

September 26, 2023

VIA ELECTRONIC SUBMISSION

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

Re: RIN 3038-AF16 Derivatives Clearing Organizations Recovery and Orderly Wind-Down Plans;
Information for Resolution Planning

Dear Mr. Kirkpatrick:

CME Group Inc. (“CME Group”)¹ appreciates the opportunity to comment on the Commodity Futures Trading Commission’s (“CFTC” or the “Commission”) Notice of Proposed Rulemaking on Derivatives Clearing Organizations Recovery and Orderly Wind-Down Plans; Information for Resolution Planning (the “NPR”).²

Chicago Mercantile Exchange Inc. (“CME”) is a wholly-owned subsidiary of CME Group. CME is registered with the CFTC as a derivatives clearing organization (“DCO”) (“CME Clearing” or the “Clearing House”). CME Clearing offers clearing and settlement services for listed futures and options on futures contracts, including those listed on CME Group’s CFTC-registered designated contract markets (“DCMs”), and cleared swaps derivatives transactions, including interest rate swaps (“IRS”) products. These DCMs are CME, Board of Trade of the City of Chicago, Inc. (“CBOT”), New York Mercantile Exchange, Inc. (“NYMEX”), and the Commodity Exchange, Inc. (“COMEX”) (collectively, the “CME Group Exchanges”). On July 18, 2012, the Financial Stability Oversight Council designated CME as a systemically important financial market utility (“SIFMU”) under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). As a SIFMU, CME is also a systemically important DCO (“SIDCO”).

I. INTRODUCTION

CME Group appreciates and supports the CFTC’s ongoing focus on the continuity of a SIDCO’s critical operations and services, which is of the utmost importance to the stability of the broader financial system. CME maintains the CME Clearing: Recovery Plan (the “Recovery Plan”) and CME Clearing: Wind-

¹ As a leading and diverse derivatives marketplace, CME Group enables clients to trade in futures, cash and over-the-counter markets, optimize portfolios, and analyze data – empowering market participants worldwide to efficiently manage risk and capture opportunities. CME Group’s exchanges offer the widest range of global benchmark products across all major asset classes based on interest rates, equity indexes, foreign exchange, energy, agricultural products, and metals. CME Group offers futures trading through the CME Globex platform, fixed income trading via BrokerTec, foreign exchange trading on the EBS platform.

² 88 FR 48968 (July 28, 2023) [hereinafter *NPR*].

Down Plan (the “Wind-Down Plan”) (collectively, the “Recovery and Wind-Down Plans”). If implemented, the Recovery and Wind-Down Plans are designed to provide continuity of CME Clearing’s critical operations and services (i.e., clearing services) in the event of various extreme but plausible scenarios. Consistent with the DCO Core Principles³ and current CFTC regulations⁴, the Recovery and Wind-Down Plans prioritize the safety and efficiency of the Clearing House and support the stability of the broader financial system. They are also designed to conform with the obligations under current CFTC regulations, particularly CFTC Regulation § 39.39, and are reviewed and approved by CME’s Board of Directors at least annually.

CME Group’s general comments on the NPR are in Section II of this letter with more technical comments detailed in the Appendix. As a housekeeping matter, CME Group notes, as the Commission recognized, that the guidance in CFTC Letter No. 16-61 (“No. 16-61”)⁵ is “non-binding guidance”⁶ and has not been previously consulted on publicly. While the NPR states that “DCOs registered with the Commission and the clearing industry in general are likely familiar with the staff letter and have probably been following developments related to this proposal,” this is the first opportunity for comment on the guidance as presented in the NPR’s proposal.⁷ Given the lack of previous consultation and the NPR’s highly prescriptive nature, as well as the robust governance arrangements which apply to SIDCOs’ recovery and wind-down plans, CME Group believes that it will be imperative for any resulting final rulemaking to include a compliance period of at least 12-months.

II. GENERAL COMMENTS

A. Importance of continuing to embrace principles-based regulation, including to continue to provide SIDCOs’ appropriate flexibility in recovery and wind-down planning

As a general matter, CME Group is concerned with the prescriptive nature of the NPR and recommends that the Commission continue to embrace a principles-based approach to regulation. For example, proposed CFTC Regulations §§ 39.39(c)(2)(ii)(A)-(K) and (c)(2)(iii) enumerates specific scenarios a SIDCO must consider as part its recovery planning. CME Group disagrees that the inclusion of specific scenarios—that the Commission refers to as “commonly applicable scenarios”—promotes the comprehensiveness of DCOs’ recovery plans.⁸ The idea that there are “commonly applicable scenarios” runs counter to the Commission’s recognition that the possibility of a scenario resulting in recovery is dependent on a given SIDCO’s structure and activities.⁹ Requiring specific scenarios be analyzed could divert focus away from those scenarios that actually could reasonably threaten a SIDCO’s viability.

³ 7 U.S.C. § 7a-1.

⁴ 17 CFR § 39.24(a)(1)(iii)-(iv).

⁵ CFTC Letter No. 16-61, *Recovery Plans and Wind-down Plans Maintained by Derivatives Clearing Organizations and Tools for the Recovery and Orderly Wind-down of Derivatives Clearing Organizations* (July 16, 2016) [hereinafter *No. 16-61*], available at <https://www.cftc.gov/csl/16-61/download>.

⁶ *NPR*, *supra* note 2, at 48976.

⁷ *Id.* (noting, the Commission states, “[t]he Commission has preliminarily determined to codify the staff guidance into the Commission’s part 39 regulations.”).

⁸ *Id.* at 48978.

⁹ *Id.*

Notably, neither the NPR nor No. 16-61,¹⁰ explain as to why the chosen scenarios are considered “commonly applicable” to DCOs’ recovery planning. Instead, the Commission merely references that some of the scenarios are included in No. 16-61. Furthermore, the NPR provides no evidence that the scenarios included in SIDCOs’ recovery plans based on current CFTC regulations fail to include scenarios that could threaten their viability as a going concern and prevent them from continuing to provide their critical operations and services. Under current CFTC Regulation § 39.39, a SIDCO’s recovery and wind-down plans are required to address scenarios related to uncovered credit losses and liquidity shortfalls and separately, general business risk, operational risk, or any other risk that threatens its viability as a going concern. These types of scenarios, as defined, are suitable and provide a SIDCO with appropriate flexibility to identify scenarios appropriate for it. CME Group recommends that the Commission maintain its current principles-based approach rather than adding unnecessary prescription (i.e., not adopt proposed CFTC Regulations §§ 39.39(c)(2)(ii)(A)-(K) and (c)(2)(iii)), particularly when such prescription may present systemic risk implications.

The above-referenced proposed regulations are but one example of the NPR’s significant deviation from CFTC’s long-held and highly successful principles-based approach that provides SIDCOs flexibility to tailor their practices to their unique characteristics.¹¹ Current CFTC Regulation § 39.39 embraces this approach and grants SIDCOs the appropriate latitude to account for differences in organizational structures, clearing membership, products cleared, and governance arrangements in recovery and wind-down planning. Accounting for these differences is equally as important for a SIDCO in recovery and wind-down planning as it is in managing its day-to-day risks. This principles-based approach permits SIDCOs to design their risk management practices with the flexibility necessary to effectively address the prevailing facts and circumstances in the markets they clear. This is particularly pertinent in the case of recovery and wind-down planning given the unique facts and circumstances that could characterize such an event, as notably, neither a recovery nor wind-down has ever occurred at a U.S. DCO. CME Group urges the Commission to reconsider the NPR’s prescriptive approach.

Similarly, it is paramount for local policy-makers, including the CFTC, to implement international standards in a manner that is suitable for the markets they oversee. While international standards may be

¹⁰ No. 16-61, *supra* note 5, at pg. 5.

