17 CFR Part 39

RIN 3038-AF16

Derivatives Clearing Organizations Recovery and Orderly Wind-down Plans; Information for Resolution Planning

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AGENCY: Commodity Futures Trading Commission

ACTION: Notice of Proposed Rulemaking

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing amendments to certain regulations applicable to systemically important derivatives clearing organizations (SIDCOs) and derivatives clearing organizations (DCOs) that elect to be subject to the provisions in Subpart C of part 39 of the Commission's regulations (Subpart C DCOs). These proposed amendments would, among other things, address certain risk management obligations, modify definitions, and codify existing staff guidance. The Commission is also proposing to amend certain regulations to require DCOs that are not designated as systemically important, and which have not elected to be covered by Subpart C of part 39, to submit orderly wind-down plans. In addition, the Commission is proposing to make conforming amendments to certain provisions, revise the Subpart C Election Form and Form DCO, and remove stale provisions.

DATES: Comments must be received by [60 days after publication in the Federal Register].

ADDRESSES: You may submit comments, identified by "Derivatives Clearing Organizations Recovery and Orderly Wind-down Plans; Information for Resolution Planning" and RIN 3038-AF16, by any of the following methods:

• *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.

• *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

• *Hand Delivery/Courier:* Follow the same instructions as for Mail, above. Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

FOR FURTHER INFORMATION CONTACT: Robert Wasserman, Chief Counsel and Senior Advisor, 202-418-5092, rwasserman@cftc.gov; Megan Wallace, Senior Special Counsel, 202-418-5150, mwallace@cftc.gov; Eric Schmelzer, Special Counsel, eschmelzer@cftc.gov,

[1] 17 CFR 145.9. Commission regulations referred to herein are found at 17 CFR chapter I (2020), and are accessible on the Commission's website at https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm.

202-418-5967; Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

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I. Background

A. The CEA, Dodd-Frank Act, and DCO Core Principles

Section 3(b) of the Commodity Exchange Act (CEA) sets forth the purposes of that Act; among these is "to ensure the financial integrity of all transactions subject to this act and the avoidance of systemic risk." Section 5b(c)(2) of the CEA, as amended in 2010 by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[2] sets forth eighteen core principles with which a DCO must comply in order to be registered with the Commission and maintain its registration (DCO Core Principles).[3] Together, the DCO Core Principles serve to reduce risk, increase transparency and promote market integrity within the financial system.[4]

Title VII of the Dodd-Frank Act grants the Commission explicit authority to promulgate rules, pursuant to section 8a(5) of the CEA, regarding the DCO Core Principles that govern the activities of all DCOs in clearing and settling swaps and futures.[5] Section 8a(5), in turn, authorizes the Commission "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of" the CEA.

For SIDCOs in particular, Title VIII of the Dodd-Frank Act grants the Commission

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[2] Title VII, Wall Street Transparency and Accountability Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 1641 (2010).

[3] Section 5b(c)(2) of the CEA, 7 U.S.C. 7a-1(c)(2).

[4] *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).

[5] Section 725(c) of Title VII of the Dodd-Frank Act, 124 Stat. at 1687 (2010), 7 U.S.C. 7a-1(c)(2)(A)(i).

explicit authority to prescribe risk management standards, "taking into consideration relevant international standards and existing prudential requirements" governing operations related to payment, clearing and settlement activities and the conduct of designated activities by such financial institutions.[6] Under Title VIII, the objectives and principles for those risk management standards are to (1) promote risk management; (2) promote safety and soundness; (3) reduce systemic risks; and (4) support the stability of the broader financial system.[7] Combined, Titles VII and VIII of the Dodd-Frank Act address one of Dodd-Frank's fundamental goals: to reduce systemic risk through properly regulated central clearing.[8]

DCOs are subject to a number of risks that could threaten their viability and financial strength, including risks from the default of one or more clearing members (including credit and liquidity risk) as well as non-default risk (including general business risk, operational risk, custody risk, investment risk, and legal risk). The realization of these risks has the potential to result in the DCO's financial failure.[9]

In light of the central role DCOs perform in the markets that they serve, the disorderly failure of a DCO would likely cause significant disruption in such markets. In particular, SIDCOs play an essential role in the financial system, and thus the disorderly failure of such a

[6] Title VIII, Payment, Clearing, and Settlement Supervision Act of 2010, Section 805, 124 Stat. 1802, 1809, 12 U.S.C. 5464(a)(2)(A), (B).

[7] *Enhanced Risk Management Standards for Systemically Important Derivatives Clearing Organizations*, 78 FR 49663, 49665 (Aug. 15, 2013).

[8] *See Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management*, 77 FR 21278, 21278 (Apr. 9, 2012).

[9] CPMI-IOSCO, Recovery of financial market infrastructures (July 5, 2017) (hereinafter CPMI-IOSCO Recovery Guidance) at ¶ 2.1.1.

DCO could lead to severe systemic disruptions if it caused the markets it serves to cease to operate effectively. Ensuring that DCOs can continue to provide critical operations and services as expected, even in times of extreme stress, is therefore central to financial stability. Maintaining provision of the critical operations and services that clearing members and others depend upon should allow DCOs to serve as a source of strength and continuity for the financial markets they serve.[10]

Core Principle D requires each DCO to ensure that it possesses the ability to manage the risks associated with discharging its responsibilities through the use of appropriate tools and procedures.[11] Recovery planning is inherently integrated into that risk management, and concerns those aspects of risk management and contingency planning which address the extreme circumstances that could threaten the DCO's viability and financial strength. To manage these risks as required by Core Principle D, a DCO needs to identify in advance, to the extent possible, such extreme circumstances and maintain an effective plan to enable it to continue to provide its critical operations and services if these circumstances were to occur. The recovery plan needs to address circumstances that may give rise to any default loss, including uncovered credit losses, liquidity shortfalls or capital inadequacy, as well as any structural weaknesses that these circumstances reveal. Similarly, the recovery plan needs to address DCOs' potential non-default losses. The recovery plan also needs to address the need to replenish any depleted pre-funded financial resources and liquidity arrangements so that the DCO can remain viable as a going concern and continue to provide its critical operations and services. The existence of the

[10] *Id.* at ¶ 2.1.2.

[11] 7 U.S.C. 7a-1(c)(2)(D)(i).

recovery plan further enhances the resilience of the DCO, and will provide market participants with confidence that the DCO will be able to function effectively even in extreme circumstances.[12]

Given the systemic importance of SIDCOs, each SIDCO must have a comprehensive and effective recovery plan designed to permit the SIDCO to continue to provide its critical operations and services. Subpart C DCOs, being held to similar standards as SIDCOs, also need to have such recovery plans. However, where a recovery plan proves, in a particular circumstance, to be ineffective, it is important that the DCO have a plan to wind down in an orderly manner. A plan for an orderly wind-down is not a substitute for having a comprehensive and effective recovery plan.[13]

The purpose of a recovery plan is to provide, with the benefit of thorough planning during business-as-usual operations, such information and procedures that will allow a DCO to effect recovery such that it can continue to provide its critical operations and services when its viability as a going concern is threatened. A recovery plan enables the DCO, its clearing members, their clients, and other relevant stakeholders, to prepare for such extreme circumstances, increases the probability that the most effective tools to deal with a specific stress will be used and reduces the risk that the effectiveness of recovery actions will be hindered by uncertainty about which tools will be used. The recovery plan will also assist the Federal Deposit Insurance Corporation (FDIC) as resolution authority under Dodd-Frank Title II[14] in

[12] CPMI-IOSCO Recovery Guidance, at ¶ 2.2.1.

[13] *Id.* at ¶ 2.2.2.

[14] 12 U.S.C. 5381 *et. seq.* ("Orderly Liquidation Authority"). While orderly wind-down as discussed here proceeds under the authority of the DCO, FDIC would act as receiver in conducting an orderly liquidation under Title II.

preparing and executing their resolution plans for a DCO.[15]

While the implementation of the recovery plan is the responsibility of the DCO itself, which accordingly also has to have the power to make decisions and take action in accordance with its rules, under Title II resolution, that responsibility and power will pass to the FDIC as receiver instead. Many recovery tools will also be relevant to a DCO under Title II resolution, not least because FDIC would "step into the shoes" of the DCO[16] and accordingly would be able to enforce implementation of contractual loss or liquidity shortfall allocation rules, to the extent that any such rules exist, and have not been exhausted before entry into resolution.[17]

To accomplish these ends, this Notice of Proposed Rulemaking (NPRM) is proposing, among other things: (1) for SIDCOs and Subpart C DCOs, that they should incorporate certain subjects and analyses in their viable plans for recovery and orderly wind-down; and (2) for all other DCOs, that they should maintain viable plans for orderly wind-down that incorporate substantially similar subjects and analyses as the proposed requirements for SIDCOs and Subpart C DCOs.

B. Regulatory Framework for DCOs

Part 39 of the Commission's regulations implements the DCO Core Principles, including Core Principles D and R, which require "that the [DCO] possesses the ability to manage the risks associated with discharging the responsibilities of the [DCO] through the use of appropriate tools

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[15] CPMI-IOSCO Recovery Guidance at ¶ 2.3.1.

[16] 12 U.S.C. 5390(a)(1)(A)(i) (upon appointment as receiver for a covered financial company, FDIC succeeds to "all rights, titles, powers, and privileges of the covered financial company and its assets, and of any stockholder, member, officer, or director of such company").

[17] CPMI-IOSCO Recovery Guidance at ¶ 2.2.3.

and procedures,"[18] and "a well-founded, transparent, and enforceable legal framework for each aspect of the [DCO]."[19] Subpart B of part 39 establishes standards for compliance with the DCO Core Principles for all DCOs.[20] Subpart C of part 39 establishes additional standards for compliance with the DCO Core Principles for SIDCOs,[21] *i.e.*, DCOs designated systemically important by the Financial Stability Oversight Council (FSOC) for which the Commission acts as the Supervisory Agency.[22] The Subpart C regulations also apply to DCOs that elect to be subject to the requirements in Subpart C.[23]

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[18] Section 5b(c)(2)(D) of the CEA, 7 U.S.C. 7a-1(c)(2)(D) ("Core Principle D – Risk Management").

[19] Section 5b(c)(2)(R) of the CEA, 7 U.S.C. 7a-1(c)(2)(R) ("Core Principle R – Legal Risk").

[20] 17 CFR 39.9-39.27.

[21] 17 CFR 39.30–39.42. Subpart C flows from Title VIII of the Dodd-Frank Act, which Congress enacted to mitigate systemic risk in the financial system and to promote financial stability. Section 802(b) of the Dodd-Frank Act.

The term "systemically important" means "a situation where the failure of or a disruption to the functioning of a financial market utility . . . could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States." Section 803(9) of the Dodd-Frank Act; *see also* 12 CFR 1320.2 (Definitions - Systemically important and systemic importance). A "financial market utility" (FMU) includes "any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person." Section 803(6)(A) of the Dodd-Frank Act; *see also* 12 CFR 1320.2 (Definitions – Financial market utility).

Section 804 of the Dodd-Frank Act requires the FSOC to designate those FMUs that FSOC determines are, or are likely to become, systemically important. Three CFTC-registered DCOs, Chicago Mercantile Exchange, Inc. (CME), ICE Clear Credit LLC (ICC), and Options Clearing Corporation (OCC), were designated as systemically important by the FSOC in 2012. Press Release, Financial Stability Oversight Council Makes First Designations in Effort to Protect Against Future Financial Crises (Jul. 18, 2012), *available at https://www.treasury.gov/press-center/press-releases/Pages/tg1645.aspx.* The bases for the designations are available at *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/designations.* The Commission is the Supervisory Agency for CME and ICC; the U.S. Securities and Exchange Commission is the Supervisory Agency for OCC. *See* 12 CFR 1320.2 (Definition of Supervisory Agency).

[22] 17 CFR 39.2.

[23] In the Commission's experience, DCOs based in the United States that have banks as clearing members have elected to be subject to Subpart C in order to achieve status as a qualified central counterparty (QCCP), while U.S.-based DCOs that do not have banks as clearing members have not made that election.

Section 805 of the Dodd-Frank Act directs the Commission to consider relevant international standards and existing prudential requirements when prescribing risk management standards for SIDCOs.[24] In 2013 the Commission determined that, for purposes of meeting the Commission's statutory obligation pursuant to Section 805(a)(2)(A) of the Dodd-Frank Act, the international standards most relevant to the risk management of SIDCOs are the PFMI.[25]

In July 2012, the Basel Committee on Banking Supervision, the international body that sets standards for the regulation of banks, published the "Capital Requirements for Bank Exposures to Central Counterparties" (Basel CCP Capital Requirements), which describes standards for capital charges arising from bank exposures to central counterparties (CCPs) related to over-the-counter derivatives, exchange-traded derivatives, and securities financing transactions. (DCOs are referred to as CCPs in international standards and guidance.) The Basel CCP Capital Requirements create financial incentives for banks, including their subsidiaries and affiliates, to clear financial derivatives with CCPs that are prudentially supervised in a jurisdiction where the relevant regulator has adopted rules or regulations that are consistent with the standards set forth in the Principles for Financial Market Infrastructures (PFMI), published in April 2012 by the Bank for International Settlements' (BIS) Committee on Payment and Settlement Systems (renamed the Committee on Payments and Market Infrastructures (CPMI)) and the Technical Committee of the International Organization of Securities Commissions (IOSCO) (collectively referred to as CPMI-IOSCO). The PFMI is available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377.pdf.

A QCCP is defined as an entity that (i) is licensed to operate as a CCP and is permitted by the appropriate regulator to operate as such, and (ii) is prudentially supervised in a jurisdiction where the relevant regulator has established and publicly indicated that it applies to the CCP, on an ongoing basis, domestic rules and regulations that are consistent with the PFMI. *See* Basel Committee on Banking Supervision, Credit Risk Framework § 50.3, available at https://www.bis.org/basel_framework/chapter/CRE/50.htm?inforce=20191215&published=20191215. The failure of a CCP to achieve QCCP status could result in significant costs to its bank clearing members (or banks that are customers of its clearing members).

The U.S. banking regulators, including the Board of Governors of the Federal Reserve (Federal Reserve), FDIC, and the Office of the Comptroller of the Currency, have adopted capital standards that are consistent with the Basel Committee's standards. For example, under the FDIC's regulations, the capital requirement for a clearing member's prefunded default fund contribution to a qualifying CCP can be as low as 0.16% of that default fund contribution. 12 CFR 324.133(d)(4). By contrast, the capital requirement for a clearing member's prefunded default fund contribution to a non-qualifying CCP is 100% of that default fund contribution. 12 CFR 324.10(a)(1)(iii), (b)(3) (requiring capital of 8% of risk-weighted asset amount), 12 CFR 324.133(d)(2) (setting risk-weighted asset amount for default fund contributions to non-qualifying CCP at 1,250% of the contribution (1,250% * 8% = 100%)). *See also* 12 CFR 324.133(c)(3) (applying a risk weight of 2% to transactions with a QCCP).

The Federal Reserve and Office of the Comptroller of the Currency have similar regulations.

[24] Section 805(a)(2) of the Dodd-Frank Act, 12 U.S.C. 5464(a)(2)(A).

[25] 78 FR 49663 at 49666. The PFMI consist of twenty-four principles addressing the risk management and efficiency of a financial market infrastructure's (FMI's) operations. Subpart C reflects the following PFMI principles: Principle 2 (Governance); Principle 3 (Framework for the comprehensive management of risks); Principle 4 (Credit risk); Principle 6 (Margin); Principle 7 (Liquidity risk); Principle 9 (Money settlements); Principle 14 (Segregation and portability); Principle 15 (General business risk); Principle 16 (Custody and

C. Recovery and Orderly Wind-down for SIDCOs and Subpart C DCOs – § 39.39

The Commission established regulations for the recovery and wind-down of a SIDCO and Subpart C DCO in 2013 with the promulgation of § 39.39.[26] Regulation 39.39[27] was codified to protect the members of a SIDCO or Subpart C DCO, as well as their customers, and the financial system more broadly, from the consequences of a disorderly failure of a DCO consistent with Principles 3 and 15 of the PFMI.[28] Regulation 39.39 also promotes the concepts in Core Principles B (Financial Resources), D (Risk Management), G (Default Rules and Procedures), I (System Safeguards), L (Public Information), O (Governance Fitness Standards), and R (Legal Risk) of Section 5b(c)(2) of the CEA.[29]

Regulation 39.39(a) defines the terms "general business risk," "wind-down," "recovery," "operational risk," and "unencumbered liquid financial assets."[30]

Regulation 39.39(b) requires SIDCOs and Subpart C DCOs to maintain viable plans for "(1) recovery or orderly wind-down, necessitated by uncovered credit losses or liquidity

investment risks); Principle 17 (Operational risk); Principle 21 (Efficiency and effectiveness); Principle 22 (Communication procedures and standards); and Principle 23 (Disclosure of rules, key procedures, and market data).

[26] *Derivatives Clearing Organizations and International Standards*, 78 FR 72476, 72494 (Dec. 2, 2013).

[27] 17 CFR 39.39. References in the remainder of this section are to the existing regulations.

[28] *See* 78 FR 72476 at 72494-95. Principle 3 of the PFMI requires an FMI to have a sound risk management framework "for comprehensively managing legal, credit, liquidity, operational, and other risks." PFMI Principle 3, at 32. Principle 15 of the PFMI requires an FMI to "identify, monitor, and manage its general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses so that it can continue operations and services as a going concern if those losses materialize. Further, liquid net assets should at all times be sufficient to ensure a recovery or orderly wind-down of critical operations and services." PFMI Principle 15, at 88.

[29] *See generally* 78 FR 72476.

[30] 17 CFR 39.39(a)(1)-(5).

shortfalls; and separately, (2) recovery or orderly wind-down necessitated by general business risk, operational risk, or any other risk that threatens the [DCO's] viability as a going concern."[31]

Regulation 39.39(c)(1) requires SIDCOs and Subpart C DCOs to identify scenarios that may potentially prevent it from being able to meet its obligations, provide its critical operations and services as a going concern and assess the effectiveness of a full range of options for recovery and orderly wind-down.[32] Regulation 39.39(c)(1) further requires the plans to include procedures for informing the Commission when the recovery plan is initiated or wind-down is pending.[33]

Regulation 39.39(c)(2) requires SIDCOs and Subpart C DCOs to have procedures for providing the Commission and the FDIC with information needed for resolution planning.[34]

Regulation 39.39(d) requires that the recovery and wind-down plans of SIDCOs and Subpart C DCOs be supported by resources sufficient to implement those recovery or wind-down plans. This paragraph is not being amended.[35]

Regulation 39.39(e) requires SIDCOs and Subpart C DCOs to maintain viable plans, approved by the SIDCO's or Subpart C DCO's board of directors and updated regularly, for

[31] 17 CFR 39.39(b)(1) and (2).

[32] 17 CFR 39.39(c)(1). The identification of scenarios and analysis by the DCO allows the DCO to more effectively and efficiently meet its obligations promptly, and may provide a DCO with a better understanding of its clearing members' obligations, the extent to which the DCO would have to perform its obligations to its clearing members in times of stress, and the ability to better plan for doing so. The scenarios and analysis in the wind-down plan are necessary in the event that recovery is not possible and resolution is not available.

[33] *Id.*

[34] 17 CFR 39.39(c)(2).

[35] 17 CFR 39.39(d).

raising additional financial resources in a scenario in which it is unable to comply with any financial resource requirements set forth in part 39.[36] This paragraph is not being amended.

Regulation 39.39(f) allows the Commission, upon request, to grant a SIDCO and Subpart C DCO up to one year to comply with any provision of § 39.39 or of § 39.35 (default rules and procedures for uncovered credit losses or liquidity shortfalls).[37]

For DCOs that neither have been designated systemically important nor elected to become Subpart C DCOs, no regulation currently requires that they maintain viable recovery plans or orderly wind-down plans. This NPRM is proposing that all DCOs be required to maintain viable orderly wind-down plans.

D. 2014 International Standards and Guidance on Recovery and Resolution of Financial Market Infrastructures

In 2014, CPMI-IOSCO published guidance for financial market infrastructures (FMIs) on the recovery planning process and the content of the recovery plans.[38] The 2014 CPMI-IOSCO Recovery Guidance interpreted the principles and key considerations under the PFMI relevant to recovery and orderly wind-down plans and planning, in particular PFMI Principles 3 and 15. The guidance also provided a menu of recovery tools separated into five categories: tools to allocate uncovered losses caused by participant default; tools to address uncovered liquidity

[36] 17 CFR 39.39(e).

[37] 17 CFR 39.39(f).

[38] CPMI-IOSCO, Recovery of financial market infrastructures (Oct. 15, 2014) (hereinafter 2014 CPMI-IOSCO Recovery Guidance). FMIs as a category include DCOs, CCPs, central securities depositories, payment systems, and trade repositories. SIDCOs are thus systemically important FMIs.

shortfalls; tools to replenish financial resources; tools for a CCP to re-establish a matched book; and tools to allocate losses not related to participant default.[39]

The Financial Stability Board (FSB) had, in 2011, published a set of Key Attributes of Effective Resolution Regimes for Financial Institutions,[40] and enhanced those standards with, as relevant here, an Annex on Resolution of Financial Market Infrastructures in 2014.[41] The Key Attributes FMI Annex calls for ongoing recovery and resolution planning for systemically important FMIs (a category that includes SIDCOs).[42] The Key Attributes FMI Annex also calls for such FMIs "to maintain information systems and controls that can promptly produce and make available, both in normal times and during resolution, relevant data and information needed by the authorities for the purposes of timely resolution planning and resolution."[43]

E. CFTC Letter No. 16-61

In July 2016, the staff of the Division of Clearing and Risk (DCR) issued an advisory letter, described therein as "guidance," regarding the content of a SIDCO's and Subpart C DCO's recovery and orderly wind-down plans, consistent with Subpart C, in particular § 39.39,

[39] *Id.* at 12-16.

[40] FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions (Oct. 2011).

[41] FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, Appendix II-Annex I: Resolution of Financial Market Infrastructures (FMIs) and FMI Participants (Oct. 15, 2014) (hereinafter Key Attributes FMI Annex). The Key Attributes FMI Annex is "to be read alongside [the] PFMI which require systemically important FMIs to have a comprehensive and effective recovery plan." *Id.* at 57.

[42] *Id.* ¶ 11.1, at 68 (stating "FMIs that are systemically important should be subject to a requirement for ongoing recovery and resolution planning").

[43] *Id.* ¶ 12.1, at 70 (listing 7 areas of information that should be made available to authorities, including: FMI rules, default fund, and loss allocation rules; stakeholders; data and information for effective and timely risk control during resolution; the status of obligations of participants; links and interoperability arrangements with other FMIs; participant collateral; and netting arrangements).

and the accompanying rule submissions designed to effectuate those plans.[44] CFTC Letter No. 16-61 highlighted subjects that staff believed these DCOs should analyze in developing a recovery plan and wind-down plan, including: the range of scenarios that may prevent the DCO from being able to meet its obligations and to provide its critical operations and services; recovery tools; wind-down scenarios and options; interconnections and interdependencies; agreements to be maintained during recovery and wind-down; financial resources; governance; notifications; assumptions; updates; and testing.[45] The advisory letter also recommended questions that a DCO should consider and the analysis of those questions that a DCO should undertake and provide to the Commission in instances where a DCO concludes that a rule should be changed.[46]

F. Additional International Guidance on Standards

In July 2017, CPMI-IOSCO issued further guidance on the PFMI related to the development of recovery plans for CCPs.[47] The (2017) CPMI-IOSCO Recovery Guidance

[44] CFTC Letter No. 16-61, Recovery Plans and Wind-down Plans Maintained by Derivatives Clearing Organizations and Tools for the Recovery and Orderly Wind-down of Derivatives Clearing Organizations, (July 16, 2016) (hereinafter CFTC Letter No. 16-61), available at: https://www.cftc.gov/csl/16-61/download. DCR staff was responding to requests from DCOs for guidance and clarification on the types of information and analysis that should be included in the requisite plans. The advisory letter explains staff's expectations following its preliminary reviews of submitted recovery plans, wind-down plans, and proposed rule changes, and issues addressed at a DCR-sponsored public roundtable. The transcript of the roundtable is available at https://www.cftc.gov/PressRoom/Events/opaevent_cftcstaff031915.

[45] CFTC Letter No. 16-61, at 4. The guidance was not intended to be an exhaustive checklist of information and analysis, and did not address resolution planning. *Id.* at 3 n.11.

[46] *Id.* at 15-19.

[47] *Supra* fn. 9. The guidance as revised in 2017 is referred to herein as the CPMI-IOSCO Recovery Guidance. CPMI-IOSCO also issued guidance on the resilience of CCPs. CPMI-IOSCO, Resilience of central counterparties: further guidance on the PFMI (July 5, 2017) (providing guidance on governance, stress testing for both credit and liquidity exposures, coverage, margin, and a CCP's contribution of its financial resources to losses).

updated the 2014 CPMI-IOSCO Recovery Guidance to provide clarification on the implementation of recovery plans, replenishment of financial resources, non-default related losses, and transparency with respect to recovery tools and their application. Similarly, the FSB issued further guidance on CCP resolution and resolution planning.[48] The 2017 FSB Resolution Guidance sets out recommended powers for resolution authorities to maintain the continuity of critical CCP functions, details on the use of loss allocation tools, and provides steps that resolution authorities should take to implement crisis management groups and develop resolution plans. In August 2022, CPMI-IOSCO published a discussion paper on CCP practices to address non-default losses in which the paper noted positively, among other things, the practice of testing and reviewing a CCP's recovery plan at least annually.[49]

G. Requirement to Submit Recovery and Wind-down Plans to the Commission – § *39.19(c)(4)(xxiv)*

In 2020, the Commission amended its reporting requirements under § 39.19 to require a DCO that is required to maintain recovery and wind-down plans pursuant to § 39.39(b) to submit its plans to the Commission no later than the date on which it is required to have the plans.[50] The rule also permits a DCO that is not required to maintain recovery and wind-down plans, but which nonetheless maintains such plans, to submit the plans to the Commission.[51] Additionally,

[48] FSB, Guidance on Central Counterparty Resolution and Resolution Planning (July 5, 2017) (hereinafter 2017 FSB Resolution Guidance).

[49] CPMI-IOSCO, A discussion paper on central counterparty practices to address non-default loses (Aug. 4, 2022) (NDL Discussion Paper).

[50] *Derivatives Clearing Organizations General Provisions and Core Principles*, 85 FR 4800, 4822 (Jan. 27, 2020); 17 CFR 39.19(c)(4)(xxiv).

[51] *Id*.

if a DCO revises its plans, the DCO must submit the revised plans to the Commission along with a description of the changes and the reason for the changes.[52]

II. Amendments to Regulation 39.39 – Recovery and Orderly Wind-down for SIDCOs and Subpart C DCOs; Information for Resolution Planning

In 2013, the Commission promulgated broad rules for a SIDCO's and Subpart C DCO's recovery and wind-down plans, including a rule that each SIDCO and Subpart C DCO must have procedures for providing the Commission and the FDIC with information needed for purposes of resolution planning.[53] At that time, practice with respect to recovery and wind-down planning was in a nascent state of development, and the relevant global standard-setting bodies, CPMI-IOSCO and the FSB, had not completed work establishing guidance for implementing international standards addressing recovery and resolution for FMIs.[54]

The Commission is proposing to further align the rules under § 39.39 with the international standards and guidance promulgated since 2013,[55] and to codify certain of the related guidance in CFTC Letter No. 16-61. The proposed amendments to § 39.39 include

[52] *Id.*

[53] 78 FR 72476, 72494 (codifying § 39.39(c)(2)).

[54] *See, e.g.*, CPMI-IOSCO, Consultative report, Recovery of financial market infrastructures, at ⁋ 1.2.1 (Aug. 2013) (distinguishing recovery planning from resolution planning and noting that "[a]spects of the consultation report concerning FMI resolution have been included in a new draft annex and will be included in an assessment methodology for the [FSB's] Key Attributes"). CPMI-IOSCO, Consultative report, Recovery and resolution of financial market infrastructures, at ⁋ 1.4 (July 2012) (outlining the features for effective recovery and resolution regimes for FMIs in accordance with the FSB's "Key Attributes for Effective Resolution Regimes for Financial Institutions").

[55] The Commission actively participated in the development of those standards and guidance in its role as a member of the relevant working groups (the CPMI-IOSCO Policy Standing Group and Steering Group and the Financial Stability Board Financial Market Infrastructure Cross-Border Crisis Management Group and Resolution Steering Group), and of the Board of IOSCO, one of the parent committees of CPMI-IOSCO.

specifying the required elements of a SIDCO's or Subpart C DCO's recovery and orderly wind-down plans, amending the requirement to have procedures to provide information needed for purposes of resolution planning, and specifying the types of information that should be provided to the Commission for resolution planning. Additionally, the Commission proposes to change the title of the regulation, amend and add definitions, and to delete certain provisions.

