

October 11, 2022

Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Via CFTC Comments Portal: <https://comments.cftc.gov>

Re: Comment on Notice of Proposed Rulemaking Regarding Governance Requirements for
Derivatives Clearing Organizations

Dear Mr. Kirkpatrick:

Nodal Clear, LLC (“Nodal Clear” or “Nodal”) appreciates the opportunity to respond to the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) Notice of Proposed Rulemaking regarding governance requirements for Derivatives Clearing Organizations (“DCOs”) (the “NOPR”).¹ As background, Nodal Clear is a registered DCO and the clearinghouse for Nodal Exchange, LLC (“Nodal Exchange”) and Coinbase Derivatives Exchange² which are both CFTC designated contract markets (“DCMs”). Nodal Clear is a wholly owned subsidiary of Nodal Exchange, itself ultimately wholly owned by the European Energy Exchange (“EEX”). Nodal Clear is a “Subpart C” DCO, having elected to comply with the requirements applicable to DCOs that have been designated systemically important (“SIDCOs”) by the Financial Stability Oversight Council. Nodal Clear respectfully submits the following comments regarding the NOPR.

I. General Comments

In general, the proposed amendments and requests for comment³ set forth in the NOPR appear to be inconsistent with the effective principles based regulatory structure traditionally adhered to by

¹ 87 FR 49559 (Aug. 11, 2022).

² Coinbase Derivatives Exchange is a registered DCM under LMX Labs LLC, formerly doing business as FairX.

³ In the NOPR, the Commission seeks comment on a number of hypothetical rule requirements. For example, on page 49560, the Commission asks “... should the Commission define what constitutes a new product for this purpose, and how should it do so?” Nodal is happy to address these questions and has done so below. However,

the Commission. Moreover, the Commission is taking such an approach in an apparent effort to alter a dynamic that is set by regulation. Nodal Clear welcomes and invites feedback from all interested parties on matters that could materially affect the risk profile of the DCO. However, after thoroughly considering such feedback, it is ultimately the DCO that must make the decision (as noted by the Commission in the NOPR).⁴

Many of the proposed amendments and requests for comment appear to create requirements to ensure that the DCO will actually consider clearing member/customer feedback before reaching its decision. In the end, the proposed rules will not change the DCO that may not consider the feedback of its clearing members and customers, but it will require all DCOs, even those that regularly consider clearing member and customer feedback, to verify any efforts through time-consuming documentation before making a material decision. This creates additional burdens to the operation of every DCO, of which some DCOs may bear much easier than others, without actually ensuring that the documented feedback will ever be heeded by the DCO that may not be doing so in the first place. Though the intentions are consistent with Nodal's business practice, the Commission cannot ensure actual consideration of clearing member and customer opinions by creating regulatory requirements to document receiving and responding to such feedback.

Nodal Clear greatly values the views and expertise shared by its clearing members via its Nodal Clear Risk Advisory Committee (discussed below) and considers it a good business practice to seek it out. Clearing member feedback is used to enhance DCO rules, operations, and risk management practices, among other areas, by challenging the assumptions of DCOs. Accordingly, Nodal believes that the principles-based approach reflective in the current regulations allows and encourages DCOs to obtain information from clearing members that could materially affect the risk profile of the DCO. Nodal believes this current principles-based approach is the most effective and equitable to all DCOs.

II. Nodal Clear's Current Governance Structure and Clearing Member Engagement

Nodal Clear supports the goals of the NOPR and currently maintains a governance structure that promotes and values feedback from clearing members and customers. However, the proposed rules would require Nodal to significantly reconfigure its governance structure without conferring any new benefit relative to Nodal's current governance structure and practices. As noted in the February 23, 2021, Market Risk Advisory Committee Central Counterparty Risk and Governance Subcommittee ("MRAC CCP Subcommittee") report, "the proposed rule changes [recommended by the MRAC CCP Subcommittee] would not align with Nodal's or MGEX's governance structure

should the Commission seek to move forward with rules of this nature, we are confident the Commission will publish a separate rule proposal setting forth the details and allow for more specific and appropriate comments.

