THE FOUNDATION FOR SECURE MARKETS

Options Clearing Corporation
125. S. Franklin Street, Suite 1200
Chicago, IL 60606
312 322 6200 | theocc.com

September 26, 2023

By Electronic Delivery

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

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

Dear Mr. Kirkpatrick:

The Options Clearing Corporation ("OCC") appreciates the opportunity to submit these comments to the Commodity Futures Trading Commission ("CFTC" or "Commission") on the above-reference proposal ("Proposal" or "Proposed Rules")[1] under the Commodities Exchange Act ("Exchange Act"). In relevant part,[2] the Proposal would (i) define certain required components of the recovery and orderly wind-down plan ("RWP") of certain derivatives clearing organizations ("DCOs"); and (ii) amend existing rules to require SIDCOs and Subpart C DCOs ("SCDCOs") to maintain information systems and controls to enable those entities to promptly provide certain specified categories of data and information to the Commission for resolution planning purposes.

I. About OCC

Founded in 1973, OCC is the world's largest equity derivatives clearing organization. OCC operates under the jurisdiction of both the CFTC and the Securities Exchange Commission ("SEC"). As a registered SCDCO under the CFTC's jurisdiction, OCC clears and settles transactions in futures and options on futures. As a registered clearing agency under the SEC's jurisdiction, OCC clears and settles transactions for exchange-listed options. OCC also provides central counterparty clearing and settlement services for securities lending transactions. In addition, OCC has been designated by the Financial Stability Oversight Council ("FSOC") as a systemically important financial market utility ("SIFMU") under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. As a SIFMU, OCC is subject to prudential regulation by the Board of Governors of the Federal Reserve System. OCC is recognized by the European Securities and Markets Authority as a Tier 1 central counterparty clearinghouse ("CCP") established in third countries under Article 25 of the European Market Infrastructure Regulation ("EMIR"). OCC operates as a market utility and is owned by five exchanges.

[1] RIN 3038-AF16 Derivatives Clearing Organizations Recovery and Orderly Wind-Down Plans; Information for Resolution Planning (Jun. 7, 2023), 88 FR 48968 (Jul. 28, 2023) ("Release").

[2] The Proposal also includes certain proposed requirements for recovery and orderly wind-down planning for DCOs that are not SIDCOs or SCDCOs (as defined herein). In light of OCC's status as a SCDCO, we are providing comment only on those provisions that impact SCDCOs.

II. Summary and Overall Comments

As a SIFMU, OCC supports the Commission's goal of ensuring that its rules reflect developments in international standard setting related to recovery and wind-down planning for CCPs. That said, we urge the Commission to avoid overly prescriptive requirements that impose one-size-fits-all mandates rather than allowing DCOs to draft RWPs that reflect their business operations, the particular risks they face, and their unique knowledge of and expertise in the products and markets they serve.

Some aspects of the Proposed Rules relating to RWP contents are relatively straightforward provisions reflecting known best practices and common standards. However, in other respects the Commission proposes to impose highly prescriptive mandates that would differ substantially from the Commission's characteristic principles-based approach and detract from the policy goals of encouraging the development of focused, actionable RWPs by SIDCOs and SCDCOs, while potentially imposing conflicting obligations on dual-CFTC/SEC registrants. Moreover, certain of the proposed requirements call for speculative information or impose impractical or ambiguous directives. In other instances, the Proposal would impose substantial financial and personnel burdens on SIDCOs and SCDCOs without proportionate benefit to the Commission, the impacted entities, or the financial system at large.

We are also concerned with the proposed amendments to § 39.39(f), which would require SIDCOs and SCDCOs to maintain and produce upon request a wide swathe of potentially highly sensitive information to the Commission for transmission to the Federal Deposit Insurance Corporation ("FDIC"). Amended §39.39(f), as proposed, would impose a virtually limitless, ongoing burden on impacted DCOs, disconnected from other ongoing obligations of the impacted DCOs. Moreover, this requirement is a potentially duplicative mandate given OCC's status as a SIFMU under the primary oversight of the SEC, which could cause regulatory overlap.

The Commission has proposed a one-size-fits-all approach that could distract DCOs from focusing their plans on the most salient risks for their individual businesses, markets served, and products cleared. We further urge the Commission to consider opportunities to harmonize its approach with that of the SEC, provide clarity to dual-registrants and contemplate a more principles-based approach that would provide flexibility and discretion to DCOs to focus on their individual business, risks, structures, and processes in designing their RWPs, while still defining the critical components of the RWP. With respect to the requirements to maintain and produce information for resolution planning, we respectfully request that the Commission exempt OCC and similarly situated SCDCOs to the extent they are already designated as systemically important and are subject to primary oversight by the SEC. Below, we detail our concerns with the Proposal, and where appropriate, suggest amendments to the Proposal to ensure that any final rule reflects the importance of both discretion for impacted SIDCOs and SCDCOs.

Thank you again for the opportunity to contribute to this rulemaking.

III. Background

As the Commission recognizes in the Release,[3] the Proposal comes in the context of more than a decade's-worth of domestic and international rulemaking and standard setting relating to CCP recovery and wind-down planning. As an SEC-regulated Covered Clearing Agency ("CCA"), a SIFMU, and a SCDCO, OCC has evolved its recovery and wind-down planning practices to incorporate developing best practices and regulatory expectations. Below we briefly review developments over that period, as relevant to OCC. While this history is well known to the Commission, we include it here as context for our comments on the Proposal.

