October 11, 2022

VIA ELECTRONIC SUBMISSION (Link)
Commodity Futures Trading Commission
Christopher Kirkpatrick
Secretary of the Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581
United States of America

Re: CCP12 response to CFTC's Notice of Proposed Rulemaking on Governance Requirements for Derivatives Clearing Organizations

The Global Association of Central Counterparties ("CCP12") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") Notice of Proposed Rulemaking ("NPR") on Governance Requirements for Derivatives Clearing Organizations ("DCOs").[1]

CCP12 is the international association for central counterparties ("CCPs"), representing 40 members who operate over 60 individual CCPs across the Americas, EMEA and the Asia-Pacific region.

We share the CFTC's view on the importance of good DCO risk governance. However, we feel strongly that the final rule should fully embrace the CFTC's principles-based approach to regulation. In that regard, we generally agree with the NPR's proposed rule text with a few comments that are primarily technical in nature.

DCOs have used RMCs for many years to discuss topics capable of materially impacting DCOs' risk profiles. We support the benefits that these arrangements can bring to the clearing members, customers, DCOs and, the financial system as a whole. However, we believe that the granularity of the suggestions in the additional requests for comments would lead to overly prescriptive rules and do not serve to strengthen DCO governance — in fact, they would likely weaken CCP governance. Prescriptive requirements could undermine a DCO's ability to effectively tailor its governance arrangements to its unique offering and efficiently adopt enhancements to its risk management practices. For example, we believe that some of the proposed additional requirements that are contemplated in the requests for comment may provide limited to no risk management benefits, such as requiring that all new products are categorically treated as materials risk matter and requiring that market participants be consulted with on rule changes that do not materially affect the risk profile of the DCO. DCO already have robust mechanisms in place for launching new products for clearing and market participant consultation, where appropriate. Therefore, CCP12 does not believe the CFTC should propose further requirements beyond what is included in the proposed rule text. Several of the proposed additional governance requirements

[1] CFTC, Notice of Proposed Rulemaking, Governance Requirements for Derivatives Clearing Organizations (Aug. 2022), available at Link

contemplated in the requests for comment are not suitable for all DCOs, given differences in size, ownership and management structures, market participants served, and mix of products cleared.

A DCO's first priority is to contribute to the stability of the broader financial markets and in accordance with current § 39.24(a)(1) their governance arrangements are required to place a high priority on the safety and efficiency of the DCO and explicitly support the stability of the broader financial system. A DCO is a risk-manager — not a risk-taker — and is therefore naturally incentivized to support financial stability by effectively managing the risks of its market participants. Market participants, on the other hand, do not have the same onus imposed on them by regulation to prioritize financial stability in their day-to-day operations. A DCO only thrives and achieves its purpose with a healthy mix of a variety of market participants, who are often in competition with each other, and thus, care must be taken so that no individual participant obtains advantages against others. With this in mind, when market participants are included in the governance arrangements of DCOs, it is of the utmost important to ensure they are required to act in the best interest of the market, prioritizing financial stability and the safety and efficiency of the DCO. As such, it is imperative to ensure that market participants' involvement in DCO governance — including through risk management committees ("RMCs") and risk advisory working groups ("RWGs") — are limited to risk-based input (opposed to commercially-driven input) into the DCO's risk management decisions. Along these lines, we appreciate the NPR's ongoing focus on risk-based input.

Proposed Amendments to § 39.24(b)

General CCP12 Comment:

CCP12 supports the proposed rule text in the NPR that requires a DCO to establish one or more RMCs and requires the DCO's board to consult with, and consider and respond to input from, the RMCs on all matters that could materially affect the risk profile of the DCO. Many CCP12 members already have RMCs (or similar bodies) that make recommendations to these CCPs' boards. Similarly, CCP12 also supports the proposed rule text in the NPR that requires a DCO to establish one or more RWGs as a forum to seek risk-based input from a broad array of market participants regarding all matters that could materially affect the risk profile of the DCO. As referenced above, we appreciate the CFTC's focus on risk-based input and believe it is of the utmost importance that input from market participants on the RMCs and RWGs be risk-based (opposed to commercially driven). Along these lines, CCP12 supports the rule text in the NPR that requires that a DCO maintain policies designed to enable RMC members to provide independent, expert opinions in the form of risk-based input on all matters presented and perform their duties in a manner that supports the safety and efficiency of the DCO and the stability of the broader financial markets.

