

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 39

RIN 3038-AF39

Protection of Clearing Member Funds Held by Derivatives Clearing Organizations

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is proposing regulations to ensure clearing member funds and assets receive the proper treatment in the event the DCO enters bankruptcy by requiring, among other things, that clearing member funds be segregated from the DCO’s own funds and held in a depository that acknowledges in writing that the funds belong to clearing members, not the DCO. In addition, the Commission is proposing to permit DCOs to hold customer and clearing member funds at foreign central banks subject to certain requirements. Finally, the Commission is proposing to require DCOs to conduct a daily calculation and reconciliation of the amount of funds owed to customers and clearing members and the amount actually held for customers and clearing members.

DATES: Comments must be received by February 16, 2024.

ADDRESSES: You may submit comments, identified by RIN 3038-AF39, by any of the following methods:

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

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

- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above. Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <https://comments.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission’s regulations.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <https://comments.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

FOR FURTHER INFORMATION CONTACT: Eileen A. Donovan, Deputy Director, 202-418-5096, edonovan@cftc.gov, Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581; Theodore

¹ 17 CFR 145.9. Commission regulations referred to herein are found at 17 CFR chapter I (2022), and are accessible on the Commission’s website at <https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm>.

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Z. Polley, Associate Director, 312-596-0551, tpolley@cftc.gov; or Scott Sloan, Special Counsel, 312-596-0708, ssloan@cftc.gov; Division of Clearing and Risk, Commodity Futures Trading Commission, 77 West Jackson Boulevard, Suite 800, Chicago, Illinois 60604.

SUPPLEMENTARY INFORMATION:

I. Background

A. Proprietary Funds

Section 4d of the Commodity Exchange Act (CEA) and Part 1 of the Commission’s regulations establish a comprehensive regime to safeguard the funds belonging to customers of a futures commission merchant (FCM).² Commission regulations define a “customer” as “any person who uses [an FCM], introducing broker, commodity trading advisor, or commodity pool operator as an agent in connection with trading in any commodity interest,” and therefore, this customer protection regime does not apply to the funds of any person who clears trades directly through a DCO, who is a “clearing member.”³ At the most general level, the customer protection regime requires FCMs to segregate customer funds from their own funds, deposit customer funds under an account name that clearly identifies them as customer funds,⁴ and obtain a written acknowledgment from each depository that holds customer funds.⁵ These acknowledgment letters, which must adhere to specific templates contained in the Commission’s regulations, require a depository to acknowledge, among other things, that the accounts opened

² 7 U.S.C. 6d; 17 CFR 1.20 – 1.39. *See also* 17 CFR 22.1 – 22.17, and 30.7 (establishing similar regimes for cleared swaps customer collateral and foreign futures customer funds).

³ 17 CFR 1.3.

⁴ 17 CFR 1.20(a).

⁵ 17 CFR 1.20, 22.5, and 30.7 (requiring an acknowledgment letter for futures customer funds, cleared swaps customer collateral, and foreign futures customer funds, respectively).

by the FCM hold funds that belong to the FCM’s customers. The customer protection regime also establishes accounting and reporting requirements applicable to customer funds,⁶ and limits both the types of investments that can be made with customer funds⁷ and the type of depositories that can hold customer funds.⁸

Many of the customer protection requirements that apply to FCMs also apply to DCOs that receive customer funds from their FCM clearing members. DCOs must segregate the customer funds of their FCM clearing members from their own funds,⁹ deposit customer funds under an account name that identifies the funds as customer funds,¹⁰ obtain acknowledgment letters from depositories,¹¹ limit the investment of customer funds to instruments listed in § 1.25,¹² and limit depositories for customer funds to those listed in §§ 1.20 and 1.49.¹³ These protections, however, do not extend to clearing members of DCOs. Only Section 5b(c)(2)(F) of the CEA (Core Principle F) and § 39.15 apply to the treatment of clearing members’ funds and assets held by a DCO in relation to cleared contracts (proprietary funds).¹⁴ These provisions require DCOs to establish standards and procedures that are designed to protect and ensure the safety of proprietary funds and require DCOs to hold proprietary funds in a manner that will minimize the risk of loss or delay in access by the DCO to the proprietary funds.¹⁵ These

⁶ 17 CFR 1.32, 1.33.

⁷ 17 CFR 1.25.

⁸ 17 CFR 1.49.

⁹ 17 CFR 1.20(g)(1); 17 CFR 39.15 (b); 17 CFR 22.3(b)(1).

¹⁰ 17 CFR 1.20(g)(1).

¹¹ 17 CFR 1.20(g)(4); 17 CFR 22.5.

¹² 17 CFR 39.15(e).

¹³ 17 CFR 1.20(g)(2), (3); 17 CFR 22.3(b) (cross-referencing 17 CFR 22.4).

¹⁴ This definition of proprietary funds is only for explanatory purposes in the background section. As discussed further below, the Commission is proposing a definition of “proprietary funds” that is referred to throughout the remainder of this proposed rulemaking.

¹⁵ 7 U.S.C. 7a-1(c)(2)(F); 17 CFR 39.15.

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provisions further require any investment of proprietary funds to be in instruments with minimal credit, market, and liquidity risks.¹⁶

Section 8a(5) of the CEA grants the Commission authority to adopt rules it determines are reasonably necessary to effectuate, among other things, the DCO core principles.¹⁷ The Commission’s initial focus in implementing Core Principle F was on the custody and safeguarding of customer funds, consistent with Section 4d of the CEA. This approach was largely responsive to the historical prevailing model in which all or nearly all clearing members of a DCO are FCMs. However, the Commission has since granted registration to a number of DCOs that clear directly for market participants without the intermediation of FCMs, including, in most cases, market participants who are natural persons (*i.e.*, individuals).¹⁸ Additionally, many DCOs that use the traditional FCM clearing model have at least some non-FCM clearing members. The Commission therefore is proposing safeguards for proprietary funds to provide protections for clearing members comparable to those applicable to customers.¹⁹ The Commission has preliminarily determined that each of these additional safeguards is reasonably necessary to effectuate DCO Core Principle F.²⁰

Specifically, the Commission is proposing to require a DCO to hold proprietary funds separately from the DCO’s own funds, in accounts that are named to clearly identify the funds as

¹⁶ *Id.*

¹⁷ 7 U.S.C. 12a(5).

¹⁸ Currently, CBOE Clear Digital, LLC; CX Clearinghouse, L.P.; LedgerX, LLC; and North American Derivatives Exchange Inc. allow individuals to be direct clearing members. Further, ICE NGX Canada Inc. clears physically delivered energy contracts directly for clearing members with a net worth exceeding CAD \$5,000,000 or assets exceeding CAD \$25,000,000.

¹⁹ The U.S. Bankruptcy Code requires a bankruptcy trustee to distribute clearing members’ cash and other assets held by a debtor DCO ratably among all clearing members. 11 U.S.C. 766(i)(2); 11 U.S.C. 761(9)(D), (10), (16). Therefore, the Commission cannot effectively create multiple account classes for the clearing members of a DCO – *e.g.*, one for FCM proprietary funds and one for non-FCM proprietary funds - because the different account classes would not be recognized by a bankruptcy court.

²⁰ CEA Section 5b(c)(2)(F), 7 U.S.C. 7a-1(c)(2)(F).

belonging to clearing members. The Commission is further proposing to prohibit a DCO or any depository from using proprietary funds in any way other than as belonging to the clearing member.

Additionally, the proposed rules include requirements for a DCO to review, on a daily basis, the amount of funds owed to each clearing member with respect to each of its accounts, both customer (including, as relevant, futures and cleared swaps) and proprietary, and to reconcile those figures to the amount of funds held in aggregate in each such type of account across all of the DCO's depositories.

The Commission is also proposing to require a DCO to obtain a letter from the depository for each account holding proprietary funds (proprietary funds letter) acknowledging, among other things, that the funds belong to clearing members and cannot be used by the DCO for any other purpose. The proposed proprietary funds letter is based on the template acknowledgment letter that a DCO is required to use in connection with customer funds.²¹

In addition to preventing the misuse of proprietary funds, the proposed requirements would help ensure that proprietary funds are appropriately protected in the event of a DCO bankruptcy. The U.S. Bankruptcy Code establishes that in the event of a DCO bankruptcy, member property, which includes funds held for clearing members' proprietary accounts,²² is repaid to clearing members *pro rata* based on their claims for such funds, and ahead of most other claims against the DCO's estate.²³ Further, Part 190 of the Commission's regulations

²¹ See 17 CFR 1.20 App. B.

²² See 11 U.S.C. 761(16) (defining "member property" as cash, a security, or other property, or proceeds of such cash, security, or property, held by a DCO for a clearing member's proprietary account).

²³ See 11 U.S.C. 766(i) (providing that member property is distributed ratably to clearing members on the basis and to the extent of their allowed net equity claims based on their proprietary accounts, and in priority to all other claims, except claims related to the administration of member property).

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establishes how clearing members' claims against the DCO's estate should be determined and how payments should be allocated among clearing members.²⁴ By requiring proprietary funds to be held separately from the DCO's funds and easily identified in a proprietary funds letter, the proposed rules will enable a bankruptcy court or trustee to more clearly identify these funds as member property. Further, the proposed rules will require the DCO to verify, on a regular basis, that it is holding the proper amount of proprietary funds, thus ensuring that these funds would be available for distribution in the event of a DCO bankruptcy.

B. Central Bank Depositories

The Commission is also proposing requirements specific to obtaining written acknowledgments from central banks holding customer or proprietary funds.²⁵ When the Commission adopted the template acknowledgment letter for depositories holding customer funds in 2013, it did not require use of the template letter by Federal Reserve Banks, due to the “unique role” of the U.S. central bank.²⁶ The Commission also recognized “that there may be valid reasons why some foreign depositories would require modifications” to the letter and stated that, in such circumstances, the Commission would consider “alternative approaches” on a case-by-case basis.²⁷

Since then, the Commission's Division of Clearing and Risk (DCR) has issued several no-action letters in which the Division confirmed that it would not recommend that the

²⁴ See 17 CFR 190.00 – 190.19.

