September 26, 2023

Via Electronic Submission

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

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

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 the "Commission") notice of proposed rulemaking relating to Derivatives Clearing Organization Recovery and Orderly Wind-Down Plans and Information for Resolution Planning (the "Proposal").[1]

ICE operates regulated marketplaces for the listing, trading and clearing of a broad array of derivatives contracts and financial securities, such as commodities, interest rates, foreign exchange and equities as well as corporate and exchange-traded funds, or ETFs. We operate multiple trading venues, including 13 regulated exchanges and six clearing houses, which are strategically positioned in major market centers around the world, including the U.S., U.K., European Union, or EU, Canada, Asia Pacific and the Middle East. ICE's six clearing houses are regulated as follows:

- ICE Clear Credit ("ICC") and ICE Clear U.S.[2] are regulated by the CFTC as Derivative Clearing Agencies ("DCO") under the Commodity Exchange Act ("CEA"). The Financial Stability Oversight Council has designated ICE Clear Credit as a systemically-important financial market utility under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. ICC is also regulated by the Securities and Exchange Commission ("SEC") as a clearing agency because it clears security-based swaps.

- ICE Clear Europe Limited ("ICE Clear Europe"), which is primarily regulated in the U.K. by the Bank of England as a Recognized Clearing House, is also subject to regulation by the CFTC as a DCO and by the European Securities and Markets Authority ("ESMA"). ICE

[1] Derivatives Clearing Organizations Recovery and Orderly Wind-Down Plans; Information for Resolution Planning (RIN 3038-AFR15), 88 Fed. Reg. 48968 (July 28, 2023).
[2] ICE Clear U.S. has elected to be a "subpart C" DCO under Commission Rule 39.31.

Clear Europe is also regulated by the SEC as a clearing agency because it clears security-based swaps.[3]

- In Canada, ICE NGX is recognized as an exchange and clearing house by the Alberta Securities Commission ("ASC") and is also registered by the CFTC as a Foreign Board of Trade ("FBOT") and as a DCO.

- In the EU, ICE Clear Netherlands is an authorized central counterparty ("CCP") and is regulated by the Dutch National Bank ("DNB") and Authority for Financial Markets ("AFM").

- In Singapore, ICE Clear Singapore is an approved clearing house supervised by the Monetary Authority of Singapore ("MAS").

As an operator of clearing houses, ICE is keenly interested in the issues raised by the Proposal. ICE recognizes the importance of recovery and wind-down planning. As such, each ICE clearing house maintains recovery and wind down plans particular to its products, members, and overall strategy, which reflect the interests of market participants and stakeholders, and which are consistent with existing regulatory requirements, including those of the CFTC, Bank of England, the SEC and CPMI/IOSCO Principles for Financial Market Infrastructures ("PFMIs"), as applicable.

ICE is supportive of the goals of the CEA and the DCO Core Principles to reduce risk, increase transparency and promote market integrity within the financial system.[4] ICE recognizes the importance of DCOs and the central role they play in the financial markets. As such, ICE supports the Commission's objective to codify certain requirements and prior guidance for DCOs around recovery and wind down planning but is concerned over the level of prescriptiveness in the Proposal, a departure from the Commission's long-standing commitment to a principles-based approach to regulation. ICE believes the prescriptiveness of the Proposal makes it unnecessarily burdensome and costly and believes the regulatory framework for implementing recovery and wind-down plans should be principles based and prioritize risk management practices that mitigate the likelihood of an event leading to the need for recovery or wind-down. Any recovery and wind-down regulation should recognize that DCOs' risk management practices are designed to provide for the continuity of critical operations and services and support the stability of the broader financial system. ICE therefore appreciates the opportunity to comment on the Proposal.

1. Critical Operations and Services (Proposed Rule 39.39(c)(1) / 39.13(k)(2)(i)).

ICE supports the requirement for a DCO to identify the critical operations and services it provides, as well as its service providers and other interconnections and interdependencies. ICE recognizes

[3] ICE Clear Europe has filed a notice with the SEC withdrawing its registration as a clearing agency in connection with ceasing to clear credit default swaps. See Exchange Act Release No. 34-98331 (Sept. 8, 2023).

[4] Title VII, Wall Street Transparency and Accountability Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 1641 (2010). Derivatives Clearing Organization Gen. Provisions and Core Principles, 76 FR 69334, 69334 (Nov. 8, 2011); Customer Clearing Documentation, Timing of Acceptance for Clearing, & Clearing Member Risk Mgmt., 77 FR 21278, 21279 (Apr. 9, 2012) (further amending § 39.12).

the importance of a DCO identifying these aspects of its operations for effective recovery and wind-down planning. However, ICE believes the reference to "ancillary services providers" in the Proposal is overly broad and could require identification of service providers that are tangentially or incidentally related to the provision of critical services. ICE suggests deleting this reference and limiting both internal and external services providers to those that are material to the provision of critical operations and services. Requiring identification of immaterial or ancillary service providers has no practical impact on recovery or wind-down planning and is burdensome for DCOs with little benefit to the Commission's policy goal.