[3] *See* Release at 48968-9.

OCC's current regulatory supervision structure, as well as the source of its recovery and wind-down planning obligations, dates back to the passage, in 2010, of the Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), including three sections of particular relevance here: Title VII set forth the Core Principles with which DCOs must comply, with the goal of "reduc[ing] risk, increas[ing] transparency and promot[ing] market integrity within the financial system"; Title VIII created the SIFMU designation process, and empowered the primary regulators of those entities to promulgate regulations concerning, among other things, their risk management procedures[4]; finally, Title II granted the FDIC orderly liquidation authority over certain non-bank financial institutions, likely[5] including CCPs (i.e. SIFMUs), under conditions defined in the statute ("Title II OLA"). However, the Dodd-Frank Act did not create any direct regulatory relationship between FDIC and SIFMUs, and no such direct relationship otherwise exists.

With respect to recovery and wind-down planning, in 2013, pursuant to Titles VII and VIII of the Dodd-Frank Act, the CFTC adopted § 39.39, which took a principles-based approach by requiring SIDCOs and SCDCOs to adopt an RWP, but declining to include prescriptive requirements for the contents.[6] Increased activity in international standard setting for CCPs followed the financial crisis, and in 2014, CPMI-IOSCO[7] and the FSB[8] both issued guidance on recovery and resolution planning for financial market intermediaries, including CCPs. In 2016, the Commission then issued guidance to DCOs on the content to include in RWPs ("Letter 16-61"), incorporating the international standard setting efforts and its own learnings to that point based on discussions with DCOs.[9] Letter 16-61 emphasized the need for DCO RWPs to "consider the DCO's individual risk profile, operations, organizational structure, financial resources, business model and practices, interconnections and interdependencies." Similarly, also in 2016, the SEC issued its CCA standards, which apply to SIFMUs regulated by the SEC. Those standards included SEC Rule 17Ad-27(e)(3)(ii), which required that a CCA's policies and procedures include an RWP.[10] However, the SEC declined to include requirements for the content of the RWP, stating that, given the nature of recovery and resolution planning, such plans are likely to closely reflect the specific characteristics of the CCA, including its ownership, organizational, and operational structures, as well as the size, systemic importance, global reach, and/or the risks inherent in the products it clears.[11]

---

[4] In 2012, pursuant to Title VIII, the FSOC designated OCC as a SIFMU, with the SEC as its primary regulator.
[5] We note that, to date, no SIFMU has entered resolution, and the FDIC's Title II OLA remains untested. To the extent any legal uncertainty exists as to the scope of that authority, nothing in this letter is intended to or does constitute a position on any such legal question. Cf. Robert Steigerwald, David W. DeCarlo, Federal Reserve Bank of Chicago Policy Discussion Paper: Resolving Central Counterparties After Dodd-Frank: Are They Eligible for "Orderly Liquidation"? (Sep. 2016), *available at* https://www.chicagofed.org/publications/policy-discussion-papers/2016/pdp-1.
[6] *Derivatives Clearing Organizations and International Standards,*78 FR 72476, 72494 (Dec. 2, 2013). Note that OCC only became a SCDCO in 2021, and therefore was not subject to § 39.39 until that time. *See* Letter to John Davidson re: Options Clearing Corporation Subpart C Election (Mar. 1, 2021), *available at* https://www.cftc.gov/media/5736/occsubpartcelection03012021/download. However, OCC was subject to parallel SEC requirements, as discussed in this section.
[7] PMI–IOSCO, Recovery of financial market infrastructures (Oct. 15, 2014).
[8] FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions ("FSB Key Attributes"), Appendix II—Annex I: Resolution of Financial Market Infrastructures (FMIs) and FMI Participants (Oct. 15, 2014).
[9] CFTC Letter 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 (Jul. 21, 2016).
[10] 17 CFR § 240.17Ad-27(e)(3)(ii).
[11] Standards for Covered Clearing Agencies Adopting Release, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70808-09 (Oct. 13, 2016).

Following the adoption of the SEC's CCA standards in 2016, OCC rule filed its RWP with the SEC in 2017 and received approval from the SEC for the plan in 2018.[12] OCC continued to refine its RWP in light of regulatory feedback, ongoing testing and review, and additional international standard setting,[13] and in both 2020 and 2023 filed and received SEC approval for substantively revised RWPs. Additionally, in each of 2021, 2022, and 2023, OCC met with its Crisis Management Group, comprised of international and domestic regulators (including the CFTC, SEC, and FDIC),[14] to discuss and present on, among other topics, recovery planning (2021); recovery planning scenarios (2022); and wind-down planning (2023).

Against this dynamic background, the Commission and the SEC have both now proposed additional rules governing the contents of RWPs for DCOs and CCAs, respectively, citing the need to incorporate and align with international standard setting activity.[15] In July 2023, OCC provided comment on the SEC's parallel proposal ("SEC RWD Proposal").[16] We now offer the following comments on the Commission's Proposal, based on our experience with recovery and wind-down planning and relevant international and domestic regulatory activity and oversight, as described above.