²⁵ “Central bank” is the term used to describe the authority responsible for policies that affect a country's supply of money and credit. See, e.g., <https://www.clevelandfed.org/publications/economic-commentary/2007/ec-20071201-a-brief-history-of-central-banks>.

²⁶ Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 FR 68506, 68535 (Nov. 14, 2013).

²⁷ *Id.* at 68536.

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Commission take enforcement action against a DCO for making certain modifications to the template acknowledgment letter in connection with customer accounts maintained at a foreign central bank.²⁸ To encourage the use of central bank accounts, which can provide a superior alternative to holding funds at a commercial bank from the perspective of credit and liquidity risk, the Commission is proposing to allow a DCO to hold customer and proprietary funds at certain central banks without obtaining the template acknowledgment letter for customer funds or the proposed proprietary funds letter. Instead, a DCO would need to obtain only a written acknowledgment that the central bank was informed that the funds deposited with the bank are customer or proprietary funds (as applicable) held in accordance with Section 4d or 5b of the CEA, and that the central bank agrees to respond to requests from specified Commission staff for information about the account, including the account balance (modified written acknowledgments). These proposed requirements are based on the requirements the Commission adopted in 2013 with regard to written acknowledgments from Federal Reserve Banks.²⁹

The Commission is proposing to allow use of the modified written acknowledgment only by a DCO that holds customer or proprietary funds at the central bank of a “money center country” as defined in § 1.49 - Canada, France, Germany, Italy, Japan, and the United Kingdom - to limit risks to customer and proprietary funds. Along with the United States, these countries

²⁸ See, e.g., CFTC Letter No. 14-124 (Oct. 8, 2014) (related to customer accounts held at the Bank of England); CFTC Letter No. 16-05 (Feb. 1, 2016) (related to customer accounts held at the Deutsche Bundesbank).

²⁹ Enhancing Protections Afforded Customers and Customer Funds, 78 FR at 68628. In 2016, the Commission issued an order under section 4(c) of the CEA conditionally exempting Federal Reserve Banks from Section 4d of the CEA (Order Exempting the Federal Reserve Banks from Sections 4d and 22 of the Commodity Exchange Act, 81 FR 53467 (Aug. 12, 2016)). The conditions of the order require Federal Reserve Banks to keep customer funds segregated and respond to information requests from the Commission, making a separate written acknowledgment from a Federal Reserve Bank unnecessary. The Commission therefore repealed the 2013 provision (then § 1.20(g)(4)(ii)) concerning written acknowledgments from Federal Reserve Banks and adopted current § 1.20(g)(4)(i), which excludes Federal Reserve Banks from the written acknowledgment requirement.

comprise the Group of Seven (G7). Representatives from the G7 countries meet several times each year to coordinate their cooperation on issues of economic policy, and the United States and its financial regulatory agencies have a history of successful cooperation with the respective financial regulatory agencies of these countries. When the definition of “money center country” was first proposed in connection with the adoption of § 1.49, a commenter suggested that the definition include “other locations with stable currencies and other indicia that customer funds will be relatively secure.”³⁰ The Commission rejected this proposal as difficult to apply and noted that it would require the Commission to expend significant resources to conduct a broad evaluation of, among other things, a country's banking, monetary, and economic policies and systems.³¹ The Commission believes that limiting the proposed change to central banks of money center countries appropriately considers security for customer and proprietary funds, flexibility for DCOs, and creating a system that is workable in practice.

Further, the Commission is not proposing to require a DCO to obtain an acknowledgment letter from a Federal Reserve Bank holding proprietary funds. This is consistent with § 1.20(g)(4), which states that a DCO does not need a written acknowledgment to hold customer funds held at a Federal Reserve Bank. Federal Reserve Banks have previously expressed an inability to agree to all of the terms in the template acknowledgment letter.³² Because Federal Reserve Banks are the source of liquidity for U.S. dollar deposits, a DCO would face lower credit and liquidity risk with a deposit at a Federal Reserve Bank than it would with a deposit at a commercial bank. In the context of customer funds, the Commission determined that it would

³⁰ See Denomination of Customer Funds and Location of Depositories, 68 FR at 5546 - 47 (Mar. 6, 2003).

³¹ *Id.*

³² Enhancing Protections Afforded Customers and Customer Funds, 78 FR at 68535.

not require a written acknowledgment from Federal Reserve Banks in order to facilitate use of these accounts and help obtain these benefits that ultimately serve market participants and the integrity of the financial markets.³³ The Commission believes that the same rationale applies with respect to proprietary funds. Further, the Commission has required DCOs with access to accounts and services at a Federal Reserve Bank to use such accounts and services where practical,³⁴ and as a policy matter seeks to facilitate use of those accounts.

II. Definitions - § 39.2

The Commission is proposing to add in § 39.2 a definition for “money center country” that is identical to the definition currently in § 1.49. Under the proposed definition, “money center country” means Canada, France, Germany, Italy, Japan, and the United Kingdom.

The Commission is also proposing a definition for “proprietary funds.” The definition uses language similar to that included in the current definitions of “futures customer funds” in § 1.3³⁵ and “cleared swaps customer collateral” in § 22.1.³⁶ The proposed definition includes all money, securities, and property held in a proprietary account³⁷ on behalf of clearing members used to margin, guarantee, or secure futures, foreign futures and swaps contracts, as well as option premiums and other funds held in relation to options contracts. The proposed definition

³³ Denomination of Customer Funds and Location of Depositories, 68 FR at 53468 (Mar. 6, 2003).

³⁴ 17 CFR 39.33(d)(5).

³⁵ 17 CFR 1.3.

³⁶ 17 CFR 22.1.

³⁷ See 17 CFR 1.3 (defining “proprietary account” as a commodity futures, commodity options, or swaps trading account, for the clearing member itself, or for certain owners and affiliates of the clearing member).

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also includes clearing member contributions to a guaranty fund to mutualize the losses resulting from a default by a clearing member.³⁸

For the avoidance of doubt, a proprietary account may be the “house” account of a clearing member that is an FCM, where the clearing member may also maintain a futures customer and/or cleared swaps customer account. The term also would include the account of a direct clearing member (that may or may not be a natural person) that does not intermediate transactions for anyone else.

III. Treatment of Funds - § 39.15

A. Holding Customer Funds at Central Banks - § 39.15(b)(3)

The Commission is proposing to amend § 39.15(b) to allow a DCO to hold customer funds at the central bank of a money center country. The proposed amendment would supplement the list of permissible depositories in § 1.49 and §§ 22.4 and 22.9. Currently, § 1.49 and § 22.9 limit foreign depositories for customer funds to a bank or trust company that has in excess of \$1 billion of regulatory capital, an FCM, or a DCO. Foreign central banks, as independent government entities, are not structured to meet regulatory capital requirements and are therefore excluded from holding customer funds under § 1.49.

The Commission believes a DCO holding customer funds at a central bank can be a superior alternative to holding commercial bank deposits because it limits the DCO’s credit and liquidity risks. The Commission is therefore proposing new § 39.15(b)(3) to permit a DCO to

³⁸ These guaranty fund contributions include those received pursuant to an assessment for additional guaranty fund contributions when permitted by a DCO’s rules.

hold customer funds at the central bank of a money center country if the DCO obtains a modified written acknowledgment, rather than the template acknowledgment letter required by §§1.20 and 22.5, to which some central banks have objected.³⁹ The proposed rule would require the central bank of a money center country only to acknowledge that it was informed that the funds deposited with the bank are customer funds held in accordance with section 4d of the CEA and to agree to respond to requests from the Commission for information about the account, including the account balance. The Commission believes the proposed rule would facilitate the holding of customer funds at the central banks of money center countries while ensuring appropriate customer protections.

The Commission believes that central banks are often the safest place to deposit customer funds and has provided exemptions from § 1.49 to permit customer funds to be held at foreign central banks in money center countries.⁴⁰ The proposed rule would codify those exemptions and permit DCOs to hold customer funds with the central bank of a money center country. As previously discussed, the Commission is proposing to limit the permissible central bank depositories to those of money center countries after considering security for customer funds, flexibility for DCOs, and the need to create a system that is workable in practice.

B. Permitted Investments - § 39.15(e)

The Commission is proposing to amend § 39.15(e) to permit a DCO to invest proprietary funds only as permitted for investment of customer funds under § 1.25. The proposed regulation

³⁹ See, e.g., CFTC Letter No. 14-124 (Oct. 8, 2014); CFTC Letter No. 16-05 (Feb. 1, 2016) (regarding modifications to the template acknowledgment letter to enable certain central banks to hold customer funds).

⁴⁰ See, e.g., CFTC Letter No. 14-124 (Oct. 8, 2014); CFTC Letter No. 16-05 (Feb. 1, 2016) (granting exemptive relief from § 1.49 to permit certain central banks to act as a depository for customer funds).

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specifies that the DCO would bear any losses from investments, as is the case with customer funds.⁴¹ The list of investments in § 1.25 is a conservative list, and the Commission believes it is appropriate for all types of clearing members. Currently, permissible investments under § 1.25 include, among other investments, general obligations of the U.S. government, general obligations of any U.S. state or municipality, certificates of deposit, and interests in money market funds.⁴² Further, § 1.25 specifies a number of terms and conditions with which permitted investments must comply, including limits on the features that an investment can contain, concentration limits, and time to maturity limits.⁴³ Regulation 1.25 also includes specific requirements for investments in money market funds and repurchase agreements.⁴⁴ By limiting investments of proprietary funds to investments that meet the requirements of § 1.25,⁴⁵ the proposed rule will ensure that any investment of proprietary funds will have minimal credit, market, and liquidity risk as required by Core Principle F.⁴⁶

C. Additional Protections for Proprietary Funds - § 39.15(f)

The Commission is proposing new § 39.15(f) to establish additional protections for proprietary funds.

⁴¹ 17 CFR 1.29(b).