The Proposal would also require preparation of "aggregate cost estimates for the continuation of services during recovery and orderly wind-down." ICE generally supports consideration of costs as part of recovery and wind-down planning; however we note that estimates are uncertain, particularly in a situation where the DCO is in distress and needs to activate its recovery or wind-down plans. If the Commission adopts this requirement, ICE suggests the Commission clarify that the estimate be based on a DCO's good faith determination of its existing cost estimates without the need for the DCO to adopt additional policies or procedures for developing and verifying cost estimates.

ICE also notes that the Proposal would require the DCO to address how it "will ensure that each identify operation or service continues through recovery or wind-down." ICE does not believe it is possible for a DCO to "ensure" that an operation or service can continue. Instead, ICE suggests that the requirement be revised to provide that the DCO must assess and document how it would continue the relevant operations or services during the recovery or wind-down period.

2. Recovery and Wind-Down Scenarios and Analysis (Proposed Rule 39.39(c)(2)/ 39.13(k)(3)).

For purposes of recovery planning, the Proposal would require a DCO to address scenarios specified by the Commission that may prevent it from meeting its obligations and provide a detailed analysis applying six criteria for each scenario. The Proposal includes a list of eleven prescribed scenarios that must be included for a SIDCO or Subpart C DCO's recovery planning relating to default and non-default losses and combinations thereof, in addition to any other scenarios that such DCO determines to be appropriate in accordance with the Proposal. As with other aspects of risk management, ICE believes it is most appropriate for DCOs to be responsible for determining relevant default and non-default loss scenarios and as such the Commission should not mandate that the DCO consider the specific scenarios identified by the Commission in the Proposal. There are differences among DCOs, including differences in clearing members, services and products cleared. The risks for each DCO differ and each DCO is best suited to identify and analyze the scenarios that could potentially materialize and would need to be considered in its recovery planning. By being so prescriptive regarding the scenarios a DCO must consider, the Commission creates the risk that a DCO does not consider scenarios more relevant to its business. In ICE's view, it should be sufficient for the Commission to require that the recovery plan scenarios address the principal default and non-default risks of the DCO. ICE notes that most DCOs are already engaged in this type of scenario analysis as part of their regular risk management as well as recovery and wind-down planning.

3. Description of Recovery Tools to be Used in a Recovery or Wind-Down (Proposed Rule 39.39(c)(4)-(5)/39.13(k)(3)).

ICE does not object to the requirement that recovery and wind-down plans identify and describe relevant tools to be used as part of a DCO's plan implementation. ICE agrees with the Commission's decision to not mandate or prescribe the tools to be used in certain situations and appreciates the Commission's recognition that a DCO should have the discretion to determine the appropriate mix of tools to be used. ICE is however concerned about the proposed detailed requirements for a DCO to identify scenarios that may prevent it from meeting the DCO's obligations and to describe the tools the DCO expects to use in an orderly wind-down, the order, time frame and governance process for using such tools, the assessments of the risks and likelihood of success of using the tools, the process for obtaining approvals, and the roles and responsibilities of various parties. DCO implementation of recovery or wind-down tools will require flexibility to respond effectively to the specific circumstances within which a recovery or wind-down is conducted, which makes it impossible for a DCO to determine in advance which tools it will use, in what order it will use such tools, and the time frame for using such tools. Further, it is difficult for a DCO to assess in advance the likelihood that a tool will be successful or to understand the full scope of risks to clearing members, customers and the broader market that may result from the use of a particular tool. If the DCO is required to provide this level of detail in its recovery and wind-down plans, the DCO will be bound to follow the processes prescribed in its plan and may be unable to react to and take mitigating actions to address situations not contemplated by the plan, which would impact the DCO's ability to manage its risk. As such, ICE suggests the Commission remove the requirement to identify scenarios and describe the various elements for implementing recovery tools.