These proposed revisions and amendments to § 39.39 are consistent with the Commission's obligation under § 805(a) of the Dodd-Frank Act to consider, in prescribing risk management standards pursuant to its authority under that provision with respect to SIDCOs, international standards in implementing regulations relating to risk management.[56] Moreover, the Commission views the relevant international standards under the PFMI, as well as the related guidance, including the CPMI-IOSCO Recovery Guidance, as helpful in informing its approach with respect to other DCOs in the context of recovery and orderly wind-down. These proposed revisions and amendments are reasonably necessary to effectuate Core Principle D[57] (Risk Management) and to accomplish the purposes of the CEA, in particular, "to ensure the financial integrity of all transactions subject to [the CEA] and the avoidance of systemic risk."[58] The proposed changes also respond to comments received from SIDCOs and Subpart C DCOs over time.

As set forth in section III, the Commission is additionally proposing to require that all other DCOs maintain and submit to the Commission an orderly wind-down plan that

[56] *See* Section 805(a) of the Dodd-Frank Act, 12 U.S.C. 5464(a).

[57] Section 5b(c)(2)(D)(i) of the CEA, 7 U.S.C. 7a-1(c)(2)(D)(i).

[58] Section 3(b) of the CEA, 7 U.S.C. 5(b).

incorporates substantially similar information and procedures. With respect to DCOs broadly, these proposed revisions and amendments should lead to more effective DCO compliance and risk management, provide greater clarity and transparency for registered DCOs and DCO applicants, and increase overall confidence and efficiency in the swaps and futures markets.[59] Among the risks associated with discharging the risk management responsibilities of a DCO[60] is the risk that, due to either default losses or non-default losses, the DCO will be unable to meet its obligations or provide its critical functions and will need to wind down. In such an event, an effective orderly wind-down plan should facilitate timely decision-making and the continuation of critical operations and services so that the orderly wind-down may occur in an orderly and expeditious manner.

A DCO needs to prepare for circumstances—especially those that are sudden, unexpected, and on too large a scale for the DCO to timely recover—for which a DCO may not have the resources to continue as a going concern. A viable orderly wind-down plan promotes the goal of ensuring, at a minimum, that the DCO has sufficient resources, capabilities and legal authority to implement the tools and procedures for orderly wind-down activities. To the extent that the Commission's bankruptcy regulations look to a DCO's orderly wind-down plan,[61] an effective orderly wind-down plan will allow for the efficient management of events.

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[59] *See* 76 FR at 69334-35 (a legally enforceable regulatory framework "provides assurance to market participants and the public that DCOs are meeting minimum risk standards" which "can serve to increase market confidence," "free up resources that market participants might otherwise hold," and "reduce search costs that market participants would otherwise incur").

[60] *See* Core Principle D(i), Section 5b(c)(2)(D)(i) of the CEA, 7 U.S.C. 7a-1(c)(2)(D)(i).

[61] *See, e.g.*, 17 CFR 190.15(c) ("In administering a proceeding under this subpart, the trustee shall, in consultation with the Commission, take actions in accordance with any recovery and wind-down plans maintained by the debtor and filed with the Commission pursuant to § 39.39 of this chapter, to the extent reasonable and practicable, and consistent with the protection of customers.")

To advance the DCO Core Principles' aims of, among other things, strengthening the risk management practices of DCOs, enhancing legal certainty for DCOs, clearing members and market participants, and safeguarding the public, the Commission is proposing to require that all DCOs maintain and submit orderly wind-down plans with the subjects and analyses included herein. Additionally, the Commission is proposing revised subjects and analyses for the recovery plans that SIDCOs and Subpart C DCOs must maintain.

A. Definitions – § 39.39(a), § 39.2

Currently, the definitions relevant to recovery and orderly wind-down planning are contained in § 39.39(a). The Commission is proposing to move two of those definitions, "wind-down" and "recovery," to § 39.2, as orderly wind-down will apply to all DCOs, and recovery is thematically linked to orderly wind-down. Because these definitions would apply to all DCOs, the Commission is proposing technical corrections to eliminate the references to SIDCOs and Subpart C DCOs in both.

The Commission is changing the term "wind-down" to "orderly wind-down"[62] and is defining it as a DCO's actions to "effect the permanent cessation, sale, or transfer, of one or more of its critical operations or services, in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system."[63] The Commission

[62] The definition also provides for the use of the term "wind-down" as a shorter form of "orderly wind-down."

[63] This definition of "orderly wind-down" would align more closely with the corresponding definition in the Federal Reserve's Regulation HH (Designated Financial Market Utilities), 12 CFR 234.2(g), but would additionally address "operational problems spreading among financial institutions or markets," consistent with the U.S. Securities and Exchange Commission's recent rule proposal. Covered Clearing Agency Resilience and Recovery and Wind-Down Plans, 88 FR 34708, 34717 (May 30, 2023).

intends the amended definition to focus the attention of DCOs on issues of financial stability in planning for and executing an orderly wind-down.[64] Given the financial crisis that preceded and informed Dodd-Frank's passage, and the purpose of the CEA to ensure the avoidance of systemic risk, the Commission believes an important goal of an orderly wind-down should be to avoid an increased risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets.

The Commission is also proposing to amend the definition of "recovery" by replacing the reference to "capital inadequacy" with "inadequacy of financial resources" in order to tie the definition of "recovery" more closely to the framework of Part 39,[65] and to move that definition, as revised, to § 39.2, in alphabetical order. Neither the recovery plan nor the orderly wind-down plan may assume government intervention or support.

The Commission is proposing to delete the definitions of "general business risk" and "operational risk," and instead to import those definitions, as modified, as part of the definition of the term "non-default losses." The Commission is also proposing to add a definition of the term "default losses." Recovery plans and orderly wind-down plans are required to address both default losses and non-default losses.

The Commission is proposing to define default losses to include both uncovered credit losses or liquidity shortfalls created by the default of a clearing member in respect of its

[64] DCOs must already consider issues of financial stability in their governance arrangements. 17 CFR 39.24(a)(1)(iv) (requiring that a DCO's governance arrangements "[e]xplicitly support the stability of the broader financial system and other relevant public interest considerations").

[65] *See, e.g.*, Regulation 39.11 (enumerating the requirements for financial resources a DCO must maintain to discharge its responsibilities); § 39.39(d) (enumerating the requirements for financial resources a SIDCO and Subpart C DCO must maintain to support its recovery plan and wind-down plan).

obligations with respect to cleared transactions. In this context, uncovered credit losses arise from the DCO's holding an insufficient value of resources to meet its obligations. For example, the DCO is obligated to pay, today, variation margin of $10 billion in U.S. dollar cash, but only has $8 billion of resources available. Similarly, in this context, a liquidity shortfalls arise from the DCO holding resources that are not in the correct form to meet its obligations. For example, the DCO is obligated to pay, today, variation margin of $10 billion in U.S. dollar cash, but only has $8 billion of U.S. dollar cash available, even though it may additionally have more than $2 billion (worth, at present market value) of securities that it is unable to convert promptly into U.S. dollar cash.[66] The definition also focuses on the clearing member's obligations with respect to cleared transactions. Thus, if the clearing member defaults on its obligations for facilities rental, or in its obligations in its role as a service provider to the DCO, those would not be "default losses" for this purpose.

The Commission is proposing to define non-default losses to mean losses from any cause, other than default losses, that may threaten the DCO's viability as a going concern. This portion of the definition is derived from former § 39.39(b)(2), which required SIDCOs and Subpart C DCOs to "maintain viable plans for" "(1) Recovery or orderly wind-down necessitated by" the risks that are currently proposed to be included in "default losses" (*i.e.*, uncovered credit losses or liquidity shortfalls" as well as "(2) Recovery or orderly wind-down necessitated by general business risk, operational risk, or *any other risk that threatens the [DCO's] viability as a going concern*" (emphasis added).

[66] Another example of a liquidity shortfall is a currency mismatch. For example, assume that the U.S. dollar to Euro exchange rate is $1.10/€1.00. The DCO has a variation margin obligation, today, of €1 billion, and only has resources available for the purpose of making payment of $1.1 billion. That would also be a liquidity shortfall.

The former definition specifically included, as potential sources of loss, "general business risk" and "operational risk." The definitions in § 39.39 will now apply to all DCOs, and thus are being moved to § 39.2. In order to ensure that DCOs consider, as part of their planning process, the full set of potential non-default losses, the definition of non-default losses is proposed to explicitly include, though not be limited to, losses arising from risks often referred to as (1) general business risk, (2) custody risk, (3) investment risk, (4) legal risk, and (5) operational risk.[67] To avoid unnecessary questions of taxonomy, however, these terms are not proposed to be separately defined, rather, the substance of these definitions are being included as instances of non-default losses.

Under the first group, losses arising from general business risk, the Commission proposes to import the previous definition of "general business risk" in § 39.39(a)(1), deleting references to SIDCOs or subpart C DCOs as surplusage. This results in "(i) any potential impairment of a derivatives clearing organization's financial position, as a business concern, as a consequence of a decline in its revenues or an increase in its expenses, such that expenses exceed revenues and result in a loss that the derivatives clearing organization must charge against capital."

Under the second group, losses arising from custody risk, the Commission proposes to adopt the discussion of custody risk in the CPMI-IOSCO Recovery Guidance.[68] This results in "(ii) losses incurred by the derivatives clearing organization on assets held in custody in the

[67] *See* NDL Discussion Paper § 2.1 ("Generally, CCPs consider a range of NDL scenarios that may arise from risks relevant to their business activities, including general business risk, operational risk, investment risk, custody risk and legal risk."). *See also* Guidance on Financial Resources to Support CCP Resolution and on the Treatment of CCP Equity in Resolution (FSB 2020) at §1.2 ("Hypothetical non-default loss scenarios").

[68] *See* CPMI-IOSCO Recovery Guidance ¶ 3.2.5 ("[A]n FMI can be exposed to custody risk and could suffer losses on assets held in custody in the event of a custodian's (or subcustodian's) insolvency, negligence, fraud, poor administration or inadequate record-keeping.")

event of a custodian's (or sub-custodian's) insolvency, negligence, fraud, poor administration or inadequate record-keeping."

Under the third group, losses arising from investment risk, the Commission proposes to adapt the discussion of investment risk in the CPMI-IOSCO Recovery Guidance.[69] This adaptation results in "(iii) losses incurred by the derivatives clearing organization from diminution of the value of investments of its own or its participants' resources, including cash or other collateral."

Under the fourth group, losses arising from legal risk, the international guidance is less helpful. The CPMI-IOSCO Recovery Guidance does not define "legal risk;" the FSB guidance simply notes that "legal, regulatory or contractual penalties could lead to significant losses or uncertainty for the CCP and can take a long time to materialise fully." Losses from legal risk can arise from causes other than "penalties": For example, in the realm of contract or tort, a DCO may be responsible for compensating a plaintiff for the DCO's breach of contract, or for the plaintiff's damages caused by, *e.g.*, the DCO's negligence. In the realm of regulatory litigation, there may be remedies other than penalties, including, *e.g.*, restitution or disgorgement. Accordingly, the Commission is proposing to broadly include "(iv) 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."

Finally, under the fifth group, losses arising from operational risk, the Commission is proposing to draw from the prior definition of operational risk, adding a few additional important

[69] *See id.* ("Investment risk is the financial risk faced by an FMI when it invests its own or its participants' resources, such as cash or other collateral.")

categories. Specifically, the Commission is proposing to add references to (1) the actions of malicious actors and (2) the possibility of disruption from internal events. Cyber risk is increasing, and organizations' operations are exposed to risk from malicious (threat) actors, who might include employees and third-party providers, criminals, terrorists, and nation-states. Thus, the Commission proposes to recognize explicitly the peril from what has been described as "malicious action by third parties intent on creating systemic harm or disruption, with concomitant financial losses."[70] Including a reference to "malicious actions (whether by internal or external threat actors)" should help protect market participants and the public by potentially improving the DCO's ability to identify vulnerabilities from malicious actors, safeguard its systems from such actors, and address possible losses that might occur if, despite the DCO's system safeguards, malicious actors detect and act upon any cyber vulnerabilities.

The Commission is also proposing to add a reference to the possibility of disruption from internal events (the current definition of operational risk refers only to "disruptions from external events"). Examples of these internal events include fire as well as flooding (due to, *e.g.*, malfunctions of sprinkler systems). This expansion to the definition should also help protect market participants and the public, by potentially improving the DCO's ability to identify vulnerabilities to its systems and operations from internal events, mitigate those vulnerabilities, and address possible losses that might occur if, despite the DCO's efforts, such vulnerabilities disrupt its systems or operations.

[70] CPMI, Cyber resilience in financial market infrastructures, at 7 (Nov. 2014); *see also* CPMI-IOSCO, Guidance on cyber resilience for financial market infrastructures (June 2016). *See generally* Executive Order No. 14028, Improving the Nation's Cybersecurity, 86 FR 26633 (May 12, 2021), available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/12/executive-order-on-improving-the-nations-cybersecurity/.

Accordingly, the Commission is proposing to refer specifically to non-default losses "(v) 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."

B. Recovery Plan and Orderly Wind-down Plan – § 39.39(b)

Regulation 39.39(b) currently requires each SIDCO and Subpart C DCO to maintain viable plans for (1) recovery or orderly wind-down, necessitated by uncovered credit losses or liquidity shortfalls; and, separately, (2) recovery or orderly wind-down necessitated by general business risk, operational risk, or any other risk that threatens the DCO's viability as a going concern.[71] Regulation 39.19(c)(4)(xxiv) currently requires a SIDCO or Subpart C DCO that is required to maintain recovery and wind-down plans pursuant to § 39.39(b) to submit those plans to the Commission no later than the date on which the DCO is required to have the plans.[72] The Commission is proposing amendments to these provisions as set forth below.

The Commission is maintaining existing regulations 39.39(d) and (e).[73] Accordingly, the recovery and orderly wind-down plans of SIDCOs and Subpart C DCOs must continue to

[71] 17 CFR 39.39(b)(1) and (2).

[72] 17 CFR Regulation 39.19(c)(4)(xxiv).

[73] Regulation 39.39(d)(2) provides, in part: "Each [SIDCO] and [Subpart C DCO] shall maintain sufficient unencumbered liquid financial assets, funded by the equity of its owners, to implement its recovery or wind-down plans . . . . [T]he [SIDCO] or [Subpart C DCO] shall analyze its particular circumstances and risks and maintain any additional resources that may be necessary to implement the plans. . . . The plan shall include evidence and analysis to support the conclusion that the amount considered necessary is, in fact, sufficient to implement the plans." Regulation 39.39(e) provides, in part: "All [SIDCOs] and [Subpart C DCOs] shall maintain viable plans for raising

include evidence and analysis to support the conclusion that they have sufficient financial resources—as set forth in regulation 39.39(d)(2)—to implement their recovery and wind-down plans. Should this proposed rulemaking be adopted, that analysis would be informed by the analyses SIDCOs and Subpart C DCOs would be required to engage in under proposed regulation 39.39(c). Consistent with regulation 39.39(e), moreover, SIDCOs and Subpart C DCOs must continue to maintain viable plans for raising additional financial resources where they are unable to comply with any financial resources requirements provided in Part 39.

1. Submission of plans for recovery and orderly wind-down – § 39.39(b)(1)

The Commission is proposing to amend § 39.39(b)(1) and (2) by combining the paragraphs into one paragraph, § 39.39(b)(1), and cross-referencing the reporting requirement in § 39.19(c)(4)(xxiv). Proposed § 39.39(b)(1) would require each SIDCO and Subpart C DCO to maintain and, consistent with § 39.19(c)(4)(xxiv), submit to the Commission, viable plans for recovery and orderly wind-down, and supporting information, due to, in each case, default losses and non-default losses.[74] The Commission is not proposing to require that the recovery plan and orderly wind-down plan be submitted as separate documents. However, the analysis for the recovery portion and wind-down portion must be set forth clearly.

The Commission requests comment on these proposed revisions.

2. Notice of Initiation of the Recovery Plan and of Pending Orderly Wind-down – § 39.39(b)(2), § 39.13(k)(1), and § 39.19(c)(4)(xxv)

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additional financial resources, including, where appropriate, capital, in a scenario in which the [SIDCO] or [Subpart C DCO] is unable, or virtually unable, to comply with any financial resources requirements set forth in this part."

[74] In Section IV below, discussing the reporting requirement in § 39.19(c)(4)(xxiv), the Commission explains the reason for adding the term "and supporting information."

Current § 39.39(c)(1) includes, in part, the requirement that recovery plans and wind-down plans "include procedures for informing the Commission, as soon as practicable, when the recovery plan is initiated or wind-down is pending."[75] The Commission proposes to move this requirement to § 39.39(b)(2) and to amend the requirement to state explicitly that in addition to having procedures in place for informing the Commission that the recovery plan is initiated or that orderly wind-down is pending, the SIDCO or Subpart C DCO must notify the Commission, as soon as practicable, when the recovery plan is initiated or orderly wind-down is pending. This is not a substantive change since the requirement to have procedures in place to provide notice necessarily implies that such notice to the Commission will occur; however, the Commission believes that explicitly stating this requirement will ensure that the SIDCO or Subpart C DCO understands this requirement.

Additionally, the Commission proposes to require that these DCOs' notice that the recovery plan is initiated or orderly wind-down is pending also be provided to clearing members.[76] Timely notification of events to clearing members is essential to enable them to prepare for a transition by the DCO into recovery or orderly wind-down. The Commission proposes that each SIDCO and Subpart C DCO that files a recovery plan and orderly wind-down plan under this section must notify clearing members (in addition to the Commission) that recovery is initiated or that orderly wind-down is pending as soon as practicable. As discussed below in Section III, the Commission proposes that DCOs that are neither SIDCOs nor Subpart

[75] 17 CFR 39.39(c)(1).

[76] CFTC Letter No. 16-61, at 14 (referencing § 39.21, "Public information," which requires a DCO to "make information concerning the rules and the operating and default procedures governing the clearing and settlement systems of the DCO available to market participants").

C DCOs notify the Commission and clearing members as soon as practicable when recovery[77] is initiated or orderly wind-down is pending.

The Commission proposes to add new § 39.19(c)(4)(xxv) to require that each DCO notify the Commission and clearing members as soon as practicable when the DCO has initiated its recovery plan or orderly wind-down is pending.

The Commission requests comment on these proposed changes.

3. Establishment of Time to File Recovery Plan and Orderly Wind-down Plan – Proposed § 39.39(b)(3)

The Commission is proposing to establish the timing of the filing of recovery plans and orderly wind-down plans. In 2013, the Commission acknowledged commenters' concerns that additional time may be required to comply with § 39.39 because relevant global standards were still in the consultative phase. The Commission promulgated § 39.39(f) to allow a SIDCO or Subpart C DCO to apply for up to one year to comply with § 39.39. Regulation 39.39(f) therefore created various dates for SIDCOs and Subpart C DCOs to file the plans required by § 39.39(b).

Commenters again requested a specific date to submit recovery plans and wind-down plans in response to the May 2019 notice of proposed rulemaking codifying § 39.19(c)(4)(xxiv).[78] In the January 2020 final rule, the Commission noted the date by which a

[77] While, under the proposal, a DCO that is neither a SIDCO nor a subpart C DCO is not required to have a recovery plan, if such a DCO does initiate recovery, it will be required to notify the Commission and clearing members.

[78] *See, e.g.*, Comment letter filed by the Futures Industry Association and the International Swaps and Derivatives Association (ISDA), at 21 (Sept. 13, 2019), available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2985&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=2.

SIDCO or new Subpart C DCO is required to maintain a recovery plan and wind-down plan depends upon when the DCO is designated as systemically important or elects Subpart C status, whether it requests relief under § 39.39(f), and whether the Commission grants such relief.[79] The Commission determined that § 39.39(f) prevented the establishment of a date certain for submitting plans to the Commission.[80] This proposal will, if adopted and finalized by the Commission, codify the elements of a recovery plan and wind-down plan required under paragraph (b) of § 39.39, and remove the uncertainty concerning the filing deadline. The need to request an extension of time for up to one year to comply with the requirements of § 39.39 (and § 39.35) will be obviated by the fixed deadline for newly designated SIDCOs to develop and maintain a recovery plan and a wind-down plan.[81] The Commission is proposing to require a DCO to submit a recovery plan and orderly wind-down plan and supporting information (to the extent it has not already done so) as required by proposed § 39.39(b) within six months of the date the DCO is designated as a SIDCO, or as part of its election to become subject to the provisions of Subpart C set forth in § 39.31, and annually thereafter.[82]

The Commission has preliminarily determined to require that a newly designated SIDCO should file a complete recovery plan and (to the extent it has not already done so) orderly wind-

[79] 85 FR at 4822.

[80] *Id.*

[81] Regulation 39.35 covers the default rules and procedures for uncovered credit losses or liquidity shortfalls (recovery) for SIDCOs and Subpart C DCOs.

[82] As discussed in section III below, it is being proposed that all DCOs will be required to maintain orderly wind-down plans on and after the effective date of this rule with respect to that requirement. As discussed further below, it is proposed that the effective date of that orderly wind-down plan requirement will be six months after this rule may be finalized. To address the possibility that a DCO may be designated a SIDCO or may elect Subpart C status during that intervening period, such a DCO will be required to maintain and file an orderly wind-down plan to the extent it has not already done so.

down plan consistent with part 39 within six months of the date of designation for the following reasons. First, in order to be designated as a SIDCO, the DCO must be a DCO registered with the CFTC. All DCOs must comply with, and demonstrate compliance as requested by the Commission, applicable provisions of the CEA and the Commission's regulations, including Subparts A and B of part 39, in order be registered. Second, the Commission expects that most of the larger DCOs for which future designation may be forthcoming have elected to be subject to Subpart C, and therefore, have recovery plans in place. Among those DCOs that are not currently subject to Subpart C, most are foreign-based DCOs that are subject to standards in their home jurisdictions that are consistent with the PFMI, and thus such foreign-based DCOs are required to have both recovery and orderly wind-down plans.[83] Third, upon notification that the FSOC is considering whether to designate a DCO systemically important, the DCO will be aware of the enhanced regulatory requirements for SIDCOs included in subpart C of part 39 of the Commission's regulations.[84] Finally, staff issued CFTC Letter No. 16-61 and its non-binding guidance in 2016. DCOs registered with the Commission and the clearing industry in general are likely familiar with the staff letter and have probably been following developments related to this proposal; hence, the Commission has preliminarily determined not to require a longer delay.

The Commission is clarifying that a DCO that elects to be subject to Subpart C of the Commission's regulations must file a recovery plan and (in the event it has not already done so) an orderly wind-down plan, and supporting information, as part of its election to be subject to the

[83] *See* text accompanying fn. 207, *infra*.

[84] 12 CFR 1320.11(a), 1320.12(a); *Authority to Designate Financial Market Utilities as Systemically Important*, 76 FR 44763 (Jul. 27, 2011).

provisions of Subpart C.[85] The Commission continues to expect that a DCO will not elect status as a Subpart C DCO before it is in full compliance with the regulations in Subpart C.

The Commission is proposing § 39.39(b)(3) to require a SIDCO to file a recovery plan, and supporting information, within six months of its designation as systemically important by the FSOC. The Commission is also proposing to require that a DCO that elects to be subject to the provisions of Subpart C must file a recovery plan and (to the extent it has not already done so) an orderly wind-down plan, and supporting information for these plans, as part of the DCO's election to be subject to the provisions of Subpart C. The Commission is proposing that such plans be updated thereafter on an annual basis.

The Commission requests comment on this aspect of the proposal.

C. Recovery Plan and Orderly Wind-down Plan: Required Elements – § 39.39(c)

Regulation 39.39(c)(1) currently requires that a SIDCO and Subpart C DCO develop a recovery plan and orderly wind-down plan that includes scenarios that may potentially prevent it from being able to meet its obligations, provide its critical operations and services as a going concern, and assess the effectiveness of a full range of options for recovery or orderly wind-down. At the time the Commission was promulgating current § 39.39(c)(1), commenters had requested specificity regarding the required elements of a recovery plan.[86] The Commission declined to provide that specificity because the international guidance relevant to such plans was

[85] The Commission is proposing to amend Exhibit F-1 to the Subpart C election form to require the submission of the recovery and orderly wind-down plans, and supporting information, as well as a demonstration of how those plans comply with the requirements of Subpart C.

[86] *See, e.g.*, Comment letter of ISDA at 2-3 (Sept. 16, 2013), filed in response to the Notice of Proposed Rulemaking, *Derivatives Clearing Organizations and International Standards*, 78 FR 50260 (Aug. 16, 2013), available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1391.

not final when § 39.39 was adopted in 2013. After the international guidance was finalized, staff issued CFTC Letter No. 16-61, which provides informal guidance from DCR concerning those elements. Supervisory experience shows that the recovery plans and orderly wind-down plans of SIDCOs and Subpart C DCOs are generally consistent with the staff guidance in Letter No. 16-61; thus, most, if not all, of the requirements described below are already incorporated into the plans submitted by the DCOs currently subject to § 39.39. The Commission has preliminarily determined to codify the staff guidance into the Commission's part 39 regulations. The Commission has preliminarily determined to specify the required elements that a SIDCO or Subpart C DCO must include in its recovery plan and orderly wind-down plan at this time.

The Commission proposes to replace § 39.39(c) in its entirety. Proposed § 39.39(c) would reflect, to the extent the Commission considers appropriate, the guidance on international standards related to recovery plans and orderly wind-down plans adopted by the global standard-setting bodies since 2013,[87] and certain of the DCR staff guidance set forth in CFTC Letter No. 16-61.[88]

As a general matter, the Commission believes that a DCO's recovery plan and orderly wind-down plan required by § 39.39(b) should include summaries that provide an overview of the plans, and descriptions of how the plans will be implemented, in order to enhance both the understanding of the persons who need to use the plans and the Commission's ability to evaluate the plans as part of its supervisory program. Proposed § 39.39(c) would also require that the description of each plan include the identification and description of the DCO's critical

[87] *E.g.*, CPMI-IOSCO Recovery Guidance.

[88] *See* 17 CFR 39.39(c)(1).

operations and services, interconnections and interdependencies, resilient staffing arrangements, obstacles to success, stress scenario analyses, potential triggers for recovery and orderly wind-down, available recovery and orderly wind-down tools, analysis of the effect of any tools identified, lists of agreements to be maintained during recovery and orderly wind-down, descriptions of governance arrangements, and testing. These proposed plan requirements are necessary for the plan to be viable, *i.e.*, capable of working successfully, are consistent with the international guidance discussed above, and should be considered the minimum that a SIDCO or Subpart C DCO must include in its recovery plan and orderly wind-down plan. The Commission proposes to add these requirements as new proposed § 39.39(c). For clarity and completeness, specific requirements will be set forth in paragraphs (c)(1) through (c)(8), as discussed below.

The Commission requests comment on this approach, and on each of the proposed specific requirements.

1. Critical Operations and Services, Interconnections and Interdependencies, and Resilient Staffing – § 39.39(c)(1)

The Commission is proposing to add new § 39.39(c)(1) requiring recovery plans and orderly wind-down plans to identify and describe the SIDCO's and Subpart C DCO's critical operations and services, including internal and external service providers; ancillary services providers; financial and operational interconnections and interdependencies; aggregate cost estimates for the continuation of services; plans for resilient staffing arrangements for continuity of operations into recovery or orderly wind-down; plans to address the risks that the failure of each critical operation and service poses to the DCO, and a description of how such failures would be addressed; and a description of how the SIDCO and Subpart C DCO will ensure that the services continue through recovery and orderly wind-down.

In developing a viable plan, both the CPMI-IOSCO Recovery Guidance and CFTC Letter No. 16-61 stress the importance of identifying the critical operations and services that the DCO provides, and the financial and operational interconnections and interdependencies among the DCO and its relevant affiliates, internal and external service providers, and other relevant stakeholders.[89] The Commission agrees that each recovery plan and orderly wind-down plan should identify and describe the critical operations and services that the DCO provides to clearing members and other financial market participants. As CPMI-IOSCO stated in its guidance, "[t]he purpose of identifying critical services is to focus the recovery plan on the FMI's ability to continue to provide these services on an ongoing basis, even when it comes under extreme stress."[90] The Commission agrees that for purposes of recovery planning in § 39.39, when determining whether a service is "critical," the DCO must consider "the importance of the service to the [DCO]'s participants and other FMIs, and to the smooth functioning of the markets the [DCO] serves and, in particular, the maintenance of financial stability."[91]

The Commission anticipates that the DCO's ability to provide critical services may also be affected by issues relating to certain services that are ancillary to the critical service, and thus issues relating to these ancillary services should be included in the recovery and orderly wind-down plan. The Commission agrees with the analysis in the CPMI-IOSCO Recovery Guidance that, "even if a specific service is judged not to be critical, a systemically important FMI needs to take account of the possibility that losses or liquidity shortfalls relating to the provision of that

[89] CPMI-IOSCO Recovery Guidance, at § 2.4; CFTC Letter No. 16-61, at 10-11.

[90] CPMI-IOSCO Recovery Guidance, at § 2.4.2.

