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February 13, 2023

VIA CFTC PORTAL

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

Re: RIN 3038-AF12 Reporting and Information Requirements for Derivatives Clearing Organizations

Dear Mr. Kirkpatrick:

The Options Clearing Corporation ("OCC") appreciates the opportunity to submit these comments on the above-reference proposal ("Proposal" or "Proposed Rules")[1] under the Commodity Exchange Act ("Exchange Act"). The Proposal would amend certain of the daily and event reporting requirements for derivatives clearing organizations ("DCOs") under Part 39 of the CFTC's regulations.[2]

About OCC

OCC, founded in 1973, is the world's largest equity derivatives clearing organization. OCC operates under the jurisdiction of both the CFTC and the Securities and Exchange Commission ("SEC"). As a registered DCO under CFTC jurisdiction, OCC clears transactions in futures and options on futures. As a registered clearing agency under SEC jurisdiction, OCC clears transactions for exchange-listed options. OCC also provides central counterparty clearing and settlement services for securities lending transactions. In addition, OCC has been designated by the Financial Stability Oversight Council as a systemically important financial market utility ("SIFMU") under Title VIII of the Dodd- Frank Wall Street Reform and Consumer Protection Act. As a SIFMU, OCC is also subject to oversight by the Board of Governors of the Federal Reserve System. OCC operates as a market utility and is owned by five exchanges.[3]

Summary and Overall Comments

OCC supports and appreciates the Commission revisiting the Part 39 reporting requirements in light of the feedback it has received from DCOs and the Commission's experience with Part 39 reporting following the most recent amendments in 2020.[4] Given the compliance and technology resources

[1] RIN 3038-AF12 Reporting and Information Requirements for Derivatives Clearing Organizations (Nov. 10, 2022), 87 FR 76698 (Dec. 15, 2022) ("Release").
[2] 17 CFR 39.
[3] Additional detail on OCC's ownership structure is provided in fn. 55, below
[4] RIN 3038-AE66 Derivatives Clearing Organization General Provisions and Core Principles, 85 Fed Reg. 4800 (Jan. 27, 2020).

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required to ensure timely and accurate daily and event reporting, OCC further supports the Commission's continued focus in the Proposed Rules to ensure that it is receiving the most relevant data from DCOs to support the Commission's supervision function.

In particular, OCC supports the Proposal's removal of the requirement for DCOs to report certain information at the individual account level. The Commission previously recognized the obstacles to such reporting when it granted no-action relief to impacted DCOs in 2021,[5] and the Proposed Rules would appropriately codify that relief. OCC also supports the removal of certain duplicative reporting requirements and the clarification of ambiguities concerning DCOs' obligations to report customer LEI information, as well as the delegation of authority for routine matters to the staff and the division director.

OCC also generally supports the addition of new Appendix C to Part 39 to replace the Reporting Guidebook ("Guidebook"). Codifying the reporting requirements increases clarity and transparency both for impacted DCOs and for the public (in terms of the scope of the Commission's surveillance and analytical capabilities). However, we have concerns about the design of certain of the new reporting fields in proposed Appendix C, including those related to variation margin timing and reporting of margin model back testing results. With respect to both, the proposed reporting fields may not align closely enough with DCO practice to provide the Commission with the information necessary to achieve the policy goals identified in the Proposal.

While we are supportive of the Commission's goal of increasing regulatory clarity and enhancing its ability to effectively supervise entities and markets within its regulatory ambit, OCC has reservations about certain aspects of the Proposal. OCC is particularly concerned by the proposed changes to the system safeguards reporting requirements in § 39.18.[6] OCC agrees with the Commission that both DCOs and the Commission benefit from clarity in the rule.[7] However, the proposed changes would have the effect of drastically increasing the number of required reports, leading to significant demands on the resources of both DCOs and the Commission to prepare and review reports of largely immaterial incidents. In addition, the proposed changes would introduce ambiguity and subjectivity through the addition of "operator error" as a reporting trigger and the inclusion of potentially overbroad definitions of "automated system" and "hardware or software malfunction." Finally, the requirement to report threats that "could compromise" certain systems, including certain third-party systems, is unclear in its scope, and has the potential to discourage capable third-parties from providing critical services to DCOs. As a result, the benefits of the amendments, as described, do not appear to outweigh the significant costs they impose.

In our detailed comments below, we address each relevant provision[8] of the Proposal and, where appropriate, identify potential alternatives or revisions that we believe will accomplish the Commission's stated goals while minimizing new operational and administrative burdens on the

[5] CFTC Letter No. 21–01 (Dec. 31, 2020). The relief was extended in 2021 and again in 2022. *See* CFTC Letter No. 21–31 (Dec. 22, 2021); CFTC Letter No. 22–20 (Dec. 19, 2022).
[6] Release at 76716.
[7] *See* Release at 76701.
[8] Because OCC does not clear fully collateralized positions as a DCO, OCC offers no comments on the proposed amendments to, §§ 39.19(c)(1)(ii) and 39.21(c)(3), (4), & (7), or to the addition of new § 39.13(h)(5)(iii). OCC does not object to those aspects of the Proposal.

Commission and DCOs, and eliminating ambiguities that could lead to the need for future clarifying rulemaking or other relief.

Detailed Comments

Please note that for ease of reference, our detailed comments below are presented in the order in which the relevant provisions are discussed in the Proposal.

§ 39.15(b)(2): Commingling Approvals

The Commission proposes several revisions to § 39.15(b)(2), which sets forth the procedures a DCO must follow when it seeks to obtain Commission approval to commingle customer positions and associated funds in a futures or cleared swaps customer account. The proposed changes appear reasonably calibrated to achieve the Commission's policy objectives while providing useful guidance to DCOs on the required contents and relevant standard for future rule filings seeking approval to commingle positions. As such, OCC is supportive of this aspect of the Proposal.

§ 39.18: System Safeguards Reporting

The Commission proposes revisions to systems-related reporting requirements in § 39.18 regarding exceptional events. As proposed, amended § 39.18(g)(1) would require a DCO to report any hardware or software malfunction or operator error that impairs, or creates a significant likelihood of impairment of, automated system operation, reliability, security, or capacity.[9] Amended § 39.18(g)(2) would require a DCO to report any security incident or threat that compromises or could compromise the confidentiality, availability, or integrity of any automated system or any information, services, or data, including, but not limited to, third-party information, services, or data, relied upon by the DCO in discharging its responsibilities.[10] The Commission would also add to § 39.18(a) definitions of "automated system" and "hardware or software malfunction."[11]

OCC is keenly aware of the importance of system safeguards to the functioning of the financial markets and understands the evolving security threats that DCOs face in the current environment. Moreover, OCC fully recognizes that the Commission must be notified of certain types of systems-related events to fulfill its oversight responsibilities. OCC agrees with the Commission that both DCOs and the Commission benefit from clarity in § 39.18(g). However, OCC is concerned that the Proposal would introduce additional ambiguity and subjectivity and create significant demands on the resources of both DCOs and the Commission to prepare and review reports of immaterial incidents. OCC offers certain amendments to the Proposal described below that would accomplish the Commission's goal of ensuring greater consistency of reporting across DCOs while minimizing new operational and administrative burdens on DCOs.

