September 13, 2019

Via Electronic Submission

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St, N.W.
Washington, DC 20581

Re: Comments on Derivatives Clearing Organization General Provisions and Core Principles RIN 3038-AE66

Dear Sir/Madam:

Intercontinental Exchange, Inc., on behalf of itself and its subsidiaries (collectively, "ICE") appreciates the opportunity to comment on the rules recently proposed by the Commodity Futures Trading Commission (the "Commission" or the "CFTC"), titled "Derivatives Clearing Organization General Provisions and Core Principles" (the "Proposed Rules" or the "Proposal").[1]

As background, ICE currently operates four registered derivatives clearing organizations ("DCOs"): ICE Clear Credit LLC,[2] ICE Clear Europe Limited,[3] ICE Clear US, Inc.[4] and ICE NGX Canada Inc.[5] ICE has a successful history of clearing exchange traded and OTC derivatives across a spectrum of asset classes including energy, agriculture and financial products. ICE Clear Credit, a CDS clearing house, is designated as systemically important under Title VIII of the Dodd-Frank Act. Accordingly, ICE is keenly interested in the issues raised by the Proposal and appreciates the opportunity to comment on the Proposed Rules.

Background

ICE is generally supportive of the Commission's efforts to enhance DCO oversight and regulations and supports a number of the specific proposals. Nonetheless, ICE is concerned with both the broad scope of the Proposed Rules and many of the substantive changes embodied in the Proposal. As discussed herein, the amendments represent a substantial revamping of significant aspects of the existing DCO regulations, and are not merely in the nature of simplifications, harmonization or other "clean-up", all of which ICE generally would

[1] 84 Fed. Reg. 22226 (May 16, 2019) (RIN 3038-AE66).
[2] ICE Clear Credit has been designated as a systemically important derivatives clearing organization pursuant to Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. ICE Clear Credit is also registered as a securities clearing agency under the Securities Exchange Act of 1934 (the "Exchange Act").
[3] ICE Clear Europe is also an authorized as a central counterparty under the European Market Infrastructure Regulation (EMIR) and a Recognised Clearing House under English law, and a registered securities clearing agency under the Exchange Act.
[4] ICE Clear US has elected to be a subpart C DCO pursuant to Commission Rule 39.31.
[5] ICE NGX Canada Inc. is also registered with the Commission as a Foreign Board of Trade and is a recognized exchange and clearing agency under the laws of Alberta, Canada.

welcome. In many cases, these changes would impose significant new technical, operational and governance demands on the clearing houses and their clearing members, with little apparent need, justification or regulatory benefit.

We have set forth below our most significant, high-level comments and suggestions with respect to the Proposed Rules. In the annex to this letter, we have also set out more detailed comments and suggestions. As will be apparent, we believe that many issues raised by the Proposed Rules warrant further consideration by the Commission, its staff, DCOs and other market participants. We urge the Commission to take the appropriate and necessary time to consider these issues further, and conduct a more detailed analysis of the costs and benefits, before finalizing rules in this area.

1. **Overall Scope of the Proposed Rules.**

In the proposing release, the Commission describes the Proposed Rules as part of its "agency-wide review of its rules, regulations and practices to make them simpler, less burdensome and less costly," a project generally referred to as "Project KISS". ICE strongly supports the Project KISS initiative, and appreciates the attention of the Commission and its staff to simplifying the regulations applicable to DCOs, among other matters. Nonetheless, ICE believes that many aspects of the Proposed Rules depart from the objectives of Project KISS, and rather than harmonize or simplify regulations, would instead impose substantial additional obligations and costs on DCOs, clearing members and market participants.

Should the Commission choose to pursue new or expanded regulatory requirements for DCOs, it should first determine that such regulations are appropriate within the framework of the Commodity Exchange Act ("CEA") and are justified by the costs and benefits of those changes. ICE does not believe it is appropriate to do so in a "Project KISS" rulemaking expressly designed to simplify and make rules less burdensome. ICE further believes that to the extent the Commission is choosing to expand the regulatory requirements applicable to DCOs, it has insufficiently considered the significant costs of the proposed requirements as compared to the purported benefits to be achieved by such requirements.

For example, as discussed in further detail below, the Proposed Rules would implement a large number of new reporting requirements for DCOs, require changes in longstanding governance structures and arrangements and impose prescriptive new requirements for default management. Such changes, whatever their merits, should not be viewed as part of Project KISS-style simplifications or attempts to make regulations less burdensome or costly. If the Commission believes that these types of amendments are necessary or beneficial from a regulatory perspective or warranted in light of G-20 commitments or other international standards (as discussed in the Proposal), ICE believes such changes would be better considered in a separate rulemaking to which appropriate attention can be given by both the Commission and market participants and with full consideration and recognition of the likely costs thereof for DCOs.