[91] *Id.*

noncritical service could threaten its viability and thus necessitate implementation of its recovery plan so that it can continue to provide those services that are judged to be critical. An FMI needs to have a recovery plan that covers all the scenarios that could threaten its viability."[92]

The Commission believes that a DCO's recovery plan and orderly wind-down plan should identify and analyze a DCO's financial and operational interconnections and interdependencies. Such an analysis is important to foster, and to provide transparency into, the ability of the DCO to implement each of its recovery plan and orderly wind-down plan. For instance, the recovery plan should account for the possibility that an affiliated entity in the financial sector may fail, resulting in a cascade of failures and resultant defaults on all obligations to the DCO, including with respect to services that the DCO depends upon to complete its operations. A DCO's recovery plan and orderly wind-down plan should also identify the DCO's critical internal and external service providers, the risks that the failure of each provider poses to the DCO, how such failures would be addressed, and how the DCO would ensure that the services would continue into recovery and orderly wind-down.[93] Similarly, the DCO should consider the impact of any disruption in services or operations it provides to clearing members and financial market participants. In this regard, CFTC Letter No. 16-61 recommended that a DCO's recovery plan include the identification and analysis of "the financial and operational interconnections and interdependencies among the DCO and its relevant affiliates, internal and external service providers and other relevant stakeholders."[94]

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[92] *Id.* at § 2.4.4. n.13.

[93] *Id.*

[94] CFTC Letter No. 16-61, at 10.

In considering and analyzing the magnitude of the costs that it needs to plan for associated with recovery or orderly wind-down, the DCO should consider the likely increase in certain of its expenses compared to its business-as-usual operating budget, including, for example, legal fees, accounting fees, financial advisor fees, the costs associated with employee retention programs, and other incentives in order to maintain critical staff. Other costs, such as marketing or those associated with the development of new products, may decrease. For purposes of orderly wind-down planning in particular, the DCO shall proceed under the conservative assumption that any resources consumed during recovery will not be available to fund critical operations and services in wind-down.

The DCO's analysis of its critical operations and services should also describe the impact of the multiple roles and relationships that a single financial entity may have with respect to the DCO including affiliated entities and external entities.[95] For instance, a single external entity (including a set of affiliated entities) may act as a clearing member, a settlement bank, custodian or depository bank, liquidity provider or counterparty. If such a single external entity defaults in one of its roles *e.g.*, as a clearing member, it will likely default in all of them.[96] An entity affiliated with the DCO may be relied upon for a variety of services, such as those related to information technology, human resources, or facilities. In order to support the viability of its

[95] *Id.*

[96] A financial conglomerate/bank holding company structure may operate through a set of legal entities (*e.g.*, a broker-dealer/futures commission merchant separate from a bank separate from an information technology service provider), each of which has different relationships with the DCO. Based on past experience with insolvencies of financial firms (*e.g.*, Refco, Lehman, MF Global), once one of these affiliates fails, the others are likely to follow it into bankruptcy or receivership proceedings quickly.

recovery or orderly wind-down plan, the DCO should address the contingency that its affiliate may not be able to perform those services.

Consistent with the CPMI-IOSCO Recovery Guidance, the Commission believes that a DCO's recovery plan should consider how its design and implementation may affect another FMI, and coordinate the relevant aspects of their plans.[97] Given the interconnected nature of the financial services ecosystem, supporting financial stability requires the recovery plan and orderly wind-down plan of each DCO to identify and address contingencies and consequences.

Recovery and orderly wind-down planning must also identify potential risks that may arise in recovery and orderly wind-down if financial weakness or failure in one of the DCO's business lines or affiliated legal entities spreads to others. The recovery and orderly wind-down plans must describe how the DCO has planned for resilient staffing arrangements for continuity of operations since it is not feasible to maintain a critical service without the concomitant personnel. As part of planning for recovery, each SIDCO and Subpart C DCO should also explain how the DCO will retain, and address the potential loss of, the services of personnel filling mission-critical roles during extreme stress. The DCO may additionally be vulnerable to key person risk; accordingly, plans for resilient staffing arrangements should identify, to the extent applicable, key person risk within the DCO or (as relevant) affiliated legal entities that the DCO relies upon to provide its critical operations and services, and how the DCO has planned for this risk.

The Commission requests comment on this aspect of the proposal.

2. Recovery Scenarios and Analysis – § 39.39(c)(2)

[97] CPMI-IOSCO Recovery Guidance, at § 2.4.14.

The Commission is proposing to add new § 39.39(c)(2) to specify scenarios that must be addressed in the SIDCO's or Subpart C DCO's recovery plan, to the extent, in each case, that such scenario is possible. The Commission believes that the current requirement that a SIDCO or Subpart C DCO "shall identify scenarios that may potentially prevent it from being able to meet its obligations" is too broad and allows for planning gaps.

To support a systematic planning process that will foster these DCOs' ability to recover effectively from situations of unprecedented stress, the Commission is proposing to adopt portions of CFTC Letter No. 16-61 describing the analysis that should take place for each scenario considered in the recovery plan; namely: (1) a description of the scenario; (2) the events that are likely to trigger the scenario; (3) the DCO's process for monitoring events triggering the scenario; (4) the market conditions, operational and financial difficulties and other relevant circumstances that are likely to result from the scenario; (5) the potential financial and operational impact of the scenario on the DCO 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 (6) the specific steps the DCO would anticipate taking when the scenario occurs or appears likely to occur including, without limitation, any governance or other procedures in order to implement the relevant recovery tools and to ensure that such implementation occurs in sufficient time for the recovery tools to achieve their intended effect.[98] The Commission believes that this six-part analysis is integral to viability of a SIDCO's and Subpart C DCO's recovery plan and orderly wind-down plan. The Commission expects that each of these DCOs will undertake such analysis for each scenario described in its recovery plan and its orderly

[98] CFTC Letter No. 16-61, at 6-7.

wind-down plan. The Commission is proposing in § 39.39(c)(2) that each recovery plan and orderly wind-down plan contain the described analysis.

In order to promote the comprehensiveness of these DCOs' recovery plans, the Commission is also proposing to require that each recovery plan describe certain "commonly applicable scenarios," most of which are described in CFTC Letter No. 16-61, to the extent such scenarios are possible in light of the DCO's activities.[99] Those scenarios include: (1) settlement bank failure; (2) custodian bank failure; (3) scenarios resulting from investment risk; (4) poor business results; (5) the financial effects from cybersecurity events; (6) fraud (internal, external, and/or actions of criminals or of public enemies); (7) legal liabilities, including liabilities related to the DCO's obligations with respect to cleared transactions and those not specific to its business as a DCO (*e.g.*, tort liability); (8) losses resulting from interconnections and interdependencies among the DCO and its parent, affiliates, and/or internal or external service providers (*e.g.*, the financial effects of the inability of a service provider to provide key systems

[99] *Id.* at 5-6. These scenarios are described as "commonly applicable" because, in the Commission's judgment, all DCOs will plausibly be vulnerable to most of these scenarios occurring, that is, most scenarios will be possible and, if such a scenario occurs, it may damage the DCO's financial position sufficiently to require recovery or orderly wind-down.

The reference to scenarios that are "possible" should not be confused with a reference to scenarios that are "likely." Thus, if a DCO deposits all relevant funds as cash with a federally regulated and insured depository institution, and in no circumstances invests them, then a scenario of losses resulting from *investment* risk would not be possible. On the other hand, while regulation of depository institutions and FDIC insurance makes a loss due to failure of such a depository bank extraordinarily unlikely, it is not impossible, and thus is a scenario that should be addressed in the recovery and orderly wind-down plans. *See, e.g.*, NDL Discussion Paper § 2.1 ("[L]ow risk is not zero risk, and consequently, CCPs should have a plan to address [non-default losses (NDL)] from these scenarios should they materialize. Some CCPs, however, do not include certain types of NDL scenario[s] in their planning because these CCPs seem to assume that regulated financial institutions or central securities depositories pose zero custody [or depository] risk, or that legal risk cannot cause an NDL (because Principle 1 of the PFMI requires a legal basis with 'a high degree of certainty'). These approaches appear to be inconsistent with the standards set forth in the PFMI.")

or services);[100] and (9) any other risks relevant to the DCO's activities. In addition to these scenarios, the Commission is proposing to require SIDCOs and Subpart C DCOs to include in their recovery plan the following additional scenarios: (1) credit losses or liquidity shortfalls created by single and multiple clearing member defaults in excess of prefunded resources required by law; (2) liquidity shortfall created by a combination of clearing member default and a failure of a liquidity provider to perform; (3) depository bank failure; and (4) losses resulting from interconnections and interdependencies with other CCPs (whether or not those CCPs are registered with the Commission as DCOs). For any of those scenarios enumerated above that the DCO determines are not possible in light of its activities, the DCO should provide its reasoning for not considering it. Finally, the Commission is proposing that a DCO must include 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.[101] The Commission believes that a DCO should describe how it is prepared for these additional exigencies in order to demonstrate to the market and its clearing members that it is prepared to meet the demands of possible market stresses.

The Commission requests comment on this aspect of the proposal.

3. Recovery and Orderly Wind-down triggers – § 39.39(c)(3)

[100] For loss scenarios resulting from interconnections and interdependencies among the DCO and its parent or affiliates, the DCO should consider, to the extent applicable, how its organizational structure may impact the specific steps it would anticipate taking.

[101] The term "in the judgment of the DCO, are particularly relevant" is being used rather than "are most relevant" to avoid the implication that it would be necessary to conduct an analysis ranking with precision the relevance of different combinations. Rather, staff of the DCO should exercise their professional judgement in selecting at least two particularly relevant combination scenarios. It is highly unlikely that no such combinations (or only one) would be possible.

Thorough planning also requires that a SIDCO or Subpart C DCO be prepared to determine when recovery or orderly wind-down is necessary, that is, when the recovery plan or orderly wind-down plan should be "triggered." Some triggers might be automatic (*e.g.*, because the DCO *is* insolvent) while others may not be obvious, and many will necessarily involve the exercise of judgment and discretion (*e.g.*, the DCO is suffering ongoing business losses that appear likely to lead to insolvency, or an adverse legal judgment that involves large financial liability appears likely).

The CPMI-IOSCO Recovery Guidance and CFTC Letter No. 16-61 each advise that a SIDCO's and Subpart C DCO's recovery plan and wind-down plan should define the criteria, both quantitative and qualitative, that they would use to determine, or to guide its discretion in determining, when to implement the recovery plan and the wind-down plan, *i.e.*, the trigger(s).[102] The Commission believes that defining those criteria (including conducting the analysis necessary to do so) would materially aid these DCOs both in developing effective plans, and in preparing to address events that lead to such triggers. While the CPMI-IOSCO Recovery Guidance references only recovery plans, the Commission believes that a similar analysis should apply to planning for consideration of orderly wind-down. The Commission also believes that the identification of possible triggers would project confidence to the public that these DCOs will continue to function in extreme circumstances (such as recovery), and convey that these DCOs have a plan to consider wind-down in an orderly manner if recovery is ineffective.

[102] *See* CPMI-IOSCO Recovery Guidance, at §§ 2.4.6-2.4.8; CFTC Letter No. 16-61, at 7.

The CPMI-IOSCO Recovery Guidance states that there may be some triggers that "should lead to a pre-determined information-sharing and escalation process within the FMI's senior management and its board of directors and to careful consideration of what action should be taken."[103] The Commission agrees that planning for such an information-sharing and escalation process as part of the DCO's governance is an important part of ensuring that the DCO is prepared to deal with contingencies. Accordingly, the Commission is proposing new § 39.39(c)(3)(i) to require that a SIDCO's or Subpart C DCO's recovery plan discuss the criteria that may trigger both implementation and consideration of implementation of the recovery plan, and the process that these DCOs have in place for monitoring for events that are likely to trigger the recovery plan. With respect to the orderly wind-down plan, the DCO must discuss the criteria that may trigger *consideration of* implementation of the plan, realizing the importance of discretion in determining whether to *implement* orderly wind-down (in contrast to recovery, a terminal process), and the process that the DCO has in place for monitoring for events that may trigger consideration of implementation of the orderly wind-down plan.

For similar reasons, the Commission is proposing § 39.39(c)(3)(ii) to require the recovery plan and orderly wind-down plan each to include a description of the information-sharing and escalation process within the SIDCO's and Subpart C DCO's senior management and the board of directors. These DCOs must have a defined process that will include the factors the DCO considers most important in guiding the board of directors' exercise of judgment and discretion with respect to recovery and orderly wind-down plans in light of the relevant triggers and that process.

[103] CPMI-IOSCO Recovery Guidance, at § 2.4.8.

The Commission requests comment on this aspect of the proposal.

4. Recovery Tools – § 39.39(c)(4)

By the end of 2013, CPMI-IOSCO had not completed their consultative work establishing guidance for use in implementing the PFMI. Their final guidance was published in October 2014 and amended in July 2017. The CPMI-IOSCO Recovery Guidance does not advise authorities to prescribe specific recovery tools; rather the guidance "provides an overview of some of the tools that an FMI may include in its recovery plan, including a discussion of scenarios that may trigger the use of recovery tools and characteristics of appropriate recovery tools in the context of such scenarios."[104] CFTC Letter No. 16-61 adopts a similar approach in that it does not prescribe the tools that a DCO should use during recovery. Rather, the letter sets forth a detailed analysis that staff expects a DCO should undertake in its recovery plan to meet its obligations or provide its critical operations and services as a going concern.[105]

The Commission declines to prescribe specific tools that SIDCOs and Subpart C DCOs must include in their recovery plans. Each DCO is different, and a variety of tools may be available to a particular DCO in each specific scenario. Rather, these DCOs should have discretion to decide on which tools to include, so long as the set of tools chosen meets standards designed to protect indirect participants (*e.g.*, clients, end users), direct participants (*i.e.*, clearing members), the DCO itself, and other relevant stakeholders (including, in the case of SIDCOs, the financial system more broadly): (1) the set of tools should comprehensively address how the DCO would continue to provide critical operations and services in all relevant scenarios; (2) each

[104] *Id.* at 1; *see also id. at* § 4.1 (summarizing specific recovery tools).

[105] CFTC Letter No. 16-61, at 7-8.

tool should be reliable, timely, and have a strong legal basis; (3) the tools should be transparent and designed to allow those who would bear losses and liquidity shortfalls to measure, manage and control their exposure to losses and liquidity shortfalls; (4) the tools should create appropriate incentives for the DCO's owners, direct and indirect participants, and other relevant stakeholders; and (5) the tools should be designed to minimize the negative impact on direct and indirect participants and the financial system more broadly.[106]

The Commission expects that each SIDCO and Subpart C DCO will consider in its planning process tools that meet the full scope of financial deficits that the DCO may need to remediate: (1) tools to allocate uncovered losses by a clearing member default: *e.g.*, the DCO's own capital (sometimes referred to as "skin-in-the-game"), cash calls (sometimes referred to as assessments), and gains-based haircutting (sometimes referred to as variation margin gains haircutting); (2) tools to address uncovered liquidity shortfalls: *e.g.*, liquidity from third-party institutions and non-defaulting[107] clearing members; (3) tools to replenish financial resources: *e.g.*, cash calls and recapitalization;[108] (4) tools to establish a matched book: *e.g.*, auctions and tear-ups; and (5) tools to allocate losses not covered by a clearing member default: *e.g.*, capital, recapitalization, and insurance.

To provide these DCOs with some flexibility, the Commission is proposing to require that each DCO's recovery plan include a complete description and analysis of the tools it

[106] *See* CPMI-IOSCO Recovery Guidance, at § 3.3.1.

[107] In the context of default losses, the defaulting participants cannot be relied upon to provide any resources. In the context of non-default losses, all participants are, at least in the first instance, non-defaulting participants.

[108] *Cf. id.* at § 2.4.9. While the CPMI-IOSCO Recovery Guidance refers to capital, § 39.11(b) recognizes that financial resources include, but are not limited to, capital.

proposes to use to cover shortfalls from the stress scenarios identified by the DCO that are not covered by pre-funded financial resources, or where the DCO does not have sufficient liquid resources or liquidity arrangements to meet its obligations in the correct form and in a timely manner. Additionally, the Commission expects each DCO will be prepared to implement tools to deal with other losses or liquidity shortfalls, including those from non-default risks that may materialize more slowly, and tools to increase the DCO's financial resources where necessary in order to implement its plans. Finally, to support the planning process, the description of recovery tools in the recovery plan should include, at a minimum, any discretion the DCO has in the use of the tool, whether the tool is mandatory or voluntary, and the governance processes and arrangements for determining which tools to use, and to what extent.

Accordingly, the Commission is proposing § 39.39(c)(4) to require a SIDCO or Subpart C DCO to have a recovery plan that includes the following: (i) a description of the tools that the DCO would expect to use in each scenario required by proposed paragraph (b) of this section that comprehensively addresses how the DCO would continue to provide critical operations and services; (ii) the order in which each such tool would be expected to be used; (iii) the time frame within which each such tool would be expected to be used; (iv) a description of the governance and approval processes and arrangements within the DCO for the use of each tool available, including the exercise of any available discretion; (v) the processes to obtain any approvals external to the DCO (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained;[109] (vi) the

[109] Thus, while (iv) focuses on internal governance and approval processes such as among DCO officers and committees, (v) focuses on external approval processes, if any, such as approvals by a regulator with the legal authority or practical power to require approval of the use of a tool.

steps necessary to implement each such tool; (vii) a description of the roles and responsibilities of all parties, including non-defaulting clearing members, in the use of each such tool; (viii) whether the tool is mandatory or voluntary; (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 DCO, linked financial market infrastructures, and the financial system more broadly. For those scenarios involving non-default losses, all clearing members are non-defaulting.

The Commission requests comment on this aspect of the proposal. With respect to the types of recovery tools in particular, the Commission welcomes comment whether DCOs use, or would anticipate using, any tools not identified above in order to meet the full scope of financial deficits a DCO in recovery may need to remediate.

5. Orderly Wind-down Scenarios and Tools – § 39.39(c)(5)

As discussed further below, planning for orderly wind-down overlaps significantly, though not totally, with planning for recovery. There may be circumstances where the SIDCO or Subpart C DCO attempts to recover but fails, upon which it should have a plan, as well as sufficient capital, to transition to and execute an orderly wind-down. SIDCOs and Subpart C DCOs must therefore plan for both recovery and orderly wind-down.

Proposed § 39.39(c)(5) would require a SIDCO's or a Subpart C DCO's orderly wind-down plan to identify scenarios that could prevent it from being able to meet its obligations, and to identify tools which may be used in the orderly wind-down of the DCO. CFTC Letter No. 16-61 states that a DCO's analysis of its wind-down options "should contain many of the elements

of a DCO's analysis of its recovery tools."[110] The letter calls for the wind-down plan to identify and analyze in detail, with respect to each scenario, nine required elements as well as "the manner in which liquidity requirements would be managed during service closure" and how essential support services would be maintained during the wind-down period.[111] The letter also calls for the wind-down plan to address obstacles to each option, and the viability of the options in light of the obstacles.

The Commission recognizes that, to plan effectively for orderly wind-down, considering the scenarios and recovery tools described in the DCO's recovery plan must precede the DCO's analysis of the events that would trigger consideration of implementation of the orderly wind-down plan, and the use of the DCO's orderly wind-down options.[112] A DCO's orderly wind-down plan should therefore include a description of the point or points in the recovery plan, for each scenario, where recovery efforts would likely be deemed to have failed and consideration of implementing the orderly wind-down plan would be triggered. The orderly wind-down plan should then describe at what point the DCO will no longer be able to meet its obligations or provide its critical services as a going concern. Once these scenarios are identified, the plan should describe the tools available to the DCO to effectuate an orderly wind-down. The DCO should, therefore, explain in its wind-down plan how it would plan to accomplish an orderly wind-down, taking into account the time it anticipates it would take to implement the plan. The orderly wind-down plan should include a complete analysis of the wind-down tools the DCO

[110] CFTC Letter No. 16-61, at 9.

[111] *Id.* at 10.

[112] *See id.* at 9.

would anticipate using, both individually and together. In order to support a thorough planning process that is consistent with the international standards, the Commission has preliminarily determined that for each wind-down tool, the DCO should describe any discretion it has in the use or sequencing of the wind-down tool for each scenario, any obstacles to the use of a particular tool, the governance and approval processes for the tools available, and how the DCO is planning for the viability of the tools in light of any identified obstacles.

To support a systematic planning process that will foster the DCO's ability to wind-down in an orderly manner in situations of unprecedented stress, where recovery is infeasible, proposed § 39.39(c)(5) incorporates certain of the staff guidance included in CFTC Letter No. 16-61, as well as international standards and guidance issued since the 2013 rulemaking. Proposed § 39.39(c)(5) would require each SIDCO and Subpart C DCO to identify scenarios that may prevent it from meeting its obligations or providing its critical services as a going concern, describe the tools that it would expect to use in an orderly wind-down that comprehensively address how the DCO would continue to provide critical operations and services, describe the order in which each such tool would be expected to be used,[113] establish the time frame within which each such tool would be expected to be used, describe the governance and approval processes and arrangements within the DCO for the use of each of the tools available, including the exercise of any available discretion, describe the processes to obtain any approvals external to the DCO (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained, set forth the steps necessary to implement each such tool, describe the roles and responsibilities of all parties,

[113] It may be the case that certain tools may be used concurrently.

including non-defaulting clearing members, in the use of each such tool, provide an assessment of the likelihood that the tools, individually and taken together, would result in orderly wind-down, and provide an assessment of the associated risks to non-defaulting clearing members and those clearing members' customers with respect to transactions cleared on the DCO, linked financial market infrastructures, and the financial system more broadly.

The Commission requests comment on this aspect of the proposal. The Commission specifically requests comment on whether the scope of clearing member customers that are focused upon (*i.e.*, "those clearing members' customers with respect to transactions cleared on the" DCO) is appropriately broad, and appropriately framed.

6. Agreements to be Maintained During Recovery and Orderly Wind-down – § 39.39(c)(6)

A DCO has a variety of contractual arrangements that must be maintained during business as usual, in times of stress, and recovery and orderly wind-down, such as those with clearing members, affiliates, linked central counterparties, counterparties, external service providers, and other third parties.[114] These contractual arrangements include the DCO's rules and procedures, agreements to provide operational, administrative and staffing services, intercompany loan agreements, mutual offset agreements or cross-margining agreements, and credit agreements.[115] Also, a DCO's recovery plan and orderly wind-down plan should identify and analyze the implications of the various contractual arrangements that the DCO maintains and

[114] *Id.* at 11.

[115] *Id.*

describe the actions that the DCO has taken to ensure that its operations can continue during recovery and orderly wind-down despite the termination or alteration of relevant contracts.[116]

Contracts may contain covenants, material adverse change clauses, or other provisions that could subject such contracts to alteration or termination as a result of the implementation of the recovery plan or orderly wind-down plan, and thus render the continuation of the DCO's critical operations and services difficult or impracticable. Therefore, the Commission believes that each DCO's recovery plan and orderly wind-down plan should be supported by the DCO's review and analysis of the DCO's contracts associated with the provision of those critical operations or services to determine if those contracts contain such provisions. Where such contractual provisions are present and enforceable against the DCO, it will need to have alternative methods to continue those critical operations and services. The DCO's recovery plan and orderly wind-down plan should describe the actions that the DCO has taken to ensure that its operations can continue during recovery and orderly wind-down despite these contractual provisions. The orderly wind-down plan should also consider whether the contractual relationships the DCO relies upon to perform its critical operations and services would transfer to a new entity in the event of the creation of a new entity or the sale or transfer of the business to another entity in an orderly wind-down. Furthermore, the Commission believes that a requirement that a DCO have plans in place to ensure that its critical operations and services will continue into recovery and orderly wind-down is consistent with the PFMI and is crucial to

[116] *Id.* Note that CFTC Letter No. 16-61 calls for the same, *i.e.*, determine whether any contractual arrangements include covenants, material adverse change clauses or other provisions that would permit a counterparty to alter or terminate the agreement as a result of the implementation of the DCO's recovery plan or wind-down plan.

providing "a high degree of confidence" that the DCO will continue its operations and "serve as a source of financial stability even in extreme market conditions."[117]

The DCO's recovery plan and orderly wind-down plan must also identify and describe any licenses, and contracts in which the DCO is the licensee, upon which the DCO may rely to provide its critical operations and services. Such licenses should be included in the DCO's analysis of its contractual arrangements that must continue into recovery and wind-down.

The Commission is proposing § 39.39(c)(6) to provide that a SIDCO or Subpart C DCO must determine which of its contracts, arrangements, agreements, and licenses associated with the provision of its critical operations and services as a DCO are subject to alteration or termination as a result of implementation of the recovery plan or orderly wind-down plan. The recovery plan and orderly wind-down plan must describe the actions that the DCO has taken to ensure that its critical operations and services will continue during recovery and wind-down despite such alteration or termination.

The Commission requests comments on this aspect of the proposal.

7. Governance – § 39.39(c)(7)

While current § 39.39 does not explicitly address the need for a DCO to have an effective governance structure to implement its recovery or orderly wind-down plans, the Commission has preliminarily determined to require an effective governance structure in order to enable the DCO to implement such plans effectively. The CPMI-IOSCO Recovery Guidance supports the Commission's determination, and recommends that the DCO's board of directors or equivalent

[117] PFMI at 36 (section on credit and liquidity risk management).

governing body formally endorse the recovery plan.[118] In addition, the guidance calls for "an effective governance structure and sufficient resources to support the recovery planning process and implementation of its recovery plan, including any decision-making processes."[119] According to the CPMI-IOSCO Recovery Guidance, an "effective governance structure" includes "clearly defining the responsibilities of board members, senior executives and business units, and identifying a senior executive responsible for ensuring that the FMI observes recovery planning requirements and that recovery planning is integrated into the FMI's overall governance process."[120] The guidance also states that the FMI's board should consider the interests of all stakeholders who are likely to be affected by the recovery plan when developing and implementing it, and the FMI "should have clear processes for identifying and appropriately managing the diversity of stakeholder views and any conflicts of interest between stakeholders and the FMI."[121]

CFTC Letter No. 16-61 provided guidance to align the regulation promulgated in 2013 with the 2014 CPMI-IOSCO Recovery Guidance. CFTC Letter No. 16-61 advised that a DCO's recovery plan and wind-down plan should set forth all relevant governance arrangements and recommends that a DCO's recovery plan and wind-down plan: (1) identify the persons responsible for the development, review, approval, and ongoing monitoring and updating of the DCO's recovery plan and wind-down plan; (2) describe the involvement of the DCO's clearing

[118] CPMI-IOSCO Recovery Guidance, at § 2.3.3.

[119] *Id.*

[120] *Id.*

[121] *Id.* at § 2.3.4.

members in the development, review, and updating of the recovery plan and wind-down plan, and in assessing the effects of the recovery plan on clearing members; (3) describe how the costs and benefits of various recovery tools are taken into account during the decision-making process; (4) describe the recovery plan and wind-down plan approval and amendment process; (5) describe the specific roles and responsibilities of the DCO's Board of Directors, relevant committees, and other employees and clearing members in activating the recovery plan and wind-down plan and in implementing various aspects thereof including, without limitation, the use of recovery tools and wind-down options; and (6) the discretion of such persons and entities in activating the recovery plan and wind-down plan, the parameters for exercise of such discretion, where such discretion may be exercised, and the governance processes for the exercise of such discretion.[122]

The Commission believes that, in order to develop thorough plans, and to be prepared to implement those plans effectively, a SIDCO or Subpart C DCO must implement and maintain transparent governance arrangements related to recovery and wind-down that are consistent with the above standards and that recognize "one size does not fit all." DCOs are required to have governance rules and arrangements in place both for business-as-usual operations and in times of extreme stress in order to meet DCO Core Principle O.[123] DCO Core Principle O requires a DCO to establish governance arrangements that are transparent to fulfill public interest requirements and to permit the consideration of the views of owners and participants.[124]

[122] CFTC Letter No. 16-61, at 13.

[123] Section 5b(c)(2)(O)(i) of the CEA, 7 U.S.C. 7a-1(c)(2)(O).

[124] *Id.*

In furtherance of Core Principle O, and to support the effectiveness of these plans and ensure their formal review, the Commission is proposing new § 39.39(c)(7) to require each SIDCO's and Subpart C DCO's recovery plan and orderly wind-down plan to be annually reviewed and formally approved by the board of directors, and to describe an effective governance structure that clearly defines the responsibilities of the board of directors, board members, senior executives, and business units. Each plan must also describe the processes that the DCO will use to guide its discretionary decision-making relevant to each plan, including those processes for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the DCO.

The Commission requests comment on this aspect of the proposal.

8. Testing – § 39.39(c)(8)

In CFTC Letter No.16-61, staff recommended that SIDCOs and Subpart C DCOs include in their recovery and wind-down plans procedures for regularly testing the viability of such plans and that testing, where applicable, be conducted with the participation of clearing members.[125] Additionally, the recovery plan and wind-down plan should identify the types of testing that will be performed, the frequency with which the plans will be tested, to whom the findings will be reported, and the procedures for updating the recovery plan and wind-down plan in light of the testings' findings.[126] Likewise, the CPMI-IOSCO Recovery Guidance provides that FMIs should, for the purpose of "ensur[ing] that the recovery plan can be implemented effectively," test and review the recovery plan at least annually as well as following changes materially

[125] CFTC Letter No. 16-61, at 15.

