

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Part 39**

**RIN 3038-AF15**

**Governance Requirements for Derivatives Clearing Organizations**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (CFTC or Commission) is proposing amendments to require derivatives clearing organizations (DCOs) to establish and consult with one or more risk management committees (RMCs) comprised of clearing members and customers of clearing members on matters that could materially affect the risk profile of the DCO. In addition, the Commission proposes establishing minimum requirements for RMC composition and rotation, and requiring DCOs to establish and enforce fitness standards for RMC members. The Commission also proposes requiring DCOs to maintain written policies and procedures governing the RMC consultation process and the role of RMC members. Finally, the Commission is proposing to require DCOs to establish one or more market participant risk advisory working groups (RWGs) that must convene at least quarterly, and adopt written policies and procedures related to the formation and role of the RWG.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by “Governance Requirements for Derivatives Clearing Organizations” and RIN number 3038-AF15, 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.<sup>1</sup>

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<sup>1</sup> 17 CFR 145.9. Commission regulations referred to in this release 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>.

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:** Eileen A. Donovan, Deputy Director, 202-418-5096, [edonovan@cftc.gov](mailto:edonovan@cftc.gov); Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581; Theodore Z. Polley III, Associate Director, (312) 596-0551, [tpolley@cftc.gov](mailto:tpolley@cftc.gov); or Joe Opron, Special Counsel, (312) 596-0653, [jopron@cftc.gov](mailto:jopron@cftc.gov); Division of Clearing and Risk, Commodity Futures Trading Commission, 77 West Jackson Boulevard, Suite 800, Chicago, Illinois 60604.

**SUPPLEMENTARY INFORMATION:**

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## I. Background

The Market Risk Advisory Committee (MRAC) is a discretionary advisory committee established by the authority of the Commission in accordance with the Federal Advisory Committee Act, as amended.<sup>2</sup> The MRAC advises the Commission on matters related to evolving market structures and movement of risk across clearinghouses, exchanges, intermediaries, market makers and end-users.<sup>3</sup> MRAC subcommittees are organized by topic to produce reports and recommendations to the full MRAC that, if approved, are submitted to the Commission for its consideration.

On February 23, 2021, the MRAC approved a report from its Central Counterparty (CCP) Risk and Governance Subcommittee (Subcommittee) that provided several recommendations on DCO risk governance.<sup>4</sup> For each topic considered in the report, the (1) DCOs and (2) clearing members and end-users (CM/EU) represented on the Subcommittee each provided separate recommendations, and in some instances proposed rule text. On some topics, the two groups reached a general agreement on how DCO governance might be improved, but there were also areas of disagreement.

The Commission is proposing several amendments to § 39.24 that are consistent with the Subcommittee's recommendations to enhance the Commission's DCO governance standards. First, the Commission proposes to require each DCO to establish and consult with one or more RMCs comprised of clearing members and customers of clearing members prior to making decisions that could materially affect the risk profile of

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<sup>2</sup> 5 U.S.C. App. 2.

<sup>3</sup> See Market Risk Advisory Committee, *available at* <https://www.cftc.gov/About/AdvisoryCommittees/MRAC>.

<sup>4</sup> MRAC CCP Risk and Governance Subcommittee, Recommendations on CCP Governance and Summary of Subcommittee Constituent Perspectives, *available at* [https://www.cftc.gov/media/6201/MRAC\\_CCPRGS\\_RCCOG022321/download](https://www.cftc.gov/media/6201/MRAC_CCPRGS_RCCOG022321/download) (Feb. 23, 2021).

the DCO, and proposes requirements related to the composition and activities of RMCs. Second, the Commission proposes to require each DCO to establish one or more RWGs in order to seek risk-based input (as opposed to commercially-driven input) from a broader array of market participants. The Commission also requests comment below on several other topics discussed in the Subcommittee report on which the DCO and CM/EU members of the Subcommittee did not reach clear agreement.

## **II. Proposed Amendments to § 39.24(b)**

Section 5b(c)(2) of the Commodity Exchange Act (CEA) sets forth core principles with which a DCO must comply in order to be registered and to maintain registration as a DCO (DCO Core Principles),<sup>5</sup> and part 39 of the Commission's regulations implement the DCO Core Principles. DCO Core Principle O requires a DCO to establish governance arrangements that are transparent, fulfill public interest requirements, and permit the consideration of the views of owners and participants.<sup>6</sup> Paragraphs (a) and (b) of § 39.24 implement this aspect of Core Principle O by providing minimum requirements regarding the substance and form of a DCO's governance arrangements. The Commission proposes to enhance these requirements by requiring a DCO to: (1) establish and consult with one or more RMCs on matters that could materially affect the risk profile of the DCO; (2) appoint clearing members and customers of clearing members to the RMC; (3) rotate RMC membership on a regular basis; (4) establish one or more RWGs; and (5) establish written policies and procedures regarding the RMC consultation process and the formation and role of each RWG.

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<sup>5</sup> 7 U.S.C. 7a-1.

<sup>6</sup> See 7 U.S.C. 7a-1(c)(2)(O)(i).

### **A. Establishment and Consultation of RMC – § 39.24(b)(11)**

Commission regulations require a DCO to consider the views of clearing members and customers of clearing members as part of the DCO's governance process. Most notably, § 39.24(a)(1)(iv) requires a DCO to have governance arrangements that support the relevant public interest considerations of clearing members, customers of clearing members, and other relevant stakeholders. Regulation 39.24(a)(2) requires a DCO's board of directors to make certain that the DCO's design, rules, overall strategy, and major decisions appropriately reflect the legitimate interests of clearing members, customers of clearing members, and other relevant stakeholders.

While not required by Commission regulations, many DCOs have addressed the above requirements by establishing advisory RMCs comprised of clearing members that provide expert opinion on key risk management issues.<sup>7</sup> Codifying this best practice furthers the purpose of Core Principle O by providing a consistent, formalized process across all DCOs to solicit, consider, and address input from clearing members and end-users before making decisions that could materially affect the risk profile of the DCO. Moreover, while serving on an RMC, clearing members and end-users would be able to use their risk management expertise to promote the safety and efficiency of the DCO and foster the stability of the broader financial markets. Finally, codifying a market participant consultation requirement formally enhances the role of market participants in the DCO risk governance process across DCOs.

