief risk officer, risk management committee, and material risk decisions;
- h. A description of how Applicant provides risk management, internal control, and internal audit personnel with sufficient independence, authority, resources, and access to the Board of Directors so that the operations of Applicant are consistent with its risk management framework;
- i. A description of how Applicant's governance arrangements assign responsibility and accountability for risk decisions, including in crises and emergencies, and assign responsibility for implementing default rules and procedures, system safeguard rules and procedures, and as applicable, recovery and wind-down plans;
- j. A description of the fitness standards applicable to members of the Board of Directors, members of any disciplinary committee, clearing members, any other individual or entity with direct access to settlement or clearing activities, and any party affiliated with any of the above individuals or entities, including a description or other documentation explaining how Applicant will collect and verify information that supports compliance with the fitness standards and how Applicant will enforce compliance with such standards; and
- k. A description of how Applicant will make certain that: (1) its Board of Directors consists of suitable individuals having appropriate skills and incentives; (2) the performance of the Board of Directors and individual directors are reviewed on a regular basis; and (3) managers have the appropriate experience, skills, and integrity necessary to discharge operational and risk management responsibilities.

EXHIBIT P — CONFLICTS OF INTEREST

- ☐ Attach as **Exhibit P**, documents that demonstrate compliance with the conflicts of interest requirements set forth in § 39.25 of the Commission's regulations, including but not limited to:
 - a. A description of Applicant's rules to minimize conflicts of interest in its decision-making process and how it enforces those rules;
 - b. A description of Applicant's process for resolving such conflicts of interest or for making fair and non-biased decisions in the event of a conflict of interest; and
 - c. A description of Applicant's procedures for identifying, addressing, and managing conflicts of interest involving members of its Board of Directors.

EXHIBIT Q — COMPOSITION OF GOVERNING BOARDS

- ☐ Attach as **Exhibit Q**, documents that demonstrate compliance with the composition of governing boards requirements set forth in § 39.26, including but not limited to documentation describing the composition of Applicant's Board of Directors, including the number of market participants.

EXHIBIT R — LEGAL RISK CONSIDERATIONS

- ☐ Attach as **Exhibit R**, documents that demonstrate compliance with the legal risk considerations requirements set forth in § 39.27 of the Commission's regulations, including but not limited to:
- a. A discussion of how Applicant operates pursuant to a well-founded, transparent, and enforceable legal framework that addresses each aspect of the activities of Applicant. The framework must provide for Applicant to act as a counterparty, including, as applicable:
 - (1) Novation;
 - (2) Netting arrangements;
 - (3) Applicant's interest in collateral (including margin);
 - (4) The steps that Applicant can take to address a default of a clearing member, including but not limited to, the unimpeded ability to liquidate collateral and close out or transfer positions in a timely manner;
 - (5) Finality of settlement and funds transfers that are irrevocable and unconditional when effected (no later than when Applicant's accounts are debited and credited); and
 - (6) Other significant aspects of Applicant's operations, risk management procedures, and related requirements.
 - b. If Applicant provides, or will provide, clearing services outside the United States, Applicant must provide a memorandum from local counsel analyzing insolvency issues in the foreign jurisdiction where Applicant is based, which should describe or otherwise document:
 - (1) The manner in which Applicant's clearing rules and procedures pertaining to customer funds ("FCM Clearing Rules") segregate such funds, in accordance with section 4d of the Act and the Commission's regulations ("ring-fence");
 - (2) The basis for the conclusion that the arrangements to ring-fence customer funds set forth in the FCM Clearing Rules would be effective, under any relevant non-U.S. law or regulation, in the insolvency of a futures commission merchant ("FCM") clearing member or of the Applicant itself, including how such customer funds would not, therefore, form part of the general estate for distribution to the unsecured creditors of an insolvent FCM clearing member or of the Applicant;
 - (3) The basis for the conclusion that the laws of the jurisdiction in which Applicant is domiciled and the laws of any other relevant jurisdiction (*e.g.*, other jurisdictions in which customer funds may be held) support the enforceability of the FCM Clearing Rules;
 - (4) The basis for the conclusion that a local court or insolvency official in the jurisdiction in which Applicant is domiciled (and any other relevant jurisdiction) respect the choice of U.S. law in governing specific aspects of the FCM Clearing Rules to determine the extent of rights that Applicant has with respect to customer funds and be bound to follow the FCM Clearing Rules with respect to customer funds. The memorandum should explain whether the application of U.S. law to customer funds would contravene any public policy in the jurisdiction in which Applicant is domiciled (or any other relevant jurisdiction);
 - (5) The basis for the conclusion that the FCM Clearing Rules are enforceable (*i.e.*, the conclusion that the Applicant may take default action, pursuant to the FCM Clearing Rules, discretely against each FCM clearing member in respect of FCM customer

accounts without interference from the law of insolvency applicable to the FCM clearing member or to Applicant); and

- (6) The basis for the conclusion that following the default of an FCM clearing member or of the Applicant, Applicant will be able to comply with the provisions of the U.S. Bankruptcy Code and Commission regulations with respect to the pro rata distribution requirements set forth therein, as well as comply with any relevant order or direction by a U.S. court (including a bankruptcy court) regarding the distribution of customer funds.

In all cases, the memorandum must include separate discussions of the legal analysis and conclusions with respect to: (a) the default of the Applicant, and (b) the default of an FCM clearing member.

COMMODITY FUTURES TRADING COMMISSION

SUBPART C ELECTION FORM

GENERAL INSTRUCTIONS: Intentional misstatements or omissions of fact may constitute federal criminal violations (7 U.S.C. 13 and 18 U.S.C. 1001).

DEFINITIONS

Unless the context requires otherwise, all terms used in this Subpart C Election Form have the same meaning as in the Commodity Exchange Act ("Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder. All references to Commission regulations are found at 17 CFR Ch. I.

For purposes of this Subpart C Election Form, the term "Applicant" shall mean a derivatives clearing organization that is filing this Subpart C Election Form with a Form DCO as part of an application for registration as a derivatives clearing organization pursuant to section 5b of the Act and 17 CFR 39.3(a).

GENERAL INSTRUCTIONS

1. Any derivatives clearing organization requesting an election to become subject to subpart C of part 39 of the Commission's regulations must file this Subpart C Election Form. The Subpart C Election Form includes the election to be subject to the provisions of subpart C of part 39 of the Commission's regulations, certain required certifications, disclosures, and exhibits, and any supplements or amendments thereto filed pursuant to 17 CFR 39.31(b) or (c) (collectively, the "Subpart C Election Form").
2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).
3. The signatures required in this Subpart C Election Form shall be the manual signatures of a duly authorized representative of the derivatives clearing organization as follows: If the Subpart C Election Form is filed by a corporation, it must be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it must be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it must be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it must be signed in the name of such organization or association by the managing agent, *i.e.*, a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.
4. All applicable items must be answered in full.
5. Under section 5b of the Act and the Commission's regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Subpart C Election Form from any Applicant seeking registration as a derivatives clearing organization and from any registered derivatives clearing organization.
6. Disclosure of the information specified in this Subpart C Election Form is mandatory prior to the processing of the election to become a derivatives clearing organization subject to the provisions of subpart C of part 39 of the Commission's regulations. The Commission may determine that additional information is required in order to process such election.
7. A Subpart C Election Form that is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Subpart C Election Form, however, shall not constitute a finding that the Subpart C Election Form is acceptable as filed or that the information is true, current or complete.
8. As provided in 17 CFR 39.31(d), except in cases where a derivatives clearing organization submits a request for confidential treatment with the Secretary of the Commission pursuant to the Freedom of Information Act and 17 CFR 145.9, information supplied in this Subpart C Election Form will be included routinely in the public files of the Commission and will be made available for inspection by any interested person.

APPLICATION AMENDMENTS

1. 17 CFR 39.31(b)(3) and (c)(4) require a derivatives clearing organization that has submitted a Subpart C Election Form to promptly amend its Subpart C Election Form if it discovers a material omission or error in, or if there is a material

change in, the information provided to the Commission in the Subpart C Election Form or other information provided in connection with the Subpart C Election Form.

2. When amending a Subpart C Election Form, a derivatives clearing organization must re-file the Election and Certifications page, amended if necessary, and including all required executing signatures, and attach thereto revised exhibits or other materials marked to show changes, as applicable.

WHERE TO FILE

1. This Subpart C Election Form must be filed electronically with the Secretary of the Commission in the format and manner specified by the Commission.
2. Any supplemental information must be filed electronically with the Division of Clearing and Risk, or any successor division, in the format and manner specified by the Commission.

COMMODITY FUTURES TRADING COMMISSION

SUBPART C ELECTION FORM

ELECTION AND CERTIFICATIONS

Exact Name of the Derivatives Clearing Organization
(as set forth in its charter, if an Applicant,
or as set forth in its most recent order of registration, if registered with the Commission)

- ☐ Check here and complete sections 1 and 3 below, if the organization is an Applicant.
- ☐ Check here and complete sections 2 and 3 below, if the organization currently is registered with the Commission as a derivatives clearing organization.
1. The derivatives clearing organization named above hereby elects to become subject to the provisions of subpart C of part 39 of the Commission's regulations in the event that the Commission approves its application for registration as a derivatives clearing organization.

The derivatives clearing organization and the undersigned each certify that, in the event that the Commission approves the derivatives clearing organization's application for registration and permits its election to become subject to subpart C of part 39 of the Commission's regulations, the derivatives clearing organization will remain in compliance with the provisions contained in subpart C of part 39 of the Commission's regulations until the election is rescinded pursuant to 17 CFR 39.31(e).

Name of Derivatives Clearing Organization

By: _____

Manual Signature of Duly Authorized Person

Print Name and Title of Signatory

2. The derivatives clearing organization named above hereby elects to become subject to the provisions of subpart C of part 39 of the Commission's regulations as of:

_____ ("Effective Date")

[insert date, which must be **at least 10 business days after the date this Subpart C Election Form is filed with the Commission**].

The derivatives clearing organization and the undersigned each certify that, as of the Effective Date set forth above, the derivatives clearing organization shall be in compliance with subpart C of part 39 of the Commission's regulations, and that the derivatives clearing organization will remain in compliance with provisions contained in subpart C of part 39 of the Commission's regulations until this election is rescinded pursuant to 17 CFR 39.31(e).

Name of Derivatives Clearing Organization

By:

Manual Signature of Duly Authorized Person

Print Name and Title of Signatory

3. The derivatives clearing organization named above has duly caused this Subpart C Election Form (which includes, as an integral part thereof, the Election and Certifications and all Disclosures and Exhibits) to be signed on its behalf by its duly authorized representative as of the _____ day of _____, 20____. The derivatives clearing organization and the undersigned each represent hereby that, to the best of their knowledge, all information contained in this Subpart C Election Form is true, current and complete in all material respects. It is understood that all required items including, without limitation, the Election and Certifications and Disclosures and Exhibits, are considered integral parts of this Subpart C Election Form.