[126] *Id.*

affecting the recovery plan.[127] As an example, it states that testing may be conducted through periodic simulation and scenario exercises.[128] The CPMI-IOSCO Recovery Guidance also states that an "FMI should update its recovery plan as needed following the completion of each test and review."[129]

In 2022, CPMI-IOSCO issued a discussion paper building on PFMI Principles 3 (Framework for the Comprehensive Management of Risks) and 15 (General Business Risk), the purpose of which was "to facilitate the sharing of existing practices to advance industry efforts and foster dialogue on [CCPs'] management of potential losses arising from non-default events . . . in particular in the context of recovery or orderly wind-down."[130] Summarizing the responses of CCPs, the discussion paper observes, "In general, responding CCPs perform annual reviews of their recovery plans" and "[a]lmost all responding CCPs conduct crisis management drills."[131] The responding CCPs also informed CPMI-IOSCO that they "use crisis management drills to improve their decision-making capabilities and their capacity to address potential [non-default losses] by improving their understanding of scenarios and tools, and testing assumptions about the effectiveness of specific tools."[132] The discussion paper quotes one CCP's response in

[127] CPMI-IOSCO Recovery Guidance, at ¶ 2.3.8.

[128] *Id.*

[129] *Id.*

[130] NDL Discussion Paper, at 2 (Executive Summary).

[131] *Id.* at § 4.

[132] *Id.*

particular explaining that crisis management exercises helped improve its operational readiness and identify the need for higher insurance coverage.[133]

In addition, the discussion paper highlights that CCPs engage in discussion-based exercises involving the internal governance structure and external partners and stakeholders, which "appears to facilitate a better understanding of roles and responsibilities before a crisis occurs" and "serve[s] to reduce the likelihood of purely ad hoc decision-making on the allocation of [non-default losses] in a crisis, while still giving decision-makers the flexibility to respond to the unique circumstances of any particular crisis."[134] The responding CCPs reported that testing typically involves a wide range of internal stakeholders and, in some cases, external stakeholders as well.[135] This greater involvement in testing "enhances the quality of such exercises by strengthening the tie between the exercise and reality of how stakeholders will react."[136]

According to the discussion paper, testing "may permit CCPs to enhance the tools and resources for identifying, measuring, monitoring and managing [non-default loss] risks" and has "the potential to increase participants' understanding of the types of scenario[s] that could generate [non-default losses], the range of magnitudes of such losses and their roles and responsibilities in addressing [nondefault losses],"[137] which could result in an "increase [in] the operational effectiveness" of the CCPs' plans.[138]

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[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

The Commission believes that the testing and reviewing practices described in the foregoing paragraphs will materially contribute to the effectiveness of recovery and orderly wind-down plans. Although the CPMI-IOSCO discussion paper focused on existing practices with respect to non-default losses, the reasoning will also apply to default losses. Periodic testing has the potential to demonstrate whether a SIDCO's or Subpart C DCO's tools and resources will sufficiently cover financial losses resulting both from participant defaults and non-default losses and whether these DCOs' rules, procedures, and governance facilitate a viable recovery or orderly wind-down. Further, testing the DCO's infrastructure is an effective means of revealing deficiencies or weaknesses which could hamper recovery or wind-down efforts, and providing an opportunity to remediate them in advance.

Thus, the Commission is proposing new § 39.39(c)(8) to require that the recovery plan and orderly wind-down plan of each SIDCO and Subpart C DCO include procedures for testing the viability of the plans, 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 must include the types of testing that will be performed, to whom the findings of such tests are reported, and the procedures for updating the recovery plan and orderly wind-down plan in light of the findings resulting from such tests. The testing must be conducted with the participation of clearing members, where the plan depends on their participation, and the DCO must consider including external stakeholders that the plan relies upon, such as service providers, to the extent practicable and appropriate.

Testing must occur following any material change to the recovery plan or orderly wind-down plan, but in any event not less than once annually. The plans shall be updated in light of the findings of such tests.

The Commission requests comment on this aspect of the proposal. The Commission specifically requests comment as to whether the rule should require that the SIDCO or Subpart C DCO include (rather than simply consider including) external stakeholders that the plan relies upon in the testing. The Commission also specifically requests comment on the proposed requirement that tests be conducted not less than annually: would a different minimum frequency be more appropriate?

D. Information for resolution planning – § 39.39(f)

As discussed above,[139] when the Commission adopted regulations for recovery and wind-down plans in 2013, CPMI-IOSCO and the FSB were in the initial phase of drafting guidance for resolution planning consistent with PFMI Principle 3, Key Consideration 4, which states that "an FMI should also provide relevant authorities with the information needed for purposes of resolution planning."[140] Consistent with that standard, current § 39.39(c)(2) requires a SIDCO or Subpart C DCO to have procedures for providing the Commission and the FDIC with information needed for purposes of resolution planning.[141]

The Commission proposes to update its regulations to align § 39.39(c)(2), as new § 39.39(f), with the additional standards and guidance applicable to resolution planning for systemically important FMIs adopted since 2013.[142] As stated in the 2017 FSB Resolution

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[139] *See* text accompanying fn. 54, *supra*.

[140] PFMI Principle 3, Key Consideration 4, at 32. The Commission notes that resolution is distinct from orderly wind-down in that the latter rests within the control of the DCO.

[141] 17 CFR 39.39(c)(2).

[142] *See, e.g.*, 2017 FSB Resolution Guidance, at § 6.4 (noting that "[a]uthorities should ensure that CCPs have in place adequate processes and information management systems to provide the authorities with the necessary data and information required for undertaking" an assessment of the financial resources and tools that the resolution authority can reasonably expect to be available under the resolution regime).

Guidance, "[a]uthorities should ensure that CCPs have in place adequate processes and information management systems to provide the authorities with the necessary data and information required for undertaking" an assessment of the financial resources and tools that the resolution authority can reasonably expect to be available under the resolution regime).[143] In the United States, upon the completion of the statutory appointment process set forth in Title II of the Dodd-Frank Act, the FDIC would be appointed the receiver of a failing SIDCO (or other covered financial company)[144] The supervision of a DCO rests with the Commission under the CEA, and, in particular, the supervision of a SIDCO rests with the Commission as the supervisory agency under Title VIII of the Dodd-Frank Act.[145] The statutory bifurcation of responsibilities between the FDIC and the Commission creates important challenges. Under Title II of the Dodd-Frank Act, it is the role of the FDIC to act as receiver for a failed covered financial company if the requirements of Title II have been met. The FDIC's ability to carry out its responsibilities as receiver would benefit from advance preparation to ensure that, in the unlikely event that resolution becomes necessary, there will be an effective and efficient transition of the SIDCO to the FDIC receivership, thereby fostering the success of a Title II resolution.[146]

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[143] 2017 FSB Resolution Guidance, at § 6.4.

[144] Section 202(a) of the Dodd-Frank Act; 12 U.S.C. 5382(a).

[145] Sections 803(8)(A)(ii) and 807(a) of the Dodd-Frank Act, 12 U.S.C. 5462(8)(A)(ii) and 5466(a); *see also* Section 2(12)(C) of the Dodd-Frank Act, 12 U.S.C. 5301(12)(C).

[146] This involves coordinated planning and information sharing to enable a smooth transition into resolution. As the supervisory agency for SIDCOs, the Commission provides information for resolution planning to the FDIC under the auspices of a Memorandum of Understanding (MOU). The current MOU is the "Memorandum of Understanding Between The Federal Deposit Insurance Corporation And The Commodity Futures Trading

Pursuant to section 8a(5) of the CEA,[147] the Commission has authority to "make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes" of the CEA. One of those purposes is "the avoidance of systemic risk."[148] As further described in the following paragraphs, it would appear that a reporting requirement that would enable the Commission to aid the FDIC in its preparations for the resolution under Title II of a DCO – where placing the DCO into resolution requires a finding by the Secretary of the Treasury, in consultation with the President, that, *inter alia*, "the failure of the [DCO] and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States"[149] – is reasonably necessary to foster the avoidance of systemic risk.

Moreover, under Title VIII of the Dodd-Frank Act, the Commission may, in consultation with the FSOC and the Board of Governors of the Federal Reserve, prescribe regulations containing risk management standards, taking into consideration relevant international standards and existing prudential requirements, for SIDCOs governing: (i) the operations related to payment, clearing, and settlement activities of SIDCOs; and (ii) the conduct of designated activities by SIDCOs.[150] Under Section 805(b) of the Dodd-Frank Act, the objectives and

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Commission Concerning The Sharing Of Information In Connection With Resolution Planning For Derivatives Clearing Organizations," dated June 26, 2015.

[147] 7 U.S.C. 12a(5)

[148] Section 3(b) of the CEA, 7 U.S.C. 5(b).

[149] Section 203(b)(2) of the Dodd-Frank Act, 12 U.S.C. 5383(b)(2).

[150] Section 805(a)(2)(A) of the Dodd-Frank Act, 12 U.S.C. 5464(a)(2)(A).

principles for such risk management standards shall be to: (1) promote robust risk management; (2) promote safety and soundness; (3) reduce systemic risks, and (4) support the stability of the broader financial system.[151] Additionally, Section 805(c) of the Dodd-Frank Act states that the standards prescribed may address areas such as: (1) risk management policies and procedures; (2) margin and collateral requirements; (3) participant or counterparty default policies and procedures; (4) the ability to complete timely clearing and settlement of financial transactions; (5) capital and financial resources requirements for the SIDCO; and (6) other areas that are necessary to achieve the objectives and principles in Section 805(b).[152]

Similar to the context of recovery and orderly wind-down planning, thorough preparation *ex ante* is crucial for successfully managing, on an inherently abbreviated timeline, matters relating to resolution, in aid of mitigating "serious adverse effects on financial stability in the United States." This thorough preparation for resolution is also crucial for establishing market confidence, and the confidence of foreign counterparts to the United States agencies. While the Commission remains persuaded that the likelihood of a SIDCO requiring resolution under Title II of the Dodd-Frank Act is "extraordinarily unlikely,"[153] thorough planning for such an exigency is essential.[154]

While less likely, it remains possible that similar information may also be required from Subpart C DCOs in times of extreme market stress, if it appears at the time that the failure of

[151] 12 U.S.C. 5464(b).

[152] 12 U.S.C. 5464(c).

[153] *See Bankruptcy Regulations*, 86 FR 19324, 19386 (Apr. 13, 2021).

[154] Key Attributes ¶11.1, FSB CCP Resolution Planning Guidance §7.

such a DCO might meet the requirements set forth in section 203(b) of the Dodd-Frank Act.[155] Thus, while the Commission anticipates that the intensity of resolution planning for Subpart C DCOs will be significantly less than that for SIDCOs, in order to promote the goal of assuring that Subpart C DCOs will, if necessary, remain capable of effectively being resolved under Title II, including during times of extreme stress, § 39.39(f) would apply equally to SIDCOs and Subpart C DCOs.[156]

The Commission's DCR staff has been working with FDIC staff on resolution planning for the two SIDCOs. This joint work has revealed that the Commission does not receive certain information from the SIDCOs that the FDIC may need to plan for resolution. The Commission therefore has determined to update its reporting requirements for SIDCOs and Subpart C DCOs to reflect additional information that may be used for resolution planning consistent with the international standards set forth in the PFMI and related guidance.[157]

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[155] 12 U.S.C. 5383(b). While the determination under Title II is made at the time when the entity (here a DCO) is under stress (*see* 12 U.S.C. 5383(b)(1) (determination that "the financial company *is* in default or in danger of default," emphasis added), the determination under Title VIII is made during business as usual, after a detailed process including notice to the proposed systemically important financial market utility, and the standards for the determination are different than those for the designation. *See generally* Section 804 of the Dodd-Frank Act, 12 U.S.C. 5463; 12 CFR Part 1320 (Designation of Financial Market Utilities). Thus, an entity not designated in advance under Title VIII may nonetheless in particular circumstances be determined to meet the standards for resolution under Title II, similarly, an entity designated in advance under Title VIII may not, even in the event of its failure, be determined to meet the standards under Title II.

Nonetheless, it would appear that the failure of a DCO that has been determined during business as usual to have met the criteria for designation pursuant to 12 U.S.C. 5463 is more likely to have such adverse effects on financial stability than the failure of a DCO that has not been determined to have met those criteria.

[156] The Commission does not at this time believe that it is likely that the failure of a U.S.-based DCO that is neither a SIDCO nor a Subpart C DCO would meet the requirements set forth in Section 203(b) of the Dodd-Frank Act, 12 U.S.C. 5383(b), given the generally smaller size of such DCOs and the fact that such DCOs do not have banks as clearing members (*see supra* fn. 23). For foreign-based DCOs, the relevant resolution authority would be the resolution authority in the home jurisdiction. Accordingly, the Commission is not proposing to extend this requirement to DCOs that are neither SIDCOs nor Subpart C DCOs.

[157] *See* Sections 805(a)(1)(A)-(B) of the Dodd-Frank Act, 12 U.S.C. 5464(a)(1)(A)-(B).

Most of the global standards and guidance relating to planning for resolution (including for CCPs) apply to resolution authorities, in cooperation with supervisory authorities (where the resolution authority is separate from the supervisory authority).[158] Because 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 may not be available publicly. Moreover, while the recovery and orderly wind-down plans described above should be comprehensive in themselves, there may be additional information that the Commission may require to plan for the resolution of a SIDCO or Subpart C DCO. The Commission therefore proposes to specify the types of information a SIDCO or Subpart C DCO may be required to provide for resolution planning in light of international standards and guidance established since 2013.

1. Planning for Resolution Under Title II of the Dodd-Frank Act – § 39.39(f)

Current § 39.39(c)(2) requires SIDCOs and Subpart C DCOs to have procedures in place to provide the Commission and the FDIC with information for purposes of resolution planning. This rule is consistent with the Key Attributes FMI Annex: "In order to facilitate the implementation of resolution measures, FMIs should be required to maintain information systems and controls that can promptly produce and make available, both in normal times and during resolution, relevant data and information needed by the authorities for purposes of timely resolution planning and resolution . . . ."[159] The Commission is proposing in new § 39.39(f) to clarify that the requirement that a DCO have procedures in place to provide information directly

[158] *E.g.*, FSB CCP Resolution Planning Guidance §7.

[159] Key Attributes FMI Annex, at § 12.1.

to the Commission and the FDIC for resolution planning purposes means that the DCO must provide such information to the Commission. The Commission would no longer be requiring DCOs to provide information related to resolution planning directly to the FDIC. The Commission provides such information related to resolution planning to the FDIC under the MOU.

The Commission is also proposing, consistent with the Key Attributes FMI Annex, to require that SIDCOs and Subpart C DCOs "maintain information systems and controls that can promptly produce and make available" data and information requested by the Commission for purposes of resolution planning and resolution in the form and manner specified by the Commission. The Commission expects that the form and manner would be designed to facilitate the Commission's ability to share the information with the FDIC. Such systems and controls are, for the most part, already in place during business as usual between each DCO and the Commission. The explicit requirement that a SIDCO and Subpart C DCO ensure that its systems will continue to be able to provide information to the Commission during resolution is sound public policy, as it will ensure the Commission receives critical information during this transitional period. The requirements of the CEA apply to any DCO as long as it is doing business, and the affirmation that a DCO's systems will be designed to be able to continue to function should help to provide assurances to stakeholders and market participants that clearing services will continue through all potential exigencies.

Accordingly, the Commission is proposing new § 39.39(f) to require that a SIDCO or Subpart C DCO maintain information systems and controls to provide to the Commission any data and information requested for purposes of resolution planning and resolution, and that each

must supply such information and data electronically, in the form and manner specified by the Commission.

2. Required Information – §§ 39.39(f)(1)-(7)

It is sound regulatory policy for the Commission to be transparent about the types of information that a SIDCO or Subpart C DCO might anticipate providing to the Commission, upon request, in order to enable the Commission to aid the FDIC in planning for resolution under Title II of the Dodd-Frank Act. This transparency is sound public policy because it would help assure stakeholders that, in the extraordinarily unlikely event that resolution of a SIDCO or Subpart C DCO under Title II becomes necessary, there will be an effective and efficient transition of the DCO to the FDIC receivership, and a successful resolution under Title II would be forthcoming. Thorough preparation is also helpful in supporting market confidence, and the confidence of foreign counterparts to the United States agencies.[160]

Resolution planning necessarily involves assessing a number of types of information: information that is publicly available, information that is otherwise reported to the Commission under part 39, and information that is in the possession of the DCOs but that is not otherwise reported to the Commission.

Over past years, Commission staff has worked with staff from the FDIC and the SIDCOs to identify and obtain information for the purpose of planning for the highly unlikely event of a SIDCO entering into resolution.[161] Global guidance on standards for resolution planning developed since 2013 have informed these information requests.

[160] To date, the Commission has requested information for resolution planning only from SIDCOs.

[161] This is consistent with § 6.4 of the 2017 FSB Resolution Guidance.

Under Core Principle J, the Commission may request any information from a DCO that the Commission determines to be necessary to conduct oversight of the DCO.[162] The Commission believes that certain information for resolution planning that goes beyond the information usually obtained during business as usual under the Core Principles and associated Part 39 regulations should be available when a DCO is systemically important to the financial system, may be approaching such systemic importance, or has opted into Subpart C.[163] As noted above, the FDIC must be ready to step in as receiver of a failing DCO on very short notice and work to achieve a resolution that mitigates risks to financial stability created by the DCO's failure, including by restoring market confidence and preventing contagion. The information proposed to be requested will assist in planning for resolution, thereby helping the FDIC to fulfill its role and accomplish its objectives, which in turn helps accomplish one of the purposes of the CEA, the avoidance of systemic risk.

Proposed subparts (1) through (7) describe seven types of information that are relevant to planning for resolution under Title II of the Dodd-Frank Act. The frequency with which information may be requested may vary over time, with some information requested only once, while other information may be requested multiple times (*e.g.*, annually, or upon significant changes to the structure of the DCO's business arrangements). The Commission expects that, in the latter case, the frequency of the requests may change over time, as the Commission gains more knowledge.

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[162] Section 5b(c)(2)(J) of the CEA, 7 U.S.C. 7a-1(c)(2)(J). *See also* 17 CFR 39.19(c)(5)(i) (a DCO shall provide upon request "Any information related to its business as a clearing organization ….")

i. Structure and Activities – § 39.39(f)(1)

As part of planning for resolution, the FDIC develops resolution options that are underpinned by an understanding of the structure of the SIDCO or Subpart C DCO. Proposed § 39.39(f)(1) would cover information related to the SIDCO's and Subpart C DCO's structure and activities and would include, among other things, documents and information about the SIDCO's and Subpart C DCO's legal structure and hierarchy. The Commission anticipates that this information would include current comprehensive organizational charts (including all direct and indirect subsidiaries where the SIDCO directly or indirectly owns more than a fifty percent controlling interest), governing documents and arrangements, rights and powers of shareholders, and current organizational documents (including by-laws, articles of incorporation or association/organization, and committees). The Commission acknowledges that some of this information may be publicly available on a SIDCO's website, may be included in recovery plans, or may otherwise be reported to the Commission under part 39. In the event that information is required that is not readily available through the ordinary course of regulatory oversight, a SIDCO and Subpart C DCO must be prepared to provide current information under the umbrella of "structure and activities" upon request.[164]

Proposed § 39.39(f)(1) would request information related to the SIDCO's or Subpart C DCO's organizational structure and corporate structure, activities, governing documents and arrangements, rights and powers of shareholders, committee members and responsibilities.

The Commission requests comment on this aspect of the proposal.

ii. Information About Clearing Members – § 39.39(f)(2)

[164] In some cases, the response may include cross-references to specific places where the information is already available, or has previously been provided, and assurance that the information remains current.

Another aspect of resolution planning is developing an understanding of the risks that may trigger consideration of orderly wind-down and the implications for resolution should that orderly wind-down fail. In order to understand these risks, certain information about a SIDCO's or Subpart C DCO's clearing members may be instructive. Generalized or anonymized information about clearing members such as types and amounts of collateral posted (for both house and customer accounts), variation margin, and contributions to default and guaranty funds may be instructive, both for *ex ante* planning and in the runway to resolution. Such information may provide insight into the risks that clearing members and the markets would be exposed to in the event of a systemic failure, and of the potential interplay between those risks.

The information requested in the category may also include general information regarding exposures or other measures of business risk with respect to all or a subset of clearing members. This type of information may assist in the planning for potential triggers for resolution and for understanding potential challenges in executing a resolution. The Commission recognizes that this type of information changes over time; accordingly, the Commission anticipates that it may request such information on an annual basis or more frequently in the run-up to resolution. Proposed § 39.39(f)(2) would permit requests for information on clearing members generally, including (for both house and customer accounts) information regarding collateral, variation margin, and contributions to default and guaranty funds.

The Commission requests comment on this aspect of the proposal.

iii. Arrangements with Other Clearing Entities – § 39.39(f)(3)

In order to plan for continuity of operations in resolution, the Commission and FDIC must understand how the SIDCO or Subpart C DCO interacts with the operations of other DCOs

and financial market infrastructures.[165] In particular, the Commission and FDIC must understand the SIDCO's or Subpart C DCO's cross-margining or mutual offset arrangements. These agreements and arrangements may require additional handling in resolution, both because of the exposures and obligations the SIDCO may be subject to, as well as the resources and tools they may provide.

The Commission proposes to require that SIDCOs and Subpart C DCOs provide to the Commission upon request copies of the most current versions of mutual offsetting arrangements or agreements for cross-margining arrangements with external entities. Additionally, for each such arrangement or agreement, the SIDCO or Subpart C DCO should be prepared to provide data concerning the recent scope of the relationship, such as information related to amounts of daily initial margin. The Commission proposes to require that SIDCOs and Subpart C DCOs update such information upon request by the Commission.

Proposed § 39.39(f)(3) would request information on arrangements and agreements with other clearing entities relating to clearing operations, including offset and cross-margin arrangements.

The Commission requests comment on this aspect of the proposal.

iv. Financial Schedules and Supporting Details – § 39.39(f)(4)

In order to prepare for receivership operations in resolution, and to develop resolution strategy options, there needs to be a clear understanding of the SIDCO's or Subpart C DCO's financial position and capital structure, which may include some combination of assets,

[165] For example, these relationships may be between DCOs registered with the Commission, *e.g.*, Chicago Mercantile Exchange (CME) and Options Clearing Corporation, or between a DCO registered with the Commission and another CCP supervised by an agency other than the CFTC, *e.g.*, CME and the Fixed Income Clearing Corporation.

liabilities, revenues and expenses, in advance of an extreme event. A DCO's financial statements and exhibits reported to the Commission contain relevant information that will assist the Commission and FDIC in forming a detailed understanding of the potential resources and financial exposures of the SIDCO or Subpart C DCO that would be important to the success of a Title II receivership. To prepare for resolution, the Commission and FDIC require a detailed understanding of the potential supports for and impediments to potential resolution strategies, including sources and uses of funds in resolution.

In order to form this understanding, it would be useful for the DCO to identify potential creditor claims and the potential resources available to satisfy such claims. There may be information in possession of the DCO that may not be available in public filings, on a DCO's website, or in financial reports and schedules required to be filed under other provisions of part 39, including off-balance sheet obligations or contingent liabilities.

The type of information requested under proposed § 39.39(f)(4) would include requests for information on off-balance sheet obligations or contingent liabilities, and obligations to creditors, shareholders, or affiliates not otherwise reported under Part 39.

The Commission requests comment on this aspect of the proposal.

v. Interconnections and Interdependencies with Internal and External Service Providers – § 39.39(f)(5)

The evaluation of possible obstacles to the continuation of essential services provided by internal and external service providers (including affiliates and other third parties), and the use of software, information, and other tools provided under license, is integral to resolution planning. While the recovery plans required under § 39.39(b) should include much of this information, effective planning for receivership may include the need for a more detailed understanding of the

requirements to continue making use of identified services (and thus understanding of the steps to meet such requirements).

Each SIDCO or Subpart C DCO must provide the Commission, upon request, copies of external or inter-affiliate contracts or agreements that permit the SIDCO or Subpart C DCO to perform its critical functions (including third-party or affiliate service agreements, building or equipment leases, etc.). In the case of inter-affiliate arrangements, the DCO should identify which entity in the group is the contracting party and, where relevant, whether there are any inter-affiliate service agreements that address provision of services. This type of information should inform the resolution plan by revealing any dependencies by affiliates on essential support functions provided by the SIDCO or Subpart C DCO. It may also foster planning for alternatives where required. The Commission may also request copies of inter-affiliate contracts or agreements, where the SIDCO or Subpart C DCO provides essential support to other affiliates.

Additionally, where some of the contracts and agreements for services would grant the service provider the option to terminate the contract in the event of assignment to a bridge financial company (*i.e.*, may not be "resolution resilient"), the resolution plan may need to identify alternatives. Thus, providing CFTC (and, ultimately, FDIC) with information that could help identify those contracts and agreements for services that are not resolution resilient would assist planning in advance of entry into resolution.

Further, because application of the FDIC's authority under Title II with respect to continuation of pre-receivership contracts[166] in the case of a non-U.S. contracting party may be less straightforward than with respect to a U.S.-based contracting party, the Commission may

[166] *See* Section 210(c)(13) of the Dodd-Frank Act ("Authority to Enforce Contracts"), 12 U.S.C. 5390(c)(13).

request that a SIDCO or Subpart C DCO provide a list of critical interconnections or interdependencies that are subject to material contracts/agreements governed in whole or in part by non-U.S. law.

Lastly, the resolution plan may need to maintain important tools and capabilities provided under license arrangements. For instance, the resolution plan may need to cover the transfer of licenses to the bridge financial company for products or indices underlying the contracts cleared by the SIDCO or Subpart C DCO. To accomplish this, the Commission may request that a SIDCO or Subpart C DCO provide a copy of such licenses and licensing agreements.

The Commission anticipates that the type of information described above would be requested on a one-time basis, with updates to be provided upon significant changes to the structure of the DCO's business arrangements (including change to the agreements), or when new agreements are executed. Proposed § 39.39(f)(5) would require SIDCOs and Subpart C DCOs to provide information regarding interconnections and interdependencies with internal and external service providers, licensors, and licensees, including information regarding services provided by or to affiliates and other third parties and related agreements, upon request by the Commission.

The Commission requests comment on this aspect of the proposal.

vi. Information Concerning Critical Personnel – § 39.39(f)(6)

While the recovery and orderly wind-down plans contain information related to critical positions and resilient staffing, in order to plan for resolution, a DCO may have to take steps to ensure that those positions remain filled. This includes steps to ensure that there is an adequate pool of financial resources readily available to ensure that during times of stress, there is staff in place. During times of extreme stress, people in critical positions may have terminated (or may

terminate) their association with the DCO, or their association may have been terminated (or may be terminated). Proposed § 39.39(f)(6) would require a SIDCO or Subpart C DCO to provide information for all critical positions described in the recovery and orderly wind-down plans.[167] The Commission believes that this information is essential if the FDIC is to succeed in a Title II receivership, as they will need qualified personnel to fill these positions in order to manage and operate the entity.

The Commission requests comment on this aspect of the proposal.

vii. Other Required Information – § 39.39(f)(7)

Proposed § 39.39(f)(7) would recognize that resolution planning is a complex, ongoing, and developing process, and that information requirements may change over time as the Commission and the FDIC gain experience with resolution planning for DCOs, and as information needs and business models change. Thus, certain information requirements may not be covered by the specific items listed in proposed § 39.39(f)(1)-(6). In that regard, proposed § 39.39(f)(7) would include a broad provision to encompass information which the Commission requires for this purpose, but not covered by the specific categories of information in proposed §§ 39.39(f)(1)-(6).

The Commission requests comment on this aspect of the proposal.

3. Requested Reporting – § 39.19(c)(5)(iii)

The Commission proposes to add a new requested reporting requirement to § 39.19 to reflect updates to the information requested in proposed §§ 39.39(f)(1)-(7). Proposed § 39.19(c)(5)(iii) would require a SIDCO or Subpart C DCO that submits information pursuant

[167] As in all cases, such information would be provided and obtained under security arrangements appropriate to the sensitivity of the information.

to § 39.39(f) to update the information upon request by the Commission. The Commission needs timely and an accurate information to monitor a SIDCO or Subpart C DCO, especially during stressful times. Depending upon the nature of the change and the information previously submitted, the response may be a confirmation that the information previously submitted remains accurate.

The Commission requests comment on this aspect of the proposal.

D. Renaming Regulation 39.39

When codified in 2013, Regulation 39.39 covered the Commission's expectations regarding a SIDCO's or Subpart C DCO's obligations with regard to recovery and orderly wind-down plans. The Commission proposes to change the title of Regulation 39.39 to reflect that the proposed regulations, if adopted by the Commission, will encompass recovery and orderly wind-down planning for SIDCOs and Subpart C DCOs, as well as information required to plan for resolution.

The Commission requests comment on this aspect of the proposal.