IV. Detailed Comments on the Proposal

As noted above, OCC supports the Commission's aims of aligning its requirements with developments in international standard-setting and codifying its existing guidance. OCC has in fact considered such international standards and the Commission's guidance in drafting and revising its RWP. However, we believe the Proposal includes elements that are inconsistent with the Commission's previous, principles-based approach to recovery and orderly wind-down planning and could run counter to the objective of facilitating the creation of dynamic, decision-useful RWPs. As detailed below, our concerns with the Proposal fall into five categories: 1) certain [definitions and] requirements are overly prescriptive, thereby reducing impacted DCOs' ability to optimize their RWPs for their particular circumstances; 2) several of the prescriptive requirements seek information of a highly speculative nature; 3) other required elements are ambiguous or impractical to provide or comply with; and 4) the proposed testing requirements are potentially overly burdensome absent clarifying guidance; and 5) the proposed requirements to maintain and provide information for resolution planning are unbounded, and potentially duplicative for OCC given its status as a CCA and SIFMU for whom the SEC is the primary regulator.

---

[12] *See* Securities Exchange Act Release No. 83918 (Aug. 23, 2018), 83 FR 44091 (Aug. 29, 2018) (File No. SR-OCC-2017-021) (Order approving the adoption of OCC's RWP).

[13] *See, e.g.,* CPMI–IOSCO, Recovery of financial market infrastructures (July 5, 2017); CPMI–IOSCO, A discussion paper on central counterparty practices to address non-default loses (Aug. 4, 2022).

[14] The CMG is formed pursuant to the FSB Key Attributes to facilitate regulatory coordination with respect to financial market intermediaries that are systemically important in more than one jurisdiction. Specifically, OCC's CMG is intended to "enhance preparedness and planning for, and to facilitate the crisis management, recovery and resolution of OCC." Additional participants include the Federal Reserve Board and regulators from Canada, France, and the United Kingdom.

[15] *See* Release at 48997 ("Proposed § 39.39(c) would codify elements for a recovery plan and orderly wind-down plan that are, in general, drawn from the guidance on international standards related to recovery plans and orderly wind-down plans adopted by international standards-setting bodies since 2013, and described in detail in CFTC Letter No. 16–61"); RIN 3235-AN19 Covered Clearing Agency Resilience and Recovery and Wind-down Plans (May 17, 2023), 88 FR 34708, 34717 (May 30, 2023).

[16] *See* Letter from Megan Malone Cohen, Corporate Secretary, General Counsel, dated July 17, 2023, *available at* https://www.sec.gov/comments/s7-10-23/s71023-225499-472722.pdf.

A. The Proposal Includes Several Overly Prescriptive Requirements

OCC appreciates that the Commission, with several years of experience in reviewing SIDCO and SCDCO RWPs and continued participation in international standard setting, has undertaken to codify more detailed requirements for RWP contents. Defining the content requirements for RWPs provides clarity to DCOs on regulatory expectations and enhances structural comparability of RWPs across the population of SIDCOs and SCDCOs regulated by the Commission. Indeed, as discussed above, the SEC recently drew upon its own experience reviewing the RWPs of CCAs and the same developments in international standard setting as cited in the Proposal in the SEC RWD Proposal. However, in contrast to the approach taken by the Commission in the Proposal, the SEC RWD Proposal focused on identifying the *necessary elements* of an RWPs, but generally provided CCAs with flexibility to tailor their RWPs to address their unique risks and structures, as well as their specific markets served and products cleared.

The Commission's more prescriptive approach is reflected in each of the provisions discussed below:

- § 39.2 (Definitions); Proposed Descriptions of "Legal Risk" and "Operational Risk": The Commission has proposed an extensive, multi-part definition of "non-default losses," encompassing the categories of (1) general business risk, (2) custody risk, (3) investment risk, (4) legal risk, and (5) operational risk.[17] Each category is granularly enumerated. In defining "non-default losses," the Commission has broadly adhered to international guidance for the descriptions of the first three categories."[18] However, with respect to "legal risk" and "operational risk," the Commission goes past that existing guidance by providing its own definitions.[19] We are concerned that the Commission is adopting a definition that may prove inconsistent with the approach of other regulators. The Commission should consider whether guidance in this area would be more appropriate, pending the development of international consensus.

  We also have specific concerns about the language of the proposed definition. The Proposal would enumerate "legal risk" as "losses from adverse judgments, or other losses, arising from legal, regulatory, or contractual obligations, including damages or penalties, and the possibility that contracts that the derivatives clearing organization relies upon are wholly or partly unenforceable." We believe the ambiguity of the phrase "the possibility that" in the last clause creates uncertainty as to the precise circumstances that the Commission is attempting to capture. Contracts are subject to a wide variety of terms and conditions. In the normal course of business, circumstances may arise that create a remote possibility, in the event of certain contingencies, that the enforceability of some element of a contract (potentially immaterial) may be called into dispute. To the extent that the Commission is attempting to capture all such circumstances, we believe the language is overbroad and not calibrated to focus a DCO on the critical risks that could lead to a recovery situation.

---

[17] Release at 48973.
[18] *See* Release at 48974.
[19] The Proposal would enumerate "legal risk" as "losses from adverse judgments, or other losses, arising from legal, regulatory, or contractual obligations, including damages or penalties, and the possibility that contracts that the derivatives clearing organization relies upon are wholly or partly unenforceable." The Proposal would enumerate "operational risk" as losses occasioned by deficiencies in information systems or internal processes, human errors, management failures, malicious actions (whether by internal or external threat actors), disruptions to services provided by third parties, or disruptions from internal or external events that result in the reduction, deterioration, or breakdown of services provided by the derivatives clearing organization."

