May 13, 2024

Via Electronic Submission

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

Re: Notice of Proposed Rulemaking: **Requirements of Designated Contract Markets and Swap Execution Facilities Regarding Governance and Mitigation of Conflicts of Interest Impacting Market Regulation Functions (RIN 3038–AF40)**

Dear Mr. Kirkpatrick:

Intercontinental Exchange Inc., on behalf of itself and its subsidiaries (collectively "ICE"), appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") Notice of Proposed Rulemaking on Requirements of Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest in Market Regulation Functions ("Proposal").[1]

ICE operates regulated marketplaces for the listing, trading, and clearing of a broad array of derivatives contracts such as commodities, interest rates and foreign exchange. 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 Futures U.S. ("ICE Futures US") is regulated by the CFTC as a designated contract market ("DCM") under the Commodity Exchange Act ("CEA"). ICE Swap Trade is regulated by the CFTC as a swap execution facility ("SEF") under the CEA.

Executive Summary

The Commission proposes to establish new and to modify existing governance, conflicts of interest and minimum fitness requirements for DCMs and SEFs. Among other changes, the Proposal would require DCMs and SEFs to implement new governance structures, adopt new policies and procedures regarding conflicts of interest, and expand oversight responsibilities for Chief Compliance Officers ("CCO") and Chief Regulatory Officers ("CRO"). ICE supports robust governance arrangements and regulatory oversight functions however we believe the Commission's approach unnecessarily imposes significant new, prescriptive demands on SEFs

[1] Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions, 89 Fed. Reg. 19646 (proposed Mar. 19, 2024) (to be codified at 17 C.F.R. pts. 37, 38).

and DCMs and could impede their ability to meet obligations under the core principles, without clearly identifying the problems the proposals are designed to address. In ICE's view, the Proposal does not sufficiently consider existing rules and practices of DCMs and SEFs developed to provide independent governance and to minimize conflicts of interest or describe the problems with these current practices. While ICE does not object to some of the proposed amendments, including establishing minimum fitness standards, ICE believes that the Proposal unnecessarily imposes rigid requirements on the structure of DCM and SEF governance and there are other approaches that can achieve the same objectives. The Commission should continue to allow DCMs and SEFs to have reasonable discretion in the manner they comply with the core principles and key requirements and not impose new requirements, without articulating current failings or considering the risks associated with the Proposal. If the Commission determines to proceed with this rulemaking, ICE encourages the Commission to consider the following:

- The Proposal would require CCOs/CROs to undertake substantial responsibilities related to compliance with core principles. The Commission's proposal does not take into account that self-regulatory organizations ("SRO"), not individuals, are responsible for satisfying obligations under the CEA and Commission rules and the Proposal could impair the ability of the DCM/SEF to meet its obligations.
- The Commission's prescriptive approach conflicts with the CEA which provides that a DCM shall have reasonable discretion in establishing how it complies with the core principles.[2] The Commission has not articulated a reasonable justification or benefit for the proposed changes.
- The Proposal would define a subset of responsibilities of a DCM or SEF as "market regulation functions" and require the CCO or CRO to have supervisory responsibility over such functions, including certain trade operations, record keeping and audit functions that are not appropriate to be performed or supervised by the CCO or CRO whose current core obligation is to supervise and enforce compliance by members and market participants with DCM or SEF rules.
- While fitness standards for directors and committee members may be appropriate, the Commission should not impose a subjective "good repute" standard.
- The proposed requirement to establish a board-level nominating committee is unnecessary and should not be included in any final rule.

Definition of "Market Regulations Functions" (Proposed Rules 37.1201(b)(9) & 38.851(b)(9))

The Commission proposes to define "market regulation function" to include DCM functions required by Core Principle 2 (compliance with rules), 4 (prevention of market disruption), 5 (position limitations or accountability), 10 (trade information), 12 (protection of markets and market participants), 13 (disciplinary procedures) and 18 (Recordkeeping) and related Commission regulations.[3] The Proposal cites the Commission's concern with potential conflicts of interest

[2] 7 U.S. Code Section 7- Designation of boards of trade as contract markets.