¹¹ Notably, the Commission has previously demonstrated its commitment to principles-based regulations and not enumerated specific risks or scenarios for SIDCOs to address in its risk methodologies and recognized the importance of DCO discretion, which, as described in this letter, is similarly important in recovery and wind-down planning. *See, e.g.*, Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800 (Jan. 27, 2020) at 4810 (noting, the Commission amended § 39.13(g)(2)(i) to delete the statement in the regulation that a DCO’s margin methodology address risks that “includ[e] but are not limited to jump-to-default risk or similar jump risk” and did not adopt its proposal to keep this statement and add a statement that such risks also include “concentration of positions.” The Commission states that, “DCOs have discretion with respect to how they identify, label, and address such risks; therefore, the Commission is declining to define such terms.”); Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334 (Nov. 8, 2011) at 69348-9 (The Commission states, “[p]roposed § 39.11(c)(1) would require a DCO to perform stress testing on a monthly basis in order to make a reasonable calculation of the financial resources it needs to meet the requirements of proposed § 39.11(a)(1). The DCO would have reasonable discretion in determining the methodology used to make the calculation, but would be required to take into account both historical data and hypothetical situations. The Commission is adopting § 39.11(c)(1) as proposed. The Commission believes it is appropriate to allow the DCO discretion in designing stress tests because stress testing is an exercise that inherently entails the exercise of judgment at various stages.”).

helpful in informing the CFTC’s rulemaking on recovery and wind-down planning, they should only be adopted after careful consideration of their appropriateness and designed in a manner that is fit for the markets overseen by the CFTC. Where international standards are informing the CFTC’s rulemaking, the NPR should have clearly explained why such standards are appropriate relative to CFTC registrants and the markets the CFTC oversees.¹²

B. Focusing recovery and orderly wind-down planning on SIDCOs’ critical operations and services

Consistent with the NPR’s overall focus on a SIDCO’s critical operations and services, CME Group recommends that the focus of CFTC Regulation § 39.39 *clearly* be limited to the SIDCO’s identified critical operations and services.¹³ Critical operations and services are those which market participants rely upon and “should allow DCOs to serve as a source of strength and continuity for the financial markets they serve.”¹⁴ Focusing on non-critical operations and services would divert staffing resources and time away from analysis for recovery and orderly wind-down planning regarding the operations and services identified as critical by the SIDCO without any commensurate benefit. Accordingly, a regulatory focus on non-critical operations and services could inadvertently undermine the continuity of a SIDCO’s critical operations and services.

C. Supporting scenario analysis for recovery and orderly wind-down planning that focuses on extreme but plausible conditions

CME Group recommends that the Commission clearly state in proposed CFTC Regulations §§ 39.39(c)(2) and (5) that a SIDCO’s scenario analysis is only required to be comprised of scenarios that capture extreme but plausible conditions.¹⁵ CME Clearing maintains prefunded financial resources to cover the default of the two clearing members and their affiliates creating the largest combined loss under “extreme but plausible market conditions” and has other tools and resources, consistent with current CFTC Regulation § 39.35, to allocate uncovered credit losses and liquidity shortfalls. Requiring a SIDCO to add extreme and implausible scenarios into its recovery and orderly wind-down plans would divert staffing resources and time away from preparing for extreme but plausible scenarios, such as the default of three clearing members. As described below, in some cases the proposed inclusion of extreme and implausible scenarios could place SIDCOs in the untenable position of becoming guarantors of the broader financial system. Any expectation that SIDCOs’ recovery and orderly wind-down plans address

¹² See, e.g., NPR, *supra* note 2, at 48974 (noting, the Commission provides no explanation of why certain aspects of the definition of “non-default losses” under proposed 39.2 adopt the international standard setting bodies’ guidance on recovery. For example, regarding the inclusion of custody risk in the definition, the NPR merely states, “[u]nder the second group, losses arising from custody risk, the Commission proposes to adopt substantially the discussion of custody risk in the CPMI–IOSCO Recovery Guidance. This results in (2) losses incurred by the derivatives clearing organization on assets held in custody or on deposit in the event of a custodian’s (or sub-custodian’s or depository’s) insolvency, negligence, fraud, poor administration or inadequate record-keeping.”).

¹³ See the Appendix to this letter.

¹⁴ NPR, *supra* note 2, at 48969.

¹⁵ See the Appendix to this letter.

scenarios that put a SIDCO in an inappropriate role or capture extreme and implausible conditions could create systemic risk, rather than reducing it.

CME Group is confident that the day-to-day risk management practices of SIDCOs and resources SIDCOs maintain pursuant to current CFTC Part 39 Regulations make the possibility of a recovery or wind-down event remote. Importantly, a SIDCO must be able to recognize the risk mitigating benefits their practices and resources provide in recovery and wind-down planning. CME Clearing's comprehensive recovery and wind-down scenario analysis includes a variety of scenarios designed to be extreme but plausible relating to default and non-default loss events. For each scenario, this comprises quantitative analysis of potential losses against available resources and qualitative analysis to identify the potential facts and circumstances that may characterize the scenario and to describe the monitoring processes relevant to the scenario. In addition, this analysis incorporates the steps CME Clearing may take should the scenario occur. In some cases, this analysis leads CME Clearing to conclude that the scenario would not trigger recovery or wind-down because it can be managed within its day-to-day risk management practices and resources. For example, even if CME Clearing were to experience an extreme but plausible scenario resulting in a market value loss from its investments, this scenario would not trigger recovery or wind-down due to the conservative nature of CME Clearing's investment policy. As the CFTC recognized in the NPR, the conclusions of a SIDCO's scenario analysis regarding whether a scenario could trigger the SIDCO's recovery or wind-down are necessarily driven by each SIDCO's specific structure and activities.¹⁶ Any requirements for scenario analysis in recovery and wind-down planning must preserve a SIDCO's ability to determine and design which scenarios are assessed and to evaluate them considering its unique structure and activities, as contemplated by the Commission in the NPR.

CME Group is also concerned that some of the recovery scenarios contemplated in the NPR are not only extreme and implausible, but could place inappropriate burdens on SIDCOs. One example is the NPR's proposed requirement that plans should contemplate scenarios that would effectively have a SIDCO guaranteeing against the failure of third-party custodians and banks. The inclusion of such scenarios is problematic. It suggests that a SIDCO is a guarantor of the broader financial system, a role not taken up by, or required of, any other institution in the chain of custody and management of non-cash and cash collateral. At the same time, these scenarios are implausible in assuming that prudential regulators have failed in their duty to design a regulatory framework that ensures the ongoing provision of collateral access and services in the event of a bank's resolution.¹⁷ While, for these reasons, third-party settlement bank, custodian, and depository failure scenarios are inappropriate and implausible, other scenarios, such as assuming the simultaneous default of four global systemically important banks participating in a SIDCOs markets as clearing members, which has been required to be contemplated by DCOs in certain exercises (e.g., international standard setting bodies' work),¹⁸ do not pass the plausibility test.

¹⁶ *NPR*, *supra* note 2, at 48978.

¹⁷ See 12 CFR 243.2 and 243.3(a)(1)(ii), 12 CFR 381.2 and 381.3(a)(1)(ii), and 84 FR 1438 (noting, the resolution planning for "critical operations" and those material entities that are significant to those operations).

¹⁸ See Financial Stability Board, Committee on Payments and Market Infrastructure, International Organization of Securities Commissions, *Central Counterparty Financial Resources for Recovery and Resolution* (Mar. 10, 2022), available at <https://www.fsb.org/wp-content/uploads/P090322.pdf>.

D. Promoting effective and efficient regulations, including by eliminating overlapping provisions

The CFTC has a proven history of reviewing its regulations, and amending them where necessary, to affirm its regulations remain effective and efficient and are not unnecessarily complex.¹⁹ CME Group is concerned that certain aspects of the proposed CFTC regulations overlap with each other and/or with current regulations. This overlap may lead to ineffective and inefficient regulations, as they can confuse and undermine today's certainty regarding what is required for a SIDCO's recovery and orderly wind-down plans. For example, proposed CFTC Regulation § 39.39(c)(7)²⁰ overlaps with current CFTC Regulation § 39.24, which remains unchanged under the NPR.²¹

More specifically, both proposed CFTC Regulation § 39.39(c)(7) and current CFTC Regulation § 39.24 address requirements for a SIDCO's governance arrangements, including specifying the roles and responsibilities of the management and board of directors and considering the views of stakeholders. CFTC Regulation § 39.24(b)(10) requires that a SIDCO's governance arrangements assign responsibility for implementing the recovery and wind-down plans pursuant to current CFTC Regulation § 39.39. Generally, CFTC Regulation § 39.24 establishes requirements that universally apply to a SIDCO's governance arrangements, inclusive of a SIDCO's recovery and wind-down plans. Proposed CFTC Regulation § 39.39(c)(7), however, would establish requirements that narrowly apply to governance for a SIDCO's recovery and orderly wind-down plans. CME Group believes that the requirements for SIDCOs' governance under CFTC Regulation § 39.24 remain sufficient and that a siloed expansion of regulations for SIDCOs' governance in this narrow area of a SIDCO's recovery and wind-down planning is inappropriate. For example, proposed CFTC Regulation § 39.39(c)(7)(iv) would require a SIDCO to describe in its recovery and orderly wind-down plans the process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the DCO. However, a SIDCO already manages these views and interests more broadly across its operations pursuant to CFTC Regulation § 39.24. Overlapping governance requirements for SIDCOs in multiple places, particularly where they are not completely aligned, may create regulatory and operational risk without any attendant benefit. Notably, the CFTC has also reviewed and amended its requirements for governance under CFTC

¹⁹ See, e.g., Project KISS, 82 FR 23765 (May 24, 2023) (noting, the Commission states, “[a]lthough the CFTC, as an independent federal agency, is not bound by EO 13777, the Commission is nevertheless commencing an agency-wide review of its rules, regulations, and practices to make them simpler, less burdensome, and less costly. This initiative is called Project KISS, which stands for ‘Keep It Simple Stupid.’ In support of these efforts, the Commission has approved the solicitation of suggestions from the public regarding how the Commission’s existing rules, regulations, or practices could be applied in a simpler, less burdensome, and less costly manner.”); Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800 (Jan. 27, 2020) (noting, the Commission states, “[s]ince the part 39 regulations were adopted, Commission staff has worked with DCOs to address questions regarding interpretation and implementation of the requirements established in the regulations. In May 2019, the Commission proposed certain changes to its part 39 regulations (Proposal) in order to enhance certain risk management and reporting obligations, clarify the meaning of certain provisions, simplify processes for registration and reporting, and codify staff relief and guidance granted since the regulations were first adopted.”).