ICE is also concerned that several aspects of the Proposed Rules appear to involve broad-based changes in response to particular, narrow events and novel products, such as the September 2018 Nasdaq Clearing AB clearing member default and discussions in the U.S. around futures contracts on digital currencies. While such events and products may warrant additional regulatory attention, ICE does not believe imposing broad-based new rules on DCOs

generally is an appropriate response. Needed changes resulting from such events should be evaluated explicitly on that basis, and should be tailored to the particular situations and circumstances that gave rise to them.

2. **Reporting of Customer-by-Customer Information (Proposed Rule 39.13(g)(8)(i)(B) and 39.19(c)(1)).**

ICE generally supports greater transparency of client clearing information to DCOs. Nonetheless, ICE believes that the Commission should further consider the costs and complexities associated with developing new operational systems and procedures to clearing members and DCOs of the proposal, and consider ways to phase in any new requirements to allow for the necessary development of new operational systems and procedures, at both the DCO and clearing member levels. As drafted, the proposed changes to Rules 39.13(g)(8)(i)(B) and 39.19(c)(1), substantially modify the requirements for reporting of customer positions in futures contracts and, to a lesser extent, in swaps. Specifically, in revised Rules 39.13(g)(8)(i)(B) and 39.19(c)(1), the DCO must establish rules that require its clearing members to provide to the DCO the end-of-day gross positions of each beneficial owner within each customer origin of the clearing member. ICE understands the Commission's desire to receive more granular customer information and supports the Commission's intent and purpose to do so. ICE believes that having the customer-by-customer information is helpful to a DCO in managing their business and enhancing their risk management capabilities. This being said, the CFTC has not previously required customer-by-customer reporting to the DCO with respect to futures positions and implementing the proposed changes will take substantial time and resources to implement. DCOs and market participants should also have the opportunity to consider whether the changes could affect other longstanding practices, such as the treatment by DCOs of the risk in the customer account on a net basis. As such, ICE encourages the Commission to work with and consult the industry as a whole to implement any changes to current practices. ICE believes substantial changes such as those proposed require an industry effort and consultation. To this end, ICE looks forward to working with the Commission to discuss this important topic and implement any necessary changes.

The Proposed Rules would also require end-of-day reporting as to the "risk sensitivities and position data" for the reported positions. Particularly with respect to risk sensitivities, it is not clear what information would be required to be reported, on what basis and with what parameters. To fully comment on the feasibility and costs associated with such a proposal, the Commission needs to provide greater detail.

While the Commission did not expressly request comment on the timing of daily reporting, ICE is concerned that the added reporting obligations challenge an already tight reporting deadline set out in 39.19(c)(1)(i). For example, the final cutoff for the submission of positions and any related adjustments by clearing members is 9:00 AM ET at ICE Clear US. Immediately following the cutoff, the operational finalization of positions is completed by ICE Clear US and the initiation of the daily reporting begins. The current 10:00 AM ET deadline for the daily reports does not provide sufficient time to respond to operational delays, submission errors, or the regular reconciliation and validation breaks that occur in the normal processing of firm submissions. The Commission's updated burden estimate,[6] which already significantly

[6] OMB control number 3038–0076

underestimates the total reporting burden, suggests each daily report takes DCOs 30 minutes per day to compile. This leaves little room to account for the daily operational processes related to the finalization of clearing data for reporting purposes. If the Commission proceeds with amendments to Rule 39.19(c)(1)(i), ICE would propose moving the deadline to 12:00 PM ET each day, which is consistent with other Commission daily reporting requirements.[7]

3. **Governance Changes (Proposed Rule 39.26).**

The Proposed Rules would require that market participants (defined as either clearing members or their customers) participate on the Board of Directors or other governing body of the DCO. Under the Proposal, it would not be sufficient for the DCO to have market participants on a risk committee or similar body constituted for the particular purpose of providing representation for such participants and advice to DCO management and board of directors.

Although ICE agrees that there may be benefits in some cases to have market participants on the board or governing body of a DCO, the Commission's approach is overly prescriptive. It is not uniformly necessary for clearing members or their customers to participate on the Board of Directors or other governing body of the DCO, and ICE believes that requiring the same approach for every clearing organization regardless of differences in their structure, membership and products they trade, is unnecessarily rigid and could lead to risks and conflicts that have not been considered.