[3] We note that the text of proposed Rule 38.851(b)(9) references Core Principle 17 (composition of governing boards of DCMs) but the discussion in the Proposal references core principle 18 (recordkeeping). We assume the intended reference is to Core Principle 18, which would be consistent with the corresponding provision relating to SEFs.

between the market regulation function and the commercial interests of the DCM or SEF and would impose responsibilities on the CRO/CCO for overseeing these functions.

DCMs and SEFs are subject to comprehensive statutory and regulatory duties under the CEA and must satisfy these obligations regardless of conflicts of interest. Importantly, it is the entity, not any particular individual, that is responsible for compliance with the core principles and Commission rules. Core Principle 2 makes clear that that the DCM is obligated to "establish, monitor and enforce compliance with the rules of the contract market" and "to have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule." The market surveillance and member regulation function of a DCM and SEF are means by which the entity meets certain requirements under the core principles, but it is entity itself -- not the CRO or CCO -- that has obligations under the Commodity Exchange Act and Commission rules.

By contrast, the Commission proposes a broad definition of "market regulation function" and requires that the CCO or CRO be responsible for administering such functions. These proposals together would substantially limit the choices available to a DCM/SEF in satisfying its regulatory obligations and would require a reliance on CROs/CCOs that goes well beyond their role today. For this reason, we believe the proposal to require DCMs/SEFs to rely on CROs/CCOs to perform a broadly defined range of "market regulation functions" would impair their ability to meet statutory and regulatory obligations.[4]

In particular, ICE believes it is problematic to include in the proposed definition of "market regulation function" core principles relating to compliance with rules (Core Principle 2), especially as it relates to the real-time monitoring of trading, prevention of market disruption (Core Principle 4), especially as it relates to the real-time monitoring of trading and oversight of risk controls, audit trail (Core Principle 10) and recordkeeping (Core Principle 18). While these functions are important from the perspective of a DCM's or SEF's compliance with the core principles, they are outside the role of a CCO or CRO whose focus is on member or participant supervision and disciplinary matters. For that reason, ICE and other exchanges typically have organized trade monitoring functions separately from the market or member regulation departments.

Moreover, ICE strongly believes that it is inappropriate to include audit trail and recordkeeping functions within the remit of the CCO or CRO. Developing and maintaining an audit trail is a core function of the business of operating a trading platform. The audit trail itself is not a regulation function even though the market regulation department uses audit trail information to detect and investigate market abuses or disruptions. Similarly, recordkeeping is a responsibility related to all aspects of operating the exchange and is not limited to the regulatory function, even though records may be used or created by the regulatory team. Currently, dedicated data warehouse and record retention teams are responsible for audit-trail and recordkeeping functions at ICE and other exchanges. These teams have the expertise and knowledge to perform these functions and DCM's or SEF's ability to meet its obligations is dependent on this approach. If the Commission requires the CCO/CRO to have supervisory authority over these functions, it would impair DCMs and SEFs ability to perform these functions without any benefit. ICE is not aware of any problem

[4] Proposed Rule 38.856(a)(1) requires a CRO/CCO to have supervisory authority over "all" staff performing the DCM's "market regulation functions," and proposed Rule 37.1501(a)(1) similarly requires a SEF's CCO to have supervisory authority over all staff acting at its direction. In addition, proposed Rule 37.1501(b)(2) and Rule 38.856(e)(5) require the CRO/CCO to identify, minimize, manage and resolve conflicts of interest relating to the DCM/SEFs market regulation functions.

with their supervision that would warrant the proposed changes and we are not aware of any obvious benefit to requiring the direct supervision or administration of these functions by the CRO or CCO. Consistent with Core Principle 1, because DCMs and SEFs will continue to have the responsibility to satisfy the core principles, they should have appropriate flexibility to determine the best means of supervising these functions.

If adopted, these changes would require ICE and other DCMs/SEFs to significantly restructure their operations without a clear regulatory benefit and, as described above, introduce risk. The Commission has not raised any issues during rule enforcement reviews and we are unaware of any concerns with ICE's current structure. Accordingly, we believe that the existing rules for DCMs and SEFs are sufficient to provide market regulation oversight and to minimize conflicts of interest.