- § 39.39(c)(2)(ii) (Recovery Scenarios): The Proposal identifies 11 scenarios that each SIDCO and SCDCO is required to separately address in its RWP.[20] As proposed, a SIDCO or SCDCO must address each of the 11 scenarios unless it "determines [the scenario] is not possible in light of its structure and activities," a high bar given that many scenarios are possible even if not plausible. We believe that the Commission should instead allow impacted DCOs to make a risk-based assessment of the scenarios most likely to impact them, thereby allowing the DCO to focus its RWP in a manner designed to be most up-to-date and decision-useful. More broadly, we urge the Commission to reconsider the necessity of addressing myriad default- and non-default loss scenarios in the RWP. The core of the issue is whether the loss in the scenario is a default loss or non-default loss, as each may implicate separate governance mechanisms and recovery tools. Various types of non-default losses, however, to the extent they lead to the triggering of a recovery plan, will be addressed in a similar manner, with the similar goal of re-establishing business-as-usual status without a disruption in critical services.
- § 39.39(c)(7) (Governance): OCC generally supports proposed §39.39(c)(7), which would require SIDCOs and SCDCOs to describe in their RWPs relevant governance mechanisms and structures for the approval and implementation of, and exercise of discretion under, the RWP. However, § 39.39(c)(7)(iv), which would require impacted DCOs to "[d]escribe the [DCO's] process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the [DCO]," has the potential to impose unnecessary obstacles on a DCO in a distressed situation. DCOs can and should consider ways to obtain and incorporate stakeholder feedback in the design and assessment of their RWPs. But requiring DCOs to have a formal mechanism or process for considering such views during an actual recovery scenario would impose logistical and procedural burdens on the DCO at the very moment when DCOs should have both the certainty of being able to rely on their RWP as drafted, as well as the flexibility to address unforeseen circumstances with the goal of ensuring the uninterrupted provision of critical services.
- More broadly, aspects of the Proposal related to governance appear potentially in tension with the existing, principles-based requirements of § 39.24(a) of the Commission's rules, which define the required governance principles for DCOs.[21] Among the existing requirements under current rule § 39.24(a) is that a DCO's board of directors "make certain that the derivatives clearing organization's design, rules, overall strategy, and major decisions appropriately reflect the legitimate interests of clearing members, customers of clearing members, and other relevant stakeholders." A DCO's governance arrangements are also required to "[e]xplicitly support the stability of the broader financial system and other relevant public interest considerations of clearing members, customers of clearing members, and other relevant stakeholders." These provisions apply across a DCO's activities. However, proposed § 39.39(c)(7)(iv), discussed above, could be understood to require a separate, RWP-specific process for managing stakeholder interests. Similarly, proposed § 39.39(c)(7)(iii) would require SIDCOs and SCDCOs to "describe the processes that the [DCO] will use to guide its discretionary decision-making relevant to each plan," one of several prescriptive requirements in the Proposal mandating impacted DCOs to describe their criteria and processes for

[20] Note that these 11 scenarios would be in addition to any other scenario(s) that the DCO chooses based on relevance to that particular DCO. Moreover, the Proposal would require DCOs to "consider any combination of at least two scenarios involving multiple failures (*e.g.*, a member default occurring simultaneously, or nearly so, with a failure of a service provider) that, in the judgment of the [DCO], are particularly relevant to the [DCO's] business."
[21] 17 CFR Part I § 39.24.

their use of discretion in connection with the RWP.[22] But a DCO is already guided in its use of discretion by the existing principles under § 39.24(a). Unfortunately, the Proposal does not discuss how to reconcile proposed § 39.39(c)(7) with § 39.24(a). The Proposal therefore introduces confusion as to the relevant standards and procedures, which is especially problematic given the need for decisiveness and certainty during the implementation of an RWP. We therefore urge the Commission to reconsider the need to go beyond the existing, principles-based governance requirements of § 39.24(a).

B. Elements of the Required Analyses in Proposed §§ 39.39(C)(2)(i) and 39.39(c)(4) Seek Speculative Information

Consideration of the systemic implications of a DCO's actions and the predictable effects of the potential actions to be taken in a recovery situation are critical to a DCO's recovery and wind-down planning. OCC agrees with the Commission that a detailed and comprehensive recovery and wind-down planning process will result in DCOs "being . ... more likely to continue to provide those critical services and operations upon which clearing members and other financial market participants depend, and to avoid the potential harms to clearing members, other financial market participants, and the financial system more broadly, from a disorderly cessation of those services and operations."[23] To that end, we appreciate the Commission providing clarity with respect to its expectations for the components of the analysis a SIDCO or SCDCO should provide for each recovery scenario (§ 39.39(c)(2)(i)) and each recovery tool (§ 39.39(c)(4)). Indeed, we believe the prescribed elements are generally consistent industry best practices and the analysis in OCC's current RWP. We are concerned, however, that, as proposed, certain of the analyses the Proposal seeks in both of these sections requires impacted DCOs to provide assessments of potential second- and third-order consequences, for which they may be privy to limited information.