⁴ "Finally, for the avoidance of doubt, the Commission notes that while it believes that codifying an RMC consultation requirement will significantly enhance overall DCO risk management, a DCO's board of directors has the ultimate responsibility to make major decisions with respect to the DCO." 87 FR 49560.

but Nodal and MGEX believe their existing structures achieve the goals/outcomes of the proposed changes and are therefore generally supportive of the intent/ objective of the [MRAC CCP Subcommittee] recommendation.”

Accordingly, the proposed rules, if implemented, would have a punitive impact on a DCO like Nodal Clear that embraces clearing member and customer feedback by forcing a governance restructuring at considerable cost and burden without any new or additional benefit. While some DCOs may be able to bear these costs with little consequence, other DCOs would prefer not to absorb such costs, particularly when they will not ensure the result the Commission likely intends to achieve.

Nodal Clear currently has the following governance structure in place:

Nodal Clear Governance Structure	
Nodal Clear Board of Directors	<p>Purpose: Management of the business and affairs of Nodal Clear</p> <p>Responsibilities/Authority: To approve the Nodal Clear Rules and any revision thereto, the Nodal Clear compliance procedures and any revisions thereto, and any procedures in lieu of, or in addition to, the Nodal Clear Rules or the Nodal Clear compliance procedures and any revisions thereto.</p> <p>Composition: At least five board members, provided, that at all times there is (i) at least one market participant and (ii) not less than thirty-five percent (35%) of the voting Board Members, but not fewer than two individuals, shall be Public Directors.</p> <p>Meeting Frequency: Quarterly</p>
Nodal Clear Risk Management Committee⁵	<p>Purpose: A committee of the Board that reports to the Board that aids Nodal Clear in managing the risk associated with the operation of a DCO. (i) Advises the Board on significant changes to Nodal Clear’s risk</p>

⁵ Nodal Clear Risk Management Committee Charter, available at <https://www.nodalclear.com/wp-content/uploads/2021/05/Nodal-Clear-LLC-Risk-Management-Committee-Charter-8-7-2015.pdf>

	<p>model and default procedures; (ii) Recommends to the Board standards and requirements for initial and continuing clearing membership eligibility; (iii) Advises the Board regarding the eligibility of products for clearing.</p> <p>Responsibilities/Authority: Oversees the Nodal Clear risk program on behalf of the Board with the authority to (i) monitor the risk program of Nodal Clear for sufficiency, effectiveness, and independence and (ii) oversee all facets of the risk program.</p> <p>Composition: At least 35% Public Directors, currently consists of a majority of Public Directors.⁶ Each member is also a member of the Nodal Clear Board of Directors.</p> <p>Meeting Frequency: Quarterly, but more often if necessary.</p> <p>Reporting: The Nodal Clear Risk Management Committee Chairman, or his or her designee, shall make regular reports of the Nodal Clear Risk Management Committee’s activities to the Board.</p>
<p>Nodal Clear Risk Advisory Committee⁷</p>	<p>Purpose: Established under the authority of the Chairman of the Nodal Clear Risk Management Committee of the Board of Nodal Clear, LLC as well as the Chief Risk Officer. Advises Nodal Clear in managing the risk associated with being the central counterparty to contracts cleared by Nodal Clear. (i) Advises Nodal Clear on significant changes to Nodal Clear’s risk model and default procedures; (ii) Advises Nodal Clear</p>

⁶ As such term is defined in the Commodity Exchange Act (“CEA”).

⁷ Nodal Clear Risk Advisory Committee Charter, available at <https://www.nodalclear.com/wp-content/uploads/2021/05/Nodal-Clear-Risk-Advisory-Committee-Charter-Oct-2-2015.pdf>

regarding products eligible for clearing; and (iii) Advises Nodal Clear regarding any risk related matter they believe is significant to Nodal Clear's role as a central counterparty.