Other Provisions Relating to Chief Compliance Officer and Chief Regulatory Officer (Proposed Rules 37.1501 & 38.856)

As noted above, the CEA requires a DCM/SEF to comply with core principles and provides the DCM/SEF reasonable discretion to establish compliance with the rules. Consistent with the CEA, DCM/SEFs should be allowed to determine how best to meet their compliance obligations including defining the scope of oversight responsibilities and structure for any CRO/CCO role. The CFTC should continue to afford reasonable discretion for the DCM/SEF to determine the scope and responsibility of any CRO/CCO role, including whether a CRO role for a DCM is appropriate and not impose prescriptive requirements.[5]

In addition, a DCM/SEF cannot comply with the core principles without managing conflicts of interests. ICE does not believe it is appropriate for the responsibility for compliance to be placed on any one individual (i.e. the CCO/CRO) when it is the entity itself that has compliance obligations under the CEA. For this reason, DCMs and SEFs have written policies and procedures designed to identify and document existing or potential conflicts of interests. Organizational structures vary across DCM/SEFs, as do the products, markets, and market participants. The Commission should continue to provide DCM/SEFs with the flexibility necessary for effective governance by allowing DCM/SEFs themselves the discretion to design policies that fit their particular structure and characteristics. Accordingly, ICE does not support the requirement that the CCO/CRO identity, manage and resolve conflicts of interest.

The Commission has also proposed to require the board of directors or senior officer of the SEF/DCM, in consultation with the ROC, to approve the compensation of the CCO/CRO.[6] The Commission notes that while some portion of compensation may be in the form of equity, DCMs should avoid tying a CRO/CCO's salary to business performance in order to avoid potential conflicts of interest.[7] The Commission also states the ROC is well-situated to determine whether

[5] Under Part 39, the CFTC recognized that a Derivatives Clearing Organization ("DCO") has the obligation to comply with the CEA and Commission rules and requires a DCO to appoint a CCO who reports to the board of directors. The CCO is responsible for reviewing the DCO's compliance with core principles, establishing and administering policies and procedures designed to comply with the CEA, establishing procedures for the remediation of compliance issues and in consultation with the board, mitigating conflicts of interests. The CFTC's proposed CCO/CRO responsibilities for DCM/SEFs significantly expands the responsibilities and scope of oversight from those required for a CCO of the DCO. ICE questions why the CFTC is proposing to implement such divergent standards.

[6] *See id.* at 19713, 19719. Proposed Rule 37.1501(a)(5) and Rule 38.856(d).

[7] See Proposal at 19675.

specific compensation structures could raise potential conflicts of interest.[8] ICE supports the requirement for the board of directors/senior officer to approve the composition of the CCO/CRO and agrees that the ROC is well suited to determine whether a CCO/CRO compensation structures raises conflicts of interest concerns. The Commission has requested comment on whether they should prohibit CRO/CCO compensation from being directly dependent on the SEF/DCMs business performance.[9] It is commonplace in the financial industry for year-end compensation to be tied to the overall performance of the business or the parent company. In order to retain and attract qualified CRO/CCO candidates, the Commission should not prohibit linking compensation to performance of a business unit and should instead defer to the judgement of the board of directors/and or ROC to make these determinations.

Minimum Fitness Standards (Proposed Rules 37.207 & 38.801)

The Commission is considering adding an additional minimum fitness requirement that individuals subject to fitness standards must be in "sufficiently good repute."[10] The CFTC did not explicitly propose to include a "sufficiently good repute" standard but suggested that it might add this standard in a final rule and has requested comment on whether SEFs and DCMs should consider additional eligibility criteria to prevent individuals from serving as an officer or member of the board of directors if their background raises concerns about the individual's ability to effectively govern, manage, or influence the operations or decision making of a SEF or DCM. The Commission has not defined the "good repute" standard, but we believe the standard would require the DCM/SEF to identify negative criteria outside of those listed in Sections 8(a)(2) and (3) of the CEA. ICE does not support imposing a "good repute" standard and believes that the minimum fitness standards for directors as proposed in Rules 37.207 and 38.801 are sufficient to enable DCMs and SEFs to determine whether individuals are suitable for service on the board or other committees. The "good repute" standard is vague and subjective and will create uncertainty for DCMs and SEFs when implementing. Any specified fitness criteria should be objective and tied to specific, verifiable events as provided under Section 8a(2)-(3) of the CEA.