Specifically, we believe the following provisions of the Proposal reflect this concern:

- § 39.39(c)(2)(i): "For each scenario, the recovery plan shall provide an analysis that includes . . (D) the market conditions and other relevant circumstances that are likely to result from the scenario [and] (E) the potential financial and operational impact of the scenario on the derivatives clearing organization and on its clearing members, internal and external service providers and relevant affiliated companies, both in an orderly market and in a disorderly market"; and
- § 39.39(c)(4): "A derivatives clearing organization or subpart C derivatives clearing organization shall have a recovery plan that includes the following . . . (ix) an assessment of the likelihood that the tools, individually and taken together, would result in recovery [and] "(x) an assessment of the associated risks from the use of each such tool to non-defaulting clearing members and those clearing members' customers with respect to transactions cleared on the derivatives clearing organization, linked financial market infrastructures, and the financial system more broadly."

[22] *See* proposed § 39.39(c)(3)(ii) (requiring DCOs to "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"); proposed § 39.19(c)(4)(iv) (requiring "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"); and proposed § 39.19(c)(5)(v) (requiring DCOs to "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").

[23] Release at 48997.

- § 39.39(c)(5): "Each systemically important derivatives clearing organization and Subpart C derivatives clearing organization shall: . . (ix) provide an assessment of the likelihood that the tools, individually and taken together, would result in orderly wind-down; and (x) provide an assessment of the associated risks from the use of each such tool to non-defaulting clearing members and those clearing members' customers with respect to transactions cleared on the derivatives clearing organization, linked financial market infrastructures, and the financial system more broadly."

A DCO's ability to anticipate the ways in which broader markets, and their myriad participants, will react to a distress scenario at the DCO (or, for example, at a bank that provides services to a DCO), and the entry of that DCO into a recovery process will vary depending on the scenario . Moreover, DCOs are unlikely to have detailed insight into other companies' workings to assess "the potential financial and operational impact of [a] scenario . . . on. . . clearing members, internal and external service providers and relevant affiliated companies, both in an orderly market and in a disorderly market."

With respect to the likelihood of the DCO's recovery tools resulting in recovery, the purpose of a DCO's RWP is, of course, "to continue to provide those critical services and operations upon which clearing members and other financial market participants depend," and a DCO will adopt a RWP that it believes is designed to accomplish that goal, using tools that function as intended to achieve that goal. So for any DCO, the expected outcome of the use of its recovery tools is continuation of its critical services and operations and a return to business-as-usual. Speculation that is predicated on some other outcomes assumes away the purpose underlying the design of the RWP the recovery tools.

Speculation by a DCO in its RWP about all of the potential second- and third-order consequences of its incremental actions is necessarily of limited value to both the DCO and the Commission, and ultimately detracts from the utility of the RWP. As contemplated by the Proposal (and discussed further below), stakeholders' views will be considered during the RWP design process, and the Commission will have the opportunity to provide feedback to the DCO, both formally and informally; through these mechanisms, the DCO can and will obtain input on whether the assumptions underlying its RWP are consistent with stakeholder assumptions regarding the impacts of similar scenarios and use of the DCO's recovery and wind-down tools. While a DCO should clearly consider such input in designing its own plan, by definition its RWP will be structured to achieve the goals of recovery or orderly wind-down, based on the DCO's best, informed view of the conditions under which its plan will be implemented.

Therefore, we request that the Commission amend the Proposal to clarify, with respect to each of the requirements cited above, that a DCO's RWP will satisfy the relevant requirement to the extent that it includes an assessment of the "reasonably likely" or "reasonably anticipated" outcomes, risks, or consequences (as applicable) of the scenarios and/or tools discussed.[24]

[24] In reference to proposed Regulations 39.39(c)(4) and (5), we note that Letter 16-61, rather than directing the inclusion of such speculative information, instead suggested topics that might be discussed in addressing the risks presented by recovery tools. In keeping with the more principles-based approach of Letter 16-61's guidance, the focus was therefore on delineating the risks presented by the recovery tools in the manner in which the DCO believed was appropriate and feasible, rather than requiring the DCO to answer multiple prescriptive requirements, some of which may not be reasonably anticipated by the DCO. *See* Letter 16-61 at pp. 7-8 ("a Recovery Plan should identify and analyze:. . . the key risks associated with the use of each tool (e.g., that clearing members will not satisfy their assessments or other obligations or participate in voluntary tools, or that the use of assessments or other recovery tools will result in additional defaults or otherwise exacerbate the adverse impacts of the scenario)."

C. Several Elements of the Proposal Are Ambiguous or Impractical As Proposed

OCC agrees with the Commission that "[t]he requirement to maintain and submit to the Commission viable plans for orderly wind-down provides greater clarity and transparency before wind-down and facilitates timely decision-making and the continuation of critical operations and services during orderly wind-down."[25] For that reason, we welcome recent international and domestic efforts to detail regulatory expectations on the content of RWPs, including the Proposal and the SEC RWD Proposal. However, certain aspects of the Proposal introduce ambiguity or present questions of practicality in a manner that could diminish impacted DCOs' ability to produce RWPs that meet regulatory expectations, and thereby reduce the ultimate utility of the Proposed Rules. Below we identify several such provisions and provide a brief explanation of our concerns with each. In some instances, we also suggest potential alternative language to reduce ambiguity; in others, we note that the issue is a broader structural concern with the Proposal.