²⁰ While Section II.D of this letter primarily references proposed CFTC Regulation § 39.39(c)(7), the comments in this section similarly apply to proposed CFTC Regulations §§ 39.39(c)(2)(i)(F), (c)(3)(ii), (c)(4)(iv), and (c)(5)(v) that also address governance for recovery and wind-down planning.

²¹ CME Group addresses other areas of overlap in proposed CFTC regulations under the NPR in the Appendix to this letter.

Regulation § 39.24 in 2020²² and 2023²³ and in each instance did not adopt additional requirements for governance specific to SIDCO obligations, such as the requirement to maintain a risk management framework. The Commission should eliminate the overlapping requirements under proposed CFTC Regulation § 39.39(c)(7), as further detailed in the Appendix to this letter, and continue to rely on applicable governance regulations already in place.

E. Recognizing current practices and providing appropriate flexibility with respect to any requirements for SIDCOs to test their recovery and orderly wind-down plans

CME Group is concerned with certain aspects of the requirement for SIDCOs to test their recovery and orderly wind-down plans in proposed CFTC Regulation § 39.39(c)(8). CME Group appreciates the importance of SIDCOs evaluating the viability of their recovery and orderly wind-down plans and that the NPR recognizes that a SIDCO should determine the “types of testing that will be performed” regarding its recovery and wind-down planning.²⁴ CME Clearing employs various practices that collectively evaluate the viability of its Recovery and Wind-Down Plans, which the NPR notes is the focus of its proposed testing requirement.²⁵ Consistent with CFTC Regulations §§ 39.16(b) and 39.18(c)(3)(ii), CME Clearing conducts testing of its default management plan and business continuity and disaster recovery plan with its clearing members, in addition to annually reviewing its Recovery and Wind-Down Plans. As described further below, a SIDCO should have the flexibility to determine the manner in which it will test the viability of its recovery and orderly wind-down plans, including regarding the participation of external stakeholders.

CME Group is concerned with the proposed CFTC Regulation § 39.39(c)(8) that SIDCOs conduct testing “with the participation of their clearing members, where the plan depends on their participation, and the derivatives clearing organization shall consider including external stakeholders that the plan relies upon, such as service providers, to the extent practicable and appropriate.” This prescriptive approach is inconsistent with the principles-based regulations under CFTC Regulations §§ 39.16(b) and 39.18(c)(3)(ii) for default management plan and business continuity and disaster recovery plan testing and may have unintended consequences. In particular, this may divert the focus of a SIDCO and its clearing members and other stakeholders from confirming they are prepared to address either a clearing member default or operational resilience event. SIDCOs’ current testing practices are important to avoiding an outcome where a clearing member default or operational resilience event becomes a recovery event.

For example, while a SIDCO likely conducts its default management plan testing considering stressed market conditions, requiring that conditions be set at the level of stress that would trigger the use of recovery tools may be of little benefit. Effectively—rather than the current approach to default management plan testing where clearing members submit their best bids via independent analysis of the provided portfolio—assuming the utilization of the entire guaranty fund (i.e., use of recovery tools) dictates the outcome of the bidding process on an *ex ante* basis. Such an approach reduces the utility of

²² Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800 (Jan. 27, 2020) (noting, the requirements under current CFTC Regulation § 39.24 were previously included in CFTC Regulation § 39.32)

²³ Governance Requirements for Derivatives Clearing Organizations, 88 FR 44675 (July 13, 2023).

²⁴ NPR, *supra* note 2, at 48982.

²⁵ *Id.*

clearing members' participation and the benefit of default management plan testing to the SIDCO itself. Given this, a SIDCO may elect to test its recovery and wind-down planning by conducting table-top exercises with or without external stakeholders, as a complement to testing pursuant to CFTC Regulations §§ 39.16(b) and 39.18. Additionally, considering the confidential and highly sensitive nature of certain aspects of a SIDCO's recovery and orderly wind-down plans such as sale of assets, it may not always be appropriate for external stakeholders to be involved. CME Clearing would expect to design the testing of these aspects as table-top exercises without the participation of external stakeholders. CME Group believes that SIDCOs must have appropriate flexibility in designing any tests of their recovery and orderly wind-down plans, so that they can be devised in a manner that is holistically most beneficial to preparing SIDCOs and their stakeholders for addressing events that may ultimately lead to recovery.

CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(8), as detailed in the Appendix to this letter, to ensure SIDCOs have appropriate flexibility in designing the testing of their recovery and wind-down planning.

F. Recognition of the statutory requirements for the Federal Deposit Insurance Corporation's ("FDIC") orderly liquidation authority

CME Group believes clarifications are warranted with respect to the NPR's discussion of Title II of the Dodd-Frank Act ("Title II"). In particular, the NPR states that "Title II establishes the Federal Deposit Insurance Corporation (FDIC) as the receiver for failing financial institutions designated as systematically important, like SIDCOs."²⁶ This statement implies that an entity designated under Title VIII of the Dodd-Frank Act would automatically be subject to the FDIC's orderly liquidation authority ("OLA") under Title II. CME Group disagrees with that characterization for two reasons. First, as the CFTC is aware, the statutory requirements to invoke OLA necessitate the Secretary of the Treasury (in consultation with the President of the United States) reaching factual determinations regarding the entity and prevailing circumstances.²⁷ Second, other statements in the NPR contradict this reading that systemic importance under Title VIII *de facto* results in OLA under Title II.²⁸ The Commission makes similar assumptions in proposed CFTC Regulation § 39.39(f)(7) where it proposes to require information and data for the purposes of resolution under Title II. Considering the fact that the Commission is not the resolution authority for SIDCOs and SIDCOs are not *de facto* subject to Title II, it is not clear that the Commission has the statutory authority to request this information under proposed CFTC Regulation § 39.39(f)(7) for resolution pursuant to Title II. CME Group believes any suggestion that it has been finally concluded that

²⁶ *Id.* at 49049.

²⁷ Such determinations include, *inter alia*, that the entity meets the definition of "financial company" in Title II; that such financial company is in default or in danger of default; that no viable private sector alternative is available to prevent the default; that the financial company's failure and liquidation through a Chapter 7 bankruptcy would have serious adverse effects on financial stability in the U.S.; and the FDIC, acting as receiver for such financial company and after taking into account numerous specified considerations, would avoid or mitigate such adverse effects. *See* Wall Street Transparency and Accountability Act of 2010 § 203, Public Law 111-203 (2010), codified at 12 U.S.C. § 5381 *et. seq.*

²⁸ *See, e.g., NPR, supra* note 2, at 48983 (noting, the Commission states, "[i]n the United States, ***upon the completion of the statutory appointment process set forth in Title II of the Dodd-Frank Act***, the FDIC would be appointed the receiver of a failing SIDCO (or other covered financial company) (emphasis ***added***); *see also id.*, at fn. 155 (noting, the Commission states, "an entity designated in advance under Title VIII may not, even in the event of its failure, be determined to meet the standards under Title II").

all SIDCOs would automatically be subject to OLA to the extent that they were failing contradicts statutory language and Congressional intent. As such, CME Group believes the Commission should reconsider its conclusions in the NPR in relation to Title II decision-making and not adopt proposed CFTC Regulation § 39.39(f)(7) since it appears to be outside the scope of the Commission's statutory authority in regard to Title II.

III. CONCLUSION

CME Group appreciates the opportunity to comment on the CFTC's NPR. As noted previously, we have supplemented our general comments contained above with additional technical comments which are contained in the Appendix to this letter. CME Group's comments are intended to ensure the Commission continues to employ principles-based regulations.

If you have any comments or questions, please feel free to contact me at (312) 930-3260 or via email at Suzanne.Sprague@cmegroup.com.