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<sup>7</sup> See e.g. Chicago Mercantile Exchange, Inc., Clearing House Risk Committee Charter, accessed on February 3, 2022, available at <http://investor.cmegroup.com/static-files/7445789a-8aaa-46ec-8539-069e8cbff0fab>; ICE Clear Credit Regulation and Governance, Fact Sheet, accessed February 3, 2022, available at [https://www.theice.com/publicdocs/clear\\_credit/ICE\\_Clear\\_Credit\\_Regulation\\_and\\_Governance.pdf](https://www.theice.com/publicdocs/clear_credit/ICE_Clear_Credit_Regulation_and_Governance.pdf).

Therefore, the Commission is proposing new § 39.24(b)(11), which would require a DCO to maintain governance arrangements that establish one or more RMCs<sup>8</sup>, and require a DCO's board of directors to consult with, and consider and respond to input from, its RMC(s) on all matters that could materially affect the risk profile of the DCO.<sup>9</sup> While the Commission is not proposing to prescribe exactly how a board of directors should respond to RMC input, the board of directors must respond to the substance of the input it receives rather than merely acknowledging that the input was received. Proposed § 39.24(b)(11) would identify a non-exhaustive list of matters that could materially affect the risk profile of the DCO, including any material change to the DCO's margin model, default procedures, participation requirements, and risk monitoring practices, as well as the clearing of new products.

Clearing members have a significant interest in the clearing of new products, especially at DCOs with mutualized default funds. The fact that new products typically have low open interest upon launch does not prevent them from potentially materially affecting the risk profile of the DCO. When determining whether a new product could materially affect its risk profile, a DCO should consider the product's potential impact as the product matures, and not only at the onset of trading, when risks may be less pronounced.

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<sup>8</sup> The Commission notes that some DCOs maintain separate RMCs for each product type that they clear. For example, Chicago Mercantile Exchange, Inc.'s (CME) Clearing House Risk Committee oversees primarily futures and options products, and its Interest Rate Swaps Risk Committee oversees interest rate swaps products. See CME, Governance, accessed on February 3, 2022, available at <https://www.cmegroup.com/education/articles-and-reports/governance.html>.

<sup>9</sup> RMCs are mentioned in existing Commission regulations (*see, e.g.*, § 39.24((b)(7)) given that many DCOs already use them, but current regulations do not explicitly require a DCO to establish an RMC or prescribe the nature of its role.

The Commission requests comment on whether a DCO's proposal to clear a new product should be categorically treated as a matter that could materially affect the DCO's risk profile for purposes of the proposed RMC consultation requirement given the heightened potential for novel and complex risks associated with clearing new products. If so, should the Commission define what constitutes a new product for this purpose, and how should it do so? For example, should the Commission define new products to include those that have margining, liquidity, default management, pricing, or other risk characteristics that differ from those currently cleared by the DCO? In the alternative, should the Commission require DCOs to adopt policies defining what constitutes a new product?

Finally, for the avoidance of doubt, the Commission notes that while it believes that codifying an RMC consultation requirement will significantly enhance overall DCO risk management, a DCO's board of directors has the ultimate responsibility to make major decisions with respect to the DCO.<sup>10</sup>

#### **B. Policies and Procedures Governing RMC Consultation – § 39.24(b)(11)(i)**

The Commission is proposing new § 39.24(b)(11)(i), which would require a DCO to maintain written policies and procedures to make certain that the RMC consultation process is described in detail, and includes requirements for the DCO to document the board's consideration of and response to RMC input. The Commission believes that explicitly requiring DCOs to develop and maintain policies and procedures governing DCO consultation with its RMC(s), and to document the activities of its RMC(s), will promote transparency, accountability, and predictability, and facilitate effective oversight

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<sup>10</sup> See 17 CFR 39.24(a)(2) through (3).

by the Commission in this area. The Commission requests comment on whether DCOs should be required to create and maintain minutes or other documentation of RMC meetings.

### **C. Representation of Clearing Members and Customers on RMC – §**

#### **39.24(b)(11)(ii)**

As discussed above, Core Principle O and § 39.24 require DCOs to consider the views and legitimate interests of clearing members and customers of clearing members in their decision-making process. This principle is rooted in the need to ensure that these parties have an opportunity to express their concerns, and in recognition of the stake that clearing members and their customers have in the financial integrity of the DCO, as well as the fact that DCOs benefit from their unique perspective and expertise on risk management issues. Accordingly, the Commission is proposing new § 39.24(b)(11)(ii), which would require a DCO to maintain policies to make certain that an RMC includes representatives from clearing members and customers of clearing members.

With respect to RMC composition, the Commission proposes to adopt the Subcommittee’s recommendation that an RMC include “representatives” from both clearing members and customers of clearing members. The Commission believes that requiring more than one clearing member and more than one customer of a clearing member ensures a minimum level of market participant participation on RMCs while providing DCOs with appropriate flexibility to account for differences among DCOs in terms of size, business models, resources, and governance structure. However, the Commission requests comment on whether it should adopt additional specific composition requirements, and if so, what those requirements should be.

#### **D. Rotation of RMC Membership – § 39.24(b)(11)(iii)**

The Commission believes that requiring DCOs to regularly rotate their RMC membership will promote the ability of clearing members and customers of clearing members from a broad array of market segments to provide their expertise, and will ensure that the RMC provides the DCO with fresh perspectives on risk management matters. Accordingly, the Commission is proposing new § 39.24(b)(11)(iii), which would require a DCO to maintain policies to make certain that membership of an RMC is rotated on a regular basis. The Commission requests comment on whether it should set a minimum frequency for RMC membership rotation, what are the advantages and disadvantages of doing so, and, if it does, what that frequency should be.