Responsibilities/Authority: Provides advice, at the discretion of each member of the Risk Advisory Committee, to Nodal Clear regarding the Nodal Clear risk program, including: (a) providing advice on major risk management policy issues, financial safeguards, and financial surveillance issues; (b) recommending changes that would ensure fair, vigorous, and effective risk management; (c) recommending changes that would support the broader financial system or other relevant public interest considerations; (d) advising on risk management related matters for products eligible for clearing; (e) maintaining confidentiality of information and discussions as appropriate; (f) maintaining minutes and records of its meetings; and (g) reviewing such other matters and perform such additional activities, within the scope of its responsibilities, as the Chairman of the RAC deems necessary or appropriate.

The Risk Advisory Committee shall have the authority and discretion to consult directly with Nodal Clear staff. The Risk Advisory Committee is an advisory committee and has no decision making authority.

Composition: The Chief Risk Officer of Nodal Clear shall be a member of the Risk Advisory Committee and its Chairman. Any clearing member of Nodal Clear can appoint at least one person to be a member of the Risk Advisory Committee. The Chairman of the Risk Advisory Committee may appoint additional individuals with relevant risk

	<p>experience to be members of the Risk Advisory Committee at his or her discretion. The Chairman of the Risk Advisory Committee has the right to remove any individual from the Risk Advisory Committee at his or her discretion.</p> <p>Meeting Frequency: As often as the Chairman of the Risk Advisory Committee may deem necessary and appropriate in his or her judgment.</p> <p>Reporting: The Risk Advisory Committee Chairman, or his or her designee, shall make regular reports of the Risk Advisory Committee’s activities to the Nodal Clear Risk Management Committee and the Board. If so requested in writing by any Risk Advisory Committee member, any recommendation of the Risk Advisory Committee, or individual Risk Advisory Committee member, shall be presented to the Nodal Clear Risk Management Committee and the Board at their next scheduled meeting.</p>
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Nodal believes the governance structure described above currently accomplishes the objective of the NOPR. Below is a side-by-side comparison of Nodal Clear’s governance structure to the governance structure described in the NOPR. The intent of the below comparison is to show how Nodal Clear’s existing governance structure achieves the same objectives as the proposed rules.

Proposed Rule Requirements	Existing Nodal Clear Governance Structure	Notable Differences
39.24(b)(11) A derivatives clearing organization shall have governance arrangements that...establish one or more risk management committees and require the board of directors to consult with, and consider and	The Nodal Clear Risk Management Committee is a committee of the board that oversees and provides feedback, which is	None

<p>respond to input from, the risk management committee(s) on all matters that could materially affect the risk profile of the derivatives clearing organization, including any material change to the derivatives clearing organization’s margin model, default procedures, participation requirements, and risk monitoring practices, as well as the clearing of new products. A derivatives clearing organization shall maintain written policies and procedures to make certain that:</p>	<p>considered and addressed, on all facets of the Nodal Clear risk program on behalf of the Nodal Clear Board.</p>	
<p>39.24(b)(11)(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;</p>	<p>Per the Nodal Clear Risk Management Committee Charter, the Committee Chairman makes regular reports of the Committee to the Nodal Clear Board. The Nodal Clear Board’s consideration and response to such input is documented in the minutes of the Nodal Clear Board. It should be noted that each member of Nodal Clear’s Risk Management Committee is also a Board member thereby ensuring consideration of committee input by the Board.</p>	<p>None</p>
<p>39.24(b)(11)(ii) A risk management committee includes representatives from clearing members and customers of clearing members;</p>	<p>Per the Nodal Clear Risk Management Committee Charter, the committee must consist of at least 35% Public Directors and currently</p>	<p>Customer representation is accomplished at the Nodal Clear Board level⁸ which currently</p>

⁸ Pursuant to Commission Regulation 39.26.