Name of Derivatives Clearing Organization

By:

Manual Signature of Duly Authorized Person

Print Name and Title of Signatory

COMMODITY FUTURES TRADING COMMISSION**PART 39, SUBPART C ELECTION FORM****DISCLOSURES AND EXHIBITS**

Each derivatives clearing organization that requests an election to become subject to the provisions set forth in subpart C of part 39 of the Commission's regulations shall provide the Disclosures and Exhibits set forth below:

DISCLOSURES:

The derivatives clearing organization shall publish on its website in a readily identifiable location, the following documents that are required to be completed pursuant to 17 CFR 39.37:

1. The derivatives clearing organization's responses to the Disclosure Framework for Financial Market Infrastructures ("Disclosure Framework"), published by the Committee on Payments and Market Infrastructure ("CPMI") and the Board of the International Organization of Securities Commissions ("IOSCO"). The derivatives clearing organization's responses must be completed in accordance with section 2.0 and Annex A of the Disclosure Framework and must fully explain how the derivatives clearing organization observes the Principles for Financial Market Infrastructures ("PFMIs") published by CPMI-IOSCO.

Provide the URL to the specific page on the derivatives clearing organization's website where its responses to the Disclosure Framework may be found:

2. The most recent quantitative disclosure prepared by the derivatives clearing organization that satisfies the Public Quantitative Disclosure Standards for Central Counterparties published by CPMI-IOSCO ("Quantitative Disclosure").

If applicable, provide the URL to the specific page on the derivatives clearing organization's website where its Quantitative Disclosure may be found:

EXHIBITS:**EXHIBIT INSTRUCTIONS:**

1. The derivatives clearing organization must include a Table of Contents listing each Exhibit required by this Subpart C Election Form.
2. If the derivatives clearing organization is an Applicant, in its Form DCO, the derivatives clearing organization may summarize such information and provide a cross-reference to the Exhibit in this Subpart C Election Form that contains the required information.

The derivatives clearing organization shall provide the following Exhibits to this Subpart C Election Form:

EXHIBIT A – COMPLIANCE WITH SUBPART C

Attach, as Exhibit A, a regulatory compliance chart that sets forth citations to the relevant rules, policies, and procedures of the derivatives clearing organization that address §§ 39.32-39.39 of the Commission's regulations and a narrative summary of the manner in which the derivatives clearing organization will comply with each regulation.

The narrative summary shall: (a) specifically and meaningfully explain the manner in which the derivatives clearing organization will comply with each such regulation; (b) sufficiently integrate references to documents contained in the exhibits to this Subpart C Election Form to clearly convey the derivatives clearing organization's policies and procedures with respect to each regulation; and (c) readily identify within such exhibits those derivatives clearing organization rules and governing documents that support the certifications set forth in this Subpart C Election Form. The narrative summary may be included as part of the compliance chart required by Exhibit A or a separate document within Exhibit A.

All citations and compliance summaries shall be separated by individual regulation and shall be clearly labeled with the corresponding regulation.

EXHIBIT B – FINANCIAL RESOURCES

Attach, as **Exhibit B**, information and documents that demonstrate compliance with the financial resource requirements set forth in § 39.33 of the Commission's regulations, including but not limited to:

- a. Valuation of financial resources – Attach as **Exhibit B-1**, a demonstration that assessments for additional guaranty fund contributions (*i.e.*, guaranty fund contributions that are not prefunded) are not included in calculating the financial resources available to meet the derivatives clearing organization's obligations under § 39.33(a) or § 39.11(a)(1).
- b. Liquidity resources – Attach as **Exhibit B-2**, a demonstration that the derivatives clearing organization maintains eligible liquidity resources as required under § 39.33(c).
- c. Liquidity providers – Attach as **Exhibit B-3**, a demonstration that the derivatives clearing organization's liquidity providers meet the requirements as set forth in § 39.33(d).
- d. Documentation of financial resources and liquidity resources – Attach as **Exhibit B-4**, a demonstration that the derivatives clearing organization documents its supporting rationale for, and has appropriate governance arrangements relating to, the amount of total financial resources it maintains pursuant to § 39.33(a) and the amount of total liquidity resources it maintains pursuant to § 39.33(c).

EXHIBIT C – SYSTEM SAFEGUARDS

Attach, as **Exhibit C**, information and documents that demonstrate compliance with the system safeguards requirements set forth in § 39.34 of the Commission's regulations, including but not limited to:

- a. Attach as **Exhibit C-1**, a demonstration that, notwithstanding § 39.18(c)(2), the business continuity and disaster recovery plan described in § 39.18(c)(1) and the physical, technological, and personnel resources described in § 39.18(c)(1) enable the derivatives clearing organization to recover its operations and resume daily processing, clearing, and settlement no later than two hours following the disruption, for any disruption including a wide-scale disruption.
- b. Attach as **Exhibit C-2**, a demonstration that the derivatives clearing organization maintains a degree of geographic dispersal of physical, technological and personnel resources consistent with the requirements set forth in § 39.34(b).

- c. Attach as **Exhibit C-3**, a demonstration that the derivatives clearing organization conducts regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve the required recovery time objective in the event of a wide-scale disruption, and that the provisions of § 39.18(e) apply to such testing.

EXHIBIT D – DEFAULT RULES AND PROCEDURES FOR UNCOVERED LOSSES OR SHORTFALLS

Attach, as **Exhibit D**, information and documents that demonstrate compliance with the requirements for default rules and procedures for uncovered losses or shortfalls set forth in § 39.35 of the Commission's regulations, including but not limited to:

- a. Allocation of uncovered credit losses – Attach as **Exhibit D-1**, a demonstration that the derivatives clearing organization has explicit rules and procedures that address fully any loss arising from any individual or combined default relating to any clearing member's obligations to the derivatives clearing organization.
- b. Allocation of uncovered liquidity shortfalls – Attach as **Exhibit D-2**, a demonstration that the derivatives clearing organization has established rules and/or procedures that enable it to promptly meet all of its settlement obligations, on a same day and, as appropriate, intraday and multiday basis, in the context of the occurrence of the scenarios set forth in § 39.35(b)(1)(i) and (ii). The derivatives clearing organization must demonstrate how such rules and procedures comply with the requirements of § 39.35(b)(2).

EXHIBIT E – RISK MANAGEMENT

Attach, as **Exhibit E**, information and documents that demonstrate compliance with the risk management requirements set forth in § 39.36 of the Commission's regulations, including but not limited to:

- a. Stress tests of financial resources – Attach as **Exhibit E-1**, a demonstration that the derivatives clearing organization conducts stress tests of its financial resources in accordance with the standards and practices set forth in § 39.36(a);
- b. Sensitivity analysis of margin model – Attach as **Exhibit E-2**, a demonstration that the derivatives clearing organization conducts on a monthly basis or more frequently as appropriate, a sensitivity analysis of its margin models to analyze and monitor model performance and overall margin coverage. The derivatives clearing organization shall demonstrate that the sensitivity analysis is conducted on both actual and hypothetical positions and in accordance with the requirements set forth in § 39.36(b)(2) and (3);
- c. Stress tests of liquidity resources – Attach as **Exhibit E-3**, a demonstration that the derivatives clearing organization conducts stress tests of its liquidity resources in accordance with the standards and practices set forth in § 39.36(c);
- d. Theoretical and empirical properties – Attach as **Exhibit E-4**, a demonstration that the derivatives clearing organization conducts an assessment of the theoretical and empirical properties of its margin model for all products it clears;
- e. Validation – Attach as **Exhibit E-5**, a demonstration that the derivatives clearing organization conducts on an annual basis, a full validation of its financial risk management model and its liquidity risk management model in accordance with the requirements set forth in § 39.36(e);
- f. Custody and investment risk – Attach as **Exhibit E-6**, a demonstration that the custody and investment arrangements of the derivatives clearing organization's own funds and assets are subject to the same requirements as those specified in § 39.15 for the funds and assets of clearing members, and apply to the derivatives clearing organization's own funds and assets to the same extent as if such funds and assets belonged to clearing members; and

- g. Settlement banks – Attach as **Exhibit E-7**, a demonstration that the derivatives clearing organization, monitors, manages, and limits its credit and liquidity risks arising from its settlement banks; establishes and monitors adherence to strict criteria for its settlement banks that take account of, among other things, their regulation and supervision, creditworthiness, capitalization, access to liquidity, and operational reliability; and monitors and manages the concentration of credit and liquidity exposures to its settlement banks.

EXHIBIT F – RECOVERY AND WIND-DOWN

Attach, as **Exhibit F**, information and documents that demonstrate compliance with the recovery and orderly wind-down requirements set forth in § 39.39 of the Commission's regulations, including but not limited to:

- a. Recovery and wind-down plans – Attach as **Exhibit F-1** the derivatives clearing organization's recovery plan, orderly wind-down plan, supporting information for these plans, and a demonstration that the plans comply with the requirements of § 39.39(c).
- b. Financial resources to support recovery – Attach as **Exhibit F-2**, a narrative summary that demonstrates how the financial statements filed with the Commission pursuant to §§ 39.11 and 39.33 demonstrate that the derivatives clearing organization maintains sufficient unencumbered liquid financial assets, funded by the equity of its owners, to implement its recovery or wind-down plans. The narrative summary shall include a description of how the derivatives clearing organization complies with the requirements of § 39.39(d).
- c. Additional financial resources – Attach as **Exhibit F-3**, a demonstration that the derivatives clearing organization maintains viable plans for raising additional financial resources as required under § 39.39(e).

BILLING CODE 6351-01-C

PART 190—BANKRUPTCY RULES

■ 9. The authority citation for part 190 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6c, 6d, 6g, 7a–1, 12, 12a, 19 and 24; 11 U.S.C. 362, 546, 548, 556, and 761–767, unless otherwise noted.

■ 10. In § 190.12, revise paragraph (b)(1) to read as follows:

§ 190.12 Required reports and records.

* * * * *

(b) * * *

(1) As soon as practicable following the commencement of a proceeding that is subject to this subpart and in any event no later than three hours following the later of the commencement of such proceeding or the appointment of the trustee, the debtor shall provide to the trustee copies of each of the most recent reports that the debtor was required to file with the Commission under § 39.19(c) of this chapter, including copies of any reports required under §§ 39.19(c)(2), (3), and (4) of this chapter (including the most up-to-date version of any recovery and orderly wind-down plans of the debtor

maintained pursuant to § 39.13(k) or § 39.39(b) of this chapter) that the debtor filed with the Commission during the preceding 12 months.

* * * * *

■ 11. In § 190.15, revise paragraphs (a) and (c) to read as follows:

§ 190.15 Recovery and wind-down plans; default rules and procedures.

(a) *Prohibition on avoidance of actions taken pursuant to recovery and orderly wind-down plans.* Subject to the provisions of section 766 of the Bankruptcy Code and §§ 190.13 and 190.18, the trustee shall not avoid or prohibit any action taken by a debtor subject to this subpart that was reasonably within the scope of, and was provided for, in any recovery and orderly wind-down plans maintained by the debtor pursuant to § 39.13(k) or § 39.39(b) of this chapter and filed with the Commission pursuant to § 39.19 of this chapter.