#### **E. Establishment of RWG to Obtain Input – § 39.24(b)(12)**

As noted above, the Commission's proposal to require a DCO to establish and consult with an RMC that includes clearing member and customer representatives who are rotated on a regular basis would further implement the Core Principle O requirement that a DCO establish governance arrangements that permit the consideration of the views of owners and participants. However, the Commission recognizes that practical considerations, most notably the size of a typical RMC and the significant time commitment that an RMC would require of its members, will limit the number of representatives that can serve on a DCO's RMC at any given time. Many DCOs have dozens of clearing members, each of which can have a large number of customers. Moreover, as proposed, an RMC's duties would involve formal consultation with a DCO's board of directors on all matters that could materially affect the risk profile of the DCO. Thus, RMC membership may constitute a significant time commitment. As an

advisory working group, an RWG would require a smaller time commitment from its participants. Therefore, in order to further expand and diversify the information available to a DCO while making material risk decisions, and to expand opportunities for those with a stake in DCO risk management to provide input, the Commission is proposing new § 39.24(b)(12) to require a DCO to establish one or more RWGs, and to maintain policies and procedures regarding the formation and role of each RWG. Having an RWG would allow a DCO to seek risk-based input (as opposed to commercially-driven input) from a broader array of market participants, such that a diverse cross-section of the DCO's clearing members and customers of its clearing members are represented, regarding all matters that could materially affect the risk profile of the DCO. Requiring policies and procedures regarding the role of each RWG will promote transparency, accountability, and predictability and facilitate effective oversight by the Commission. Finally, the Commission proposes to require each RWG to convene at least quarterly, with the goal of ensuring that each RWG is able to discuss and provide input on material risk matters in a timely manner.

The Commission requests comment on whether the proposed requirement that each RWG convene quarterly is the appropriate frequency. The Commission also requests comment on whether it should require DCOs to document the proceedings of RWG meetings, considering both the transparency and accountability benefits of such a requirement and the potential impact of a documentation requirement on free and open dialogue.

### **III. Proposed Amendments to § 39.24(c)**

#### **A. Fitness Standards for RMC Members – § 39.24(c)(1)**

Regulation 39.24(c) implements subsection (ii) of DCO Core Principle O, which requires a DCO to establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the DCO, any other individual or entity with direct access to the settlement or clearing activities of the DCO, and any other party affiliated with any of the foregoing individuals or entities.<sup>11</sup> If a DCO is required to establish and consult with its RMC on all matters that could materially affect the risk profile of the DCO as proposed, the Commission believes a DCO also would need to consider the fitness of individual members for RMC participation, recognizing that fitness standards may vary across DCOs. Therefore, the Commission proposes to amend § 39.24(c) by adding new paragraph (c)(1)(iv) (and renumbering current paragraphs (c)(1)(iv) and (v) accordingly) to require a DCO to establish and enforce appropriate fitness standards for its RMC members.

**B. Role of RMC Members as Independent Experts – § 39.24(c)(3)**

As discussed above, the Commission’s proposal to require a DCO’s board of directors to consult with its RMC(s), comprised of clearing member and customer representatives, is intended to benefit the DCO risk management process by engaging a broad array of backgrounds and expertise. The Commission believes that in order to ensure that RMC members feel empowered to provide objective input during this process, they must be able to serve as independent experts, neither beholden to their employers’ particular interests nor acting as fiduciaries of the DCO. Therefore, the Commission is proposing new § 39.24(c)(3) to require a DCO to maintain policies designed to enable its RMC members to provide independent, expert opinions in the form

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<sup>11</sup> See 7 U.S.C. 7a-1(c)(2)(O).

of risk-based input on all matters presented to the RMC for consideration, and perform their duties in a manner that supports the safety and efficiency of the DCO and the stability of the broader financial system. The Commission requests comment on whether requiring RMC members to act as independent experts, neither beholden to their employers' commercial interests nor acting as fiduciaries of the DCO raises any potential legal issues for those members. Specifically, as a matter of corporate law, would RMC members be forced to contend with competing duties or obligations to the DCO and their employer, including any duties or obligations that would foreclose RMC participation? If so, how may the goal of receiving independent, expert opinions be achieved? Should DCOs be required to have policies specific to RMC members for managing conflicts of interest?

#### **IV. Request for Comment**

The Commission generally requests comment on all aspects of the proposed rules. Additionally, the Commission requests comments on the following specific items, which the Commission might address in a future rulemaking:

##### **A. Market Participant Consultation Prior to a Rule Change**

Commission regulations require a DCO to include in its rule submissions under §§ 40.5, 40.6, and 40.10 a brief explanation of any substantive opposing views expressed to the DCO by governing board or committee members, members of the DCO, or market participants that were not incorporated into the rule, or a statement that no such opposing views were expressed.<sup>12</sup>

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<sup>12</sup> 17 CFR 40.5(a)(7)(iv); 40.6(a)(7)(iv); 40.10(a)(1) (incorporating by reference the requirements of 17 CFR 40.6(a)(7)).

The proposed amendments to § 39.24 would require a DCO's board of directors to consult with its RMC, which must contain representatives from clearing members and customers of clearing members, on all matters that could materially affect the risk profile of the DCO, including matters that would be captured in DCO rule submissions. In addition, a DCO would be required to establish one or more RWGs as a forum to seek risk-based input from a broad array of market participants, such that a diverse cross-section of the DCO's clearing members and customers of clearing members are represented, regarding all matters that could materially affect the risk profile of the DCO.

The Commission requests comment on whether it should also require a DCO to consult with a broad spectrum of market participants prior to submitting any rule change pursuant to §§ 40.5, 40.6, or 40.10. If so, what constitutes a sufficiently broad spectrum of market participants, and how should the DCO engage that group? Should a DCO be required to consult only on those rule changes that could materially affect the DCO's risk profile?

In accomplishing effective consultation, is there value to requiring a DCO to respond to market participant feedback? Specifically, where specific risk-based feedback from market participants has not been incorporated in the DCO's decision, should the DCO be required to respond to market participants informing them of the decision and outlining the rationale behind their action? How could such a requirement be tailored to avoid forcing a DCO to respond to excessively detailed or irrelevant comments?

As noted above, Commission regulations currently require a DCO to provide to the Commission a "brief explanation of any substantive opposing views." Should the Commission further clarify the meaning of "substantive" in the context of this

requirement? Should a DCO be required to provide the Commission with a report of all opposing views expressed to the DCO? Rather than expecting the DCO to accurately describe opposing views, should the Commission only require a DCO to pass on to the Commission any opposing views expressed to the DCO in writing? Should a DCO be required in its submission to the Commission to respond to opposing views expressed to the DCO? Finally, should the Commission consider additional rules to address a DCO's failure to comply with the full submission requirements of Part 40, such as the imposition of an automatic stay?