Very truly yours,



Suzanne Sprague
Senior Managing Director, Global Head of Clearing & Post-Trade Services

cc: Chairman Rostin Behnam
Commissioner Kristin N. Johnson
Commissioner Christy Goldsmith Romero
Commissioner Summer K. Mersinger
Commissioner Caroline D. Pham
Clark Hutchison, Director, Division of Clearing and Risk

APPENDIX

Definitions – Amendments to CFTC Regulation § 39.2

For the reasons described in Section II.A of this letter, CME Group recommends that the definition for “non-default losses” in proposed CFTC Regulation § 39.2 not be adopted and that the Commission maintain its current definitions of “general business risk” and “operational risk” in current CFTC Regulation § 39.39(a). This would be consistent with CME Group’s recommendations with respect to proposed CFTC Regulation § 39.39(c)(2)(ii)(A)-(K), and addresses the current misalignment in the NPR, as described below. The definition of “non-default losses”, like the specific list of recovery scenarios included in proposed CFTC Regulation § 39.39(c)(2)(ii)(A)-(K), is overly prescriptive. For example, it describes five different types of events not related to a clearing member default in detail. Broadly, since a SIDCO’s recovery and orderly wind-down plans would address the scenarios it identifies, it seems unnecessary to adopt the proposed definitions of “default losses” and “non-default losses”, when the only times these terms are used, with respect to SIDCOs, is in proposed CFTC Regulation § 39.39(b)(1) that requires that a SIDCO maintain viable recovery and orderly wind-down plans “that may be necessitated, in each case, by default losses and by non-default losses.” In addition to the unwarranted prescriptiveness, reading the enumerated recovery scenarios in proposed CFTC Regulation § 39.39(c)(2)(ii)(A)-(K) in conjunction with the definition of “non-default losses” in proposed CFTC Regulation § 39.2 may cause confusion. This is due to the fact the scenarios included in proposed CFTC Regulation § 39.39(c)(2)(ii)(A)-(K) do not align entirely with the definition of “non-default losses” in proposed CFTC Regulation § 39.2.

Submission of Plans for Recovery and Orderly Wind-Down – Amendments to CFTC Regulations § 39.19(c)(4)(xxiv)

CME Clearing submits its Recovery and Wind-Down Plans to the Commission annually and where any revisions are made. These submissions include the appendices to its Recovery and Wind-Down Plans, as appropriate, which CME Group believes is consistent with the intention of the addition of the proposed requirement to submit “supporting information” under proposed CFTC Regulation § 39.19(c)(4)(xxiv).²⁹ CME Group believes the reference to “supporting information” means information directly related to the recovery and orderly wind-down plans—such as details on the assessment of the recovery and wind-down scenarios and tools—that SIDCOs, in their best judgement, determine is appropriate to be submitted to the Commission. CME Group assumes that it is not the intention of the proposal for all policies and procedures a SIDCO employs for risk management purposes that mitigate and monitor the risks of recovery or wind-down occurring to be submitted to the Commission, since SIDCO’s commonly provide these policies and procedures to the CFTC as part of the CFTC’s ongoing supervisory oversight. This approach would be redundant and inefficient, while diverting focus from the core of a SIDCO’s recovery and wind-down planning. Therefore, to provide certainty regarding the expectations for the submission of “supporting information”, CME Group recommends the Commission revise proposed CFTC Regulation §

²⁹ See NPR, *supra* note 2, at 48992 (noting, the Commission states, “DCOs may, in some instances, include supporting information within their plans, or may organize the documentation with supporting information kept separately, e.g., as an appendix or annex.”).

39.19(c)(4)(xxiv) to “~~supporting information~~ an appendix or appendices” (additions underscored, deletions ~~overstruck~~).³⁰

Notice of Initiation of the Recovery Plan and of Pending Orderly Wind-Down – Amendments to CFTC Regulation § 39.19(c)(4)(xxv)

CME Group is supportive of the adoption of proposed CFTC Regulation § 39.19(c)(4)(xxv).³¹ Consistent with current CFTC Regulation § 39.39(c)(1), CME Clearing’s Recovery and Wind-Down Plans include procedures for informing the Commission, as soon as practicable, when recovery is initiated or wind-down is pending. CME Group appreciates that the reference to “as soon as practicable” was maintained in proposed CFTC Regulation § 39.19(c)(4)(xxv) when notifying the Commission and clearing members when a SIDCO has initiated its recovery plan or when orderly wind-down is pending. This will ensure timely notification, while also preserving a SIDCO’s flexibility with respect to the timing of notice to clearing members considering the potential impact of the notification.

Recovery Plan and Orderly Wind-Down Plan – Amendments to CFTC Regulation § 39.39(b)(2)

The reference to CFTC Regulation § 39.39(b)(2) that is retained in CFTC Regulations § 39.39(d)(2)-(3) is no longer appropriate since proposed CFTC Regulation § 39.39(b)(2) does not contain requirements for the recovery and wind-down plans to address general business risk, operational risk, or any other risk that may threaten the SIDCO’s viability. CME Group recommends that the Commission resolve this drafting error.

Recovery Plan and Orderly Wind-Down Plan: Required Elements – Amendments to CFTC Regulation § 39.39(c)

For the reasons described in Section II.D of this letter, given the overlapping nature of proposed CFTC Regulation § 39.39(c) with proposed CFTC Regulations §§ 39.39(c)(1) through (c)(8), CME Group recommends that the references to the elements listed under proposed CFTC Regulation 39.39(c)(1) not be adopted where they are addressed elsewhere in proposed CFTC Regulations §§ 39.39(c)(1) through (c)(8).³²

CME Group does not believe that a SIDCO’s recovery and orderly wind-down plans should be required to include an overview of each plan, as proposed in CFTC Regulation § 39.39(c). CME Clearing’s experience has been that the inclusion of an overview section may result in confusion for reviewers and

³⁰ For avoidance of doubt, CME Group recommends that the reference to “supporting information” also be revised to “an appendix or appendices” in proposed CFTC Regulations §§ 39.39(b)(1) and (b)(3).

³¹ For avoidance of doubt, CME Group recommends that proposed CFTC Regulation § 39.39(b)(2) also be adopted as proposed in the NPR.

³² For avoidance of doubt, CME Group notes this is with respect to the portion of proposed CFTC Regulation § 39.39(c) that states, “[t]he description of each plan shall include the identification and description of the derivatives clearing organization’s critical operations and services, interconnections and interdependencies, resilient staffing arrangements, stress scenario analyses, potential triggers for recovery and orderly wind-down, available recovery and wind-down tools, analyses of the effect of the tools on each scenario, lists of agreements to be maintained during recovery and orderly wind-down, and governance arrangements.” Additionally, CME Group’s comments with respect to the specific elements listed that are required to be included in a SIDCO’s recovery and orderly wind-down plans under proposed CFTC Regulation § 39.39(c) are addressed in CME Group’s comments on the specific proposed regulations that address these elements in greater detail under proposed CFTC Regulations §§ 39.39(c)(1) through (c)(8).

users of the plans, since the contents covered in an overview section are covered in more detail elsewhere. While CME Group believes a SIDCO should have flexibility to determine if an overview section is appropriate for its recovery and orderly wind-down plans, it should not be required, so CME Group recommends that this requirement not be adopted.

Below reflects the revisions CME Group recommends to proposed CFTC Regulation § 39.39(c) (deletions ~~overstruck~~):

“Requirements for recovery plan and orderly wind-down plan. The recovery plan and orderly wind-down plan required by paragraph (b) of this section shall include ~~an overview of each plan and~~ a description of how each plan will be implemented. ~~The description of each plan shall include the identification and description of the derivatives clearing organization’s critical operations and services, interconnections and interdependencies, resilient staffing arrangements, stress scenario analyses, potential triggers for recovery and orderly wind-down, available recovery and wind-down tools, analyses of the effect of the tools on each scenario, lists of agreements to be maintained during recovery and orderly wind-down, and governance arrangements.~~”

Critical Operations and Services, Interconnections and Interdependencies, and Resilient Staffing – Amendments to CFTC Regulation § 39.39(c)(1)

CME Group supports the Commission’s proposal that a SIDCO be required to identify and describe its critical operations and services. However, to be consistent with references to “market participants” in the DCO Core Principles and current CFTC Part 39 Regulations, CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(1) to “clearing members and other ~~financial~~ market participants” (deletions ~~overstruck~~).

CME Clearing’s Recovery and Wind-Down Plans identify and describe the financial and operational interconnections and interdependencies CME Clearing relies upon to provide its critical operations and services. These interconnections and interdependencies cover third-parties (e.g., external service providers) and affiliates of CME. The requirement under proposed CFTC Regulation § 39.39(c)(1) that a SIDCO’s recovery and orderly wind-down plans identify and describe the service providers upon which it relies to provide its critical operations and services is consistent with CME Clearing’s current practices. However, the drafting of proposed CFTC Regulation § 39.39(c)(1) may lead to confusion by referencing service providers and separately referencing interconnections and interdependencies, given the inherent overlap between an interconnection and a service provider relationship. Confusion may also arise because the use of term “service providers” in current CFTC Part 39 Regulations has primarily been in the context of outsourcing requirements under CFTC Regulation § 39.18(d). The broader reference to “interconnections and interdependencies” seems more appropriate because it avoids an unintended outcome where the reference to service providers alone is read to not encompass all relevant types of interconnections and interdependencies. Therefore, CME Group recommends that, in relevant part, the Commission revise proposed CFTC Regulation § 39.39(c)(1) to “the financial and operational interconnections and interdependencies ~~service providers~~ upon which the derivatives clearing organization relies to provide these critical operations and services, ~~including internal and external~~

~~service providers and ancillary services providers, financial and operational interconnections and interdependencies”~~ (additions underscoring, deletions ~~overstruck~~).