§ 39.39(b)(2): Recovery plan and orderly wind-down plan

As proposed, § 39.39(b)(2) would require a SIDCO or SCDCO "to have procedures for informing the Commission and clearing members, as soon as practicable, when the recovery plan is initiated or orderly wind down is pending." The term "initiated" clearly identifies the causal event for the contemplated notification (i.e., the determination by the DCO to initiate the recovery plan, pursuant to the RWP's terms), and we support the use of such a clear standard. [26] However, the term "pending" lacks similar clarity and introduces the potential for market confusion through different interpretations by impacted DCOs. We therefore recommend that in any final rule, the Commission conform the requirements by requiring impacted DCOs to inform the Commission and clearing members, as soon as practicable, when either the recovery plan or orderly wind down plan is initiated.

§ 39.39(c)(1): Critical operations and services, interconnections and interdependencies, and resilient staffing arrangements

As proposed, § 39.39(c)(1) would require SIDCOs and SCDCOs to identify their critical operations and services, as well as their plans relating to the staffing, interdependencies, and contractual arrangements that underpin those operations and services. Identification of critical services and operations is the necessary predicate for all recovery and wind-down planning, and we support the general goal of promoting resilient arrangements for the purpose of attempting to ensure continuation of those services and operations. However, as proposed, certain elements of proposed § 39.39(c)(1) lack clarity or raise questions about what is necessary for compliance. Specifically, we discuss below our concerns regarding the requirements for impacted DCO to identify i) their plans for resilient staffing arrangements for continuity of operations; ii) obstacles to success of the recovery plan and orderly wind-down plan; iii) plans to address the risks associated with the failure of each critical operation or service; and iv) how they will ensure that each identified operation or service continues through recovery and orderly wind-down.

DCOs, like almost all regulated entities, rely on third parties to provide a variety of services that may support the DCO's critical services. The nature of the DCO's relationship to the service provider, the services provided, and the roster of relevant service providers necessarily evolves over time. For example, a service provider may add or subtract service offerings, a contract may expire and be renegotiated, or the DCO may

[25] Release at 49001.

[26] We note, however, that the SEC RWD Proposal does not require the notification of clearing members simultaneously with the notification to the SEC. *See* SEC RWD Proposal, proposed rule 17Ad-26(a)(7). We urge the Commission to collaborate with the SEC to harmonize the notification requirements prior to the issuance of any final rules.

determine to switch providers. We agree with the Commission that planning for recovery and wind-down requires understanding how these relationships will be impacted by entering such a situation. Such an understanding turns on incorporating planning and tracking these relationship terms and conditions throughout the third-party engagement and risk management process, including when negotiating contracts and considering whether and to who to outsource important functions. In so doing, DCOs employ a variety of contractual terms to maximize predictability and stability in their relationships with their most critical service providers, including in a recovery or wind-down situation. However, for purposes of recovery and wind-down planning, we believe the *process* for tracking these relationships and their contractual bases is the key information. Given that the identity of key service providers changes over time, as do contractual terms, the RWP should provide assurance that *at any given point in time*, a DCO will be able to quickly assess its key commercial relationships and how they are impacted by unfolding events. Thus, we recommend that the final rule require impacted DCOs to identify with specificity the method by which the DCO tracks, on an ongoing basis, the service providers that support the DCO's critical operations and services. The DCO should be permitted to maintain the actual list of those third parties as part of the supporting information for the RWP, rather than as part of the RWP itself.

We also agree that any consideration of how a DCO will continue its critical services necessarily requires consideration of how to plan to retain the necessary staff for such efforts. But, as with service provider relationships (see below), we believe the DCO's process for preparing to retain and incentivize critical employees under adverse circumstances is the critical piece of information necessary for both the DCO and regulators and resolution authorities. That is, what is of most relevance for planning, in addition to identifying staffing needs for continuation of critical services, are what retention tools the DCO uses, how it considers retention when setting and negotiating employment terms with essential personnel, and how it tracks the terms of each such employee's employment. These process considerations provide more decision-useful information at any given point in time than lists of specific employees, which may become dated quickly due to shifts in responsibility or normal attrition.

With respect to the requirements to identify obstacles to success of the RWP, a DCO's goal in designing an RWP is to craft a plan that the DCO believes will succeed under the contemplated scenarios. To that end, in connection with each recovery tool analyzed in OCC's plan, there is a discussion of key risks to the use of the tool. However, a separate section on obstacles to the overall plan's success would be contrary to the goal of shaping a plan to accomplish a recovery or orderly wind-down in the face of known and anticipated risks. The Commission should therefore clarify whether a DCO satisfies this proposed requirement by discussing risks attendant to the various components of the RWP.

Finally, with respect to the proposed requirement that a DCO identify how it will ensure that each identified operation or service continues through recovery and orderly wind-down, we urge the Commission to revise this provision to require a DCO to identify how it will *seek to* ensure the continuation of its critical operations and services.

39.36(c)(6): Agreements to be maintained during recovery and orderly wind-down

DCOs, like almost all regulated entities, rely on contracts, licenses, and other arrangements with third parties to provide a variety of services that may support the DCO's critical services. The nature of the DCO's relationship to the provider, the services provided, and the roster of third-party providers necessarily evolves over time. For example, a service provider may add or subtract service offerings, a contract may expire and be renegotiated, or the DCO may determine to switch providers. We agree with the Commission that planning for recovery and wind-down requires understanding how these relationships will be impacted by entering

such a situation. Such an understanding turns on incorporating planning and tracking these relationship terms and conditions throughout the third-party engagement and management process, including when negotiating contracts and considering whether and to whom to outsource important functions. In so doing, DCOs employ a variety of contractual terms to maximize predictability and stability in their relationships with their most critical service providers, including in a recovery or wind-down situation. However, for purposes of recovery and wind-down planning, we believe the key information is how the DCO incorporates the need for such resiliency into its *process* for entering into and monitoring these relationships. That is, how does the DCO incorporate resiliency and contingencies for distress situations into its third-party management process. The identity of key service providers changes over time, as do contractual terms. Rather than provide specifics on its portfolio of contracts at any given time, the DCO's RWP should provide assurance that *at any given point in time*, a DCO will be able to quickly assess its key commercial relationships and how they are impacted by unfolding events.