Furthermore, ICE does not believe that the CEA (including Core Principle Q) mandates any particular form of participation. In this regard, the relevant statutory language refers to the "governing board or committee," which ICE believes should be read to contemplate participation through risk or other committees rather than on the governing board itself. In this regard, within ICE, DCOs have different approaches to market participant representation in governance, depending on the DCO's particular organization structure, cleared products, business considerations, jurisdiction of organization, and other relevant factors.

As a matter of policy, ICE believes that each DCO should have flexibility to consider the means for providing market participant representation best suited to its business (including the mix of cleared products) and structure (including whether there are separate guaranty funds or risk waterfalls for different products). A less prescriptive approach would continue to allow DCOs, which may be organized in a range of jurisdictions and may be registered in additional capacities in various jurisdictions,[8] to adopt a form of representation that takes into account any corporate or regulatory requirements, or market practices, in those jurisdictions.

Requiring representation on the Board of Directors or other governing body may also create risks to the market participants involved. Depending on the corporate structure of the DCO, participation on the Board of Directors or governing body may bring fiduciary and other duties in favor of the DCO, which may expose the participant to legal liability and pose conflicts of interest with the participant's other activities. While some of these risks may be mitigated or

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[7] §16.00(b)(2).

[8] The proposing release also suggests that the Commission may be under the mistaken impression that board level-participation is required under the relevant requirements in the EU or other jurisdictions. This is not the case, and in fact the proposal is likely inconsistent with the requirements of the rules in some foreign jurisdictions. Under the European Market Infrastructure Regulation (EMIR), for example, clearing organizations are required to have market participant participation at the level of a risk committee, not at the governing board level. See EMIR Article 28.

covered through exculpatory provisions, indemnification and other rules, it may not be possible to do so completely or in all cases.

In addition, ICE does not believe that the Commission's suggestion of allowing nonvoting representation by market participants on the governing board is necessarily a viable or desirable approach in all cases. Market participants may prefer representation on a risk or similar committee (even if the risk committee is technically advisory) to nonvoting representation on the governing board. Nonvoting representation may also raise issues of corporate governance, confidentiality[9] and duties to the DCO that will need to be assessed by a DCO in light of its particular circumstances.

4. Additional Reporting (Proposed Rule 39.19).

The Proposed Rules would add a number of mandatory event-specific reports for DCOs under Rule 39.19(c). The Commission should identify and carefully examine the problem it is attempting to solve by requiring additional reporting requirements and provide further information on the purpose and background of the proposed changes. It would be helpful to the market to better understand why the Commission is proposing these changes. ICE urges the Commission to not modify the current well-functioning reporting regime with new, overly complicated and prescriptive rules.

Major Board Decisions (Proposed Rule 39.19(c)(4)(xxii))

ICE sees no reason why "major Board decisions" should be required to be reported. As an initial matter, Boards of Directors do not necessarily categorize their decisions as "major" or "non-major." In addition, important Board of Directors decisions are already routinely disclosed to clearing members and other interested parties, including under Rule 39.32(a)(3). Moreover, where such a decision results in a change of the clearing house rules, it would be expected that the DCO would file such a change for self-certification under Commission Rule 40.6 or approval under Commission Rule 40.5, in either case obviating any need for a separate reporting requirement. Further, other reporting requirements already apply (or would apply) to clearing member defaults (and similar events), liquidity events, corporate changes and similar extraordinary or emergency situations. Accordingly, it is not clear what particular Board decisions are of concern to the Commission that are not already reported in some form. If the Commission believes additional categories of events should be reported, it should propose specific requirements in that regard.

Finally, the Proposed Rules do not clearly specify the timing of the proposed new reporting requirement. It is often be the case that a Board will make a decision that is not intended to be immediately implemented or announced publicly. A Commission reporting requirement should not force announcement of a decision before the Board of Directors chooses to do so.

[9] From a practical perspective, the mandatory participation of clearing members on a DCO's governing board may dilute otherwise meaningful risk discussions at the board because of confidentiality concerns.

Reporting of "Issues" with Settlement Banks (Proposed Rule 39.19(c)(4)(xv))

Mandatory reporting of "issues" with settlement banks is inherently vague, even though the proposed requirement is limited to material issues or concerns. A range of operational problems may occur with a settlement bank that are resolved in the ordinary course of operations. If reporting of this type of event is to be required, the Commission should limit the requirement to extraordinary events outside of the expected course of business, and provide greater specificity, or examples, as to the types of event that concerns the Commission.