Additionally, we believe the remit of the RMCs and RWGs over matters that could materially affect the risk profile of the DCO is appropriate, as it strikes the appropriate balance of allowing a DCO to effectively manage its risks by enhancing its risk management practices as necessary, while allowing for further risk-based input on changes to practices that have a material effect on the DCO's risk profile.

A. Establishment and Consultation of RMC – § 39.24(b)(11)

CFTC Request for Comment: *The Commission requests comment on whether a DCO's proposal to clear a new product should be categorically treated as a matter that could materially affect the DCO's risk profile for purposes of the proposed RMC consultation requirement given the heightened potential for novel and complex risks associated with clearing new products. If so, should the Commission define what constitutes a new product for this purpose, and how should it do so? For example, should the Commission define new products to include those that have margining, liquidity, default management, pricing, or other risk characteristics that differ from those currently cleared by the DCO? In the alternative, should the Commission require DCOs to adopt policies defining what constitutes a new product?*

CCP12 response:

A DCO's clearing of new products should not categorically be treated as a matter that could materially affect the DCO's risk profile, thus requiring RMC consultation. Simply put, not all new products will materially affect the risk profile of a DCO. More than 1000 new derivatives products have been launched each year for the past several years and many of them are iterations of existing contracts, which are structured very similarly or have similar risk characteristics to those already cleared by a DCO. For example, if a DCO already clears equity options, adding a product that has another underlying equity would not materially affect its risk profile.

DCOs also have policies and procedures in place within their governance arrangements that define what constitutes a new product from a risk management perspective and provide the basis for evaluating the risks of new products to clearing, including if these risks could have a material impact on the risk profile

of the DCO. We believe that DCOs are best suited to carry out this evaluation, as these risks are unique to the characteristics of the respective DCO, including its products and risk profile. Beyond simply considering if a DCO does or does not clear products similar to a new product it intends to clear, DCOs also consider if a new product can be risk managed within its current risk management framework – e.g., if its current margin methodology is appropriate for the given new product. In practice, DCOs conduct comprehensive analysis when clearing new products to determine their risk implications, including consulting with market participants should the product materially affect the risk profile of the DCO.

In light of the fact that not all products would materially impact the risk profile of a DCO, requiring consultations for all new products as a matter of procedure would significantly undermine the efficiency of the process of bringing new products into clearing without risk management benefit. Ultimately, this could limit or delay the ability of market participants to effectively manage their risks by utilizing new products. CCP12 believes that adding to the administrative process for clearing any new products conflicts with the long-standing practices of allowing designated contract markets ("DCMs") to list new products via the self-certification process ushered in with the Commodity Futures Modernization Act in 2000, and reaffirmed in more recent legislation, which has been successful for over two decades.

Furthermore, we would like to refer the CFTC to the report of the CCP Risk and Governance Subcommittee of CTFC's Market Risk Advisory Committee on CCP governance, which recommended to add a new rule 39.24(b)(4) stating that a DCO shall have governance arrangements that "[e]stablish one or more risk management committees and require the board of directors to consult with and consider feedback from the risk management committee(s) on […] the clearing of new products that could significantly impact the derivatives clearing organization's risk profile"[2]. The interests of DCOs, clearing members, and participants were represented on that subcommittee, and they found it appropriate and agreed to have a materiality threshold for RMC consultation regarding new products.

Consequently, we believe that proposed § 39.24(b)(11) strikes the appropriate balance of preserving a DCO's ability to effectively and efficiently conduct comprehensive analysis of new products, while requiring consultation with its RMC where such products materially affect the DCO's risk profile. For the reasons stated above, we do not believe that CFTC should adopt new rules that would dictate that all new products would be categorically treated as if they could materially affect the DCO's risk profile or define what constitutes a new product.

[2] CFTC, Report, Recommendations on CCP Governance and summary of Subcommittee constituent perspectives (Feb. 2021), available at Link

B. Policies and Procedures Governing RMC Consultation – § 39.24(b)(11)(i)

CFTC Request for Comment: *The Commission requests comment on whether DCOs should be required to create and maintain minutes or other documentation of RMC meetings.*

CCP12 response:

CCP12 believes that the proposed rule text for the requirements specified in § 39.24(b)(11)(i) are sufficient and we do not think any further requirements should be adopted. CCP12 believes that it is important to point out to the Commission that it is already standard practice for DCOs to create and maintain documentation of RMC meetings. As noted above, many CCP12 members already have RMCs that are consistent with the NPR and those committees operate according to written procedures.