III. Orderly Wind-down Plans for DCOs That Are Not SIDCOs or Subpart C DCOs

The Commission is proposing, as reasonably necessary to effectuate Core Principle D(i),[168] to require DCOs that are neither SIDCOs nor Subpart C DCOs to maintain and submit to the Commission plans for orderly wind-down, with requirements that are substantially similar to the proposed requirements for the orderly wind-down plans to be submitted by SIDCOs and Subpart C DCOs.[169] Given that the failure of one of these DCOs is much less likely to have

[168] Section 5b(c)(2)(D)(i) of the CEA, 7 U.S.C. 7a-1(c)(2)(D)(i); *see* Section 8a(5) of the CEA, 7 U.S.C. 12a(5).

[169] For orderly wind-down planning involving insolvency or default of a DCO member or participant, the Commission also grounds this proposed rulemaking in Core Principle G(i), which requires that a DCO have "rules

"serious adverse effects on financial stability in the United States,"[170] the Commission is not proposing to require these DCOs to maintain recovery plans.[171]

A. Requirement to Maintain and Submit an Orderly Wind-down Plan – § 39.13(k)(1)(a)

The Commission is proposing to require that a DCO that is neither a SIDCO nor a Subpart C DCO must nevertheless maintain and submit to the Commission viable plans for orderly wind-down necessitated by default losses and non-default losses. The possibility that such losses may render the DCO unable to meet its obligations or to continue its critical functions to the point it must wind down is inherently one of the risks associated with the discharging of the DCO's responsibilities.[172] Additionally, the point at which a DCO must wind down may arise suddenly, in a manner that does not allow for time to plan. Wind-down plans are essential to help facilitate an orderly and expeditious wind-down; moreover, planning for an orderly wind-down—including, for example, considering the circumstances that may trigger a wind-down, the tools the DCO would implement to help ensure an orderly wind-down (along with the likely effects on clearing members and the financial markets from implementing such tools), and the governance arrangements to guide decision-making during an orderly wind-down—can strengthen the risk management practices of the DCO (including by identifying

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and procedures designed for the efficient, fair, and safe management of events" during such scenarios. Section 5b(c)(2)(G)(i) of the CEA, *7* U.S.C. 7a-1(c)(2)(G)(i).

[170] Section 203(b)(2) of the Dodd-Frank Act, 12 U.S.C. 5383(b)(2).

[171] For U.S.-based DCOs that are neither SIDCOs nor Subpart C DCOs, see discussion at *supra* fn. 156. Separately, foreign-based central counterparties registered with the Commission as DCOs are required to maintain recovery and wind-down plans by their home-country regulators. *See infra* fn. 207 and accompanying text. Thus, even if one of these were in future to be designated as systemically important under Title VIII, they would already maintain a recovery plan.

[172] Section 5b(c)(2)(D)(i) of the CEA, 7 U.S.C. 7a-1(c)(2)(D)(i).

vulnerabilities that can be mitigated), enhance legal certainty for the DCO, its clearing members and market participants, and increase market confidence, three pillars of the DCO Core Principles' aims. As discussed below, the subjects and analyses the Commission is proposing for inclusion in a DCO's orderly wind-down plan overlap with many of the analyses DCOs must otherwise undertake to ensure compliance with the DCO Core Principles.

In order to facilitate accomplishment of these goals, the Commission proposes to add new § 39.13(k)(1)(a) to require that a DCO that is not a SIDCO or Subpart C DCO maintain and, consistent with the proposed revisions to § 39.19(c)(4)(xxiv), submit to the Commission, a viable plan for orderly wind down necessitated by default losses and non-default losses, and supporting information.[173] In additional support of these goals, and as discussed further below, the Commission is proposing to add other provisions under § 39.13(k).

The Commission requests comment on the proposed changes. In particular, the Commission requests comment on the extent to which the proposed requirements concerning orderly wind-down plans for DCOs that are neither SIDCOs nor Subpart C DCOs appropriately balance seeking to ensure that such DCOs are prepared to wind-down in an orderly manner and mitigating the costs of preparing plans for such a wind-down. To the extent a better balance can be achieved, please discuss both the requirements that should be deleted or modified and the basis for the conclusion that the regulatory goal of orderly wind-down would reliably be achieved in light of such changes.

[173] In Section IV below, discussing the reporting requirement in § 39.19(c)(4)(xxiv), the Commission explains the reason for including the term "and supporting information."

B. Notice of the Initiation of Pending Wind-down – § 39.13(k)(1)(b)

Along the same lines—and consistent with the requirement for SIDCOs and Subpart C DCOs—the Commission is proposing to require that a DCO have procedures in place to notify the Commission and clearing members, as soon as practicable, when orderly wind-down is pending, and to provide such notification in such circumstances. Timely notification of events is essential for helping the Commission and clearing members effectively to address the issues raised by the DCO's transition into wind-down and that having the proper procedures in place beforehand will facilitate such timely notification.

The requirement that DCOs notify the Commission and clearing members of a pending orderly wind-down is reasonably necessary to effectuate Core Principle J, under which a DCO "shall provide to the Commission all information that the Commission determines to be necessary to conduct oversight of the [DCO],"[174] and Core Principle L, under which a DCO "shall provide to market participants sufficient information to enable the market participants to identify and evaluate accurately the risks and costs associated with using the services of the" DCO and "disclose publicly and to the Commission information concerning . . . any other matter relevant to participation in the settlement and clearing activities of the" DCO.[175]

Accordingly, the Commission proposes to add new § 39.13(k)(1)(b) to require that each DCO shall have procedures for informing the Commission and clearing members, as soon as practicable, when orderly wind-down is pending, and shall notify the Commission and clearing members consistent with proposed § 39.19(c)(4)(xxv).

The Commission requests comment on these proposed changes.

[174] Section 5b(c)(2)(J) of the CEA, 7 U.S.C. 7a-1(c)(2)(J).

[175] Section 5b(c)(2)(L) of the CEA, 7 U.S.C. 7a-1(c)(2)(L).

C. Orderly Wind-down Plan: Required Elements – §§ 39.13(k)(2)-(6)

As is the case for SIDCOs and Subpart C DCOs, the Commission believes, as a general matter, that the orderly wind-down plan of a DCO that is not a SIDCO or a Subpart C DCO should include a summary providing an overview of the plan followed by a detailed description of how the DCO will implement the plan. The description of how the DCO will implement its plans shall include an identification and description of the critical operations and services the DCO provides to clearing members and financial market participants, the service providers upon which the DCO relies to provide these critical operations and services, interconnections and interdependencies, and staffing arrangements (including how they are resilient), obstacles to success of the orderly wind-down plan, aggregate cost estimates for the continuation of services during orderly wind-down, and how the DCO will ensure that its services continue through orderly wind-down. The plan shall also include a stress scenario analysis addressing the failure of each critical operation and service, a description of the criteria the DCO would consider in determining whether and when to trigger orderly wind-down and the process for monitoring for events that may trigger the wind-down; a description of the information-sharing and escalation processes within the DCO's senior management and board of directors following an event triggering consideration of orderly wind-down and identification of the factors the board of directors would consider in exercising judgment or discretion with respect to any decision-making during wind down; an identification of scenarios that may trigger orderly wind-down and analysis of the tools the DCO would use following the occurrence of each scenario; an identification and review of agreements to be maintained during orderly wind-down; a description of the DCO's governance with respect to planning for orderly wind-down and during the orderly wind-down; and testing. The Commission believes these subjects and analyses are

the minimum elements that DCOs should incorporate in their orderly wind-down plans pursuant to their obligation to manage the risks associated with discharging their responsibilities under Core Principle D.[176]

Accordingly, the Commission is proposing new § 39.13(k)(2) to require a DCO to include in its orderly wind-down plans a summary providing an overview of the plan followed by a detailed description of how the DCO will implement the plan.

The Commission requests comment on this aspect of the proposal. Each required element of the orderly wind-down plan is discussed in more detail below.

1. Critical Operations and Services, Interconnections and Interdependencies, and Resilient Staffing – § 39.13(k)(2)(a)

In Section II, the Commission highlighted the importance of incorporating into recovery and orderly wind-down plans an identification and description of the critical operations and services that the SIDCO or Subpart C DCO provides to clearing members and financial market participants, the service providers upon which the DCO relies upon to provide these critical operations and services, financial and operational interconnections and interdependencies, and resilient staffing arrangements. As set forth below, the same is true for the orderly wind-down plans for DCOs that are not SIDCOs or Subpart C DCOs.

i. Critical Operations and Services Provided by and to DCOs

Limiting the operational disruption and financial harm to a DCO's clearing members and other financial market participants during an orderly wind-down, turns on the DCO's

[176] To the extent foreign CCPs are subject to home jurisdiction regulation with different requirements for the subjects and analyses that must be included in their wind-down plans, the Commission welcomes comments describing those requirements, and including suggestions on how to achieve the goals of this regulation in a manner that appropriately addresses possible inefficiencies.

understanding of the critical operations and services that the DCO performs for clearing members and other financial market participants, and, in turn, operations and services performed by others that are critical to the DCO performing those critical functions. Thus, the Commission is proposing to require that a DCO's orderly wind-down plan include an identification and description of the critical operations and services that the DCO provides to clearing members and other financial market participants. For any critical (to the DCO) operations or services that the DCO relies upon which are performed by internal or external service providers, the plan should identify those providers and describe the critical operations or services they perform. Likewise, to the extent the DCO's ability to discharge its functions may be affected by the performance of ancillary service providers, the plan should identify those ancillary service providers and describe the operations or services they perform. By requiring the identification and description of the DCO's critical operations and services, including those performed by internal or external service providers, and any ancillary service providers, the Commission seeks to ensure, to the extent practicable, that the DCO's ability to perform the critical operations and services that others depend upon continues during the orderly wind-down process.

In the same vein, the Commission is proposing to require that a DCO's orderly wind-down plan identify and describe the obstacles to success of the plan, and the DCO's plan to address the risks associated with the failure of each such critical operation and service. A stress scenario analysis (or similar undertaking) addressing the failure of each critical operation and service while the DCO is still a going concern should highlight whether and how the operation or service can continue in orderly wind-down. The Commission expects the DCO's orderly wind-down plan to address the full range of options in order to ensure that operations and services critical to the DCO continue in the orderly wind-down process. In considering and analyzing the

magnitude of the costs associated with an orderly wind-down, certain of the DCO's expenses will likely increase, including, for example, legal fees, accounting fees, financial advisor fees, the costs associated with employee retention programs, and other incentives that may be necessary to maintain critical staff. Other costs, such as marketing or those for developing new products, may decrease as a result of wind-down. Further, a DCO shall proceed under the conservative assumption that any resources it may have consumed as part of its recovery efforts, if any, will not be available to fund critical operations and services in an orderly wind-down.

ii. Interconnections and Interdependencies

The Commission is additionally proposing to require that the orderly wind-down plan identify and describe the DCO's financial and operational interconnections and interdependencies. Given the web of relationships that may exist among the DCO and its relevant affiliates, internal and external service providers, and other relevant stakeholders, identifying and describing the interconnections and interdependencies could provide much-needed transparency and clarity for purposes of developing and implementing an orderly wind-down plan. For instance, the financial resources available to a DCO during wind-down may be limited when one financial entity serves multiple roles and relationships with respect to the DCO or when multiple affiliates of the DCO depend upon the same intercompany loan agreement or insurance policy with group coverage limits. Interconnections and interdependencies may also adversely impact the value of the DCO's assets, which can be crucial in wind-down where a DCO is trying to meet costs associated with preserving critical operations and services and meeting liquidity needs. Accordingly, a DCO's orderly wind-down plan should identify and describe any interconnections and interdependencies and address the effect such relationships

may have on the DCO's ability to continue performing its functions during the wind-down process.

iii. Resilient Staffing and Support Services Arrangements

As noted in section II, a DCO in wind-down cannot maintain critical operations and services without both essential personnel and support services. Accordingly, the Commission is proposing to require that the orderly wind-down plan identify and describe plans for resilient staffing arrangements under which personnel essential for critical operations and services would be maintained and services supporting the DCO's critical operations and services would continue. To the extent the DCO relies upon contractors as personnel providing critical operations and services, the DCO should have staffing arrangements and agreements in place for such contracting work to continue in wind-down. Similarly, to the extent the DCO relies upon third-party service providers to provide critical operations and services, including facilities, utilities, and communication technologies, the DCO should have arrangements and agreements in place for such third-party services to continue in wind-down. Further, to promote its ability to ensure the success of the plan, the DCO should identify obstacles to that success. Additionally, as part of the DCO's responsibility to maintain critical operations and services, the Commission is proposing to require that the orderly wind-down plan include aggregate cost estimates for essential personnel and support services, and address the manner in which the DCO will meet the associated costs. Just as the case may be for SIDCOs and Subpart C DCOs, other DCOs may be vulnerable to key person risk; accordingly, plans for resilient staffing arrangements should identify, to the extent applicable, key person risk within the DCO or (as relevant) affiliated legal entities that the DCO relies upon to provide its critical operations and services, and how the DCO has planned to address such risk.

Accordingly, the Commission is proposing new § 39.13(k)(2)(a) to require that the DCO's orderly wind-down plan include the identification and description of the DCO's critical operations and services, interconnections and interdependencies, and resilient staffing arrangements, obstacles to success of the orderly wind-down plan, as well as a stress scenario analysis addressing the failure of each identified critical operation or service. Additionally, the orderly wind-down plan must include aggregate cost estimates for the continuation of critical operations and services and a description of how the DCO will ensure that such operations and services continue through orderly wind-down.

The Commission requests comment on this aspect of the proposal.

2. Triggers for Consideration of Orderly Wind-down and Processes for Information-Sharing and Decision-Making – §§ 39.13(k)(2)(b)–(c)

The Commission is proposing to require that orderly wind-down plans for DCOs include a description of the criteria that would guide the DCO in considering whether and when to implement wind-down, and the process for monitoring for events that may trigger consideration of orderly wind-down. As noted in section II, any viable orderly wind-down plan must establish and define criteria (which may be in the alternative) that the DCO would consider in triggering consideration of wind-down. The criteria may be quantitative, such as the case where the DCO does not have the financial resources to continue as a going concern, or qualitative, such as the case where judgment may be needed (for instance, in circumstances involving litigation that is proceeding in a manner that suggests that a large, adverse finding is likely). Predefined criteria should help avoid undue delays in deciding whether to wind-down, which, in turn, should help increase the opportunity for an orderly wind-down. By monitoring for events that may trigger the consideration of wind-down, moreover, a DCO will be better situated to make a timely

decision regarding wind-down. Further, predefined criteria will provide confidence to market participants and the public that the DCO has proper plans in place to monitor for and manage situations that may require an orderly wind-down.

Additionally, the Commission is proposing to require that the orderly wind-down plan include a description of the information-sharing and escalation processes within the DCO's senior management and board of directors following an event triggering consideration of an orderly wind-down. By establishing automatic procedures under which the relevant decision-makers may obtain the necessary information, the DCO may avoid undue delays in ultimately deciding whether to wind-down.

Similarly, the Commission is proposing to require that orderly wind-down plans include the factors that the board of directors anticipates that it would consider in any decision-making regarding wind-down where judgment or discretion is required. The Commission believes that the factors enumerated in the orderly wind-down plan should be those that the DCO considers most important in guiding the discretion of the board of directors. A predefined framework within which the board may exercise judgment and discretion should facilitate a timely decision regarding wind-down.

Accordingly, the Commission is proposing new §§ 39.13(k)(2)(b)–(c) to require that the DCO's orderly wind-down plan include a description of the criteria that the DCO would consider in determining whether to implement wind-down and, relatedly, the process for monitoring for events that may trigger consideration of an orderly wind-down; a description of the information-sharing and escalation processes within the DCO's senior management and board of directors following an event triggering consideration of an orderly wind-down; and the identification of

the factors that the DCO considers most important in guiding the board of directors' judgment or discretion with respect to any decision-making during the wind-down.

The Commission requests comment on this aspect of the proposal.

3. Orderly Wind-down Scenarios and Tools – § 39.13(k)(3)

The Commission is proposing to require that a DCO's orderly wind-down plan (i) identify the scenarios that may lead to an orderly wind-down, *i.e.*, those scenarios that may prevent the DCO from meeting its obligations or providing its critical operations and services as a going concern, and (ii) analyze the tools the DCO would use following the occurrence of each scenario. Specifically, the Commission is proposing to require that the analysis describe the tools the DCO would expect to use in an orderly wind-down that comprehensively address how the derivatives clearing organization would continue to provide critical operations and services; describe the order in which the DCO would expect to implement any identified tools; describe the governance and approval processes and arrangements that will guide the exercise of any available discretion in the use of each tool; describe the processes to obtain any approvals external to derivatives clearing organization (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained; establish the time frame within which the DCO may use each tool; set out the steps necessary to implement each tool; describe the roles and responsibilities of all parties in the use of each tool; provide an assessment of the likelihood that the tools, individually and taken together, would result in orderly wind-down; and provide an assessment of the associated risks to non-defaulting clearing members and those clearing members' customers with respect to transactions cleared on the DCO, and linked financial market infrastructures.

As may be the case for SIDCOs and Subpart C DCOs, the scenarios that may trigger consideration for wind-down are typically those where recovery efforts (if any) are deemed to have failed. At that point, the DCO will no longer be able to meet its obligations or provide its critical operations and services as a going concern. For each scenario where the DCO may reach such a point, the Commission is proposing to require that the orderly wind-down plan analyze the tools available to effectuate an orderly wind-down.

The DCO's tools—*i.e.*, the wind-down options available to the DCO in each particular scenario—comprise those actions it may take to effect, in an orderly manner, the sale or transfer, or if necessary in extreme circumstances, permanent cessation, of its clearing and other services. The Commission intends that the proposed analysis will require the DCO to assess the effectiveness of a full range of actions for orderly wind-down.

Among other things, an effective set of wind-down tools enables the DCO to manage liquidity requirements in a manner in which critical operations and services would be maintained during the orderly wind-down period. Various factors may prevent an action from being effective, including, for instance, the number of steps required to implement the action (*e.g.*, disclosure, risk reduction, trade reduction, transfer or close-out of positions, and liquidation of investments), the time required to complete each step (*e.g.*, contract termination and other relevant requirements following disclosure), the discretion of various parties affecting the use or sequence of the action (including non-defaulting parties), and any legal limits regarding the action (*e.g.*, the relevant DCO rules or rule amendments necessary to support the use of the action and the roles, obligations and responsibilities of the various parties in the use of the action).

Additionally, any action involving a proposed transfer may turn out to be difficult to achieve due to the financial and operational capacity that would be required of a transferee or the status of the DCO as a distressed seller. Further, the action may have adverse consequences on clearing members or other financial market participants. The Commission proposes to require this analysis in order to assist the DCO in determining which actions may effectuate an orderly wind-down where critical operations and services would be maintained throughout the orderly wind-down period while minimizing public harm.

Accordingly, the Commission is proposing new § 39.13(k)(3) to require that a DCO's orderly wind-down plan include, following a thorough analysis, the set of scenarios that may trigger consideration of orderly wind-down and an analysis of the tools the DCO would use in each scenario. The Commission is proposing to require that the analysis describe the tools the DCO would expect to use in an orderly wind-down; describe the order in which the DCO would expect to implement any identified tools; describe the governance, approval processes and arrangements that will guide the exercise of any available discretion in the use of each tool; establish the time frame within which the DCO may use each tool; set out the steps necessary to implement each tool; describe the roles and responsibilities of all parties in the use of each tool; provide an assessment of the likelihood that the tool would result in orderly wind-down; and provide an assessment of the associated risks to non-defaulting clearing members and their customers, linked financial market infrastructures, and the financial system more broadly, from the use of each tool.

The Commission requests comment on this aspect of the proposal.

4. Agreements to be Maintained During Orderly Wind-Down – § 39.13(k)(4)

The Commission is proposing to require that a DCO's orderly wind-down plan identify any agreements associated with the provision of its critical services and operations that are subject to alteration or termination as a result of winding down and describe the actions the DCO has taken to ensure such operations and services will continue during wind-down. Similar to SIDCOs and Subpart C DCOs, the DCO may have a variety of contractual agreements with clearing members, affiliates, linked central counterparties, counterparties, external service providers, and other third parties. The contractual agreements may take the form of contracts, arrangements, agreements, and licenses associated with the provision of its services as a DCO, and may cover the DCO's rules and procedures, agreements for the provision of operational, administrative and staffing services, intercompany loan agreements, mutual offset agreements or cross-margining agreements, and credit agreements. Under the Commission's proposed requirement, the DCO's orderly wind-down plan must review and analyze its agreements to determine if they contain covenants, material adverse change clauses, or other provisions that may render the continuation of the DCO's critical operations and services difficult or impracticable upon implementation of the orderly wind-down plan. The Commission is proposing to require that the DCO take proactive steps to ensure that its critical operations and services would continue in an orderly wind-down, notwithstanding any contractual provision to the contrary.

As is the case for SIDCOs and Subpart C DCOs, a requirement ensuring that the DCO's agreements do not hinder its ability to continue critical operations and services in an orderly wind-down, or, if they do, that the orderly wind-down plan provides viable strategies to address the situation, is important to an orderly wind-down. Additionally, this requirement will aid in

providing a higher degree of confidence with respect to this group of DCOs in the public markets even in extreme market conditions with the potential to trigger the consideration of implementation of orderly wind-down plans. In addition to Core Principle D(i), this proposed requirement is supported by Core Principle R, requiring that the DCO have an "enforceable legal framework for each aspect" of its activities.[177] To the extent any agreement prohibits the DCO from continuing its critical operations and services in an orderly wind-down, a DCO may not have an enforceable legal framework within which to carry out all of its activities, specifically those associated with an orderly wind-down.

Accordingly, the Commission is proposing new § 39.13(k)(4) to require that a DCO's orderly wind-down plan identify any contracts, arrangements, agreements, and licenses associated with the provision of its critical services and operations that are subject to alteration or termination as a result of the implementation of the orderly wind-down plan. The orderly wind-down plan shall describe the actions the DCO has taken to ensure such operations and services can continue during orderly wind-down, despite such potential alteration or termination.

5. Governance – § 39.13(k)(2)(5)

The Commission is proposing to require that a DCO's orderly wind-down plan include predefined governance arrangements with respect to wind-down planning and orderly wind-down that set forth the responsibilities of the board of directors, board members, senior executives and business units, describe the processes that the DCO will use to guide its discretionary decision-making relevant to the orderly wind-down plan, and describe the DCO's process for identifying and managing the diversity of stakeholder views and any conflict of

[177] Section 5b(c)(2)(R) of the CEA, 7 U.S.C. 7a-1(c)(2)(R).

interest between stakeholders and the DCO. Additionally, the Commission is proposing to require that the DCO's board of directors formally approve and annually review the orderly wind-down plan.

An effective governance arrangement will assist DCOs in reacting quickly to adverse scenarios, provide transparency to the orderly wind-down process, and help ensure that DCOs properly vet wind-down decisions with consideration of the interests of all relevant parties. Further, the proposed requirements with respect to governance are supported by Core Principle O, which requires that DCOs establish transparent governance arrangements "to fulfill public interest requirements" and "permit the consideration of the views of owners and participants,"[178] and Core Principle P, which requires that DCOs establish both "rules to minimize conflicts of interest in the decision making-process" and "a process for resolving conflicts of interest."[179]

Accordingly, the Commission is proposing new § 39.13(k)(5) to require that a DCO's orderly wind-down plan describe an effective governance structure that clearly defines the responsibilities of the board of directors, board members, senior executives and business units, describe the processes that the DCO will use to guide its discretionary decision-making relevant to the orderly wind-down plan, and describe the DCO's process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the DCO. Additionally, the Commission is proposing to require that a DCO's board of directors formally approve and annually review the orderly wind-down plan.

The Commission requests comment on this aspect of the proposal.

[178] Section 5b(c)(2)(O) of the CEA, 7 U.S.C. 7a-1(c)(2)(O).

[179] Section 5b(c)(2)(P) of the CEA, 7 U.S.C. 7a-1(c)(2)(P).

6. Testing – § 39.13(k)(2)(6)

For DCOs that are neither SIDCOs nor Subpart C DCOs, the Commission is proposing a testing requirement as part of the orderly wind-down plan that is similar, but not identical, to proposed new § 39.39(c)(8). Specifically, the Commission is proposing new § 39.13(k)(2)(6) to require that the orderly wind-down plan for these DCOs include procedures for testing the DCO's ability to implement the tools upon which the orderly wind-down plan relies. The orderly wind-down plan must include the types of testing that will be performed, to whom the findings of such tests will be reported, and the procedures for updating the plan in light of the findings resulting from such tests. Such testing must occur following any material change to the orderly wind-down plan, but in any event not less frequently than once annually.

The testing requirement for DCOs that are neither SIDCOs nor Subpart C DCOs should emphasize the reliable operability of the tools that potentially would be implemented in a wind-down; as such, the Commission is not proposing to require these DCOs to conduct crisis management drills or similar exercises as part of the testing requirement. Moreover, because of the wide range of possible types of clearing members, the Commission is not proposing to require these DCOs to conduct testing with the participation of clearing members.[180] Nonetheless, where the plan relies upon the performance of clearing members and other internal stakeholders, or external stakeholders such as service providers, such DCOs should consider whether involving such parties is practical.

As discussed above, however, testing the orderly wind-down plan—through assessing the operation and sufficiency of tools and resources to address losses— and updating the plan

[180] Such DCOs that are subject to regulation by other authorities may be subject to more stringent requirements with respect to testing by those authorities.

accordingly is a critical part of a DCO's risk management practice. Testing can reveal deficiencies in the effectiveness of specific tools. It can also enhance the tools and resources for identifying, measuring, monitoring, and managing risk in general. Periodic testing, moreover, may reveal any deficiencies or weaknesses in a DCO's infrastructure which may hamper wind-down efforts.

The Commission requests comment on this aspect of the proposal. The Commission specifically requests comment on the proposed requirement that tests be conducted not less than annually: would a different minimum frequency be more appropriate for DCOs other than SIDCOs or Subpart C DCOs?

D. Conforming Changes to Bankruptcy Provisions – Part 190.

The Commission is proposing several conforming changes to Part 190's bankruptcy provisions that follow from the proposed requirement that all DCOs maintain viable plans for orderly wind-down. First, current § 190.12(b)(1) requires that a DCO in a Chapter 7 proceeding provide to the trustee copies of, among other things, the wind-down plan it must maintain pursuant to § 39.39(b).[181] The Commission is proposing that the regulation be amended to include orderly wind-down plans that DCOs must maintain pursuant to proposed new § 39.13(k) in addition to § 39.39(b).

Second, current § 190.15(a) requires that the trustee not avoid or prohibit certain actions taken by the DCO either reasonably within the scope of, or provided for in, any wind-down plan maintained by the DCO and filed with the Commission pursuant to § 39.39.[182] The Commission

[181] 17 CFR 190.12(b)(1).

[182] 17 CFR 190.15(a).

is proposing that the regulation be amended to include orderly wind-downs plans maintained by DCOs and filed with the Commission pursuant to proposed new § 39.13(k) in addition to § 39.39.

Third, current § 190.15(c) requires that the trustee act in accordance with any wind-down plan maintained by the debtor and filed with the Commission pursuant to § 39.39 in administering the bankruptcy proceeding.[183] The Commission is proposing that the regulation be amended to include orderly wind-downs plans maintained by DCOs and filed with the Commission pursuant to proposed new § 39.13(k) in addition to § 39.39.

Last, current § 190.19(b)(1) requires that a shortfall in certain funds be supplemented in accordance with the wind-down plan maintained by the DCO pursuant to § 39.39 and submitted pursuant to § 39.19.[184] The Commission is proposing that the paragraph be amended to include orderly wind-downs plans maintained by DCOs pursuant to proposed new § 39.13(k) in addition to § 39.39.

The Commission requests comment on this aspect of the proposal.

IV. Establishment of Time to File Orderly Wind-down Plan – § 39.19(c)(4)(xxiv)

In light of the proposed requirement that all DCOs maintain and submit to the Commission viable plans for orderly wind down and supporting information, the Commission is proposing to establish the timing for submitting orderly wind-down plans and supporting information for DCOs currently registered with the Commission. As the Commission is proposing to amend § 39.19(c)(4)(xxiv) to establish the time for SIDCOs and Subpart C DCOs to

[183] 17 CFR 190.15(c).

[184] 17 CFR 190.19(b)(1).

file a recovery plan and an orderly wind-down plan, the Commission proposes to amend the same section to establish a fixed deadline for DCOs currently registered with the Commission to file orderly wind-down plans. Under the proposed rule, DCOs currently registered with the Commission must complete and submit orderly wind-down plans and supporting information within six months from the effective date of the rule (if it is adopted). Pursuant to Core Principle D(i), all DCOs must already ensure they possess the ability to manage the risks associated with discharging their responsibilities through the use of appropriate tools and procedures. A potential wind down, due either to default or non-default losses, is always a latent risk for any DCO engaged in clearing and settlement activities; accordingly, DCOs should already have some plans in place for implementing tools and procedures to manage an orderly wind-down.