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[9] Release at 76716.
[10] *Id.*
[11] *Id.*

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Materiality Threshold

Of paramount concern to OCC is the proposed removal of the materiality threshold for reportable events. As proposed, the amended rule would substantially increase the burden on the Commission and DCOs, particularly those, such as OCC, that are subject to multiple regulatory regimes.

If adopted as proposed, the amended rule would require significant expenditure of effort by critical personnel within OCC, all for the purpose of providing the Commission with minimal marginal benefit. OCC's processes to comply with the requirements of existing § 39.18 are instructive. Currently, OCC maintains processes that include:

(1) Ongoing automated and manual monitoring of relevant systems and applications to identify potentially reportable incidents.
(2) When such an incident is identified, the preparation of a preliminary impact assessment ("PIA"). Each PIA requires input from and review by staff across different departments to ensure that all relevant facts and circumstances regarding an incident are considered.
(3) Review of the PIA to determine if the event is material, which includes assessing the operational and financial impact to OCC and market participants.
(4) For each material event, preparation of a report for regulatory submission, which requires time to gather needed information, obtain confirmation from OCC personnel with authority and knowledge on the incident, draft the report, and ensure review by appropriate individuals, including management-level staff and, as needed, senior technical personnel.
(5) Creating appropriate policies and procedures, and training relevant personnel, as to all of the above.

In addition, pursuant to the requirements of the SEC's Regulation Systems Compliance and Integrity ("Reg SCI"),[12] OCC prepares and submits a quarterly *de minimis* events report, a consolidated report with summary descriptions of all *de minimis* events that occurred during the preceding quarter.[13] In OCC's experience, the number of *de minimis* events is significantly higher than immediately reportable events under Reg SCI, and thus the preparation of a quarterly *de minimis* events report in lieu of preparing a full report for each incident saves considerable time and resources.[14]

Removing the materiality threshold in § 39.18 would substantially increase the number of reportable events, including immaterial events that pose no significant risk to OCC's ability to fulfill its core clearing, settlement, and risk management functions, or to the market more generally. OCC is

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[12] As a registered clearing agency under SEC jurisdiction, OCC complies with Reg SCI, which imposes a framework to notify the SEC of certain events, among other requirements. Pursuant to Reg SCI, OCC is required to notify the SEC within 24 hours of SCI events ("immediately reportable events"), other than *de minimis* events which are subject to quarterly reporting. SCI events include systems disruptions, systems compliance issues, and systems intrusions in respect of SCI systems, which encompass systems that, with respect to securities, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance.17 CFR 242.1000 *et seq.*
[13] 17 CFR 242.1002(b)(5)(ii).
[14] *See* Regulation Systems Compliance and Integrity, Securities Exchange Act Release No. 34-73639 (Nov. 19, 2024), 79 FR 72251, 72381-72385 (Dec. 5, 2014) ("Reg SCI Adopting Release") (including a discussion regarding the number of reportable events and the costs of compliance).

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concerned that the Commission has significantly underestimated the time and resources needed to prepare and submit the additional incident reports each DCO would be required to make if the Proposal were adopted, which would not provide a concomitant benefit to any party. The process for identifying, assessing, and reporting covered incidents and threats (as described in Steps 1-5, above) is time and resource intensive, and requires the focus of senior personnel with significant operational and risk management responsibilities. Requiring some version of this process for myriad immaterial reports could divert attention and resources from DCOs' most critical needs. Such an increase in reportable events would also impact the Commission's ability to effectively leverage its resources to conduct efficient oversight of DCOs; the removal of the materiality threshold will create a burden for Commission staff, who will be required to review a large number of detailed reports of immaterial events, rather than focusing on critical events impacting DCOs and the market.

Though the release states the Commission's view that "neither hardware nor software malfunctions, nor security incidents or threats—particularly cybersecurity incidents or threats—are readily categorized as material or non-material,"[15] that conclusion appears to be inconsistent with the one drawn by the Commission's peer regulators. In addition to the SEC's Reg SCI (discussed above and in footnote 19, below), in November 2021, several prudential regulators of banking institutions issued a joint rule requiring incident reporting by bank service providers, which included an explicit materiality threshold for defining reportable incidents.[16] Notably, international efforts are ongoing to create greater convergence in incident reporting standards, which raises additional questions about the Commission's choice to diverge from what appears to be an emerging domestic consensus around the inclusion of a materiality threshold.[17]

OCC believes that prior to finalizing any amendment to § 39.18, the Commission should carefully consider the feedback it receives from DCOs regarding the burden of compliance with the current Proposal. The Commission estimates that the amendments will require DCOs to file an additional four reports per year, on average, and this additional reporting will cost each DCO approximately $152 per year.[18] Based on its experience with similar – and arguably less broad – requirements under Reg SCI, OCC believes four additional reports per year is a significant underestimate given the removal of the materiality standard and the ambiguity and broadness introduced in the Proposal's terminology.[19] As discussed in more detail below, the "could compromise" language alone could

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[15] Release at 76701.

[16] 12 C.F.R. §§ 53.4, 225.303, 304.24; Office of the Comptroller of the Currency, Federal Reserve System, and Federal Deposit Insurance Corporation, *Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers* at 74 (Nov. 18, 2021), available at: https://www.federalreserve.gov/newsevents/pressreleases/bcreg20211118a.htm (requiring reporting when the bank service provider determines that it has experienced a computer-security incident that has materially disrupted or degraded, or is reasonably likely to materially disrupt or degrade, covered services provided to such banking organization for four or more hours") (last accessed February 10, 2023).

[17] *See* Financial Stability Board, *Achieving Greater Convergence in Cyber Incident Reporting* (October 17, 2022), available at: https://www.fsb.org/wp-content/uploads/P171022.pdf (last accessed February 10, 2023).

[18] Release at 76711.

[19] For comparison, in its final rule, following input by potentially impacted entities, the SEC estimated 24 systems disruptions, 20 systems compliance issues, and one systems intrusion per year for each SCI entity and an overall burden estimate of 1,080 hours per entity for events that are not *de minimis* under Reg SCI. For reporting of *de minimis* events including a summary description on a quarterly basis, the SEC estimated 160 hours per entity on an annual basis, which

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scope in thousands of reportable threats for each DCO. Additionally, the Commission has undervalued the time and resources involved in the preparation of a report.[20] Given that the Proposal does not suggest that different types of reports will require different amounts of information, each report a DCO submits will require considerable time and resources from technology, security, and operations staff to gather and research facts and circumstances, legal and compliance staff to draft and review notices, and management personnel and other individuals with relevant knowledge to review and provide confirmation, as needed. Aside from the costs associated with renegotiating third-party contracts, OCC notes that including third parties in the Proposal scope will require additional time and resources from DCOs for submissions, including to coordinate receipt of necessary information and provide third parties with the opportunity to review factual information, to the extent required to do so by contract.

