February 13, 2023

Via Electronic Submission

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

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

Dear Mr. Kirkpatrick:

Intercontinental Exchange, Inc., on behalf of itself and its subsidiaries (collectively, "ICE") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") notice of proposed rulemaking relating to Reporting and Information Requirements for Derivatives Clearing Organizations (the "Proposal").[1]

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

ICE is generally supportive of the Commission's efforts to update and enhance data collection from DCOs and agrees that certain aspects of the current reporting framework should be amended. ICE however has substantial concerns that the Proposal would impose new burdensome requirements without clear benefits relating to notifications of immaterial system failures and security events. With additional comments in the Appendix, ICE is focusing its comments on the following:

[1] Reporting and Information Requirements for Derivatives Clearing Organizations (RIN 3038-AF12), 87 Fed. Reg. 76698 (Dec. 15, 2022).
[2] ICE Clear Credit has been designated as a systemically important derivatives clearing organization pursuant to Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). ICE Clear Credit is also registered as a securities clearing agency under the Securities Exchange Act of 1934 (the "Exchange Act").
[3] ICE Clear Europe is an authorized as a central counterparty under the European Market Infrastructure Regulation (EMIR) and a recognized clearing house under English law. ICE Clear Europe is also a registered securities clearing agency under the Exchange Act.
[4] ICE Clear US has elected to be a subpart C DCO pursuant to Commission Rule 39.31.
[5] ICE NGX Canada Inc. is also registered with the Commission as a foreign board of trade and is a recognized exchange and clearing agency under the laws of Alberta, Canada.

- Elimination of Individual Customer-Level Variation Margin Reporting. ICE strongly supports the Commission's proposal to eliminate the requirement in Commission Rule 39.13(c)(1) for DCOs to provide daily reporting of variation margin and cash flows at an individual customer account level.

- Reporting for System Failures and Intrusions. ICE opposes the Commission's Proposal to eliminate the materiality thresholds for required reporting of system failures. ICE also disagrees with the proposed creation of a new reporting requirement for security incidents and threats, including potential (i.e., not actual) incidents and threats with no materiality threshold. The absence of any materiality threshold would make these proposals extraordinarily burdensome without any clear benefit to the Commission.

- Additional Appendix C Fields Related to Variation Margin. ICE opposes the additional variation margin reporting requirements in Appendix C and believes that specific timing information is irrelevant, so long as the amounts are paid before a DCO's deadline. ICE also does not agree with the Commission that the exact timing of payments is indicative of the DCO's liquidity position or ability to manage liquidity risks.

- New Requirement to Report Daily Back Testing. ICE opposes the proposal to amend Commission Regulation 39.19(c)(1)(i) to require daily reporting of back testing results. ICE believes such reporting would be burdensome and provide little benefit to the Commission.

1. Elimination of Individual Customer-Level Variation Margin Reporting.

ICE strongly supports the elimination of individual customer-level variation margin reporting. As noted in the Proposal, the Commission's DCO rule amendments adopted in 2020 included a requirement for DCOs to report on a daily basis initial margin, variation margin, cash flow and position information for each clearing member by individual customer account.[6] The Commission has since recognized that most DCOs do not possess individual customer-level variation margin and cash flow information and may not have the ability to obtain this information from their clearing members. In response, Commission staff has issued successive no-action letters delaying implementation of these requirements.[7] The Commission is now proposing to codify this relief by eliminating the requirement to provide customer-level information regarding variation margin and cash flows. ICE agrees that this is appropriate. In response to the Commission's question in the Proposal, ICE does not believe that there are any products or market segments for which such customer-level daily reporting is appropriate.[8]

[6] Commission Rule 39.19(c)(1)(i)(B) and (C).
[7] See CFTC No-Action Letter No. 21-01 (Dec. 31, 2020); CFTC No-Action Letter No. 21-31 (Dec. 22, 2021); CFTC No-Action Letter No. 22-20 (Dec. 19, 2022).
[8] See Proposal at 76702.