The Commission proposes to require that any DCO that submits an application for registration with the Commission six months or more after the effective date of this rulemaking (if it is adopted), must submit its orderly wind-down plans and supporting information at the time it submits an application for registration with the Commission under § 39.3.[185] The Commission is also requiring that all DCOs, upon revising their plans, but in any event no less frequently than annually, submit the current plan(s) and supporting information to the Commission, along with a description of any changes and the reason(s) for such changes.[186]

[185] For any DCO that submits (or has submitted) an application for registration with the Commission before the date that is six months after the effective date of this rulemaking, if it is adopted, the Commission is proposing to require that the DCO have until the date that is six months after the effective date of this rulemaking to submit its orderly wind-down plan and supporting information.

[186] *See* Section 5b(c)(2)(J) of the CEA, 7 U.S.C. 7a-1(c)(2)(J) ("Core Principle J – Reporting") (requiring that DCOs "provide to the Commission all information that the Commission determines to be necessary to conduct oversight of the [DCO]").

In § 39.19(c)(4)(xxiv), as well as in § 39.13(k) and § 39.39(b), the Commission is proposing to add the words "and supporting information" to references to submitting recovery and/or orderly wind-down plans. DCOs may, in some instances, include supporting information within their plans, or may organize the documentation with supporting information kept separately, *e.g.*, as an appendix or annex. To avoid confusion as to whether such separately kept information is required to be submitted to the Commission, and to ensure that the Commission has timely access to such supporting information, the Commission is proposing to amend §§ 39.19(c)(4)(xxiv), 39.13(k) and 39.39(b) to require its submission explicitly.

Accordingly, the Commission proposes to amend § 39.19(c)(4)(xxiv). Specifically, the Commission proposes to require that any DCO not currently registered with the Commission submit its viable plans for orderly wind-down and supporting information at the time it files its application for registration with the Commission under § 39.3. Because the Commission is proposing to require that all DCOs must maintain and submit plans for orderly-wind down and supporting information, the Commission proposes to remove the current language from § 39.19(c)(4)(xxiv) suggesting or providing that DCOs that are not SIDCOs or Subpart C DCOs *may* maintain and submit orderly wind-down plans to the Commission. For DCOs that are currently registered with the Commission and are not SIDCOs or Subpart C DCOs, the Commission is proposing to require that they submit their viable plans for orderly wind-down and supporting information no later than six months after this final rulemaking is published. Upon revising their plans, moreover, but in any event no less frequently than annually, all DCOs shall submit the current plan(s) and supporting information to the Commission, along with a description of any changes and the reason(s) for such changes.

The Commission requests comment on this aspect of the proposal. The Commission specifically requests comment concerning whether a DCO should additionally be required to update its recovery and orderly wind-down plans upon changes to the DCO's business model, operations, or the environment in which it operates, to the extent such changes significantly affect the viability or execution of the recovery and orderly wind-down plans. The Commission also specifically requests comment concerning whether six months is sufficient time to develop these plans, or if a longer time (*e.g.*, one year) would be more appropriate.

V. Amendment to Regulation 39.34(d)

As discussed in the context of recovery plans and orderly wind-down plans, the Commission proposes to discontinue the process by which the Commission could grant, upon request of a SIDCO or DCO that is electing to become subject to subpart C, up to one year to comply with §§ 39.39 and 39.35.[187] The Commission is proposing to remove a similar provision in § 39.34(d) wherein a SIDCO or Subpart C DCO could request, and the Commission may grant, up to one year to comply with any provision of § 39.34 (System safeguards for SIDCOs and Subpart C DCOs) because granting such requests would be inconsistent with the system safeguard rules for SIDCOs and Subpart C DCOs that have been in effect for years.[188] The Commission is therefore proposing to remove § 39.34(d) in its entirety.

The Commission requests comment on this aspect of the proposal.

VI. Amendments to Appendix B to Part 39 – Subpart C Election Form

[187] *See* 17 CFR 39.39(f).

[188] *See System Safeguards Testing Requirements for Derivatives Clearing Organizations*, 81 FR 64322 (Sept. 19, 2016).

The Commission is proposing to amend the Subpart C Election Form to reflect the above proposed changes to Part 39. One of these amendments will reflect the elimination of the request for an extension of up to one year to comply with any of the provisions of §§ 39.34, 39.35, or 39.39. The "General Instructions" and "Elections and Certifications" portions of the Subpart C Election Form are proposed to be amended to delete the references to requests for relief of up to one year for those sections of part 39. Another amendment will modify Exhibit F-1 to include the DCO's recovery plan, orderly wind-down plan, supporting information for these plans, and a demonstration that the plans comply with the requirements of § 39.39(c).

The Commission requests comment on this aspect of the proposal.

VII. Amendments to Appendix A to Part 39 –Form DCO

The Commission is proposing to amend Form DCO, in particular, Exhibit D – Risk Management to reflect the above proposed changes to Part 39. The amendment will add an Exhibit D-5 to include the DCO's orderly wind-down plan, and a demonstration that the plan complies with the requirements of proposed § 39.13(k).

The Commission requests comment on this aspect of the proposal.

VIII. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.[189] The

[189] 5 U.S.C. 601-612.

regulations proposed by the Commission will affect only DCOs. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[190] The Commission has previously determined that DCOs are not small entities for the purposes of the RFA.[191] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed regulations will not have a significant impact on a substantial number of small entities.

B. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation.[192]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the proposed rules implicate any other specific public interest to be protected by the antitrust laws.

The Commission has considered the proposed rulemaking to determine whether it is anticompetitive and has identified no anticompetitive effects. The Commission requests comment on whether the proposed rulemaking is anticompetitive and, if it is, what the anticompetitive effects are.

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[190] *Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act,* 47 FR 18618 (Apr. 30, 1982).

[191] *See A New Regulatory Framework for Clearing Organizations*, 66 FR 45604, 45609 (Aug. 29, 2001).

[192] Section 15(b) of the CEA, 7 U.S.C. 19(b).

Because the Commission has preliminarily determined that the proposed rules are not anticompetitive and have no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the proposed rules.

C. Paperwork Reduction Act

The Paperwork Reduction Act (PRA)[193] provides that Federal agencies, including the Commission, may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number from the Officer of Management and Budget (OMB). The PRA is intended, in part, to minimize the paperwork burden created for individuals, businesses, and other persons as a result of the collection of information by federal agencies, and to ensure the greatest possible benefit and utility of information created, collected, maintained, used, shared, and disseminated by or for the Federal Government.[194] The PRA applies to all information, regardless of form or format, whenever the Federal Government is obtaining, causing to be obtained, or soliciting information, and includes required disclosure to third parties or the public, of facts or opinion, when the information collection calls for answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.[195] This proposed rulemaking contains reporting and recordkeeping requirements that are collections of information within the meaning of the PRA. This section

[193] 44 U.S.C. 3501 *et seq.*

[194] 44 U.S.C. 3501.

[195] 44 U.S.C. 3502(3).

addresses the impact of the proposal on existing information collection requirements associated with part 39 of the Commission's regulations. Changes to the existing information requirements as a result of this proposal are set forth below. OMB has assigned Control No 3038-006, "Requirements for Derivatives Clearing Organizations," to the information collections associated with these regulations.[196] The Commission is revising its total burden estimates for this clearance to reflect the proposed amendments.

The Commission therefore is submitting this proposal to the OMB for its review in accordance with the PRA.[197] Responses to this collection of information would be mandatory. The Commission will protect any proprietary information according to the Freedom of Information Act and part 145 of the Commission's regulations.[198] In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public any "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers."[199] Finally, the Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[200]

[196] For the previously approved estimates, see ICR Reference No. 202303-3038-001, available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202303-3038-001.

[197] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[198] 5 U.S.C. 552; 17 CFR part 145 (Commission Records and Information).

[199] 7 U.S.C. 12(a)(1).

[200] 5 U.S.C. 552a.

1. Event-Specific Reporting – § 39.19(c)(4)

Proposed § 39.39(b) would require a SIDCO or Subpart C DCO to submit written recovery plans and orderly wind-down plans within six months of designation as a SIDCO or upon a DCO's election as a Subpart C DCO (in each case, if this happens subsequent to the effective date), consistent with current § 39.19(c)(4)(xxiv). This reporting requirement is already included in the information collection burden associated with the collection of information titled "Requirements for Derivatives Clearing Organizations, OMB Control No. 3038-0076." The Commission has previously estimated that this requirement entails an estimated 4,320 burden hours for all covered DCOs along with an associated annual cost burden of $341,280.[201] While the timing for this reporting requirement has changed, there is no change in frequency, and the Commission does not anticipate any other change to this reporting requirement caused by this change to the timing for the report to be submitted. However, because of enhancements to the requirements for these plans, the Commission anticipates an increase in the reporting burden from the proposed subjects and analyses that SIDCOs and Subpart C DCOs would be required to include in their recovery and orderly wind-down plans from 480 hours to 600 hours. The Commission will use a blended rate of 50% financial examiners ($237/hour) and 50% lawyers ($499/hour) resulting in $368/hour.[202]

[201] This is based on the Commission's estimate that nine covered DCOs will be required to submit one written recovery plan and wind-down plan annually. The Commission had estimated that covered DCOs will require 480 hours on average to draft the required plans at a previously estimated $79 per hour.

[202] According to the May 2021 National Occupational Employment and Wage Estimates Report produced by the U.S. Bureau of Labor Statistics, available at https://www.bls.gov/oes/current/oes_nat.htm, the mean salary for category 23-1011, "Lawyers," is $198,900. This number is (a) divided by 1800 work hours in a year to account for sick leave and vacations, (b) multiplied by 4.0 to account for retirement, health, and other benefits, as well as for office space, computer equipment support, and human resources support, and (c) in light of recent high inflation, further multiplied by 1.1294 to account for the change in the Consumer Price Index for Urban Wage-Earners and Clerical Workers from 263.612 in May of 2021 to 297.730 in April of 2023, all of which yields

The Commission specifically invites public comment on the accuracy of its estimates that the proposed regulations will not impose a new reporting burden but increase the reporting burden estimate to 600 hours.

The Commission's burden estimate for § 39.19(b), including drafting or updating, approving, and testing the wind-plan, is as follows:

Estimated number of respondents: 6

Estimated number of reports per respondent: 1.

Average number of hours per report: 600

Estimated annual hours burden: *3,600*

Estimated gross annual reporting burden: $1,324,800

Proposed § 39.13(k)(1)(a) would require a DCO that is neither a SIDCO nor a Subpart C DCO to submit, pursuant to § 39.19(c)(4)(xxiv), a written orderly wind-down plan. Given the similarities between the recovery plan and orderly wind-down plan, and the consequent efficiencies in preparing both plans, the Commission estimates that the orderly wind-down plan would require 400 hours to develop for non-SIDCO and non-Subpart C DCOs and 100 hours/year to update. The estimated 400 hours represents a reduction of one-third the amount of time that the Commission estimates is required for SIDCOs and Subpart C DCOs to develop both the recovery plan and orderly wind-down plan. This proposed amendment, if adopted, would increase the existing annual burden for this clearance by 3,600 hours.[203] The Commission

an hourly rate of $499. Using a similar analysis, category 13-2061, "Financial Examiners," under business and financial services occupations, has a mean annual salary of $94,270, yielding an hourly rate of $237.

[203] In an effort to adequately estimate the potential burden, the Commission will ignore the fact that, as discussed elsewhere in this NPRM, some DCOs have developed, and regularly update, their orderly wind-down plans pursuant to regulations imposed by non-U.S. regulators.

will use the same blended rate of $368/hour. The Commission specifically invites public comment on the accuracy of its estimates.

The Commission's burden estimate for § 39.19(c)(4)(xxiv), including drafting or updating, approving, and testing the wind-plan, is as follows:

Estimated number of respondents: 9

Estimated number of reports per respondent: 1.

Average number of hours per report: 400

Estimated annual hours burden: *3,600*

Estimated gross annual reporting burden: $1,324,800

The Commission is proposing to add new § 39.19(c)(4)(xxv) to require that each SIDCO or Subpart C DCO that is required to have a procedure for informing the Commission when the recovery plan is initiated or that orderly wind-down is pending pursuant to either § 39.39(b)(2) or § 39.13(k)(1) shall notify the Commission and clearing members as soon as practicable when the DCO has initiated its recovery plan or that orderly wind-down is pending. SIDCOs and Subpart C DCOs are currently required under § 39.39(c)(1) to have procedures in place to notify the Commission when a recovery plan or orderly wind-down was initiated and the Commission is now proposing to codify this as a formal notification requirement, thus, the Commission does not view this aspect of the proposed regulation as a new reporting requirement under OMB Control No. 3038-0076. However, the requirement to notify clearing members was set out in CFTC Letter No. 16-61 but was not codified, and may therefore be considered a new event-specific reporting requirement. The Commission anticipates that, if adopted, the notification to the Commission and to clearing members will be drafted by a lawyer (and thus involve a cost/hour of $308) and will be an electronic notification. The current regulation requires procedures be in

place to notify the Commission, and the proposed regulation requires that the notification be sent to the Commission and to clearing members. The Commission anticipates that proposed §§ 39.39(b)(2), 39.39(k)(1), and 39.19(c)(4)(xxv) would increase the event-specific reporting burden estimate marginally.

Since notifications of this type are accomplished by electronic means, the existing procedure will have to be updated to include notice to the DCO's clearing members. Since this can be accomplished using methods and tools that the DCO currently uses to provide notices to members of, *e.g.*, changes in DCO rules or procedures, it is unlikely that the DCO will need to design and implement new tools.

While no DCO (and no CFTC-regulated clearinghouse prior to the amendments to the CEA that provided for regulation of DCOs) has ever initiated recovery, several have (due to a paucity of business) made the decision to wind-down operations. The Commission conservatively estimates that one notification (total) under § 39.19(c)(4)(xxv) would occur every four years.

The Commission's burden estimate for § 39.19(c)(4)(xxv) is as follows:

Estimated number of respondents: 1.

Estimated number of reports per respondent: 0.25.

Average number of hours per report: 1.

Estimated annual hours burden: 0.25

Estimated gross annual reporting burden: $125.

2. Requested Reporting—§ 39.19(c)(5)

The Commission is proposing to add a new requested reporting requirement for SIDCOs and Subpart C DCOs that submit information to the Commission pursuant to § 39.39(f)(2).

Proposed § 39.19(c)(5)(iii) would require a SIDCO or Subpart C DCO that submits information for resolution planning purposes to update the information upon request of the Commission. The Commission believes this is a new requested reporting requirement, which will be performed by lawyers at a cost of $499/hour. This proposed amendment, if adopted, would increase the existing annual burden for this clearance by an estimated 600 hours. The Commission's burden estimate for this new reporting requirement under § 39.39(c)(5) is as follows:

Estimated number of respondents: 6.

Estimated number of reports per respondent: 1

Average number of hours per report: 100

Estimated annual hours burden: 600.

Estimated gross annual reporting burden: $299,400.

These proposed information collection requirements would result in an incremental increase in the annual hours burden associated with OMB Clearance No. 3038-0076. The Commission estimates the proposed amendments, if adopted, would yield the following incremental totals:

Estimated number of annual responses for all respondents: 15.25.

Estimated total annual burden hours for all respondents: 4,920.25

Estimated gross annual reporting burden: $1,889,285.

Request for comment

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussion above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission will consider public comments on this proposed collection of information in:

(1) Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

(2) Evaluating the accuracy of the estimated burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;

(3) Enhancing the quality, utility, and clarity of the information proposed to be collected; and

(4) Minimizing the burden of the proposed information collection requirements on registered entities, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.*, permitting electronic submission of responses.

Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;
- (202)395-6566 (fax); or
- *OIRAsubmissions@omb.eop.gov* (email).

Please provide the Commission with a copy of submitted comments so that, if the Commission determined to promulgate a final rule, all comments can be summarized and addressed in the final rule preamble. Please refer to the **ADDRESSES** section of this rulemaking for instructions on submitting comments to the Commission. A copy of the

supporting statements for the collections of information discussed above may be obtained by vising RegInfo.gov. OMB is required to make a decision concerning the proposed information collection requirements between thirty (30) and sixty (60) days after the publication of the Notice of Proposed Rulemaking in the **Federal Register**. Therefore, a comment to OMB is best assured of receiving full consideration if OMB receives it within 30 calendar days of publication of this NPRM. Nothing in the foregoing affects the deadline enumerated above for public comments to the Commission on the proposed rules.

D. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.[204] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five specific considerations identified in section 15(a) of the CEA (collectively referred to as section 15(a) factors) addressed below.

The Commission recognizes that the proposed amendments may impose costs. The Commission has endeavored to assess the expected costs and benefits of the proposed amendments in quantitative terms, including PRA-related costs, where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the applicable proposed amendments in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of the proposed amendments, in that they will require DCOs to undertake analyses that are specific to

[204] Section 15(a) of the CEA, 7 U.S.C. 19(a).

the characteristics of each DCO, including the specifics of the DCO's business model, services and operations provided by the DCO to clearing members and other financial market participants, products cleared (and the DCO's role in the financial sector), services and operations provided by others that the DCO relies upon to provide its services and operations to others, infrastructure, and governance arrangements. Both the initial costs, and any initial and recurring compliance costs, will also depend on the size, existing infrastructure, practices, and cost structure of each DCO.

The Commission generally requests comment on all aspects of its cost-benefit considerations, including the identification and assessment of any costs and benefits not discussed herein; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualitatively describe the costs and benefits of the proposed amendments; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's discussion. The Commission welcomes comment on such costs, particularly from existing SIDCOs and Subpart C DCOs that can provide quantitative cost data based on their respective experiences. Commenters may also suggest other alternatives to the proposed approach.

2. Baseline

The baseline for the Commission's consideration of the costs and benefits of this proposed rulemaking are: (1) the DCO Core Principles set forth in section 5b(c)(2) of the CEA; (2) the Commission's regulations in Subpart C of part 39, which establish additional standards for compliance with the core principles for those DCOs that are designated as SIDCOs or have elected to opt-in to the Subpart C requirements in order to achieve status as a QCCP; and (3) subpart C Election Form in appendix B to part 39.

Some of the proposed revisions and amendments to § 39.39 would codify staff guidance and international standards. To the extent that market participants have relied upon the staff guidance that is proposed to be codified, the actual costs and benefits of the proposed rules, as discussed in this section of the proposal, may not be as significant. Additionally, the proposed changes to § 39.39 would not apply to all fifteen DCOs currently registered with the Commission. Rather, the proposed amendments to § 39.39 apply to SIDCOs and Subpart C DCOs. There are currently two SIDCOs,[205] and four Subpart C DCOs.[206] All SIDCOs and Subpart C DCOs have recovery plans and orderly wind-down plans on file with the Commission which may generally be consistent with the staff guidance issued in CFTC Letter No. 16-61 and current § 39.39(b). Additionally, the SIDCOs have already provided information related to resolution planning which may fulfill requests for information under current § 39.39(c)(2), which is proposed to be revised as § 39.39(f).

As discussed further below, the Commission is proposing to require that DCOs that are neither SIDCOs nor electors into Subpart C to develop and maintain plans for orderly wind-down. This would be a new requirement. However, of the nine such DCOs that are currently registered, five are based in jurisdictions that implement regulatory requirements that are consistent with the PFMI.[207] These include standards that require both recovery and orderly wind-down plans. Accordingly, to the extent that these five DCOs have already designed and

[205] CME and ICC.

[206] ICE Clear US, Inc.; Minneapolis Grain Exchange, LLC; Nodal Clear, LLC; and OCC.

[207] These are ICE NGX Canada, Inc. (Canada), LCH SA (France), Eurex Clearing AG (Germany), as well as ICE Clear Europe and LCH Ltd (United Kingdom). Each of these jurisdictions has reported that they have fully implemented the standards in the PFMI. *See* https://www.bis.org/cpmi/level1_status_report.htm.

maintain plans for orderly wind-down that are consistent with the proposed rules, the actual costs and benefits of the proposed rules, as discussed in this section of the proposal, may be reduced.[208] These standards will be new, however, for the remaining four non-Subpart C DCOs (and for any new DCOs that are similarly situated).[209]

The Commission's analysis below compares the proposed amendments to the regulations in effect today; however, it then takes into account current industry practices that may mitigate some of the costs and benefits set out in each section. The Commission seeks comment on all aspects of the baseline.

3. Recovery plan and Orderly Wind-down Plan – § 39.39(b)

The Commission is clarifying that each SIDCO and Subpart C DCO must submit its recovery plan and orderly wind-down plan to the Commission consistent with existing § 39.19(c)(4)(xxiv). The Commission is further proposing in § 39.39(b)(2) to require that a SIDCO or Subpart C DCO notify the Commission and clearing members when the recovery plan is initiated or orderly wind-down is pending, and to add a corresponding event-specific reporting requirement in § 39.19(c)(4)(xxv). Proposed § 39.39(b)(3) would also establish that a SIDCO must file its recovery plan and (to the extent it has not already filed one) orderly wind-down plan within six months of designation as a SIDCO, and a DCO electing to be subject to Subpart C of the Commission's regulations must file its recovery plan and (to the extent it has not already filed one) orderly wind-down plan on the effective date of its election.

[208] To the extent foreign CCPs are subject to home jurisdiction regulation with different requirements for the subjects and analyses that must be included in their orderly wind-down plans, the Commission welcomes comments describing those requirements, and including suggestions on how to achieve the goals of this regulation in a manner that appropriately addresses possible inefficiencies.

[209] CBOE Clear Digital, LLC, CX Clearinghouse, L.P., LedgerX LLC, and North American Derivatives Exchange, Inc.

i. Benefits

Proposed § 39.39(b)(1) explicitly requires that a SIDCO and a Subpart C DCO must have plans for recovery and orderly wind-down, and that these plans must each cover both default losses and non-default losses. This has the benefit of enhancing the resilience of these DCOs, and reducing the risk that they pose to clearing members and other financial market participants (and, in some cases, to the financial system), by requiring these plans to cover the full range of risks.

Proposed § 39.39(b)(2) requires that SIDCOs and Subpart C DCOs have procedures to notify the Commission and clearing members that recovery is initiated or orderly wind-down is pending as soon as practicable, and that such notice is provided to the Commission and clearing members. The requirement to notify the Commission is not a new requirement, and the requirement to notify clearing members, which was explicit in the staff guidance, will aid clearing members in protecting their interests.

Finally, establishing a date for the filing of recovery plans and orderly wind-down plans in proposed § 39.39(b)(3),[210] is responsive to commenters' requests made over time for date certainty, and that choosing six months as that certain date takes into account both resilience and practicality. Requiring that a newly-designated SIDCO submit its plans no later than six months after designation and that a DCO submit its plans at the time of making the election to become subject to Subpart C (if it has not already done so) fosters the objectives of promoting resiliency and prepares SIDCOs and Subpart C DCOs to meet the challenges of recovery or orderly wind-down in the event that they are necessary. Further, allowing newly designated SIDCOs six

[210] With respect to orderly wind-down plans, the Commission notes that this requirement would be applicable only to the extent the DCO does not have an orderly wind-down plan on file at the Commission.

months to submit their plans should provide enough time to develop the plans. The Commission believes that these regulations will benefit registrants and market participants.

ii. Costs

The current regulations require a SIDCO or Subpart C DCO to maintain viable plans for recovery and orderly wind-down, and to submit such plans to the Commission. DCOs already have systems in place to notify clearing members when specific actions are taken, and the Commission believes that these existing systems can be used to notify clearing members when the recovery plan is initiated or orderly wind-down is pending. Thus, the costs involved would be the effort involved in preparing to use these existing systems to notify clearing members when the recovery plan is initiated or orderly wind-down is pending (including testing), and, if and when necessary, using them to make such notifications. Moreover, it does not appear that establishing the specified periods for filing the will cause additional costs above those involved in developing the recovery and orderly wind-down plans.

iii. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits in light of the specific considerations identified in section 15(a) of the CEA. In consideration of sections 15(a)(2)(A), (B), (D), and (E) of the CEA, the proposed amendments will protect market participants, enhance the financial integrity of futures markets, reflect sound risk management practices, and enhance the public interest, by ensuring that the Commission and clearing members are notified when the recovery plan is initiated or orderly wind-down is pending, thereby aiding the Commission in taking action to protect markets and the broader financial system, and enabling clearing members to protect their own interests.

Section 15(a)(2)(C), price discovery, is not implicated by the proposed amendments.

4. Recovery Plan and Orderly Wind-down Plan: Required Elements – § 39.39(c)

Proposed § 39.39(c) would establish the required content of a SIDCO's or Subpart C DCO's recovery plan and orderly wind-down plan consistent with the guidance set forth in CFTC Letter No. 16-61. Proposed §§ 39.39(c)(1)-(8) would require that each plan's description include the identification and description of the critical operations and services the DCO provides to clearing members and other financial market participants, the service providers the DCO relies upon to provide these critical operations and services, interconnections and interdependencies, resilient staffing arrangements, obstacles to success of the plan, stress scenario analyses, potential triggers for recovery and orderly wind-down, available recovery and orderly wind-down tools, analyses of the effect of the tools on each scenario, lists of agreements to be maintained during recovery and orderly wind-down, and governance arrangements.

i. Benefits

Current § 39.39 does not provide explicit regulations governing the required elements of a SIDCO's or Subpart C DCO's recovery plan and orderly wind-down plan. At the time the 2013 rule was promulgated, the international standards and guidance covering such elements (with which a SIDCO and Subpart C DCO must comply) were consultative and not finalized. CFTC Letter No. 16-61 provided SIDCOs and Subpart C DCOs with comprehensive guidance related to the elements of acceptable recovery plans and orderly wind-down plans. 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.

Codifying the guidance set out in CFTC Letter No. 16-61, and enhancing the set of elements discussed in that guidance through proposed §§ 39.39(c)(1)-(8) should benefit market participants, including both DCOs and their members, by establishing specific regulatory requirements for well-designed and effective recovery and orderly wind-down plans. The requirements of proposed §§ 39.39(c)(1)-(8) should contribute to DCOs achieving a better *ex ante* understanding of, the critical services and operations that it provides clearing members and other financial market participants, the services and operations provided by others (including internal staff) upon which it depends to provide those services and operations (and contractual arrangements with such others that might be altered or terminated as a result of the circumstances that lead to the need for recovery or orderly wind-down), the scenarios that might lead to recovery or orderly wind-down, of the challenges a DCO would face in a recovery or wind-down scenario, the tools that the DCO would rely upon to meet those challenges, and the challenges and complexities in using those tools, and the DCO's governance arrangements for recovery and orderly wind-down. This understanding will be significantly enhanced if the DCO engages in annual testing of its plans, and modifies those plans in light of the results of such testing.

Thus, the DCOs, clearing members, and other financial market participants will benefit through the DCO being better prepared to meet those challenges successfully (and thus 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).

Including these explicit and specific requirements for recovery plans and orderly wind-down plans should significantly enhance the DCO's ability to implement its recovery plan (or, if necessary, orderly wind-down plan) promptly and effectively. Additionally, the information will better enable a newly designated SIDCO, or a DCO that is electing subpart C status, to understand the requirements for well-developed and effective plans, and to consider relevant issues including the tools it intends to activate, its process for monitoring for triggers, the sequencing of tools, impediments to the timely or successful use of its tools, its governance arrangements, internal and external approval processes, and whether contractual agreements will continue during recovery and orderly wind-down; moreover, it will have a plan in place to handle exigencies in a manner that mitigates the risk of financial instability or contagion.

ii. Costs

The specific requirements for a recovery plan's and orderly wind-down plan's description, analysis, and testing set forth in this regulation will require substantial time to be spent on analytical effort by DCO staff, including attorneys, compliance staff, and other subject matter experts. DCO staff will spend time to review existing plans and supporting arrangements, compare them to the proposed rules (to the extent that they are ultimately adopted), and make modifications or additions to those plans, in light of, *inter alia*, the specifics of each DCO's business model, services and operations provided by the DCO to clearing members and other financial market participants, products cleared (and the DCO's role in the financial sector), services and operations provided by others that the DCO relies upon to provide its services and operations to others, infrastructure, and governance arrangements. The revised plans will then need to be reviewed, first by senior management and then by the board of directors, at the cost of

the time of those persons, and potentially further amended in light of the results of such reviews (resulting in the further expenditure of time).

All of these DCOs will need to incur the cost of staff time to undertake additional analysis to (a) ensure that their recovery and orderly wind-down plans meet those portions of the proposed requirements that represent codification of staff guidance, and (b) meet those portions of the proposed requirements that represent enhancements to the staff guidance (this includes enhancements resulting from changes to definitions, *e.g.*, calling for considerations of non-default losses due to the actions of malicious actors, including internal, external, and nation-states).

This additional analysis includes developing an overview of each plan and describing how the plan will be implemented, ensuring that each plan identifies and describes (i) the critical operations and services that the DCO provides to clearing members and other financial market participants, (ii) the service providers upon which the DCO relies to provide these operations and services, (iii) plans for resilient staffing arrangements for continuity of operations, (iv) obstacles to success of the plans, (v) plans to address the risks associated with the failure of each critical operation and service, (vi) how the DCO will ensure that the identified operations and services continue thorough recovery and orderly wind-down.