Scope and Applicability

In the Proposal, the Commission indicated that it intended to create a "clear, bright-line rule that requires DCOs to report each qualifying hardware or software malfunction, or operator error, and security incident and threat."[21] It pointed to the removal of the materiality threshold as the means of doing so. However, OCC is concerned that the proposed definitions of "automated system" and "hardware or software malfunction" in proposed § 39.18(g)(1), and the term "could compromise" in §39.18(g)(2) are each overly broad and ambiguous, thereby undermining the Commission's goal of creating clarity. When considered collectively, along with the removal of the materiality threshold, these changes would have the effect of dramatically increasing the reach and burdens of the rule.

"Automated Systems": Proposed § 39.18(g)(1) would require DCOs to report "[a]ny hardware or software malfunction or operator error that impairs, or creates a significant likelihood of impairment of, automated system operation, reliability, security, or capacity."[22] The Proposal would define "automated system" to mean "computers, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related resources that a [DCO] uses in its operations."[23] As proposed, "automated system" could be read to encompass most, if not all, parts of a DCO's network, including systems that narrowly, if at all, impact either the DCO's core settlement and clearing functions or market participants, and pose no significant risk to the market. By way of example, "computer" could include individual workstations, regardless of the job function of the user, and "software" could include time-tracking or chat applications used as part of a DCO's daily operations. As demonstrated by these examples, absent further guidance from the Commission, it will be difficult for a DCO to determine with any confidence whether any system used for any purpose by the DCO does not fall within the ambit of the rule.

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would certainly exceed the Commission's estimated cost of $152 a year for the additional reporting. Reg SCI Adopting Release at 72384-85.

[20] The Commission has valued the submission of each additional report at $38, which OCC has calculated by dividing $152, the estimated cost of the additional reporting per year, by 4, the estimated number of additional reports per year. *Supra, fn.19 and accompanying text*.

[21] Release at 76701.

[22] Release at 76716.

[23] *Id.* (proposed amendment to § 39.18(a)).

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"Hardware or Software Malfunction": The Proposal would define "hardware or software malfunction" as "any circumstance where an automated system or a manually initiated process fails to function as designed or intended, or the output of the software produces an inaccurate result."[24] Considering the scope of this definition, the phrases "fails to function as designed or intended" and "produces an inaccurate result" are both overly inclusive and ambiguous. The definition would scope in minimally impactful events that do not implicate the Commission's policy concerns. For example, under this definition, a broken screen on a DCO's video conferencing setup may be a "hardware malfunction" under the Proposal, since the camera failed to function as designed or intended. Similarly, an inaccurate result in software that is part of a DCO's development or testing environment would be deemed a "software malfunction" under the Proposal despite serving its intended function of finding issues prior to production.

"Operator Error": The subjective nature of the term "operator error" in proposed § 39.18(g)(1) creates a likelihood that DCOs operating in good faith may nevertheless interpret it in different ways, thus undermining the Commission's stated goal of creating consistency of reporting across DCOs by adding clarity to § 39.18. It is unclear who an "operator" is for purposes of the Proposal or what type of "error" warrants reporting under the rule. Depending on how broadly this term is construed, a reportable event might include an accidental workstation reboot by a system administrator or an employee coding error with no impact to the market. Indeed, given that clearing members are responsible for providing information to OCC via applications provided by OCC, an "operator" of OCC's systems could even be construed to include an agent or employee of such a clearing member. OCC would have limited ability to identify and investigate errors by such putative "operators" for purposes of the proposed reporting requirements. As importantly, operator errors are frequently immediately detected and remediated due to manual or automated cross-checks, logging, or other validation controls such as management or security review. Reports triggered by such events, absent any limitation based on imminence, extent, or likelihood of harm, would have minimal value to the Commission from a risk surveillance perspective, in OCC's view.

"Could Compromise": Proposed § 39.18(g)(2) would require DCOs to report "[a]ny security incident or threat that compromises or could compromise the confidentiality, availability, or integrity of any automated system or any information, services, or data, including, but not limited to, third-party information, services, or data, relied upon by the DCO in discharging its responsibilities."[25] The requirement to report any incident or threat that "could compromise" is particularly ambiguous in scope and lacks any measure of proximity to a DCO's core clearing, settlement, and risk management functions. Because each represents a threat that could, under certain conditions, impact a system relied upon by a DCO in discharging its responsibilities, it appears that a DCO may be required to report hundreds of phishing attempts, routine activities thwarted by its cyber defenses, and publicly known security threats that have not even been directed at the DCO, but of which DCOs are aware. We do not believe the Commission intended or would be well served by this result.

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[24] *Id.*
[25] *Id.*

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Impact on Third-Party Relationships: We are also concerned that, as proposed, new § 39.18(g)(2) will increase the costs to DCOs of obtaining third-party services, and may force DCOs to terminate existing third-party relationships and seek alternate sources of supply, including for mission-critical services. OCC, like other DCOs, negotiates security terms in third-party service agreements, which include provisions with respect to applicable third-party regulatory obligations. For certain third-party agreements, this includes obligations to provide information to OCC so that OCC can satisfy its reporting obligations relating to systems integrity and cyber threats.[26] If adopted as proposed, OCC would be required to renegotiate contracts with such third parties to ensure OCC is notified of events subject to the amended rules, including potential incidents or threats. Not only would such renegotiations impose an additional cost on OCC and the third parties, there is a risk that – especially without a materiality qualifier - service providers may be reluctant to agree to new obligations based on the ambiguous language discussed above in light of liability concerns, given the ambiguity and likely requirement to notify DCOs of potentially numerous commonplace activities or remote threats that pose little, if any, risk to the DCO.[27] We urge the Commission to consider these implications, as well as the additional costs they imply for DCOs and third-party service providers, in any final rule.

<u>Recommendations</u>

In light of the above, OCC suggests the Commission amend the Proposal to provide certainty regarding reporting obligations and lessen the operational and administrative burdens on DCOs. First, OCC suggests that the Commission remove the ambiguity and broadness introduced by certain terms discussed above, such as "automated systems" or "hardware or software malfunction." These definitions should be refined to avoid reports of systems and incidents that narrowly, if at all, impact market participants and pose no significant risk to a DCO's core functions. Additionally, OCC suggests that the Commission add certainty by incorporating examples of "operator error" and removing "could compromise" from the Proposal to focus the scope of the requirements and avoid DCOs reporting events with little value from a market risk perspective.

