



October 11, 2022

**Via Electronic Submission**

Mr. Christopher Kirkpatrick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, D.C. 20581

**Re: Governance Requirements for Derivatives Clearing Organizations**

Intercontinental Exchange Inc., on behalf of itself and its subsidiaries (“ICE”), appreciates the opportunity to comment on the notice of proposed rulemaking by the Commodity Futures Trading Commission (the “Commission” or the “CFTC”), titled “Governance Requirements for Derivatives Clearing Organizations” (the “DCO Governance Proposal” or the “Proposal”).<sup>1</sup>

ICE currently operates four derivatives clearing organizations (“DCOs”) registered with the Commission: ICE Clear Credit LLC,<sup>2</sup> ICE Clear Europe Limited,<sup>3</sup> ICE Clear US, Inc.,<sup>4</sup> and ICE NGX Canada Inc.<sup>5</sup> ICE also operates ICE Clear Netherlands and ICE Clear Singapore, which are not registered as DCOs with the Commission but are registered clearing organizations in other jurisdictions. ICE has a successful history of clearing exchange-traded and OTC derivatives across a spectrum of asset classes including energy, agriculture and financial products.

As an operator of DCOs, ICE is keenly interested in the issues raised by the DCO Governance Proposal. Each ICE DCO maintains governance processes and committee structures that are particular to its products, members, rules, overall strategy and reflect the interests of direct and indirect market participants and other stakeholders. ICE therefore appreciates the opportunity to comment on the Proposal.

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<sup>1</sup> 87 Fed. Reg. 49559 (August 11, 2022) (RIN 3038-AF15).

<sup>2</sup> 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 (“Dodd-Frank Act”). ICE Clear Credit is also registered as a securities clearing agency under the Securities Exchange Act of 1934 (the “Exchange Act”).

<sup>3</sup> ICE Clear Europe is authorized as a central counterparty under the European Market Infrastructure Regulation (“EMIR”) and a recognized clearing house under English law. ICE Clear Europe is also a registered securities clearing agency under the Exchange Act.

<sup>4</sup> ICE Clear US has elected to be a subpart C DCO pursuant to Commission Rule 39.31.

<sup>5</sup> 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.

### **A. ICE values market participant feedback.**

The Commission proposes to require DCOs to establish and consult with a risk management committee (“RMC”) comprised of clearing members and customers of clearing members prior to making decisions that could materially affect the risk profile of the DCO. The Commission also proposes to require DCOs to establish risk advisory working groups (“RWGs”) to seek risk-based input (as opposed to commercially-driven input) from a broader array of market participants. ICE agrees that DCO committees are an important way for DCOs to engage with market participants and consider their perspectives. For this reason, all ICE’s DCOs presently have committees that include market participants and certain ICE DCOs presently also have working groups that solicit industry feedback and consult with management on different issues. ICE supports the Commission proposal to require DCOs to establish RMCs and RWGs. However, ICE does not support the proposed prescriptive requirements regarding the mandatory rotation, composition, and its over-broad view of material risk. ICE believes that the most effective approach would be to establish principles and allow a DCO the flexibility to tailor the RMCs and RWGs to DCOs’ specific characteristics. Since DCOs may be organized in a range of jurisdictions and may be registered in additional capacities, a principles-based approach also allows DCOs the flexibility to account for any corporate or regulatory requirements or market practices in those jurisdictions.

In addition, ICE notes that certain ICE clearing houses are dually-registered both as a DCO with the CFTC and as a clearing agency with the Securities and Exchange Commission (“SEC”). The SEC also has issued proposed rules on clearing agency governance and conflicts of interest (the “Clearing Agency Governance Proposal”).<sup>6</sup> Given the subject matter overlap of the CFTC DCO Governance Proposal and SEC Clearing Agency Governance Proposal, ICE urges coordination between the agencies to ensure that any such final rules are structured so that dually registered clearing houses can efficiently comply with both agencies’ rules. For example, the SEC and CFTC proposals differ related to whether RMCs are advisory committees or required to be board-level committees. In addition, it is unclear whether the CFTC’s proposed requirements on RMC rotation are consistent with the Clearing Agency Governance Proposal requiring RMC “reconstitution.” As such, ICE encourages regulatory harmonization across jurisdictions as this assists market participants and market operators in complying with regulations.

The items below are intended to respond to the Commission’s requests for comments regarding the proposed governance measures with these general comments in mind.

***Role of an RMC.*** The Proposal requires DCOs to establish one or more RMCs and sets out a consultative role for the RMC.<sup>7</sup> As noted above, certain ICE DCOs currently have risk

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<sup>6</sup> 15 U.S.C. 78a et seq., 87 Fed. Reg. 51812 (August 23, 2022).