## **B. RMC Member Information Sharing with Firm to Obtain Expert**

### **Opinions**

The Commission believes that the proposed RMC requirements will greatly improve the level of market participant input during the DCO risk governance process for those DCOs that do not currently have an RMC. However, the Commission recognizes that an RMC member's employer may have subject matter experts other than the RMC member who could provide additional expertise that could improve the RMC's ability to make informed recommendations to the DCO. The information provided to a DCO's RMC is often confidential, however, and the value of the enhanced input must be weighed against the increased risk of disclosure in allowing confidential information to be shared outside of the RMC. Moreover, different types of information may require different levels of confidentiality. For example, information concerning prospective changes to aspects of the DCO's risk management framework may have a different level of confidentiality than information concerning an action against a member due to financial responsibility concerns.

The Commission requests comment on whether DCOs should be required to maintain policies and procedures designed to enable an RMC member to share certain types of information it learns in its capacity as an RMC member with fellow employees in order to obtain additional expert opinion. If so, what types of information should be eligible to be shared? What measures should be taken to ensure that confidential information is appropriately protected?

## **V. 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.<sup>13</sup> The amendments 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.<sup>14</sup> The Commission has previously determined that DCOs are not small entities for the purpose of the RFA.<sup>15</sup> 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 economic impact on a substantial number of small entities.

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<sup>13</sup> 5 U.S.C. 601 *et seq.*

<sup>14</sup> 47 FR 18618 (Apr. 30, 1982).

<sup>15</sup> *See* 66 FR 45604, 45609 (Aug. 29, 2001).

## **B. Paperwork Reduction Act**

The Paperwork Reduction Act (PRA)<sup>16</sup> 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 Office of Management and Budget (OMB). This proposed rulemaking contains reporting and recordkeeping requirements that are collections of information within the meaning of the PRA. This section addresses the impact that the proposal will have on existing information collection requirements associated with part 39 of the Commission's regulations.

The Commission is proposing to add new § 39.24(b)(11) to require a DCO to establish one or more RMC(s) and require its board of directors to consult with the relevant RMC on all matters that could materially affect the DCO's risk profile. The Commission also is proposing to add new § 39.24(b)(11)(i), which would require a DCO to maintain policies to ensure that the RMC consultation process is described in detail, including the documentation and consideration of input; new § 39.24(b)(11)(ii), which would require a DCO to maintain policies to ensure each RMC includes representatives from clearing members and customers of clearing members; new § 39.24(b)(11)(iii) to require a DCO to maintain policies that make certain membership of each RMC is rotated on a regular basis; new § 39.24(b)(12) to require a DCO to establish one or more RWG(s) and to maintain policies and procedures regarding the formation and role of each RWG; and new § 39.24(c)(1)(iv), which would require a DCO to establish fitness standards for RMC members. Finally, the Commission is proposing new § 39.24(c)(3), which would

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<sup>16</sup> 44 U.S.C. 3501 *et seq.*

require a DCO to maintain policies enabling its RMC members to provide independent, expert opinions in the form of risk-based input to the RMC, and to perform their duties in a manner that supports the DCO's safety and efficiency and the stability of the broader financial system.

The proposed regulations require a DCO to develop governance arrangements for its RMC(s) and RWG(s), to the extent it does not already have governance arrangements meeting the requirements. Existing regulations require a DCO to disclose new governance arrangements to the extent permitted under applicable statutory and regulatory requirements on confidentiality to the Commission, other relevant authorities, clearing members and their customers, owners of the DCO, and the public.<sup>17</sup> Because this disclosure requirement stems from existing regulations, it is already included in the reporting burden estimate for § 39.24 and currently covered by the collection of information titled "Requirements for Derivatives Clearing Organizations, OMB control number 3038-0076." The proposed regulations will not impose a new reporting burden and will not increase the reporting burden estimate.

#### Request for Comment

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. The Commission will consider public comments on this proposed collection of information in:

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<sup>17</sup> See 17 CFR 39.24(b)(2).

(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.

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

Copies of the submission from the Commission to OMB are available from the CFTC Clearance Officer, 1155 21st Street, NW, Washington, DC 20581, (202) 418-5160 or from <http://RegInfo.gov>. 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 all comments can be summarized and addressed in the final rulemaking, and please refer to the **ADDRESSES** section of this proposed rule for instructions on submitting comments to the Commission. OMB is required to make a decision concerning the proposed information collection requirements between 30 and 60 days after publication of this proposed rule 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 proposed rule. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rule.

### **C. 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.<sup>18</sup> 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 herein 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

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<sup>18</sup> 7 U.S.C. 19(a).

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. Additionally, any initial and recurring compliance costs for any particular DCO will depend on the size, existing infrastructure, practices, and cost structure of the DCO.

The Commission generally requests comment on all aspects of its cost-benefit considerations, including the identification and assessment of any 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 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; and (2) § 39.24. Specifically, 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, and § 39.24 implements DCO Core Principle O. Of the fifteen DCOs currently registered with the Commission, twelve already have some form of an RMC, which may have been intended, in part, to fulfill the DCO's compliance obligations under DCO Core Principle O and § 39.24. Of the fifteen DCOs currently registered with the Commission, six already have

some form of an RWG, which may have been intended, in part, to fulfill the DCO's compliance obligations under DCO Core Principle O and § 39.24.

### 3. Proposed Amendments to § 39.24

#### *a. Summary of Proposed Amendments*

The Commission is proposing regulations that require each DCO to establish an RMC and require each DCO's board of directors to consult with, and consider and respond to input from, the RMC on all matters that could materially affect the DCO's risk profile. The Commission also proposes to require DCOs to: establish fitness standards for RMC members; maintain policies to ensure each RMC includes representatives from clearing members and customers of clearing members; maintain policies that require rotation of the membership of each RMC on a regular basis, and maintain written policies and procedures regarding the RMC consultation process. The Commission also proposes to require each DCO to maintain policies enabling RMC members to provide independent, expert opinions in the form of risk-based input to the RMC, and to perform their duties in a manner that supports the DCO's safety and efficiency and the stability of the broader financial system. Finally, the Commission proposes to require each DCO to establish one or more RWGs as a forum to seek risk-based input from a broad array of market participants, such that a diverse cross-section of the DCO's clearing members and customers of clearing members are represented, regarding all matters that could materially affect the risk profile of the DCO. RWGs would be required to convene at least quarterly. In addition, each DCO would be required to adopt written policies and procedures related to the formation and role of the RWG.