For the reasons described in Section II.D of this letter, CME Group recommends that certain aspects of proposed CFTC Regulation § 39.39(c)(1) should not be adopted due to their overlap with current and/or proposed CFTC Part 39 Regulations. More specifically, CME Group notes:

- **Aggregate cost estimates for the continuation of identified critical operations and services during recovery and orderly wind-down**

Proposed CFTC Regulation § 39.39(c)(1) requires that a SIDCO’s recovery and orderly wind-down plans identify and describe the aggregate cost estimates for the continuation of its critical operations and services. This requirement overlaps with the requirements under current CFTC Regulations §§ 39.11(a)(2) and 39.39(d)(2) that require that a SIDCO’s plans evidence the sufficiency of its resources for implementing its plans, which inherently require that a SIDCO’s recovery and orderly wind-down plans include aggregate cost estimates. Given this, CME Group recommends that the reference to “aggregate cost estimates for the continuation of services during recovery and orderly wind-down” in proposed CFTC Regulation § 39.39(c)(1) not be adopted by the Commission.

- **Obstacles to success of the recovery plan and orderly wind-down plan**

Proposed CFTC Regulation § 39.39(c)(1) requires that a SIDCO’s recovery and orderly wind-down plans identify and describe obstacles to success of the plans. This requirement overlaps with the requirements under proposed CFTC Regulations §§ 39.39(c)(4)(ix) and 39.39(c)(5)(ix) which require a SIDCO’s recovery and orderly wind-down plans to include an assessment of the likelihood that recovery and wind-down tools would result in recovery and wind-down, respectively. In particular, assessing the likelihood that tools would result in recovery and wind-down is virtually identical to a SIDCO identifying potential obstacles to the success of the plans. Given this, CME Group recommends that the reference to “obstacles to success of the recovery plan and orderly wind-down plan” in proposed CFTC Regulation § 39.39(c)(1) not be adopted by the Commission.

- **Plans to address the risks associated with the failure of each critical operation or service and how the derivatives clearing organization will ensure that each identified operation or service continues through recovery and orderly wind-down**

Proposed CFTC Regulation § 39.39(c)(1) requires that a SIDCO’s recovery and orderly wind-down plans identify and describe plans to address the risks associated with the failure of each critical operation or service and how it will ensure that each identified operation or service continues through recovery and orderly wind-down. This requirement overlaps with the collective requirements and overall objective of a SIDCO’s recovery and wind-down planning under current and proposed CFTC § 39.39. For example, these aspects of proposed CFTC Regulation § 39.39(c)(1) overlap with proposed CFTC Regulation § 39.39(b)(1)—read in conjunction with the proposed definitions of “recovery” and “orderly wind-down” under proposed CFTC Regulation § 39.2—that requires a SIDCO to have viable plans for recovery and orderly wind-down. Given this, CME Group recommends that the references to “plans to address the risks associated with

the failure of each critical operation or service” and “how the derivatives clearing organization will ensure that each identified operation or service continues through recovery and orderly wind-down” in proposed CFTC Regulation § 39.39(c)(1) not be adopted by the Commission. To the extent the Commission decides to adopt these requirements despite the overlap, they should, at a minimum, be revised to make clear the requirements are each with respect to a SIDCO’s identified critical operations and services and that while a SIDCO can *design* its recovery and orderly wind-down plans to provide for continuity of its critical operations and services, it cannot *ensure* their continuity.

CME Group believes the reference to resilient staffing arrangements under proposed CFTC Regulation § 39.39(c)(1) is with respect to a SIDCO’s critical operations and services. Therefore, CME Group recommends that the Commission make this clear and revise proposed CFTC Regulation § 39.39(c)(1) to “plans for resilient staffing arrangements for continuity of **its critical operations and services**” (additions **underscored**).

Recovery Scenarios and Analysis – Amendments to CFTC Regulation § 39.39(c)(2)

Consistent with CME Group comments in Sections II.B and C of this letter, CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(2) to “[e]ach systemically important derivatives clearing organization and subpart C derivatives clearing organization shall identify scenarios that may prevent it from meeting its obligations ~~or in~~ providing its critical **operations and** services as a going concern **under extreme but plausible conditions**” (additions **underscored**, deletions ~~overstruck~~).

To the extent the Commission decides to adopt proposed CFTC Regulation § 39.39(c)(2)(i)(A)-(F) despite its overly prescriptive nature, CME Group believes it is critical that a SIDCO not be expected to predict all the unique facts and circumstances that could surround a recovery scenario. This is an impossible task of little risk management benefit, as it could inadvertently result in a recovery plan that is so rigid it is narrowly designed to only address the identified facts and circumstances, thus, reducing the potential effectiveness of the recovery plan if an actual recovery event occurs. Further, this approach could also divert a SIDCO’s focus away from the circumstances that most plausibly could characterize a recovery scenario.

Amendments to CFTC Regulation § 39.39(c)(2)(i)

Consistent with CME Group’s comments in Section II.C, with respect to proposed CFTC Regulation § 39.39(c)(2)(i)(C) that a SIDCO’s recovery scenario analysis include its process for monitoring for events that could trigger a scenario, these processes are likely to be part of a SIDCO’s day-over-day risk management practices and therefore, more appropriately addressed in other documentation maintained by the SIDCO. For example, the risk management framework a SIDCO maintains pursuant to CFTC Regulation § 39.13(b) is required to address “the monitoring and management of the entirety” of the risks identified. Therefore, CME Group recommends that the Commission: i) recognize that a SIDCO’s processes for monitoring events that could trigger a recovery scenario may also be outlined in documentation maintained by the SIDCO other than the recovery plan; and ii) not require a SIDCO to duplicate this documentation in the recovery plan if that is the case.

The obligations under proposed CFTC Regulations §§ 39.39(c)(2)(i)(D) and (E) overlap, since the financial and operational impact of the recovery scenario would encompass the circumstances that are likely to result from the scenario. More specifically, proposed CFTC Regulation § 39.39(c)(2)(i)(D) requires that a SIDCO’s recovery scenario analysis include the market conditions and other relevant circumstances that are likely to result from the scenario. Similarly, proposed § 39.39(c)(2)(i)(E) requires the analysis include the potential financial and operational impact of the scenario on market stakeholders, both in an orderly market and in a disorderly market. In addition to the overlapping nature of these proposed requirements, CME Group has the following concerns:

- **Potential expectation to predict endless circumstances**
CME Group is concerned that the reference to “market conditions and other relevant circumstances” under proposed CFTC Regulation § 39.39(c)(2)(i)(E) could be read to expect a SIDCO to predict endless fact patterns not necessarily related to the recovery scenario, whereas, the reference to “financial and operational impacts” to stakeholders under proposed CFTC Regulation § 39.39(c)(2)(i)(E) is more clearly targeted.
- **Potential to inadequately capture impacted stakeholders**
CME Group is also concerned that the specific reference to impacts to “clearing members, internal and external service providers and relevant affiliated companies” in proposed CFTC Regulation § 39.39(c)(2)(i)(E) may not adequately capture the stakeholders impacted by a recovery scenario.³³ Notably, proposed CFTC Regulation § 39.39(c)(2)(i)(E) does not reference customers.
- **Confusion regarding expectation for evaluating impacts**
CME Group finds the reference to impacts in both an orderly and a disorderly market confusing, as CME Group would expect that analyzing the impacts of the recovery scenario occurring should focus on analyzing these impacts under the conditions under which the scenario is assumed to occur (i.e., extreme but plausible).

For these reasons, CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(2)(i)(D)-(E) to “(D) ~~the market conditions and other relevant circumstances that are likely to result from the scenario;~~ (E) the potential financial and operational impact of the scenario on the derivatives clearing organization and on its clearing members and their customers, and any other relevant stakeholders ~~internal and external service providers and relevant affiliated companies, both in an orderly market and in a disorderly market~~” (additions underscored, deletions ~~overstruck~~).

The obligations under proposed CFTC Regulations §§ 39.39(c)(2)(i)(F) and 39.39(c)(4) overlap, since the steps a SIDCO would take to address a recovery scenario necessitate the use of its recovery tools. In particular, proposed CFTC Regulation § 39.39(c)(2)(i)(F) requires that a SIDCO’s recovery scenario analysis include the specific steps the DCO would expect to take when the scenario occurs, or appears likely to occur, whereas proposed CFTC Regulation § 39.39(c)(4) establishes the overall requirements for

³³ CME Group made similar comments on proposed CFTC Regulation § 39.39(c)(1).

a SIDCO's recovery plan with respect to its recovery tools. For example, proposed CFTC Regulation § 39.39(c)(4), in direct overlap with proposed CFTC Regulation § 39.39(c)(2)(i)(F), requires a SIDCO to describe the order in which each tool would be expected to be used, the timeframe in which each tool would be expected to be used, and the steps necessary to use each tool. Given this, CME Group recommends that the Commission not adopt proposed CFTC Regulation § 39.39(c)(2)(i)(F).