Reporting of "Issues" with Margin Models (Proposed Rule 39.19(c)(4)(xxiv))

Similarly, a requirement to report "issues" with margin models that affect calculation or collection of margin is vague and uncertain. Margin models face exceedances and other circumstances that are addressed through well-established review processes and independent validation processes and reported in industry standard public quantitative disclosures. In addition, there are existing reporting requirements that may apply to significant problems with a margin model, including for system failures under Rule 39.18(g). If the Commission believes additional reporting is necessary, it should limit the requirement to extraordinary events that are material to the operation of the clearing organization.

Changes in Service Providers (Proposed Rules 39.19(c)(4)(xiv) and (xvi))

The Proposed Rules would require a DCO to report ordinary course changes in its settlement banks or depositories. The purpose or benefit of this proposed requirement is unclear to ICE. Commission Rules already impose a number of requirements regarding settlement banks and depositories, and in addition DCO policies relating to such service providers are generally subject to Commission review and oversight. In addition, DCOs are already required to submit to the Commission a segregation letter for any new depository for customer property.

DCOs may have a number of such providers, and may change or modify their use of services from such providers from time to time for commercial, operational or other reasons in the ordinary course. ICE does not believe such changes (so long as they are within, and subject to the terms of, the DCO's policies in the area) on their own should need to be separately reported to the CFTC in real time. If additional reporting with respect to such service providers is desired, in ICE's view it should be limited to notice of defaults or significant failures by a settlement bank or depository.

Changes in Funding Arrangements (Rule 39.19(c)(4)(xiii))

Similarly, the Proposed Rules would require a DCO to report any change in liquidity funding arrangements. ICE believes that such requirements are unnecessary, so long as the DCO continues to satisfy its liquidity and other financial resources requirements and so long as such changes are consistent with the DCO's policies and procedures, as applicable. At a minimum, any notification requirement should be limited to material changes in such arrangements.

Timing of Notices

ICE also respectfully requests that the timing of notices be reconsidered, with a view toward providing more reasonable notice periods and distinguishing between emergency and non-emergency notices. For example, while ICE agrees that notice of a change in fiscal year is appropriate, it is not clear why that notice needs to be "immediate," on par with notices of defaults and similar events. Other, non-emergency notifications of reportable events could be made within a reasonable period such as five or ten business days.

Requirement for Certification by Employees (Proposed Rule 39.19(b)(2))

ICE opposes the proposed new requirement in Rule 39.19(b)(2) that when making a submission pursuant to the Rule, an employee of a DCO certify that he or she is duly authorized to make such a submission on behalf of the DCO. ICE does not believe there is any need for such a certification, and in particular does not believe that there is any serious prospect of an "unauthorized" submission being made with respect to these matters by DCO personnel. The proposed change would add an unnecessary compliance burden for the DCO and its personnel, and unnecessarily impose personal risk or liability on DCO personnel where it is not beneficial or warranted.

In other contexts where certification is required, including revised Rule 39.11(f)(4), ICE believes that the appropriate certification standard should state that the relevant report is accurate and complete "in all material respects." Rule 39.11(f)(4) would thus read "a certification by the person responsible for the accuracy and completeness of the report that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the information contained in the report is accurate and complete in all material respects". In ICE's view, given the risk of legal liability and penalties for the person providing the certification, the materiality qualification is appropriate and fair under the circumstances.

5. Default Management.

In ICE's view, the Proposed Rules are unnecessarily prescriptive with respect to several default management matters.

Default Committee (Proposed Rule 39.16(c))

The Proposed Rules would require a DCO to have a default committee that would be convened in the event of a default involving substantial or complex positions to help identify market issues with any action the DCO is considering. The DCO would be required to include clearing members and other participants to help the DCO efficiency manage the positions of the defaulter.

The issue of whether DCOs should be required to have a default committee that includes clearing members and other participants is a complex issue and needs to take into account various considerations and interests, including:

- the overriding need for the DCO to be able to quickly and efficiently liquidate the positions of the defaulter, in a way that protects the positions and resources of the clearing organization and its non-defaulting participants;

- the ability and willingness of clearing participants, and their personnel, to participate on such a committee[10];
- the particular expertise needed for default management for relevant products, and the availability of sufficient personnel at clearing participants with such expertise;
- the authority, responsibility and duties of participants[11]; and,
- the confidentiality, resource allocation and conflict of interest considerations that arise from their participation.