⁴² 17 CFR 1.25(a); *see also Investment of Customer Funds by [FCMs] and [DCOs]*, 88 FR 81236 (Nov. 21, 2023) (proposing, among other changes, to add certain foreign sovereign debt and certain U.S. Treasury exchange traded funds, both subject to limitations, to the list of permitted investments and to limit the types of money market funds that are permitted investments).

⁴³ 17 CFR 1.25(b).

⁴⁴ 17 CFR 1.25(c), (d).

⁴⁵ Proposed § 39.15(e) cross-references § 1.25, which provides that an FCM or DCO may invest “customer money” in certain instruments. The regulatory text of § 1.25, however, does not refer to “proprietary funds.” The Commission recently approved proposed amendments to § 1.25. Based on comments received on those proposed amendments, if appropriate, the Commission may consider further amending § 1.25 either in the final rule or as a re-proposed rule to ensure that the regulatory text provides clarity on the application of § 1.25 to a DCO’s investment of “proprietary funds,” as permitted under § 39.15(e).

⁴⁶ 7 U.S.C. 7a-1(c)(2)(F); 17 CFR 39.15(e).

1. Segregation of Proprietary Funds - § 39.15(f)(1)

Proposed § 39.15(f)(1) is based on § 1.20(a) and would require a DCO to account for proprietary funds separately from its own funds, and to hold proprietary funds in accounts that are named to clearly identify the funds being held as belonging to clearing members. The Commission believes this would prevent misuse of proprietary funds by a DCO, and would help a bankruptcy trustee or judge to easily identify the funds that should be treated as member property in the unlikely event of a DCO bankruptcy. The proposed rule also would require the DCO to, at all times, maintain in the accounts holding proprietary funds enough resources to cover the total value of proprietary funds owed to its clearing members. The proposed rule would prevent a DCO from rehypothecating or otherwise using proprietary funds for its own benefit, thus ensuring that the funds are available when needed by clearing members or the DCO for permitted uses.

2. Written Acknowledgment from Depositories - § 39.15(f)(2)

The Commission is proposing to require a DCO to obtain from any depository holding proprietary funds a written acknowledgment that the funds belong to the DCO's clearing members and cannot be used by the DCO for any other purpose. The Commission is proposing a template proprietary funds letter that DCOs would be required to use, which would be contained in proposed appendix D to Part 39. The proposed template proprietary funds letter is substantively the same as the current template acknowledgment letter for DCO accounts holding futures customer funds required by § 1.20, and requires a depository to acknowledge, among other things, that the accounts referenced in the letter hold funds that belong to the DCO's clearing members, that the funds should be accounted for separately from those belonging to the

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DCO, and that the funds cannot be used to cover the DCO's obligations to the depository.⁴⁷

Further, the template proprietary funds letter would require the depository to respond to a request from the director of DCR, or any successor division, or the director's designees, for information about the account, including the account balance. Proposed § 39.15(f)(2) also includes the same procedural requirements as those in § 1.20. Specifically, it would require a DCO to file a proprietary funds letter with the Commission within three days of opening an account, to update a letter when certain information it contains changes, and to maintain a copy of the letter in accordance with § 1.31.

The Commission believes that requiring a proprietary funds letter would ensure that a depository holding proprietary funds would know that the funds belong to the DCO's clearing members and cannot be used by the DCO for any other purpose, which will help prevent the misuse of funds by the DCO or an employee of the DCO. Further, having a letter for each proprietary funds account would help a bankruptcy court or trustee easily identify those funds that constitute member property in the event of a DCO bankruptcy.

The Commission is proposing to exclude accounts at Federal Reserve Banks from the requirement to obtain a proprietary funds letter. This is consistent with § 1.20(g)(4), which states that a DCO does not need a written acknowledgment to hold customer funds at a Federal Reserve Bank. As discussed above, the Commission believes that Federal Reserve Banks would be unable to sign the template proprietary funds letter, and wants to promote the use of Federal Reserve Bank accounts by DCOs when possible.

⁴⁷ See 17 CFR 1.20 App. B.

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The Commission is also proposing a simpler written acknowledgment requirement for accounts held at the central bank of a money center country. Although a DCO holding proprietary funds at the central bank of a money center country would have to comply with the same procedural requirements applicable to other depositories, it would not have to use the template proprietary funds letter. The DCO would only have to obtain a written acknowledgment stating that: (1) the central bank was informed that the funds deposited with the bank are proprietary funds held in accordance with Section 5b(c)(2)(F) of the CEA and Commission regulations; and (2) the bank agrees to respond to requests from the Commission for information about the account, including the account balance. As was the case with the acknowledgment letter used for accounts holding customer funds, the Commission believes many central banks would have issues with the proposed template proprietary funds letter. The Commission believes the proposed rule would allow DCOs to gain the benefits of holding funds at central banks while adequately safeguarding those funds and ensuring that the Commission has the information it needs to conduct oversight of DCOs.

3. Commingling of Proprietary Funds - § 39.15(f)(3)

Proposed § 39.15(f)(3) is based on §§ 1.20(e) and (g) applicable to customer funds, and would permit a DCO to commingle proprietary funds from multiple clearing members in a single account at a depository, but would not permit a DCO to commingle proprietary funds with the DCO's own funds or customer funds. Having a clear separation between proprietary funds and a DCO's own funds will make it more difficult for funds to be misused, and will provide additional clarity in the event of a DCO bankruptcy regarding the funds that should be treated as member property rather than part of the debtor's estate. Further, the ability to commingle

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proprietary funds from multiple clearing members in one account allows DCOs to limit operational risks by simplifying their banking processes and procedures.

4. Use of Proprietary Funds - § 39.15(f)(4)

Proposed § 39.15(f)(4) is based on § 1.20(f) and would require a DCO and any depository holding proprietary funds to treat all proprietary funds as belonging to the clearing members of the DCO. The Commission believes the proposed rule will help ensure that proprietary funds are not rehypothecated or otherwise used by a DCO and are readily available if needed either by the clearing member directly, or for a permitted clearing member use by the DCO. However, the Commission does not intend for this requirement to interfere with or alter DCOs' risk management programs. Proposed § 39.15(f)(4)(i)(A) therefore would clarify that the proprietary funds of a clearing member could be used to satisfy obligations of that clearing member's customers, to the extent that use is permitted by the DCO's rules and the DCO's agreement(s) with the clearing member. In addition, proposed § 39.15(f)(4)(i)(B) further would clarify that a DCO use contributions of non-defaulting clearing members to a guaranty fund to cover losses stemming from a default, to the extent that use is permitted by the DCO's rules and its agreement(s) with its clearing members. Nothing in the proposed rule would prevent a DCO from holding guaranty fund contributions in a separate proprietary funds account from proprietary funds held as initial margin.

Moreover, proposed § 39.15(f)(4)(ii) would provide that a depository receiving proprietary funds from a DCO for deposit in a segregated account may not hold, dispose of, or use such funds as belonging to any person other than the clearing members of the depositing DCO. Unlike the DCO, which is responsible for separately considering the proprietary funds

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owed to each individual clearing member, a depository is only responsible for considering the proprietary funds it has received as belonging to the clearing members as a group.

D. Daily Reconciliation - § 39.15(g)

The Commission is proposing new § 39.15(g), which would require a DCO to conduct a daily reconciliation for each type of segregated account (futures customer funds, cleared swaps customer collateral, and proprietary funds) it holds for its clearing members. This proposal is based on the requirement applicable to FCMs in § 1.32. Under proposed § 39.15(g), by noon of each business day, the DCO would have to perform these reconciliations on balances held as of the close of the previous business day. The proposed requirement is intended to verify, each business day, that the DCO maintains sufficient funds in each relevant account type to cover its aggregate obligations to clearing members. The Commission believes that the required daily calculation and reconciliation and independent review requirements in the proposed rule would help a DCO to identify quickly any misuse or loss of proprietary or customer funds.

Proposed § 39.15(g)(1), (2), and (3) would require a DCO to calculate the amount of, respectively, futures customer funds, cleared swaps customer collateral, and proprietary funds owed to each clearing member. These provisions would further require the DCO to reconcile the total amount, aggregated across all clearing members, of each of futures customer funds, cleared swaps customer collateral, and proprietary funds, with the amount of each respective type of funds held in separate accounts across all depositories. This reconciliation is intended to confirm, each business day, that the DCO maintains, in each type of account, an adequate value of segregated funds to meet its obligations to clearing members.

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Requirements for the method of conducting these calculations are contained in proposed § 39.15(g)(4). Proposed §39.15(g)(4)(i) would require segregation of duties, consistent with generally accepted auditing standards.⁴⁸ Each of the DCO’s calculations and reconciliations would need to be approved by a person who did not prepare the initial calculation or the related reconciliation, and who does not report to the person who prepared them.

Proposed § 39.15(g)(4)(ii)(A) would address the valuation of securities in the required calculations of amounts owed and held. Securities would have to be valued at their current market value, with haircuts applied in accordance with existing § 39.11(d)(1).

Proposed § 39.15(g)(4)(ii)(B) would address mismatches in currencies in the same account type by permitting a deficit in one currency to be offset by a surplus in another currency, with conversion based on publicly available exchange rates, and with surpluses subject to haircuts reasonably determined by the DCO, applied consistently.⁴⁹

Proposed § 39.15(g)(4)(ii)(C) would address situations in which customer funds of one type are commingled in a different type of customer account (*e.g.*, futures customer funds in a cleared swaps customer account). In these instances, the proposed rule would require DCOs to treat all funds in a futures customer account as futures customer funds and all funds in a cleared swaps customer account as cleared swaps customer collateral, both in terms of funds owed and funds held, for purposes of the calculation and reconciliation required by proposed § 39.15(g).

⁴⁸ See Statement on Auditing Standards 145, Appendix C, ¶21 (“Segregation of duties is intended to reduce the opportunities to allow any person to be in a position to both perpetrate and conceal errors or fraud in the normal course of the person’s duties”). See also 17 CFR 1.11(e)(3)(i)(G) (requiring each FCM’s Risk Management Program to include “[p]rocedures requiring the appropriate separation of duties among individuals responsible for compliance with the Act and Commission regulations relating to the protection and financial reporting of segregated funds.”)