In order to avoid regulatory overlap and ensure that DCO reporting is limited to matters that inform the Commission in its jurisdiction and consistent with its derivatives-market surveillance mission, we further suggest that the Commission limit these definitions to only those systems or events that impact DCOs' market activities that are subject to the Commission's jurisdiction. This would be consistent with the approach taken by the SEC under Reg SCI, which limits the definition of SCI

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[26] *See* Securities Exchange Act Release No. 34-96113 (Oct. 20, 2022), 87 FR 64824 (Oct. 26, 2022) (File No. SR-OCC-2021-802) ("SEC Cloud Infrastructure Notice"), at fn. 6 (referencing the inclusion of terms and conditions in OCC contract with cloud service provider designed to enable OCC to comply with Reg. SCI).

[27] By way of illustration, OCC has contracted with a large cloud services provider Amazon Web Services ("AWS") for certain cloud-based webhosting services relating to core OCC clearing and settlement functions. *See* SEC Cloud Infrastructure Notice. As proposed, §39.18(g)(2) would require OCC to report to the CFTC "any . . . threat that . . . could compromise the confidentiality, availability, or integrity of any . . . third-party information, services, or data, relied upon by [OCC] in discharging its responsibilities." Absent any qualifiers pertaining to imminence, potential extent of harm, or likelihood of impact, the term "any . . . threat that . . . could compromise" AWS is so expansive that it would encompass nearly every identified cyber threat anywhere in the world, given AWS's scale.

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systems to "systems that, *with respect to securities*, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance."[28]

Finally, OCC urges against increasing the scope of reporting in such a manner that would substantially increase the number of reportable events without clear benefit to DCOs or the Commission. As experts in their markets and systems, OCC believes that DCOs are best positioned to determine which incidents are material in their impact on the DCO, its members and their customers, or the markets generally. The Proposal would effectively remove this decision-making authority from DCOs and lead to a significant increase in the number of reportable events, primarily consisting of immaterial events, with little corresponding benefit to the Commission, the protection of market participants, or the risk management practices of DCOs.[29] Should the Commission nevertheless determine to require reporting of all events, irrespective of materiality, OCC recommends that the Commission clarify that DCOs may submit a report at each quarter end with summary descriptions of all of the events from the preceding quarter that the DCO, in its judgment, deemed to be not material.[30] As discussed above, the Commission should carefully consider the extent of the resources each DCO commits to analysis and review for each event report. A quarterly report summarizing non-material events would allow the Commission and DCOs to focus their attention and resources on managing critical events while ensuring that the Commission remains informed of systems-related events to fulfill its oversight responsibilities. A quarterly report requirement would also align with the Commission's desire to promote consistency in materiality assessments across DCOs. A quarterly report would provide Commission staff with sufficient information to assess, on an ongoing basis, the materiality determinations of each DCO. To the extent the staff had concerns about the standard applied by any DCO, it would then be able to address those concerns directly with the DCO. OCC believes that under these proposed changes, the Commission will be able to ensure effective oversight and achieve its policy goals, while also promoting efficient use of staff and DCO resources.

§§ 39.19(c)(1)(i)(B) & (C): Individual Account Level Reporting of Variation Margin and Cash Flows

The Commission proposes to amend §§ 39.19(c)(1)(i)(B) & (C) by removing the requirement for DCOs to report daily variation margin and cash flows by individual customer account. As noted in the Proposal, the requirement to report by individual customer account was adopted in 2020, but the Commission provided no-action relief to DCOs in December 2020,[31] prior to the rule taking effect, and has twice extended that relief.[32] OCC, other DCOs, and the Futures Industry Association (FIA), on behalf of its members, sought that no action relief as a result of the significant technical and

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[28] 17 CFR 242.1000.
[29] Section 15(a) of the CEA specifies that costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. 7 U.S.C. 19(a).
[30] As noted above, such an approach would be consistent with the existing obligations of dually registered DCOs. 17 CFR 242.1002.
[31] Release at 76701-02, fn. 16.
[32] *See supra*, fn. 5.
[32] *See* Letter from Joe Kamnik (Sept. 13, 2019) ("OCC 2019 Comment Letter") at pp. 4-6.

operational issues presented by the obligation to report by individual customer account. Some of those technical and operational issues were detailed in OCC's comment letter in response to the July 2019 proposal to add the account-level reporting requirement.[33]

OCC welcomes the Commission's willingness to revisit this provision in light of the feedback received from DCOs following the adoption of the 2020 amendments to §§ 39.19(c)(1)(i)(B) & (C). We appreciate the Commission's clarification that the 2020 amendments "were not intended to require DCOs to report any information that they do not currently have, or do not currently report," and its recognition, based on consultation with impacted DCOs, including OCC, that "many DCOs do not possess customer-level information regarding variation margin and cash flows."[34] Because, consistent with industry standard practice, OCC does not, in the regular course of its business, collect variation margin and cash flow information at the individual account level from clearing members, compliance with the requirement would require OCC to issue new rules for clearing members mandating the collection and reporting of such information. Doing so would impose significant costs on both OCC and its clearing members.[35] Moreover, as OCC (like other DCOs) engages in variation margin netting at the customer origin level (rather than the individual account level), variation margin and cash flow information at the individual customer account level would provide little information about OCC's actual current exposure to any given clearing member's customers. Therefore, the information would be of limited utility to the Commission in its stated goal of understanding whether DCOs have adequate measures in place to address those customers whose positions create the most risk.

Given the fact that this information is not currently available to DCOs and the imbalance between the anticipated costs and benefits of obtaining and reporting it, OCC supports the proposed amendments to § 39.19(c)(1)(i)(B) & (C) to remove the customer-level variation margin and cash flow reporting requirements. DCOs, clearing participants, and the Commission will all benefit from the certainty provided by including a resolution to this issue in the form of a final rule, rather than a series of no-action letters.

New Appendix C to Part 39: Codification of the Guidebook

OCC strongly supports the Proposal to add a new Appendix C to Part 39 to codify the reporting fields for the daily reporting requirements in § 39.19(c)(1).[36] OCC believes that codifying the reporting fields, which are currently provided in the Guidebook issued by the Commission's Division of Clearing and Risk ("DCR"), provides clarity and transparency to market participants and the public.

As noted in the Proposal, OCC has regularly engaged with DCR staff on revisions to the Guidebook, as well as to address issues arising from daily reporting, and finds this dialogue to be fruitful and

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identifying aspects of the proposed rule that were inconsistent with OCC's processes) and noting that OCC anticipated the necessary technological and operational changes required to implement the proposal would entail a "costly, long-term effort"), *available at* https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=28972 (last accessed February 10, 2023).

[34] Release at 76701.

[35] *See* Letter from OCC *et al.* to Clark Hutchison, Director, CFTC Division of Clearing and Risk (Nov. 6, 2020).