39.39(c)(3)(i): Recovery and orderly wind-down triggers

Proposed § 39.39(c)(3)(i) would require that a SIDCO's or SCDCO's "(A) recovery plan shall establish the criteria that may trigger implementation or consideration of implementation of that plan, and the process the [DCO] has in place for monitoring for events that are likely to trigger the scenarios identified in subparagraph (2); and (B) orderly wind-down plan shall establish the criteria that may trigger consideration of implementation of that plan. . . ." We are concerned that the ambiguity and inconsistencies in the standards included in the Proposed Rule as drafted could create uncertainty for DCOs, the Commission, and stakeholders. Specifically, subpart (A) would require the adoption of criteria that "*may* trigger implementation *or consideration of implementation*" of the plan. We appreciate the use of "may trigger" generally, as it recognizes that discretion can be applied by DCOs in the application of their identified triggers. However, criteria that "may trigger. . . consideration of implementation" of the RWP is a vague standard that could include all kinds of prudent measurements and risk gauges, some of which might be much further from ultimately causing the plan to be triggered than others. The same holds true in subpart (B). To the extent the Commission is seeking language that enables the exercise of discretion by a DCO in triggering wind-down, it should harmonize the language with subpart A. We would therefore suggest deleting the phrase "consideration of implementation" from subpart A, and in subpart B, deleting the words "consideration of."[27]

D. The Commission Should Consider Guidance and Additional Limitations to Ensure the Proposed Testing Requirements Do Not Impose Excessive Burdens

Proposed rule 39.39(c)(8) would require DCOs, in their RWPs, to include "procedures for testing the viability of the [RWP], including testing of the [DCO'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 [RWP] in light of the findings resulting from such tests." Testing would be required after material revisions to the RWP, and no less than annually, and DCOs would be required to include clearing members in testing, and other stakeholders to the extent practicable. OCC agrees with the Commission about the importance of ensuring that RWPs not just contain all the required elements, but also be workable in a potential crisis situation, and further agrees that the results of the testing should be shared pursuant to predetermined procedures to ensure

[27] The "consideration of implementation" standard is also in tension with the SEC RWD Proposal, which requires identification of triggers that "would trigger implementation" of the RWP. *See* SEC RWD Proposal, proposed rule 17Ad-26(a)(4). We again urge the Commission to collaborate with the SEC to harmonize these requirements in any final rules.

that any necessary revisions occur as soon as possible. It is essential that DCOs, their members and customers, and regulators all have confidence that the RWP will operate as designed. Indeed, the value of periodic testing of the RWP and its elements is to reduce the burden on a DCO at a time when resources may be stretched thin, by ensuring that the DCO has a workable roadmap to address the situation at hand. We believe OCC's ongoing testing and assurance work is consistent with the Commission's policy objectives, and we urge the Commission not to add unnecessary or duplicative testing requirements in any final rule.

OCC tests the implementation of certain of its recovery and wind-down tools and related processes as part of its regular and periodic testing, including with mandatory participation by clearing members where such participation will contribute to the utility of the testing procedures. This testing is designed to assess and enhance the operational capacity and effectiveness of OCC in its risk management process and tools. All other RWD tools are tested on a schedule determined by OCC's Recovery and Wind Down Working Group, with the goal of ensuring regular testing of critical components of the RWP. For example, we test several of the recovery tools as well as liquidity facility draws as an extension of our default management testing. We also conduct testing with related FMIs and our settlement banks, as well. We use table-top exercises to develop and test how OCC would respond to extreme scenarios that might push OCC into recovery. OCC also performs monthly analysis of each Clearing Member's Clearing Fund requirement in relation to the Clearing Member's net capital, to monitor each Clearing Members ability to fund its Clearing Fund assessments. These processes, and the review of their results, including by senior management and the Risk Committee of OCC's board of directors, enable OCC to ensure that its RWP is up-to-date and properly designed in light of evolving circumstances at OCC and in the market. Any resulting changes in the RWP are then approved by OCC's board of directors and rule filed with OCC's regulators.