Moreover, the Commission has proposed to amend Rule 37.207(c) and Rule 38.801(c) to include additional minimum fitness standards for certain persons functioning in a supervisory capacity[11] and to include eligibility standards based on certain disciplinary offenses.[12] ICE generally does not object to these standards. ICE requests however that the Commission clarify the application of proposed Rule 37.207(c)(1)(iv) and 38.801(c)(1)(iv), which would disqualify certain persons found to have failed to exercise supervisory responsibility under the rules. ICE notes that members of ICE's disciplinary panels and the Business Conduct Committee include CCOs employed by DCM market participants. There are circumstances where the market regulation department may take an action against the CCO's employer (and not the CCO themselves) for

[8] Id.
[9] Id at 19678.
[10] See Proposal at 19659.
[11] The proposal requires DCMs and SEFs to establish fitness standards for: officers; for members of its board of directors, committees, disciplinary panels, and dispute resolution panels (or anyone performing functions similar to the foregoing); for members of the SEF or DCM; for any other person with direct access to the SEF or DCM; and for any person who owns 10 percent or more of a SEF or DCM and who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the SEF or DCM, and any party affiliated with any of those persons.
[12] *See id.* at 19709, 19715.

failure to supervise. ICE believes that the Proposal may require the DCM/SEF to remove the CCO from a disciplinary panel even though the CCO was not a named subject in the matter. ICE requests the Commission clarify that in this scenario, the CCO would still be allowed to maintain their status on the panel or committee.

ICE also requests the Commission amend proposed Rule 37.207(a) and Rule 38.801(a) to clarify that the minimum fitness standards only apply to "natural persons" who own more than 10 percent or more of the SEF or DCM and not to legal entities such as corporations or limited liability companies.[13]

The Board of Directors (Proposed Rules 37.1204 & 38.854)

The Proposal would require SEF's and DCM's boards be comprised of 35% public directors.[14] ICE supports this proposal and agrees that the 35% level should be applied to any board-level executive committee or similarly empowered body. The Commission has also requested comment on increasing the required percentage of public directors on the board to 51%. ICE does not support any increase above the current 35% level and believes the current structure and function of the board and the ROC, which is composed entirely of public directors and tasked with the oversight of the regulatory programs of SEFs and DCMs, are sufficient to manage any conflicts that the business may face meeting its regulatory and compliance obligations, including those under the CEA and the Commission's rules. Furthermore, in setting the 35% composition requirement in 2007, the Commission stated that the level "struck an appropriate balance between (1) the need to minimize conflicts of interest in the DCM-decision making process and (2) the need for expertise and efficiency in such processes."[15] The Commission recognized the potential difficulty in finding individuals who qualify as public directors and those with expertise. We note that proposed Rule 37.1204(b) and 38.854(b) now requires board members, including public directors, to have the relevant expertise and knowledge to fulfill their roles and responsibilities. There is a limited pool of individuals that meet the proposed public director definition and have the relevant expertise to fulfil the role. The CFTC needs to consider that it can be difficult for DCMs and SEFs to find knowledgeable individuals willing and able to serve as public directors. ICE also notes that the Proposal would require that DCMs and SEFs have a ROC composed solely of public directors, as discussed below. The ROC would be responsible for overseeing all aspects of market regulation functions and for monitoring the sufficiency, effectiveness and independence of those functions. Given the proposed requirement for a ROC constituted solely of public directors to perform these functions, ICE does not believe there would be a regulatory benefit to increasing the required percentage of public directors at the board level.