[36] Release at 76702-04. Note that the proposed new reporting fields are discussed below.

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constructive. OCC looks forward to continuing such cooperative engagement with the staff going forward, irrespective of the format in which the daily reporting fields are provided.

§ 39.19(c)(1)(iii): Inclusion of Additional Data Fields

The Commission proposes to add new § 39.19.(c)(1)(iii), which would provide that "notwithstanding the specific fields set forth in [new Appendix C], a [DCO] may choose to submit, after consultation with DCR staff, any additional data fields that is necessary or appropriate to better capture the information that is being reported."[37] OCC supports the inclusion of a rule explicitly providing a DCO with the ability to add new data fields if and when necessary for completeness or clarity. However, to provide flexibility to DCOs given the potential timing issues attendant to daily reporting and ambiguity as to the extent of the consultation requirement, we suggest that the Commission replace the phrase "consultation with" to "notification to." Furthermore, for the avoidance of doubt as to whether a DCO is subject to an ongoing obligation to report on any such additional data field following the date of the initial inclusion, we suggest that the Commission clearly state that after the first date of inclusion, a DCO will not have an obligation to continue to include such additional data fields other than as agreed to in writing by the DCO and Commission staff.

§ 39.19(c)(1): Proposed New Reporting Fields for the Daily Reporting Requirements

The Commission proposes to add several new reporting fields to the Part 39 daily reporting requirements, which would be included in new Appendix C to Part 39, of which two are relevant to OCC.[38]

Variation Margin Timing

First, the Proposal would add fields requiring DCOs to report certain timing information about variation margin calls and payments. The Proposal states that this information is "directly relevant to DCO liquidity," and that receiving it on a daily basis would "support [the Commission's] ongoing surveillance and oversight of DCOs and the markets, including potentially identifying liquidity issues as they develop. . . ."[39] The Proposal further states that the Commission "anticipates that this information would be useful for historical analysis to evaluate whether potential deficiencies exist regarding DCO liquidity as it relates to the collection and payment of variation margin, including whether and how particular market circumstances contribute to liquidity issues." While OCC recognizes the Commission's interest in seeking to analyze DCO and clearing member liquidity, and market risk more generally, we do not believe the Proposal, as currently drafted, would support the Commission's policy goals. As described in more detail below, OCC's current practice for making margin calls and the manner and timing of the collection of such payments is unique to our operation, highly complex and centered around ensuring compliance with our rules. We expect other DCOs' practices are similarly bespoke. Given those idiosyncrasies, it does not appear that raw data

[37] Release at 76703, fn. 21.
[38] Because the new risk ladder and trade date/event description fields only apply to DCOs that clear interest rate swaps, forward rate agreements, and inflation index swaps, OCC is not offering comments on the Proposal as it relates to those fields.
[39] Release at 76702-03.

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on gross variation margin payments and granular time stamps on variation margin calls and payments would provide the Commission with actionable insight "in evaluating risks at each DCO and across the derivatives markets." Below, we provide additional information about our margin call and payments practices that informs our views. Where appropriate, we have offered some alternative data points for consideration should the Commission determine to proceed with the Proposal.

Generally, OCC has a single daily settlement for futures clearing members, referred to by OCC and its clearing members as the start-of-day ("SOD") settlement cycle, though the timing of payment may differ depending on whether there is a net payment obligation to or from OCC, as well as whether the relevant account is one that is subject to cross-margining with another DCO ("X-M Account").[40] Pursuant to OCC's rules and the terms of OCC's cross-margining agreement with CME, each clearing member is required to pay to OCC/CME at or prior to 7:30 A.M. Central Time (for X-M Accounts) or pay to OCC at or prior to 8:00 A.M. Central Time (for non X-M Accounts) the amount of any *net* daily premium and variation payments due to OCC for each such clearing member's accounts on that day, as calculated based on the clearing member's end of day positions from the prior business day.[41] Cash amounts due *from* OCC to clearing members in each account are required to be paid at or prior to 1:00 P.M. Central Time each business day, and similarly reflect *net* obligations.[42] In the ordinary course, OCC does not require payment of intra-day margin on futures,[43] but may assess such margin as appropriate, in its discretion.[44]

Whether in connection with the SOD cycle or an intra-day settlement, OCC does not receive or issue payments directly from or to clearing members to satisfy daily settlement. Instead, OCC instructs clearing banks to debit or credit a clearing member's accounts in order to effect settlement.[45] Clearing members are required to establish and maintain an account at an OCC approved clearing bank, and to authorize the bank to follow OCC's written instructions. Requests from OCC for payment from a clearing member's bank account in respect of the SOD settlement cycle occurs during overnight processing and must be satisfied at or prior to the set settlement times specified above. A clearing member must satisfy intra-day assessments within one hour from the time the payment instruction is issued to the clearing member's bank.

Furthermore, as noted above, clearing member payments to or from OCC at settlement times are made on a net basis, taking into account multiple categories of pay or collect obligations in addition to the mark-to-market amounts the Commission appears to be seeking in the Proposal.[46] In

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[40] OCC and CME are parties to a cross-margining agreement pursuant to which they participate in a program to facilitate the cross-margining of positions in options cleared by OCC with positions in futures and commodity options cleared by CME. *See generally* Securities Exchange Act Release No. 34-90464 (Nov. 19, 2020), 85 FR 75384 (File No. SR-OCC-2020-011) (Nov. 25, 2020) (SEC notice of no objection to OCC adoption of Second Amended and Restate Cross-Margining Agreement between OCC and CME).
[41] *See* OCC Rules 502 and 706. OCC rules may be found at https://www.theocc.com/getmedia/9d3854cd-b782-450f-bcf7-33169b0576ce/occ_rules.pdf (last accessed February 10, 2023).
[42] *Id.*
[43] *See* OCC Rule 1301.01.
[44] *See* OCC Rule 609.
[45] *See* OCC Rule 502.
[46] Proposed Appendix C to Part 39 seek amounts of "variation margin" paid or collected. CFTC Rule 1.3 (17 CFR 1.3(fff)) defines "variation margin" as "a payment made by a party to a futures. . . to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was

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calculating a net pay or collect amount, OCC includes, in addition to mark-to-market movements in futures positions, a variety of other potential charges, some of which relate to securities-related positions in accounts that hold both securities options and futures. As a result, a clearing member with a negative mark-to-market value on its account at the end of one business day may nevertheless have a net receive from (i.e., be paid by) OCC on the next day,[47] and similarly, a clearing member with a positive mark-to-market value on its account may nevertheless *owe* a payment to OCC the next day.[48] Similarly, an intra-day settlement might include account adjustments beyond variation margin, and therefore also reflect a net payment that exceeds just the mark-to-market component. Therefore, to the extent that the Commission is seeking information on liquidity demands on OCC and clearing members, OCC respectfully submits that the net payment amount would provide the Commission with more useful information.