Additional testing requirements, including mandatory participation by clearing members and/or other stakeholders, in all or many aspects of the testing, would require significant investment of time and resources from a DCO's most critical personnel (to plan the testing, coordinate with clearing members and stakeholders, and execute the testing, which is a highly manual process) for little or no benefit.[28] To the extent the Commission does impose any additional testing requirements, or believes a separate, RWP-designated test of the same processes that are already tested regularly is required, mandating that such testing on an annual basis would be duplicative of the ongoing testing (described above) that DCOs like OCC do to ensure that critical components of the RWP are well understood and properly designed. Additional or a completely separate testing of the RWP would thus introduce unnecessary and potentially significant burdens without a proportionate benefit.[29]

We believe the testing described above is tailored to OCC's circumstances and appropriately designed to "demonstrate whether [OCC's] tools and resources will sufficiently cover financial losses resulting both from participant defaults and non-default losses and whether [OCC's] rules, procedures, and governance facilitate a viable recovery or orderly wind-down" as well as "[reveal] deficiencies or weaknesses which could hamper recovery or wind-down efforts, and [provide] an opportunity to remediate them in advance."[30] We encourage the Commission to clarify its expectations as to what constitutes "testing" for purposes of proposed Rule

[28] In addition to the costs imposed on DCOs, we note that many entities are clearing members of more than one DCO (and may be members of other CCPs subject to similar requirements) and will therefore be required to devote their own time and resources to multiple testing exercises every year.
[29] Some aspects of a DCO's RWP may not lend themselves out to full simulation-type testing in any event. For example, to the extent a DCO's RWP contemplates a potential transaction with an as-yet-unidentified third-party (e.g., a merger or acquisition), simulating such a scenario may not be feasible in any practical sense.
[30] Release at 48982.

17Ad-26(a)(8). In so doing, the Commission should provide assurance that DCOs have the discretion to determine what type of testing is appropriate to enable the DCO to evaluate the effectiveness of its RWP based on the current market conditions and other circumstances.

E. <u>The Proposed Rule on Information for Resolution Planning Lacks Appropriate Limitations and In Any Event Should Not Apply to an Entity Such as OCC, which is Subject to Primary Regulation by the SEC</u>

The Proposal includes a revised § 39.39(f) which would require SIDCOs and SCDCOs to "maintain information systems and controls that are designed to enable the [DCO] to provide data and information electronically, as requested by the Commission for purposes of resolution planning and during resolution under Title II of the Dodd-Frank Act" and to "provide such information and data in the form and manner specified by the Commission." OCC appreciates the Commission's desire to facilitate the ability of the FDIC to plan for (and conduct) potential resolution pursuant to FDIC's Title II OLA. However, we are concerned that the requirements, as proposed, are too broad and have the potential to impose on impacted DCOs a parallel, unbounded examination-like obligation to provide information to a regulator with whom it does not have a statutory supervisory relationship. In light of OCC's SIFMU designation and primary regulation by the SEC, we also believe it is unnecessary and potentially counterproductive to subject OCC and similarly situated SCDCOs, which are not SIDCOs, to proposed § 39.39(f).

The Commission proposes to require SIDCOs and SCDCOs to maintain and provide upon request seven different categories of data and information, the last of which is a general catch-all category ("Any other information deemed appropriate to plan for resolution under Title II of the Dodd-Frank Act."). In the Release, the Commission acknowledges that the covered information and data is that that might be requested and used by the FDIC for purposes of planning for and during resolution under Title II. As proposed, § 39.39(f) contains no limitations on the timing or scope of the requests that the Commission can make to any SIDCO or SCDCO pursuant to the rule, nor does it define a process pursuant to which an impacted DCO could engage with the Commission or the FDIC to discuss such requests. The effect is that the Commission is essentially proposing to establish a freestanding examination/inspection obligation for SIDCOs and SCDCOs, where the FDIC can request nearly limitless data or information from a SIDCO or SCDCO (via the Commission), without that DCO having any opportunity to engage with the FDIC, as it would with a direct regulator, thereby, creating the potential for miscommunication and inefficiency.[31]

More fundamentally, there is no need to subject OCC to such a requirement given the nature of its regulation by the SEC, and any final rule should include an exemption for OCC and any entity similarly situated. OCC is not a SIDCO; the Commission states that it is including SCDCOs in the scope of proposed § 39.39(f) given the possibility that they might come under FDIC's Title II OLA. But as a SIFMU, OCC presumably already falls within that authority. As a SIFMU, a CCA, and an SRO subject to the SEC's regulatory framework and examination authority, OCC is already required to maintain and provide upon request a wide scope of documents and information. In explaining the necessity for the new rule, the Commission states that "[b]ecause of the nature of principle-based regulation for DCOs, there may be information in the possession of a DCO that is required for resolution planning but may not ordinarily be reported to the Commission and

[31] By way of example, certain of the information that falls within the categories defined in proposed rule 39.39(f) is already public. Should the FDIC seek such information – along with other, non-public information - from a DCO, that DCO might propose to limit the production to the non-public information. Currently, the Proposal includes no mechanism for discussing such a limitation, and would require Commission staff to engage in a game of "telephone" with the DCO and the FDIC to resolve the issue.

may not be available publicly." But the SEC's regulatory framework is more prescriptive and involves a much broader set of recordkeeping requirements for maintaining and providing such information to the SEC. Therefore, at any given time, the SEC is in possession of large amounts of information about OCC, which it may choose to share with the FDIC. Subjecting OCC to proposed § 39.39(f) would therefore create potentially significantly burdensome and duplicative obligations on OCC that could ultimately conflict with the requirements of its primary regulator.

V. Conclusion

We thank the Commission for the opportunity to provide comment on the Proposed Rules. If you have any questions, please do not hesitate to contact Andrew Feller, Associate General Counsel, at 202.971.7238, or afeller@theocc.com. We would be pleased to provide the Commission with any additional information or analyses that might be useful in determining the content of the final rules.

Sincerely,

Megan Malone Cohen

Megan Malone Cohen
General Counsel and Corporate Secretary