* * * * *

(c) *Implementation of recovery and orderly wind-down plans.* In administering a proceeding under this subpart, the trustee shall, in

consultation with the Commission, take actions in accordance with any recovery and orderly wind-down plans maintained by the debtor pursuant to § 39.13(k) or § 39.39(b) of this chapter and filed with the Commission pursuant to § 39.19 of this chapter, to the extent reasonable and practicable, and consistent with the protection of customers.

* * * * *

■ 12. In § 190.19, revise paragraph (b)(1) to read as follows:

§ 190.19 Support of daily settlement.

* * * * *

(b) * * *

(1) Such funds shall be supplemented with the property described in paragraphs (b)(1)(i) through (iv) of this section, as applicable, to the extent necessary to meet the shortfall, in accordance with the derivatives clearing organization's default rules and procedures adopted pursuant to § 39.16 and, as applicable, § 39.35 of this chapter, and (with respect to paragraph (b)(1)(ii) of this section) any recovery and orderly wind-down plans maintained pursuant to § 39.13(k) or

§ 39.39(b) of this chapter and submitted pursuant to § 39.19 of this chapter. Such funds shall be included as member property and customer property other than member property in the proportion described in paragraph (a) of this section, and shall be distributed promptly to members' house accounts and members' customer accounts which accounts are entitled to payment of such funds as part of that daily settlement.

* * * * *

Issued in Washington, DC, on July 3, 2023 by the Commission.

Christopher Kirkpatrick,
Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Derivatives Clearing Organizations Recovery and Orderly Wind-Down Plans; Information for Resolution Planning—Voting Summary and Chairman's and Commissioners' Statements

Appendix 1—Voting Summary

On this matter, Chairman Behnam and Commissioners Johnson and Goldsmith Romero voted in the affirmative. Commissioner Pham voted to concur. Commissioner Mersinger voted in the negative.

Appendix 2—Statement of Support of Chairman Rostin Behnam

As a fundamental pillar of global financial reform efforts and our most universally effective tool in the box, central clearing reduces risks, fosters resiliency, and builds continuity and confidence in financial markets. The global implementation of the central clearing mandate has produced a significant demand for clearing services and a substantial increase in overall clearing volumes in the swaps market. However, clearing is not without risk. Policymakers, both bank and market regulators, must take the necessary steps to ensure that clearinghouses are not simply commercially viable, but can continue to operate and provide critical services as expected, even in times of extreme market stress.

Today, the Commission considered a proposed rule to amend the requirements related to recovery and orderly wind-down and resolution planning for Derivatives Clearing Organizations (DCOs) that have been designated as systemically important (SIDCOs) as well as other DCOs that elect to comply with DCO core principles by satisfying the higher standards for SIDCOs—referred to as “Subpart C DCOs.” At a high level, the proposal would codify and expand existing staff guidance,¹ as well as propose to

specify the types of information that a SIDCO or Subpart C DCO may be required to provide to the Commission to share with the FDIC for resolution planning. Building on the themes of risk management, resilience and contingency planning, this proposal aims to build consistency, awareness, and preparedness across SIDCOs and Subpart C DCOs by providing greater predictability should an unlikely event occur that prevents a DCO from being able to meet its obligations, provide critical services to its members, or if a DCO ultimately needs to wind-down operations in an orderly manner. That is why I fully support the proposal.

Today's proposal would set forth in Commission regulation an expectation that SIDCOs and Subpart C DCOs, as financial market infrastructures, have comprehensive and effective recovery plans and orderly wind-down plans. These plans would analyze the services that clearing members and others rely upon the DCOs to provide, as well as the necessary services that others provide to the DCOs. DCOs would also be required to consider, as part of their planning process, a thorough set of scenarios that might potentially create losses that challenge their ability to provide their critical operations and services. Some scenarios that we specify may not be applicable to every DCO, and the proposal notes scenarios are to be considered to the extent they are possible in light of the DCO's structure and activities. However, the proposal, reiterating existing guidance, cautions DCOs considering whether a scenario is possible to avoid confusing “low risk” with “zero risk.” There is a difference. A low risk scenario, which is remotely possible, must be addressed by the plans whereas a scenario that is not possible would not. It is critical that scenario analyses and, in turn, the preparation of recovery and orderly wind-down plans occur during business-as-usual operations, and not during times of stress, in order to ensure thorough preparation and planning.

I have remarked before, among the many lessons learned from the 2008 financial crisis, the interconnectedness of our global financial system is one of, if not the single, most important. All risk analyses must include a holistic examination of the systemic relationships throughout all of our financial markets. The proposal would require a SIDCO and Subpart C DCO to identify its financial and operational interconnections and interdependencies, plans for resilient staffing arrangements, governance structure, and any contracts or agreements subject to alteration in the event of orderly wind-down. The proposal also requires each SIDCO and Subpart C DCO to assess the full range of options for recovery and orderly wind-down, to test the plans, and to notify clearing members when recovery or wind-down is initiated.

In light of recent market events, the proposal approved by the Commission would require all DCOs, not just SIDCOs and Subpart C DCOs, to submit viable plans for orderly wind-down. The wind-down plan

requirements for non-SIDCOs that are not Subpart C DCOs are similar in that the plan must identify scenarios, triggers, and available tools.

Finally, the proposal expands on existing regulation requiring SIDCOs and Subpart C DCOs to have procedures in place for providing the Commission with information needed for resolution planning. In the spirit of regulatory transparency, this proposal identifies categories of information that a SIDCO or Subpart C DCO would be required to provide to the Commission for such planning.

I look forward to the public's submission of comments and feedback on this proposed rulemaking.

Appendix 3—Statement of Commissioner Kristin N. Johnson

Derivatives clearing organizations (DCOs) play a significant role in our markets by providing essential clearing and settlement market infrastructure. As intermediaries, these firms serve a fundamental role in creating stability. DCOs face substantial risks including custody, credit, and liquidity risk; general business, operational, and legal risks; as well as the risk of clearing member defaults. Such risks may pose a threat to a DCO's continuity of operations, as well as its clearing members and the broader financial system.

During periods of stress, DCOs provide services that are crucial for continuity in the financial markets they serve. Given the significance of DCOs in our markets, a liquidity or solvency crisis event at a DCO may trigger effects that have far-reaching consequences throughout the entire financial system. Recovery and wind-down plans are critical to prevent losses across our markets and any knock-on effects or spill over into other markets. It is essential that DCOs have recovery and orderly wind-down plans to prevent significant market disruption throughout our financial system.

I support the Commission's consideration of the proposed regulations on recovery and orderly wind-down plans for DCOs. The proposed rule addresses the longstanding need for DCOs to have wind-down plans. While the Commission has previously taken appropriate steps to introduce recovery and orderly wind-down plans for DCOs deemed systemically important in the aftermath of the 2008 Financial Crisis, evidence suggests the need to ensure the integrity of not only the largest DCOs, but all DCOs. In addition, the proposal provides for an important update to Commission regulations for DCOs including codification of staff guidance 16–61 and incorporation of international guidance on recovery and resolution planning issued since 2013.¹ The implementation of these proposed regulations would operate to support the strength and continuity of all DCOs as

¹ See CFTC Letter No. 16–61, Recovery Plans and Wind-down Plans Maintained by Derivatives Clearing Organizations and Tools for the Recovery and Orderly Wind-down of Derivatives Clearing Organizations (July 21, 2016), available at [https://www.cftc.gov/LawRegulation/CFTCStaffLetters/](https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm?title=16-61&field_csl_letter_types_target_id%5B%5D=711&field_csl_letter_year_value=)

[letters.htm?title=16-61&field_csl_letter_types_target_id%5B%5D=711&field_csl_letter_year_value=](https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm?title=16-61&field_csl_letter_types_target_id%5B%5D=711&field_csl_letter_year_value=)

¹ Commodity Futures Trading Commission, Notice of Proposed Rulemaking on Derivatives Clearing Organizations Recovery and Orderly Wind-down Plans; Information for Resolution Planning, p. 5–6 (Jun. 7, 2023), https://www.cftc.gov/media/8711/votingdraft060723_17CFRPart39b/download (hereinafter “NPRM on DCO Recovery and Orderly Wind-down Plans”).

instructed by the reforms established in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).²

The History and Development of § 39.39 Recovery and Wind-Down Regulations

I. Legislative and Regulatory History

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank Act”) establishing a clearing framework for over-the-counter derivatives, including swaps.³ The Dodd Frank Act introduced statutory authority for the Commission to promulgate regulations governing DCOs. Title VII of the Dodd-Frank Act sets out eighteen core principles for DCOs (DCO Core Principles), with which DCOs must comply in order to register and maintain registration with the Commission.⁴ The DCO Core Principles “serve to reduce risk, increase transparency, and promote market integrity within the financial system.”⁵ In conjunction with section 8a(5) of the Commodity Exchange Act (CEA), Title VII grants the Commission authority to promulgate regulation as necessary to implement and enforce the DCO Core Principles.⁶ In 2011, the Commission adopted regulations to implement Title VII of Dodd-Frank.⁷ These regulations created regulatory standards for compliance with DCO Core Principles.⁸ Among the many regulations adopted was Part 39, including DCO Core Principle D—Risk Management.⁹ Core Principle D requires DCOs to have policies and procedures in place that ensure the DCO will be able to manage the risks associated with discharging its responsibilities.¹⁰

Title VIII of the Dodd-Frank Act introduced a collaborative, multi-agency framework for regulating systemically important financial market utilities (FMUs) providing payment, clearing, and settlement activities.¹¹ Specifically, section 804 of the Dodd-Frank Act provides the Financial Stability Oversight Council (FSOC) with the authority to designate certain FMUs as systemically important.¹² This includes the ability to designate DCOs as systemically important (SIDCOs). In 2012, FSOC designated two CFTC-registered DCOs as SIDCOs.¹³

In addition to establishing a multi-agency regulatory framework, Title VIII created standards for SIDCOs for risk mitigation.¹⁴ The objectives and principles for risk management at SIDCOs include (1) promoting risk management; (2) promoting safety and soundness; (3) reducing systemic risks; and (4) supporting the stability of the broader financial system.¹⁵ The risks that DCOs face may not only threaten the viability and strength of a DCOs operations, but also may threaten clearing members of DCOs and the broader financial system. Such risks include credit and liquidity risk by both the DCO itself and its clearing members as well as other general business, operational, custody, investment, and legal risks.¹⁶ All of these risks could result in financial failures of DCOs. Disorderly failure¹⁷ of DCOs—in particular SIDCOs—would likely cause significant disruption to our financial markets.¹⁸ This systemic risk results in a necessity for DCOs to have viable plans for recovery and orderly wind-down during times of significant stress or in the event of failure.