2. Reporting of System Failures and Security Threats.

The Proposal would significantly expand the reporting and information requirements applicable to electronic system failures and malfunctions and security incidents. In particular:

- The amendments would remove the "materiality" requirement under Rule 39.18(g)(1), requiring a DCO to promptly notify Commission staff of 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.

- New Rule 39.18(g)(2) would require notice of 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 relied upon by the DCO. This requirement extends to third-party information, services or data. There is no consideration of materiality in this proposed new rule.

ICE believes that removing the materiality standard and not including a materiality standard in the new security incident reporting provision in Rule 39.18(g)(2) would make the reporting requirements unworkable. Although the Proposal indicates that the Commission is concerned that materiality might be judged differently by various DCOs, whether a system malfunction is material to a DCO's operations will in fact be different for each DCO. Other than a belief that different DCOs should have more similar assessments of materiality, the Commission has not articulated the benefit to the Commission receiving notices of hardware or software malfunctions and operator errors that are immaterial to the operation, reliability, security or capacity of a DCO's systems.

In addition, by removing the materiality standard, the Proposal creates uncertainty regarding a DCO's reporting obligations when the DCO's compensating controls and mitigation efforts eliminate or substantially minimize the impairment of automated systems' operation, reliability, security or capacity. The initial malfunction or error could be considered to create a "significant likelihood" even though measures taken by the DCO mean there is no or little impact. In such cases, there is no benefit to the Commission receiving notice from a DCO and there would be significant costs to the DCO associated with building reporting systems for routine and unimpactful malfunctions and errors.

The Commission's proposed new reporting requirement for security incidents and threats raises similar concerns about imposing a burden that outweighs the benefits. The proposed new reporting requirement would apply to any "threat" that "could compromise" a relevant automated system. DCOs face "threats" on a daily basis (e.g., malicious or phishing emails, cyberattacks, network scans or similar attacks). To protect themselves, DCOs have systems, practices and procedures to repel such threats and are almost always able to do so without operational impairment or incident. Under the proposed standard, however, regardless of the success of a threat, a DCO would be required to report it to the Commission. The Commission has not articulated why it would benefit from receiving notices of failed threats. ICE instead believes any reporting requirement should be limited to reporting of actual incidents that have a material impact on a DCO's operations, reliability, or security.

For these reasons, ICE believes the cost-benefit analysis related to the changes to DCOs' reporting obligations significantly understates the costs. In particular, ICE believes that the absence of a materiality threshold means that there would be significantly more than the "four" additional reports[9] each year stated in the cost-benefit analysis. ICE does not believe the Commission has articulated any benefit that justifies this additional burden. Lastly, the Commission has not considered the likelihood that expanding reporting in the way proposed would diminish, rather than improve, its ability to oversee DCOs because Commission staff would need to assess which of the many reports it receives from DCOs is material.

ICE also notes that the standards in the Proposal differ from the reporting standards for system events and security events applicable to designated contract markets ("DCMs") and swap execution facilities ("SEFs"). Specifically, Commission Rule 38.1051(e) requires DCMs to report "significant systems malfunctions"[10] and "cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security or capacity."[11] SEFs are subject to substantially the same standard.[12] ICE does not believe there is a reason to have a different standard applicable to DCOs than to DCMs and SEFs, and ICE is not aware of any problems or shortcomings with the current approach for DCMs and SEFs. In particular, the operations of DCMs and DCOs are often linked and in many cases a malfunction, error or security event is likely to affect both. As a result, ICE believes that the reporting standards and thresholds for DCOs should be consistent with the standards for DCMs and SEFs.