4. Agreements to be Maintained During Recovery or Wind-Down (Proposed Rule 39.39(c)(6)/ 39.13(k)(4)).

The Commission is proposing to require that a DCO's plans identify agreements associated with the provision of critical services and operations that are subject to alteration or termination due to the recovery and wind-down plans being implemented. ICE agrees with the concept that the recovery and wind-down plans should assess the impact of recovery or wind-down on relevant agreements. ICE however believes the proposed language referencing agreements "associated with the provision of its critical operations and services" as overly broad. ICE instead recommends that the Commission consider the approach used by the Federal Deposit Insurance Corporation (FDIC) for U.S. banks in their resolution plans. Under this approach, "critical services" have been more narrowly defined as "services and operations of the [entity], such as servicing, information technology support and operations, human resources and personnel that are necessary to continue the day-to-day operations of the [entity]."[5] ICE believes such an approach would focus on the most relevant service providers and would also be consistent with standards of another financial regulator that acts as a resolution authority.

The Commission is also proposing to require that a DCO's plans describe the actions the DCO has taken to ensure such operations and services will continue during recovery and wind-down. Consistent with comments above, ICE suggests the Commission remove the reference to

[5] See 12 CFR 360.10(b)(5).

"ensuring" that critical operations and services will continue, as the DCO cannot ensure such operations it can only have reasonable policies and procedures in place designed to ensure that critical operations and services will continue. ICE suggests the Commission revise the relevant provision to state that the plan should describe the relevant policies and procedures the DCO has to facilitate continuation of critical operations and services.

5. Wind-Down Plan Requirements for Other DCOs (Proposed Rule 39.13(k)).

The Proposal would impose Commission requirements for wind-down plans (but not recovery plans) for DCOs that are not SIDCOs or subpart C DCOs. ICE does not object to the wind-down plan requirement for such DCOs subject to the comments set forth above relating to corresponding provisions in Rule 39.39.

Furthermore, ICE notes that DCOs subject to this new requirement will in many cases be already subject to similar requirements under the laws and regulations of other jurisdictions (such as under UK, EU or Canadian requirements). ICE urges the Commission to apply the wind-down plan requirements in a manner that avoids inconsistencies or conflicts with requirements in other jurisdictions.

6. Information for Resolution Planning (Proposed Rule 39.39(f)).

The Proposal would impose a broad new requirement on SIDCOs and subpart C DCOs to maintain systems and controls to enable them to provide data to the Commission for resolution planning and during resolution. As proposed, DCOs would be required to provide a broad range of data about the DCO's organizational structure and arrangements, clearing members, financial resources, off-balance sheet and other liabilities and obligations, various interconnections and interdependencies with service providers, and critical personnel. Although ICE understands that Commission and resolution authority access to information is important for resolution planning, ICE is concerned about the potential breadth, open-ended nature and frequency of the proposed requirements. In particular, ICE notes that much of the relevant information is already provided to the Commission through Rule 39.19 reporting and the recovery and wind-down plans. The Commission should avoid requiring provision of duplicative information.

ICE further notes that some of the information requested may be commercially sensitive, not merely about the DCO itself and its affiliates but also about clearing members and their financial condition and exposures. DCOs may be limited in their ability to provide such information to the Commission or a resolution authority under their arrangement with clearing members and clearing members may be concerned about the further transmission or dissemination of any such information. The Commission should consider the extent it needs such information and appropriate steps to protect the confidentiality of such information if required to be provided.

The frequency of requests is also concerning. Although ICE recognizes that it may not be possible to predict when exactly a resolution could occur, or when the Commission or a resolution authority may need information, the Proposal would require the DCO to make available a wide range and significant volume of information upon request, including detailed financial information outside of the normal schedule of preparation of financial statements and other financial reports. It is burdensome for DCOs to be ready to provide such information at any time. As a result, ICE

suggests that the Commission provide a more regular schedule, potentially in conjunction with Rule 39.19 reporting such that additional ad hoc requests are kept to a minimum.

7. Annual Review and Submission (39.19(c)(4)(xxiv)).

The Commission is proposing to require all DCOs to submit revisions to their recovery and/or wind-down plans to the Commission. In addition, in the absence of any changes to the recovery and/or wind-down plans, a DCO must submit its plans to the CFTC on an annual basis. ICE does not object to providing recovery and/or wind down plans following material changes but does not support requiring DCOs to submit their recovery and wind-down plans on an annual basis absent any material changes. As such, ICE recommends this be reflected in any final rulemaking.

8. Notice of Initiation of the Recovery Plan and of Pending Orderly Wind-Down (Proposed Rule 39.39(b)(2))/ 39.19(c)(4)(xxv)/ 39.13(k)(1)(b)).