⁴⁹ For example, one would expect that the haircuts the DCO applies to currency mismatches with respect to its obligations to clearing members here would be no smaller than the haircuts the DCO applies to currency mismatches with respect to collateral posted by a clearing member.

Proposed § 39.15(g)(4)(iii) would address the process by which a DCO would calculate the amounts owed to clearing members for each account type by requiring the DCO to apply, for each account type, the approach set forth for FCMs in §1.20(i). This would include calculating the net liquidating equity for each clearing member (in each account type), taking into account the market value of funds it receives from the clearing member, gains and losses on futures contracts, options, and swaps (applying this approach to cleared swaps), fees lawfully accruing in the normal course of business (which, in the case of a DCO, would include transaction fees), and authorized distributions or transfers of collateral. In aggregating amounts owed, the DCO would not reduce the sum of credit balances owed to clearing members with debit balances owed by other clearing members.⁵⁰

Finally, proposed § 39.15(g)(5) would require the DCO to immediately report to the Commission any discrepancy in any of the relevant calculations or any one or more of the reconciliations that reveals that the DCO did not, at the close of the previous business day, maintain in separate segregated accounts money, securities, and property in an amount sufficient in the aggregate to cover the total value of funds owed to all clearing members.

E. Exclusions for Foreign Derivatives Clearing Organizations - § 39.15(h)

The Commission is not, at this time,⁵¹ proposing to apply the new member property protections in proposed §§ 39.15(e)(3) (permitted investment of proprietary funds), (f) (proprietary funds), and (g)(3) (daily reconciliation of proprietary funds) to certain DCOs organized outside the United States (foreign DCOs). Specifically, proposed § 39.15(h) would

⁵⁰ See 17 CFR 1.20(i)(4).

⁵¹ The Commission may, in light of ongoing and future developments with respect to clearing models at such DCOs, including with respect to the participation of U.S. market participants (particularly such market participants who are natural persons) reconsider these decisions (both with respect to Part 39 and to Part 190) in a future rulemaking.

provide that proposed §§ 39.15(e)(3), (f) and (g)(3) do not apply to a foreign DCO that would, in the event of its insolvency, be subject to a foreign proceeding, as defined in the U.S. Bankruptcy Code, in the jurisdiction in which it is organized.⁵² Member property held at most foreign DCOs would not be protected under Part 190 in the event the DCO enters bankruptcy,⁵³ and the Commission wants to avoid potential conflicts with requirements concerning protection of member property under the applicable law in a foreign DCO’s home jurisdiction.⁵⁴

IV. Reporting - § 39.19

The Commission is proposing new § 39.19(c)(4)(xxv) to include, together with the other event-specific reporting requirements applicable to DCOs, the requirement in proposed § 39.15(g)(5) that a DCO report any discrepancies in the amount of proprietary or customer funds it holds. The Commission believes that including all reporting requirements applicable to DCOs in § 39.19 may assist DCOs in tracking their reporting obligations.

⁵² The U.S. Bankruptcy Code defines “foreign proceeding” as “a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.” 11 U.S.C. 101(23). Further, the U.S. Bankruptcy Code defines “foreign court” as “a judicial *or other* authority competent to control or supervise a foreign proceeding” (emphasis added) (11 U.S.C. 1502(3)). Because the definition includes non-judicial authorities, a resolution proceeding where the assets and affairs of a foreign DCO are controlled by a resolution authority would constitute a foreign proceeding under 11 U.S.C. 101(23), and thus a DCO that is subject to such a resolution proceeding would fall within the exclusion of such paragraphs. (*See, e.g.*, In re Tradex Swiss AG, 384 B.R. 34, 42 (Bankr. D.Mass. 2008) (Swiss Federal Banking Commission “is an administrative agency” and qualifies as a foreign court under 1502(3)), In re ENNIA Caribe Holding N.V., 594 B.R. 631, 639-40 & n. 11 (Bankr. S.D.N.Y. 2018) (where the Central Bank of Curaçao and St. Maarten, as a regulator, controls the affairs of the foreign debtor, an insurance company, it constitutes a foreign court under 11 U.S.C. 1502(3)).

⁵³ *See* 17 CFR 190.11(b).

⁵⁴ As the Commission noted in revising its Part 190 bankruptcy regulations in 2020, in the context of certain DCOs organized outside the United States, “the Commission has traditionally focused its efforts on the protection of the [] customers of FCM members of such foreign DCOs.” (*Bankruptcy Regulations*, 86 FR 19324, 19366 (April 13, 2021) (emphasis supplied)). In promulgating those regulations, the Commission attempted to avoid conflicts with insolvency proceedings in the jurisdiction where a foreign DCO is organized. (*Id.*) Thus, pursuant to 17 CFR 190.11(b), the Commission’s Part 190 bankruptcy regulations are limited to protecting contracts cleared on behalf of FCM customers at such foreign DCOs and the property margining or securing such contracts. The foreign DCOs to which this limitation applies are those DCOs organized outside the United States that are “subject to a foreign proceeding, as defined in 11 U.S.C. 101(23), in the jurisdiction in which it is organized.”

V. Request for Comment

The Commission is requesting comments on all aspects of its proposal. Additionally, the Commission specifically requests comment on the following:

Would classification of guaranty fund contributions as proprietary funds inhibit DCOs' current guaranty fund programs? The Commission has proposed to specifically include guaranty fund deposits in the definition of proprietary funds, and does not intend for the inclusion to prevent DCOs from continuing to use guaranty funds as one of their default resources.

Should the Commission require DCOs to report to the Commission the daily calculations and reconciliations required by proposed § 39.15(g)?

Anti-money laundering (AML) and know-your-client (KYC) programs are required for many entities registered with the Commission, including intermediaries such as FCMs. In the context of intermediated DCOs, FCMs perform this critical role of assisting U.S. government agencies in detecting and preventing money laundering. However, in the context of non-intermediated DCOs, in the absence of an FCM, DCOs may be exploited by actors seeking to engage in illegal and illicit activities. How might the Commission ensure AML and KYC compliance for DCOs that offer direct clearing services (a market structure that would not include FCMs or other intermediaries that are typically directed to create Bank Secrecy Act compliance programs)? Should DCOs offering direct-to-customer services to non-eligible contract participants or retail customers be required to comply with AML and KYC requirements?

Should the Commission require any additional written acknowledgments (to those contained in proposed § 39.15(b)(3) or § 39.15(f)(2)(vi) as applicable) from central banks of

money center countries in order for a DCO to use them to hold futures customer funds, cleared swaps customer collateral, or proprietary funds?

VI. 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.⁵⁵ The amendments proposed by the Commission will affect only DCOs. The Commission has previously established certain definitions of “small entities” to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.⁵⁶ The Commission has previously determined that DCOs are not small entities for the purpose of the RFA.⁵⁷ Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)⁵⁸ imposes certain requirements on federal agencies, including the Commission, in connection with conducting or sponsoring any “collection of information,” as defined by the PRA. Under the PRA, an agency may not conduct

⁵⁵ 5 U.S.C. 601 *et seq.*

⁵⁶ Policy Statement and Establishment of Definitions of “Small Entities” for Purposes of the Regulatory Flexibility Act 47 FR 18618 (Apr. 30, 1982).

⁵⁷ See A New Regulatory Framework for Clearing Organizations 66 FR 45604, 45609 (Aug. 29, 2001).

⁵⁸ 44 U.S.C. 3501 *et seq.*

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or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and budget (OMB).⁵⁹ The PRA is intended, in part, to minimize the paperwork burden created for individuals, businesses, and other persons as a result of the collection of information by federal agencies, and to ensure the greatest possible benefit and utility of information created, collected, maintained, used, shared, and disseminated by or for the Federal Government.⁶⁰ The PRA applies to all information, regardless of form or format, whenever the Federal Government is obtaining, causing to be obtained, or soliciting information, and includes required disclosure to third parties or the public, of facts or opinions, when the information collection calls for answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.⁶¹

This proposal, if adopted, would result in a collection of information within the meaning of the PRA, as discussed below. This proposed rulemaking contains collections of information for which the Commission has previously received a control number from OMB. The title for this existing collection of information is OMB control number 3038-0076, Requirements for Derivatives Clearing Organizations (“OMB Collection 3038-0076”).

The Commission therefore is submitting this proposal to the OMB for its review in accordance with the PRA.⁶² Responses to this collection of information would be mandatory. The Commission will protect any proprietary information according to the Freedom of

⁵⁹ See 44 U.S.C. 3507(a)(3); 5 CFR 1320.5(a)(3).

⁶⁰ See 44 U.S.C. 3501.

⁶¹ See 44 U.S.C. 3502(3).

⁶² See 44 U.S.C. 3507(d) 5 CFR 1320.11.

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Information Act and Part 145 of the Commission’s regulations.⁶³ In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public any “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.”⁶⁴ Finally, the Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.⁶⁵

1. OMB Collection 3038-0076— Requirements for Derivatives Clearing Organizations

The Commission is proposing a new reporting requirement in § 39.15(f)(2) to require DCOs based in the United States to obtain a template proprietary funds letter from each depository that holds proprietary funds and to file that letter with the Commission. The template letter and filing requirements are substantially the same as the requirement in § 1.20(d) for FCMs to file an acknowledgment letter signed by each depository holding customer funds. In OMB control number 3038-0024, “Regulations and Forms Pertaining to Financial Integrity of the Market Place; Margin Requirements for SDs/MSPs,”⁶⁶ the Commission estimated that each FCM would file three acknowledgment letters a year and that filing each letter would take two hours to complete. Because the proposed letter and requirements for DCOs are the same as those for FCMs, the Commission believes that the estimates for FCMs filing acknowledgment letters are appropriate for DCOs filing proprietary funds letters. Therefore, the Commission believes

⁶³ See 5 U.S.C. 552; see also 17 CFR Part 145 (Commission Records and Information).

⁶⁴ 7 U.S.C. 12(a)(1).