*b. Benefits*

The proposed additions to § 39.24 would promote more efficient, effective, and reliable DCO risk management, benefitting DCOs, clearing members, market participants, and the financial system more broadly. RMCs would provide a formal mechanism for DCOs to receive valuable expert input from market participants on critical issues including the DCO's margin model, default procedures, participation requirements, and risk monitoring practices, as well as the clearing of new products that could materially impact the DCO's risk profile. Moreover, codifying the requirement that a DCO's board of directors consult with, and consider and respond to input from, market participants on an RMC will formalize a widely-used method for engaging market participants in the risk governance process. This would allow DCOs to more effectively consider and address risks impacting DCO stability, market participant stability, and market resilience.

To the extent that some DCOs already have RMCs that are compliant or partially compliant with the proposed rules, the benefits of the proposed regulations are currently being realized to some degree.

The proposed regulations would help RMCs to be well positioned to provide effective risk management opinions to the DCO's board of directors by requiring DCOs to establish RMC membership fitness standards. These standards would help to ensure that individual RMC members are well qualified to perform the RMCs' duties. Ensuring that RMCs include representatives from clearing members and customers of clearing members would give DCOs the benefit of these stakeholders' perspectives on risk management issues, and gives market participants the benefit of a forum for conveying

their input on risk management issues. Rotating the membership of the RMCs on a regular basis would promote a diversity of perspectives. In addition, requiring DCOs to implement policies enabling RMC members to provide independent, expert opinions in the form of risk-based input, and to perform their duties in a manner that supports the DCO's safety and efficiency, would help ensure that RMC members feel empowered to provide objective input during this process by serving as independent experts that are neither beholden to their employers' commercial interests nor acting as fiduciaries of the DCO. These requirements for RMCs and their members collectively increase the likelihood of effective DCO risk management. Finally, requiring DCOs to develop and maintain policies and procedures governing DCO board of directors consultation with its RMC(s), and to document the activities of its RMC(s), will promote transparency, accountability, and predictability, and facilitate effective oversight by the Commission in this area.

Similarly, the requirement that each DCO establish one or more RWGs will further increase the likelihood of effective DCO risk management by providing each DCO with an expanded pool of clearing member and customer of clearing member representatives to consult when considering matters that could materially affect the risk profile of the DCO. Requiring DCOs to maintain written policies and procedures related to the formation and role of each risk advisory working group will promote transparency, accountability, and predictability and facilitate effective oversight by the Commission in this area.

As discussed above, the Commission requests comments on the potential benefits of the proposed changes to § 39.24, including benefits that would be realized by DCOs,

other market participants (including clearing members and their customers), or the financial system more broadly.

*c. Costs*

To the extent that some DCOs do not already have RMCs or would need to adjust the policies and procedures of their existing RMCs to comply with the proposed rules, the proposed regulations would impose some costs on DCOs. Costs could arise from additional hours a DCO's employees might need to spend analyzing the compliance of the DCO's rules and procedures with these requirements, designing and drafting new or amended rules and procedures when necessary, and implementing these new or amended rules and procedures. Specifically, DCOs would need to draft governance arrangements providing for RMCs and RWGs with the membership requirements and policies stated in the proposed amendments to § 39.24 if compliant arrangements are not already in place.

Drafting new governance arrangements would cost DCOs administrative time. The amount of time required for each DCO to initially implement the proposed requirement would vary based on a number of factors, including whether the DCO already has policies complying with the proposed regulations and the amount of time needed for each DCO to design and draft new or amended policies where necessary. As noted above, twelve of the fifteen DCOs currently registered with the Commission already have RMCs in place in some form, which may lower the cost of implementing the proposed regulations. Further, the DCOs' policies implementing the proposed regulations would likely not change significantly from year to year, so after the initial creation of the policies, the time required to create rules and procedures would be minimal.

Ongoing implementation of the proposed regulations would also impose costs. Establishing and operating an RMC would cost a DCO time to identify potential RMC members that meet the fitness standards when the RMC is initially formed, as well as each time the RMC membership is rotated. Operation of the RMC would require a DCO to provide information to the RMC as needed for its consideration, and time for the DCO's board to consult with the RMC and consider and respond to its input. An RMC's operation would also require time from its members to consider relevant information regarding the DCO's risk practices, and to form and deliver its views. These costs would, however, be dispersed among different participants over time due to the proposed requirement that DCOs rotate their RMC members regularly.

As discussed above, the Commission requests comments on the potential costs of the proposed amendments to § 39.24, including any costs that would be imposed on DCOs, other market participants, or the financial system more broadly. In particular, for those DCOs that already have RMCs and RWGs in place, the Commission requests comment on the extent to which the proposed regulations would require changes to the DCO's existing policies and procedures regarding its RMC(s) and RWG(s).

*d. Section 15(a) Factors*

In addition to the discussion above, the Commission has evaluated the costs and benefits of the proposed amendments to § 39.24 in light of the following five broad areas of market and public concern identified in Section 15(a) of the CEA: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission believes that the proposed

amendments would have a beneficial effect on sound risk management practices and on the protection of market participants and the public.

(1) *Protection of market participants and the public*: The proposed regulations also would protect market participants and the public by improving DCOs' identification and handling of risk, reducing the likelihood that market participants and the public face unexpected costs resulting from deficient DCO risk management. The proposed amendments to § 39.24 also give market participants a voice in DCO risk management matters through their participation in RMCs and RWGs, increasing the likelihood that risks to market participants are adequately considered and minimized.

(2) *Efficiency, competitiveness, and financial integrity of futures markets*: The improvements to DCO risk management practices that the proposed regulations are designed to encourage also would benefit the financial integrity of futures and cleared swap markets. The Commission has not identified any other effect of the proposed rules on efficiency, competitiveness, and financial integrity.

(3) *Price discovery*: The Commission has not identified any effect of the proposed regulations on price discovery.