In addition, the lack of materiality or similar threshold is inconsistent with the SEC's Regulation SCI,[13] which is applicable to securities clearing agencies, including ICE Clear Credit and ICE Clear Europe which are both securities clearing agencies and DCOs. Regulation SCI does not require immediate reporting of immaterial events and defines the relevant triggering events for malfunctions as an event that "disrupts, or significantly degrades, the normal operation of"[14] the relevant system and for security events as "any unauthorized entry into the [system]".[15] Regulation SCI further provides an exemption from the prompt reporting obligation for an event "that has had, or that the [entity] reasonably estimates would have, no or a de minimis impact on the [entity's] operations or on market participants."[16] ICE believes that the Commission could consider a similar approach on this issue that limits the triggering events to those that have an actual impact on relevant operations and/or exclude from immediate reporting triggering events that have an immaterial impact on the DCO.[17]

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[9] See Proposal at 76708.
[10] CFTC Rule 38.1051(e)(1).
[11] CFTC Rule 38.1051(e)(2).
[12] CFTC Rule 37.1401(e) requires SEFs to report "material system malfunctions" and "cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security or capacity."
[13] 17 C.F.R. 242.1000 et seq.
[14] 17 C.F.R. 242.1000 ("systems disruption").
[15] 17 C.F.R.. 242.1000 ("systems intrusion").
[16] 17 C.F.R. 242.1002(b)(5). For such events, the entity is required to keep records and submit a quarterly report with a summary description of the events in question.
[17] ICE notes regulations in other jurisdictions require a clearing agency to notify the relevant regulatory authority of material systems or cyber incidents and keep records of each immaterial incident including an assessment of why the incident was considered immaterial. See, e.g., sections 4.6(c)-(d) and 4.6.1(2)(b)-(c) of National Instrument 24-102 *Clearing Agency Requirements* published by the members of the Canadian Securities Administrators.

Lastly, in past rulemakings, the Commission has taken a risk-based approach to DCO reporting obligations, allowing DCOs to determine what is material relative to their operations.[18] The removal of the materiality component is inconsistent with the CFTC's history of including materiality standards for DCO reportable events, such as those defined under § 39.19(c)(4). For example, the Commission previously contemplated adopting a reporting requirement for margin model issues without a materiality threshold and in the final rule, the Commission amended its initial proposal to include a materiality component stating it "believes that reporting only margin model issues that materially affect the DCO's ability to calculate or collect initial margin or variation margin, as opposed to all margin model issues, strikes an appropriate balance between supplying the Commission with information needed for effective oversight of DCOs, without placing an undue burden on the DCOs."[19] ICE believes that retaining the materiality threshold for the reporting is necessary to maintain a consistent risk-based approach by the Commission.

3. Additional Appendix C Fields.

The CFTC has proposed to add a requirement to report the following variation margin information: (1) time and amount of each variation margin call to relevant clearing members; (2) time and amount that each variation margin payment is received by the DCO; (3) time and amount that variation margin is paid out to relevant clearing members.[20] ICE opposes these additional requirements. As discussed with Commission staff for similar proposed changes to the existing Reporting Guidebook, ICE believes that this specific timing information is generally irrelevant, so long as the amounts are paid before the applicable DCO's deadline. ICE does not agree with the Commission that the exact timing of payments is indicative of the DCO's liquidity position or ability to manage liquidity risks. ICE also notes that collecting and reporting such information will require development of new operational systems. Some DCOs may also aggregate variation margin calls and payments with other required payments or deduct variation margin payments from amounts on deposit by a clearing member. In this case it may be difficult and arbitrary to separate out variation margin payments and their timing.

For example, if a clearing member has an increase in initial margin required and receives variation margin, some clearing houses will net the variation margin to be received against the increase in initial margin required and make a call, or give a credit, on the net amount. This approach can minimize external payments, is efficient and has less operational risk. The resulting call or credit could accurately be considered either variation or initial margin. The decision of characterizing the call as one or the other may be arbitrary. Another example involves a clearing member who has a decrease in margin required and must pay variation margin. Some clearinghouses will net the variation margin to be paid against the decrease in initial margin required to the extent there is excess cash margin on deposit and make a call on the net amount. It should also be noted that some clearinghouses externalize the payment of variation margin (i.e., require payment separately from initial margin or other amounts owed), others do not, and some allow the clearing members to choose. For those who do not externalize variation margin, the payment is generally credited to initial margin on deposit and any actual cash flow is part of a future withdrawal. These different approaches to the payment and netting of variation margin are not contemplated by the proposed reporting. At a minimum, the fields would need to be revised to better reflect the many

[18] CFTC, Final Rule on Derivatives Clearing Organization General Provisions and Core Principles, 85 Fed. Reg. 4800 (Jan. 27, 2020), at 4819-4822.
[19] *Id.*, at p. 4822.
[20] See Proposal at 76702 and 76703.

ways DCOs deal with variation margin payments. But for the reasons discussed above, ICE does not believe the limited benefits of such reporting would justify the costs and complexity of developing the systems and procedure such a reporting system.