⁶⁵ 5 U.S.C. 552a.

⁶⁶ For the previously approved estimates for this collection, see ICR Reference No. 202207-3038-001 (conclusion date Aug. 23, 2022, available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202207-3038-001).

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that the proposed requirement will require each DCO based in the United States to expend six hours per year to comply, resulting in a total burden of 60 hours for DCOs.

The aggregate burden estimate for proprietary funds template letter reporting in Collection 3038-0076 is as follows:

Estimated number of respondents: 10.

Estimated annual reports per respondent: 3.

Estimated total annual responses: 30.

Estimated average burden hours per response: 2.

Estimated annual burden hours per respondent: 6.

Estimated total annual reporting burden for all respondents: 60.

Finally, the Commission is proposing § 39.15(g) to require DCOs to report in accordance with § 39.19(c)(4) any discrepancies in the results of the required daily calculations and reconciliations. This is a new reporting requirement and thus the Commission is revising its estimate of the burden associated with event-specific reporting under § 39.19(c)(4) in Collection 3038-0076. A discrepancy in one of the required calculations or reconciliations would mean that the DCO is not holding or accounting for the correct amount of either customer or proprietary funds, *i.e.*, that it is not meeting regulatory requirements. The Commission does not anticipate DCOs will need to file this report often, and ideally not at all, such that even one report per year would exceed expectations. Nonetheless, to avoid under-estimating the burden of the proposed regulation, the Commission estimates that DCOs will file the required report once per year. The Commission believes that each report will take approximately 30 minutes to complete. The

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requirement is for DCOs to file immediately upon learning of the discrepancy, which will necessarily limit the amount of time available to prepare a report. The current burden estimate in Collection 3038-0076 for event specific reporting under § 39.19(c) is 14 reports a year per respondent. Therefore, the Commission amending Collection 3038-0076 and s estimating that 13 covered DCOs will complete an estimated 15 reports per year per respondent, resulting in a total burden of seven-and-a-half hours for event-specific reporting.

The aggregate burden estimate for event-specific reporting under § 39.19(c)(4), as amended by the proposal, is updated as follows:

Estimated number of respondents: 13.

Estimated annual reports per respondent: 15.

Estimated total annual responses: 195.

Estimated average hours per response: 0.5.

Estimated annual burden hours per respondent: 7.5.

Estimated total annual burden hours for all respondents: 97.5.

The Commission’s existing recordkeeping rule will require DCOs to maintain records of the information generated though compliance with the proposed rules.⁶⁷ Specifically, DCOs will need to maintain records related to the calculations and reconciliations required under proposed § 39.15(g) and the proprietary funds letters required under proposed § 39.15(f)(2). The Commission, however, believes that the impact of the proposed regulations on the recordkeeping burden in Collection 3038-0076 will be negligible. DCOs are already required to maintain all

⁶⁷ See 17 CFR 39.20.

information required to be created, generated, or reported under Part 39.⁶⁸ DCOs regularly maintain records of items created through their compliance with the Commission’s regulations, and the proposed rules will not raise unique recordkeeping challenges or burdens. Therefore, the Commission is retaining its existing recordkeeping burden estimates for Collection 3038-0076.

2. Request for Comment

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

(1) Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

(2) Evaluating the accuracy of the estimated burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;

(3) Enhancing the quality, utility, and clarity of the information proposed to be collected; and

(4) Minimizing the burden of the proposed information collection requirements on registered entities, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.*, permitting electronic submission of responses.

⁶⁸ *Id.*

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The Commission specifically invites public comment on the accuracy of its estimates that the proposed regulations will not impose a new recordkeeping burden and its determination to retain its existing burden estimates for recordkeeping for Collection 3038-0076.

Copies of the submission from the Commission to OMB are available from the CFTC Clearance Officer, 1155 21st Street, NW, Washington, DC 20581, (202) 418–5714 or from <https://RegInfo.gov>. Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

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

Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rulemaking, and please refer to the **ADDRESSES** section of this rulemaking for instructions on submitting comments to the Commission. OMB is required to make a decision concerning the proposed information collection requirements between 30 and 60 days after publication of this release in the *Federal Register*. Therefore, a comment to OMB is best assured of receiving full consideration if OMB receives it within 30 calendar days of publication of this release. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rules.

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.⁶⁹ Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (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 considers the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors (collectively referred to herein as Section 15(a) factors).

The Commission recognizes that the proposed amendments impose costs. The Commission has endeavored to assess the anticipated costs and benefits of the proposed amendments in quantitative terms, including PRA-related costs, where feasible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable proposed amendments in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of the proposed amendments. Additionally, any initial and recurring compliance costs for any particular DCO will depend on the size, existing infrastructure, level of clearing activity, practices, and cost structure of the DCO.

⁶⁹ 7 U.S.C. 19(a).

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The Commission generally requests comment on all aspects of its cost-benefit considerations, including the identification and assessment of any costs and benefits not discussed herein; data and any other information to assist or otherwise inform the Commission’s ability to quantify or qualitatively describe the costs and benefits of the proposed amendments; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission’s discussion. The Commission welcomes comment on such costs, particularly from existing DCOs that can provide quantitative cost data based on their respective experiences. Commenters may also suggest other alternatives to the proposed approach.

The Commission notes that this consideration is based on its understanding that the derivatives market regulated by the Commission functions internationally with: (1) transactions that involve entities organized in the United States occurring across different international jurisdictions; (2) some entities organized outside of the United States that are prospective Commission registrants; and (3) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the proposed regulations on all relevant derivatives activity, whether based on their actual occurrence in the United States or on their connection with, or effect on U.S. commerce.⁷⁰

⁷⁰ See, e.g. 7 U.S.C. 2(i).

2. Baseline

The Commission identifies and considers the benefits and costs of the proposed amendments relative to the baseline of the status quo. In particular, the baseline for the Commission’s consideration of the costs and benefits of this proposed rulemaking is the existing statutory and regulatory framework applicable to DCOs, including: (1) the DCO core principles set forth in Section 5b(c)(2) of the CEA; (2) the requirements associated with holding clearing member funds for positions in futures, foreign futures, and swaps under § 39.15; (3) the current DCO reporting requirements under § 39.19; and (4) the requirements for obtaining an acknowledgment letter from a foreign central bank holding customer funds, but not member funds.

3. Proposed Amendments to § 39.15(b)

a. Summary of Changes

The Commission is proposing new § 39.15(b)(3), which would allow the central banks of money center countries to serve as depositories for customer funds. The proposed regulation would further allow a DCO holding customer funds at the central bank of a money center country to obtain a modified written acknowledgment that is shorter and less detailed than the template acknowledgment letter in §§ 1.20 and 22.4.

b. Benefits

The Commission believes that central banks are often the best option for deposit of customer funds. By using a central bank, DCOs can minimize the credit and liquidity risks they face when holding foreign currency cash deposits. Many foreign central banks do not fit into any of the categories of permissible depositories in § 1.49, and some central banks have

expressed unwillingness to sign the template acknowledgment letter. By permitting DCOs to deposit customer funds at the central banks of money center countries and requiring an abbreviated written acknowledgment suitable for the central bank context, the Commission believes that DCOs will be able to avail themselves of the risk management benefits of holding funds at a central bank.

c. Costs

The Commission does not believe the proposed rule will impose costs on DCOs. The proposed rule does not require DCOs to hold customer funds at any particular central bank and merely enables DCOs to hold funds at certain central banks.

d. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits of the proposed amendments to § 39.15(b)(3) in light of the specific considerations identified in Section 15(a) of the CEA. The Commission believes the proposed rule would protect market participants by allowing their funds to be more easily held at foreign central banks. Central banks expose depositors to minimal credit and liquidity risks and are safe depositories for assets belonging to market participants. Similarly, the proposed rules may improve DCOs' risk management because of the low credit and liquidity risks associated with holding funds at a central bank. The Commission has considered the other Section 15(a) factors and believes that they are not implicated by the proposed amendments to § 39.15(b)(3).

4. Proposed Amendments to § 39.15(e)

a. Summary of Changes

The Commission is proposing rules that would limit the investments DCOs can make with proprietary funds to those that are permissible for customer funds under § 1.25. The proposed rule also states that DCOs would be responsible for investment losses.

b. Benefits

The proposed rule would limit investments of proprietary funds to the safe investments listed in § 1.25. This is the same list of investments that can be made with customer funds. The Commission believes this proposal would appropriately protect clearing members from risk of loss by ensuring that any investment is in instruments with minimal credit, market, and liquidity risks.

c. Costs

The proposed rule may impose some costs on DCOs. Some DCOs may have to stop investing proprietary funds in certain instruments that are currently permitted and may incur some operational costs in revising the investments that are offered to clearing members for their proprietary funds. Further, to the extent the permitted investments earn less yield than what a DCO currently invests in, the regulation would impose costs in the form of lost investment revenue for the DCO and clearing member. The total cost of this regulation will depend on a number of factors including the number of clearing members of the DCO and what, if any, investments the DCO currently makes with proprietary funds.

a. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits of the proposed amendments to § 39.15(e) in light of the specific considerations identified in Section 15(a) of the CEA. The proposed rule would benefit clearing member market participants by ensuring their funds are invested in instruments that minimize the risk of loss. While DCOs currently determine what investments to make with clearing member funds, the proposed rule establishes a list of investments that the Commission believes is appropriately conservative for all clearing members. The Commission has considered the other Section 15(a) factors and believes that they are not implicated by the proposed amendments to § 39.15(e).