The Commission has also proposed to prohibit making the compensation of public directors and non-executive members of the board directly dependent on the business performance of the SEF or DCM or its affiliate.[16] ICE is concerned that this aspect of the Proposal may be unclear, particularly as it relates to equity-based compensation and may prohibit certain common compensation practices that have not previously presented a problem. As the Commission notes in the proposing release, it is frequently the case as a matter of industry practice, to include some

[13] Please refer to the CFTC acceptable practices for DCM core principle 15. Add cite.
[14] *See id.* at 19711, 19718.
[15] See Proposal; at 19666 citing 2007 Final Release, 72 FR 6936 at 6946-6947
[16] *See id.* at 19711, 19718.

form of "nominal equity" in a compensation package for directors.[17] The Commission has acknowledged that "nominal" equity ownership, in itself, is not compensation "directly dependent" on the business performance of the SEF/DCM or its affiliate.[18] However, the Commission further notes that "[it] considers any equity ownership interest in a SEF or DCM that is more than nominal to be compensation that is 'directly dependent on the business performance' of the SEF or DCM or its affiliates."[19] The Commission has however given no guidance as to what constitutes "nominal" for this purpose. As a result, the proposal may cause considerable uncertainty for DCMs and SEFs and their directors particularly given the widespread use of equity-based compensation for directors.[20] In the absence of any history of problems arising from the current practice of awarding directors equity, it is unclear the benefit that would be achieved by finalizing this proposal. ICE believes the Commission should clarify that such current equity compensation practices do not violate the proposed Rule. ICE notes that it can be difficult to incentivize qualified persons to act as directors and equity compensation has proven to be useful when trying to attract talented individuals with sufficient expertise to serve on boards.

Public Director - Definition (Proposed Rules 37.1201(b)(13) & 38.851(b)(13))

The Commission is proposing is to codify the requirements to qualify individuals as a "public director." Currently, Commission rules require 35% of the SEF/DCM board to be comprised of public directors and requires the ROC to be comprised of all public directors. The CFTC is proposing to codify the two-prong test for qualifying individuals as public directors which is currently outlined in the acceptable practices set forth in Appendix B to Part 38 of the Commission's regulations. This test consists of: (i) a subjective requirement which obligates the board of the DCM/SEF to make an initial determination that the individual has no "material relationship" with the DCM or SEF that could affect their independent judgment or decision making as a public director; and (ii) a bright-line, objective requirement to identify material relationships that would automatically disqualify an individual from serving as a public director. The CFTC is also proposing to expand the bright-line test to include additional disqualifying material relationships. ICE agrees with the Commission that public directors and the ROC are an essential part of the DCM and SEF structure. ICE therefore generally supports codification of the current test for DCMs and SEFs. ICE however does not support the proposed modifications to the bright-line test. Currently, individuals who are members, and individuals who are directors or officers of members, are disqualified from serving as public directors. Proposed §§ 37.1201(b)(13)(i)(B) and 38.851(b)(13)(i)(B) would expand the list of disqualifying membership relationships to include individuals who are employees of members and individuals who are directors or officers of affiliates of SEF/DCM members. ICE believes that these types of disqualifications would unnecessarily limit the pool of eligible individuals with industry expertise who qualify as public directors.

In addition, the term "member" for the purpose of identifying these relationships is not limited to individuals and firms that are members of the DCM or SEF. Under proposed Rule

[17] See *id.* at 19667. See Proposed Rules 37.1204(c) and 38.854(c)
[18] *Id.* at 19667.
[19] *Id.* at 19667.
[20] We also note that the text of proposed §§ 37.1204(c) and 38.854(c) address "compensation" while the preamble discusses "ownership interests." It is unclear if this is meant to suggest that the SEF/DCM needs to consider a director's overall or preexisting equity holding rather than only equity provided by the SEF/DCM or its affiliate as direct compensation.

37.1201(b)(13)(i)(B) and Rule 38.851(b)(13)(i)(B), the term "member" has the meaning set forth in Commission Regulation 1.3 which includes all individuals and firms who have trading privileges on the SEF/DCM.[21] With the transition to electronic trading and direct access, the number of participants with trading privileges on DCMs and SEFs has significantly increased. Correspondingly, the number of individuals and firms that could potentially be deemed as members under Commission Regulation 1.3 has expanded and given the potentially large pool of members and corporate affiliates of these members, ICE is concerned that the eligible pool of individuals who qualify as "public directors" would be greatly reduced. Given the broad definition of the term "member" and the size and complexity of the organization of many DCM and SEF members, bright-line disqualifications of this type are not appropriate. ICE believes instead that such relationships can appropriately be evaluated and managed SEF/DCM boards of directors under the material relationship test of proposed Rule 37.1201(b)(13)(i) and Rule 38.851(b)(13)(i). Further, we note that this is consistent with the approach outlined by the Commission in the 2009 amendments to acceptable practices[22] whereby the Commission removed "employees of DCMs" from the list of disqualifying membership relationships.[23]