	<p>consists of a majority of Public Directors. Each member is also a member of the Nodal Clear Board of Directors.</p>	<p>has one market participant and one recently retired market participant. As discussed below, clearing member representation is provided for via the Nodal Clear Risk Advisory Committee. The two public directors currently serving on the Nodal Clear Risk Management Committee provide risk management expertise as each public director has decades of professional risk management experience in financial markets. Also, neither public director is employed by a clearing member allowing for unconflicted guidance.</p>
<p>39.24(b)(11)(iii) Membership of a risk management committee is rotated on a regular basis; and</p>	<p>Each member serves until replacement, resignation, or removal.</p>	<p>As discussed below, regular rotation can be detrimental as new members must become familiar with complex risk practices. Also, <i>all</i></p>

		Nodal Clear clearing members can each appoint a representative to the Nodal Clear Risk Advisory Committee to share their expertise.
39.24(b)(12) A derivatives clearing organization shall have governance arrangements that... Establish one or more market participant risk advisory working groups as a forum to seek risk-based input from a broad array of market participants, such that a diverse cross-section of the derivatives clearing organization’s clearing members and customers of clearing members are represented, regarding all matters that could materially affect the risk profile of the derivatives clearing organization. A derivatives clearing organization shall maintain written policies and procedures related to the formation and role of each risk advisory working group. Each market participant risk advisory working group shall convene at least quarterly.	Nodal Clear maintains a Risk Advisory Committee where risk-based input is sought on material risk matters. Each clearing member is allowed to appoint a representative. The policies and procedures of the Nodal Clear Risk Advisory Committee are set out in the public charter maintained on Nodal Clear’s website.	Customer representation is provided at the Nodal Clear Board level and informally via discussions with customers. To thrive, Nodal understands that it must listen to and address the feedback of its customers. The Nodal Clear Risk Advisory Committee meets when there are material risk matters to discuss.
39.24(c)(1) A derivatives clearing organization shall establish and enforce appropriate fitness standards for:... Members of risk management committee(s);	As provided in the Nodal Clear Risk Management Committee Charter, the committee shall be composed of at least 35% Public Directors. The Board appoints Board members to serve on the Nodal Clear Risk Management Committee in accordance	None

	<p>with the Limited Liability Company Agreement of Nodal Clear and the Board shall designate the Chairman. As provided in the Nodal Clear Nominating Committee Charter, Board members shall possess the ability to contribute to the effective oversight and management of Nodal Clear, taking into account the needs of Nodal Clear, the interests of its clearing members, their customers and the public and such factors as the individual’s experience, perspective, skills and knowledge of the industry in which Nodal Clear operates. The Board qualifications as stated in the Nodal Clear Rulebook, which are applicable to the members of the Nodal Clear Risk Management Committee, include expertise in financial services, risk management, and clearing services.</p>	
<p>39.24(c)(3) A derivatives clearing organization shall maintain policies designed to enable members of risk management committee(s) to provide independent, expert opinions in the form of risk-based input on all matters presented to the risk management</p>	<p>As provided in the Nodal Clear Risk Management Committee Charter, Members shall oversee the Nodal Clear risk program, including: i) recommending changes that would ensure</p>	<p>Nodal believes it would be exceptionally difficult to obtain truly independent opinions on risk management matters</p>

<p>committee for consideration, and perform their duties in a manner that supports the safety and efficiency of the derivatives clearing organization and the stability of the broader financial system.</p>	<p>fair, vigorous, and effective regulation and risk management; and ii) recommending changes that would support the broader financial system or other relevant public interest considerations.</p>	<p>from risk management committee members that are required under the proposed rules to be representatives of clearing members and customers of clearing members. Such committee members are often inherently conflicted. Accordingly, Nodal Clear’s Risk Management Committee is comprised of at least 35% Public Directors⁹ (currently a majority) and the committee charter provides that the committee members recommend “changes that would support the broader financial system or other relevant public interest considerations.”¹⁰</p>
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⁹ As such term is defined in the CEA.