5. Proposed Amendments to § 39.15(f)(1)

a. Summary of Changes

The Commission is proposing new § 39.15(f)(1), which would require DCOs to segregate proprietary funds from their own funds, hold the funds in accounts clearly labeled as holding proprietary funds, and hold at all times an amount sufficient in the aggregate to cover the total value of proprietary funds held for all clearing members.

b. Benefits

The proposed rule would benefit clearing members by helping to ensure that proprietary funds on deposit will not be misused. Holding proprietary funds in an account that is exclusively for proprietary funds and clearly named as being for proprietary funds would make it difficult for a DCO or any employee to use the funds for an improper purpose without being detected. Further, the requirement that accounts hold funds adequate to cover the total value of proprietary funds held for all clearing members at all times would prevent a DCO from rehypothecating or

otherwise using proprietary funds for its own benefit, thus ensuring that the funds are available when needed by clearing members or the DCO for permitted uses. The proposed rule would also ensure funds are readily identifiable in the event of a DCO bankruptcy, which would facilitate those funds receiving the appropriate preferential treatment.

c. Costs

The proposed rule might add some costs for DCOs if they need to establish new accounts for proprietary funds. DCOs would need to establish new procedures for regularly confirming that the accounts hold funds adequate to cover the total value of proprietary funds of all clearing members. However, as a mitigating factor, the Commission believes that most, if not all, DCOs currently hold proprietary funds separately from their own, and that most DCOs do not rehypothecate or otherwise use funds for their own purposes. In such cases, if there are any costs, they would be related to staff time involved with renaming current accounts holding proprietary funds. The exact costs will depend on a number of factors including how many accounts a DCO maintains for proprietary funds.

d. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits of the proposed amendments to § 39.15(f)(1) in light of the specific considerations identified in Section 15(a) of the CEA. The Commission believes the proposed rule would benefit market participants by helping to ensure their funds are not misused and by helping to make sure the funds receive the proper, preferential treatment in the event of a DCO bankruptcy. The Commission also believes that requiring DCOs to hold the total amount of proprietary funds at all times would promote sound risk management because it would ensure that the funds are available to the DCO in the event of a clearing member default. The Commission has considered

the other Section 15(a) factors and believes that they are not implicated by the proposed amendments to § 39.15(f)(1).

6. Proposed Amendments to § 39.15(f)(2)

a. Summary of Changes

The proposed rule would require DCOs to obtain a proprietary funds letter in the form prescribed in the proposed appendix from each depository holding proprietary funds. The proposed letter is based on the template acknowledgment letter for DCOs required by § 1.20, and requires depositories to acknowledge, among other things, that the funds belong to clearing members and cannot be used by the DCO for any other purpose. The proposed rule would also require a DCO to file the letters with the Commission and update the letters when certain information changes. The proposed rule would exclude Federal Reserve Banks from the requirement to obtain a proprietary funds letter from a depository holding proprietary funds. Further, the proposed rule would require a simpler written acknowledgment from the central bank of a money center country that is holding proprietary funds than that required of other depositories.

b. Benefits

The proposed rule would benefit clearing members by ensuring that all depositories holding proprietary funds would know that the funds belong to clearing members and cannot be used by the DCO for any other purpose, which would help prevent the misuse of funds by the DCO or an employee of the DCO. Further, having a proprietary funds letter for each proprietary funds account would help a bankruptcy court or trustee easily identify that the funds are member property in the event of a DCO bankruptcy.

c. Costs

The proposed rule would impose costs on DCOs. DCOs would be required to work with depositories to obtain proprietary funds letters for existing accounts and to file the letters with the Commission. Further, DCOs would need procedures for obtaining a letter for any new account and for updating letters as information changes going forward. The Commission is attempting to limit the costs of obtaining proprietary funds letters by proposing to use a template that is substantively the same as the template letter required for customer funds and is thus already in use by many DCOs and their depositories. The costs each DCO would incur would depend, in large part, on the number of depositories the DCO uses to hold proprietary funds. The Commission has estimated that the PRA costs for this rule will be \$100 per burden hour. Based on the burden estimate discussed above of six hours annually per DCO, the Commission estimates that each DCO will spend \$600 in PRA costs under this proposed rule.

d. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits of the proposed amendments to § 39.15(f)(2) in light of the specific considerations identified in Section 15(a) of the CEA. The Commission believes the proposed rule would benefit market participants by ensuring that all depositories holding proprietary funds know that the funds belong to clearing members and cannot be used by the DCO for any other purpose, thus helping to prevent the misuse of funds. Having a proprietary funds letter for each proprietary funds account would help easily identify which funds are member property in the event of a DCO bankruptcy. Finally, the helping to prevent the misuse of proprietary funds would promote sound risk management by making it more likely that the funds are available if needed to cover a

clearing member default. The Commission has considered the other Section 15(a) factors and believes that they are not implicated by the proposed amendments to § 39.15(f)(2).

7. Proposed Amendments to § 39.15(f)(3)

a. Summary of Changes

Proposed § 39.15(f)(3) would permit DCOs to commingle proprietary funds belonging to multiple clearing members in the same custodial account. The rule would prohibit a DCO from commingling proprietary funds with the DCO's own funds or with FCM customer funds.

b. Benefits

The Commission believes that permitting DCOs to commingle proprietary funds from multiple clearing members in one account would allow DCOs to minimize operational risk by simplifying their banking processes and procedures. Further, the proposed rule would ensure that proprietary funds are held separately from the DCO's funds at the depository, making it harder for a DCO or an employee of the DCO to misuse the funds without detection.

c. Costs

The Commission does not believe permitting the commingling of multiple clearing members' funds in one account would impose new costs on DCOs. Currently, many DCOs hold clearing member funds in a commingled account, and the proposed rule would only permit, not require, clearing member funds to be commingled. However, the Commission recognizes that a DCO that currently commingles clearing member funds with other funds would need to segregate such funds and establish a separate account for such funds, thereby incurring new costs. But because the prohibition on commingling a DCO's funds with its clearing members' funds codifies sound participant protection and risk management principles that most, if not all,

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DCOs already apply, the Commission does not believe that it would impose significant new costs on existing DCOs. Additionally, DCOs are currently prohibited by the requirements of Section 4d of the Act and the regulations thereunder from commingling customer funds with the funds of clearing members. The proposed rule would therefore not impose new costs with regard to holding clearing member funds and customer funds separately.

d. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits of the proposed amendments to § 39.15(f)(3) in light of the specific considerations identified in Section 15(a) of the CEA. The Commission believes that prohibiting a DCO from commingling its own funds with proprietary funds would benefit market participants by ensuring a clear delineation between the DCO's funds and proprietary funds. This delineation would make it more difficult to misuse proprietary funds and would make proprietary funds readily identifiable in the event of a DCO bankruptcy. Further, the Commission believes that the proposed rule would promote sound risk management because ensuring that clearing members' funds are held separately from the DCO's would make it more difficult for the funds to be misused without detection and would therefore make it more likely that the funds are available if needed to cover a clearing member default. The Commission has considered the other Section 15(a) factors and believes that they are not implicated by the proposed amendments to § 39.12(f)(3).

8. Proposed Amendments to § 39.15(f)(4)

a. Summary of Changes

The proposed rule would prohibit a DCO or any of its depositories from using proprietary funds for any reason other than as belonging to the DCO's clearing members. The rule would

specifically provide that an FCM's funds may be used to cover its customers' losses and as part of a DCO's mutualized guaranty fund.

b. Benefits

By eliminating any uses for proprietary funds other than on behalf of clearing members, the proposed rule would help ensure that the funds are readily available if needed either by the clearing member directly, or for a permitted use by the DCO. The clarifications providing that an FCM's funds may be used by a DCO to cover the FCM's customers' losses, or as part of a clearing member-funded, mutualized guaranty fund, ensures that the rule would not hamper DCOs' existing risk management programs.

c. Costs

Because the proposed rule would codify sound participant protection and risk management principles, the Commission does not believe that it would impose significant costs on DCOs. The Commission does not believe DCOs are currently using clearing member funds in a manner that is inconsistent with this regulation. Further, the proposed rule would not require a guaranty fund or any specific type of FCM guarantee of its customers' performance, but instead would merely permit what is currently common risk management practice among DCOs.

d. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits of the proposed amendments to § 39.15(f)(4) in light of the specific considerations identified in Section 15(a) of the CEA. The proposed rule would benefit market participants by helping to ensure that their funds are protected and available for their use. Additionally, the proposed rule would promote sound risk management by helping to ensure that clearing member funds are

readily available for permitted risk management uses by a DCO, such as in the event of a customer shortfall or clearing member default. The Commission has considered the other Section 15(a) factors and believes that they are not implicated by the proposed amendments to § 39.12(f)(3).

9. Proposed Amendments to §§ 39.15(g) and 39.19(c)(4)(xxv)

a. Summary of Changes

Proposed § 39.15(g) would require DCOs to, on a daily basis, calculate the amount of futures customer funds, cleared swaps customer collateral, and proprietary funds owed to each clearing member, separately for each account class and on a currency by currency basis. The proposed rule further would require DCOs to reconcile, separately for each account class, the amount of funds owed to all clearing members with the amount of funds held in depository accounts for that class of funds. Each calculation and reconciliation would have to be approved by a person who did not prepare the initial calculation or reconciliation. The calculation and reconciliation would have to be performed as of the close of each business day and completed by noon on the following business day. The proposed rule also would require securities to be valued at their current market value, subject to the DCO's haircuts, and calculations of the amount owed to be made in a manner consistent with the requirements of § 1.20(i). Finally, both proposed §§ 39.15(g)(5) and 39.19(c)(4)(xxv) would require DCOs to immediately report any discrepancy in the calculation or reconciliation to the Commission.

b. Benefits

By requiring a DCO to verify on a daily basis the amount of futures customer funds, cleared swaps customer collateral, and proprietary funds it is holding, for each clearing member

and across all clearing members, the proposed rule would facilitate the prompt discovery of any missing futures customer funds, cleared swaps customer collateral, or proprietary funds.