Recovery and orderly wind-down triggers – Amendments to CFTC Regulation § 39.39(c)(3)

Amendments to CFTC Regulation § 39.39(c)(3)(i)

The requirements under proposed CFTC Regulation 39.39(c)(3)(i) that a SIDCO establish criteria that may trigger implementation of the recovery and orderly wind-down plans and related monitoring processes overlap with other requirements in the NPR. For example, proposed CFTC Regulation § 39.39(c)(2)(B)-(C) requires that a SIDCO's recovery scenario analysis describe events that are likely to trigger a recovery scenario and the related monitoring processes for these events. Events that could trigger a recovery scenario are also inherently events that could trigger the implementation of the recovery plan.³⁴ CME Group believes the intention of the Commission was to focus proposed CFTC Regulation § 39.39(c)(3) on identifying what events would constitute a recovery or wind-down event (i.e., use of the recovery or orderly wind-down plan). In particular, the NPR notes, “[t]horough planning also requires that a SIDCO or Subpart C DCO be prepared to determine when recovery or orderly wind-down is necessary, ***that is, when the recovery plan or orderly wind-down plan should be “triggered.”***” (emphasis ***added***).³⁵ For these reasons, as well as those described in Section II.D of this letter, CME Group recommends that Commission revise proposed CFTC Regulation § 39.39(c)(3)(i) to (additions **underscored**, deletions ~~overstruck~~):

(i) A systemically important derivatives clearing organization's or subpart C derivatives clearing organization's:

(A) recovery plan shall ~~establish the criteria~~ **define the event or events** that may trigger implementation ~~or consideration of implementation~~ of that plan, ~~and the process the derivatives clearing organization has in place for monitoring for events that are likely to trigger the scenarios identified in paragraph (e)(2) of this section;~~ and

(B) orderly wind-down plan shall ~~establish the criteria~~ **define the event or events** that may trigger ~~consideration of~~ implementation of that plan, ~~and the process the derivatives clearing organization has in place for monitoring for events that may trigger implementation of the plan.~~

Amendments to CFTC Regulation § 39.39(c)(3)(ii)

For the reasons described in Section II.A of this letter, CME Group is concerned with the prescriptive nature of certain aspects of proposed CFTC Regulation § 39.39(c)(3)(ii) that establish requirements relating to information sharing and escalation to appropriate internal stakeholders during a recovery or wind-down event. For example, proposed CFTC Regulation § 39.39(c)(3)(ii) specifically references describing “pre-determined information-sharing” and escalation within the SIDCO's “senior management and the board of directors.” Given the unique facts and circumstances that could surround a recovery or

³⁴ CME Group's specific comments with respect to proposed CFTC Regulation § 39.39(c)(2)(i)(C) also apply to the aspects of the requirement under proposed CFTC Regulation § 39.39(c)(3)(i) that address monitoring.

³⁵ NPR, *supra* note 2, 48978.

wind-down event, it is not feasible for a SIDCO to pre-determine what information decision-makers will need to make informed decisions and this may actually result in decision-makers being inundated with unnecessary and/or unrelated information, which could ultimately cloud their decision-making. Additionally, the parties to which a SIDCO may escalate matters to in a recovery or wind-down event would be dependent on its unique governance arrangements, which may include a committee of the board of directors. For these reasons, CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(3)(ii) to require a SIDCO to establish procedures for information sharing within the SIDCO's governance arrangements.³⁶ Notably, this approach would be consistent with principles-based approach under CFTC Regulation § 39.18(e)(6)(ii) that requires that a SIDCO's security incident response plan include policies and procedures for internal and external communication and information sharing regarding security incidents.

Below reflects the revisions CME Group recommends to proposed CFTC Regulation § 39.39(c)(3)(ii) (additions underscored, deletions ~~overstruck~~):

(ii) The recovery plan and orderly wind-down plan shall include ~~a description of the pre-determined procedures for~~ information-sharing and escalation processes within the derivatives clearing organization's governance arrangements ~~senior management and the board of directors. The derivatives clearing organization must have a defined governance process that will be used that will include the factors the derivatives clearing organization considers most important in guiding the board of directors' exercise of judgment and discretion with respect to recovery and orderly wind-down plans in light of those triggers and that process.~~

Recovery tools – Amendments to CFTC Regulation § 39.39(c)(4)

While CME Clearing's current practices appear to be consistent with the goal of the requirements under proposed CFTC Regulation § 39.39(c)(4) that a SIDCO's "recovery plan include a complete description and analysis of the tools its proposes to use",³⁷ CME Group is concerned with the prescriptive and at times, overlapping nature of certain of the proposed requirements. For the reasons described in Section II.A of this letter, CME Group believes that the Commission should generally eliminate the overly prescriptive nature of requirements under proposed CFTC Regulation § 39.39(c)(4) that enumerates ten specific items a SIDCO should address relative to each of its recovery tools. In addition, for the reasons described in Section II.D of this letter, CME Group also recommends that the Commission, at a minimum, remove any overlapping aspects of proposed CFTC Regulation § 39.39(c)(4) and revise the terminology used in the regulation to be consistent with the terminology used in current and proposed CFTC Part 39 Regulations.

³⁶ For the reasons described in Section II.D of this letter, given the overlapping nature of the aspects of proposed CFTC Regulation § 39.39(c)(3)(ii) that propose requirements relating to a SIDCO's governance process with CFTC Regulation § 39.24, CME Group also recommends that these aspects of proposed CFTC Regulation § 39.39(c)(3)(ii) not be adopted. For avoidance of doubt, CME Group notes this is with respect to portion of proposed CFTC Regulation § 39.39(c)(3)(ii) that states, "[t]he derivatives clearing organization must have a defined governance process that will be used that will include the factors the derivatives clearing organization considers most important in guiding the board of directors' exercise of judgment and discretion with respect to recovery and orderly wind-down plans in light of those triggers and that process."

³⁷ *NPR, supra* note 2, 48979.

Amendments to CFTC Regulation § 39.39(c)(4)(i)

Aspects of proposed CFTC Regulation § 39.39(c)(4)(i) overlap with current CFTC Regulation § 39.39(d) that establishes requirements for financial resources of a SIDCO to support its recovery and wind-down plans. Recovery tools are the backbone of a SIDCO's financial resources to support its recovery plan. Therefore, to eliminate potential overlapping requirements, CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(4)(i) to “a description of the tools that the derivatives clearing organization would expect to use in each scenario required by paragraph (b)(1) of this section that ~~meet the full scope of financial deficits the derivatives clearing organization may need to remediate and~~ comprehensively address how the derivatives clearing organization would continue to provide its critical operations and services” (additions underscored, deletions ~~overstruck~~). Notably, revising CFTC Regulation § 39.39(c)(4)(i) in this manner would be consistent with the language under proposed CFTC Regulation § 39.39(c)(5)(ii) with respect to a SIDCO's wind-down strategies.

Amendments to CFTC Regulation § 39.39(c)(4)(iv)-(vii)

Aspects of proposed CFTC Regulation § 39.39(c)(4)(iv)-(vii) overlap, as they collectively address steps a SIDCO employs to implement its recovery tools. In particular, proposed CFTC Regulation § 39.39(c)(4)(vi) requires that a SIDCO's recovery plan include the steps necessary to implement each of its recovery tools, which would include the applicable governance, obtaining external approvals (if any), and roles and responsibilities of various parties. Each of these items are then separately addressed in the requirements in proposed CFTC Regulations §§ 39.39(c)(iv), (v), and (vii).³⁸ The broader reference to “the steps necessary to implement each such tool” under proposed CFTC Regulation § 39.39(c)(4)(vi) seems more appropriate, as compared to a more prescriptive approach of attempting to enumerate the specific types of steps that would be taken. For these reasons, as well as those in Sections II.A and II.D, CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(4)(iv)-(vii) to (additions underscored, deletions ~~overstruck~~):

- (iv) ~~a description of the governance and approval processes and arrangements within the derivatives clearing organization for the use of each of the tools available, including the exercise of any available discretion;~~
- (v) ~~the processes to obtain any approvals external to the derivatives clearing organization (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained;~~
- (vi) the steps necessary to implement each such tool;
- (vii) ~~a description of the roles and responsibilities of all parties, including non-defaulting clearing members, in the use of each such tool;~~

Amendments to CFTC Regulation § 39.39(c)(4)(x)