Moreover, as a result of the way variation payments are calculated and processed, we do not believe the Commission's proposal to require exact reporting times for variation margin payments would result in a dataset that will be explicatory or decision-useful for the Commission. While OCC's systems do include a time stamp for each net payment to or from OCC for daily settlement, those time stamps are impacted by a series of variables (e.g., settlement time and processing schedule), and therefore have limited utility for liquidity surveillance or analytical purposes. By way of example, as noted above, payments are effected via debits or credits to clearing members' account at an approved clearing bank, with the instructions to transfer funds transmitted via SWIFT. Irrespective of the recorded timing of when an instruction is issued (the basis of which is generally the receipt of an acknowledgment from SWIFT that such instruction was received), there is variation in the timing for receiving the payment confirmation (again based on a SWIFT message). The Proposal is ambiguous as to which of these events (OCC instruction, SWIFT acknowledgment of that instruction, or SWIFT message representing payment confirmation) should be reported. In addition, given that these variables are likely different at each DCO, and further considering that different DCOs may have different approaches to assessing intra-day margin, comparing exact timing for variation margin payments to and from different DCOs would be spuriously precise.[49]

In light of the above, we expect that the information that the Commission collects from the proposed new reporting fields will be reflective of individual DCOs' practices and idiosyncratic procedures, rather than broadly comparable, decision-useful data, as would be required for surveillance

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marked to market." Further support for our understanding that "variation margin" for the purposes of the proposed new reporting field comes from § 39.19(c)(1)(B) & (C), which distinguishes between "variation margin" and "all other daily cash flows relating to clearing and settlement." 17 CFR 39.19(c)(1)(B) & (C).

[47] Note that this would result in a settlement time of 1:00 P.M. Central Time, as, on a net basis, OCC would be paying the clearing member. Payment may nevertheless be made before the settlement time, at the discretion of OCC. This discretion over payment timing further reduces the utility of reporting a precise time stamp for such payments, as the exact timing may reflect numerous factors, including convenience.

[48] Note that this would result in a settlement time of 7:30 A.M. (X-M Accounts)/8:00 A.M. (non X-M Accounts) Central Time as, on a net basis, the clearing member would be paying OCC.

[49] A further complication for purposes of using exact timing data to assess clearing member liquidity is that while payment is considered final by OCC upon receipt of confirmation from a settlement bank that payment will be made on behalf of the relevant clearing member, the settlement bank may, for its own purposes, debit the funds of the clearing member's account at some later time, in effect extending an intra-day loan to the clearing member. Therefore, the precise timing of OCC's receipt of funds from the settlement bank may not reflect a simultaneous impact to the clearing member's liquidity position.

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purposes. As a result, we are concerned that the Proposal will require potentially significant investment of resources from DCOs and third parties[50] without a corresponding benefit to the Commission. We therefore urge the Commission to reconsider the inclusion of this reporting requirement in the Proposal, and to instead work collaboratively with DCOs to identify alternative means of achieving the Commission's goals.

Should the Commission nevertheless determine to include these data fields as part of the proposed amendments, OCC suggests the Commission amend the Proposal in two ways. First, we suggest that the Commission create fields for the inclusion of net payment information, to clarify whether, irrespective of any mark-to-market movements in favor of or against the clearing member's position, there was a net payment to or from the DCO. Second, with respect to timing, and in response to the Commission's request for comment on whether it would be preferable to report whether payments were made within a broader timeframe, OCC believes the Commission should focus on settlement cycle timing. To the extent there are extraordinary market movements with the potential to cause liquidity issues at clearing members and customers, there would likely be one or more intra-day margin calls by DCOs in connection with such market movements. Given that fact, the Commission's policy goals would be best served by collecting information on margin call timing as within or outside a DCO's normal settlement cycle. Specifically, we suggest that the Commission remove the "Call Time," "Received Time," and "Paid Time" fields, and that it amend the "Settlement Cycle" field to seek "ITD = Intraday" and "SOD = Start of Day" as responses.

Information on File Completeness

The Commission also proposes to require DCOs to provide information with their daily reporting that reflects that the report is complete. DCOs could provide that information in the form of either a manifest file containing a list of files sent by the DCO, or count information embedded in the individual FIXML files within each report. OCC's current practice is to send each required § 39.19 report as a single file. Adding a reporting field indicating that the file is "1 of 1" presents no significant technical challenge or investment of resources. From OCC's perspective, doing so would be more efficient than including an entire additional manifest file to provide the same information. While OCC believes that either method is feasible without significant implementation costs, given that either method would provide the Commission with sufficient evidence of file completeness, OCC encourages the Commission to provide DCOs the flexibility to choose their preferred method, in light of each DCO's systems and processes.

Request for Comment on Provision of Settlement Prices for Contracts with No Open Positions

The Proposal also states that the Commission is considering whether to require DCOs to provide current settlement prices and related information (likely settlement currency and settlement date) published by designated contract markets ("DCMs") for futures and options contracts with no open interest, and seeks comment on the costs associated with providing the information and whether the proposed fields are necessary or appropriate to capture the information. With respect to the current slate of products it clears, OCC already receives such information on a voluntary basis from the

[50] For example, in order to ensure consistency for reporting purposes, certain of OCC's settlement banks may be required to adjust their internal time-stamping methodology.

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DCMs that clear through OCC. While OCC does not foresee any material operational challenges that would arise from implementing a reporting requirement, there would be some legal and administrative costs to OCC and the DCMs if OCC were required to mandate such reporting. OCC believes the reporting of this information will be of necessarily limited utility to the Commission, as it relates only to contracts that are not presently impacting a DCO's risk profile. Given the number of contracts or tenors that may be eligible for trading at any given time, but not traded, if adopted, the Proposal would lead to millions of such low-value data points on any given day. For that reason, it is not clear from the Proposal that the benefits to the Commission would outweigh any such costs.[51]

§§ 39.19(c)(1)(i)(A) & (D): Clarifications with Respect to Customer LEI Reporting

The Commission proposes clarifying changes to two provisions of Part 39 related to the reporting of customer legal entity identifiers ("LEI"). First, the Proposal would amend § 39.19(c)(1)(i)(A) to clarify that the requirement for a DCO to identify each customer by LEI and internally-generated identifier applies to subpart (A), as well as subpart (D) (as is explicit under the existing rule). Second, with respect to both subparts (A) and (D), the Proposal would make a technical change to clarify that the requirement that a DCO is only required to provide both an LEI and any internally-generated identifier "where available" means only if the DCO has the information associated with an account.

OCC supports the clarifications and appreciates the Commission's recognition that DCOs are not, in all instances, provided customer LEIs by clearing members.