Additionally, by requiring the daily calculation and reconciliation to be approved by an independent employee, the proposed rule would help prevent a single bad actor at a DCO from misusing futures customer funds, cleared swaps customer collateral, or proprietary funds, and from concealing that misuse. The requirement to report any discrepancies to the Commission would help ensure that the Commission is immediately made aware of potentially missing funds, and that it can work with the DCO to resolve the matter.

c. Costs

The Commission understands that the daily calculation and reconciliation would impose costs on DCOs. DCOs would need to develop procedures that comply with the timing, valuation, and calculation requirements in the proposed rule, to calculate the amount of funds owed to each clearing member for each account class and to reconcile the amount of funds owed to all clearing members with the amount of funds held at depositories for each account class. Further, at least two DCO employees would have to be involved in the process of performing and approving the calculations and reconciliations each day. DCOs would also need to include the new reporting requirement in their process and procedures for event-specific reporting to the Commission. The Commission has sought to minimize the costs of the proposed regulation by only requiring reporting to the Commission of discrepancies rather than the filing of daily reports. The exact costs would depend on the account class(es) in which a DCO holds funds, and the number of clearing members and customer accounts at issue. The Commission has estimated that the PRA costs for event specific reporting are \$79 per hour. Based on the burden estimate

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discussed above of .5 hours annually per DCO, the Commission estimates that each DCO will spend \$39.50 in PRA costs under this rule.

d. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits of the proposed amendments to § 39.15(f)(5) in light of the specific considerations identified in Section 15(a) of the CEA. The proposed rule would benefit market participants by enabling any loss or theft of funds to be discovered by the DCO and reported to the Commission quickly. The Commission further believes that the proposed rule would promote sound risk management by helping to ensure that the funds are available if needed by the DCO to cover a clearing member or customer default. The Commission has considered the other Section 15(a) factors and believes that they are not implicated by the proposed amendments.

10. Proposed Amendment to § 39.15(h)

a. Summary of Changes

The proposed rule would exempt foreign DCOs from the requirements of proposed §§ 39.15(e)(3), (f), and (g)(3) because in the event of an insolvency, the clearing member funds held by a foreign DCO would not be subject to U.S. bankruptcy law.⁷¹

b. Benefits

The Commission has determined to seek to avoid conflicts with insolvency proceedings in the jurisdiction where a foreign DCO is organized. The Commission believes that certainty

⁷¹ See 17 CFR 190.11(b).

surrounding which insolvency law would apply would benefit the clearing members of foreign DCOs.

c. Costs

The Commission does not believe the rule would impose costs on foreign DCOs. The proposed rule is preserving the baseline, that funds belonging to a foreign DCO's clearing members will be treated in accordance with the insolvency law of the foreign DCO's home jurisdiction.

d. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits of the proposed amendments to § 39.15(h) in light of the specific considerations identified in Section 15(a) of the CEA. The proposed rule would benefit market participants by providing certainty regarding which insolvency law would apply to their funds in the event a foreign DCO enters an insolvency proceeding. The Commission has considered the other Section 15(a) factors and believes that they are not implicated by the proposed amendments.

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.⁷²

⁷² 7 U.S.C. 19(b).

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The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. The Commission requests comment on whether the proposed amendments implicate any other specific public interest to be protected by the antitrust laws. The Commission has considered the proposed rulemaking to determine whether it is anticompetitive and has identified no anticompetitive effects. The Commission requests comment on whether the proposed rulemaking is anticompetitive and, if it is, what the anticompetitive effects are.

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

List of Subjects in 17 CFR Part 39

Treatment of funds.

Reporting

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

PART 39 – DERIVATIVES CLEARING ORGANIZATIONS

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

Authority: 7 U.S.C. 2, 7a–1, and 12a; 12 U.S.C. 5464; 15 U.S.C. 8325.

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2. Amend § 39.2 to add definitions of “Money center country” and “Proprietary funds” in alphabetical order to read as follows:

§ 39.2 Definitions.

* * * * *

Money center country means Canada, France, Germany, Italy, Japan, and the United Kingdom.

* * * * *

Proprietary funds means all money, securities, and property received by a derivatives clearing organization from, for, or on behalf of, a clearing member and held in a proprietary account, as defined in § 1.3 of this chapter:

(1) To margin, guarantee, or secure contracts for future delivery on or subject to the rules of a contract market, derivatives clearing organization, or foreign board of trade or a cleared swap contract, and all money accruing to a clearing member as the result of such contracts;

(2) In connection with a commodity option transaction on or subject to the rules of a contract market, derivatives clearing organization, or foreign board of trade:

(i) To be used as a premium for the purchase of a commodity option transaction for a clearing member;

(ii) As a premium payable to a clearing member;

(iii) To guarantee or secure performance of a commodity option by a clearing member; or

(iv) Representing accruals (including, for purchasers of a commodity option for which the full premium has been paid, the market value of such commodity option) to a clearing member;

(3) That constitutes, if a cleared swap is in the form or nature of an option, the settlement value of the option; or

(4) As a contribution to a guaranty fund to mutualize the losses resulting from a default by a clearing member by covering the losses in accordance with the derivatives clearing organization’s rules and its agreement(s) with its clearing members.

* * * * *

3. Amend § 39.15 by adding new paragraphs (b)(3), (f), (g), and (h) and revising paragraph (e) to read as follows:

§ 39.15 Treatment of funds.

* * * * *

(b) * * *

(3) *Central banks.* Notwithstanding anything to the contrary in §§ 1.20, 1.49, 22.4, 22.5, or 22.9 of this chapter, a derivatives clearing organization may hold futures customer funds or cleared swaps customer collateral at the central bank of a money center country if it obtains from the central bank a written acknowledgment that:

(i) The central bank was informed that the customer funds deposited therein are those of customers who trade commodities, options, swaps, and other products and are being held in accordance with the provisions of section 4d of the Act and applicable Commission regulations thereunder; and

(ii) The central bank agrees to reply promptly and directly to any request from the director of the Division of Clearing and Risk or the director of the Market Participants Division, or any successor divisions, or such directors' designees, for confirmation of account balances or provision of any other information regarding or related to an account.

* * * * *

(e) *Permitted investments*—(1) Funds and assets belonging to clearing members and their customers that are invested by a derivatives clearing organization shall be held in instruments with minimal credit, market, and liquidity risks.

(2) Any investment of customer funds or assets by a derivatives clearing organization shall comply with § 1.25 of this chapter.

(3) A derivatives clearing organization may invest proprietary funds only in a manner that would be permitted for customer funds under § 1.25 of this chapter. The derivatives clearing organization shall bear sole responsibility for any losses resulting from the investment of proprietary funds.

(f) *Proprietary funds*—(1) *Segregation.* A derivatives clearing organization must separately account for and segregate all proprietary funds as belonging to its clearing members. A derivatives clearing organization shall deposit proprietary funds under an account name that clearly identifies the funds as belonging to clearing members and shows that the funds are segregated as required by this part. A derivatives clearing organization must at all times maintain in the separate segregated account or accounts money, securities and property in an amount sufficient in the aggregate to cover the total value of proprietary funds owed to all clearing members.

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(2) *Written acknowledgment from depositories.* (i) A derivatives clearing organization must obtain a written acknowledgment from each depository prior to or contemporaneously with the opening of an account for proprietary funds by the derivatives clearing organization with the depositories; provided, however, a derivatives clearing organization is not required to obtain a written acknowledgment from a Federal Reserve Bank with which it has opened an account for proprietary funds.

(ii) The written acknowledgment must be in the form as set out in appendix D to this part, except as provided in paragraph (f)(2)(vi) of this section.

(iii) A derivatives clearing organization shall promptly file a copy of the written acknowledgment with the Commission in the format and manner specified by the Commission no later than three business days after the opening of the account or the execution of a new written acknowledgment for an existing account, as applicable.

(iv) A derivatives clearing organization shall obtain a new written acknowledgment within 120 days of any changes in the following:

(A) The name or business address of the derivatives clearing organization;

(B) The name or business address of the depository receiving proprietary funds; or

(C) The account number(s) under which proprietary funds are held.

(v) A derivatives clearing organization shall maintain each written acknowledgment readily accessible in its files in accordance with § 1.31, for as long as the account remains open, and thereafter for the period provided in § 1.31.

(vi) Notwithstanding paragraph (f)(2)(ii) of this section, a derivatives clearing organization may deposit proprietary funds with the central bank of a money center country if it obtains from the central bank a written acknowledgment that:

(A) The central bank was informed that the proprietary funds deposited therein are those of clearing members who trade commodities, options, swaps, and other products and are being held in accordance with the provisions of section 5b(c)(2)(F) of the Act and Commission regulations thereunder; and

(B) The central bank agrees to reply promptly and directly to any request from the director of the Division of Clearing and Risk, or any successor division, or the director's designees, for confirmation of account balances or provision of any other information regarding or related to an account.

(3) *Commingling.* (i) A derivatives clearing organization may for convenience commingle the proprietary funds that it receives from, or on behalf of, clearing members in a single account or multiple accounts with one or more depositories.

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(ii) A derivatives clearing organization shall not commingle proprietary funds with the money, securities or property of the derivatives clearing organization, or a customer account of a clearing member of the derivatives clearing organization, or use proprietary funds to secure or guarantee the obligation of, or extend credit to, the derivatives clearing organization.

(4) *Limitation on use of proprietary funds.* (i) A derivatives clearing organization shall not hold, use or dispose of proprietary funds except as belonging to the clearing member that deposited the proprietary funds. The use of proprietary funds as belonging to clearing members may include, but is not limited to:

(A) A derivatives clearing organization may use the proprietary funds belonging to a clearing member to guarantee or cover deficits in a customer account of that clearing member in accordance with the derivatives clearing organization's rules and its agreement(s) with the clearing member; and

(B) A derivatives clearing organization may use non-defaulting clearing members' money, securities, or property that is being held as a guaranty fund to mutualize the losses resulting from a default by a clearing member to cover such losses in accordance with the derivatives clearing organization's rules and its agreement(s) with its clearing members.

(ii) No person, including any derivatives clearing organization or any depository, that has received proprietary funds for deposit in a segregated account, as provided in this section, may hold, dispose of, or use any the funds as belonging to any person other than the clearing members of the derivatives clearing organization which deposited the funds.

(g) *Daily reconciliation—(1) Futures customer funds.* By noon of each business day, a derivatives clearing organization that has received futures customer funds from its clearing members shall, as of the close of the previous business day:

(i) Calculate the amount of futures customer funds owed to each clearing member, on a currency by currency basis; and

(ii) Reconcile the total amount of futures customer funds owed, on a currency by currency basis, aggregated across all clearing members, with the amount of futures customer funds held in separate accounts across all depositories.