Title VIII of the Dodd-Frank Act also directs the Commission to consider prudential requirements and international standards when promulgating risk management regulations that govern operations relating to payment, clearing, and settlement activities for SIDCOs.¹⁹ In 2013, the Commission considered international standards relevant to risk management of SIDCOs as required under section 805(a)(2)(A).²⁰ At that time, the Commission determined the most relevant international standards were the Principles for Financial Market Infrastructure (PFMIs) established by the Bank for International Settlements (BIS) and the International Organization of Securities Commissions (IOSCO).²¹ The PFMIs are a “unified set of international risk management standards for central

counterparties” (CCPs) that facilitate clearing and settlement.²² They set out a list of twenty-four principles that seek to address the numerous risks faced by CCPs.²³

Later in 2013, the Commission implemented the Part 39 regulations setting out broad rules for recovery, wind-down, and resolution planning for SIDCOs and Subpart C DCOs.²⁴ In adopting these wind-down and recovery regulations, the Commission considered PFMI Principles 3 and 15.²⁵ PFMI Principle 3 calls for a framework for the comprehensive management of risks including legal, credit, liquidity, business, and operational risks.²⁶ PFMI Principle 15 covers general business risk and calls for a CCPs to identify, monitor, and manage general business risk.²⁷ The Commission determined that although there is no DCO Core Principle that directly calls for DCOs to establish recovery and wind-down plans, DCO Core Principles B (financial resources), D (risk management), G (default rules and procedures), and I (system safeguards), as well as PFMI Principles 3 and 15, collectively support the need for DCOs to create policies and procedures that identify scenarios that may prevent a SIDCO or Subpart C DCO “from providing critical operations and services as a going concern and would assess the effectiveness of a full range of options for recovery and wind-down.”²⁸ In light of this determination, the Commission adopted Regulation 39.39 which requires SIDCOs and Subpart C DCOs “to maintain viable plans for recovery and orderly wind-down.”²⁹

II. CFTC Letter 16–61 and International Standards

At the time the Commission adopted Regulation 39.39, there was no specific international guidance on wind-down and recovery planning. In 2014, the Committee on Payments and Market Infrastructures (CPMI) with IOSCO issued guidance for FMIs and governing authorities on development of recovery plans (2014 CPMI–IOSCO Recovery Guidance).³⁰ The guidance considered and interpreted key principles relevant to recovery planning, including PFMI Principles 3 and 15.³¹ Further, the report provided guidance on the recovery planning

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

³ Derivatives Clearing Organizations and International Standards, 78 FR 72,475, 72,476 (Dec. 12, 2013) (codified in 17 CFR pt. 39) (hereinafter “2013 DCOs Rule Release”).

⁴ 7 U.S.C. 7a–1(c)(2).

⁵ NPRM on DCO Recovery and Orderly Wind-down Plans, p. 4.

⁶ 7 U.S.C. 7a–1(c)(2)(A)(i); 7 U.S.C. 12a(5).

⁷ Derivatives Clearing Organizations General Provisions and Core Principles, 76 FR 69,333 (Nov. 8, 2011) (codified in 17 CFR pts. 1, 21, 29, and 140) (hereinafter “2011 DCOs Core Principles Release”).

⁸ 2011 DCOs Core Principles Release at 69,335.

⁹ *Id.* at 69,362.

¹⁰ 7 U.S.C. 7a–1(c)(2)(D).

¹¹ Section 805 of the Dodd-Frank Act, 12 U.S.C. 5464.

¹² Section 804 of the Dodd-Frank Act, 12 U.S.C. 5463.

¹³ 2013 DCOs Final Rule Release at 72,477.

¹⁴ Enhanced Risk Management Standards for Systemically Important Derivatives Clearing Organizations, 78 FR 49,663, 49,665 (Aug. 15, 2023) (codified in 17 CFR pt. 39) (hereinafter “2013 SIDCOs Final Rule Release”).

¹⁵ Section 805 of the Dodd-Frank Act, 12 U.S.C. 5464(b). As outlined in section 805(c), these standards may address such areas as: (1) Risk management policies and procedures; (2) margin and collateral requirements; (3) participant or counterparty default policies and procedures; (4) the ability to complete timely clearing and settlement of financial transactions; (5) capital and financial resources requirements for designated [FMUs]; and (6) other areas that are necessary to achieve the objectives and principles in [section 805](b). 2013 SIDCO Final Rule Release at 49,665 (quoting 12 U.S.C. 5464(C)).

¹⁶ NPRM on DCO Recovery and Orderly Wind-down Plans, p. 5.

¹⁷ While not formally defined in Dodd-Frank, “disorderly failure” typically refers to a significant disruption to a financial institution without a plan for recovery or wind-down that results in the inability of the institution to maintain ongoing viability that cause detrimental impacts to customers, clients, related entities, and the broader financial system.

¹⁸ NPRM on DCO Recovery and Orderly Wind-down Plans, p. 5.

¹⁹ 2013 SIDCO Final Rule Release at 49,665.

²⁰ See 2013 SIDCO Final Rule Release.

²¹ 2013 SIDCO Final Rule Release at 49,666.

²² *Id.*

²³ *Id.*

²⁴ 2013 DCOs Final Rule Release at 72,494. In 2013, the Commission also adopted regulations to allow registered DCOs that are not designated as SIDCOs to elect to become subject to the provisions of Subpart C of part 39 of the Commission’s regulations. Those DCOs that make the election are referred to as Subpart C DCOs. In making this election, Subpart C DCOs voluntarily agree to operate in compliance with and be subject to review for compliance with PFMIs and other heightened standards for SIDCOs. See 2013 DCOs Final Rule Release at 72,479.

²⁵ 2013 DCOs Final Rule Release at 72,495.

²⁶ *Id.* at 72,478.

²⁷ *Id.* at 72,495.

²⁸ *Id.*

²⁹ *Id.*

³⁰ CPMI–IOSCO, Recovery of financial market infrastructures (Oct. 15, 2014) (hereinafter “2014 CPMI–IOSCO Recovery Guidance”).

³¹ 2014 CPMI–IOSCO Recovery Guidance.

process, contents of recovery plans, and recovery tools to be used by FMIs.³²

In 2016, in light of 2014 CPMI-IOSCO Recovery Guidance, the staff of the Commission's Division of Clearing and Risk (DCR) issued Letter 16–61 to provide additional details on the subjects and analyses that SIDCOs and Subpart C DCOs should include in their wind-down plans.³³ The letter provided a list of subjects DCR believed SIDCOs and Subpart C DCOs should analyze and include in their recovery and wind-down plans including such as inclusion of particular tools to be used in recovery and wind-down.³⁴ Specifically, the guidance provided a list of specific scenarios to be evaluated and set out a framework for how to identify, monitor for, and analyze the scenario and include such information in recovery plans.³⁵ Further, the guidance suggested a framework for how to identify, implement, and analyze recovery tools in such scenarios and how to incorporate it into recovery plans.³⁶ Finally, the guidance also provided a framework for including processes for wind-down options in the event of a failure or inability to successfully implement a recovery plan.³⁷

In 2017, CPMI and IOSCO issued further guidance that updated the 2014 CPMI-IOSCO Recovery Guidance.³⁸ The guidance sought to clarify, among other things, how to implement recovery plans, replenish financial resources, and transparency in recovery tools.³⁹ Further, in 2017, the Financial Stability Board issued guidance regarding CCP resolution planning that included recommendations for resolution authorities about continuity of critical functions and implementation of crisis management groups, and development of resolution plans.⁴⁰ Most recently, in August 2022, CPMI and IOSCO published a discussion paper on CCP practices to address non-default losses which included a discussion of annual testing and review of a CCP's recovery plan.⁴¹

Recovery and Orderly Wind-Down Planning

Recovery planning is essential to DCO risk management and provides a mechanism to consider risk scenarios and their potential scope of impact, as well as evaluate specific tools, steps, and contingency plans. Recovery plans provide well-established and well-tested actionable steps that may address exigent and extreme circumstances that may threaten the viability of DCOs. An

anticipated scenario with a thoughtful corresponding recovery plan provides for a DCO to have an efficient and effective recovery “such that it can continue to provide its critical services” even while its viability may be threatened.⁴² Additionally, recovery plans provides stability, certainty, and clarity for a DCO's clearing members and clients and may reduce the potential for panic and contagion. The reduction of stress and uncertainty as a result of advance recovery planning results in optimized, efficient, and effective recovery actions. Recovery planning is globally recognized as essential for market stability, and post-financial crisis reforms emphasize this understanding. As stated by CPMI-IOSCO in 2014:

‘Recovery’ concerns the ability of an FMI to recover from a threat to its viability and financial strength so that it can continue to provide its critical services without requiring the use of resolution powers by authorities. Recovery therefore takes place in the shadow of resolution.⁴³

When recovery is not a viable option or where the execution of a recovery plan is ineffective, it is critical to financial stability for FMIs to have orderly resolution plans. Title II of the Dodd-Frank Act established the Orderly Liquidation Authority, an alternative framework and process to bankruptcy to efficiently and expeditiously wind-down financial institutions.⁴⁴ Title II establishes the Federal Deposit Insurance Corporation (FDIC) as the receiver for failing financial institutions designated as systematically important, like SIDCOs.⁴⁵ Effective wind-down plans provide the benefit of well-considered strategic planning for wind-down in advance of any viability threatening event that can be shared with the FDIC in an instance of insolvency. Wind-down plans facilitate the efficient transition of a SIDCO into FDIC receivership. Orderly wind-down procedures enhance financial market stability by minimizing the fallout of financial instability and ultimately minimize systemic risk.

Amendments to Part 39

Today, the Commission—in consultation with the FDIC, the Board of Governors of the Federal Reserve System, and the Securities and Exchange Commission (SEC)—takes the next step in recovery and wind-down planning for DCOs by proposing amendments that encompass all DCOs and provide clarity and specificity on the quality of such plans. We recognize that the failure of any DCO, not just those deemed systemically important, might result in significant market disruption. As such, the proposed regulations seek to provide important clarity and consistency for not only SIDCOs and Subpart C DCOs, but all DCOs. This NPRM codifies and expands upon DCR's 16–61 Letter and incorporates international guidance on recovery and resolution planning issued since 2013. The DCR staff has thoughtfully crafted proposed

rules which will guide SIDCOs, Subpart C DCOs, and all other DCOs in updating or crafting wind-down plans and, in some instances, recovery plans.