Based on its own experience, ICE does not believe a mandatory approach requiring the use of a default committee that includes clearing members and other participants is advisable. In ICE's view, a DCO should have flexibility to determine the appropriate level of consultation, if any, of clearing members or market participants depending on the nature of the products cleared and the particular default scenario. For some products and scenarios, consulting clearing members and other participants might be a sensible approach; for other products and scenarios, particularly more liquid products in a fast moving market, it might be unnecessary and might result in a costly delay if a DCO is required to consult with clearing members and other participants. Accordingly, the scope of any consultation, including whether clearing members and other participants are required to participate and to what extent and on what basis, and other details, are best worked in the DCO's own rules and procedures that are designed to reflect the unique nature of the products they clear.[12]

The Proposed Rules would require that the default committee be activated for "complex" and "substantial" default situations, but it is not clear from the proposal what criteria would be used to determine whether a default scenario meets this standard, or who would make the determination. The timing of any required determination is also uncertain. In any default scenario, it is to be expected that time will be of the essence, and the DCO will need to retain the ability, and the flexibility, to close out and replace the defaulter's positions as quickly as feasible. In practice, this means any default committee would need to be established in advance of any default; otherwise, the DCO runs the risk that markets will move in a way unfavorable to the DCO while it spends time constituting a default committee, which may increase the risk to the DCO and the ultimate cost to the DCO and its non-defaulting participants. At the same, it may not be clear prior to a default which particular products are at issue, and what particular expertise may be needed for a default committee. Relevant personnel may also be in different geographic locations and time zones, which may make mandatory coordination through a default committee difficult.

Other key questions that are not specified in the Proposed Rules relate to the experience required to be a participant on a default committee, and the number of participants

[10] In this regard, ICE notes the practices suggested by the Futures Industry Association in its Central Clearing: Recommendations for CCP Risk Management (Nov. 2018), which recommends ***voluntary*** involvement of clearing participant representatives in default management committees.

[11] ICE believes that if any clearing members or other participants provide help, they should do so strictly on an advisory basis as opposed to having any authority or responsibility with respect to any actions.

required for an effective default committee. Inefficiencies may arise both with a committee that is too small and one that is too big. Any requirement also has to take into account the possibility that there will be multiple such demands on clearing participants and their traders from multiple clearing houses at the same time in the case of the default of a significant market participant, and further that clearing participants and their affiliates may need to address the entity's (and its affiliates") own risk management and default management with respect to other positions (including uncleared positions) as a result of such a default event. Participants on default committees may face other conflicts between the interests of the DCO and the interests of their own firms. In ICE's view, it is not feasible for any regulation to address all of such considerations, and thus the breadth of considerations weighs against mandating use of a default committee.

It is also unclear what the Commission means by "identify market issues with any action the DCO is considering" as a goal of the default committee. Is this limited to the effect of the action on the DCO's ability to liquidate and the price at which it is able to liquidate the positions, or is the Commission suggesting that the DCO needs to consider the wider impact on other market participants that may be caused by liquidation activity, including an auction? ICE strongly believes that the DCO's focus during the default management process should be on returning to a balanced book as quickly as possible, within the resources available to the DCO and in a manner that permits continued operation of the DCO. A DCO should not have obligations to consider, or predict, other market effects from its liquidation activity, any more than any other market participant would be required to consider such effects (subject of course to any applicable legal requirements on transactions in the market). It is also not appropriate for a DCO to influence or determine market directions, or to attempt to do so.

Auction Requirements (Proposed Rule 39.16(c)(2)(iii)(C))

Proposed revisions to Rule 39.16 would impose prescriptive requirements with respect to mandatory bidding in default management auctions. ICE believes that the proposal is unnecessary and counterproductive. Default auction design is a complicated process, involving numerous tradeoffs and considerations. Although ICE generally agrees that a DCO should have the ability to require clearing members to participate in a default auction, there is no single approach to determining the level of mandatory bid, or other relevant terms of participation. For this reason, ICE does not believe mandatory bidding, or other auction terms, should be set by prescriptive regulation. Instead, ICE believes such matters should be left to the DCO to determine in its rules and procedures, subject to regulatory oversight.

For example, among the key questions for a DCO in default auctions is how to define the product class for purposes of bidding requirements and dividing the relevant portfolios into lots for auction. The Proposed Rule does not provide an adequate definition of the product class for this purpose, and there are many different possible ways of defining a product class, such as futures versus swaps, and within futures, financial futures versus physical futures, precious metals futures versus other metal futures and softs futures versus other agricultural futures. Within swaps, there may be a decision as to whether interest rate and credit default swaps be treated as different products, and within CDS, whether swaps should be categorized by region or type of credit, among other factors.