(2) *Cleared swaps customer funds.* By noon of each business day, a derivatives clearing organization that has received cleared swaps customer collateral from its clearing members shall, as of the close of the previous business day:

(i) Calculate the amount of cleared swaps customer collateral owed to each clearing member, on a currency by currency basis; and

(ii) Reconcile the total amount of cleared swaps customer collateral owed, aggregated across all clearing members, with the amount of cleared swaps customer collateral held in separate accounts across all depositories.

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(3) *Proprietary funds.* By noon of each business day, a derivatives clearing organization that has received proprietary funds from its clearing members shall, as of the close of the previous business day:

(i) Calculate the amount of proprietary funds owed to each clearing member, on a currency by currency basis; and

(ii) Reconcile the total amount of proprietary funds owed, aggregated across all clearing members, with the amount of proprietary funds held in separate accounts across all depositories.

(4) *Calculations.* (i) Each calculation and reconciliation required by this paragraph (g) must be approved by a person who did not prepare the calculation or reconciliation and who does not report to the person that prepared the calculation or reconciliation.

(ii) In performing the calculations required by this paragraph (g):

(A) Securities shall be valued at their current market value, with haircuts applied in accordance with § 39.11(d) of this part; and

(B) A reconciliation deficit in a particular account type in one currency may be offset by a surplus in that same account type in another currency, based on publicly available exchange rates, with the surplus subject to haircuts reasonably determined by the derivatives clearing organization, consistently applied.

(C) Where customer funds, including funds received to margin, guarantee, or secure futures, options, foreign futures, foreign options, or swaps, are, pursuant to an order of the Commission or a DCO rule filed pursuant to paragraph (b)(2) of this section, received for the purpose of holding such funds in a futures account, they shall be treated as futures customer funds, both for purposes of funds owed and funds held. Where such funds are received for the purpose of holding such funds in a cleared swaps customer account, they shall be treated as cleared swaps customer collateral, both for purposes of funds owed and funds held.

(iii) Calculations of amounts owed in this paragraph (g) shall be made consistent with the requirements of § 1.20(i) of this chapter, as applied to the accounts of a derivatives clearing organization with respect to its members' futures customer, cleared swaps customer, and proprietary accounts.

(5) A derivatives clearing organization shall immediately report to the Commission, pursuant to § 39.19 of this part, any discrepancies in the calculation of the amount of funds held for each clearing member and any one or more of the reconciliations that reveals that the derivatives clearing organization did not, at the close of the previous business day, maintain in separate segregated accounts money, securities and property in an amount sufficient in the aggregate to cover the total value of funds owed to all clearing members.

(h) *Exclusions for foreign derivatives clearing organizations* — Paragraphs (e)(3), (f) and (g)(3) of this section do not apply to a derivatives clearing organization organized outside the

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United States that would, in the event of its insolvency, be subject to a foreign proceeding, as defined in 11 U.S.C. 101(23), in the jurisdiction in which it is organized.

4. Amend § 39.19 by adding new paragraph (c)(4)(xxv) to read as follows:

§ 39.19 Reporting.

* * * * *

(c) * * *

(4) * * *

(xxv) *Discrepancy in customer or proprietary funds.* A derivatives clearing organization shall immediately report to the Commission any discrepancies in the calculation of the amount of funds held for each clearing member and any one or more of the reconciliations required pursuant to § 39.15(g) of this part that reveals that the derivatives clearing organization did not, at the close of the previous business day, maintain in separate segregated accounts money, securities and property in an amount sufficient in the aggregate to cover the total value of funds owed to all clearing members.

* * * * *

5. Add appendix D to Part 39 to read as follows:

Appendix D to § Part 39 - Derivatives Clearing Organization Acknowledgment Letter for CFTC Regulation 39.15 Proprietary Funds Account

[Date]

[Name and Address of Bank or Trust Company]

We refer to the Segregated Account(s) which [Name of Derivatives Clearing Organization] (“we” or “our”) have opened or will open with [Name of Bank or Trust Company] (“you” or “your”) entitled:

[Name of Derivatives Clearing Organization] Proprietary Funds Account, CFTC Regulation 39.15 Proprietary Funds Account under Section 5b(c)(2)(F) of the Commodity Exchange Act [and, if applicable, “, Abbreviated as [short title reflected in the depository's electronic system]”]

Account Number(s): []

(collectively, the “Account(s)”).

You acknowledge that we have opened or will open the above-referenced Account(s) for the purpose of depositing, as applicable, money, securities and other property (collectively the

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“Funds”) of clearing members who trade commodities, options, swaps, and other products, as required by Commodity Futures Trading Commission (“CFTC”) Regulations, including Regulation 39.15, as amended; that the Funds held by you, hereafter deposited in the Account(s) or accruing to the credit of the Account(s), will be separately accounted for and segregated on your books from our own funds and from any other funds or accounts held by us in accordance with the provisions of the Commodity Exchange Act, as amended (the “Act”), and Part 39 of the CFTC's regulations, as amended; and that the Funds constitute member property as defined by 11 U.S.C. § 761(16) and CFTC Regulation 190.01.

Furthermore, you acknowledge and agree that such Funds may not be used by you or by us to secure or guarantee any obligations that we might owe to you, and they may not be used by us to secure or obtain credit from you. You further acknowledge and agree that the Funds in the Account(s) shall not be subject to any right of offset or lien for or on account of any indebtedness, obligations or liabilities we may now or in the future have owing to you. This prohibition does not affect your right to recover funds advanced in the form of cash transfers, lines of credit, repurchase agreements or other similar liquidity arrangements you make in lieu of liquidating non-cash assets held in the Account(s) or in lieu of converting cash held in the Account(s) to cash in a different currency.

You agree to reply promptly and directly to any request for confirmation of account balances or provision of any other information regarding or related to the Account(s) from the director of the Division of Clearing and Risk of the CFTC, or any successor divisions, or such director's designees, and this letter constitutes the authorization and direction of the undersigned on our behalf to release the requested information without further notice to or consent from us.

The parties agree that all actions on your part to respond to the above information requests will be made in accordance with, and subject to, such usual and customary authorization verification and authentication policies and procedures as may be employed by you to verify the authority of, and authenticate the identity of, the individual making any such information request, in order to provide for the secure transmission and delivery of the requested information to the appropriate recipient(s).

We will not hold you responsible for acting pursuant to any information request from the director of the Division of Clearing and Risk of the CFTC, or any successor divisions, or such director's designees, upon which you have relied after having taken measures in accordance with your applicable policies and procedures to assure that such request was provided to you by an individual authorized to make such a request.

In the event that we become subject to either a voluntary or involuntary petition for relief under the U.S. Bankruptcy Code, we acknowledge that you will have no obligation to release the Funds held in the Account(s), except upon instruction of the Trustee in Bankruptcy or pursuant to the Order of the respective U.S. Bankruptcy Court.

Notwithstanding anything in the foregoing to the contrary, nothing contained herein shall be construed as limiting your right to assert any right of offset or lien on assets that are not Funds maintained in the Account(s), or to impose such charges against us or any account maintained by

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us with you for the purpose of holding our own funds. Further, it is understood that amounts represented by checks, drafts or other items shall not be considered to be part of the Account(s) until finally collected. Accordingly, checks, drafts and other items credited to the Account(s) and subsequently dishonored or otherwise returned to you or reversed, for any reason, and any claims relating thereto, including but not limited to claims of alteration or forgery, may be charged back to the Account(s), and we shall be responsible to you as a general endorser of all such items whether or not actually so endorsed.

You may conclusively presume that any withdrawal from the Account(s) and the balances maintained therein are in conformity with the Act and CFTC regulations without any further inquiry, provided that, in the ordinary course of your business as a depository, you have no notice of or actual knowledge of a potential violation by us of any provision of the Act or the CFTC regulations that relates to the segregation of proprietary funds; and you shall not in any manner not expressly agreed to herein be responsible to us for ensuring compliance by us with such provisions of the Act and CFTC regulations; however, the aforementioned presumption does not affect any obligation you may otherwise have under the Act or CFTC regulations.

You may, and are hereby authorized to, obey the order, judgment, decree or levy of any court of competent jurisdiction or any governmental agency with jurisdiction, which order, judgment, decree or levy relates in whole or in part to the Account(s). In any event, you shall not be liable by reason of any action or omission to act pursuant to any such order, judgment, decree or levy, to us or to any other person, firm, association or corporation even if thereafter any such order, decree, judgment or levy shall be reversed, modified, set aside or vacated.

The terms of this letter agreement shall remain binding upon the parties, their successors and assigns and, for the avoidance of doubt, regardless of a change in the name of either party. This letter agreement supersedes and replaces any prior agreement between the parties in connection with the Account(s), including but not limited to any prior acknowledgment letter agreement, to the extent that such prior agreement is inconsistent with the terms hereof. In the event of any conflict between this letter agreement and any other agreement between the parties in connection with the Account(s), this letter agreement shall govern with respect to matters specific to Section 5b(c)(2)(F) of the Act and CFTC Regulation 39.15, as amended.

This letter agreement shall be governed by and construed in accordance with the laws of [Insert governing law] without regard to the principles of choice of law.

Please acknowledge that you agree to abide by the requirements and conditions set forth above by signing and returning to us the enclosed copy of this letter agreement, and that you further agree to provide a copy of this fully executed letter agreement directly to the CFTC (via electronic means in a format and manner determined by the CFTC). We hereby authorize and direct you to provide such copy without further notice to or consent from us, no later than three business days after opening the Account(s) or revising this letter agreement, as applicable.

[Name of Derivatives Clearing Organization]

By:

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Print Name:

Title:

ACKNOWLEDGED AND AGREED:

[Name of Bank or Trust Company]

By:

Print Name:

Title:

Contact Information: [Insert phone number and email address]

DATE:

Issued in Washington, DC, on December __, 2023, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.