<sup>7</sup> See, e.g., proposed § 39.24(b)(11), which reads in part:

(11) Establish one or more risk management committees and require the board of directors to consult with, and consider and respond to input from, the risk management committee(s) ... A derivatives clearing organization shall maintain written policies and procedures to make certain that:

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



committees, and in many cases these risk committees include market participants. Certain ICE DCOs have board-level risk committees with responsibility delegated by the board for governance and oversight over the DCO's risk management function.<sup>8</sup> Other ICE DCOs have consultative risk committees which make recommendations to the board. ICE understands the Proposal to allow either type of committee to satisfy the requirements for an RMC, but not to require that a DCO have both types of RMCs and supports this approach because it allows a DCO the flexibility to implement an RMC suitable to its size, markets, business model, and other regulatory requirements.

**RMC Composition.** The Proposal requires DCOs to “establish and consult with one or more RMCs comprised of both clearing members and customers of clearing members.”<sup>9</sup> The Proposal requests comments on whether the Commission should adopt additional specific RMC composition requirements.<sup>10</sup> ICE is supportive of the requirement to include both clearing members and customers of clearing members on the RMC however ICE does not believe that the Commission should adopt additional specific RMC composition requirements. Such specifics are more appropriately suited to a DCO's policies and procedures which are designed by the DCO with its own business and structure in mind.

**RMC Rotation.** The Proposal requires DCOs to maintain policies and procedures to ensure that the membership of an RMC is rotated on a regular basis.<sup>11</sup> ICE emphasizes the importance of an engaged and knowledgeable RMC that can provide effective risk management opinions to a DCO's board of directors, and notes that, in many cases, risk committees include members that are directors or management of the DCO. While ICE recognizes the potential value of fresh perspectives of new RMC members, rotation requirements could impair the value an experienced and knowledgeable RMC member provides to a DCO's risk management function. Of paramount importance to the value of an RMC is the expertise and experience of its members, which is often closely correlated with tenure. Moreover, the CFTC needs to consider that it can be difficult for DCOs to find knowledgeable individuals willing and able, with the support of their employers, to commit resources to an RMC. For these reasons, ICE does not believe the Commission should mandate rotation of RMC members.

Accordingly, ICE strongly advises against a rule requiring a minimum frequency of rotation of RMC members, given the requisite expertise of members, time commitment (on top of existing duties to their own employers) and the length of time it takes for a member to become knowledgeable and actively participate. Prescriptive requirements on the rotation of RMC members also impose a significant burden on market participants to supply appropriately experienced, knowledgeable, and available employees to participate on the RMCs, as firms may lack or be unwilling to commit resources to provide new individuals for rotation. Should such requirements be imposed on DCOs, it may be appropriate for the Commission to, in parallel,

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<sup>8</sup> ICE Clear Europe has a board-level risk committee made up of market participants as required by EMIR.

<sup>9</sup> 87 Fed. Reg. 49559, 49559-60 (August 11, 2022). As a technical comment, ICE respectfully submits that any final regulation should clarify that “customers of clearing members” means “customers for which the clearing member provides clearing services at the derivatives clearing organization”. This clarification is particularly important for DCOs that offer direct clearing access, as it narrows the proposed requirement to its intended purpose. For example, clearing members (“Contracting Parties”) at ICE NGX clear only for themselves and not for any customers.

<sup>10</sup> Id. at 49561.

<sup>11</sup> Id.



impose requirements on market participants to supply the required amount of appropriately experienced employees to participate on DCO RMCs. As the obligation to manage the risks of the DCO reside exclusively with the DCO, ICE believes the DCO has a strong incentive and is best suited to make determinations on RMC membership.

**RMC Consultation.** The Proposal requires a DCO to consult with its RMC on matters that could materially affect its risk profile, including any material change to the DCO's margin model, default procedures, participation requirements, risk monitoring practices, and the clearing of new products. ICE requests clarification that the RMC consultation requirement only applies to the clearing of new products which will materially affect the DCO's risk profile. ICE does not agree that all new products should categorically be treated as a material risk matter as not all new products will materially affect a DCO's risk profile (e.g., additional reference entities on already clearing eligible products). In addition, ICE does not believe that all new products will require changes to a DCO's clearing and operational arrangements, financial safeguards, and risk management procedure. In practice, ICE clearing houses conduct comprehensive analyses in advance of introducing new products for clearing to determine their risk implications, including consulting with market participants should the potential new product materially affect the risk profile of the clearing house. As not all new products will materially impact a DCO's risk profile, requiring consultations for all new products regardless of risk impact would significantly undermine the efficiency of the current process of introducing new products for clearing and as a result may limit or delay the ability of market participants to effectively manage their risks by utilizing a new cleared product. This type of approach appears potentially inconsistent with the policy goal of promoting clearing. Given the differences among DCOs discussed above, ICE believes that DCOs, rather than the Commission, are best suited to define for themselves what constitutes a new product in their policies and procedures. However, if the Commission moves forward with defining new products, ICE suggests focusing the definition on new classes of products, namely those that could significantly impact the DCO's risk profile via margining, liquidity, default management, pricing, or other risk characteristics that *materially* differ from those of products currently cleared by the DCO.