(4) *Sound risk management practices*: The proposed regulations are designed to support sound risk management practices at DCOs by providing a forum for independent, expert risk-based input to a DCO's board of directors from clearing members and customers of clearing members. Proposed requirements regarding RMC composition, fitness standards for RMC members, and RMC membership rotation all support RMCs' purpose of promoting sound risk management practices. In addition, the proposed requirement that a DCO establish one or more RWGs is designed to further expand and

diversify the information available to a DCO while making material risk decisions, and to expand opportunities for those with a stake in DCO risk management to provide input, which further promotes sound risk management.

(5) *Other public interest considerations*: The Commission has not identified any effect of the proposed regulations on other public interest considerations.

#### **D. 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.<sup>19</sup>

The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. The Commission requests comment on whether the proposed amendments 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 rule amendments 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

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<sup>19</sup> 7 U.S.C. 19(b).

anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the proposed rule amendments.

**List of Subjects in 17 CFR Part 39**

Governance 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 § 39.24 as follows:

a. Revise paragraphs (b)(9) and (10)(iii);

b. Add paragraphs (b)(11) and (b)(12);

c. Republish paragraph (c) heading, redesignate paragraphs (c)(1)(iv) and (v) as paragraphs (c)(1)(v) and (vi) and republish as redesignated, and add new paragraph (c)(1)(iv); and

d. Add paragraph (c)(3).

The revisions and additions read as follows:

**§ 39.24 Governance.**

\* \* \* \* \*

(b) \* \* \*

(9) Assign responsibility and accountability for risk decisions, including in crises and emergencies;

(10) \* \* \*

(iii) Recovery and wind-down plans required by § 39.39, as applicable;

(11) Establish one or more risk management committees and require the board of directors to consult with, and consider and respond to input from, the risk management committee(s) on all matters that could materially affect the risk profile of the derivatives clearing organization, including any material change to the derivatives clearing organization's margin model, default procedures, participation requirements, and risk monitoring practices, as well as the clearing of new products. A derivatives clearing organization shall maintain written policies and procedures to make certain that:

(i) The risk management committee consultation process is described in detail, and includes requirements for the derivatives clearing organization to document the board's consideration of and response to risk management committee input;

(ii) A risk management committee includes representatives from clearing members and customers of clearing members; and

(iii) Membership of a risk management committee is rotated on a regular basis; and

(12) Establish one or more market participant risk advisory working groups as a forum to seek risk-based input from a broad array of market participants, such that a diverse cross-section of the derivatives clearing organization's clearing members and customers of clearing members are represented, regarding all matters that could materially affect the risk profile of the derivatives clearing organization. A derivatives clearing organization shall maintain written policies and procedures related to the

formation and role of each risk advisory working group. Each market participant risk advisory working group shall convene at least quarterly.

(c) *Fitness standards.*

(1) \* \* \*

(iv) Members of risk management committee(s);

(v) Any other individual or entity with direct access to the settlement or clearing activities of the derivatives clearing organization; and

(vi) Any other party affiliated with any individual or entity described in this paragraph.

\* \* \* \* \*

(3) A derivatives clearing organization shall maintain policies designed to enable members of risk management committee(s) to provide independent, expert opinions in the form of risk-based input on all matters presented to the risk management committee for consideration, and perform their duties in a manner that supports the safety and efficiency of the derivatives clearing organization and the stability of the broader financial system.

Issued in Washington, DC, on July 29, 2022, by the Commission.

Christopher Kirkpatrick,

*Secretary of the Commission.*

NOTE: The following appendices will not appear in the Code of Federal Regulations.

**Appendices to Governance Requirements for Derivatives Clearing Organizations –  
Commission Voting Summary, Chairman’s Statement, and Commissioners’  
Statements**

**Appendix 1 – Commission Voting Summary**

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, Mersinger, and Pham voted in the affirmative. No Commissioner voted in the negative.

**Appendix 2 – Statement of Support of Chairman Rostin Behnam**

The last several years have tested the resilience of the derivatives markets and post-financial crisis reforms more generally in ways that few risk scenarios could have contemplated. Despite a resoundingly strong response to the numerous market shocks, the global regulatory community, in concert with market participants, has appropriately debated the need for additional tools, resources, and rules to manage these and future risks. As farmers, ranchers, corporates, pension funds, insurers, and other market participants continue to turn to the derivatives markets for risk management and price discovery, it is critical that derivatives clearing organizations (DCOs) clearing these products sufficiently calibrate their risk management tools and frameworks to meet the most extreme, but plausible, tail events.

DCOs with governance structures that embrace the diverse risk-based views of clearing members and their clearing members’ customers will be better situated to refine their risk management frameworks to withstand extreme but plausible market conditions while promoting financial stability. With an ever-evolving risk landscape, including new clearing structures, new product innovation, and the emerging risk of climate change to

name just a few, it is critical that DCOs' governance arrangements and fitness standards evolve.

That is why I support today's proposal to amend the governance requirements for DCOs in CFTC Regulation 39.24 to enhance the role of clearing members and customers of clearing members in the risk governance process for DCOs. A DCO's robust risk management framework is particularly critical because of the systemic nature of clearinghouses and the integral role that DCOs have in promoting financial stability.

Today's DCO governance proposal is a direct outgrowth of the work of the Central Counterparty (CCP) Risk and Governance Subcommittee (Subcommittee) of the Commission's Market Risk Advisory Committee ("MRAC"),<sup>1</sup> of which I was the immediate past Sponsor. The Subcommittee's February 2021 report to the MRAC provided several recommendations for improving DCO governance standards that the Commission is proposing today to amend CFTC Regulation 39.24.

First, the Commission proposes to require each DCO to establish one or more risk management committees (RMCs) to consult with clearing members and clearing member customers prior to making any decisions that could materially affect the risk profile of the DCO. Under the proposal, the DCO would need to consult with the RMC for material changes to a DCO's margin model, default procedures, participation requirements, risk monitoring practices, and clearing of new products. The proposal would further require a DCO to have written policies and procedures related to the RMC's consultation process,

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<sup>1</sup> The MRAC is a discretionary advisory committee established by the authority of the Commission in accordance with the Federal Advisory Committee Act. 5 U.S.C. App. 2. The MRAC advises the Commission on matters related to evolving market structures and movement of risk across clearinghouses, exchanges, intermediaries, market makers, and end-users. See Market Risk Advisory Committee, *available at <https://www.cftc.gov/About/AdvisoryCommittees/MRAC>*.

composition, and rotation of the membership on a regular basis. As proposed, a DCO would be required to establish and enforce appropriate fitness standards for RMC members. The Commission also proposes that a DCO maintain policies that are designed to enable RMC members to provide independent, expert opinions in the form of risk-based input on all matters presented to the RMC for its consideration.