Currently, Regulation 39.39 only applies to SIDCOs and Subpart C DCOs. It requires these DCOs “to maintain viable plans for recovery and orderly wind-down.”⁴⁶ The regulation specifies that in developing such plans, SIDCOs and Subpart C DCOs must identify scenarios which may prevent the DCO from meeting its obligations, providing its critical operations and services, and assess options for recovery and wind-down.⁴⁷ The wind-down plan must include procedures to timely notify the Commission when a recovery plan is initiated or a wind-down plan is pending as well as procedures for providing both the Commission and FDIC with necessary information for resolution planning.⁴⁸ Section 39 also requires the plans to be supported with financial resources sufficient to implement such plans.⁴⁹ SIDCOs and Subpart C DCOs must also maintain viable plans for raising additional financial resources, including capital, which must be approved by the DCO's board of directors and regularly updated.⁵⁰ For non-SIDCOs and non-Subpart C DCOs, no regulation currently requires them create and maintain recovery or wind-down plans.⁵¹

To align part 39 with CFTC Letter No. 16–61 and international standards, the Commission proposes to require all DCOs to create, maintain, and submit to the Commission plans for orderly wind-down substantially similar to those currently required for SIDCOs and Subpart C DCOs.⁵² Additionally, the Commission proposes to amend Regulation 39.39 for SIDCOs and Subpart C DCOs to include eight specific sections in their wind-down and recovery plans:

1. Identify and describe critical operations and services, interconnections and interdependencies, and agreements and plans to address the risks associated with each.⁵³
2. Conduct a six-part analysis for each recovery scenario, including for commonly applicable scenarios like settlement or custodian bank failure and scenarios resulting from investment risk, poor business results, fraud, legal liabilities, and losses resulting from interconnectedness and interdependencies.⁵⁴
3. Discuss criteria that may trigger consideration or implementation of the recovery plan, describes a plan for monitoring events that are likely trigger the recovery plan, and includes a description of information-sharing and escalation processes

⁴⁶ 2013 DCOs Final Rule Release at 72,495; 17 CFR 39.39(b).

⁴⁷ 17 CFR 39.39(c)(1).

⁴⁸ 17 CFR 39.39(c)(2).

⁴⁹ 17 CFR 39.39(d).

⁵⁰ 17 CFR 39.39(e).

⁵¹ NPRM on DCO Recovery and Orderly Wind-down Plans, p. 13.

⁵² Proposed § 39.13(k); NPRM on DCO Recovery and Orderly Wind-down Plans, p. 18–19.

⁵³ Proposed § 39.39(c)(1).

⁵⁴ Proposed § 39.39(c)(2).

³² 2014 CPMI-IOSCO Recovery Guidance.

³³ CFTC Letter No. 16–61 (July 21, 2016).

³⁴ *Id.*

³⁵ *Id.* at 5.

³⁶ *Id.* at 7.

³⁷ *Id.* at 9.

³⁸ CPMI-IOSCO, Recovery of financial market infrastructures (July 5, 2017) (hereinafter “2017 CPMI-IOSCO Recovery Guidance”).

³⁹ NPRM on DCO Recovery and Orderly Wind-down Plans, p. 15.

⁴⁰ *Id.* (citing FSB, Guidance on Central Counterparty Resolution and Resolution Planning (July 5, 2017) (hereinafter “2017 FSB Resolution Guidance”).

⁴¹ *Id.* at 16 (citing CPMI-IOSCO, A discussion paper on central counterparty practices to address non-default losses (Aug. 4, 2022)).

⁴² *Id.* at 17.

⁴³ 2014 CPMI-IOSCO Recovery Guidance.

⁴⁴ Section 204(b) of the Dodd-Frank Act (codified at 12 U.S.C. 5384(b)).

⁴⁵ See 12 U.S.C. 5384(b).

with the DCO's senior management and board.⁵⁵

4. Describe recovery tools, the order in which they will be used, the time frame for use of each tool, governance and approvals to execute the tools, necessary steps to implement the tools, whether a tool is mandatory or voluntary, and an assessment of the risks associated with each tool.⁵⁶

5. Identify and describe scenarios that would prevent the DCO from meeting its obligations and tools that may be used in the orderly wind-down.⁵⁷

6. Determine the agreements, arrangements, and licenses that are subject to change or termination as a result of activation of a recovery or wind-down plan and describe actions the DCO will take to ensure continuity of operations and services during recovery and wind-down despite alteration or termination.⁵⁸

7. Include a requirement for an annual review and formal approval by the board of directors and describe the governance structure that defines the responsibilities of board members, senior executives, and business units. Must also include description of the decision-making process.⁵⁹

8. Describe procedures for testing of viability plans and tools. The description must describe the types of testing and the procedures for updating the plans in light of findings from test results. The testing must be conducted with participation of clearing members.⁶⁰

The other proposed amendments for Part 39 include updates to definitions to apply generally to all DCOs, establishing a fixed deadline to develop and file recovery and wind-down plans, requiring DCOs to provide certain information directly to the Commission to be shared with the FDIC⁶¹ as well as information upon request, and updating the Subpart C election forms.

Conclusion

Prior to Dodd-Frank, there were limited means to facilitate orderly resolution. The lack of planning for financial distress proved tremendously harmful to our economy in a period of severe disruption. I believe the proposed rules, as currently drafted, would effectively facilitate transparency as well as provide a foundation for quick, efficient, and effective action in instances of market instability and risk to DCOs operations. Greater transparency and thoughtfully developed risk plans will result in increased confidence in our derivatives markets.

I want to thank the staff of the Division of Clearing and Risk—Robert Wasserman, Megan Wallace, and Eric Schmelzer—for

their diligent and thoughtful work on these proposed regulations.

While I support the proposal, I look forward to carefully considering the comments we receive to determine the best path forward to protect our markets through the stability of DCOs. I am hopeful the comments submitted in response to the proposal will offer thoughtful guidance on the questions offered in the release of the notice of proposed rule-making.

Appendix 4—Statement of Commissioner Christy Goldsmith Romero

No one expects to fail. But the lessons from the 2008 financial crisis highlight how quickly contagion can spread between highly interconnected institutions, threatening the viability of firms. As the Special Inspector General for TARP (“SIGTARP”), I reported to Congress on the decisions made by the Government to save “too big to fail” Wall Street institutions. The theme that ran through our findings was a massive failure in planning, and shock from institutions and regulators caught unaware by dangerous interconnections across the financial system. The Government intervened with bailouts to avoid the chaos from disorderly bank failures that would hurt Main Street.

Fast forward to 2023, where the financial industry and regulators were once again shocked by bank failures—regional bank failures that required government intervention, although not a bailout. These failures seemed to happen at lightning speed as online banking and other technology as well as social media played a role in snowballing customer redemptions.¹ Once again, the lack of planning was apparent, and the government intervention was intended to help Main Street.

That government intervention 15 years after Congress authorized TARP only reinforces the importance of Dodd-Frank Act provisions designed to protect our financial system from systemic risk. I have reported to, and testified before, Congress on lessons learned from the 2008 financial crisis, on how to manage systemic risk, and on efforts to prevent future government intervention, such as requirements for living wills from the largest banks. I testified before the Senate in 2014 that I strongly supported the Dodd-Frank Act’s “dual approach: front line measures aimed at keeping the largest financial institutions safe and sound, and a last line defense aimed at letting a company fail without damaging the economy.”²

¹ An unfortunate consequence of these regional bank failures was large numbers of depositors withdrawing their funds only to deposit them in the largest banks. See, e.g., Edward Harrison, *The Fed Is Helping Too-Big-to-Fail Banks Become Bigger*, Bloomberg (May 2, 2023) available at <https://www.bloomberg.com/news/newsletters/2023-05-02/the-fed-is-helping-too-big-to-fail-banks-become-bigger>.

² Written Testimony Submitted by The Honorable Christy L. Romero, Special Inspector General for the Troubled Asset Relief Program Before the U.S. Senate Banking, Housing and Urban Affairs Committee Subcommittee on Financial Institutions and Consumer Protection, available at <https://www.sig tarp.gov/sites/sigtarp/files/Testimony/>

I support the proposed rule today because it does just that. It strengthens both front line measures and the last line of defense by laying out specific requirements for all clearinghouses to have orderly wind-down plans. This expands our requirements for wind-down plans from a handful of clearinghouses to the full range of clearinghouses—ranging from those deemed systemically important to new or future entrants, such as those who are digital asset-focused. The rule today codifies and strengthens the provisions in Commission guidance from 2016, and is designed in consideration of international standards.

I support the proposed rule because it has two major benefits. First, just as with bank living wills, the requirement for orderly wind-down plans decreases the likelihood that any failure will be disorderly, chaotic, or require government intervention, thereby protecting financial stability—in other words, the last line of defense. Second, the exercise of creating and maintaining the plans with the specific requirements contained in the rule could help to prevent the failure of clearinghouses by shoring up areas of potential existential risk and giving the Commission insight into risk exposure for our own oversight responsibilities—in other words, front line measures.

I want to thank the staff for these efforts to implement the goals of the Dodd-Frank Act and protect the financial system. I thank them for working with my office on changes to improve the proposal in ways that will promote greater transparency into interconnections in our financial system and improve accountability for clearinghouses as they develop and test their plans.

Last Line Defense: The Proposal Will Help Protect Financial Stability in the Face of New Kinds of Market Stress by Reducing the Likelihood of Disorderly and Chaotic Failures

As I testified to Congress in 2014, it is crucial for regulators and institutions to make use of “what was missing in the crisis—time—time to understand the interconnections and the risk they pose, and limit any dangerous risk so they are not caught unaware again.”³ While we already require systemically significant clearinghouses and a small handful of other clearinghouses to maintain orderly wind-down plans,⁴ we do not require it for all.

In supporting the expansion of the requirement for orderly wind-down plans to all clearinghouses, I am reminded of one of my interviews with Treasury Secretary Timothy Geithner. Secretary Geithner told me, “What size and mix of business do you classify as systemic? . . . It depends too much on the state of the world at the time. You won’t be able to make a judgment about

SIGTARP testimony TBTF and SIFI regulation July 16 2014.pdf (July 16, 2014) (2014 Goldsmith Romero Testimony).

³ 2014 Goldsmith Romero Testimony.

⁴ *Derivatives Clearing Organizations and International Standards*, 78 FR 72476, 72494 (Dec. 2, 2013).

⁵⁵ Proposed § 39.39(c)(3).

⁵⁶ Proposed § 39.39(c)(4).

⁵⁷ Proposed § 39.39(c)(5).

⁵⁸ Proposed § 39.39(c)(6).

⁵⁹ Proposed § 39.39(c)(7).

⁶⁰ Proposed § 39.39(c)(8).

⁶¹ This includes information about organization structure, activities, and governance; information about clearing members; arrangements with other clearing entities (including offset and cross-margin arrangements); financial schedules and supporting details (off balance sheet obligations, contingent liabilities, obligations to creditors, shareholders, and affiliates). Proposed § 39.39(f).

what's systemic and what's not until you know the nature of the shock.”⁵

Although the Financial Stability Oversight Council makes systemic designations, the fact that the Government intervened in regional bank failures this year emphasizes that disorderly failures of even non-systemic financial players can cause chaos and harm regular people. Additionally, this month our nation faced challenges with the debt ceiling, which would have had substantial impacts, which may not be planned for by all institutions.

By requiring orderly wind-down plans for all, and adopting the proposed standardized requirements before a crisis hits, we can better understand which market stresses might cause severe disruptions across clearinghouses, and how a failure may spread across derivatives markets, the financial system, and even the economy. We can then engage in supervision to ensure that clearinghouses effectively manage risk.