Regulatory Oversight Committee (Proposed Rules 37.1206 & 38.857)

The Commission is proposing to codify the requirement under the acceptable practices of DCM Core Principle 16 that a DCM have a ROC comprised of public directors and is also proposing to add an analogous ROC requirement for SEFs.[24] ICE supports the Commission's proposal to codify the requirement for a SEF/DCM to have a ROC composed of public directors. ICE has always maintained SEF and DCM ROCs which have followed the acceptable practices outlined in SEF Core Principle 12 and DCM Core Principle 16.

Consistent with current acceptable practices under Core Principle 16, ROCs are responsible for minimizing conflicts of interest, overseeing the DCMs regulatory program, reviewing regulatory budgets and resources, supervising DCM regulatory officers and reviewing regulatory changes. The Proposal would fundamentally change the role and purpose of the ROC by expanding its oversight responsibilities to include those proposed to fall within the scope of "market regulation function." The Commission, however, has not articulated why the role of the ROC under current acceptable practices is no longer sufficient. ICE does not support expanding the role of the ROC beyond those responsibilities currently contemplated within Appendix B to Part 38, including expansion to oversight of trade operations staff and technology staff maintaining audit trails.

Moreover, ICE agrees with the Commission's recognition as outlined in its release on DCM Core Principle 15, that ROCs are intended to conduct oversight and review and are not intended to assume managerial responsibility or perform direct compliance work.[25] Consistent with this statement, ICE believes that the CCO/CRO and SEF/DCM regulatory departments should be responsible for day-to-day management and oversight of regulatory functions—not the ROC.

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[21] *See id.* at 19710, 19716.
[22] See Conflicts of Interest in Self- Regulation and Self-Regulatory Organizations, 74 FR 18982 (Apr. 27, 2009)
[23] The Commission stated that "the amendments merely shift the point of analysis from the bright-lines of subsection (2)(ii) to the overarching material relationship test of subsection (2) (i)."
[24] Please refer to proposed Rules 38.857(a) and 37.1206 (a).
[25] See Proposal at 19671,

Finally, ICE does not support proposed Rules 37.1206(d)(6) and 38.857(d)(6) which would require that the ROC review "all" regulatory proposals prior to implementation.[26] The term "regulatory proposals" is not defined or described in the Proposal. The majority of SEF/DCM activity is regulated and as proposed the ROC would be tasked with reviewing and approving all rule, policy or procedure changes, including those related to trade practice, contract specifications, recordkeeping, and governance. The ROC should not be required to be involved in oversight or approval of any activities of the DCM/SEF outside of those related to the responsibilities managed by the CCO/CRO. Further, if the ROC is required to approve all "regulatory proposals" it is unclear the role of the board of directors.

Nominating Committee and Diverse Representation (Proposed Rules 37.1205 and 38.855)

The Proposal requires SEFs and DCMs to establish a board-level nominating committee.[27] ICE appreciates the CFTCs objective of strengthening governance standards in the nomination process but cautions against limiting the ability of SEFs and DCMs to establish a governance structure that is appropriate to their business model. In this regard, ICE believes that a nominating committee is not the sole approach to evaluating director nominees and ICE SEFs and DCMs have other structures to facilitate the evaluation and nomination of exchange directors without establishing separate nominating committees. For example, ICE Futures US currently considers the views of market participants through product committees comprised of market participants and through consultations with market participants. Such structure has proven to be both effective and efficient. The Proposal's imposition of a prescriptive nominating committee structure would require DCMs and SEFs to alter existing governance arrangements and add new and potentially duplicative processes, without any clear benefit. ICE believes its current exchange and SEF processes and structures are successful at identifying and nominating qualified directors. ICE does not believe the Commission has identified a problem with the current process for selecting potential directors that would benefit from the imposition of a nominating committee.[28]