Further, the DCO will need to ensure that the analysis of scenarios for its recovery plan includes each of the scenarios specified in § 39.39(c)(2)(ii)(A-K), or that the analysis documents why such scenario is not possible in light of the DCO's structure and activities, and that, for each possible scenario, the analysis includes the elements specified in § 39.39(c)(2)(i)(A-F). The DCO will need to ensure that the analysis establishes triggers for recovery or consideration of orderly wind-down, and the information-sharing and governance process within senior

management and board of directors. The DCO will also need to ensure that the plans describe the tools that it would use to meet the full scope of financial deficits that the DCO might need to remediate, and, for each set of tools, provides the additional analysis described in § 39.39(c)(4)(ii-ix) (for the recovery plan) and § 39.39(c)(5)(iii-x) (for the orderly wind-down plan).

Additionally, the DCO will need to ensure that its plans include determinations of which of the contracts, etc. associated with the provision of its services as a DCO are subject to alteration or termination as a result of the implementation of recovery or orderly wind-down, and the actions that the DCO has taken to ensure that its critical operations and services will continue during recovery and orderly wind-down despite such alteration or termination. The DCO will also need to ensure that the plans are formally approved, and annually reviewed, by the board of directors, describe effective governance structures and processes to guide discretionary decision-making relevant to each plan, and describe the DCO's process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the DCO.

Moreover, the DCO will need to ensure that its plans include procedures for testing their viability, including the DCO's ability to implement the tools that each plan relies upon. This also includes the types of testing to be performed, to whom the results are reported, and procedures for updating the plans in light of the findings resulting from such tests. The tests need to include the participation of clearing members, where the plans rely upon their participation. The tests must be repeated following any material change to the recovery plan or orderly wind-down plan, but in any event not less than once annually.

If the foregoing recovery or orderly wind-down planning identifies vulnerabilities that need to be improved upon, the DCO will incur the cost of remediating such vulnerabilities.

As noted earlier in this section, plans revised in light of the foregoing analysis will then need to be reviewed, first by senior management and then by the board of directors, at the cost of the time of those persons, and potentially further amended in light of the results of such reviews (resulting in the further expenditure of time).

It is impracticable to quantify these costs, because they depend on the specific design and other circumstances of each DCO. including the specific services and operations that the DCO provides to clearing members and other financial participants, the services and operations provided by others that the DCO relies upon to provide those services, the contractual arrangements between and those service providers, and the DCO's current recovery and orderly wind-down plans., It seems likely that these requirements will require hundreds of hours of the effort of skilled professionals, at a cost of tens of (perhaps more than a hundred) thousands of dollars.

For DCOs that are currently SIDCOs or Subpart C DCOs, or other DCOs that may currently maintain recovery and orderly wind-down plans, the amount of time required for each DCO to initially amend its recovery plan and orderly wind-down plan may vary depending on the extent to which the DCO already addressed the foregoing requirements in its existing plans. The analysis and plan preparation that a SIDCO or Subpart C DCO will undertake to comply with this regulation, including designing and implementing changes to existing plans, was, to a significant extent, established in the 2016 staff guidance, and, based on staff's experience, SIDCOs and Subpart C DCOs generally already follow those standards. To that extent, for these DCOs, those costs may be reduced.

The Commission requests comment from existing SIDCOs and Subpart C DCOs concerning their estimates of the time, and corresponding costs, they would expect to incur in

ensuring that their existing plans meet the requirements of the proposed rule, along with supporting data concerning the amount of effort expended on preparing existing plans, and the extent to which additional time may need to be spent to conform such plans to the proposed rules. The Commission also seeks comment from the public more generally as to estimates, along with supporting data, of the time, and corresponding costs that might be incurred in developing recovery and orderly wind-down plans that meet those requirements.

Additionally, to what extent are existing SIDCOs and Subpart C DCOs following the staff guidance in CFTC Letter No. 16-61? What is the impact of current practice among existing SIDCOs and Subpart C DCOs with respect to that staff guidance on the costs and benefits that would result from implementation of the proposed rules?

iii. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits in light of the section 15(a) factors. In consideration of sections 15(a)(2)(A), (B), (D), and (E) of the CEA, the Commission believes the proposed amendments to §§ 39.39(c)(1)-(8) would enhance existing protection of market participants and the public and the financial integrity of futures markets, and the regulations should aid in sound risk management practices by ensuring that the DCO considers in advance the impact that recovery and orderly wind-down would have on its operations and customers. Moreover, specifying the contents of the plans in the regulation should increase the possibility that a DCO could continue to provide the critical services and operations upon which its clearing members and other financial market participants depend, and reduce the possibility that a DCO would fail in a disorganized fashion. The proposed rule should reduce the likelihood of a DCO's failure to meet its obligations to its members, thereby enhancing protection for a DCO's members and their customers, and should help to avoid the

systemic effects of a DCO failure. Having the requisite plans in place, moreover, should allow DCOs to handle exigencies in a manner that mitigates the risk of financial instability or contagion. These benefits favor the public interest. Section 15(a)(2)(C), price discovery, does not appear to be implicated by the proposed amendments.

5. Information for Resolution Planning – § 39.39(f)

The Commission is proposing in § 39.39(f) to require that a SIDCO and Subpart C DCO maintain information systems and controls to provide data and information necessary for the purposes of resolution planning to the Commission, and upon request provide such data and information to the Commission, electronically, in the form and manner specified by the Commission. Proposed §§ 39.39(f)(1)-(7) describes the types of information deemed pertinent to planning for resolution of a SIDCO or Subpart C DCO under Title II of the Dodd-Frank Act. Much of this information may already be provided to the Commission, and thus may not be requested. The proposed regulation expands on current § 39.39(c)(2) and lists explicitly the types of information that SIDCOs and Subpart C DCOs may be required to provide upon request because they are relevant to resolution planning, but which may not ordinarily be required to be provided under other sections of part 39.

i. Benefits

Proposed §§ 39.39(f)(1)-(7) describes the types of information that the Commission proposes to require for resolution planning under Title II of the Dodd-Frank Act. Thorough preparation *ex ante* is crucial for successfully managing matters relating to the resolution of a SIDCO or Subpart C DCO, as well as for establishing market confidence and the confidence of foreign counterparts to the Commission and to the United States agencies responsible for resolution of a SIDCO or Subpart C DCO. Because of the nature of principles-based regulation,

there is some information in the possession of the DCO that, while important for resolution planning purposes, may not ordinarily be reported to the Commission and may not be publicly available. Thus, the primary benefit from this regulation is that the type of information to be requested will be available to the DCO, and upon request, the Commission may obtain the information in order to assist the Commission in planning and preparing for the resolution of a distressed DCO. There is also considerable public benefit in enhancing preparedness for resolution by making available to FDIC, as the resolution authority, information relevant to planning for the resolution of a SIDCO or Subpart C DCO.

ii. Costs

The proposal assumes that there is information relevant to resolution planning that is not ordinarily reported to the Commission under § 39.19, but which is in the possession of the DCO. As such, SIDCOs and Subpart C DCOs will face certain incremental costs (from gathering the information, reviewing it for accuracy, and transmitting it to the Commission) to produce this information upon request as required by proposed §§ 39.39(f)(1)-(7). Gathering the information and transmitting it would likely be accomplished by paraprofessionals, while review may require the work of paraprofessionals or professionals. The time that would be required to accomplish these tasks would depend on the information requested and the DCO's information system architecture. A crude estimate of the time required might be 10-20 hours, at a cost of $1,000-$3,000, once or twice a year for a SIDCO, and once every five years for a Subpart C DCO.

To the extent that some of this information requires analyses by the DCO that are not currently conducted, such incremental costs may be more significant. Here, the DCO would need to develop tools to analyze its information (which may involve new uses for existing tools, or may in some cases require the development of new tools), gather the underlying data, use the

tools, review the results, and then transmit those results to the Commission. This may also involve effort in working with Commission staff to clarify and/or to sharpen the request. While some of this effort might be accomplished by paraprofessionals, the proportion that would need the effort of professionals would likely be greater than in the previous paragraph. A crude estimate of the time required might be 30-60 hours, at a cost of $5,000-$10,000, once a year for a SIDCO, and once every ten years for a Subpart C DCO.

It should be noted that the Commission does not anticipate asking Subpart C DCOs for information for resolution planning in the near term. This is because, even in the highly unlikely event that a Subpart C DCO would enter recovery, and that such recovery would fail, the likelihood of such a DCO qualifying for resolution under Title II is fairly low.

The Commission seeks comments, in particular from SIDCOs and Subpart C DCOs, on the accuracy of these estimates (with respect to both time required and cost), and on how they may be improved. In particular, SIDCOs that have responded to similar requests in the past are invited to discuss the costs that they incurred in doing so (both in building tools where necessary and in gathering and reviewing the information), and to provide insight into expected costs to do so in the future

iii. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits in light of the specified considerations identified in section 15(a) of the CEA. In consideration of sections 15(a)(2)(A), (B), (D), and (E) of the CEA, the Commission preliminarily believes that proposed §§ 39.39(f)(1)-(7) would protect market participants and the public, and support the financial integrity of futures markets, by enhancing preparation for resolution of DCO in advance of systemic failure, and thus increasing the likelihood that resolution would be successful.

Furthermore, advance planning may identify issues that should and can be corrected in advance of market failure, thereby providing an opportunity to improve DCO risk management practices and further enhance the protection of market participants and the public, and the financial integrity of the derivatives markets. Finally, there is a strong public interest in holding CFTC-registered SIDCOs and Subpart C DCOs to regulations that incorporate international standards and guidance. Section 15(a)(2)(C), price discovery, does not appear to be implicated by this proposal.

6. Requested reporting – § 39.19(c)(5)(iii)

Proposed §§ 39.39(f)(1)-(7) requires a corresponding amendment to § 39.19(c)(5) regarding requested reporting. Proposed § 39.19(c)(5)(iii) would require that a SIDCO or Subpart C DCO that submits information related to resolution planning to the Commission pursuant to §§ 39.39(f)(1)-(7), shall update the information upon request.

i. Benefits

The Commission is proposing an additional requirement to clarify that the information for resolution planning requested under proposed § 39.39(f) would be updated upon request. By requesting (and then providing to the FDIC) current, accurate, and pertinent information for resolution planning, the Commission may be able to assist in resolution planning more effectively. The financial system benefits as a whole when the FDIC can obtain, with the aid of the Commission, current, accurate, and pertinent information for resolution planning related to a SIDCO's or Subpart C DCO's structure and activities (§ 39.39(f)(1)), clearing members (§ 39.39(f)(2)), arrangements with other DCOs (§ 39.39(f)(3)), financial schedules and supporting details (§ 39.39(f)(4)), interconnections and interdependencies with internal and external service

providers (§ 39.39(f)(5)), information concerning critical personnel (§ 39.39(f)(6)), and other necessary information (§ 39.39(f)(7)).

ii. Costs

The Commission anticipates that proposed § 39.19(c)(5) would add incremental costs to the business-as-usual activities of the DCOs. For information that is regularly maintained by the DCO, this would involve repeating the efforts described above in Section VIII.D.5(ii) of gathering, reviewing, and transmitting the information. For information that requires analyses that are not currently conducted by the DCO, the corresponding efforts described above in Section VIII.D.5(ii) would be called for, but some may be reduced or eliminated: the DCO would once again need to gather the information, but would presumably be able to use the tools that it repurposed (or newly developed) when it responded to the information request for the first time. Moreover, there may not be a need to clarify or sharpen the request, to the extent that the request is identical (except for time-period) to the first request. The DCO would still need to review the results, and transmit them to the Commission.

iii. Section 15(a) factors

In addition to the discussion above, the Commission has evaluated the costs and benefits in light of the specified considerations identified in section 15(a) of the CEA. In consideration of sections 15(a)(2)(A), (B), (D), and (E) of the CEA, the Commission believes that §§ 39.39(f)(1)-(7) protects market participants and the public, and promotes the financial integrity of futures markets, by ensuring that resolution plans are based on current, accurate, and pertinent information. Further, planning for resolution is a pillar of sound risk management principles, and supports the public interest. Section 15(a)(2)(C), price discovery, does not appear to be implicated by this proposal.

7. Viable Plans for Orderly Wind-Down for DCOs that are Neither SIDCOs Nor Subpart C DCOs – § 39.13(k)

Proposed § 39.19(k)(1)(a) would require that DCOs that are neither SIDCOs nor Subpart C DCOs maintain and submit to the Commission viable plans for orderly wind down necessitated by default losses and non-default losses. As discussed above, proposed §§ 39.19(k)(2)-(6) would enumerate the information required to be incorporated in an orderly wind-down plan.

i. Benefits

Requiring DCOs that are neither SIDCOs nor Subpart C DCOs to maintain viable plans for orderly wind-down should contribute to a better *ex ante* understanding by such DCOs of the critical services and operations that clearing members and other financial market participants depend upon them to provide, and of the challenges the DCO would face in doing so. DCOs will benefit through better preparation to meet those challenges; moreover, by enumerating certain subjects, analyses, and testing that all DCOs must include in their orderly wind-down plans, a DCO's ability to wind-down promptly and in an orderly manner during any exigency should be significantly enhanced. To the extent that this analysis identifies vulnerabilities, the DCO will have the opportunity to remediate them.[211]

Importantly, an orderly and expeditious wind-down will help mitigate the damage to the DCO's participants (and their customers, if any) by facilitating either the continuation of the DCO's services (potentially through another DCO) or the prompt return of their participants' collateral.

[211] To the extent that a foreign-based DCO already maintains an orderly wind-down plan, pursuant to the regulations of its home-country regulator, that meets the standards set in the proposed regulation, these benefits would be reduced or eliminated.

ii. Costs

The Commission anticipates that some DCOs may bear a significant cost burden, as described further below, due to the proposed regulation, because of the various analyses and testing these DCOs would be required to conduct.

The specific requirements for an orderly wind-down plan's description, analysis, and testing set forth in this regulation will require substantial time to be spent on analytical effort by DCO staff, including attorneys, compliance staff, and other subject matter experts. DCO staff will need to draft plans and supporting arrangements that meet the standards set in the proposed rules (to the extent that they are ultimately adopted) in light of, *inter alia*, the specifics of each DCO's business model, services and operations provided by the DCO to clearing members and other financial market participants, products cleared (and the DCO's role in the financial sector), services and operations provided by others that the DCO relies upon to provide its services and operations to others, infrastructure, and governance arrangements. The plans will then need to be reviewed, first by senior management and then by the board of directors, at the cost of the time of those persons, and potentially further amended in light of the results of such reviews (resulting in the further expenditure of time).

These analyses include developing an overview of the orderly wind-down plan and describing how the plan will be implemented, ensuring that the orderly wind-down plan identifies and describes (i) the critical operations and services that the DCO provides to clearing members and other financial market participants, (ii) the service providers upon which the DCO relies to provide these operations and services, (iii) plans for resilient staffing arrangements for continuity of operation, (iv) obstacles to success of the plan, (v) plans to address the risks

associated with the failure of each critical operation and service, (vi) how the DCO will ensure that the identified operations and services continue thorough orderly wind-down.

Further, the DCO will need to ensure that the analysis of scenarios for its orderly wind-down plan identifies scenarios that may prevent the DCO from meeting its obligations or providing critical operations and services as a going concern. The DCO will need to ensure that the analysis establishes triggers for consideration of orderly wind-down, and the information-sharing and governance process within senior management and board of directors. The DCO will also need to ensure that the plan describes the tools that it would use in an orderly wind-down that comprehensively address how the DCO would continue to provide critical services, the governance and approval processes and arrangements that will guide the exercise of any available discretion, the steps necessary to implement each tool, the roles and responsibilities of all parties in the use of each tool, an assessment of the likelihood that the tools, individually and taken together, would result in an orderly wind-down, and an assessment of the risks to non-defaulting clearing members and their customers, and linked financial market infrastructures.

Additionally, the DCO will need to ensure that its plan includes determinations of which of the contracts, etc. associated with the provision of its services as a DCO are subject to alteration or termination as a result of the implementation of the orderly wind-down plan, and the actions that the DCO has taken to ensure that its critical operations and services will continue during orderly wind-down despite such alteration or termination. The DCO will also need to ensure that the plans are formally approved, and annually reviewed, by the board of directors, describe effective governance structures and processes to guide discretionary decision-making relevant to the plan, and describe the DCO's process for identifying and managing the diversity of stakeholder views and any conflict of interest between stakeholders and the DCO.

Moreover, the DCO will need to ensure that its plan includes procedures for testing the DCO's ability to implement the tools that the orderly wind-down plan relies upon. This also includes describing the types of testing to be performed, to whom the results are reported, and procedures for updating the plans in light of the findings resulting from such tests. The tests must be repeated following any material change to the orderly wind-down plan, but in any event not less than once annually.

If the foregoing wind-down planning identifies vulnerabilities that need to be improved upon, the DCO will incur the cost of remediating such vulnerabilities.

As noted earlier in this section, plans revised in light of the foregoing analysis will then need to be reviewed, first by senior management and then by the board of directors, at the cost of the time of those persons, and potentially further amended in light of the results of such reviews

While it is impracticable to quantify these costs, because they depend on the specific design and other circumstances of each DCO. it seems likely that these requirements will require less effort than the corresponding requirements for both recovery plans and orderly wind-down plans for SIDCOs and Subpart C DCOs, because these DCOs are required only to prepare, and meet the standards for, an orderly wind-down plan. Moreover, in many cases, the business structure and operations of these DCOs may be less complex than those of SIDCOs or Subpart C DCOs. Nonetheless, the Commission estimates that an orderly wind-down plan will require hundreds of hours of the effort of skilled professionals, at a cost of tens of thousands of dollars.

For those DCOs that are based in jurisdictions that, pursuant to a legal framework that is consistent with the PFMI, already require them to maintain orderly wind-down plans, the cost should be substantially less, as the requirements for orderly wind-down plans are likely to be comparable to the requirements applicable in those other jurisdictions (and thus these DCOs

would, for the most part, be able to rely upon their existing plans).[212] For other DCOs that are not required to have orderly wind-down plans pursuant to regulations of either the CFTC or other regulators, these costs would be larger while the orderly wind-down plans are first being developed, although there will be additional (albeit reduced) costs in reviewing, testing, and updating these plans on an ongoing basis. The initial costs may be mitigated to the extent that such DCOs may already have some form of a wind-down plan in place as part of their general risk management strategy. Additionally, DCOs may already have performed some of the proposed analyses as part of their existing regulatory compliance programs.

iii. Section 15(a) Factors

In addition to the discussion above, the Commission has evaluated the costs and benefits in light of the specific considerations identified in section 15(a) of the CEA. In consideration of section 15(a)(2)(A) of the CEA, the Commission believes that the proposed regulations should protect market participants and the public. At the outset, a viable plan for orderly wind down reduces uncertainty in times of market stress, since its existence enhances legal certainty for the DCO's clearing members and market participants, and increases the likelihood of an orderly and expeditious wind-down that will mitigate the harm to their interests from the closing of the DCO. Further, a viable plan for orderly wind-down should increase market confidence, because clearing members and their customers would know beforehand that the DCO is well prepared to undertake an orderly wind-down, if necessary. Importantly, the proposed regulations should enhance protection for a DCO's members and their customers by reducing the likelihood that a

[212] To the extent that this assumption is incorrect, and the proposal would require foreign-based DCOs to comply with overly burdensome additional requirements, the Commission seeks comments that set forth inconsistencies between the proposed requirements and the requirements in the relevant foreign jurisdictions, and recommendations as to how those inconsistencies can and should be mitigated through amendments to the proposed requirements.

DCO would fail to meet certain obligations to its members and other market participants in orderly wind-down.

In consideration of section 15(a)(2)(B) of the CEA, with respect to the efficiency, competitiveness, and financial integrity of markets, plans for orderly wind-down (and for determining when orderly wind-down might be necessary) would enhance financial integrity of markets, by enhancing the likelihood that any wind-down would be orderly, and the existence of these standards might enhance market participants confidence in (and thus the competitiveness of) DCOs.

In consideration of section 15(a)(2)(D) of the CEA, the proposed regulations would aid in sound risk management practices. The 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. Wind-down planning—including, for example, considering the circumstances that may trigger an orderly wind-down, the tools the DCO would implement to help ensure an orderly wind-down (along with the likely effects on clearing members and the financial markets from implementing such tools), and the governance arrangements to guide decision-making during a wind-down—also would strengthen the risk management practices of the DCO by, among other things, identifying vulnerabilities that can be mitigated and preparing for multiple exigencies. Having an orderly wind-down plan in place, moreover, should allow the DCO to handle exigencies in a manner that mitigates the risk of financial instability or contagion. Moreover, in consideration of section 15(a)(2)(E), having an orderly wind-down plan in place would promote the public interest. However, section 15(a)(2)(C), price discovery, is not implicated by the proposed amendments.

8. Notification Requirement for DCOs that are Neither SIDCOs Nor Subpart C DCOs of Pending Orderly Wind-down – §§ 39.19(k)(1)(b) and 39.19(c)(4)(xxv)

The Commission is proposing in new § 39.19(k)(1)(b) that DCOs that are neither SIDCOs nor Subpart C DCOs have procedures in place for informing the Commission and clearing members, as soon as practicable, when orderly wind-down is pending, consistent with the requirements of proposed new paragraph § 39.19(c)(4)(xxv).[213]

i. Benefit

A DCO should notify the Commission as soon as practicable of a pending orderly wind-down so that the Commission may promptly take appropriate steps to monitor the wind-down process, and to protect the interests of clearing members and other market participants. Likewise, a DCO should notify its clearing members as soon as practicable as well, so that they may promptly take steps to protect themselves (including, *e.g.*, by seeking to replace hedge positions). Such information-sharing fosters market transparency, which can serve to increase confidence and enhance market participants' abilities to protect their own interests.

ii. Costs

DCOs should already have tools and procedures in place for notifying the Commission and clearing members of other circumstances or events triggering notification; Thus, the only costs involved would be the effort involved in preparing to use these existing tools and procedures to notify the Commission and clearing members when orderly wind-down is pending (including testing), and, if and when necessary, using them to make such notifications.

[213] Proposed new § 39.19(c)(4)(xxv) would provide that each DCO shall notify the Commission and clearing members as soon as practicable when, among other things, orderly wind-down is pending.

iii. Section 15(a) Factors

The proposed regulations should protect market participants and the public under section 15(a)(2)(A) of the CEA, enhance efficiency, competitiveness, and financial integrity of futures markets under section 15(a)(2)(B) of the CEA, aid in sound risk management practices under section 15(a)(2)(D) of the CEA, and promote the public interest under section 15(a)(2)(E) of the CEA. Clearing members and their customers cannot accurately evaluate the risks and costs associated with using a DCO's services if they do not have sufficient information, including when the DCO is no longer a going concern. A requirement that clearing members be notified as soon as practicable of a pending winding-down also allows market participants time to take action to protect their own interests. Likewise, market participants can use a DCO's services with the confidence that the DCO will not delay in notifying them of a pending orderly wind-down, which should enhance competitiveness. The requirement also reduces risk by providing DCO's stakeholders sufficient notice to help ensure an orderly wind-down. However, section 15(a)(2)(C), price discovery, is not implicated by the proposed amendments.

9. Timing for DCOs' Submission of Recovery and Orderly Wind-Down Plans – § 39.19(c)(4)(xxiv)

Proposed § 39.19(c)(4)(xxiv) would continue to require that a DCO that is required to maintain recovery and orderly wind-down plans pursuant to § 39.39(b) shall submit its plans to the Commission no later than the date the DCO is required to have the plans. It would add an explicit requirement that those plans be accompanied by supporting information, and would newly require that a DCO that is required to maintain orderly wind-down plans pursuant to § 39.13(k) shall submit its plans and supporting information at the time it files its application for

registration under § 39.3.[214] The Commission is proposing a deadline of six months from the effective date of the rule (if adopted) for those DCOs currently registered with the Commission to complete and submit the orderly wind-down plans and supporting information. Moreover, this proposed rule would continue to require that a SIDCO or Subpart C DCO, upon revising the plan(s), submit the current (formerly, "revised") plan(s) to the Commission, along with a description of any changes and the reason(s) for such changes. This requirement would be new for other DCOs. The proposal would add requirements that the plans, including any supporting information, must be submitted at least annually.

i. Benefits

DCOs seeking registration with the Commission will promptly have orderly wind-down plans and supporting information available upon registration. Clearing members and potential customers, moreover, will immediately benefit from orderly wind-down planning that has already taken place. For those DCOs currently registered with the Commission, the Commission believes six months is sufficient with respect to both the time and resources necessary for orderly wind-down planning, and takes into account the need to prepare promptly viable plans for orderly wind-down, given that a disorderly wind-down poses risks to clearing members and other financial market participants, and potentially, in some cases, risk to the financial system, especially in turbulent and uncertain market environments

Requiring that current plans be submitted at least annually would help to ensure that the plans available to the Commission for review remain reasonably current (given the possibility

[214] As previously noted, for any DCO that submits (or has submitted) an application for registration with the Commission before the date that is six months after the effective date of this rulemaking, if it is adopted, the Commission is proposing to require that the DCO have until the date that is six months after the effective date of this rulemaking to submit its orderly wind-down plans.

that some minor changes or updates to the plans may be considered as not meeting the threshold of "revisions"), thereby aiding the Commission's exercise of its supervisory responsibilities both in its ongoing risk-based examination program and in case of financial distress at the DCO.

As discussed above in Section IV, DCOs may, in some instances, include supporting information within their plans, or may organize the documentation with supporting information kept separately, *e.g.*, as an appendix or annex. Adding the term "and supporting information" would have the benefit of ensuring that the Commission has timely access to such supporting information.

ii. Costs

The Commission anticipates that the costs for DCOs to submit the viable plans for orderly wind-down that they are otherwise required to maintain would be limited to the cost of transmission using DCOs' already established systems and procedures to submit documents to the Commission. Similarly, re-submitting current plans with supporting information should involve only the costs of gathering that information together and transmitting it, as the information must be at hand in order to plan adequately. As discussed above, some DCOs will already have orderly wind-down plans in place; others may already have considered at least some of the subjects and analyses as part of their efforts to comply with the DCO Core Principles.

iii. Section 15(a) Factors

For the same reasons as previously noted above, the Commission believes the proposed regulations would protect market participants and the public under section 15(a)(2)(A) of the CEA, enhance competitiveness of futures markets under section 15(a)(2)(B) of the CEA, and aid in sound risk management practices under section 15(a)(2)(D) of the CEA. Ensuring the prompt

availability of viable plans for orderly wind down would reduce uncertainty in times of market stress, increase market confidence, and provide assurance to market participants and the public that DCOs are meeting minimum risk standards. Likewise, orderly wind-down plans enhance protection for a DCO's members and their customers. Having viable plans for orderly wind-down already in place additionally provides greater clarity and transparency before wind-down, assists the DCO in identifying vulnerabilities and preparing for multiple exigencies, and facilitates timely decision-making and the continuation of critical operations and services during orderly wind-down. Given its benefits, the Commission believes that new DCOs should have viable plans for orderly wind-down in place at the time they seek registration and before market participants come to rely upon them. The Commission has considered the other section 15(a) factors and believes they are not implicated by the proposed amendments.

10. Conforming Changes to Bankruptcy Provisions – Part 190.

Based upon the proposed requirement that all DCOs maintain viable plans for orderly wind-down, the Commission is proposing several conforming changes to Part 190's bankruptcy provisions. Specifically, current § 190.12(b)(1) would be amended so that a DCO in a Chapter 7 proceeding provide to the trustee copies of, among other things, orderly wind-down plans it must maintain pursuant to new § 39.13(k) in addition to § 39.39(b). Current § 190.15(a) would be amended so that the trustee not avoid or prohibit certain actions taken by the DCO either reasonably within the scope of, or provided for in, any orderly wind-down plains maintained by the DCO and filed with the Commission pursuant to new § 39.13(k) in addition to § 39.39. Current § 190.15(c) would be amended so that the trustee act in accordance with any orderly wind-down plans maintained by the debtor and filed with the Commission pursuant to new § 39.13(k) in addition to § 39.39 in administering the bankruptcy proceeding. Current

§ 190.19(b)(1) would be amended so that a shortfall in certain funds be supplemented in accordance with orderly wind-down plans maintained by the DCO pursuant to new § 39.19(k) in addition to § 39.39.

i. Benefits

In promulgating the current Part 190 bankruptcy rules for DCOs in 2021, the Commission found that "directing a trustee to implement the DCO's own default rules and procedures, and recovery and orderly wind-down plans, would benefit the estate by providing the trustee with a menu of purpose-built rules, procedures and plans to liquidate a DCO, which rules, procedures and plans the DCO has developed subject to the requirements of the Commission's regulations and supervision of the Commission. Adding concepts of reasonability and practicability will give the trustee the discretion to modify those rules, procedures, and plans where and to the extent appropriate."[215] Adding the orderly wind-down plans required under proposed § 39.39(k) for DCOs other than SIDCOs and Subpart C DCOs should further achieve these benefits, by providing such a menu in an additional context, namely the bankruptcy of these DCOs.

ii. Costs

The Commission does not anticipate additional costs from the proposed regulations. The amendments are conforming changes so that the orderly wind-down plan of a DCO that is neither a SIDCO nor a Subpart C DCO is given the same weight as a SIDCO's or Subpart C DCO's orderly wind-down plan would be given in bankruptcy.