Second, the Commission proposes to require each DCO to establish one or more risk advisory working groups (RWGs) as a forum to seek risk-based input (as opposed to commercially-driven input) from a broader array of market participants on matters that could materially affect the DCO's risk profile. The Commission proposes to require a DCO to maintain written policies and procedures related to the formation and role of each RWG, which would be required to convene at least quarterly.

Finally, the Commission is also requesting comment on the consultation process to add or amend a DCO rule, disclosure of opposing views in a rule submission, and whether DCOs should be required to maintain policies and procedures designed to enable an RMC member to share certain types of information in order to obtain additional expert opinions.

Today's proposal is an extremely positive and critical step towards further enhancing the effectiveness of the CFTC's governance standards. Strengthening the clearing ecosystem and developing a DCO governance policy has been a priority since I joined the Commission in 2017. As Chairman, this critical market infrastructure will remain a focus, and I look forward to taking a data-driven approach to support any possible enhancements to the agency's oversight of DCOs, ensuring coordination and consistency with our domestic and international partners as we collectively pursue our

shared goals of market resiliency and financial stability. Today is a big step, and the Commission will continue to monitor the clearing ecosystem and engage market participants on DCO risk and governance issues in the future.

I wish to again thank the hardworking staff in the Division of Clearing and Risk for all of their efforts towards bringing us here today.

### **Appendix 3 – Statement of Support of Commissioner Kristin N. Johnson**

I support the Commission’s consideration of the proposed derivatives clearing organization (DCO) governance measures that establish structural and procedural mechanisms designed to improve efforts to identify and mitigate material risks, strengthen DCO resilience, and foster the integrity of our markets.

DCOs provide comprehensive settlement services and take on counterparty risk with the assistance of clearing members to facilitate centralized and over-the-counter trading. DCOs also stand as final guarantors of performance in the event of a customer and clearing member default. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)<sup>1</sup> introduced groundbreaking reforms that directed the bulk of derivatives trading to DCOs, charging them with the great responsibility of maintaining the integrity of the derivatives markets through comprehensive and prudent risk mitigation practices. These practices include securely handling participant funds and assets, developing and administering robust forward-looking margining frameworks for idiosyncratic markets, consistently setting appropriate margin levels for trader portfolios, and collecting risk-based guaranty fund contributions from clearing members. DCO risk

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, tit. VII (July 21, 2010) (codified in relevant part at 7 U.S.C. 7a-1).

mitigation practices thereby can profoundly impact individual firms and, depending on the systemic importance of a specific DCO, the broader financial market.

The proposed rules include recommendations that the Commission received from the Central Counterparty (CCP) Risk and Governance (Subcommittee) of the Market Risk Advisory Committee (MRAC).<sup>2</sup> I thank Chairman Behnam, who previously served as the sponsor of the MRAC and its subcommittees. The Subcommittee’s Report is the product of effective collaboration among market participants with divergent views. The Report reflects the leadership of Chairman Behnam and the Subcommittee Co-Chairs, Alicia Crighton and Lee Betsill, as well as the exceptional stewardship of Alicia Lewis, Special Counsel to the Chairman. Today, I serve as the MRAC’s sponsor, and intend to continue the work of Chairman Behnam and further the goals outlined in the Committee’s Charter– “promoting the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation, as well as the monitoring and management of systemic risk.”<sup>3</sup>

The proposed rulemaking requires DCOs to standup risk management committees comprised of clearing members and their customers to leverage their risk management expertise and formalize the role of market participants in the DCO governance process pursuant to DCO Core Principles. The proposed rulemaking acknowledges that, at times, the perspectives of DCOs and their clearing members may not be aligned. As privately-owned businesses DCOs balance the interests of their owners and those of clearing members who have strong incentives to mitigate preventable default because DCO

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<sup>2</sup> See Report of the Central Counterparty (CCP) Risk and Governance Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission (Feb. 23, 2021) (the “Report”).

<sup>3</sup> MRAC Charter available at <https://www.cftc.gov/About/AdvisoryCommittees/MRAC>.

clearing members disproportionately bear default costs. DCOs adopt diverse business organizational forms and may have existing board committees focused on risk management oversight, however, we anticipate that comments to the proposal will articulate the best approach for establishing a clear and uniform process for risk management committees to report concerns on all matters that could materially affect a DCO's risk profile to the board of directors or appropriate decision-making authority and for ensuring that the decision-making authority effectively considers the reported concerns.

In 2010 and 2011, similar requirements were proposed but not adopted.<sup>4</sup> DCO Core Principles O (Governance Fitness Standards), P (Conflicts of Interest), and Q (Composition of Governing Boards) collectively address governance requirements related to considering the views of owners and participants, adopting appropriate fitness standards for directors and others, minimizing and resolving conflicts of interest in decision-making, and including market participants on governing boards or committees. DCO Core Principle O expressly directs each DCO to establish governance arrangements that “permit the consideration of the view of owners and participants.”<sup>5</sup> Consequently, today's proposal rekindles a critical, unresolved effort to reinforce DCO risk governance.

While I am supportive of the proposal, I stand committed to carefully consider, based on the comments that we receive, the benefits, efficacy, limitations, and burdens of the proposed governance rules. There are certain aspects of the proposal where I

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<sup>4</sup> See Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 FR 63732 (Oct. 18, 2010); Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities, Additional Requirements Regarding the Mitigation of Conflicts of Interest, 76 FR 722 (Jan. 6, 2011).

<sup>5</sup> 7 U.S.C. 7a-1(c)(2)(O).

particularly believe substantive comments from market participants will tremendously add value to the deliberative process. I am hopeful that the comments submitted in response to the proposal will support drafting final rules that make our markets stronger and safer through regulatory oversight. I am sensitive to the need to consider how the proposed measures supplement existing risk management oversight and concerns about the need to ensure that the proposed rules effectively accomplish the articulated goals of making our markets safer and more resilient.

With the considerations noted above, I support issuing today's proposal for comment. The Dodd-Frank Act prominently entrusts DCOs with maintaining the integrity of the derivatives markets through risk mitigation practices that can profoundly impact individual firms and the broader financial market. The Dodd-Frank Act amendments to the Commodity Exchange Act also expressly direct each DCO to establish governance arrangements that internalize the views of participants. I look forward to receiving substantive commentary from all stakeholders to facilitate tailoring governance rules that further enhance a DCO's ability to prudently manage risk.

#### **Appendix 4 – Statement of Support of Commissioner Christy Goldsmith Romero**

I support the Commission's efforts to strengthen the resilience of clearing houses to future risk, including through this proposed rule. Since the 2008 financial crisis, I have spent my entire career in federal public service helping our nation recover, and build a stronger, safer, more resilient, financial system. I have seen how clearing houses play an important public interest role – one of critical market infrastructure that fosters financial stability, trust and confidence in U.S. markets. The Financial Stability Oversight Council ("FSOC") has recognized this public interest role, designating several clearing houses as

systemically important Financial Market Utilities. FSOC’s designation highlights the important role that the Commission plays in the oversight of clearing houses.

Thank you to the staff for taking this oversight role seriously. Thank you for working closely with me and my office on changes to improve the proposal in ways that will facilitate effective oversight by the Commission and promote greater accountability, transparency, and predictability.

Clearing houses serve as a cornerstone to mitigating risk in U.S. markets. The 2008 financial crisis revealed that over-the-counter trades left market participants vulnerable to the weaknesses of their counterparties, and left regulators in the dark about hidden risk. In contrast, clearing houses – who put themselves in the center of counterparties – take on counterparty risk and bring transparency to the markets and regulators.

One important post-crisis reform was to increase central clearing of trades in U.S. markets, putting clearing houses in even more of a public interest role. However, this has resulted in a concentration of more risk in clearing houses. FSOC found that the failure or disruption of systemically important clearing houses “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 U.S. financial system.”<sup>1</sup>

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<sup>1</sup> See <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/designations>.

FSOC designates clearing houses who serve as central counterparties responsible for clearing a large majority of trades as systemically important Financial Market Utilities.

The systemic nature of several clearing houses registered with the Commission further underscores the need for vigilant oversight by the Commission.<sup>2</sup> Under the Commission’s oversight, clearing houses have shown resilience in navigating an ever-growing list of recent market stress events. They have helped U.S. markets maintain financial stability during the global pandemic, supply chain issues, and geopolitical events.

However, uncertainty surrounding these events has driven home the need for the Commission to enhance its rules so that clearing houses strengthen their resilience to future risk. The public interest role of clearing houses is best served when the clearing houses work with their clearing members who have much at stake as they shoulder the burden of losses and defaults. Clearing houses, members, and end users should work collaboratively to decide how to increase the resilience of their respective clearing house, and how to best navigate risk during times of market stress. Simply put, there is strength in numbers and diversity of perspective.

We have seen how clearing houses have benefitted from risk management committees and other working groups that reflect a broad coalition of stakeholders. Their voices should be heard in a meaningful way.<sup>3</sup> Today, the Commission proposes

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<sup>2</sup> The Commodity Exchange Act established several core principles for Derivatives Clearing Houses, including a requirement that the clearing houses establish governance arrangements that are transparent to fulfill public interest requirements and to permit the consideration of the views of owners and participants. 7 U.S.C. 7a-1(c)(2)(O). To further implement these core principles, the Commission adopted several rules including a rule that clearing houses maintain clear, documented governance arrangements. Commission regulation 39.24(b).

<sup>3</sup> The Commission previously stated that clearing organization governance rules, “improve DCO risk management practices by promoting transparency of governance arrangements and making sure that the interests of a DCO’s clearing members and, where relevant, their customers are taken into account.” Derivatives Clearing Organization General Provisions and Core Principles, 85 FR. 4800, 4848 (Jan. 27., 2020).

formalizing requirements for these committees.<sup>4</sup> We propose a requirement for the consideration of input from members of risk committees on matters that could strengthen or weaken the resilience of the clearing organization to future risk. The proposed rule seeks to balance the calls of those on the committees for increased transparency, predictability, and a voice in risk management, with the clearing houses' calls for flexibility and consideration of their own internal opinions on risk. Commenters will tell us whether we have gotten this balance right in a way that will strengthen the resilience of clearing houses to future risk while keeping it agile to respond to sudden market events.

Additionally, we endeavor to formalize governance rules that promote accountability of clearing houses, and facilitate oversight by the CFTC. Both accountability and oversight are served in the proposal through written policies and procedures, and documentation that stakeholder voices have been solicited and heard. The proposal is not prescriptive about the content of the policies and procedures. A requirement for written policies and procedures, accompanied by documentation of the consideration of input, will benefit the full range of clearing houses, from systemically significant clearing houses to new or future clearing houses, including in the digital asset space, who may not have a history of risk management committees.

It is my hope that over time, a requirement for policies and procedures will serve as a launch pad for best practices to emerge. I look forward to public comment on additional opportunities for how the Commission can effectively advance best practices,

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<sup>4</sup> Proposals include broad and diverse participation, fitness, the importance of independent, expert opinions, and a performance of committee duties focused on the safety of the clearing organization and the stability of the financial system.

including the question of whether the Commission should require the publication of the policies and procedures, and whether the Commission should be prescriptive of the content. I also look forward to comments on whether meetings of risk advisory working groups should be documented to ensure that those members' voices are adequately heard in a meaningful way.

Today's proposal serves as an important first step to promote accountability, transparency, predictability, and effective oversight for the governance of clearing houses. We also invite comment on certain future rulemaking for best practices. I look forward to future consideration of additional opportunities for the Commission to promote transparency, accountability, predictability, and effective oversight.<sup>5</sup>

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<sup>5</sup> While there may be a diversity of views on these additional opportunities, I hope that diversity will help, rather than deter, this independent Commission to develop strong and long-lasting rules to strengthen the resilience of clearing houses to future risk.