Aspects of proposed CFTC Regulation § 39.39(c)(4)(x) use terminology that is inconsistent with terminology used in current and proposed CFTC Part 39 Regulations. Clear and unambiguous regulations are critical for SIDCOs' maintenance of their recovery and orderly wind-down plans and the CFTC's supervisory oversight. To make this regulation consistent with proposed CFTC Regulations § 39.39(c)(2)(i)(E) that would require a SIDCO's recovery scenario analysis include the *impact* to

³⁸ CME Group's also believes that the roles and responsibilities of various parties would be captured in the description of the recovery tool under proposed CFTC Regulation § 39.39(c)(4)(i).

stakeholders, CME Group recommends that proposed CFTC Regulation § 39.39(c)(4)(x) also clearly focus on assessing the impacts, rather than risks, to stakeholders of the use of each recovery tool. As another example, proposed CFTC Regulation § 39.39(c)(4)(x) uses the terms “linked financial market infrastructures.” This term does not exist elsewhere in current CFTC Part 39 Regulations and should not be adopted. In line with the above,³⁹ CME Group is also concerned that the specific reference to impacts to “to non-defaulting clearing members and those clearing members’ customers with respect to transactions cleared on the derivatives clearing organization, linked financial market infrastructures” in proposed CFTC Regulation § 39.39(c)(4)(x) may not adequately capture the stakeholders impacted by a recovery tool. For example, the use of a recovery tool may impact a SIDCO’s parent.

Below reflects the revisions CME Group recommends to proposed CFTC Regulation § 39.39(c)(4)(x) (additions **underscoring**, deletions **~~overstruck~~**):

an assessment of the associated **risks impacts** from the use of each such tool to non-defaulting clearing members and ~~those clearing members’~~ **their** customers with respect to transactions cleared ~~on by~~ the derivatives clearing organization, ~~linked financial market infrastructures~~ **other relevant stakeholders**, and the **broader** financial system ~~more broadly~~.

Orderly wind-down scenarios and tools – Amendments to CFTC Regulation § 39.39(c)(5)

CME Group believes that the analysis that is required of a SIDCO for its recovery tools and wind-down strategies should be consistent, which the Commission also appears to realize based on the language included in the NPR.⁴⁰ Therefore, CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(5) to (additions **underscoring**, deletions **~~overstruck~~**):

- (5) *Orderly wind-down scenarios and tools.* Each systemically important derivatives clearing organization and Subpart C derivatives clearing organization shall:
- (i) identify scenarios that may prevent it from meeting its obligations ~~or in~~ providing **its** critical operations and services as a going concern **under extreme but plausible conditions**;
 - (ii) describe the tools that it would expect to use in an orderly wind-down that comprehensively address how the derivatives clearing organization would continue to provide **its** critical operations and services;
 - (iii) describe the order in which each such tool would be expected to be used;
 - (iv) establish the time frame within which each such tool would be expected to be used;
 - (v) ~~describe the governance and approval processes and arrangements within the derivatives clearing organization for the use of each of the tools available, including the exercise of any available discretion;~~
 - (vi) ~~describe the processes to obtain any approvals external to the derivatives clearing organization (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained;~~
 - (vii) set out the steps necessary to implement each such tool;

³⁹ See CME Group’s comments on proposed CFTC Regulation § 39.39(c)(1).

⁴⁰ NPR at 48980 (noting, the Commission states, “CFTC Letter No. 16–61 states that a DCO’s analysis of its wind-down options “should contain many of the elements of a DCO’s analysis of its recovery tools.””).

~~(viii) describe the roles and responsibilities of all parties, including non-defaulting clearing members, in the use of each such tool;~~

~~(ixvi) provide an assessment of the likelihood that the tools, individually and taken together, would result in orderly wind-down; and~~

~~(xvii) provide an assessment of the associated risks impacts from the use of each such tool to non-defaulting clearing members and ~~those clearing members'~~ their customers with respect to transactions cleared ~~on by~~ the derivatives clearing organization, ~~linked financial market infrastructures~~ other relevant stakeholders, and the broader financial system ~~more broadly~~.~~

Agreements to be maintained during recovery and orderly wind-down – Amendments to CFTC Regulation § 39.39(c)(6)

CME Group is concerned that the language under proposed CFTC Regulation § 39.39(c)(6) may inappropriately be read to require that a SIDCO focus its recovery and wind-down planning on all contracts related to its critical operations and services and not just those that it depends on to continue to provide its critical operations and services in recovery or wind-down. A SIDCO maintains numerous contracts related to its clearing and settlement arrangements and a focus on all contracts in recovery and wind-down planning would take focus away from those that a SIDCO actually depends on to provide its critical operations and services. Therefore, CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(6) to “[a] systemically important derivatives clearing organization and subpart C derivatives clearing organization shall determine which of its contracts, arrangements, agreements, and licenses it depends on to provide associated with the provision of its critical operations and services ~~as a derivatives clearing organization~~ are subject to alteration or termination as a result of implementation of the recovery plan or orderly wind-down plan” (additions underscored, deletions ~~overstruck~~).

In addition, while a SIDCO can plan to take steps to address situation where a contract on which it depends is subject to alternation or termination due to the implementation of its recovery or orderly wind-down plans, it cannot *ensure* it will be able to take these actions in all circumstances.⁴¹ Therefore, CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(6) to “[t]he recovery plan and orderly wind-down plan shall describe the actions that the derivatives clearing organization has taken or plans to take that are designed to ensure that its critical operations and services will continue during recovery and orderly wind-down despite such alteration or termination” (additions underscored).

Governance – Amendments to CFTC Regulation § 39.39(c)(7)

For the reasons described in Section II.D of this letter, given the overlapping nature of proposed CFTC Regulation § 39.39(c)(7) with current CFTC Regulation § 39.24, CME Group recommends that the Commission revise these regulations to as follows (additions underscored, deletions ~~overstruck~~):

Current CFTC Regulation § 39.24

(b) *Governance arrangement requirements.* A derivatives clearing organization shall have governance arrangements that:

⁴¹ Note, some actions may be taken pre-emptively in advance of a recovery or wind-down event occurring and some may only be taken at the point in time the event occurs.

...

(5) Clearly specify the roles and responsibilities of the board of directors and its committees, including the establishment of a clear and documented risk management framework **and recovery and orderly wind-down plans required by § 39.39, as applicable;**

(6) Clearly specify the roles and responsibilities of management;

...

(10) Assign responsibility for implementing the:

(i) Default rules and procedures required by §§ 39.16 and 39.35, as applicable;

(ii) System safeguard rules and procedures required by §§ 39.18 and 39.34, as applicable; and

(iii) Recovery and **orderly** wind-down plans required by § 39.39, as applicable;

Proposed CFTC Regulation § 39.39(c)(7)

(7) *Governance.* Each systemically important derivatives clearing organization and Subpart C derivatives clearing organization's recovery plan and orderly wind-down plan shall, in each case, ~~(i) Be formally~~ approved, and annually reviewed, by ~~the its~~ board of directors;

~~(ii) Describe an effective governance structure that clearly defines the responsibilities of the board of directors, board members, senior executives, and business units;~~

~~(iii) Describe the processes that the derivatives clearing organization will use to guide its discretionary decision-making relevant to each plan; and~~

~~(iv) Describe the derivatives clearing organization's process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the derivatives clearing organization.~~

Testing – Amendments to CFTC Regulation § 39.39(c)(8)

For the reasons described in Section II.E of this letter, in recognition of SIDCOs' current risk management practices and embracing principles-based regulations, CME Group recommends that the Commission revise proposed CFTC Regulation § 39.39(c)(8) to as follows (additions **underscored**, deletions **~~overstruck~~**):

(8) *Testing.* The recovery plan and orderly wind-down plan of each systemically important derivatives clearing organization and Subpart C derivatives clearing organization shall include procedures for testing the viability of the recovery plan and orderly wind-down plan, including testing of the derivatives clearing organization's ability to implement the tools that each plan relies upon. The recovery plan and the orderly wind-down plan shall include the types of testing that will be performed, to whom the findings of such tests are reported, and the procedures for updating the recovery plan and orderly wind-down plan, **where necessary**, in light of the findings resulting from such tests. A systemically important derivatives clearing organization and Subpart C derivatives clearing organization shall conduct the testing described in this paragraph with the participation of their clearing members, ~~where the plan depends on their participation,~~ and ~~the derivatives clearing organization shall consider including other relevant~~ external stakeholders, **in each case, that the plan relies upon, such as service providers,** to the extent

practicable and appropriate **and shall, dependent on the circumstances, be permitted to rely on the testing that is required to be performed in accordance with this part 39, including §§ 39.16(b) and 39.18.** Such testing shall **be documented and** occur following any material change to the recovery plan or orderly wind-down plan, but in any event **not less than once at least on an annually basis,** and the plan shall be promptly updated, **where necessary,** in light of the findings resulting from such testing.