The ways in which product class is defined for an auction, and the way in which a portfolio is set to be auctioned, may have a significant impact on the auction outcome. If product class is defined too narrowly, an insufficient number of participants may have bidding requirements; if it is too broadly defined, participants may be forced to bid for products they are not prepared to hold or risk manage. ICE believes these definitional questions are best left to the DCO under its Rules and procedures, and should not be specified in regulations.

ICE also believes the Proposal is too prescriptive in requiring that bidding requirement be tied to open positions as represented by initial margin requirements. In ICE's view, a DCO may reasonably determine that bidding requirements be tied instead to guaranty fund requirements, a combination of guaranty fund and margin requirements, and/or other relevant factors.

Ultimately, in ICE's view, the specifics of auction design are best left to the DCO's determination, in accordance with its governance processes, rather than having the Commission attempt to specify a particular approach that cannot consider the unique, unforeseeable circumstances of a future clearing member default. A DCO's choices with respect to auction design are of course subject to the Commission's review and oversight, including where appropriate self-certification under Rule 40.6 or approval under Rule 40.5. The Commission's existing rules and supervisory authority already provide it the tools necessary to review a DCO's auction rules, policies and procedures.

Public Notice of Default (Proposed Rule 39.16(c)(2)(ii))

The Commission is proposing to amend §39.16(c)(2)(ii) to require that a DCO have default procedures that include immediate public notice on the DCO's website of a declaration of default. ICE believes that, depending on the facts and circumstances of a default, an immediate announcement could potentially impact the market and the DCO's ability to manage the default. While the ICE DCOs would provide a public notice of a clearing member default, consistent with applicable legal requirements, through a circular or similar publication on its website, ICE does not believe it is clear that in all cases an "immediate" notice is in the best interests of the DCO or its participants, or the broader market. Accordingly, ICE suggests that any requirement that a DCO provide public notice of a default be "as soon as practicable under the circumstances".

6. Financial Resources (Proposed Rule 39.11(a)(2)).

As proposed to be revised Rule 39.11(a)(2) would require that a DCO identify and adequately manage its general business risk and hold sufficient liquid resources to cover potential business losses that are not related to clearing member defaults, so that the DCO can continue to provide services as a going concern. The ICE clearing houses meet or exceed their applicable regulatory operating capital requirements. The ICE clearing houses maintain sufficient capital to: allow for an orderly wind down or restructuring; cover operational, legal and business risks; and cover credit and market risks not covered by the clearing members' margin and guaranty fund deposits. The ICE clearing houses (including the non-EMIR ICE clearing houses) adhere to the most conservative of the regulatory capital requirements (i.e., the

regulatory capital required by the European Market Infrastructure Regulation).[13] As such, ICE is generally supportive of the Commission's proposed rules in this regard.

7. **Enterprise Risk Management (Proposed Rule 39.10(d)).**

ICE agrees with the importance of enterprise risk management for DCOs, and is generally supportive of the Commission's proposed rules in this regard.

8. **New Product Notices (Proposed Rule 39.19(c)(4)(xxvi)).**

The Proposed Rules would create a new requirement for 30 days advance notice of any "new product". As an initial matter, it is not entirely clear what is meant by a "new product" for this purpose, and in particular how extensions and variants of existing products should be treated. More significantly, ICE believes the proposed requirement is duplicative of existing Commission requirements.

Currently, a DCO is required to file a self-certification or approval filing under Rule 40.5 or 40.6 for any new product that involves a change to DCO rules. For any new product that is a swap, in addition a filing under Rule 39.5 will be required. For new products that are exchange-traded futures, the relevant exchange would need to make a filing under Rule 40.2. For this reason, ICE does not see any benefit for the proposed additional notice under Rule 39.19. It is also not clear why the Commission would need earlier notice under this rule than is required under the other cited filing provisions. ICE is not aware of any significant problems with the current process for accepting new products for clearing,[14] and would accordingly urge the Commission not to adopt this additional notice requirement.

9. **Margin Backtesting (Proposed Rule 39.13(g)(7)(iii)).**

The Proposed Rules would require a DCO, when conducting margin back testing, to compare portfolio losses only to those components of initial margin that capture changes in market risk factors. ICE fundamentally agrees that portfolio backtesting of the *statistical* performance of the core margin model should be solely based upon "market risk factors" that can be directly measured and tested. Such a requirement is consistent with best practice and the recommendations of the Principles for Financial Market Infrastructures (PFMIs).[15]

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[13] See Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on capital requirements for central counterparties.