¹⁰ Nodal Clear Risk Management Committee Charter, available at <https://www.nodalclear.com/wp-content/uploads/2021/05/Nodal-Clear-LLC-Risk-Management-Committee-Charter-8-7-2015.pdf>

Accordingly, Nodal Clear asks that the Commission reconsider the proposed rules and continue to follow a principles-based approach that allows for existing governance structures that accomplish the Commission's goals in an appropriate and equitable manner for all DCOs.

III. Proposed Amendments to § 39.24(b)

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

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

Commission Request for Comment: *The Commission requests comment on whether a DCO's proposal to clear a new product should be categorically treated as a matter that could materially affect the DCO's risk profile for purposes of the proposed RMC consultation requirement given the heightened potential for novel and complex risks associated with clearing new products. If so, should the Commission define what constitutes a new product for this purpose, and how should it do so? For example, should the Commission define new products to include those that have margining, liquidity, default management, pricing, or other risk characteristics that differ from those currently cleared by the DCO? In the alternative, should the Commission require DCOs to adopt policies defining what constitutes a new product?¹¹*

Nodal Comment:

Consistent with the February 23, 2021, MRAC CCP Subcommittee report and the agreed best practices set forth on page three of the report, Nodal recommends that only those new products that could significantly impact the DCO's risk profile should require RMC consultation. A new product should not be treated categorically as a matter that could materially affect the DCO's risk profile for purposes of the proposed RMC consultation requirement. Nodal Clear clears thousands of futures contracts and regularly clears new products launched by an exchange that are simply extensions of existing contracts or contracts that have risk profiles that are similar to existing contracts. To require RMC consultation prior to launching/clearing all new products would add procedures that would create delays with no risk management value. Such a requirement could also be counterproductive as RMC members could overlook and fail to fully consider new products that present material risks as such products are obscured by the noise created by routine contract

¹¹ 87 FR 49560.

launches. Again, the current principles-based approach is effective and equitable; therefore, when consultation is deemed appropriate the DCO should follow the good business practice and principle of soliciting feedback, rather than being required to do it in all product launch cases.

Nodal Clear also does not see a need for the Commission to define what constitutes a new product that would require RMC consultation. Nodal Clear already maintains a new contract approval policy that is used to determine whether a product presents a new risk and is therefore subject to approval by Nodal Clear's Risk Management Committee, which appropriately has at least 35% public directors with risk expertise (Nodal Clear's Risk Management Committee has a majority of public directors). Also, Nodal Clear's contract approval policy has product specific considerations that would be difficult for the Commission to replicate and apply across product types for each DCO. For example, Nodal Clear's new contract approval policy requires that we consider whether an electric power contract product is associated with a geographic expansion to a new regional transmission organization. This type of specific material consideration regarding this type of product would only be known to the DCO and would be difficult to capture through a definition by the Commission. Nodal Clear also consults with its clearing members individually via informal meetings and collectively via Nodal Clear Risk Advisory Committee meetings when it seeks to clear a product that presents materially different risks. We find this consultative process to be incredibly valuable as it is used to identify and address the risk concerns of our clearing members and garner support for our risk management approach. It should also be noted that clearing members separately also make their own decisions about which product categories they will permit participants to trade.

Nodal Clear supports §39.24(b)(11) as proposed because it is consistent with the language proposed by the MRAC CCP Subcommittee, current practices of most DCOs, and the materiality criteria avoids creating an unproductive and tedious product approval process. As discussed above, Nodal has concerns regarding Commission considerations on expanding §39.24(b)(11) beyond what is being proposed.

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

Proposed Regulation Text: *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;*

CFTC Request for Comment: *The Commission requests comment on whether DCOs should be required to create and maintain minutes or other documentation of RMC meetings.*

Nodal Comment:

Nodal believes that the Commission should continue to permit DCOs to exercise their discretion as to how to best document a board's consideration of and response to input from an RMC meeting.