The Proposal would require a DCO to have procedures in place to notify the Commission and clearing members as soon as practicable when a recovery plan is initiated or an orderly wind-down is pending. ICE supports implementation of DCO Core Principle J (Reporting) and DCO Core Principle L (Public Information) however it is unclear when the Commission would consider an orderly wind-down plan to be pending. ICE believes that a DCO should be able to implement risk reducing activities and/or delay the invocation of its wind-down plan without having to notify clearing members or other market participants and without the Commission considering these actions to be "pending" a wind-down. Notification of a pending wind-down to clearing members may frustrate a DCO's ability to carry out these functions and may result in increased risks to the DCO's clearing members. As such, ICE recommends the Commission clarify that an orderly wind-down is not pending until the Board of Directors has taken action to approve initiation of the wind-down plan.

9. Other Governance Issues (Proposed Rule 39.39(c)(7))/ 39.13(k)(5)).

In furtherance of Core Principle O, the Proposal would require plans to address the processes that guide discretionary decision-making relevant to the recovery and wind-down plans and further discuss the process for identifying and managing the diversity of stakeholder views and conflicts of interest between stakeholders and the DCO. ICE generally agrees that development of recovery and wind-down plans should take into account the diversity of stakeholder views and that implementation of plans should be subject to a clear and well-defined governance process. It is unclear however that this proposed requirement intends to require a DCO to include more specifics around the decision-making within these governance processes.

ICE is also concerned that the Proposal suggests a need for additional governance processes involving relevant stakeholders once the plan is activated. In ICE's view, once the decision has been taken to implement the plan, time is of the essence, and the DCO should promptly implement the steps of the plan in accordance with the DCO's rules and procedures.

10. Testing (Proposed Rule 39.39(c)(8)/39.13(k)(6)).

ICE agrees that testing of the recovery and wind-down plans is appropriate. ICE does not object to the proposed annual frequency of testing, provided that the recovery and/or wind-down plan testing can be combined with existing default testing and that the DCO is not required to separately test each recovery tool on an annual basis. ICE is concerned that a recovery and/or wind-down plan testing requirement separate from default testing could be burdensome, particularly for clearing members who are likely to have testing obligations at multiple clearing organizations. Moreover, ICE believes that an annual testing requirement should not require the testing of each recovery tool but should instead be risk-based.

ICE agrees it is appropriate for SIDCOs and Subpart C DCOs to include clearing members in testing to the extent that the plan depends on their participation. With respect to other external stakeholders, ICE believes the Proposal takes the correct approach in requiring that SIDCOs and Subpart C DCOs consider whether involvement of external stakeholders is necessary or desirable. ICE notes that involvement of clearing members and external stakeholders is not necessarily appropriate for certain scenarios/tools, including scenarios and tools related to general business losses or other non-default losses. DCOs should have flexibility to determine the appropriate approach to testing and clearing member and stakeholder involvement in such cases.

11. Timing of Initial Submission.

The Proposal would require existing DCOs to submit the first recovery and wind-down plans under revised Rule 39.39 or wind-down plans under Rule 39.13(k), within 6 months of the effectiveness of the Rules. Given the detailed requirements that have been proposed, and the potential need to rewrite existing plans to address all of the requirements, ICE recommends a longer period (of at least a year) before plans must be submitted.

12. Coordination.

ICE notes that certain ICE clearing houses are dually-registered both as a DCO with the Commission and a securities clearing agency with the SEC under the Exchange Act. The SEC has separately proposed rules relating to recovery and wind-down planning for clearing agencies under its jurisdiction.[6] Given the subject matter overlap of the Proposal and the SEC's proposal, ICE strongly urges coordination between the two agencies to ensure that any such final rules are structured so that dually registered clearing houses can efficiently comply with both agencies' rules.

More generally, DCOs, including the ICE DCOs, may be subject to regulation by regulators in multiple jurisdictions, each of which may have its own recovery, wind-down and resolution planning requirements. ICE urges the Commission, to the greatest extent possible, to coordinate with other regulators and resolution authorities to avoid subjecting DCOs to duplicative or conflicting requirements for their recovery and wind-down plans. It is unduly burdensome for a DCO to develop and maintain separate recovery and wind-down plans to satisfy requirements of

[6] See Covered Clearing Agency Resilience and Recovery and Wind-Down Plans, 88 Fed. Reg. 34708 (May 30, 2023).

different regulators. Moreover, separate recovery and wind-down plans intended to satisfy different regulatory requirements could inadvertently complicate or frustrate the implementation of such plans.

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ICE appreciates the opportunity to comment on the Proposal. ICE supports the goals of the Commission in clarifying and codifying requirements recovery and wind-down plans. As noted in this letter, ICE believes that certain aspects of the Proposal are overly prescriptive or burdensome and can be revised in a manner that will be consistent with the goals of efficient and effective recovery and wind-down planning.

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
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