Information for resolution planning – Amendments to CFTC Regulation § 39.39(f)

For the reasons described in Section II.D of this letter, CME Group recommends that overlapping information sharing provisions for resolution planning included in proposed CFTC Regulation § 39.39(f) not be adopted where this information is already provided to the Commission and/or required to be publicly available pursuant to CFTC Part 39 Regulations.⁴² This approach would be consistent with the Commission’s intent, since proposed CFTC Regulation § 39.39(f) makes reference to requiring information which is not already required by CFTC Regulation § 39.19. Please refer to the below table for more detail.⁴³

⁴² CME Group’s comments with respect proposed CFTC Regulation § 39.39(f)(7) are addressed in Section II.F of this letter.

⁴³ CME Group’s comments with respect proposed CFTC Regulation § 39.19(c)(5)(iii) are addressed in these comments on proposed CFTC Regulation § 39.39(f)(2).

Note, CME Group has included color-coding and emphasized certain **text** in the table where CME Group believed this may be beneficial in demonstrating the overlap between proposed CFTC Regulation § 39.39(f) and current CFTC Regulations.

Relevant Aspects of Proposed CFTC Regulation § 39.39(f)	Current CFTC Regulations
<p>(f) <i>Information for resolution planning</i>... This includes the following: (1) Information regarding the derivatives clearing organization’s organizational structure and corporate structure, activities, governing documents and arrangements, rights and powers of shareholders, and committee members and their responsibilities.</p>	<p>CFTC Regulation § 39.19</p> <p>(c) <i>Reporting requirements</i>. Each registered derivatives clearing organization shall provide to the Commission or other person as may be required or permitted by this paragraph (c) the information specified as follows:</p> <p>(4) <i>Event-specific reporting</i>—</p> <p>(ix) <i>Change in ownership or corporate or organizational structure</i>—(A) <i>Reporting requirement</i>. A derivatives clearing organization shall report to the Commission any anticipated change in the ownership or corporate or organizational structure of the derivatives clearing organization or its parent(s) that would:</p> <p>(1) Result in at least a 10 percent change of ownership of the derivatives clearing organization;</p> <p>(2) Create a new subsidiary or eliminate a current subsidiary of the derivatives clearing organization; or</p> <p>(3) Result in the transfer of all or substantially all of the assets of the derivatives clearing organization to another legal entity.</p> <p>(B) <i>Required information</i>. The report shall include: A chart outlining the new ownership or corporate or organizational structure; a brief description of the purpose and impact of the change; and any relevant agreements effecting the change and corporate documents such as articles of incorporation and bylaws.</p> <p>CFTC Regulation § 39.21</p> <p>(c) <i>Public disclosure</i>. A derivatives clearing organization shall make the following information readily available to the general public, in a timely manner, by posting such information on the derivatives clearing organization's website, unless otherwise permitted by the Commission: (6) The derivatives clearing organization's rulebook, including rules and procedures for defaults in accordance with § 39.16;</p> <p>CFTC Regulation § 39.24</p> <p>(b) <i>Governance arrangement requirements</i>. A derivatives clearing organization shall have governance arrangements that: (2) To an extent consistent with other statutory and regulatory requirements on confidentiality and disclosure, are disclosed, as appropriate, to the Commission, other relevant</p>

Relevant Aspects of Proposed CFTC Regulation § 39.39(f)	Current CFTC Regulations
	<p>authorities, clearing members, customers of clearing members, owners of the derivatives clearing organization, and to the public;</p> <p>CFTC Regulation § 39.37* (a) <u>Complete and publicly disclose its responses to the Disclosure Framework for Financial Market Infrastructures published by the Committee on Payment and Settlement Systems and the Board of the International Organization of Securities Commissions;</u></p> <p><i>*Note, SIDCOs' disclosures pursuant to CFTC Regulation § 39.37(a) include disclosures relating to all of the areas referenced in CFTC Regulation § 39.39(f)(1), particularly, relating to governance.</i></p>
<p>(f) <i>Information for resolution planning...</i> This includes the following: (2) Information concerning clearing members, including (for both house and customer accounts) information regarding <u>collateral, variation margin,</u> and contributions to default and <u>guaranty funds.</u></p>	<p>CFTC Regulation § 39.11 (f) <i>Reporting requirements.</i> (1) <i>Quarterly reporting.</i> Each fiscal quarter, or at any time upon Commission request, a derivatives clearing organization shall: (iii) <u>Report to the Commission the value of each individual clearing member's guaranty fund</u> deposit, if the derivatives clearing organization reports having guaranty fund deposits as a financial resource available to satisfy the requirements of paragraph (a)(1) of this section and §§ 39.33(a) and 39.39(d), if applicable.</p> <p>CFTC Regulation § 39.19 (c) <i>Reporting requirements.</i> Each registered derivatives clearing organization shall provide to the Commission or other person as may be required or permitted by this paragraph (c) the information specified as follows: (1) <i>Daily reporting.</i> (i) A derivatives clearing organization shall <u>compile as of the end of each trading day, and submit to the Commission</u> by 10:00 a.m. on the next business day, a report containing the following information related to all positions other than fully collateralized positions: (A) <u>Initial margin requirements and initial margin on deposit for each clearing member, by house origin and by each customer origin, and by each individual customer account.</u> The derivatives clearing organization shall identify each individual customer account, using both a legal entity identifier, where available, and any internally-generated identifier, within each customer origin for each clearing member;</p>

Relevant Aspects of Proposed CFTC Regulation § 39.39(f)	Current CFTC Regulations
	<p>(B) Daily <u>variation margin, separately listing the mark-to-market amount collected from or paid to each clearing member, by house origin and by each customer origin</u>;</p> <p>(C) All other daily cash flows relating to clearing and settlement including, but not limited to, option premiums and payments related to swaps such as coupon amounts, collected from or paid to each clearing member, by house origin and by each customer origin; and</p> <p>(D) End-of-day positions, including as appropriate the risk sensitivities and valuation data that the derivatives clearing organization generates, creates, or calculates in connection with managing the risks associated with such positions, for each clearing member, by house origin and by each customer origin, and by each individual customer account. The derivatives clearing organization shall identify each individual customer account, using both a legal entity identifier, where available, and any internally-generated identifier, within each customer origin for each clearing member.</p>
<p>(f) <i>Information for resolution planning...</i> This includes the following: (3) Arrangements and agreements with other derivatives clearing organizations, including offset and <u>cross-margin</u> arrangements.</p>	<p>CFTC Regulation § 39.13</p> <p>(i) <i>Cross-margining.</i></p> <p>(1) A derivatives clearing organization that <u>seeks to implement or modify a cross-margining program with one or more clearing organizations shall submit rules for Commission approval pursuant to § 40.5 of this chapter</u>. The submission shall include information sufficient for the Commission to understand the risks that would be posed by the program and the means by which the derivatives clearing organization would address and mitigate those risks.</p> <p>(2) The Commission may request additional information in support of a rule submission filed under this paragraph (i), and may approve such rules in accordance with § 40.5 of this chapter.</p>
<p>(f) <i>Information for resolution planning...</i> This includes the following: (4) Off-balance sheet obligations or contingent liabilities, and obligations to creditors, shareholders, or affiliates not otherwise reported under part 39.</p>	<p>CFTC Regulation § 39.11</p> <p>(f) <i>Reporting requirements.</i></p> <p>(2) <i>Annual reporting.</i></p> <p>(i) A derivatives clearing organization shall submit to the Commission an audited year-end financial statement of the derivatives clearing organization calculated in accordance with U.S. generally accepted accounting principles; provided, however, that for a derivatives clearing organization that is incorporated or organized under the laws of any foreign country, the financial statement may be prepared in accordance with either U.S. generally accepted accounting principles or the International Financial Reporting Standards issued by the International Accounting Standards Board.</p>

Relevant Aspects of Proposed CFTC Regulation § 39.39(f)	Current CFTC Regulations
<p>(f) <i>Information for resolution planning...</i> This includes the following: (6) Information concerning critical personnel.</p>	<p>CFTC Regulation § 39.19</p> <p>(c) <i>Reporting requirements.</i> Each registered derivatives clearing organization shall provide to the Commission or other person as may be required or permitted by this paragraph (c) the information specified as follows: (4) <i>Event-specific reporting</i>—</p> <p>(x) <i>Change in key personnel.</i> A derivatives clearing organization shall <u>report to the Commission no later than two business days following the departure or addition of persons who are key personnel as defined in § 39.2</u>. The report shall include, as applicable, the name and contact information of the person who will assume the duties of the position permanently or the person who will assume the duties on a temporary basis until a permanent replacement fills the position.</p>
<p>(f) <i>Information for resolution planning...</i> This includes the following: (7) Any other information deemed appropriate to plan for resolution under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.</p>	<p>Please refer to CME Group’s comments in Section II.F of this letter.</p>