While a committee of a DCO board would normally maintain minutes of any Nodal Clear Risk Management Committee meetings, the documentation of input from the RMC and the board's response may best be addressed in a different format. For example, there could be instances where meeting minutes are best documented with an agenda (e.g., where the meeting is largely for informational purposes and there is little discussion) or where there is considerable discussion and the specific input is best articulated in an email or other concise form. Proposed §39.24(b)(11)(i) permits DCOs to choose the best method of documentation and should not be revised to constrain the acceptable forms of meeting a documentation requirement.

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

Proposed Regulation Text: A risk management committee includes representatives from clearing members and customers of clearing members;

CFTC Request for Comment: However, the Commission requests comment on whether it should adopt additional specific composition requirements, and if so, what those requirements should be.

Nodal Comment:

Nodal believes that soliciting and listening to customer feedback is critical to our success. Accordingly, Nodal consults with its customers constantly and provides for customer representation on its Board pursuant to Commission regulation 39.26. Similarly, Nodal also values the feedback of its clearing members and conducts both regular informal meetings as well as formal Nodal Clear Risk Advisory Committee meetings where each clearing member can present its views. Nodal is not opposed to the creation of an additional committee to establish a formal forum for customer feedback, but we are opposed to requiring that both the RMC and RWG consist of both clearing members and customers of clearing members. We believe there is value in meeting with clearing members separate from their customers as clearing members' interest in the financial integrity of the DCO is more acute because they are subject to mutualized losses via the guaranty fund and assessments.¹² Additionally, the presence of customers could chill dialogue between clearing members and the DCO as a clearing member discusses its views on risk. For example, a clearing member may not express valid concerns regarding a particular product in front of a customer when it knows such customer is interested in trading that product due to the concern that the customer may seek to shift its trading to a different clearing member that is more supportive of the new product.

Further, requiring that both the RMC and RWG consist of both clearing members and customers of clearing members seems to obscure any distinction between the two advisory groups. It seems

¹² Nodal recognizes that customers of clearing members could be impacted by recovery tools like variation margin gains haircutting and tear-up, but such risk is much more remote relative to the impact felt by clearing members via loss mutualization from the use of the guaranty fund and possible DCO assessments.

more logical to provide for a separate customer committee and a clearing member committee, but Nodal believes it is appropriate in a principles-based regulatory structure to trust a DCO to use its knowledge of its clearing members and customers to employ a committee structure that best allows for productive risk management discussions.

Nodal believes that the Commission should not adopt additional RMC composition requirements. DCOs should continue to have discretion to assemble risk committees that best reflect the needs of the particular DCO and the exchanges/products it clears. Regulatorily imposed composition requirements are likely to impair a DCO's risk management. For example, a requirement to include representatives from each product group cleared would not provide for a balanced representation of product-based risk if open interest and trading occurs predominantly in one product group.

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

Proposed Regulation Text: Membership of a risk management committee is rotated on a regular basis;

CFTC Request for Comment: *The Commission requests comment on whether it should set a minimum frequency for RMC membership rotation, what are the advantages and disadvantages of doing so, and, if it does, what that frequency should be.*

Nodal Comment:

Nodal believes that the Commission should not set a minimum frequency for RMC membership rotation. Nodal is fortunate to have members of its risk committees that are familiar with Nodal's risk practices (e.g., margin model, guaranty fund sizing, default rules) and the unique characteristics of some of its cleared products (e.g., power contracts) who are therefore able to provide informed guidance and feedback. Such expertise is both very valuable and uncommon such that replacing these members on a regular basis would be very time consuming and difficult. Nodal also recognizes the value of having new members that can provide a fresh perspective and challenge assumptions, but we believe the DCO should be permitted to assemble a risk committee that strikes the right balance between expertise and new ideas as opposed to the pro forma replacement of risk committee members.