[14] To the extent the Commission is concerned about products, such as digital currency products, that may raise additional issues or warrant more consideration (see, e.g., CFTC Staff Advisory No. 18-14 (May 21, 2018)), ICE believes any such concerns should be addressed in the context of those specific products. There is no need to slow down the new product launch process for ***all*** products because of a concern about ***some*** products.

[15] Paragraph 5.2.31 of the PFMI provides that "When performing backtesting to assess the statistical performance of the margin system, the CCP should include in a given test only the components of the model that can be directly measured and tested without the use of ad hoc assumptions. For example, margin charges, including certain add-on charges, that are not determined based upon a statistical model, should be excluded from this type of backtesting. Components of the margin system that cannot be directly measured and tested in this way - for instance, components that reflect particular portfolio characteristics, such as liquidity or concentration - should nevertheless be subject to detailed validation for conceptual soundness (see paragraph 3.6.18 of the PFMI) as well as adequate and conservative consideration in stress testing."

However, when performing back testing to assess whether the CCP has collected sufficient margin to meet its coverage requirement, the DCO should include all of the margin model's charges and add-ons, in other words, all of the margin resources available to mitigate the risk of the position (excluding any voluntary excess posted by a clearing member).

10. Additional Comments.

Additional specific comments on the Proposed Rules are set out in the annex hereto.

Conclusion

ICE appreciates the opportunity to comment on the Proposed Rules, and the engagement of the Commission and its staff in the rulemaking process. ICE shares the Commission's goals of refining the DCO regulations to be simpler, less burdensome and less costly. ICE respectfully requests that the Commission and its staff consider the comments in this letter in light of those goals.

Sincerely,

Scott Hill
Chief Financial Officer
Intercontinental Exchange, Inc.

Annex

Additional Comments of Intercontinental Exchange, Inc.

Topic	Rule Section Under Proposed Rules	Comment
Written Acknowledgment from Depositories	1.20	ICE is supportive of the Commission's proposed amendment to Rule 1.20(d) to clarify that the requirements listed in Rules 1.20(d)(3) through (6) do not apply to a DCO, or to an FCM that clears through that DCO, if the DCO has adopted rules that provide for the segregation of customer funds.
Definitions	1.3; 39.2	ICE generally supports the Commission's proposed amendments to the Part 39 definitions but notes below sections which need to be further refined. Business Day - Regulations under the CEA define 'Business Day' as: "any day other than a Sunday or holiday." In all notices required to be delivered pursuant to the CEA or regulations in this chapter, the Commission requires such notice be given in terms of business days and the rule for computing time shall be to exclude the day on which notice is given and include the day on which shall take place the act of which notice is given." This proposal conflicts with the definition of Business Day in Rule 39.19(b)(3) and proposed Rule 39.2. The Commission should clarify this in the Proposed Rules. In connection with the notice and reporting requirements under Part 39, ICE supports the Commission defining "foreign holiday" as a day on which a DCO and its domestic financial markets are closed for a holiday that is not a Federal holiday in the United States, adding the term to the list of exceptions to the definition of "Business Day," such that foreign DCOs would not be required to provide reports on a foreign holiday.
Amendment to Order of Registration	39.3(a)(2); Form DCO	ICE supports the Commission's proposed amendments to eliminate the requirement to use Form DCO to request an amended order of

		registration. Under current practice, a DCO is permitted to file a request for an amended order with the Commission rather than submitting Form DCO. ICE believes this modification will help streamline the process for a DCO to file a request for an amended order.
Customer Definitions	39.2	The amendments make a number of clarifications and similar changes relating to definitions of "customers" and "customer accounts". In the context of DCOs organized outside the United States, however, references to customer accounts do not distinguish appropriately between customer accounts carried by FCM clearing members and customer accounts carried by non-FCM clearing members, which may be subject to segregation and other requirements under non-US law rather than under the CEA.
Transfer of Open Interest	39.3(f)	ICE supports the Commission's proposed amendments, which recognize that a transfer of open interest would not necessarily be tied to a corporate change, and provide a clear procedure for obtaining Commission action on a proposed transfer. Accordingly, ICE supports the proposed amendments to Rule 39.3(g), which allows a DCO seeking to transfer its open interest to submit rules for Commission approval pursuant to Rule 40.5, rather than submitting a request for an order at least three months prior to the anticipated transfer. ICE would suggest, however, that it may be appropriate in particular circumstances for a transfer to take effect pursuant to a self-certification under Rule 40.6 as well as an approval under Rule 40.5. Self-certification would be appropriate where the transfer does not raise any particular novel issues or concerns. The Commission should also clarify that it may, in appropriate circumstances, take action on a transfer request in less than 45 days, both in circumstances that do not raise particular concerns and in exigent or distressed circumstances in which the full period may not be necessary or feasible. ICE also believes the Commission should clarify the procedures and requirements for a transfer between a registered DCO and a clearing organization that is not a registered DCO (such as a foreign clearing organization that is either exempt from DCO registration or otherwise not subject to DCO registration based on its activities), or