4. Daily Reporting of Back Testing Results

ICE opposes the amendment to Commission Regulation 39.19(c)(1)(i) that would require DCOs to submit to the Commission the results of daily back testing. DCOs perform back testing on a daily basis pursuant to existing Commission Regulation 39.13(g)(7)(i) and Commission Regulation 39.19(c)(4)(xxiii) requires DCOs to report certain "material" margin model issues to the Commission. Further, DCO margin models are required to be independently validated[21] and before deployment undergo additional detailed analysis and scrutiny. The Commission has failed to identify a reason that the current reporting system provides insufficient information to the Commission or explain why it needs back testing data on a daily basis to supervise the performance of margin models over time. ICE believes the additional burdens on DCOs to provide daily reporting of back testing results is not justified. Daily reporting would also require DCOs to reconfigure systems or create new systems that analyze and report back testing, and the Commission has not articulated why these added costs are necessary.

Furthermore, ICE believes that the proposed new back testing fields in Appendix C will not provide meaningful information to the Commission particularly around breach details. For example, the fields provide for comparing initial margin requirements to variation margin payments to determine the "Breach Amount". The reported initial margin requirements and variation margin payments, however, would likely not be associated with the same set of positions. From a formal statistical (hypothesis testing) point of view, the back-testing of the initial margin model should consider fixed positions over the implemented margin period of risk. Position changes can lead to significant variation margin payments, where negative variation margin payments can substantially exceed the initial margin requirements computed for a different set of positions. It would be incorrect to assume that a DCO with a 5- or 6-day margin period of risk would continue to allow a clearing participant to add positions if the participant defaulted on one of the days. The limited fields set forth in Appendix C may thus result in a value for a Breach Amount that does not reflect true margin model performance.

Furthermore, individual DCOs have implemented robust and prudent intraday risk management processes where new positions are accepted for clearing if, and only if, the available collateral on deposit provides sufficient financial resources to cover the risk of the newly formed portfolios. This means that the DCO may require additional collateral prior to trade acceptance if the available initial margin funds are insufficient. Under these circumstances, simple comparison of initial margin resources and variation margin payments could thus also lead to incorrect conclusions.

As a result, ICE believes the approach set out in Appendix C may not accurately reflect back testing results and could lead to incorrect conclusions about margin model performance. In ICE's view, the current reporting system relating to back testing provides the Commission with more useful information than the more prescriptive requirements in the Proposal.

[21] CFTC Rule 39.13(g)(3).

5. Other Comments.

ICE has included additional comments and technical suggestions to the Proposal in Annex A.

Conclusion

ICE appreciates the opportunity to comment on the Proposal. ICE also appreciates the willingness of the Commission and staff to consider updates to relevant reporting requirements in light of the experience of DCOs. As noted in this letter, ICE is concerned about the proposed expansion of certain reporting requirements relating to system failures and security events and believes that a materiality threshold should be maintained

Sincerely,

Chris Edmonds
Chief Development Officer
Intercontinental Exchange Inc.

cc: Honorable Chairman Rostin Benham
Honorable Commissioner Christy Goldsmith Romero
Honorable Commissioner Kristen N. Johnson
Honorable Commissioner Summer Mersinger
Honorable Commissioner Caroline D. Pham
Clark Hutchison, Director, Division of Clearing and Risk
Eileen A. Donovan, Deputy Director, Division of Clearing and Risk