Front Line Measures: The Best Use of Orderly Wind-Down Plans Is Helping To Ensure We Never Need To Rely on Them

It has been said that those who fail to plan, plan to fail. But when it comes to financial stability, planning to fail is actually one of the best ways to avoid failing. A handful of clearinghouses already have wind-down plans pursuant to Commission guidance from 2016.⁶

I support the proposed rule with its specific requirements of what these wind-down plans should include because it can help mitigate the risk of failure, and prevent the need to ever rely on them. I testified before Congress in 2014 saying, that I encouraged regulators to use living wills to “build a comprehensive roadmap of interconnections to capture the common risks, linkages and interdependencies in the financial system.”⁷

I support that the proposed rule contains those same requirements—the inclusion of a clearinghouse's interconnections and interdependences. In addition to the well-established clearinghouses, our registrants include clearing houses (as well as applicants) that are focused largely on digital assets. This includes some clearinghouses where the clearing members are retail

customers. Given the highly interconnected nature of the digital asset industry, and our lack of visibility into unregulated affiliates, we could find ourselves without the information needed to identify affiliate risk and supervise the management of that risk. This was most notably experienced with registered clearinghouse Ledger X, an affiliate of FTX.

Additionally, an increase in cyberattacks, including the one on ION Markets, show how increasing reliance on third party services and providers can create new avenues for disruption. When those disruptions hit multiple firms at once, the damage can compound, creating cascading failures that threaten financial stability. By requiring clearinghouses to identify these kinds of interdependencies and interconnections before they become a problem, as well as to identify potential triggering events, document how they will monitor these triggers, and conduct stress scenario analysis, this proposal encourages a systemic perspective that would help clearinghouses and the Commission steer away from trigger events, and more comprehensively manage what would otherwise be existential risk.⁸

The proposal also requires clearinghouses to test wind-down plans annually, or when they are updated. This is an opportunity for a regular robust assessment of the risks that a clearinghouse faces. The proposal recognizes that testing may be enhanced by participation by other stakeholders. I look forward to hearing comments about whether there are situations or scenarios where the participation of stakeholders other than clearing members should be required, instead of simply considered.

Clearinghouses can only identify failures caused by risks that they consider and review. The scenarios prescribed by the proposal would require assessing a broad range of relevant risks. I look forward to hearing from commenters about whether there are any other areas that might help us promote the resilience of clearinghouses and protect against chaotic failures.

This Proposal Will Only Protect the Financial System if We Have the Courage To Apply It

Unlike living wills for systemically important banks, there is no formal review or acceptance requirement for these wind-down plans. But that does not excuse us from a responsibility to carefully scrutinize the plans to ensure that they are comprehensive, appropriate, and rigorously tested. In 2011, I testified before Congress that rules designed to prevent systemic risk that would require government intervention “are only as effective as their application” and that ultimately, we “rely on the courage of the

⁸ It would require clearinghouses to identify scenarios that may prevent them from fulfilling their critical role, including not just due to adverse market outcomes, but also financial effects from cybersecurity events and other losses from interconnections with third party services and providers. And it requires a clearinghouse to consider how a combination of failures, like the sort that crop up in a financial crisis, might affect its ability to operate.

regulators to protect our nation's broader financial system.”⁹

We should have the courage to use these plans as a roadmap for our own vigilant oversight of derivatives markets and a guide for where we should focus efforts to bolster resilience to market stresses. I welcome comment on all aspects of the proposal, but especially those recommending additional ways we can promote financial stability.

For these reasons, I support the proposed rule.

Appendix 5—Dissenting Statement of Commissioner Summer K. Mersinger

I cannot support the proposed amendments to Part 39 of the Commodity Futures Trading Commission's¹ regulations before us today. The proposed amendments would: (1) make substantial changes to the current recovery and orderly wind-down plan regulations applicable to systemically important derivatives clearing organizations (SIDCOs) and Subpart C derivatives clearing organizations (Subpart C DCOs);² (2) require for the first time that all other CFTC-registered derivatives clearing organizations (DCOs) have orderly wind-down plans; (3) revise the CFTC's bankruptcy regulations that the CFTC just recently amended to now require a bankruptcy trustee to act in accordance with a DCO's recovery and orderly wind-down plans; and (4) require SIDCOs and Subpart C DCOs to provide copious amounts of information to the Federal Deposit Insurance Corporation (FDIC) through the CFTC for the purpose of planning the potential resolution of the entity (the Proposal).

To be clear, in considering the Proposal, the Commission is not debating whether SIDCOs and Subpart C DCOs should be required to engage in thoughtful planning for recovery and orderly wind-down. That has already been decided.³ They are required to do so.⁴ In fact, they have been required to do so since December 2013.⁵

⁹ *Statement of Christy Romero, Acting Special Inspector General, Troubled Asset Relief Program Before the House Committee on Financial Services Subcommittee on Financial Institutions and Consumer Credit*, available at https://www.sigtarp.gov/sites/sigtarp/files/Testimony/Citi_Too_Big_To_Fail_June_14_2011_Testimony.pdf, (June 14, 2011).

¹ This statement uses the terms CFTC or Commission to refer to the Commodity Futures Trading Commission.

² As used herein, the term Subpart C DCO refers to a derivatives clearing organization that elects to be subject to the provisions in Subpart C of Part 39 of the Commission's regulations.

³ See *Derivatives Clearing Organizations and International Standards*, 78 FR 72476 (Dec. 2, 2013).

⁴ CFTC Rule 39.39(b), 17 CFR 39.39(b) (“Each [SIDCO] and [Subpart C DCO] shall maintain viable plans for: (1) recovery or orderly wind-down, necessitated by uncovered credit losses or liquidity shortfalls; and, separately, (2) recovery or orderly wind-down necessitated by general business risk, operational risk, or any other risk that threatens the [DCO's] viability as a going concern.”).

⁵ See 78 FR at 72476 (stating “the rule is effective December 31, 2013”). However, the Commission may, upon request, grant a SIDCO or a Subpart C DCO up to one year to comply with any provision

Continued

⁵ See *Statement of Christy Romero, Acting Special Inspector General, Troubled Asset Relief Program Before the House Committee on Financial Services Subcommittee on Financial Institutions and Consumer Credit*, available at https://www.sigtarp.gov/sites/sigtarp/files/Testimony/Citi_Too_Big_To_Fail_June_14_2011_Testimony.pdf (June 14, 2011).

⁶ Staff have provided guidance on what clearing houses should consider when developing recovery and wind-down plans, much of which is codified in this rule. CFTC Letter No. 16–61, *Recovery Plans and Wind-down Plans Maintained by Derivatives Clearing Organizations and Tools for the Recovery and Orderly Wind-down of Derivatives Clearing Organizations*, (July 16, 2016) (hereinafter CFTC Letter No. 16–61), available at: <https://www.cftc.gov/csl/16-61/download>. The 2016 guidance was intended to be consistent with international standards. I note that this guidance has not been updated in seven years—seven years that included disruption and substantial market stresses.

⁷ 2014 Goldsmith Romero Testimony.

Instead, through a set of prescriptive requirements, the Proposal takes a “government knows best” approach to recovery and orderly wind-down plans and the events that might trigger them. Furthermore, the Proposal’s obligation to have an orderly wind-down plan, and many of the Commission’s prescriptive directives attendant thereto, would extend to all DCOs, not just the SIDCOs and Subpart C DCOs that tend to be the largest and most complex derivatives clearinghouses.

Ignoring the Work of SIDCOs and Subpart C DCOs Over the Past Decade

Over the past decade, SIDCOs and Subpart C DCOs have spent considerable time and resources developing viable plans for recovery and orderly wind-down. Adoption of those plans was not a one-time event, and those plans have not been allowed to grow stale. Indeed, current CFTC regulations require SIDCOs and Subpart C DCOs to *maintain* those plans.⁶

In accordance with Commission regulations, SIDCOs and Subpart C DCOs have been revising and updating those plans and taking steps to develop their strategies and tools, including adopting changes to their rulebooks that explicitly set forth tools they would use and when they would use them. Furthermore, the CFTC has engaged with SIDCOs and Subpart C DCOs on the contents of those plans and associated rules, including through approving rule changes and conducting examinations.

The Proposal would make significant changes to the CFTC’s current regulations addressing recovery and orderly wind-down plans. With respect to SIDCOs and Subpart C DCOs, I do not believe that the benefits of the rule changes in this Proposal outweigh the costs of implementing them. Worse, I believe that the Proposal’s prescriptive requirements would undermine the ability of SIDCOs and Subpart C DCOs to manage risks during business as usual and appropriately plan for recovery and orderly wind-down.

The Proposal Is Too Prescriptive

I am further concerned that the Proposal would require *every* DCO to consider as a potential trigger for recovery or orderly wind-down, as applicable,⁷ a scenario that *some* DCOs might be able to manage during business as usual—a much preferred outcome in my opinion. This is not just a difference of semantics. The distinction between whether a DCO can manage a specific factual circumstance during business as usual or whether that fact pattern would trigger recovery or orderly wind-down has significant financial and governance implications.

In fact, if the CFTC requires a DCO to have tools and resources in its recovery plan to address a scenario that the DCO has determined it can manage during business as usual, then those resources and tools are required to be set aside for recovery and, by

definition, are not available to manage the situation during business as usual. Not only is that inefficient and counterproductive, it undermines the focus on the DCO’s risk management during business as usual. It is the DCO, not the Commission, that is in the best position to determine what risks it can manage during business as usual, and what risks would trigger use of its recovery plan and/or orderly wind-down plan, and to allocate its resources accordingly.

Furthermore, the Proposal would require recovery and orderly wind-down plans to consider a potentially limitless set of scenarios. The Proposal states, “The [DCO’s] recovery plan scenarios should also address the default risks and non-default risks to which the [DCO] is exposed.” While the preamble spends a significant amount of time pontificating on a variety of risk-inducing scenarios, the Proposal does not define the terms “default risks” or “non-default risks” that are used in the rule text, and the requirement contains no limiting language. Without clear definitions or limitations, this phrase requires a DCO to consider *every* risk to which it might possibly be exposed in its recovery and orderly wind-down plans.

The Proposal goes on to require each SIDCO and Subpart C DCO to “identify scenarios that *may* prevent it from *meeting its obligations* or providing its critical services as a going concern”⁸ (emphasis added) in its recovery and orderly wind-down plans. I am concerned that this extremely low threshold could capture anything—and everything.

As if considering the aforementioned “risks” and “scenarios” were not enough, the Proposal requires a SIDCO’s or Subpart C DCO’s recovery plan to “establish the criteria that may trigger implementation or consideration of implementation of that plan,” and its orderly wind-down plan to “establish the criteria that may trigger consideration of implementation of that plan.” I am not sure there is a clear distinction between “risks,” “scenarios,” and “triggers” in the Proposal.