[215] *Bankruptcy Regulations*, 86 Fed. Reg. 19324, 19412 (Apr. 13, 2021).

iii. Section 15(a) Factors

The proposed regulations should enhance protection for market participants and the public under section 15(a)(2)(A) of the CEA, enhance the competitiveness and financial integrity of futures markets under section 15(a)(2)(B) of the CEA, aid in sound risk management practices under section 15(a)(2)(D) of the CEA, and promote the public interest under section 15(a)(2)(E) of the CEA. The assurance that the orderly wind-down plan, to the extent reasonable and practicable, and consistent with the protection of customers, will be followed in a bankruptcy proceeding should instill confidence in a DCO's clearing members and customers, who can make certain decisions without fear that a trustee will inappropriately diverge from the orderly wind-down plan in bankruptcy. Moreover, market participants in general can be assured that the DCO's pre-bankruptcy actions will not be voided by the trustee; likewise, the DCO's clearing members and customers can anticipate that a shortfall will be supplemented in the manner provided for in the orderly wind-down plan. The Commission also believes that a viable plan for orderly wind-down should also reduce the risk of disorderly events in bankruptcy. All of these factors would also promote the public interest. However, section 15(a)(2)(C), price discovery, is not implicated by the proposed amendments

11. Requests for Up to One Year to Comply with §§ 39.34(d), 39.35, and 39.39(f)

Conforming to the approach of setting a six-month deadline discussed in section VIII(D)(4) above, the Commission is proposing to discontinue the process currently provided in subpart C pursuant to which the Commission may grant, upon request of a SIDCO or DCO that is electing to become subject to Subpart C, up to one year to comply with §§ 39.34, 39.35, and 39.39. The costs and benefits, and the application of the CEA Section 15(a) factors, for this approach were discussed there.

12. Amendments to Appendix A and Appendix B to Part 39

The Commission is proposing to amend Exhibit D to Form DCO. The proposal would add a requirement to provide as Exhibit D-5, the DCO's orderly wind-down plan, and a demonstration that the plan complies with the requirements of § 39.13(k).

This proposed change would implement the proposal to require the submission of the orderly wind-down plan. The Commission has considered the section 15(a) of the CEA factors and believes that they are not implicated by the proposed change to Form DCO.

The Commission is also proposing to amend the "General Instructions" and "Elections and Certifications" portions of the Subpart C Election Form. The proposal would remove the sections of the forms that reference requests for an extension of time to comply with any of the provisions of §§ 39.34, 39.35, and 39.39. Similarly, the Commission is proposing to amend the requirements for Exhibit F-1 to call for the attachment of the applicant's recovery plan and orderly wind-down plan, supporting information for these plans, and a demonstration that the plans comply with § 39.39(c).

These proposed changes would implement the proposal to delete the provision for making such requests for an extension of time, and the proposal to require the submission of the plans. The Commission does not anticipate that these proposed changes would impose any costs on SIDCOs or Subpart C DCOs. The Commission has considered the factors called for in section 15(a) of the CEA and believes that they are not implicated by the proposed changes to the Subpart C Election Form.

List of Subjects

17 CFR Part 39

Default rules and procedures, Definitions, Reporting requirements, Risk management, Recovery and Orderly wind-down, System safeguards.

17 CFR Part 190

Bankruptcy, Brokers, Reporting and recordkeeping requirements.

For the reasons stated in the preamble the Commodity Futures Trading Commission proposes to amend 17 CFR Chapter I as follows:

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

1. The authority citation for part 39 continues to read as follows:

Authority: 7 U.S.C. 2, 7a-1, and 12a; 12 U.S.C. 5464; 15 U.S.C. 8325.

2. In § 39.2, add the following definitions in alphabetical order:

Default losses means credit losses or liquidity shortfalls created by the default of a clearing member in respect of its obligations with respect to cleared transactions.

Non-default losses means losses from any cause, other than default losses, that may threaten the derivative clearing organization's viability as a going concern. These include, but are not limited to, (i) any potential impairment of a derivatives clearing organization's financial position, as a business concern, as a consequence of a decline in its revenues or an increase in its expenses, such that expenses exceed revenues and result in a loss that the derivatives clearing organization must charge against capital, (ii) losses incurred by the derivatives clearing organization on assets held in custody in the event of a custodian's (or subcustodian's) insolvency, negligence, fraud, poor administration or inadequate record-keeping, (iii) losses incurred by the derivatives clearing organization from diminution of the value of investments of its own or its participants' resources,

including cash or other collateral, (iv) 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, and (v) 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.

Orderly wind-down or *wind-down* means the actions of a derivatives clearing organization to effect the permanent cessation, sale, or transfer, of one or more of its critical operations or services, in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system.

Recovery means the actions of a derivatives clearing organization, consistent with its rules, procedures, and other *ex-ante* contractual arrangements, to address any uncovered credit loss, liquidity shortfall, inadequacy of financial resources, or business, operational or other structural weakness, including the replenishment of any depleted pre-funded financial resources and liquidity arrangements, as necessary to maintain the derivatives clearing organization's viability as a going concern.

* * * * *

3. In 39.13, add paragraphs (j) and (k) to read as follows:

(j) Reserved.

(k)

(1) Each derivative clearing organization that is not a systemically important derivatives clearing organization or a subpart C derivatives clearing organization shall:

(a) Maintain and, consistent with paragraph 39.19(c)(4)(xxiv) of this chapter, submit to the Commission, a viable plan for orderly wind-down that may be necessitated by default losses and by non-default losses, including supporting information for that plan.

(b) Have procedures for informing the Commission and clearing members, as soon as practicable, when orderly wind-down is pending, and shall notify the Commission and clearing members consistent with § 39.19(c)(4)(xxv) of this chapter.

(2) The orderly wind-down plan required by paragraph (k)(1) of this section shall include an overview of the plan and a description of how the plan will be implemented. The description of the plan shall include the identification and description of the derivatives clearing organization's critical operations and services, interconnections and interdependencies, resilient staffing arrangements, stress scenario analyses, potential triggers for consideration of implementing the orderly wind-down plan, available wind-down tools, analyses of the effect of the tools on each scenario, lists of agreements to be maintained during orderly wind-down, and governance arrangements.

(a) *Critical operations and services, interconnections and interdependencies, and resilient staffing arrangements.* The orderly wind-down plan shall identify and describe the critical operations and services the derivatives clearing organization provides to clearing members and other financial market participants, the service providers upon which the derivatives clearing organization relies to provide these critical operations and services, including internal and external service providers and ancillary services providers, financial and operational

interconnections and interdependencies, aggregate cost estimates for the continuation of services during orderly wind-down, plans for resilient staffing arrangements for continuity of operations, obstacles to success of the orderly wind-down plan, plans to address the risks associated with the failure of each critical operation and service, and how the derivatives clearing organization will ensure that each identified operation and service continues through orderly wind-down.

(b) *Orderly wind-down triggers*. The orderly wind-down plan shall establish the criteria that may trigger consideration of implementation of that plan, and the process the derivatives clearing organization has in place for monitoring for events that may trigger implementation of the plan.

(c) The orderly wind-down plan shall include a description of the pre-determined information-sharing and escalation process within the derivatives clearing organization's senior management and the board of directors. The derivatives clearing organization must have a defined 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 its orderly wind-down plan in light of those triggers and that process.

(3) *Orderly wind-down scenarios and tools*. The orderly wind-down plan shall:

(a) identify scenarios that may prevent the derivatives clearing organization from meeting its obligations or providing critical operations and services as a going concern;

(b) describe the tools that the derivatives clearing organization would expect to use in an orderly wind-down that comprehensively address how the derivatives clearing organization would continue to provide critical operations and services;

(c) describe the order in which each such tool would be expected to be used;

(d) 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;

(e) describe the processes to obtain any approvals external to derivatives clearing organization (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained;

(f) establish the time frame within which each such tool could be used;

(g) set out the steps necessary to implement each such tool;

(h) describe the roles and responsibilities of all parties in the use of each such tool;

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

(j) 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, and linked financial market infrastructures.

(4) *Agreements to be maintained during orderly wind-down.* The derivatives clearing organization shall determine which of its contracts, arrangements, agreements, and licenses associated with the provision of its critical operations and services as a derivatives clearing organization are subject to alteration or termination as a result of implementation of the orderly wind-down plan. The orderly wind-down plan shall describe the actions that the derivatives clearing organization has taken to ensure that its critical operations and services will continue during orderly wind-down, despite such potential alteration or termination.

(5) *Governance*. The derivatives clearing organization's orderly wind-down plan shall:

(a) Be formally approved, and annually reviewed, by the board of directors;

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

(c) Describe the processes that the derivatives clearing organization will use to guide its discretionary decision-making relevant to the orderly wind-down plan; and

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

(6) *Testing*. Each derivatives clearing organization's orderly wind-down plan shall include procedures for testing the derivatives clearing organization's ability to implement the tools that the orderly wind-down plan relies upon. 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 orderly wind-down plan in light of the findings resulting from such tests. Such testing shall occur following any material change to the orderly wind-down plan, but in any event not less than once annually, and the plan shall be promptly updated in light of the findings resulting from such testing.

4. In 39.19, revise paragraph (c)(4)(xxiv) and add new paragraphs (c)(4)(xxv) and (c)(5)(iii) to read as follows:

(c)(4)(xxiv) A derivatives clearing organization that is required to maintain recovery and orderly wind-down plans pursuant to § 39.39(b) shall submit its plans and supporting information to the Commission no later than the date on which the derivatives clearing organization is required to have the plans. A derivatives clearing organization that is required to maintain an orderly wind-down plan pursuant to § 39.13(k) shall submit its plan and supporting information to the Commission at the time it files its application for registration under § 39.3. A

derivatives clearing organization shall, upon revising its recovery plan or orderly wind-down plan, but in any event no less frequently than annually, submit the current plan(s) and supporting information to the Commission, along with a description of any changes and the reason(s) for such changes.

(c)(4)(xxv) Each derivatives clearing organization shall notify the Commission and clearing members as soon as practicable when the derivatives clearing organization has initiated its recovery or when orderly wind-down is pending.

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(c)(5)(iii*) Information for resolution planning*. A systemically important derivatives clearing organization or subpart C derivatives clearing organization that submits information to the Commission pursuant to § 39.39(f)(2) shall update such information upon request.

5. In § 39.34 delete paragraph (d) in its entirety and reserve.

6. Amend § 39.39 by revising the section heading to read as follows:

§ 39.39 Recovery and orderly wind-down for systemically important derivatives clearing organizations and subpart C derivatives clearing organizations; Information for resolution planning.

7. In § 39.39(a), remove (1)-(4) and renumber (a)(5) to 39.39(a) as follows:

(a) *Definitions*. For the purposes of this section: *Unencumbered liquid financial assets* include cash and highly liquid securities.

8. In § 39.39 revise paragraphs (b)(1) and (2), and add new paragraph (3) to read as follows:

(b) *Recovery plan and orderly wind-down plan*. (1) Each systemically important derivatives clearing organization and subpart C derivatives clearing organization shall maintain

and, consistent with § 39.19(c)(4)(xxiv) of this chapter, submit to the Commission, viable plans for recovery and orderly wind-down that may be necessitated, in each case, by default losses and by non-default losses, including supporting information for such plans.

(2) Each systemically important derivatives clearing organization and subpart C derivatives clearing organization shall 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, and shall notify the Commission and clearing members consistent with § 39.19(c)(4)(xxv) of this chapter.

(3) Each systemically important derivatives clearing organization shall file a recovery plan and (to the extent it has not already done so) an orderly wind-down plan, and supporting information for these plans, within 6 months of designation as systemically important by the Financial Stability Oversight Council. Each derivatives clearing organization electing to become subject to the provisions of Subpart C of this chapter shall file a recovery plan and (to the extent it has not already done so) an orderly wind-down plan, and supporting information for these plans, as part of its election. Each recovery plan and orderly wind-down plan shall be updated annually.

9. In § 39.39 replace paragraph (c) in its entirety and add new paragraph (c) to read as follows:

(c) The recovery plan and orderly wind-down plan required by paragraph (b) of this section shall include an overview of each plan and a description of how each plan will be implemented. The description of each plan shall include the identification and description of the derivatives clearing organization's critical operations and services, interconnections and interdependencies, resilient staffing arrangements, stress scenario analyses, potential triggers for recovery and

orderly wind-down, available recovery and wind-down tools, analyses of the effect of the tools on each scenario, lists of agreements to be maintained during recovery and orderly wind-down, and governance arrangements.

(1) *Critical operations and services, interconnections and interdependencies, and resilient staffing arrangements.* The recovery plan and orderly wind-down plan shall identify and describe the critical operations and services the derivatives clearing organization provides to clearing members and other financial market participants, the service providers upon which the derivatives clearing organization relies to provide these critical operations and services, including internal and external service providers and ancillary services providers, financial and operational interconnections and interdependencies, aggregate cost estimates for the continuation of services during recovery and orderly wind-down, plans for resilient staffing arrangements for continuity of operations, obstacles to success of the recovery plan and orderly wind-down plan, plans to address the risks associated with the failure of each critical operation or service, and how the derivatives clearing organization will ensure that each identified operation or service continues through recovery and orderly wind-down.

(2) *Recovery scenarios and analysis*. Each systemically important derivatives clearing organization and subpart C derivatives clearing organization shall identify scenarios that may prevent it from meeting its obligations or providing its critical services as a going concern.

(i) For each scenario, the recovery plan shall provide an analysis that includes: (A) a description of the scenario; (B) the events that are likely to trigger the scenario; (C) the derivatives clearing organization's process for monitoring for such events; (D) the market conditions and other relevant circumstances that are likely to result from the scenario; (E) the potential financial and operational impact of the scenario on the derivatives clearing organization

and on its clearing members, internal and external service providers and relevant affiliated companies, both in an orderly market and in a disorderly market; and (F) the specific steps the derivatives clearing organization would expect to take when the scenario occurs, or appears likely to occur, including, without limitation, any governance or other procedures that may be necessary to implement the relevant recovery tools and to ensure that such implementation occurs in sufficient time for the recovery tools to achieve their intended effect.

(ii) The derivatives clearing organization's recovery plan scenarios should also address the default risks and non-default risks to which the derivatives clearing organization is exposed, and shall include at least the following scenarios, to the extent such a scenario is possible in light of the derivatives clearing organization's structure and activities: (A) credit losses or liquidity shortfalls created by single and multiple clearing member defaults; (B) liquidity shortfall created by a combination of clearing member default and a failure of a liquidity provider to perform; (C) settlement bank failure; (D) custodian or depository bank failure; (E) losses resulting from investment risk; (F) losses from poor business results; (G) financial effects from cybersecurity events; (H) fraud (internal, external, and/or actions of criminals or of public enemies); (I) legal liabilities, including liabilities related to the derivatives clearing organization's obligations with respect to cleared transactions and those not specific to the derivatives clearing organization's business as a derivatives clearing organization; (J) losses resulting from interconnections and interdependencies among the derivatives clearing organization and its parent, affiliates, and/or internal or third-party service providers; and (K) losses resulting from interconnections and interdependencies with other derivatives clearing organizations. The recovery plan shall also 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 derivatives clearing organization, are particularly relevant to the derivatives clearing organization's business. The derivatives clearing organization shall document the reasons why the selected scenarios are particularly relevant. For any scenario enumerated in this subparagraph that the derivatives clearing organization determines is not possible in light of its structure and activities, the derivatives clearing organization should document its reasoning.

(3) *Recovery and orderly wind-down triggers.* (i) A systemically important derivatives clearing organization's or subpart C derivatives clearing organization's: (A) recovery plan shall establish the criteria that may trigger implementation or consideration of implementation of that plan, and the process the derivatives clearing organization has in place for monitoring for events that are likely to trigger the scenarios identified in subparagraph (2); and (B) orderly wind-down plan shall establish the criteria that may trigger consideration of implementation of that plan, and the process the derivatives clearing organization has in place for monitoring for events that may trigger implementation of the plan.

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

(4) *Recovery tools.* A derivatives clearing organization or subpart C derivatives clearing organization shall have a recovery plan that includes the following: (i) a description of the tools that the derivatives clearing organization would expect to use in each scenario required by

paragraph (b) of this section that meet the full scope of financial deficits the derivatives clearing organization may need to remediate and comprehensively address how the derivatives clearing organization would continue to provide critical operations and services; (ii) the order in which each such tool would be expected to be used; (iii) the time frame within which each such tool would be expected to used; (iv) a description of the governance and approval processes and arrangements within the derivatives clearing organization for the use of each of the tools available, including the exercise of any available discretion; (v) the processes to obtain any approvals external to the derivatives clearing organization (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained; (vi) the steps necessary to implement each such tool; (vii) a description of the roles and responsibilities of all parties, including non-defaulting clearing members, in the use of each such tool; (viii) whether the tool is mandatory or voluntary; (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.

(5) *Orderly wind-down scenarios and tools*. Each systemically important derivatives clearing organization and Subpart C derivatives clearing organization shall: (i) identify scenarios that may prevent it from meeting its obligations or providing critical operations and services as a going concern; (ii) describe the tools that it would expect to use in an orderly wind-down that comprehensively address how the derivatives clearing organization would continue to provide critical operations and services; (iii) describe the order in which each such tool would be

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

(6) *Agreements to be maintained during recovery and orderly wind-down.* A systemically important derivatives clearing organization and subpart C derivatives clearing organization shall determine which of its contracts, arrangements, agreements, and licenses associated with the provision of its critical operations and services as a derivatives clearing organization are subject to alteration or termination as a result of implementation of the recovery plan or orderly wind-down plan. The recovery plan and orderly wind-down plan shall describe the actions that the derivatives clearing organization has taken to ensure that its critical operations and services will continue during recovery and orderly wind-down despite such alteration or termination.

(7) *Governance*. Each systemically important derivatives clearing organization and Subpart C derivatives clearing organization's recovery plan and orderly wind-down plan shall, in each case,

(i) Be formally approved, and annually reviewed, by the board of directors;

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

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

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

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

shall occur following any material change to the recovery plan or orderly wind-down plan, but in any event not less than once annually, and the plan shall be promptly updated in light of the findings resulting from such testing.

10. In 39.39, replace paragraph (f) in its entirety and add new paragraph (f) to read as follows:

(f) To the extent not already provided pursuant to paragraph (b) above, or required by § 39.19, a systemically important derivatives clearing organization or subpart C derivatives clearing organization shall maintain information systems and controls that are designed to enable the derivatives clearing organization 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 shall provide such information and data in the form and manner specified by the Commission. This includes the following:

(1) Information regarding the derivatives clearing organization's organizational structure and corporate structure, activities, governing documents and arrangements, rights and powers of shareholders, and committee members and their responsibilities.

(2) Information concerning clearing members, including (for both house and customer accounts) information regarding collateral, variation margin, and contributions to default and guaranty funds.

(3) Arrangements and agreements with other derivatives clearing organizations, including offset and cross-margin arrangements.

(4) Off-balance sheet obligations or contingent liabilities, and obligations to creditors, shareholders, or affiliates not otherwise reported under part 39.

(5) Information regarding interconnections and interdependencies with internal and external service providers, licensors, and licensees, including information regarding services provided by or to affiliates and other third parties and related agreements.

(6) Information concerning critical personnel.

(7) Any other information deemed appropriate to plan for resolution under Title II of the Dodd-Frank Act.

11. Revise appendix A to part 39 – Form DCO to read as follows:

COMMODITY FUTURES TRADING COMMISSION

FORM DCO

DERIVATIVES CLEARING ORGANIZATION

APPLICATION FOR REGISTRATION

GENERAL INSTRUCTIONS: Intentional misstatements or omissions of fact may constitute federal criminal violations (7 U.S.C. 13 and 18 U.S.C. 1001).

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EXHIBIT D – RISK MANAGEMENT

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e. Orderly wind-down plan – Provide as **Exhibit D-5,** the derivatives clearing organization's orderly wind-down plan, and a demonstration that the plan complies with the requirements of §39.13(k).

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12. Revise appendix B to part 39 – Subpart C Election Form, General Instructions and Elections and Certifications to read as follows:

COMMODITY FUTURES TRADING COMMISSION

SUBPART C ELECTION FORM

GENERAL INSTRUCTIONS: Intentional misstatements or omissions of fact may constitute federal criminal violations (7 U.S.C. 13 and 18 U.S.C. 1001).

DEFINITIONS

Unless the context requires otherwise, all terms used in this Subpart C Election Form have the same meaning as in the Commodity Exchange Act ("Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder. All references to Commission regulations are found at 17 CFR Ch. I.

For purposes of this Subpart C Election Form, the term "Applicant" shall mean a derivatives clearing organization that is filing this Subpart C Election Form with a Form DCO as part of an application for registration as a derivatives clearing organization pursuant to section 5b of the Act and 17 CFR 39.3(a).

GENERAL INSTRUCTIONS

1. Any derivatives clearing organization requesting an election to become subject to subpart C of part 39 of the Commission's regulations must file this Subpart C Election Form. The Subpart C Election Form includes the election to be subject to the provisions of subpart C of part 39 of the Commission's regulations, certain required certifications, disclosures, and exhibits, and any supplements or amendments thereto filed pursuant to 17 CFR 39.3l(b) or (c) (collectively, the "Subpart C Election Form").

2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. The signatures required in this Subpart C Election Form shall be the manual signatures of a duly authorized representative of the derivatives clearing organization as follows: If the Subpart C Election Form is filed by a corporation, it must be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it must be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it must be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it must be signed in the name of such organization or association by the managing agent, *i.e.*, a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.

4. All applicable items must be answered in full.

5. Under section 5b of the Act and the Commission's regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Subpart C Election Form from any Applicant seeking registration as a derivatives clearing organization and from any registered derivatives clearing organization.

6. Disclosure of the information specified in this Subpart C Election Form is mandatory prior to the processing of the election to become a derivatives clearing organization subject to the provisions of subpart C of part 39 of the Commission's regulations. The Commission may determine that additional information is required in order to process such election.

7. A Subpart C Election Form that is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Subpart C Election Form, however, shall not constitute a finding that the Subpart C Election Form is acceptable as filed or that the information is true, current or complete.

8. As provided in 17 CFR 39.3l(d), except in cases where a derivatives clearing organization submits a request for confidential treatment with the Secretary of the Commission pursuant to the Freedom of Information Act and 17 CFR 145.9, information supplied in this Subpart C Election Form will be included routinely in the public files of the Commission and will be made available for inspection by any interested person.

APPLICATION AMENDMENTS

1. 17 CFR 39.3l(b)(3) and (c)(4) require a derivatives clearing organization that has submitted a Subpart C Election Form to promptly amend its Subpart C Election Form if it discovers a material omission or error in, or if there is a material change in, the information provided to the Commission in the Subpart C Election Form or other information provided in connection with the Subpart C Election Form.
2. When amending a Subpart C Election Form, a derivatives clearing organization must re-file the Election and Certifications page, amended if necessary, and including all required executing signatures, and attach thereto revised exhibits or other materials marked to show changes, as applicable.

WHERE TO FILE

1. This Subpart C Election Form must be filed electronically with the Secretary of the Commission in the format and manner specified by the Commission.
2. Any supplemental information must be filed electronically with the Division of Clearing and Risk, or any successor division, in the format and manner specified by the Commission.

COMMODITY FUTURES TRADING COMMISSION

SUBPART C ELECTION FORM

ELECTION AND CERTIFICATIONS

Exact Name of the Derivatives Clearing Organization
(as set forth in its charter, if **an Applicant,**

or as set forth in its most recent order of registration, if registered with the Commission)

Check here and complete sections 1 and 3 below, if the organization is an Applicant.

Check here and complete sections 2 and 3 below, if the organization currently is registered with the Commission as a derivatives clearing organization.

1. The derivatives clearing organization named above hereby elects to become subject to the provisions of subpart C of part 39 of the Commission's regulations in the event that the Commission approves its application for registration as a derivatives clearing organization.

The derivatives clearing organization and the undersigned each certify that, in the event that the Commission approves the derivatives clearing organization's application for registration and permits its election to become subject to subpart C of part 39 of the Commission's regulations, the derivatives clearing organization will remain in compliance with the provisions contained in subpart C of part 39 of the Commission's regulations until this election is rescinded pursuant to 17 CFR 39.3l(e).

Name of Derivatives Clearing Organization

By:

Manual Signature of Duly Authorized Person

Print Name and Title of Signatory

2. The derivatives clearing organization named above hereby elects to become subject to the provisions of subpart C of part 39 of the Commission's regulations as of:

_____ ("Effective Date")

[insert date, which must be **at least 10 business days after the date this Subpart C Election Form is filed with the Commission].**

The derivatives clearing organization and the undersigned each certify that the derivatives clearing organization will remain in compliance with provisions contained in subpart C of part 39 of the Commission's regulations until this election is rescinded pursuant to 17 CFR 39.31(e).

_____

Name of Derivatives Clearing Organization

By:_____

Manual Signature of Duly Authorized Person

_____

Print Name and Title of Signatory

3. The derivatives clearing organization named above has duly caused this Subpart C Election Form (which includes, as an integral part thereof, the Election and Certifications and all Disclosures and Exhibits) to be signed on its behalf by its duly authorized representative as of the _____ day of _____ , 20__. The derivatives clearing organization and the undersigned each represent hereby that, to the best of their knowledge, all information contained in this Subpart C Election Form is true, current and complete in all material respects. It is understood that all required items including, without limitation, the Election and Certifications and Disclosures and Exhibits, are considered integral parts of this Subpart C Election Form.

_____

Name of Derivatives Clearing Organization

By:_____

Manual Signature of Duly Authorized Person

_____

Print Name and Title of Signatory

13. Revise appendix B to part 39 – Subpart C Election Form, Disclosures and Exhibits to read as follows:

COMMODITY FUTURES TRADING COMMISSION

PART 39, SUBPART C ELECTION FORM

DISCLOSURES AND EXHIBITS

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EXHIBIT F – RECOVERY AND ORDERLY WIND-DOWN

Attach, as **Exhibit F,** information and documents that demonstrate compliance with the recovery and orderly wind-down requirements set forth in § 39.39 of the Commission's regulations, including but not limited to:

a. Recovery and orderly wind-down plans – Attach as **Exhibit F-1** the derivatives clearing organization's recovery plan, orderly wind-down plan, supporting information for these plans, and a demonstration that the plans comply with the requirements of § 39.39(c).

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PART 190—BANKRUPTCY RULES

14. The authority citation for part 190 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6c, 6d, 6g, 7a-1, 12, 12a, 19 and 24; 11 U.S.C. 362, 546, 548, 556, and 761-767, unless otherwise noted.

15. In §190.12, replace paragraph (b)(1) in its entirety to read as follows:

(b)(1) As soon as practicable following the commencement of a proceeding that is subject to this subpart and in any event no later than three hours following the later of the commencement of such proceeding or the appointment of the trustee, the debtor shall provide to the trustee copies of each of the most recent reports that the debtor was required to file with the Commission under § 39.19(c) of this chapter, including copies of any reports required under § 39.19(c)(2), (3), and (4) of this chapter (including the most up-to-date version of any recovery

and orderly wind-down plans of the debtor maintained pursuant to § 39.13(k) or § 39.39(b) of this chapter) that the debtor filed with the Commission during the preceding 12 months.

16. In §190.15 replace paragraph (a) in its entirety to read as follows:

(a) *Prohibition on avoidance of actions taken pursuant to recovery and orderly wind-down plans.* Subject to the provisions of section 766 of the Bankruptcy Code and §§ 190.13 and 190.18, the trustee shall not avoid or prohibit any action taken by a debtor subject to this subpart that was reasonably within the scope of, and was provided for, in any recovery and orderly wind-down plans maintained by the debtor pursuant to § 39.13(k) or § 39.39(b) of this chapter and filed with the Commission pursuant to § 39.19 of this chapter.

17. In § 190.15, replace paragraph (c) in its entirety to read as follows:

(c) *Implementation of recovery and orderly wind-down plans.* In administering a proceeding under this subpart, the trustee shall, in consultation with the Commission, take actions in accordance with any recovery and orderly wind-down plans maintained by the debtor pursuant to § 39.13(k) or § 39.39(b) of this chapter and filed with the Commission pursuant to § 39.19 of this chapter, to the extent reasonable and practicable, and consistent with the protection of customers.

18. In § 190.19 replace paragraph (b)(1) in its entirety to read as follows:

(1) Such funds shall be supplemented with the property described in paragraphs (b)(1)(i) through (iv) of this section, as applicable, to the extent necessary to meet the shortfall, in accordance with the derivatives clearing organization's default rules and procedures adopted pursuant to § 39.16 and, as applicable, § 39.35 of this chapter, and (with respect to paragraph (b)(1)(ii) of this section) any recovery and orderly wind-down plans maintained pursuant to § 39.13(k) or

§ 39.39(b) of this chapter and submitted pursuant to § 39.19 of this chapter. Such funds shall be included as member property and customer property other than member property in the proportion described in paragraph (a) of this section, and shall be distributed promptly to members' house accounts and members' customer accounts which accounts are entitled to payment of such funds as part of that daily settlement.

* * * * *

Issued in Washington, DC, on June _____, 2023 by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission