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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 39

RIN 3038-AF15

Governance Requirements for Derivatives Clearing Organizations

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is adopting amendments to its rules 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 is adopting minimum requirements for RMC composition and rotation, and requiring DCOs to establish and enforce fitness standards for RMC members. The Commission is also adopting requirements for DCOs to maintain written policies and procedures governing the RMC consultation process and the role of RMC members. Finally, the Commission is adopting requirements for DCOs to establish one or more market participant risk advisory working groups (RWGs) that must convene at least two times per year, and adopt written policies and procedures related to the formation and role of the RWG.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. DCOs must comply by [INSERT DATE ONE YEAR AFTER THE EFFECTIVE DATE].

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SUPPLEMENTARY INFORMATION:

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I. Background

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),[1] 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.[2] Regulation 39.24 implements this aspect of Core Principle O by providing minimum requirements regarding the substance and form of a DCO's governance arrangements.

[1] 7 U.S.C. 7a-1.
[2] *See* 7 U.S.C. 7a-1(c)(2)(O)(i).

In August 2022, the Commission proposed several amendments to § 39.24 to enhance the Commission's DCO governance standards (the "Proposal").[3] The purpose of the Proposal was to further the implementation of DCO Core Principle O, which 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,[4] by enhancing and standardizing DCO risk governance requirements and improving participant involvement in DCO risk management. The specific recommendations in the Proposal are consistent with recommendations made in a report by the Central Counterparty (CCP) Risk and Governance Subcommittee (Subcommittee) of the Market Risk Advisory Committee (MRAC), a discretionary advisory committee established by the authority of the Commission in accordance with the Federal Advisory Committee Act, as amended.[5] In the Proposal, the Commission first proposed to require each DCO to establish one or more RMCs and require the DCO to require its board to consult with, and consider and respond to input from, its RMC(s) on matters that could materially affect the risk profile of the DCO. The Commission also proposed requirements related to the composition and activities of RMCs. Second, the Commission proposed to require each DCO to establish one or more RWGs in order to seek risk-based input (as opposed

[3] Governance Requirements for Derivatives Clearing Organizations, 87 FR 49559 (Aug. 11, 2022).
[4] *See* 7 U.S.C. 7a-1(c)(2)(O)(i).
[5] 5 U.S.C. App. 2; As explained in the proposing release, the Subcommittee, which is comprised of DCOs, clearing members, and end users, published a report outlining a series of recommendations to enhance the Commission's DCO governance standards. This report formed the basis for the Proposal. *See* 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 (Feb. 23, 2021).

to commercially-driven input) from a broader array of market participants. The Commission also requested comment on the following topics that the Commission might address in a future rulemaking: (1) whether the Commission should 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; and (2) whether the Commission should require a DCO 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.

The comment period for the Proposal ended on October 11, 2022. The Commission received 18 substantive comment letters.[6] After considering the comments, the Commission is adopting the Proposal subject to certain changes, as noted below.

II. Amendments to § 39.24(b)

Regulation 39.24(b) sets forth requirements for a DCO's governance arrangements. The Commission proposed to enhance these requirements by requiring a DCO to: (1) establish one or more RMCs, and require its board to consult with, and

[6] The Commission received comment letters submitted by the following: Barclays, BlackRock, Inc., Citigroup, Inc., Goldman Sachs Group, Inc., JPMorgan Chase & Co., Societe Generale, T. Rowe Price, UBS AG, and the Vanguard Group. (Barclays, et al.); BlackRock, Inc. (BlackRock); Cboe Clear Digital, LLC (Cboe Digital); The Global Association of Central Counterparties (CCP12); Citadel; CME Group, Inc. (CME); Eurex Clearing AG (Eurex); Futures Industry Association (FIA); ForecastEx LLC (ForecastEx); FTX US (FTX); Paolo Saguato, Assistant Professor, George Mason University Antonin Scalia Law School; Intercontinental Exchange, Inc. (ICE); Investment Company Institute (ICI); International Swaps and Derivatives Association (ISDA); North American Derivatives Exchange, Inc. (NADEX); Nodal Clear, LLC (Nodal); The Options Clearing Corporation (OCC); and Securities Industry and Financial Markets Association's Asset Management Group (SIFMA AMG). All comments referred to herein are available on the Commission's website, at *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7304*.

consider and respond to input from, its RMC(s) on matters that could materially affect the risk profile of the DCO; (2) appoint clearing members and customers of clearing members to each 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.

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

i. Proposed § 39.24(b)(11)

Proposed § 39.24(b)(11) would require a DCO to maintain governance arrangements that establish one or more RMCs,[7] 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, 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.[8]

Barclays et al., BlackRock, CME, Eurex, FIA, ICE, ISDA, Nodal, OCC, Paolo Saguato, and SIFMA AMG generally supported proposed § 39.24(b)(11).[9]

However, CME suggested that the Commission modify proposed § 39.24(b)(11) to specify that the board is required to consult with, and consider and respond to "risk-

[7] The Commission notes that some DCOs maintain separate RMCs for each product type that they clear. For example, Chicago Mercantile Exchange, Inc.'s 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*.

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

[9] Eurex also stated that proposed § 39.24(b)(11) aligns with sections (1)-(3) of Article 28 of EMIR.

based" input (as opposed to commercially-driven input) from the RMC. CME argued that the Commission should make clear its preference for risk-based input as opposed to commercially-driven input because it is imperative to ensure that market participants acting as RMC members, consistent with current Commission regulations, prioritize the safety and efficiency of the DCO and support the stability of the broader financial system.

FIA and SIFMA AMG recommended that the Commission modify proposed § 39.24(b)(11) to require an RMC to meet at least quarterly. FIA further recommended that the Commission should require a DCO to provide regular written risk reports to RMC members between RMC meetings. FIA also suggested that the Commission should require an RMC to include the following topics as standing agenda items: stress testing results, sensitivity analysis, stress test scenarios review, back testing results, collateral composition, and financial resources.

ForecastEx and NADEX expressed support for the concept of an RMC, but argue that applying the proposed RMC requirements to DCOs that clear only fully collateralized positions would serve no meaningful purpose because they carry no credit risk, which, in turn, eliminates or minimizes the significance of margin models, default procedures, participation requirements, and risk management procedures.

ICE and OCC requested that the Commission clarify whether proposed § 39.24(b)(11) will provide a DCO with the option to structure its RMC as either an advisory committee or as a board-level committee. ICE, which operates four registered

DCOs,[10] argued that a DCO should be able to choose either option, noting that some ICE DCOs have an advisory RMC which makes recommendations to the board, while others have a board-level RMC with responsibility delegated by the board for governance and oversight over the DCO's risk management function. ICE stated that the decision to establish an advisory RMC or a board-level RMC depends upon each DCO's size, markets, business model, and other regulatory requirements. OCC noted that it has delegated its risk management responsibilities to several board-level committees, each with a specific subject matter responsibility, that in most instances make recommendations to the board and in some instances may act on behalf of the board through delegated authority. OCC urged the Commission to collaborate with the Securities and Exchange Commission (SEC) to resolve what it believes to be a potential conflict between proposed § 39.24(b)(11), which OCC believes requires an RMC to be an advisory committee, and recently proposed SEC regulations (SEC Proposal),[11] which OCC believes require an RMC to be a committee of the board of directors.

OCC asked that the Commission clarify that a DCO would be permitted under the proposed rules to delegate various risk management responsibilities to multiple committees (*e.g.*, an Audit Committee that oversees legal and compliance risk, and a Technology Committee that oversees information technology and security risks), rather

[10] The four DCOs are ICE Clear Credit LLC, ICE Clear Europe Limited, ICE Clear US, Inc., and ICE NGX Canada Inc.

[11] In August 2022, the SEC proposed enhancements to its governance requirements for central counterparties. *See* Clearing Agency Governance and Conflicts of Interest, Securities Exchange Act Release No. 34-95431 (Aug. 8, 2022), 87 FR 51812 (Aug. 23, 2022), *available at* https://www.sec.gov/rules/proposed/2022/34-95431.pdf.

than using a single body labeled "risk management committee," so long as those bodies each satisfy the requirements of an RMC.

With regard to the non-exhaustive list of matters that could materially affect the risk profile of the DCO included in proposed § 39.24(b)(11), ISDA recommended that the Commission add "rule enforcement policy [and] public information policy," while FIA recommended that the Commission add "outsourcing function, system safeguards, access models, liquidity risk, financial resources, and non-default procedures."

Cboe Digital stated that the Commission should remove the list and simply require DCOs to have policies and procedures for determining whether a matter could affect the DCO's risk profile. It argued that the list is broad and undefined, and added that if the Commission is going to keep the list, that it should more narrowly define the included matters. Specifically, Cboe Digital argued that it's not clear whether a change to one of the included matters that is material but not risk-based would still need to go to the RMC. OCC recommended removing "new products" from the list of items that could materially affect the risk profile of a DCO, but requested that if the Commission retains the explicit reference to "new products" in the final rule, it limit the requirement to new "asset classes," or define a subset of "new products" that would be captured by the final rule to include only those that have margining, liquidity, default management, pricing, or other risk characteristics that differ materially from those currently cleared by the DCO.

The Commission agrees with CME that it is important to ensure that market participants serving on an RMC provide risk-based input and prioritize the safety and efficiency of the DCO and support the stability of the broader financial system, rather than the commercial interests of the firm they represent. For that reason, proposed

§ 39.24(c)(3) requires a DCO to maintain policies designed to enable its RMC members to provide independent, expert opinions in the form of risk-based input (as opposed to commercially-driven input) on all matters presented to the RMC for consideration.

However, there is a distinction between the substantive merits of RMC members' input and their motivations for providing that input. A DCO's board of directors cannot reliably determine whether input from RMC members is motivated by the RMC members' views of the safety and efficiency of the DCO and financial stability, or by the commercial interests of the members' firms. Accordingly, the Commission declines to modify proposed § 39.24(b)(11) to require a DCO's board of directors to only respond to risk-based input, as suggested by CME. In the interest of transparency, a DCO's board must respond on the merits to all substantive input from the RMC. If a DCO's board believes that RMC input is incorrect or misguided on the merits, the board should note that in its response.

In response to comments by FIA and SIFMA AMG suggesting that the Commission should require an RMC to meet at least quarterly, the Commission believes that an RMC would generally need to meet at least quarterly to meet its obligation to consult with the board on all matters that could materially affect the risk profile of the DCO, and notes that many DCOs already require their RMC(s) to meet at least quarterly.[12] In an unusual circumstance in which the material risk issues facing the DCO

[12] The Commission notes that the risk committee charters of CME, ICC and OCC require the committee to meet at least four times per year, and the LCH Limited and LCH SA risk committee charters require the committees to meet at least six times per year. Chicago Mercantile Exchange, Inc., Clearing House Risk Committee Charter, § 3 (May 3, 2022), *available at* http://investor.cmegroup.com/static-files/7445789a-8aaa-46ec-8539-069e8cbf0fab; The Options Clearing Corporation, Risk Committee Charter § 3

would allow for more than three months to pass between RMC meetings, the Commission does not wish to impose a meeting on RMC members that are already devoting significant time to advising the board on risk issues. Therefore, the Commission declines to modify proposed § 39.24(b)(11) to add a requirement that each RMC convene at least quarterly.

The Commission also declines to adopt FIA's suggestion that the Commission require a DCO to provide a regular written risk report to RMC members between RMC meetings. While the Commission recognizes the potential benefits of this practice, a DCO should have the flexibility to determine the best method of communication with its RMC members to ensure that they are adequately informed on material risk issues such that they can provide effective input to the board. Similarly, the Commission declines to require RMCs to have certain topics as standing items on its agenda. The Commission believes that a DCO's RMC is in the best position to identify the risks most pertinent to the DCO and should have the flexibility to design its meeting agenda accordingly.

The Commission agrees with ForecastEx and NADEX that a DCO that requires each of its clearing members to fully collateralize its positions before a trade is executed has eliminated the credit risk associated with those positions, which, in turn, eliminates or reduces the significance of risk management issues including margin models, liquidity

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(May 26, 2022), *available at* https://www.theocc.com/getmedia/e71a4c1d-52dc-4c95-aeb1-98dab9159f41/risk_committee_charter.pdf.; LCH SA, Terms of Reference of the Risk Committee of the Board of Directors, § 2.4 (Sep. 9, 2020), *available at* https://www.lch.com/system/files/media_root/LCH%20SA%20-%20RiskCo%20ToRs.pdf; LCH Limited, Terms of Reference of the Risk Committee of the Board of Directors, § 2.4 (Jan. 4, 2023), *available at* https://www.lch.com/system/files/media_root/LCH-Limited-Risk-Commitee-Terms-of-Reference.pdf.

risk management, guaranty funds, stress testing, default procedures, and participation requirements. It is the Commission's understanding that these are the primary topics on which RMCs and RWGs contribute to DCO risk management. The Commission recognizes that fully collateralized DCOs still face operational, legal, and other risks that could materially affect the risk profile of the DCO. However, the Commission believes that given the reduction of many risks facing these DCOs, and the significant attendant reduction in issues for any RMC to address, it is not appropriate to require these DCOs to assume the costs associated with maintaining RMCs and RWGs that satisfy the requirements of this final rule. As a result, the Commission believes that the requirements to have an RMC and RWG are not appropriate for fully-collateralized DCOs. Accordingly, the Commission is adopting new § 39.24(d) to provide that a DCO may satisfy the requirements of paragraphs (b)(11), (b)(12), (c)(1)(iv), and (c)(3) of § 39.24 by having rules that permit it to clear only fully collateralized positions. The Commission notes that this is consistent with the carveouts from certain risk-related requirements that the Commission previously provided to fully collateralized DCOs.[13]

In response to comments by ICE and OCC asking the Commission to clarify whether § 39.24(b)(11) will provide a DCO with the option to structure its RMC as either an advisory committee or as a board-level committee, the Commission notes that proposed § 39.24 seeks to provide a DCO with flexibility to design its governance arrangements in a manner that best fits its unique structure provided that it does so in a manner that is consistent with the minimum requirements set forth in § 39.24, as

[13] *See* Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800, 4803-4805 (Jan. 27, 2020).

amended by this final rule. Therefore, the Commission confirms that a DCO may structure its RMC as either an advisory committee or as a board-level committee to satisfy the requirements of § 39.24(b)(11).[14] Moreover, in response to OCC's inquiry, the Commission confirms that a DCO may delegate various risk management responsibilities to multiple committees, rather than a single body labeled "risk management committee," so long as each committee complies with the requirements of § 39.24. The Commission notes that the text of § 39.24(b)(11), as proposed and adopted, explicitly acknowledges the possibility of "one or more" risk management committees.

In response to comments on the non-exhaustive list of matters that could materially affect the risk profile of the DCO included in proposed § 39.24(b)(11), the Commission continues to believe that the proposed list provides DCOs with an appropriate level of guidance to illustrate matters that require RMC consultation. In response to comments by FIA and ISDA suggesting additional topics, the Commission notes that the list of topics in § 39.24(b)(11) is meant to be illustrative, not exhaustive, and that *all* matters that could materially affect the risk profile of the DCO are subject to the consultation requirement, regardless of whether they fit in a listed category. Therefore, it is not necessary to endeavor to include all potential categories of issues that could materially affect the risk profile of the DCO. In response to Cboe Digital's request that the Commission clarify whether a material change to one of the matters included on the list that does not involve risk issues would still need to go to the RMC, the Commission notes that such a change would not necessarily be subject to the consultation

[14] If a DCO structures its RMC as an advisory committee to satisfy the requirements of § 39.24(b)(11), it may also have a separate board-level RMC comprised of members of the board of directors.

requirement; a board is only required to consult with its RMC(s) on matters that could materially affect the risk profile of the DCO.

ii. Request for Comment – New Products

The Commission also requested 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 § 39.24(b)(11) RMC consultation requirement given the potential for novel and complex risks associated with clearing new products. If so, the Commission requested comment on whether it should define what constitutes a new product for this purpose, and how should it do so. The Commission further questioned whether it should define new products to include, for example, those that have margining, liquidity, default management, pricing, or other risk characteristics that differ from those currently cleared by the DCO, or, in the alternative, should require DCOs to adopt policies defining what constitutes a new product.

In response, BlackRock, Cboe Digital, CCP12, CME, Eurex, FTX, ICE, NADEX, Nodal, and OCC commented that a new product should not be treated categorically as a matter that could materially affect the DCO's risk profile. Several of these commenters (Eurex, Nodal, Cboe Digital, CCP12, NADEX, OCC) noted that many new contracts are simply extensions of, or are substantially similar to, existing contracts. CME, CCP12, Eurex, ICE, and Nodal stated that categorically treating new products as a matter that could materially affect the DCO's risk profile could lead to delays in product launches and unnecessary administrative burden. OCC argued that a categorical definition of new products is incompatible with OCC's unique obligation, as the only listed equity option

clearinghouse, to clear an option on an underlying equity within one day after receipt of notification of a registered options exchange's intent to list such option.[15]

CCP12 and CME argued that applying the RMC consultation requirement to all new products would be contrary to congressional intent. They noted that the Commodity Futures Modernization Act of 2000 amended the CEA to allow designated contract markets (DCMs) to self-certify new products and list them the next business day.[16] The purpose of this, they argued, was to promote the ability of DCMs to innovate and respond quickly to competitive conditions in fast-changing markets subject to Commission oversight. CME further argued that Congress reaffirmed its support of a streamlined approach to new products in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, when it instituted a 10-day review period for rule submissions[17] but left the review period for product certifications unchanged. CME further noted that DCMs have the primary responsibility for listing new products. While CME acknowledged that a DCO is part of that process and needs to consider new products in light of its product eligibility requirements and risk management framework, CME argued that making the DCO bring all new products through an RMC consultation process would dramatically change a DCO's role by creating a two-track regulatory process, with the DCO's process being more onerous.

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[15] In support of this assertion, OCC cited generally to its "Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934, *available at* https://ncuoccblobdev.blob.core.windows.net/media/theocc/media/clearingservices/services/options_listing_procedures_plan.pdf.

[16] *See* 7 USC § 7a-2(c)(1).

[17] *See* 7 USC § 7a-2(c)(2).

ISDA commented that while not all new products will add risk to a DCO, all new products should be submitted to the RMC so it can determine whether board consultation is necessary.

Eurex noted that requiring consultation only with respect to new products that could materially affect the risk profile of the DCO would harmonize with EMIR Article 28(3), which requires a risk committee to advise on the clearing of new classes of instruments. Eurex stated that it believes that if a DCO already clears a certain class of instruments, clearing a new product within that class would not have a material impact on the DCO's risk profile.

BlackRock, Cboe Digital, FIA, ICE, OCC, and SIFMA AMG provided suggestions on how to define new products for purposes of the proposed § 39.24(b)(11) RMC consultation requirement. FIA and SIFMA AMG agreed with the list of factors identified in the request for comment (different margining, liquidity, default management, pricing, or other risk characteristics from products already cleared) and further recommended that the Commission include factors from opinions published by the European Securities and Markets Authority (ESMA).[18] BlackRock stated that if the Commission were to provide guidance on how to define a new product, it should include limited availability of pricing sources, the addition of a new asset class, or the introduction of exceedingly long tenors. ICE stated that while it thinks DCOs are in the best position to define what constitutes a new product, if the Commission were to provide

[18] *See* ESMA Opinion on Article 15 and 49: Common Indicators for New products and Services Under Article 15 and for Significant Changes Under Article 49 of EMIR, *available at* https://www.esma.europa.eu/document/opinion-common-indicators-new-products-and-services-under-article-15-and-significant.

guidance, it should focus the definition on new classes of products, and agreed with the factors identified in the Commission's request for comment. OCC stated that the Commission should limit the definition of "new products" to new "asset classes," or define "new products" using the factors identified in the Commission's request for comment.

Cboe Digital, CCP12, Eurex, and ICE believe that DCOs are the best judge of what constitutes a new product and stated that many already have policies and procedures in place within their governance arrangements that define what constitutes a new product from a risk management perspective. Cboe Digital commented that the Commission should, instead of categorically treating new products as a matter that could materially affect the DCO's risk profile, require a DCO to establish policies and procedures to determine if a new product or a material change to a new product could materially impact risk. Cboe Digital further commented that if the Commission treats the clearing of a new product as a matter that must be categorically treated as materially affecting a DCO's risk profile, it should seek to harmonize the definition of a new product with the relevant definitions under part 40 of the Commission's regulations.

OCC stated that the proposed rule is also potentially inconsistent with governance-related aspects of other Commission rules that require a DCO to have "appropriate requirements" for determining the eligibility of contracts for clearing, including the consideration of the "[o]rganizational capacity of the [DCO] and clearing members to address any unusual risk characteristics of a product." The Commission notes that OCC did not identify the inconsistency. Moreover, the Commission notes that Regulation 39.12(b)(vii) requires a DCO to consider the "operational" (not

"organizational") capacity of the DCO and its clearing members to address any unusual risk characteristics of a product.

As previously noted, the Commission proposed to require a DCO's board to consult with its RMC if the launch of a new product constitutes a matter that could materially affect the risk profile of the DCO. However, the Commission requested comment on whether it should alternatively require board consultation for products that meet a new, to be added, definition of "new products," and, if so, how the Commission should define "new products" for this purpose. After considering the comments, the Commission continues to believe that the Proposal's requirement that a DCO's board consult with its RMC if the launch of a new product constitutes a matter that could materially affect the risk profile of the DCO is appropriate. The Commission recognizes that many new contracts are substantially similar to existing contracts, and therefore requiring a DCO's board to consult with the RMC on all new products could result in unnecessary administrative costs and delays in launching new products. Moreover, the Commission agrees with the several commenters that stated that DCOs are uniquely situated to determine what constitutes a new product. The Commission notes that § 39.24(b)(11)(i) will require DCOs to maintain written policies and procedures regarding the RMC consultation process, which includes policies and procedures for determining which matters could materially affect a DCO's risk profile. The Commission also expects each DCO to define in its policies and procedures what it means to "materially affect the risk profile of the DCO." The Commission believes that the list of factors it identified in the request for comment for determining whether a new product could materially affect the risk profile of the DCO (different margining, liquidity, default

management, pricing, or other risk characteristics from products already cleared) are a good starting point for DCOs as they draft or update their policies and procedures in this area.

The Commission noted some confusion in the comments regarding whether the Proposal required board consultation with the RMC for all new products, or only for those that could materially affect the risk profile of the DCO. To make it clear in the rule text that the requirement is the latter, the Commission is revising § 39.24(b)(11) to state that the board must consult with its RMC(s) on the previously enumerated items "as well as the clearing of new products *that could materially affect the risk profile of the derivatives clearing organization*" (added text in italics).

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

i. Proposal

Proposed § 39.24(b)(11)(i) would require a DCO to maintain written policies and procedures to make certain that its 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.

BlackRock, CCP12, Eurex, Nodal, and SIFMA AMG supported proposed § 39.24(b)(11)(i). Eurex noted that the proposed rule broadly aligns with Article 28(2) of EMIR and Article 15 of EU regulation 153/2013.

OCC argued that if a board of directors has delegated its risk management responsibilities to a board-level committee, there is no longer a need for the board to consult with and issue a response to that committee.

BlackRock stated that a DCO's board should be required to respond to the substance of the input it receives rather than merely acknowledging the input was received. Doing so, it said, will bolster the effectiveness of RMCs and the board and will ultimately enhance market resiliency. SIFMA AMG commented that it is important that a board's response to the recommendation of the RMC, which should include the board's rationale for its decision, be shared with market participants to help inform their own decisions to continue to clear with that DCO, especially at DCOs where risk is mutualized across clearing members and clearing member customers. CCP12 and Nodal stated that DCOs should have discretion as to how to best document a board's consideration of and response to input from the RMC. They argued that proposed §39.24(b)(11)(i) permits DCOs to choose the best method of documentation and should not be revised to constrain the acceptable forms of meeting the documentation requirement.

The Commission continues to believe that explicitly requiring DCOs to develop and maintain policies and procedures governing DCO consultation with its RMC(s), and to document the board's consideration of and response to RMC input, will promote transparency, accountability, and predictability, and facilitate effective oversight by the Commission in this area.

In response to OCC's comment, the Commission agrees that if a board of directors has delegated responsibility to a board-level RMC to make certain risk decisions, then it has eliminated the need for the board to consult with the RMC with respect to those decisions.

The Commission confirms that the requirement that a DCO document the board's consideration and response to RMC input requires a board to respond to the substance of the input it receives rather than merely acknowledging that input was received. However, the Commission declines to adopt a requirement that would make a DCO share its response to RMC input with all market participants. The Commission recognizes that some risk-related discussions may involve sensitive information that a DCO may not wish to share broadly. Moreover, the Commission notes that § 39.21(a) already requires DCOs to provide market participants with sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the services of the DCO.[19]

ii. Request for Comment – RMC Meeting Minutes

The Commission requested comment on whether DCOs should be required to create and maintain minutes or other documentation of RMC meetings.

In response, BlackRock, FIA, ISDA, and NADEX stated that RMCs should be required to keep minutes. BlackRock argued that keeping minutes is necessary to promote transparency, accountability, and predictability, and facilitate effective oversight by the Commission in this area. ISDA stated that minutes of RMCs should be made available to RMC members and shared with the board and regulators. It argued that because the decisions made at the RMC meetings have an impact on a wide variety of market participants, DCOs should produce a summary that is made public and that does not include confidential information.

[19] 17 CFR 39.21(a).

In response to the comments, the Commission is revising proposed § 39.24(b)(11)(i) to 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 risk management committee input *and create and maintain minutes of each [RMC] meeting*" (added text in italics). The Commission agrees with BlackRock that requiring RMC meeting minutes will promote transparency, accountability, and predictability, and facilitate effective oversight by the Commission in this area. In response to ISDA's suggestion that a DCO should be required to publish a public summary of RMC meetings, the Commission declines to adopt such a requirement at this time in order to preserve a DCO's ability to protect sensitive information, but notes that § 39.21(c)(9) requires public disclosure of information that is relevant to participation in the clearing and settlement activities of the DCO.[20]

C. Representation of Clearing Members and Customers on RMC – § 39.24(b)(11)(ii)

Proposed § 39.24(b)(11)(ii) would require a DCO to maintain policies to make certain that an RMC includes representatives from clearing members and customers of clearing members. The Commission requested comment on whether it should adopt additional specific composition requirements, and if so, what those requirements should be.

[20] 17 CFR 39.21(c)(9).

Barclays, et al., BlackRock, CME, Eurex, FIA, ICE, ISDA, and SIFMA AMG generally supported the proposal to require that an RMC includes representatives from clearing members and customers of clearing members.

SIFMA AMG recommended that the Commission require no fewer than three clearing members and three clearing member customers on an RMC, and, if the overall RMC membership is "especially large," that clearing member and customer participation must represent a "meaningful component" of the RMC. ISDA questioned whether the proposed rule will be adequate to ensure sufficient industry input and challenge, and proposed an alternative rule requiring a DCO to have RMC members that "cover a wide variety of organizations and roles," with no fewer than eight external members, at least 50 percent of which are clearing members.

Cboe Digital and NADEX did not support requiring an RMC to include more than one clearing member. Cboe Digital argued that the proposed rule is overly prescriptive and does not account for the differences in size and offerings across DCOs. It argued that the Commission should only require a DCO to have at least one clearing member representative on its RMC, and that a DCO should be permitted to establish a policy that additional clearing member RMC representatives should proportionately represent the number of clearing members of (or products offered by, if applicable) the DCO. NADEX stated that the proposed rule would not be appropriate for all DCOs because, for example, a newly registered DCO may only have one clearing member, which would make it unable to include multiple clearing members on an RMC.

Cboe Digital, CCP12, NADEX, Nodal, and OCC did not support the proposed requirement that an RMC also include customers of clearing members and instead

supported a principles-based approach that allows a DCO to decide which governance body should have customer representation. Nodal argued that requiring customers of clearing members to be on the RMC could chill dialogue between clearing members and DCOs. For example, a clearing member might choose not to express valid concerns regarding a particular product in front of a customer that may be interested in trading that product, due to the concern that the customer may seek to shift its trading to a different clearing member that is more supportive of the new product. In addition, Nodal stated that it would be difficult to obtain truly independent opinions on risk management matters from clearing members and customers of clearing members, and that the Commission should implement different RMC composition requirements as a result. OCC noted that "customers" is not a homogenous group and at certain DCOs it may be impossible to ensure each type of customer group is represented. OCC further noted that customers are not subject to direct mutualization; therefore, it may be difficult to ensure that they are not unduly motivated by their commercial interests. Cboe Digital argued that clearing members are much better suited than their customers to inform DCO risk management frameworks because their expertise, business purposes, and operational structure center around clearing risk and operations in order to fulfil their role of processing, clearing, and settling trades through a DCO, in contrast to customers whose operations can vary widely and do not necessarily focus on clearing operations or risk management.

In response to the Commission's request for comment on whether it should adopt additional specific RMC composition requirements, BlackRock stated that the Commission should adopt further specific requirements. BlackRock gave as an example

that, for members, DCOs could require that a minimum percentage of initial margin is represented across a minimum number of participants, setting such parameters to ensure that a meaningful level of risk is represented while preventing dominance by a handful of firms. FIA recommended that the Commission consider requiring RMCs to include DCO representatives, which would include, at a minimum, the President (or a designee) and the Chief Risk Officer. To harmonize with Article 28 of EMIR, FIA recommended that the Commission require that: (1) a number of independent members of the board of directors with the appropriate level of skills and expertise serve on the RMC; (2) the chair of the RMC be an independent member of the board; and (3) no group represented (clearing members, customers of clearing members, DCO and independent directors) have a majority. ICI recommended requiring DCOs to have a "meaningful proportion" of customers on their RMCs, and recommended that the Commission set forth selection parameters that would ensure a cross-section of customers are included. ForecastEx stated that the Commission should prohibit affiliates of a DCO from serving as members of an RMC.

NADEX argued that proposed § 39.24(b)(11)(ii) should not apply to "retail-focused" DCOs. NADEX stated that for its retail-focused DCO, it should suffice to maintain a "contact us" page on its website with an email address, physical address, and live chat option for market participants to provide feedback. NADEX argued that, unlike traditional DCOs in which clearing members generally have expertise in the financial industry and risk management, the overwhelming majority of NADEX's customers are not industry professionals. Instead, they are often new to the industry, lack operational risk management experience, have no ownership or financial stake in the DCO, and

require time and education to become acquainted and comfortable with self-directed transactions in short-term derivatives. NADEX also noted that the Commission stated in 2019 when considering proposed rules to define the term "market participant" for the purpose of board composition requirements that the Commission was "sympathetic to [NADEX's] concerns that the burden and cost of including market participants that are primarily retail and not exposed to the risk of lost margin or the default of the DCO's other customers may not be warranted for fully collateralized, non-intermediated DCOs." NADEX requested the Commission consider an amended definition of "market participant" to substitute for the proposal's use of "clearing member" and "customer of a clearing member" that would allow the DCO discretion to operate in a manner best suited to its business model. Alternatively, NADEX proposed that any retail-focused DCO be exempt from this requirement in the event the new regulation is adopted as proposed.

Eurex noted that the proposed requirement is consistent with Article 28(1) of EMIR, which requires that a CCP's risk committee be composed of representatives of its clearing members, independent members of the board, and representatives of its clients. Eurex further noted that EMIR Article 28(1) specifies that none of the groups of representatives may have a majority in the risk committee. However, Eurex believes that that the Commission's proposal strikes the right balance and does not need this further requirement.

Finally, OCC noted that proposed § 39.24(b)(11)(ii) requires an RMC to include "clearing members and customers of clearing members," while the SEC Proposal requires an RMC to include "representatives from owners and participants." OCC argued that

while these terms are not directly inconsistent, the distinction supports the view that the intended meaning and role of the RMC amongst the CFTC and SEC is inconsistent.

After considering the comments, the Commission is modifying proposed § 39.24(b)(11)(ii) to clarify that the rule requires a DCO to maintain written policies and procedures to make certain that its RMC includes at least two clearing member representatives and at least two representatives of customers of clearing members.

The Commission is not making any substantive changes to proposed § 39.24(b)(11)(ii). The Commission continues to believe that ensuring a minimum level of clearing member and customer representation on RMCs will further 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 customers before making decisions that could materially affect the risk profile of the DCO. The Commission also continues to believe that the rule as proposed provides appropriate flexibility to account for differences among DCOs in terms of size, business models, resources, and governance structure. Therefore, the Commission declines to adopt the proposals put forth by ISDA and SIFMA AMG that would increase the minimum number of required market participants, and the proposals put forth by Cboe Digital and NADEX to reduce the number of required clearing members.

In response to NADEX's comment that the proposed rule would not be appropriate for all DCOs because, for example, a newly registered DCO may only have one clearing member, which would make it unable to include multiple clearing members on an RMC, the Commission notes that Regulation 1.3 defines a clearing member as "any person that has clearing privileges such that it can process, clear and settle trades through

a derivatives clearing organization on behalf of itself or others."[21] Therefore, a DCO with one clearing member is only possible if a DCO has a single FCM clearing member that clears for all other participants clearing through the DCO, which is not the case at any DCO registered with the Commission. In the event that a DCO had a single FCM clearing member, and no direct clearing members from which to draw RMC members, it could comply with the composition requirement by having multiple representatives from its single clearing member on its RMC. While DCOs will generally benefit from selecting RMC members with the differing perspectives that result from working at different firms, a DCO would not have the ability to do so in this case. Similarly, the Commission notes that a DCO may have only direct clearing members and no customers from which to draw RMC members and therefore would be unable to satisfy the composition requirement with regard to representatives of customers of clearing members. In recognition of this, the Commission is modifying the text of § 39.24(b)(11)(ii) so that a DCO is only required to include on its RMC "*if applicable*, at least two representatives of customers of clearing members" (added text in italics).

The Commission has considered the comments opposed to customer representation on an RMC, and continues to believe that the benefits of requiring customer representation on an RMC outweighs the potential costs. Customers provide a perspective on risk management issues that is different from that of the DCO and its clearing members, and as important stakeholders with a financial stake in the integrity of the DCO, they deserve an opportunity to provide input on topics such as the protection of customer assets and collateral at the RMC level, where key risk discussions take place.

[21] 17 CFR 1.3.

The Commission also disagrees with Nodal's argument that it would be difficult to obtain independent opinions on risk management matters from clearing members and customers of clearing members. In the Commission's experience, it is common practice that RMC members provide effective risk-based input directed at the safety of the DCO.

After considering the responses to the Commission's request for comment, the Commission does not believe that it is necessary to adopt further specific requirements regarding RMC composition at this time. As noted above, the Commission believes that it is important to provide DCOs with a degree of flexibility in their RMC composition to account for differences among DCOs in terms of size, business models, resources, and governance structure.

In response to NADEX's suggestion that the proposed requirement should not apply to "retail focused" DCOs, the Commission does not believe that "retail focused" is a meaningful distinction in this context. As previously discussed, some DCOs exclusively clear fully collateralized products, and the Commission agrees that because full collateralization addresses many critical risk issues, a fully collateralized DCO and its participants would not necessarily benefit from having an RMC. Any DCO that offers margined products, on the other hand, whether retail focused or not, must be able to manage the risks of margined products, and should have participants capable of providing meaningful input on the risk topics addressed by the RMC.

Finally, in response to OCC's comment noting that proposed § 39.24(b)(11)(ii), which requires an RMC to include "clearing members and customers of clearing members," and the SEC Proposal, which requires an RMC to include "representatives from owners and participants," are not the same, the Commission acknowledges that the

requirements are different, but does not believe this presents any issues in the ability of a dually-registered entity to comply with both requirements.

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

The Commission proposed 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 also requested comment on whether it should set a minimum frequency for RMC membership rotation, the advantages and disadvantages of doing so, and, if it does set a rotation frequency requirement, what that frequency should be.

Eurex and NADEX do not believe that the Commission should adopt proposed § 39.24(b)(11)(iii), arguing that depending on the size of the DCO and the qualifications of its participants to serve on an RMC, there may not be enough individuals suitable and interested in serving on the committee to rotate regularly. Eurex further argued that the proposed requirement does not align with EU regulation, which affords CCPs the discretion to determine their nomination, renomination, and rotation policies.

BlackRock, Cboe Digital, CCP12, CME, ISDA, Nodal, OCC, and Paolo Saguato support proposed § 39.24(b)(11)(iii), but do not support the Commission establishing a minimum frequency for RMC membership rotation. CCP12 and OCC stated that the importance of continuity and expertise as a means of effectively managing liquidity or credit risks (and ultimately supporting the stability of the broader system) outweighs any governance benefits resulting from a minimum rotation frequency requirement, particularly in the case of DCOs that are systemically important. CCP12, CME, FIA, and Nodal stated that DCOs have members of their risk committees with specialized knowledge of the DCO's risk practices and/or particular products, and such expertise

would be hard to replace. BlackRock, FIA, ISDA, and Paolo Saguato stated that DCOs should be allowed to stagger RMC membership rotation. ForecastEx noted that in the case of a DCO with most of its activity coming from a few clearing members, it may be more beneficial from a risk management perspective to ensure that the larger clearing members are represented on the RMC for longer periods of time. OCC stated that if the Commission imposes a rotation requirement, it should clarify that independent directors are not subject to the requirement and that the rotation requirement applies to persons, not the firms they represent. ISDA noted that many DCO RMCs include representatives of management, for example the Chief Risk Officer. ISDA suggested that the rule should only require a DCO to rotate RMC representatives external to the DCO.

FIA stated that the terms of an RMC should not restrict or limit appointed members' tenure. However, FIA supports DCOs defining transparent criteria for RMC membership, such as clearing expertise, market and asset class expertise, etc., and rotating on the basis of these relevant criteria.

ISDA proposed a minimum length of membership of two years to account for the large amount of information a new RMC member needs to process, and the resulting time required to get up to speed and become a valuable resource for the DCO. ISDA also suggested that it may be appropriate to institute a cap that would prevent RMC members from staying on for more than five consecutive years.

SIFMA AMG recommended that the Commission require that clearing member and customer representatives be grouped for purposes of establishing a staggered rotation. For example, if a DCO chose to have a minimum of three RMC members from

each group and a three-year rotation, the DCO could stagger their rotation to ensure continuity of expertise.

ICE stated that prescriptive requirements on the rotation of RMC members also would impose a significant burden on market participants to supply appropriately experienced, knowledgeable, and available employees to participate on the RMCs, as firms may lack or be unwilling to commit resources to provide new individuals for rotation. ICE contended that should such requirements be imposed on DCOs, it may be appropriate for the Commission to, in parallel, impose requirements on market participants to supply the required amount of appropriately experienced employees to participate on RMCs. As the obligation to manage the risks of the DCO resides exclusively with the DCO, ICE believes the DCO has a strong incentive and is best suited to make determinations on RMC membership.

ICE and OCC stated that it is unclear whether the proposed requirement on RMC "rotation" is consistent with the SEC Proposal requiring RMC "reconstitution."

The Commission continues to believe that requiring a DCO to regularly rotate its 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 varied perspectives on risk management matters. After reviewing the responses to the Commission's request for comment, the Commission declines to prescribe a minimum frequency for RMC member rotation. The Commission recognizes that there are risk management benefits associated with retaining RMC members who have specialized knowledge of a DCO's operations, risk practices, and/or particular products, and that it may be difficult to replace those members. A DCO

may also choose to establish one or more *ex officio* management positions on its RMC, such as the DCO's president or chief risk officer, which it would not need to rotate off of the RMC. The Commission further recognizes that DCOs may also benefit from staggering their rotation and requiring different rotation frequencies for different classes of members. In response to a request by OCC that the Commission carve out an exception for independent directors from a DCO's board who serve on an RMC, the Commission notes that OCC did not explain a need for such a carve-out, and the Commission declines to provide an exception for independent directors from the rotation requirement at this time.[22]

The Commission also notes that in certain circumstances it may be appropriate to rotate a specific RMC member, but not the firm they represent, selecting another individual from the same firm to serve on the RMC. For example, a DCO may make this determination when a significant percentage of contracts cleared on the DCO are cleared by a relatively small number of clearing members. In response to ICE's comment that firms may lack or be unwilling to commit resources, specifically appropriately experienced, knowledgeable, and available employees, to meet the proposed rotation requirement, the Commission believes that, based on current participation in RMCs and the interest in participation expressed through the Commission's MRAC, there is adequate interest. In response to ICE and OCC's statement that it is unclear whether the proposed requirement on RMC "rotation" is consistent with the SEC's proposal requiring

[22] The Commission notes that this concern seems most relevant to an RMC that is structured as a board-level committee.

RMC "reconstitution," the Commission, after reviewing proposed SEC Rule 17Ad-25(d)(1), believes that the provisions are consistent and focused on the same goals.

After reviewing the comments, the Commission is adopting § 39.24(b)(11)(iii) as proposed. As discussed above, the Commission believes that the rule will provide a DCO with the flexibility to choose how to design its policies for RMC membership rotation provided that the DCO's policies and procedures provide for varied perspectives on risk management matters.

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

Proposed § 39.24(b)(12) would require a 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. In addition, proposed § 39.24(b)(12) would require a DCO to maintain written policies and procedures related to the formation and role of each RWG, and require that each RWG convene at least quarterly.

The Commission requested comment on whether the proposed requirement that each RWG convene quarterly is the appropriate frequency. The Commission also requested comment on whether it should require a DCO 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.

Barclays, et al., BlackRock, CCP12, CME, Nodal, OCC, Paolo Saguato, and SIFMA AMG generally supported the Commission's proposal to require a DCO to

establish one or more RWGs. SIFMA AMG recommended that the Commission clarify that the matters required to be brought to the RWG are the same scope of matters to be brought to the RMC.

Cboe Digital, Eurex, ForecastEx, NADEX, and Nodal expressed concerns with the proposed requirement. Cboe Digital argued that requiring use of an RWG for a smaller DCO, or a DCO with a homogenous product offering, would be arbitrary, burdensome, and superfluous given the functions of the DCO's RMC. Eurex noted that proposed § 39.24(b)(12) is not harmonized with EMIR or EU Regulation 152/2013, which leave the establishment of further committees beyond the risk committee to the discretion of the CCP. Moreover, Eurex argued that the decision to establish additional committees or working groups beyond an RMC for the purposes of gathering risk-based input should be left to the discretion of the DCO. Eurex also stated that if the Commission chooses to adopt § 39.24(b)(12), it should allow DCOs to design their own policies and procedures regarding membership rotation. Nodal commented that the material difference between the RMC and the RWG is unclear and, therefore, questioned what additional risk management value is gained from requiring an RWG in addition to an RMC. NADEX stated that the proposed regulation should not be implemented because a DCO is in the best position to determine its governance needs based on its specific business and size. Moreover, it argued that it may be difficult for smaller DCOs to find members for a second committee beyond their RMC. ICE noted that it faces challenges in finding available resources at firms to engage in various committees and advisory roles given the resource constraints currently present in the industry, and argued

that because the proposed rules create various additional overlapping opportunities for input such as the RMC and RWG, these limited resources may be further strained.

The Commission received several comments on the proposed requirement that each RWG convene at least quarterly. FIA and ISDA agreed with the proposed requirement, but CCP12, CME, Eurex, ICE, Nodal, OCC, and SIFMA AMG do not believe it is necessary for the Commission to prescribe a minimum frequency of RWG meetings. Nodal suggested that the Commission could revise proposed § 39.24(b)(12) to provide that the RWG shall be convened by the DCO prior to the DCO making changes that could materially affect the risk profile of the DCO. BlackRock stated that the Commission should require RWGs to meet bi-annually, or more frequently if warranted by the risk issues at the DCO.

The Commission also received several comments on whether the Commission should require DCOs to document the proceedings of RWG meetings. CME believes that requiring and publishing meeting minutes may chill open dialogue and impede progress on addressing risk issues. According to CME, a DCO should be able to determine whether to document RWG proceedings and, if so, the manner in which to do so. CCP12 believes that the Commission should only require a DCO to document the topics discussed by the RWG. SIFMA AMG stated that an RWG should be required to document its recommendations to the RMC or board, but not its discussions generally. ISDA stated that DCOs should document each RWG meeting because of the transparency and accountability benefits, and also to allow members of the group that miss a meeting to efficiently participate in the next meeting. ISDA further argued that a DCO could mitigate any potential impact on free and open dialogue by limiting the information in the

meeting minutes to discussion topics and points that were made by participants, omitting the identity of those who made the points. According to ISDA, the minutes should also contain areas of disagreement and document any agreement or decision made on the discussed topics. FIA stated that it supports the requirement that a DCO document the proceedings of RWG meetings. FIA does not believe that such a requirement will chill discussion within the RWG, but instead will create a record of matters discussed and general feedback provided. Moreover, FIA believes that the Commission should require that this documentation be provided to the RMC as an input for consideration.

FIA believes that the firms represented on the RWG should provide risk-based feedback, but also that firms should be able to use this forum to provide views and feedback without being limited to the structural formality of the RMC. FIA views the RWG primarily as a forum to provide transparency to market participants and to allow them to engage in open dialogue so the DCO obtains the views of its members and their customers. BlackRock suggested that the role of the RWG could be further enhanced if RMCs were explicitly required to consider feedback from the RWG(s).

After considering the comments, the Commission is adopting § 39.24(b)(12) largely as proposed, but is revising it with respect to the required meeting frequency for RWGs and with respect to meeting documentation requirements discussed below. A requirement of a quarterly RWG meeting may be unduly burdensome for a DCO that is not confronted with issues materially affecting its risk profile that would require RWG consultation at a given time. It is also important, however, that an RWG hold regular meetings to ensure that it serves as a consistent forum for members to discuss and provide input on risk matters facing a DCO in a timely manner. As a result, the

Commission is revising § 39.24(b)(12) to require that each RWG "shall convene at least two times per year."

In response to Nodal's questioning of the material differences between the RMC and the RWG, and the additional risk management value in requiring an RWG in addition to an RMC, the Commission continues to believe that establishing one or more RWGs will enhance a DCO's risk management by providing the DCO with an expanded pool of participants to seek input from when considering matters that could materially affect the risk profile of the DCO. Some participants with valuable risk management insight may be reluctant to serve on an RMC due to the time commitment involved and thus may prefer to serve on an RWG.

The Commission recognizes that a smaller DCO, in particular, may have a more difficult time finding participants to serve on its RWG, especially in light of RMC composition requirements, than a DCO with a larger membership. However, the Commission notes that a DCO with a smaller membership or a homogenous product offering will in most instances need fewer participants on its RWG to represent a diverse cross-section of its clearing members and customers of clearing members. The Commission further notes that it proposed and is adopting a flexible composition requirement for RWGs in order to allow DCOs to construct their RWGs in a manner that fits the DCO's membership composition and product offerings.

In response to a comment by SIFMA AMG, the Commission confirms that the matters required to be brought to the RWG, "all matters that could materially affect the risk profile of the [DCO]," are the same as those on which the board of directors must

consult with the RMC. The Commission expects each DCO to define in its policies and procedures what it means to "materially affect the risk profile of the DCO."

In response to Eurex's comment on differences between § 39.24(b)(12) and European law, the Commission notes that the RWG requirement is not incompatible with EMIR or EU Regulation 152/2013, as described by Eurex, because nothing in EU Regulation 152/2013 prohibits a clearinghouse from establishing additional committees beyond the risk committee, including an RWG. The Commission confirms that § 39.24(b)(12) provides a DCO with the flexibility to design appropriate rotation policies for its RWG.

The Commission received several comments regarding whether it should require DCOs to document the proceedings of RWG meetings. In response to comments from CCP12, FIA, and ISDA arguing that an RWG documentation requirement would provide transparency and accountability benefits, the Commission is revising proposed § 39.24(b)(12) to add that a DCO must "*include requirements for the [DCO] to document and provide to the risk management committee, at a minimum, a summary of the topics discussed and the main points raised during each meeting of the risk advisory working group*" (added text in italics) in the written policies and procedures required by proposed § 39.24(b)(12). The Commission believes that requiring a DCO to document and provide an RWG's feedback to the RMC will help ensure that the RWG's input is appropriately considered in the DCO's risk governance process. The Commission declines to add a requirement that RMCs consider feedback from an RWG, but recognizes the potential risk management benefits of RMC and RWG collaboration, and expects that many DCOs will formalize this collaboration in their governance arrangements. The Commission

believes, however, that this is an area where DCOs would benefit from the flexibility to structure their governance arrangements in a manner that best suits them.

III. Amendments to § 39.24(c)

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

The Commission proposed 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.

BlackRock, Eurex, FIA, ICE, Paolo Saguato, and SIFMA AMG stated that they generally agree with the Commission's proposal to require a DCO to establish fitness standards for its RMC members. BlackRock noted that the material considered by RMC members will be specialized and will require a certain level of experience and skills. ICE agrees with allowing DCOs the flexibility to determine appropriate fitness standards for their RMC members. Eurex noted that the Commission's proposal would generally harmonize with Article 28(2) of EMIR. NADEX stated that it doesn't think there should be an RMC requirement, but if there is, then RMC members should have appropriate fitness standards. Finally, SIFMA AMG recommended that the Commission also require DCOs to establish and enforce fitness standards for its RWG members. The Commission did not receive any comments opposed to the proposed requirement.

The Commission continues to believe that proposed § 39.24(c)(1)(iv) is consistent with 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.[23] 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 RMC members, recognizing that fitness standards may vary across DCOs. Therefore, the Commission is adopting § 39.24(c)(1)(iv) as proposed.

The Commission declines to adopt a requirement that a DCO establish fitness standards for its RWG members. The Commission expects that RWG(s) will be a critical component of a DCO's overall risk management framework by providing insight on risk matters from a broad array of market participants in a more open and less formal forum than an RMC, so that a larger group of market participants can participate. Accordingly, the Commission does not believe that it is appropriate to require DCOs to establish fitness standards for RWG members that could have the unintended effect of limiting the potential pool of RWG members.

B. Role of RMC Members – § 39.24(c)(3)

Proposed § 39.24(c)(3) would require a DCO to maintain policies designed to enable its RMC members to provide independent, expert opinions in the form 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 requested 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. The Commission asked whether, as a matter of corporate law,

[23] *See* 7 U.S.C. 7a-1(c)(2)(O).

RMC members would 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, and if so, how the goal of receiving independent, expert opinions could be achieved. The Commission also asked whether DCOs should be required to have policies specific to RMC members for managing conflicts of interest.

Barclays, et al., BlackRock, CCP12, CME, ICE, ISDA, OCC, and SIFMA AMG generally supported proposed § 39.24(c)(3). CCP12 stated that it strongly believes that RMC members' participation in a DCO's governance arrangements must be contingent on the members acting in a manner that prioritizes the safety and efficiency of the DCO and the stability of the broader financial system. CCP12 also believes that an RMC member's obligations cannot be to the commercial interests of the member's employer, as the role of the RMC is to provided risk-based input on the matters that come before it.

CME, ICE, and OCC commented on the proposal's use of the term "expert" in the context of RMC members providing "expert opinions." ICE stated that it would not support imposing an overly strict interpretation of what constitutes an "expert" (*e.g.*, required accreditation or certification requirements). CME and OCC stated that the Commission should substitute "expert" with "informed" as doing so would enable RMC members to provide independent and informed opinions in the form of risk-based input, without implicating the legal connotations that accompany the concept of "expert opinions." CME went further to state that such a change would also prevent possible misinterpretation about whether the person providing the opinion must have a specific degree, certification, accreditation, or license to demonstrate the requisite expertise. CME noted that using the term "informed" instead of "expert" would also align the

proposed requirement with a similar provision in the SEC Proposal that requires "risk-based, independent, and informed" opinion from RMC members.

Several commenters discussed the proposed requirement for a DCO to maintain policies designed to enable its RMC members to provide "independent" input on risk matters. ISDA stated that it is common practice that RMC members act not as representatives of their employer, but as independent experts. ISDA further stated that it is not aware that this practice has led to issues anywhere. Conversely, Cboe Digital, ForecastEx, and Nodal questioned the feasibility of ensuring that RMC members are able to provide independent input. Cboe Digital commented that while RMC members should be required to set aside commercial interest bias and provide only risk-based input, they will nonetheless likely possess a degree of implicit bias that cannot be untangled given the compensation paid by their employer. Cboe Digital also argued that the independence requirement is unnecessary because RMC members are already subject to a DCO's rules designed to minimize conflicts of interest in the decision-making process of the DCO established pursuant to § 39.25, must meet a DCO's fitness standards established pursuant to § 39.24(c), and must carry out their duties and responsibilities as prescribed by the committee's governing documents by applying their professional expertise through a risk-based lens. NADEX stated that while it believes that independent input is important when considering significant risk matters, policies requiring RMC member independence are unnecessary if a board of directors contains one or more independent directors, because the board of directors has the ultimate responsibility to make major decisions. NADEX also argued that, if the Commission adopts the proposed requirement, DCO-DCM dual registrants should be exempt because

Commission regulations permit DCMs to establish a board of directors comprised of at least 35 percent public directors with the same requirement applicable to executive committees.[24] Therefore, NADEX argued, dual-registered entities are already considering independent views in their decision-making. Nodal argued that it would be exceptionally difficult to obtain truly independent opinions on risk management matters from clearing members and customers because they are inherently conflicted. Nodal believes that the Commission should revise the proposed rules to allow DCOs to instead design policies focused on including RMC members who would qualify as "public directors," as defined in the CEA. ForecastEx commented that the Commission should recognize the tie RMC members will have with their employers, and design a regulation with this connection in mind. SIFMA AMG stated that while RMC members' contributions reflect a risk-based, independent, and informed opinion, the Commission should explicitly require clearing members and clearing member customers to represent the perspectives of their employers.

In response to the Commission's request for comment on whether, as a matter of corporate law, RMC members would be forced to contend with competing duties or obligations to the DCO and their employer, NADEX stated that an RMC member's ability to waive their fiduciary duties to their employing firm would be dependent upon the company's legal entity type and its state of incorporation/organization, and cited recent legal authority from the Delaware Court of Chancery which, in the view of

[24] *See* Guidance on, and Acceptable Practices in, Compliance with Core Principles, 17 CFR 38, appendix B, Core Principle 16, section (b)(2). The composition NADEX cites is an "acceptable practice" rather than a strict requirement. *See* Appendix B section 2.

NADEX, decided that a stockholder of a Delaware corporation cannot waive claims against corporate directors for breach of fiduciary duties.[25] NADEX further argued that because the fiduciary laws of the state in which each DCO is organized may differ, the proposed independence requirement would not be able to be applied uniformly, and therefore should not be implemented. Cboe Digital stated that efforts to attempt to ensure RMC member independence could lead to costly legal disputes.

OCC noted that it has several board-level risk management committees, and that under general corporate law principles, directors on those committees necessarily are fiduciaries of the DCO. OCC argued that this fiduciary relationship does not cause a director to lose independence; in fact, OCC public directors, who otherwise are independent from OCC, are fiduciaries to OCC by virtue of their service as OCC directors. OCC requested that the Commission clarify that a director's fiduciary duty to the DCO does not render that director non-independent and does not violate proposed § 39.24(c)(3). Absent such a clarification, OCC contended, it may be impossible for a director of a DCO to serve on an RMC at all.

FIA commented that DCOs have governance specific to their corporate make-up that is governed by applicable corporate laws and that RMC members, as employees of their firm, may have certain duties to their employer. However, FIA does not think this raises any competing duties or obligations with RMC participation. FIA believes that an RMC's participant clearing members and customers are well-suited for risk input without requiring fiduciary obligations that may conflict with their individual employment.

[25] *See Manti Holdings, LLC v. The Carlyle Group, Inc*., 2022 WL 444272 (Del. Ch. Feb. 14, 2022).

In response to the Commission's request for comment on whether DCOs should be required to have policies specific to RMC members for managing conflicts of interest, CCP12 stated that while DCOs already implement policies that set out the role of the RMC and the duties of their members, which may also be supplemented by a requirement for members to sign non-disclosure agreements, a DCO should be afforded the flexibility to design its own policies for the governance arrangements of RMCs based on the DCO's own unique structure. FIA suggested that DCO policies and procedures specific to RMC members for managing conflicts of interest would help RMC members provide appropriate input. BlackRock stated that the Commission should require DCOs to specify in their policies and procedures that RMC members would not be serving as fiduciaries to the DCO, particularly when acting as a fiduciary to the DCO may conflict with the RMC's objective of supporting the stability of the broader financial system. Eurex noted that Article 28(4) of EMIR provides that the members of the risk committee are bound by confidentiality requirements, and that where the chairman of the risk committee determines that a member has an actual or potential conflict of interest on a particular matter, that member must not be allowed to vote on that matter. Eurex believes that the Commission could harmonize § 39.24(c)(3) with EU regulation and fulfill the same interest in ensuring that RMC members feel empowered to provide objective input by requiring that all RMC members be bound by confidentiality requirements, addressing the avoidance of conflicts of interest, and specifying that RMC members owe no fiduciary duties to DCOs. Eurex believes this would also reflect the best practices that DCOs already successfully have in place for RMCs.

After considering the comments, the Commission is adopting proposed § 39.24(c)(3) as modified below.

Proposed § 39.24(c)(3) would, in part, require a DCO to maintain policies designed to enable RMC members to provide "independent, expert opinions in the form of risk-based input." As explained above, CME, ICC, and OCC argued that requiring an RMC member to provide an "expert" opinion could lead to a possible misinterpretation about whether the person providing the opinion must have specific credentials to demonstrate sufficient expertise. That was not the Commission's intention. Rather, the Commission is requiring RMC members to have pre-existing risk management knowledge. Therefore, the Commission is adopting § 39.24(c)(3) with the term "expert" replaced by "informed." The Commission also notes that this change will harmonize § 39.24(c)(3) with a similar provision in the SEC Proposal.[26]

In light of the confusion seen in some comments regarding the Commission's use of the term "independent" in proposed § 39.24(c)(3), the Commission is adopting § 39.24(c)(3) without that term. The Commission's use of the term "independent" referred to the ability of an RMC member to provide risk-based input while serving on an RMC, rather than input motivated by the commercial interests of the member's employer. Because a DCO would still be required to maintain policies designed to enable members of the RMC to provide risk-based input in the absence of that term, the Commission believes this modification will avoid potential further confusion while preserving the substance of the requirement as proposed. The Commission nevertheless notes that its use of the term "independent" in the Proposal did not refer to, as some commenters

[26] *See supra* n.9, at p. 73 (proposed rule 17Ad-25(d)(2)).

appeared to suggest, the same concept as board member independence, which focuses on ensuring that a board includes members who are not an executive, officer, or employee of the DCO or an affiliate thereof. The Commission believes that both types of independence are important to effective risk governance, but they are distinct concepts. Therefore, the Commission disagrees with NADEX's suggestion that RMC member independence is unnecessary if a board of directors contains one or more independent directors. Moreover, the Commission disagrees with comments questioning the feasibility of an RMC member providing independent input in light of the compensation paid to the RMC member by its employer. In the Commission's experience, it is common practice that RMC members provide effective risk-based input directed at the safety of the DCO.

In discussing the concept of RMC member independence, the Proposal noted that RMC members should be neither beholden to their employers' particular interests nor acting as a fiduciary of the DCO.[27] ICE and OCC noted that some RMCs operate as board-level committees, with RMC members who are also members of the board, and thus have legal fiduciary duties to the DCO. Moreover, some DCOs include key members of management on an RMC, such as the DCO's president or chief risk officer. Board members and DCO management can be valuable contributors to an RMC, and the Commission wants to be clear that § 39.24(c)(3) does not prevent individuals with legal fiduciary duties to the DCO from serving on an RMC. For the purposes of § 39.24, RMC members do not have fiduciary duties to the DCO by virtue of their participation on an RMC, and a given member's legal fiduciary duties to the DCO based on a role as a

[27] 87 FR 49561-62.

director or officer of the DCO are not inconsistent with the role of an RMC member. The DCO itself is legally obligated to prioritize its own safety, and to support the stability of the broader financial system and other relevant public interest considerations.[28]

The Commission received several responses to its request for comment on whether, as a matter of corporate law, RMC members would be forced to contend with competing duties or obligations to the DCO and their employer, and the related matter of whether DCOs should be required to have policies specific to RMC members for managing conflicts of interest. NADEX appears to believe that participation on an RMC could require RMC members to waive their fiduciary obligations to their employing firms, but the Commission notes that this is not the case for purposes of § 39.24. The Commission also does not believe that potential variance in fiduciary laws across states presents an issue for RMC participation. In response to Cboe Digital's argument that efforts to attempt to ensure RMC members are independent to an extent that eliminates all bias, even implicit bias, favoring the commercial interests of the RMC member's employer could lead to costly legal disputes, the Commission notes that neither the proposed nor the final rule requires that degree of independence. Rather, the focus is on the fact that each RMC member's input, and the input of the RMC as a whole, should be risk-based, and focused on the safety of the DCO, the stability of the broader financial system, and other public interest considerations.

The Commission believes that RMC members are able to manage conflicts of interest pursuant to the policies and procedures DCOs will adopt to comply with new § 39.24(c)(3), as well as DCOs' existing conflict of interest obligations under § 39.25.

[28] 17 CFR 39.24(a)(1)(iii), (iv).

As suggested by FIA, these policies may include procedures for RMC members to recuse themselves in certain circumstances where there is a conflict of interest or the appearance of a conflict of interest, such as where the interests of the RMC member's employer are affected in a manner distinct from the interests of other clearing members or other clients (*e.g.*, where DCO staff is proposing action against the clearing member that employs the RMC member). Also, as CCP12 suggested, a DCO may choose to require RMC members to sign non-disclosure agreements, as many currently do. Ultimately, the Commission believes, as suggested by CCP12, that a DCO should be afforded the flexibility to design its policies in this area based on the DCO's structure and concerns.

IV. Additional Comments

The Commission in the Proposal also requested comment on the following topics which might be address in a future rulemaking: (1) whether the Commission should 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; and (2) whether the Commission should require a DCO 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. The Commission appreciates the comments it received on these topics, and while they are not discussed here because they were outside the scope of the Proposal, the Commission may address them in a future rulemaking.

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.[29] The final rule adopted 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.[30] The Commission has previously determined that DCOs are not small entities for the purpose of the RFA.[31] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the regulations adopted herein will not have a significant economic impact on a substantial number of small entities. The Chairman made the same certification in the proposed rulemaking, and the Commission did not receive any comments on the RFA.

B. Paperwork Reduction Act

The Paperwork Reduction Act (PRA)[32] 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 final rule contains reporting and recordkeeping requirements that are collections of information within the meaning of the PRA. As the Commission noted in the Proposal, the reporting burden estimate for "Requirements for

[29] 5 U.S.C. 601 *et seq*.
[30] 47 FR 18618 (Apr. 30, 1982).
[31] *See* 66 FR 45604, 45609 (Aug. 29, 2001).
[32] 44 U.S.C. 3501 *et seq*.

Derivatives Clearing Organizations," OMB control number 3038-0076,[33] accounted for the disclosure of new and updated governance arrangements required under § 39.24 to the Commission, other relevant authorities, clearing members and their customers, owners of the DCO, and the public.[34] The Commission requested comments regarding its PRA burden analysis in the preamble to the Proposal, but did not receive any responses.

The Commission is making the following modifications to the Proposal in response to other comments: the Commission is adopting new § 39.24(d) to provide that a DCO may satisfy the requirements of paragraphs (b)(11), (b)(12), (c)(1)(iv), and (c)(3) of § 39.24 by having rules that permit it to clear only fully collateralized positions; the Commission is revising proposed § 39.24(b)(11) to require a DCO to create and maintain minutes of each RMC meeting; the Commission is revising proposed § 39.24(b)(11) to clarify that a DCO's board must consult with, and consider and respond to input from, the RMC on the clearing of new products that could materially affect the risk profile of the DCO; the Commission is modifying proposed § 39.24(b)(11)(ii) to clarify that the rule requires a DCO to maintain written policies and procedures to make certain that its RMC includes at least two clearing member representatives and, if applicable, at least two representatives of customers of clearing members; the Commission is revising proposed § 39.24(b)(12) to require a DCO to include in its written policies and procedures related to the formation and role of each RWG requirements for the DCO to document and provide to the RMC, at a minimum, a summary of the topics discussed and the main points raised during each meeting of the RWG; the Commission is revising

[33] *See* Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800, 4831 (Jan. 27, 2020).
[34] *See* 17 CFR 39.24(b)(2).

§ 39.24(b)(12) to require each RWG to meet at least two times per year, rather than quarterly, as originally proposed; and the Commission is revising proposed § 39.24(c)(3) to replace the term "expert" with "informed" and to remove the term "independent."

The Commission is revising its burden estimate for OMB control number 3038-0076 to account for modifications to the Proposal made in response to comments. Specifically, the Commission believes that the burden will increase because DCOs will be required under § 39.24(b)(11) to create and maintain minutes of each RMC meeting, and under § 39.24(b)(12) to document and provide to the RMC, at a minimum, a summary of the topics discussed and the main points raised during each meeting of the RWG. The Commission estimates a DCO will spend an average of four hours creating minutes of each RMC meeting and four hours documenting a summary of the topics discussed and the main points raised during each meeting of the RWG, which includes attending the meeting, taking notes, and putting the notes into the required format following the meeting. The Commission estimates that a DCO's RMC and RWG will each need to hold an average of six meetings per year to satisfy the §§ 39.24(b)(11) and (12) requirements that a DCO's RMC and RWG address all matters that could materially affect the risk profile of the DCO. Therefore, as a result of the modifications, the revised estimated aggregate burden is as follows:

Estimated number of respondents: 15[35]

[35] The Commission notes that while new § 39.24(d) provides that a DCO may satisfy the requirements of paragraphs (b)(11), (b)(12), (c)(1)(iv), and (c)(3) by having rules that permit it to clear only fully collateralized positions, such DCOs are included in the total estimated number of respondents because these DCOs would still be required to develop and disclose governance arrangements required by the other provisions of § 39.24. The Commission's estimate is therefore conservative to the extent that these DCOs are not

Estimated number of reports per respondent: 18[36]

Average number of hours per report: 4

Estimated gross annual reporting burden: 1,080

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.[37] 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 final rule may impose costs. The Commission has endeavored to assess the expected costs and benefits of the final rule 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 rules in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of the final rule. 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.

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required to prepare and maintain minutes of each RMC meeting, and document and provide to the RMC, at a minimum, a summary of the topics discussed and the main points raised during each meeting of the RWG.

[36] The Commission notes that the previous estimated aggregate burden was six reports. As described above, the commission is proposing 12 new reports, bringing the total to 18 reports. *See supra* n. 31.

[37] 7 U.S.C. 19(a).

To further the Commission's consideration of the costs and benefits imposed by the Proposal, the Commission invited comments from the public on all aspects of its cost-benefit considerations, including the identification and assessment of any costs and benefits not discussed by the Commission; 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 did not receive any comments specific to the benefits and costs of the proposed changes to § 39.24. To the extent that the Commission received comments that indirectly address the costs and benefits of the Proposal, those comments are discussed as relevant below.

As outlined above in Section V.B., the Commission made several modifications in response to comments on the Proposal. The Commission believes that the amendments to current § 39.24 may result in some additional costs to DCOs as compared to current § 39.24.

2. Baseline

The baseline for the Commission's consideration of the costs and benefits of this final rule is: (1) the DCO Core Principles set forth in Section 5b(c)(2) of the CEA; and (2) § 39.24. 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. The Commission recognizes that, to the extent that DCOs already have in place some form of the proposed governance arrangements, the actual costs and benefits of the proposed regulation may not be significant.

3. Amendments to § 39.24

a. Summary of the Final Rule

The Commission is adopting regulations that require each DCO to establish an RMC and require a 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 final rule also requires DCOs to: establish fitness standards for RMC members; maintain policies to ensure each RMC includes at least two clearing member representatives and, if applicable, at least two representatives of 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 that include requirements for the DCO to document the board's consideration of and response to RMC input and create and maintain minutes of each RMC meeting. In addition, the final rule requires each DCO to maintain policies enabling RMC members to provide informed 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 final rule further requires 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 will be required to convene at least two times per year. In addition, the final rule requires each DCO to adopt written policies and procedures related to the formation and role of the RWG and include requirements for the DCO to document and provide to the RMC, at a minimum, a summary of the topics discussed and the main points raised during each meeting of the RWG.

Finally, the Commission is adopting new § 39.24(d) to allow a DCO to alternatively satisfy the requirements of paragraphs (b)(11), (b)(12), (c)(1)(iv), and (c)(3) of § 39.24 by having rules that permit it to clear only fully collateralized positions.

b. Benefits

The Commission believes that § 39.24, as amended by this final rule, will promote more efficient, effective, and reliable DCO risk management, benefitting DCOs, clearing members, market participants, and the financial system more broadly. RMCs will provide a formal mechanism for DCOs to receive valuable 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 will 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 this final rule, the benefits of the regulations are currently being realized to some degree.

The final rule will help RMCs to be well positioned to provide effective risk management input to the DCO's board of directors by requiring DCOs to establish RMC membership fitness standards. These standards will help to ensure that individual RMC members are appropriately qualified to perform their duties. Ensuring that RMCs include at least two clearing member representatives and, if applicable, at least two representatives of customers of clearing members will 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 will promote a diversity of perspectives. In addition, requiring DCOs to implement policies enabling RMC members to provide informed opinions in the form of risk-based input, and to perform their duties in a manner that supports the DCO's safety and efficiency, will help ensure that RMC members feel empowered to provide objective input during this process. 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. After considering a

comment from BlackRock arguing that keeping RMC minutes is necessary to promote transparency, accountability, and predictability, and comments from FIA, ISDA, and NADEX that also supported the requirement, the Commission revised proposed § 39.24(b)(11) to require a DCO to create and maintain minutes of each RMC meeting.

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 RWG will promote transparency, accountability, and predictability. After considering comments from CCP12, FIA, and ISDA arguing that an RWG documentation requirement would provide transparency and accountability benefits, the Commission revised proposed § 39.24(b)(12) to require a DCO to include in the written policies and procedures related to the formation and role of each RWG a requirement that the DCO document and provide to the RMC, at a minimum, a summary of the topics discussed and the main points raised during each meeting of the RWG.

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 amendments to § 39.24, the final rule may impose some additional costs on DCOs. Costs could arise from additional hours a DCO's employees (or potentially outside counsel or other consultants) might need to spend conforming the DCO's rules and procedures to these requirements, drafting new or amended rules and procedures when necessary, and

implementing these rules and procedures. Specifically, a DCO must draft written policies and procedures that describe the RMC consultation process in detail and that enable RMC members to provide informed opinions in the form 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. In addition, a DCO must document the board's consideration of and response to RMC input, prepare minutes of each RMC meeting, and summarize the topics discussed and main points raised during each RWG meeting. A DCO will also be required to host RMC and RWG meetings as often as is necessary to address all matters that could materially affect the risk profile of the DCO, and with respect to RWGs, at least two times per year.

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 final rule. Further, the DCOs' policies implementing the final rule will 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 compliance with the final rule will also impose costs. Establishing and maintaining an RMC will 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. ICE stated that requirements on the rotation of RMC members may impose a significant burden on market participants to supply appropriately experienced, knowledgeable, and available employees to participate on the RMCs. However, the Commission notes that market participants will not be required to

participate on the RMC, and the Commission believes that the benefits of being able to provide input will outweigh the costs for those that do participate.

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.

d. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits of the 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 final rule will 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 Commission believes that the final rule will enhance the protection of market participants and the public by improving DCOs' identification and handling of risk and reducing the likelihood that

market participants and the public face unexpected costs resulting from deficient DCO risk management. The final rule also gives 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 final rule will benefit the financial integrity of the markets for futures and cleared swaps, and options thereon, by promoting sound risk management decisions through the adoption of minimum requirements regarding the substance and form of a DCO's governance arrangements. The Commission has not identified any other effect of the final rule on efficiency, competitiveness, and financial integrity.

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

(4) *Sound risk management practices*: The final rule is designed to support sound risk management practices at DCOs by providing a forum for informed risk-based input to a DCO's board of directors from clearing members and customers of clearing members. 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 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 final rule 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.[38]

The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. In the Proposal, the Commission requested comment on whether: (1) the proposed rulemaking implicates any other specific public interest to be protected by the antitrust laws; (2) the proposed rulemaking is anticompetitive and, if it is, what the anticompetitive effects are; and (3) whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the proposed rule amendments. The Commission received one comment, from ISDA, stating that the proposed rules were not anticompetitive.

The Commission has considered the final rule to determine whether it is anticompetitive and has identified no anticompetitive effects. Because the Commission has determined that the 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.

List of Subjects in 17 CFR Part 39

[38] 7 U.S.C. 19(b).

Governance requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 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 (12);

c. Redesignate paragraphs (c)(1)(iv) and (v) as paragraphs (c)(1)(v) and (vi) 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 that could materially affect the risk profile of the derivatives clearing organization. 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 and create and maintain minutes of each risk management committee meeting;

(ii) A risk management committee includes at least two clearing member representatives and, if applicable, at least two representatives of 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, and include requirements for the derivatives clearing organization to document and provide to the risk management committee, at a minimum, a summary of the topics discussed and the main points raised during each meeting of the risk advisory working group. Each market participant risk advisory working group shall convene at least two times per year.

(c) * * *

(1) * * *

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

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(3) A derivatives clearing organization shall maintain policies designed to enable members of risk management committee(s) to provide informed 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.

(d) *Fully collateralized positions.* A derivatives clearing organization may satisfy the requirements of paragraphs (b)(11), (b)(12), (c)(1)(iv), and (c)(3) of this section by having rules that permit it to clear only fully collateralized positions.

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Christopher Kirkpatrick,

Secretary of the Commission.