It is also worth noting the specific dynamics in Nodal Clear's Risk Management Committee and Risk Advisory Committee. The Nodal Clear Risk Management Committee benefits greatly from the decades of financial market risk management expertise of its public directors. These public directors would be difficult to replace and regular rotation would not advance effective risk management. Additionally, as noted above, each Nodal Clear Clearing Member can appoint a representative to the Nodal Clear Risk Advisory Committee so if the purpose of rotation is to give each Clearing Member the opportunity to serve, such goal is accomplished at Nodal Clear's Risk Advisory Committee without forced rotation. Also, customer representation is accomplished at the

Nodal Clear Board level which currently has one market participant and one recently retired market participant.

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

Proposed Regulation Text: *A derivatives clearing organization shall have governance arrangements that... Establish one or more market participant risk advisory working groups as a forum to seek risk-based input from a broad array of market participants, such that a diverse cross-section of the derivatives clearing organization’s clearing members and customers of clearing members are represented, regarding all matters that could materially affect the risk profile of the derivatives clearing organization. A derivatives clearing organization shall maintain written policies and procedures related to the formation and role of each risk advisory working group. Each market participant risk advisory working group shall convene at least quarterly.*

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

Nodal Comment:

It is unclear to Nodal what the material difference is between the Commission’s proposed RMC and RWG. Both the RMC and RWG are advisory committees providing risk-based input to the DCO and both are supposed to be comprised of clearing members and customers. As described in the NOPR, the RWG is not supposed to provide commercially driven input; likewise, proposed 39.24(c)(3) requires the RMC to provide independent, risk-based opinions for the benefit of the DCO and the broader financial system. The key difference appears to be that the RWG should seek input from a “broad array of market participants” implying that the RWG might be larger. The Venn diagram of the RMC and RWG committees appears to have significant overlap. It is unclear to Nodal what risk management value is derived from having both committees as currently designed in the proposed rules.

Nodal does not believe it is necessary to prescribe the frequency of RWG meetings. It is quite possible that a quarter may pass where there have been no material risk related changes or planned changes for discussion and a meeting would be held only to meet a regulatory requirement. Nodal supports the Commission’s goal of allowing the RWG to discuss and provide input on material risk in a timely manner¹³ but believes it can be accomplished in a less prescriptive manner consistent with the Commission’s principles-based regulatory structure. For example, the

¹³ 87 FR 49561.

Commission could revise §39.24(b)(12) to provide that the RWG shall be convened by the DCO prior to the DCO making changes that could materially affect the risk profile of the DCO.

Similar to comments provided above, Nodal believes that DCOs should have discretion as to how to best document the proceedings of the RWG. For example, there could be instances where the Chatham House Rule is preferred and instances where detailed minutes might be more appropriate.

IV. Proposed Amendments to § 39.24(c)

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

Proposed Regulation Text: *A derivatives clearing organization shall establish and enforce appropriate fitness standards for: ... Members of risk management committee(s);*

Nodal Comment: Nodal supports having fitness standards for RMC members.

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

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

CFTC Request for Comment: *The Commission requests comment on whether requiring RMC members to act as independent experts, neither beholden to their employers' commercial interests nor acting as fiduciaries of the DCO raises any potential legal issues for those members. Specifically, as a matter of corporate law, would RMC members be forced to contend with competing duties or obligations to the DCO and their employer, including any duties or obligations that would foreclose RMC participation? If so, how may the goal of receiving independent, expert opinions be achieved? Should DCOs be required to have policies specific to RMC members for managing conflicts of interest?*

Nodal Comment:

As the Commission provided in proposed §39.24(c)(3), members of RMCs should perform their duties in a manner that supports the safety and efficiency of the DCO and the stability of the broader financial system. Nodal believes it would be exceptionally difficult to obtain truly independent opinions on risk management matters from risk management committee members that are required under the proposed rules to be representatives of clearing members and customers of clearing members. Such committee members are often inherently conflicted. For example, a clearing member may oppose a DCO's effort to clear a new product where that clearing member is currently providing such product on a bilateral basis and the DCO cleared product would

compete with the product offered by the clearing member. Accordingly, Nodal Clear’s Risk Management Committee is comprised of at least 35% Public Directors¹⁴ (currently a majority) and the committee charter provides that the committee members recommend “changes that would support the broader financial system or other relevant public interest considerations.”¹⁵

Nodal believes public directors are better able to provide truly independent risk-based input than clearing members and customers even where such clearing members and customers are subject to DCO policies designed to enable independence. The Commission should revise the proposed rules to accommodate risk management committee membership policies that are arguably better at meeting member independence objectives.