Conflicts of Interest for Advisory Committees (Rules 37.1202 and 38.852)

The Proposal requires DCMs and SEFs to establish policies and procedures requiring officers or members of their boards of directors, committees, or disciplinary panels to disclose actual or potential conflicts of interests.[29] ICE does not object to the proposed conflicts of interest requirements but strongly recommends the Commission only apply these requirements to SEF/DCM committees with actual decision-making authority and not apply the requirements to advisory committees. ICE is concerned that the proposal may limit the effectiveness of its advisory committees that are designed to involve and seek the views of market participants who may in fact have conflicts of interest. For example, ICE Futures US has a cotton committee that solicits views from participants trading in ICE's cotton market. The cotton committee is an advisory committee and cannot approve any rule or procedure changes. If the cotton committee is subject to the conflict-of-interest requirements, its members would not be able to participate in deliberations or voting on any matter involving trading or delivery which would defeat the purpose

[26] See id. at 19712, 19719.
[27] Rules 37.1205 and 38.855.
[28] It should also be noted that CFTC registered Derivatives Clearing Agencies are not required to have board level nominating committees and are given the discretion to evaluated directors in various forums.
[29] See id. at 19710, 19717.

of having an advisory committee. Such a result is also contrary to Core Principle 17, which obligates DCMs to consider the views of market participants. Accordingly, we ask the Commission to expressly eliminate advisory committees from the conflicts of interest rules.

Revocation and Suspension of Designation (Proposed Rules 37.5(c)(5)(i) & 38.5(c)(5)(i))

The Proposal provides that the Commission can revoke a SEF or DCM designation for failure to comply with regulations resulting from a change in ownership or corporate structure.[30] While the Commission has an interest in receiving notification of significant changes in ownership or corporate structure, ICE believes that including a provision relating to revocation of a designation in this context is unnecessary. Both before and after any change in ownership, a DCM or SEF is required to comply with the CEA and Commission regulations and the Commission has the authority to take action if the entity is not in compliance. Suggesting that the Commission could withdraw registration solely due to a change of ownership or corporate structure seems excessive and may unnecessarily deter ordinary and reasonable corporate changes and transactions. Threatening revocation of a license over an untimely notification of a corporate reorganization or similar error would be particularly inappropriate.[31] As such, ICE recommends the Commission either remove proposed Rule 37.5(c)(6)(i) and Rule 38.5(c)(6)(i) from any final rulemaking or amend these sections to explicitly provide a Commission notice requirement to the registrant and an opportunity to remedy any non-compliance before taking steps to revoke registration.

Furthermore, we note that proposed Rule 37.5(d) and Rule 38.5(d) delegate the authority to commence an action to revoke or suspend the designation of a SEF or DCM to the Director of the Division of Market Oversight. ICE believes that the decision to suspend or revoke a designation should reside solely with the Commission. We note that the Commission has provided insufficient justification for the Division of Market Oversight's ability to suspend or revoke the designation of an entity in the context of ownership and organizational changes, particularly where there is no equivalent revocation processes for DCMs or SEFs who have committed more serious regulatory violations. ICE believes that proposed Rule 37.5(c)(6)(ii) and Rule 38.5(c)(6)(ii) which authorize the Director of the Division of Market Oversight to enter an order directing the SEF or DCM to cease and desist from the violation is a more reasonable approach for the Commission to address this issue. Accordingly, ICE recommends the Commission refrain from adopting proposed Rule 37.5(d) and Rule 38.5(d).

Conclusion

ICE appreciates the opportunity to comment on the Proposal. ICE supports the Commission's goals and objectives to foster independent governance and minimize and resolve conflicts of interest in governance and decision-making. However, for reasons discussed above, aspects of the Proposal are not tailored to address an identified problem and thus would impose costs without benefits. ICE appreciates the opportunity to continue working with the Commission.

[30] See Rule 37.5(c)(6)(i) and Rule 38.5(c)(6)(i) at 1917.
[31] See Statement of Commissioner Caroline D. Pham on DCM and SEF Conflicts of Interest Proposal (February 20, 2024), https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement022024c.

Sincerely,

Kara Dutta
Vice President, Head of Legal, US Futures & Clearing
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