A Faulty Premise and Unnecessary Requirements for All DCOs

Based on the Proposal’s definition of “orderly wind-down,”⁹ one purpose of having an orderly wind-down plan is to effect the permanent cessation of one or more of a DCO’s critical operations or services in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system. We already have such a process—the bankruptcy

of a DCO pursuant to chapter 7 of the U.S. Bankruptcy Code and Part 190 of the Commission’s regulations.

Indeed, the Commission engaged in an extensive effort just a few years ago to update Part 190 of the Commission’s regulations so that they specifically address the bankruptcy of a DCO.¹⁰ By imposing on every DCO costly and burdensome requirements designed to prevent the DCO from ever going through the bankruptcy process, or to control that process by attempting to tell a bankruptcy trustee that it must follow the DCO’s orderly wind-down plan, the Proposal assumes that bankruptcy proceedings are so fraught with the peril of disorder that any DCO going through bankruptcy pursuant to chapter 7 of the U.S. Bankruptcy Code and Part 190 of the Commission’s regulations would threaten the stability of the U.S. financial system.

I question the fundamental premise of the Proposal that *every* DCO offers one or more services that is so critical that the sale, transfer, or permanent cessation of that service would threaten the stability of the U.S. financial system, thereby justifying the requirement that every DCO develop an orderly wind-down plan to avoid that. The preamble of the Proposal acknowledges that “the failure of [a DCO that is neither a SIDCO nor a Subpart C DCO] is much less likely to have ‘serious adverse effects on financial stability in the United States,’” and states that, as a result of that conclusion, “the Commission is not proposing to require these DCOs to maintain recovery plans.” And yet, the Proposal would require those DCOs to expend significant time and resources to maintain and submit to the Commission a plan to “effect the permanent cessation, sale, or transfer, of one or more of its critical operations or services, in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system.”

Just as I do not believe that it is necessary for every DCO to have an orderly wind-down plan, I certainly do not see the purpose of a DCO applicant submitting an orderly wind-down plan to the CFTC as part of its application for registration as a DCO. Not only does a DCO applicant lack a magic ball to foresee its future level of success, the applicant might not even be approved by the Commission. We are asking applicants to plan for going-out-of-business before they even have permission to go into business.

Unbridled Access to Information

I also am very concerned by the unbridled scope of information the Commission could

of CFTC regulations 39.39 or 39.35. See CFTC Rule 39.39(f), 17 CFR 39.39(f).

⁶ CFTC Rule 39.39(b), 17 CFR 39.39(b).

⁷ The Proposal would require all DCOs to have orderly wind-down plans, and only SIDCOs and Subpart C DCOs to have recovery plans.

⁸ The Proposal uses the term “critical services” with respect to recovery scenarios and the term “critical operations and services” with respect to orderly wind-down scenarios.

⁹ The Proposal defines “orderly wind-down” as “the actions of a derivatives clearing organization to effect the permanent cessation, sale, or transfer, of one or more of its critical operations or services, in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system.”

¹⁰ See Part 190 Bankruptcy Regulations, 86 FR 19324, 19325 (Apr. 13, 2021) (stating that one of the “major themes in the revisions to part 190” is that “[t]he Commission is promulgating a new subpart C to part 190, governing the bankruptcy of a clearing organization. In doing so, the Commission is establishing *ex ante* the approach to be taken in addressing such a bankruptcy, in order to foster prompt action in the event such a bankruptcy occurs, and in order to establish a more clear counterfactual (*i.e.*, ‘what would creditors receive in a liquidation in bankruptcy?’) in the event of a resolution of a clearing organization pursuant to Title II of Dodd-Frank.”) (footnote omitted).

demand from SIDCOs and Subpart C DCOs under the Proposal with the goal of the Commission providing said information to the FDIC for purposes of resolution planning. As the primary regulator of SIDCOs and Subpart C DCOs, the CFTC can already request and receive information necessary to appropriately oversee these entities.¹¹ Additionally, pursuant to CFTC Regulation 39.39(c)(2), each SIDCO and Subpart C DCO already must have “procedures for providing the Commission and the [FDIC] with information needed for purposes of resolution planning.”¹²

The Proposal would specify six types of information that each SIDCO and Subpart C DCO would be required to provide upon request. It then includes an all-encompassing catch-all category of “any other information deemed appropriate to plan for resolution under Title II of the Dodd-Frank Act.” I do not support giving a government regulator, let alone two federal regulators, unlimited access to information, especially when that information is being collected for the purpose of providing it to a federal regulator that is not the entity’s primary regulator. I am unmoved, and certainly not comforted, by the assertion that someone (though it is unclear who) must “deem the information appropriate” before it is requested by the CFTC or shared with the FDIC.

What’s more, in light of today’s cybersecurity risks, government agencies must take care in determining what information they collect and store. We must only collect information we need to do our job as regulators, not information we may want at some point for some event that may or may not materialize.

Conclusion

I have great respect for the Commission’s long history of implementing principles-based regulation and allowing our regulated entities the flexibility to build the appropriate policies and procedures—best suited for their unique business—to satisfy those principles. Unfortunately, this Proposal supplants prescriptions for principles and regulatory constraints for flexibility.

Appendix 6—Concurring Statement of Commissioner Caroline D. Pham

I respectfully concur regarding the Notice of Proposed Rulemaking for Derivatives Clearing Organizations Recovery and Orderly Wind-down Plans; Information for Resolution Planning. While I generally support and appreciate the diligent efforts on this proposal, I do have several significant concerns regarding the proposal’s breadth and prescriptiveness, as well as foundational questions on accountability and the role of the government in resolution planning.

¹¹ The preamble to the Proposal notes that “Under Core Principle J, the Commission may request any information from a DCO that the Commission determines to be necessary to conduct oversight of the DCO” and concedes that its aim is to obtain and provide to the FDIC “certain information for resolution planning that goes beyond the information usually obtained during business as usual under the Core Principles and associated Part 39 regulations.”

¹² CFTC Rule 39.39(c)(2), 17 CFR 39.39(c)(2)

Strengthening the Financial System Through Global Standards

It has been almost 14 years since the G20 met in Pittsburgh to address the financial stability risks that emerged during the 2008 global financial crisis. One pivotal outcome of that meeting was the agreement to improve the over-the-counter (OTC) derivatives markets by agreeing that all standardized OTC contracts should be exchange-traded and cleared through regulated central counterparties (CCPs) by 2012, aiming to diminish counterparty credit risk and enhance transparency.¹³ This important decision resulted in a stronger and more resilient financial system by aiming to prevent a recurrence of the crisis from inadequate risk management. At that meeting, the G20 leaders pledged to implement this central clearing mandate in a coordinated and consistent manner across jurisdictions.

In 2012, the Committee on Payments and Market Infrastructures¹⁴ and the International Organization of Securities Commissions (CPMI—IOSCO) established the Principles for Financial Market Infrastructures (PFMIs).¹⁵ The PFMIs are a set of international standards that provide guidance for the operation and oversight of certain financial market utilities (FMUs), including CCPs (such as CFTC-regulated derivatives clearing organizations (DCOs) or SEC-regulated clearing agencies), trade repositories, payment systems, and central securities depositories (CSDs), that the international community has determined to be an essential component to preserving financial stability in the global financial markets.¹⁶

U.S. Approach to Implementation of the PFMIs

Pursuant to Title VIII of the Dodd-Frank Act, the U.S. has implemented the PFMIs through multiple regulators overseeing different FMUs, including DCOs, clearing agencies, payment systems, and CSDs.¹⁷ The Financial Stability Oversight Council (FSOC) designates certain FMUs as systemically important if they pose a risk to the stability of the U.S. financial system (designated FMUs or DFMUs).¹⁸ To date, the FSOC has designated eight FMUs as systemically important, including two systemically

¹³ See Leaders’ Statement: The Pittsburgh Summit (2009), available at <https://www.oecd.org/g20/summits/pittsburgh/G20-Pittsburgh-Leaders-Declaration.pdf>.

¹⁴ The Committee on Payments and Market Infrastructures was renamed the Committee on Payment and Settlement Systems. See History of the CPMI, Bank for International Settlements, available at <https://www.bis.org/cpmi/history.htm>.

¹⁵ See Principles for Financial Market Infrastructures, Bank for International Settlements, available at https://www.bis.org/cpmi/info_pfmi.htm.

¹⁶ *Id.*

¹⁷ See Designated Financial Market Utilities, Board of Governors of the Federal Reserve System, available at www.federalreserve.gov/paymentsystems/designated_fm_u_about.htm.

¹⁸ *Id.*

important derivatives clearing organizations (SIDCOs) regulated by the CFTC.¹⁹

The CFTC, the SEC, and the Federal Reserve have all taken steps to implement Title VIII and the PFMIs, and to promote the stability and efficiency of FMUs subject to their oversight. All three U.S. regulators have to achieve the same outcomes, because each is implementing the same standards from Title VIII and the PFMIs. In reviewing each agency’s approach—the Fed’s Regulation HH and the SEC’s recent proposal for recovery and wind-down plans for clearing agencies—it seems that there is an opportunity for greater alignment and consistency across the CFTC, SEC, and the Fed to implementing these same requirements. I believe the U.S. should take an outcomes-based approach to oversight of DFMUs because we all have to get to the same destination in the end.

CFTC’s 2013 Recovery and Wind-Down Rule for SIDCOs and Subpart C DCOs

In 2013, the CFTC determined that the PFMIs were the most relevant international standards for the risk management of SIDCOs, for purposes of meeting its obligations under Title VIII, and began implementing rules fully consistent with the PFMIs.²⁰ Specifically, the CFTC promulgated its recovery and wind-down rules for SIDCOs and Subpart C DCOs in 2013.²¹ Since then, we have been fortunate enough to receive valuable guidance from CPMI—IOSCO and the Financial Stability Board regarding resolution frameworks for FMUs, the recovery planning process, and the content of recovery plans. These guidelines were initially published in 2014 and subsequently updated in 2017 (“CPMI—IOSCO Recovery Guidance”), providing us with invaluable insights.²² I support keeping the CFTC’s rules up-to-date and upholding international standards under Title VIII and the PFMIs established by CPMI—IOSCO.

In our derivatives markets, DCOs provide central clearing and serve as intermediaries who effectively mitigate risk for hundreds of thousands of transactions every day through the settlement and central clearing of contracts. A significant portion of settlement and clearing in the derivatives market is carried out by two CFTC-registered DCOs

¹⁹ The Federal agency that has primary jurisdiction over one of the eight designated FMUs is indicated in parentheses: The Clearing House Payments Company, L.L.C. (Federal Reserve); CLS Bank International (Federal Reserve); Chicago Mercantile Exchange, Inc. (CFTC); The Depository Trust Company (Securities and Exchange Commission (SEC)); Fixed Income Clearing Corporation (SEC); ICE Clear Credit L.L.C. (CFTC); National Securities Clearing Corporation (SEC); and The Options Clearing Corporation (SEC). See *id.*

²⁰ See *Derivatives Clearing Organizations and International Standards*, 78 FR 72475, 72478 (Dec. 2, 2013) and *Derivatives Clearing Organizations General Provisions and Core Principles*, 85 FR 4800, 4822 (Jan. 27, 2020).