		vice versa.
Financial Resources	39.11	The proposed amendments would make certain technical changes and clarifications to the required calculation of financial resources and liquidity resources and the stress loss calculation. Among other changes, the amendments would require that when calculating its largest financial exposure, the DCO (1) in netting exposure against clearing member initial margin, must use only the required portions of the margin on deposit (and not any excess margin on deposit) and may only use customer initial margin to the extent permitted by law; and (2) must combine the customer and house stress test losses of each clearing member using the same stress test scenarios. These proposed changes do not appear to be intended to be substantive, and ICE is generally supportive of these clarifications. In addition, the Commission should further consider clarifying that required margin for this purpose includes add-ons, such as concentration charges and liquidity charges, alongside base initial margin to better align with international standards (see CPMI-IOSCO Public Quantitative Disclosure Standards for Central Counterparties Item 6.1). The Commission should clarify that in applying the 20% limitation on use of assessments to meet the required financial resources under Rule 39.11(a)(1), the calculation should be based on the exposure prior to netting against initial margin (as is the case under the current rule).
Risk Management	39.13	ICE supports the proposed changes to replace "ensure" with "minimize the risk" and make conforming changes...".
Risk Management	39.13(g)(1)	In terms of the added requirement for regular review of margin models and parameters, although some DCOs already comply with this proposed requirement, ICE notes that this new requirement is beyond the scope and purpose of Project KISS. If this change is adopted, the Commission should clarify in the rule that "on a regular basis" means annually and also permit employees of an affiliate of the DCO to conduct the validations.

Risk Management	39.13(g)(8)	ICE is supportive of the Commission's proposed amendment to the language in Rule 39.13(g)(8)(ii), which gives a DCO reasonable discretion in determining the percentage by which customer initial margin requirements must exceed the DCO's clearing initial margin requirements.
Risk Management	39.13(h)(5)	CFTC Rule 39.13(h)(5) requires a DCO to periodically review the risk management policies of its clearing members. The CFTC is proposing to clarify that, following such reviews, DCOs take actions to address concerns identified in such reviews. ICE does not support this requirement. DCOs have not historically been required to supervise or impose changes in the risk management policies of clearing members. ICE believes that any such requirement would be more appropriate at the DSRO level, rather than the clearing organization level.
Treatment of Customer Funds	39.15	ICE generally supports these changes, including allowing commingling of swaps in the futures account pursuant to rules submitted under Rule 40.5 rather than pursuant to a separate Commission order under Section 4d of the CEA.
Rule Enforcement	39.17	ICE generally supports the Commission's proposed changes to Rule 39.17(b), which permit a DCO's board of directors to delegate its responsibility for compliance with the requirements to "an appropriate committee" instead of a "risk management" committee. The CFTC should also consider allowing a broader delegation by the board of directors to the President or equivalent officer.
Public Information	39.21	The proposed amendments to Rule 39.21(c) would require disclosure of the financial resource package concurrently with making Rule 39.11 submissions to the Commission. For DCOs that are subsidiaries of public companies, it may not be feasible to make such a public disclosure until relevant financial statements for the public parent have been disclosed in accordance with all securities law requirements. As a result, ICE would suggest changing "concurrently" to as "promptly as practicable, taking into account applicable disclosure requirements," or provisions to that effect.
Legal Risk	39.27	The CFTC is proposing to amend Rule 39.27(c), adding subparagraph (3), which would require DCOs providing clearing

		services outside the US to ensure on an ongoing basis that the memorandum regarding conflicts of laws, required under Exhibit R of Form DCO, be accurate and up-to-date, and would further require that an updated memorandum be filed with the Commission following all material changes to the analysis. ICE suggests the Commission instead require the memorandum be reviewed and updated at regular intervals (rather than continuously), for example, not less than at least once every three years, or within a defined timeframe after a material change to the law.