§ 39.19(c)(1)(i): Daily Reporting of Margin Model Back Testing

The Proposal would amend § 39.19(c)(1)(i)(A) to require DCOs to include in their daily Part 39 reporting the results of their margin model back testing. OCC already performs such testing on a daily basis, as required under § 39.13(g)(7)(i). OCC has no objection to reporting its margin model back testing results but is concerned that the proposed new reporting fields in Appendix C do not align with the output of that back testing. For that reason, as discussed below, we offer suggestions to more precisely capture that output in the reporting fields as part of any final rule.

OCC conducts daily back testing pursuant to § 39.13(g)(7)(i), which requires, in pertinent part, that "[a DCO] shall conduct back tests, as defined in § 39.2 . . ., using an appropriate time period but not less than the previous 30 days, as follows:

> (i) On a daily basis, a derivatives clearing organization shall conduct back tests with respect to products or swap portfolios that are experiencing significant

[51] OCC also notes that the DCO Core Principle on public disclosure states that each DCO must disclose publicly and to the Commission "daily settlement prices, volume, and open interest for each contract settled or cleared by the [DCO]." By definition, any contract that would have been cleared or settled by a DCO is one that had open interest. As a result, OCC notes that an explicit requirement to report settlement prices for contracts with no open interest is potentially in tension with this Core Principle. 7 USC 7a-1(c)(2)(L)(iii)(IV).

> market volatility, to test the adequacy of its initial margin requirements, as follows: . . .
>
> (A) For that product if the derivatives clearing organization uses a product-based margin methodology; . . . [and]
>
> (C) For each account held by a clearing member at the derivatives clearing organization that contains a significant position in that product, by house origin and by each customer origin. . ."[52]

"Back test," in turn, is defined as "a test that compares a derivatives clearing organization's initial margin requirements with historical price changes to determine the extent of actual margin coverage."[53]

Pursuant to § 39.13(g)(7)(i), OCC implements back testing procedures to test its methodology for determining the amount of margin to collect from clearing members and validate the assumptions and mechanisms inherent in its methodology and to make any necessary changes to the methodology. Each trading day, OCC estimates the risk exposure of accounts and uses this estimate as a basis for each account's margin charge. On the following business day, the net asset value of each position is determined at both points in time (i.e., that day and the prior day) by valuing any given position with its corresponding closing price. Profit and loss ("P&L") is then determined by the difference between the two net asset values. OCC's current back testing procedures compare an account's observed P&L on a portfolio basis and determines the actual number of instances in which the realized loss on an account exceeded the margin, referred to as an "exceedance," over an observation period of one year. The purpose of the back testing is to ensure that OCC's margin model's output meets an established confidence level of 99% with respect to realized losses over a two-day horizon (close to close), at the account level and to evaluate information that may indicate potential issues with margin models. These procedures are designed "to ensure that its margin models continue to provide adequate coverage of [OCC's] risk exposures to its clearing members."[54] OCC understands that its back testing procedures are consistent with industry standards for DCOs.

The proposed reporting fields in Appendix C for reporting back testing results pursuant to § 39.19(c)(1)(i)(A) do not align precisely with the metrics used in back testing as described above. As an initial matter, the proposed back testing fields in Appendix C to Part 39 refer to "Breaches," rather than exceedances. Moreover, proposed Appendix C to Part 39, in a section titled "Breach Details (Daily Reporting)" seeks reporting of three metrics: Initial Margin, Variation Margin, and Breach Amount, and defines Breach Amount as the "Difference between the initial margin and variation margin." As noted, OCC's back testing identifies exceedances by comparing initial margin to P&L, not variation margin. As detailed in the discussion of the proposed revisions to § 39.19(c)(1), above, variation margin is calculated on a net basis across a given portfolio, taking into consideration debit and credit items beyond any margin calculated based on any changes in the

[52] 17 CFR 39.13(g)(7)(i).
[53] 17 CFR 39.2.
[54] *See* RIN 3038-AC98 Risk Management Requirements for Derivatives Clearing Organizations; Proposed Rule, 76 FR 3698 (Jan. 20, 2011).

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mark-to-market value of the positions in the relevant account. Therefore, to the extent the Commission seeks daily back testing information "enabling the Commission to evaluate and monitor margin model performance on an ongoing basis," revising the proposed reporting fields would facilitate reporting of information that is consistent with DCOs' current back testing outputs, and therefore provide the Commission with insights into how DCOs themselves assess their margin model effectiveness.

In order to align the daily reporting requirements with the back testing DCOs currently conduct pursuant to § 39.13(g)(7)(i), OCC suggests revising the Breach Details portion of the Back Testing Reporting section of proposed Appendix C in the following manner:

BREACH DETAILS (DAILY REPORTING)		
Field Name	**Description**	**Use**
Initial Margin	Margin requirement by account portfolio calculated by the DCO's margin methodology. Unless an integral part of the margin methodology, this figure should not include any additional margin add-ons.	M
~~Variation Margin~~ Static Portfolio Profit/Loss	~~Variation margin should include the net sum of all cash flows between the DCO and clearing members by origin~~ Profit or loss on the same portfolio against which the Initial Margin was assessed.	M
Breach Amount	Difference between the initial margin and ~~variation margin~~ static portfolio profit/loss.	M

These changes would ensure that the back testing reporting requirements provide the Commission with information that reflects the actual output of OCC and other DCOs' back testing practices under § 39.13(g)(7)(i).

§ 39.19(c)(4)(ix)(A)(1): Reporting Change of Control of the DCO

Section 39.19(c)(4)(ix)(A)(1) currently requires a DCO to report to the Commission any anticipated change in the ownership or corporate or organizational structure of the DCO or its parent(s) that would result in at least a 10 percent change of ownership of the DCO. The Commission proposes to amend § 39.19(c)(4)(ix)(A)(1) to require a DCO to report any change to the entity or person that holds a controlling interest, either directly or indirectly, in the DCO. By removing the 10 percent threshold, the Commission seeks to ensure that the reporting requirement captures all circumstances in which a change of control of the DCO may occur.

As proposed, amended § 39.19(c)(4)(ix)(A)(1) would require a DCO to report "any anticipated change in [its] ownership or corporate or organizational structure or its parent(s) that would. . . [r]esult in at least a 10 percent change of ownership of the [DCO] or a change to the entity or person holding a controlling interest in the [DCO], whether through an increase in direct ownership or voting interest in the [DCO] or in a direct or indirect corporate parent entity of the [DCO]." While

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OCC agrees in principle that amending the reporting requirement to capture any change in control is appropriate, we note there is potential ambiguity as to the meaning of "the entity. . . holding a controlling interest in the [DCO]." As proposed, it is unclear whether the "entity . . . holding a controlling interest" refers to the specific corporate entity holding an ownership interest in the DCO, or whether it refers to any parent entity of one or more owners that collectively own more than 50% of the DCO. Therefore, we request the Commission provide additional guidance in connection with any final rule in order to clarify the new reporting requirement.[55]

§§ 39.19(c)(4)(xii) and (xiii): Reporting Changes to Credit Facility Funding and Liquidity Funding Arrangements

OCC appreciates the Commission's proposed amendment to §§ 39.19(c)(4)(xii) and (xiii), which would clarify that those rules require reporting new arrangements as well as changes to existing ones. The proposed amendment is consistent with OCC's interpretation of the existing rule, and OCC supports the Proposal's removal of any potential ambiguity.