V. Request for Comment

A. Market Participant Consultation Prior to a Rule Change

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

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

As noted above, Commission regulations currently require a DCO to provide to the Commission a “brief explanation of any substantive opposing views.” Should the Commission further clarify the meaning of “substantive” in the context of this requirement? Should a DCO be required to provide the Commission with a report of all opposing views expressed to the DCO? Rather than expecting the DCO to accurately describe opposing views, should the Commission only require a DCO to pass on to the Commission any opposing views expressed to the DCO in writing? Should a DCO be required in its submission to the Commission to respond to opposing views expressed to the DCO? Finally, should the Commission consider additional rules to address a DCO’s failure to comply with the full submission requirements of Part 40, such as the imposition of an automatic stay?

¹⁴ As such term is defined in the CEA.

¹⁵ Nodal Clear Risk Management Committee Charter, available at <https://www.nodalclear.com/wp-content/uploads/2021/05/Nodal-Clear-LLC-Risk-Management-Committee-Charter-8-7-2015.pdf>

Nodal Comment:

Nodal Clear currently consults with its clearing members regarding all material rule changes. Additionally, the vast majority of Nodal Clear's rule filings are made pursuant to §40.6 which provides, in part, that a DCO must post its rule change filing on its website concurrent with the filing of the rule change with the Commission and that such rule change cannot become effective for at least 10 business days. Between Nodal's current practices and existing rule change regulations, market participants have the opportunity to comment on rule changes and the Commission has authority to seek comment from market participants before a rule change is effective.

Regarding responding to feedback, at Nodal Clear it is common to have discussions with clearing members where Nodal Clear responds to feedback regarding proposed DCO decisions. It has been Nodal's experience that customers of clearing members are less interested in DCO rulebook changes (though Nodal welcomes discussions with customers that express an interest). Accordingly, Nodal Clear does not believe it is necessary to create a requirement that a DCO respond to market participant feedback, although that is what Nodal would normally do. The costs and burdens associated with documenting compliance with such a rule (e.g., potentially recording phone calls with market participants and/or taking minutes of informal meetings) would greatly outweigh any limited benefit, particularly when existing regulations provide for sufficient opportunity for participants to comment.

The Commission does not need to further clarify the meaning of "substantive" or require a DCO to provide the Commission with a report of all opposing views expressed to the DCO. The current regulation and process (i.e., the DCO must provide a brief explanation of substantive opposing views) is effective, equitable, and efficient for all DCOs. It ensures that non-substantive opposing views are omitted and prevents unnecessary delay in the regulatory review process. Additionally, the transparent nature of the current rule filing process allows the Commission to request additional information both via a direct request to the filing DCO and/or via a stay and request for public comment.

B. RMC Member Information Sharing with Firm to Obtain Expert Opinions

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

Nodal Comment:

It is unnecessary to create a rule that requires a DCO to maintain policies and procedure for sharing risk committee information. The extent of sharing between a DCO and its risk committees that is permitted tends to be case specific. For example, a DCO may allow information regarding performance metrics to be shared more broadly than information regarding upcoming commercial initiatives. Additionally, Nodal, as well as other DCOs, already has processes in place to properly manage the sharing and protection of confidential information as it is already within a DCOs interest to protect such discussions.

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Nodal Clear appreciates the opportunity to comment on the Notice of Proposed Rulemaking.

Respectfully submitted,

/s/ Cody Alvarez

Cody Alvarez
Chief Compliance Officer &
Corporate Counsel