**RWG Design.** With respect to the design of an RWG, ICE advises against a prescriptive approach, including mandating the form and frequency of meetings, and whether and how to document the proceedings of RWG meetings. ICE recommends that Commission rules only require a DCO to convene the RWG when there is a matter that could materially affect the DCO's risk profile, rather than prescribing a quarterly RWG meeting frequency. Indeed, a DCO may not have any matters that could materially affect its risk profile and it would be inefficient and a burden on the resources of the DCO and market participants if there was a regulatory requirement to convene an RWG meeting. Further, ICE notes the challenges in finding available resources at firms to engage in various committees and advisory roles given the resource constraints currently present in the industry. Given that the Proposal creates various additional overlapping opportunities for input such as the RMC and RWG, such limited resources may be further strained. Accordingly, ICE recommends that the Commission not prescribe a specific structure of RWGs, rather, ICE suggests that the Commission establish principles and allow DCOs the flexibility to structure RWGs. Such principles may include requiring DCOs to provide forums to



obtain risk-based input from market stakeholders, which would be at the discretion of the DCO to tailor to its specific characteristics.

***Market Participant Consultation Prior to Rule Change.*** The Proposal requests comment on whether the Commission should require DCOs to consult with a broad spectrum of market participants prior to submitting any rule change. ICE believes that such requirement is inconsistent with the statutory construct of self-certification. Generally, under the Commodity Exchange Act (“CEA”), DCOs may implement a new rule or rule amendment through written certification that it complies with the CEA.<sup>12</sup> Commission Rule 40.6 implements this process and includes the content of the submission and applicable timelines, among other things. In ICE’s view, the Commission cannot require DCOs to consult prior to submitting rule changes unless the CEA is amended.

The Proposal also requests comment on whether the Commission should require DCOs to respond to market participant feedback in respect of proposed rule changes. ICE believes that the current public rule filing process provides the appropriate regulatory framework for DCOs to respond to feedback from market participants. The Commission’s current rule filing process is designed to publicly announce and explain a DCO’s proposed rule modifications and the rationale behind it. DCOs are also already required to provide a brief explanation of any substantive opposing views in the rule filing. ICE believes that this current standard ensures appropriate risk-based feedback such that filings continue to be sufficiently standardized and readily absorbable by market participants. Accordingly, ICE does not believe it is necessary to impose additional governance demands on DCOs and market participants without clear justification or regulatory benefit.

**B. ICE supports the establishment of fitness standards for committee members and policies governing committee membership.**

ICE supports the consideration of fitness standards of individual members of DCO RMCs. The Proposal requires a DCO to establish and enforce appropriate fitness standards for its RMC members. ICE agrees with the Commission’s observation that fitness standards may vary across DCOs and agrees with allowing DCOs the flexibility to determine appropriate fitness standards for their committee members.

ICE further supports the establishment by DCOs of relevant policies governing committee membership. The Proposal requires a DCO to maintain policies designed to enable its RMC members to provide independent, expert opinions in the form of risk-based input and perform their duties in a manner that supports the safety and efficiency of the DCO and the stability of the broader financial system.<sup>13</sup> ICE cautions against imposing an overly strict interpretation of an “expert” (e.g., required accreditation or certification requirements). In addition, ICE cautions

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<sup>12</sup> 7 U.S.C. 7a-2.

<sup>13</sup> From a drafting perspective, such requirement to maintain policies to enable RMC members to provide independent, expert opinions and perform their duties in a manner that supports the safety and efficiency of the DCO and the stability of the broader financial system may be more appropriately situated under Commission Rule 39.24(b) which covers governance arrangement requirements rather than Rule 39.24(c) which relates to fitness standards.



against a “one size fits all” approach, including one that mandates the type of information that can be shared among RMC members and their colleagues to obtain expert opinions. Such specifics are more appropriately suited to a DCO’s policies and procedures and are designed by the DCO with its own business and structure in mind.

### **Conclusion**

ICE appreciates the opportunity to comment on the Proposal and the engagement of the Commission and its staff in the rulemaking process. ICE shares the Commission’s goals of promoting transparency, accountability, and predictability and facilitating effective oversight. ICE respectfully requests that the Commission consider its comments in light of those goals.

Respectfully submitted,

A handwritten signature in black ink that reads "Christopher A. Edmonds". The signature is written in a cursive style with a large initial "C".

Chris Edmonds  
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Intercontinental Exchange, Inc.