§ 39.19(c)(4)(xv): Reporting Issues with Credit Facility Funding Arrangements, Liquidity Funding Arrangements, and Custodian Banks

The Proposal would make two changes to § 39.19(c)(4)(xv), which currently requires a DCO to report to the Commission within one day any material issues or concerns arising regarding the performance, stability, liquidity, or financial resources of any settlement bank used or approved for use by the DCO. First, the rule would be amended to require reporting of material issues or concerns regarding a DCO's credit facility funding arrangements, liquidity funding arrangements, and custodian banks, along with settlement banks. Second, the rule would be revised to require reporting within one business day *after the DCO becomes aware* of any reportable issue. OCC supports these changes, which appropriately address the variety of arrangements that DCOs use to meet their ongoing and situational funding requirements, while also recognizing that DCOs should not be subject to potential enforcement action for not reporting an issue of which they are not even aware.

OCC agrees that the additional liquidity and funding relationships for which the Commission proposes to add a reporting requirement are similar in nature to settlement bank relationships for purposes of the Commission's legitimate need to be able to assess material risks to DCOs. That similarity is already reflected in OCC's process for managing such risks. OCC maintains a robust Risk Management Framework governing, among other things, risks presented to OCC's provision of efficient and effective clearing and settlement services to the markets it serves by credit risk from

[55] By way of illustration, OCC is owned by five options exchanges, which each own an equal 20% share of OCC. OCC's owner exchanges are the Cboe Exchange, Inc., Nasdaq ISE, LLC, Nasdaq Phlx, LLC, NYSE MKT LLC, and NYSE Arca, Inc. The NYSE exchanges are owned by a common parent and the Nasdaq exchanges are owned by a common parent. As proposed, it is unclear whether "a change to the entity or person holding a controlling interest in" OCC would be effected if, for instance, NYSE acquired an additional 11% interest, or only if one of the NYSE entities (either NYSE MKT LLC or NYSE Arca, Inc.) acquired an additional 31% interest. We note, however, that in either scenario, OCC would be required to report pursuant to either current or the proposed amended § 39.19(c)(4)(ix)(A)(1) due to the transfer of a 10% change of ownership currently relevant to OCC as a practical matter,

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third-party financial institutions that facilitate payment, clearing, and settlement activities.[56] Such third-parties include clearing banks, custodians, liquidity providers, and investment counterparties, all of which are monitored on an ongoing basis pursuant to a separate Third-Party Risk Management Framework.[57] Through the process established by these frameworks, issues with third-party financial institutions are identified, escalated, and reported, as appropriate. OCC already subjects each of the proposed institution types – credit facility funding arrangements, liquidity funding arrangements, and custodian banks – to the same ongoing diligence as it does settlement banks. Therefore, OCC believes incorporating these additional institutions to the reporting requirement of § 39.19(c)(4)(xv) would not create a substantial burden for OCC.

While, as noted above, OCC monitors these third-party relationships on an ongoing basis, there may be circumstances in which information about a material issue is simply not available to OCC within one business day of arising. Failure of a third-party to identify an issue for a DCO (or publicly) should not subject that DCO to potential enforcement action from the Commission. Therefore, OCC supports the proposed change to the timing requirement under § 39.19.(c)(4)(xv).

§ 39.19(c)(4)(xxv) and § 39.25: Technical and Non-Substantive Changes

OCC supports the proposed consolidation of the current reporting requirement under § 39.37(b)(1) into new § 39.19(c)(4)(xxv), which OCC understands to be a non-substantive change to existing DCO reporting obligations.

OCC further supports the technical change to § 39.25, which OCC similarly understands to be solely technical and clarifying in nature, and not a change to any substantive requirement applicable to DCOs.

§§ 39.37(c) and (d): Removal of Duplicative Reporting Requirements

OCC supports and appreciates the proposed amendments to §§ 39.37(c) & (d), relieving DCOs of duplicative requirements to report certain information both publicly and to the Commission.

§ 140.94(c)(1): Delegation of Authority to Division Director

OCC generally supports the proposed changes to § 39.Part 140.94(c)(1), which would delegate authority to the director of the Division of Clearing and Risk of certain of the Commission's authorities pursuant to §§ 39.19(a)[58] & (b).[59] OCC agrees that the proposed delegations would

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[56] OCC Risk Management Framework (Dec. 22, 2022), *available at* https://www.theocc.com/getmedia/3c9809d7-1671-4976-91da-121d21b47d53/Risk-Management-Framework.pdf (last accessed Feb. 10, 2023).
[57] OCC Third-Party Risk Management Framework (Dec. 22, 2022), *available at* https://www.theocc.com/getmedia/68a1ea2d-ddae-4a93-a309-100bf70a0f28/Third-Party-Risk-Management-Framework.pdf (last accessed Feb. 10, 2023).
[58] 17 CFR 39.19(a) ("A derivatives clearing organization shall provide to the Commission the information specified in this section and any other information that the Commission determines to be necessary to conduct oversight of the derivatives clearing organization").
[59] 17 CFR 39.19 (b)(1) ("A derivatives clearing organization shall submit the information required by this section to the Commission in a format and manner specified by the Commission").

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appropriately empower the staff to facilitate efficient administration of Part 39, and ensure the Commission and its staff can obtain relevant information in a timely manner. As reflected in this letter, as well as comments by OCC and others in response to the most recent amendments to the Part 39 reporting requirements in 2020,[60] changes to DCOs' reporting obligations can pose significant technical or logistical challenges, and necessitate substantial investment of time and resources to effect compliance. Therefore, while we support the proposed delegations, we urge the Director and the staff to continue to engage in open dialogue with DCOs prior to exercising the delegated authority to seek additional information pursuant to § 39.19 or to change the format or manner of any required reporting.

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We thank the Commission for the opportunity to provide comment on the Proposed Rules. If you have any questions, please do not hesitate to contact Andrew Feller, Associate General Counsel, at 312.322.4674, or afeller@theocc.com. We would be pleased to provide the Commission with any additional information or analyses that might be useful in determining the content of the final rules.

Sincerely,

Megan Cohen
Deputy General Counsel and Corporate Secretary

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[60] *See generally* Comments for Proposed Rule 84 FR 22226, 17 CFR Parts 1, 39, and 140 Derivatives Clearing Organization General Provisions and Core Principles, *available at* https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2985&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1 (last accessed February 10, 2023).