²¹ *Id.*

²² See CPMI—IOSCO, Recovery of financial market infrastructures (Oct. 15, 2014), available at <https://www.bis.org/cpmi/publ/d121.pdf> and CPMI—IOSCO, Resilience of central counterparties: further guidance on the PFMI (July 5, 2017), available at <https://www.bis.org/cpmi/publ/d163.htm>.

designated as SIDCOs by the FSOC in 2012.²³ It is no secret that if one of these SIDCOs were to experience a failure or collapse that it could have far-reaching and detrimental effects on the broader financial system. As “giant warehouses of risk”, SIDCOs play a crucial role in mitigating risks for the entire global financial system. However, in the event of any DCO’s financial distress or potential failure, effective regulations are necessary to ensure an orderly wind-down and recovery process. And that is why I believe it is so important that our DCOs are efficiently-regulated and well-managed at every level, and why the CFTC has long had the preeminent regulatory framework for the oversight of CCPs and led many international initiatives to strengthen financial stability.

While the prospect of a DCO collapse may appear to be beyond the realm of possibility, it is crucial for regulators to avoid succumbing to a failure of imagination. In instances where existing regulations prove inadequate, it is our responsibility through rulemakings to devise contingency plans for such worst-case scenarios.

Striking a Balance in Our Rulemaking—More Is Not Always Better

I thank the staff of the Division of Clearing and Risk and the Office of General Counsel for their work on this proposal. I would also like to particularly thank Bob Wasserman and Eric Schmelzer for their hard work and for the time they spent with my office on this proposal.

Generally, it is important that the CFTC continues to periodically review our regulations to see that they remain fit-for-purpose and to update them as necessary to reflect developments in international standards as well as in our markets. But as I mentioned earlier, while I support today’s proposed rulemaking, I do have some significant concerns.

Definitions

First, regarding the definitions in this proposal. I appreciate that we attempt to align our definition for “orderly wind-down” with the definition in Regulation HH, as well as considered the definition in the recent SEC proposal. I thank the staff for making the revisions that I requested and welcome comments.

Another definition of particular focus to me was “legal risk.” Given my experience implementing governance, risk, and control frameworks—including legal risk management—I took particular care to evaluate the proposal’s definition of legal risk and worked with the staff to try to ensure that the CFTC’s definition was consistent with both international standards as well as best practices. I drew upon my own experience with risk governance frameworks for legal risk. I also looked at other aspects of the CFTC rules where we address legal risk for swap dealers and FCMs, as well as the Basel Committee publications on operational risk (since legal risk is a subset of operational risk), as well as the aforementioned CPMI–IOSCO Recovery Guidance, and the Fed’s definition of legal risk (although that is for

banking organizations). I then suggested, and my language is incorporated into the proposal, that the definition of legal risk includes “losses arising from legal, regulatory, or contractual obligations.” I encourage commenters to take a look at this proposed definition for legal risk, which builds upon some statements in the Recovery Guidance, and to weigh in if this is an appropriate definition, or if there’s a better or alternate formulation.

Recovery Scenarios

Second, I believe it would be helpful to have commenters provide feedback on the likelihood of the stress scenarios and whether each of these scenarios are events or types of risk that should be included in all DCOs’ recovery plans. I also believe that there should be a materiality threshold in connection with determining the recovery scenarios that need to be addressed.

One example of a materiality threshold is that the applicable recovery scenarios would need to have a “significant likelihood” of being triggered, or to evaluate whether multiple scenarios happening at the same time would pose a material risk to the DCO. I would like to have commenters weigh in on potential approaches to tailoring the type and number of required recovery scenarios.

Information for Resolution Planning

Third, turning to resolution planning, I believe that it is important to consider the respective roles and responsibilities of the CFTC as the primary regulator over our DCOs, and the FDIC as the resolution authority under Title II. Based on my own experience engaging with the FDIC, I understand and support the need for the FDIC to be able to carefully engage in resolution planning to address the financial stability risk posed by SIDCOs.

However, I believe that the accountability for sound financial and risk management should lie squarely with CCPs, including for stress, disruption, and even the unlikely event of resolution. Instead, it seems that our proposal shifts accountability from CCP management to the CFTC as regulator, and the FDIC as the primary responsible party for resolution planning, making it the government’s job, not CCP management’s job, to plan ahead. I believe this oversteps the appropriate role of government, and even interferes with day-to-day business operations by diverting limited resources from critical risk areas to burdensome document production. I will highlight a few examples.

Our proposal requires that SIDCOs produce voluminous information and documentation directly to the CFTC on an *ex ante* basis, so that the CFTC can then, in turn, review the information and documentation and then produce it to the FDIC to maintain. This raises several concerns.

From one perspective, I am concerned that we are shifting accountability and responsibility from the management of the SIDCOs where it should be, to the CFTC. One example is the proposal’s requirements with respect to producing legal contracts for internal and external service providers, so that the CFTC and the FDIC can identify

which contracts or agreements for services are not resolution resilient. It does not make sense to me why the burden-shifting is first on the CFTC and the FDIC. It is critical that the management of the SIDCOs identify and mitigate their legal risks, and in the first instance, review their *own* legal contracts and make their *own* determination.

I am not familiar with any other circumstance, for any other regulator, in which that type of legal documentation is comprehensively produced to the regulator on an ongoing basis to maintain. I believe that it is more common for regulated entities to be required to maintain an inventory of such legal documentation in addition to recordkeeping and retention requirements, and to mitigate the legal risks associated with those legal contracts or contractual obligations. Then, the regulator would periodically inspect or examine the framework for legal risk management and any specific regulatory requirements associated with the specific type of legal documentation, including the review of a sample or multiple samples of those legal contracts as appropriate. I would like to hear from commenters if this approach, which is standard practice for inspections and examinations, would make sense here.

Another example of this burden-shifting from business management to the regulators is with respect to producing copies of licenses and licensing agreements to the CFTC so that the CFTC can then produce them to the FDIC. I am not aware of any other regulator that keeps its own document repository of business licenses and licensing agreements for regulated entities.

Regarding information about clearing members that is requested for resolution planning, I do wonder if the CFTC already has this information because we directly regulate clearing members such as futures commission merchants (FCMs) and swap dealers. I would like to ensure that we are collecting any information from SIDCOs in the most efficient way possible, in order to make the best use of the CFTC’s limited resources and to limit the administrative burden. And, it goes without saying that I hope the CFTC will request only information that is truly necessary, and is not information that the CFTC already collects, in order to minimize duplication.

And more generally, because the SEC and the Fed are the other regulators with primary jurisdiction over their respective DFMUs, I would like to know if the SEC and the Fed will be taking the same approach as the CFTC to the production of information for resolution planning to the FDIC. Again, there should be alignment across all three agencies if we are all subject to the same Dodd-Frank statutory requirements.

Orderly Wind-Down Plans

Fourth, moving to orderly wind-down plans, there are a number of detailed technical requirements set forth in the proposal. I will address a few of particular concern.

Ancillary service providers. The proposal includes a requirement to identify ancillary service providers in connection with critical operations and services provided by and to

²³ See note 7, *supra*.

DCOs. To be clear, this requirement is referring to fourth parties, which is the next frontier after third party risk management. I encourage commenters to address whether this requirement is an appropriate way to approach the risk from fourth parties, or if it the proposal is overbroad.

Annual testing. Regarding annual testing of tools for wind-down plans, I wonder if there is a more appropriate frequency for testing that would make sense for smaller DCOs that present a more limited risk profile. I believe that testing frequency should be risk-based, and I appreciate that the staff added this question into the proposal at my request. I also noted that it is possible that more than one tool can be used concurrently, and the staff have added a question regarding listing the order in which DCOs would use tools for wind-down plans.

Wind-down scenarios. On a technical point regarding wind-down scenarios, the proposal includes a requirement to assess the associated risks to non-defaulting clearing members and their customers and linked FMIs. I appreciate that the staff made some adjustments to that language in order to reflect my concern that because there are clearing members that are not FCMs that clear on an agency basis for their customers, that the proposal more accurately contemplates different types of clearing members and clearing models or market structure.

For example, there are clearing members of a DCO that are swap dealers and do self-clearing of their principal trading activities. Without clarification, the rule text could have been construed to encompass all of the clients, counterparties, and customers of a swap dealer that is a clearing member, even

if unrelated to the swap dealer's self-clearing of swap dealing activity—such as the retail banking customers of a commercial bank, where the federally-chartered banking entity subject to regulation by the Office of the Comptroller of the Currency, is also registered with the CFTC as a swap dealer. I believe it would be overreaching for a DCO to be required to assess the associated risks of a DCO wind-down scenario to the retail banking customers of that legal entity.

Scope and lack of tailoring. I believe the proposal takes a one-size-fits-all approach to DCO wind-down plans by requiring all DCOs, regardless of size or risk profile, to adhere to the same extensive requirements. As one example, I imagine that for fully-collateralized DCOs which present a lesser risk profile, the cost of the legal and consulting fees to draft such wind-down plans could easily exceed their total annual operating budget, and a much simpler or straightforward plan would be sufficient. Accordingly, I believe the Commission should consider whether to allow risk-based tailoring of wind-down plans, and I appreciate that the staff has included a question in the proposal to reflect my concern.

Implementation of Plans

Finally, regarding implementation period, I am concerned that the mere six months for implementation that is permitted in the proposal is not sufficient for the incredibly thorough and detailed plans that the proposal requires. I appreciate that the staff has added a question on the appropriate amount of time to implement these new requirements for DCO recovery and orderly wind-down plans.

Conclusion

The world has come a long way since the 2008 global financial crisis to address systemic risk and financial stability in connection with FMIs such as CCPs, and I commend the leadership of the CFTC's efforts, alongside the G20, Financial Stability Board, IOSCO, the Bank for International Settlements (BIS) CPML, and both U.S. and non-U.S. authorities. Though much work has been done, I believe in the adage that one's work is never done. That is why I support, and continue to support, the Commission and staff in periodically reviewing and updating our rules to reflect developments in international standards as well as in markets.

It is evident that the staff has invested significant time and effort in their drafting of this proposal for DCO recovery and orderly wind-down plans, and information for resolution planning, and I appreciate the staff's thoughtfulness. Nonetheless, I respectfully concur because I have several significant concerns regarding the proposal's breadth and prescriptiveness, as well as foundational questions on accountability and the role of the government in resolution planning.

Further, I believe there could be important benefits to enhancing the clarity of this proposal. The sheer length of the proposed rule itself makes it challenging to discern and address specific issues effectively. I believe that a more direct and concise rule would be prudent, and I look forward to receiving public comment.

[FR Doc. 2023-14457 Filed 7-27-23; 8:45 am]

BILLING CODE 6351-01-P