Additional Comments

Proposed Rule Number	Description of proposed amendment	ICE Comments
39.18(a)	New definition of "hardware or software malfunction"	The Commission's definition is so broad that the Proposal would require reporting where there is an "inaccurate result" or other malfunction that result in no impact to the DCO's operations because of compensating controls, back-up systems and other mitigations. In such cases, there is no impairment to the DCO and the Commission has not explained why reporting is required. DCOs have procedures in place to check for and promptly correct malfunctions in hardware and software and when these corrections work, it should be considered the normal operation of a DCO and require no reporting.
39.15(b)(2)	Simplification of Commingling Requests	The Commission proposes to amend Rule 39.15(b)(2) to simplify the procedures for obtaining approval under Rule 40.5 for the commingling of customer positions in futures, foreign futures and/or swaps in a single segregated account. ICE supports the proposal as it reduces the information required to be submitted by a DCO. In proposed Rule 39.15(b)(2)(vii), the Commission would require an express confirmation by the DCO that it only provides portfolio margining as permitted under Rule 39.13(g)(4). ICE believes this requirement is unnecessary as it is redundant with the requirement in Rule 40.5 that the DCO demonstrate that its proposal complies with the Commodity Exchange Act and Commission regulations. Lastly, in response to the Commission's specific question,[22] ICE does not believe that the Commission should require disclosure of additional information to market participants for purposes of evaluating a commingling rule submission. ICE believes that the information already required under the public Rule 40.5 filing, as proposed to be modified, will provide interested

[22] Proposal at 76700.

		market participants with sufficient information to evaluate a commingling proposal.
Appendix C	Codifying the Reporting Guidebook	ICE is supportive of this codification in principle. The Commission states in the Proposal that it is not proposing to codify the "non-substantive technical and procedural aspects...that address the format and manner in which DCOs provide this information".[23] ICE agrees with this approach. However, ICE notes that there are numerous substantive points relating to data elements and reporting requirements that have been clarified through discussions between the CFTC and DCOs following the release of the Guidebook in 2022. In ICE's view, it is important for these points to be codified.
Appendix C	Reporting of settlement prices of contracts with no open interest.	Although it has not proposed a specific rule provision, the Commission states that it is considering whether to require DCOs to provide settlement prices published by a DCM for futures and options contracts with no open interest.[24] ICE opposes such a requirement. It is unclear why the DCO should be required to obtain or provide settlement prices where there is no open interest (i.e., no outstanding cleared positions) in a contract. Similarly, the usefulness of a DCOs settlement price for a contract that has no open interest is not apparent to ICE. Importantly, such settlement prices may not be reliable given the lack of trading activity. Although the Commission does not appear to be considering such a requirement for swaps, ICE notes that it would also oppose such requirement for swap contracts with no open interest.
39.19(c)(1)(i)(D)	Requirement that LEI, if available, and internally-generated identifier(s) must be added to all data that is on an individual customer level.	In ICE's view, the Commission has not articulated a clear need or use for this information. ICE believes that extensive system changes would be required to add identifiers to each relevant data point. ICE believes that the costs would outweigh the benefit because DCOs are unlikely to have LEI information for customers and thus this data point would not be populated. Accordingly, ICE does not believe there is much point to adding the LEI requirement to the rule.

[23] Proposal at 76702.
[24] Proposal at 76703.

39.19(c)(4)(xv)	Amending requirement to report material issues with settlement bank(s) to also include credit facility providers. Also amending requirement to change "...when issues arise..." to when the DCO becomes aware.	ICE does not object to this change. As a technical matter, however, the proposed amendment refers to material issues or concerns regarding the performance, stability, liquidity or financial resources of the credit facility funding arrangement, whereas ICE believes that it would be more accurate to refer instead to the provider of the arrangement.
39.19(c)(4)(xxv)	Requirement to notify the CFTC within ten business days when the DCO updates its PFMI Disclosure Framework.	The Commission should state explicitly that the requirement only applies to a material change to the PFMI Disclosure Framework, to be consistent with the provisions of Rule 39.37(b)(2).