C. Representation of Clearing Members and Customers on RMC – § 39.24(b)(11)(ii)

CFTC Request for Comment: *However, the Commission requests comment on whether it should adopt additional specific composition requirements, and if so, what those requirements should be.*

CCP12 response:

We fully support current §§ 39.24(a) and 39.26 that require that a DCO's board shall make certain that the DCO's design, rules, overall strategy, and major decisions appropriately reflect legitimate interests of clearing members, customers of clearing members, and other relevant stakeholders, as well as that the DCO's board (or board-level committee) include market participants. We also believe that these important stakeholders should participate, at a minimum, on either the RMC or the RWG. We do not agree, however, that customers of clearing members must be present on both the RMC and RWG. DCOs rightfully have differing governance arrangements based on their organization, ownership and management structures, market participants served, and products cleared, among other things, but such arrangements still achieve the CFTC's required objectives as set out under § 39.24. For example, the RMCs at some DCOs are a board-level committee, where the clearing member directors represent their customers, and the RMCs are informed by the RWGs. Representation on the RWG can be sufficient to convey perspectives of customers of clearing members that are not otherwise conveyed by the representatives of clearing members on the RMC.

Broadly, we do not believe that the CFTC should adopt any additional specific composition requirements for RMCs, as these committees are structured differently and sit at different places organizationally across DCOs, based on their size, products cleared, and related risk management needs. With the varied nature of DCOs it is important to emphasize that their risk management needs, and use of RMCs will also vary. As such, setting a blanket requirement for the composition of said committees will not be suitable for all DCOs' risk management needs. DCOs must have the flexibility to compose their respective RMCs in a way that best serves their needs and the markets they clear, not to fulfil an arbitrary regulatory requirement. Accordingly, we do not believe that any additional RMC composition requirements should be included, and rather, a DCO should be able to establish their RMCs with the balance of expertise appropriate for the profile of their market participants and the products they clear.

D. Rotation of RMC Membership – § 39.24(b)(11)(iii)

CFTC Request for Comment: *The Commission requests comment on whether it should set a minimum frequency for RMC membership rotation, what are the advantages and disadvantages of doing so, and, if it does, what that frequency should be.*

CCP12 response:

CCP12 believes that the proposed rule text for the requirements specified in § 39.24(b)(11)(iii) is sufficient and we do not think any further requirements should be adopted. Specifically, establishing a minimum frequency for RMC membership rotation should not be required. Rather, DCOs should have flexibility in determining how best to rotate RMC members to maintain an appropriate balance between retaining member expertise and allowing for perspectives from new members. First, RMC members often serve because they have specialized expertise or a familiarity with the intricacies of a DCO's risk management framework that would merit a longer term. Second, CCP12 believes that frequent rotation of RMC members could negatively impact risk management, given the time it takes for RMC members to come up to speed on specific DCO-related risk matters. Third, finding the appropriate candidates with the right expertise and who can meet the time commitment is not an insignificant challenge and frequent rotation would make this task more difficult. Lastly, the onboarding can be a lengthy process (e.g., CV review and documentation signing, etc.). The importance of continuity and expertise as a means of effectively managing liquidity or credit risks and ultimately, supporting the stability of the broader system, far outweighs any governance benefits from requiring a minimum frequency for rotation, particularly in the case of DCOs that are systemically important financial market utilities. An additional note is that some CCPs have an RMC as a board-level committee made up of representatives from the board of directors. This would make frequent rotation even more difficult and could conflict with the overall by-laws of such organizations.

E. Establishment of RWG to Obtain Input – § 39.24(b)(12)

CFTC Request for Comment: *The Commission requests comment on whether the proposed requirement that each RWG convene quarterly is the appropriate frequency. The Commission also requests comment on whether it should require DCOs to document the proceedings of RWG meetings, considering both the transparency and accountability benefits of such a requirement and the potential impact of a documentation requirement on free and open dialogue.*

CCP12 response:

While CCP12 supports the formation of RWGs and that the membership of those working groups be made up of a diverse cross-section of clearing members and their customers, we do not believe that it is necessary to prescribe a specific frequency for the RWG meetings. In the event that a DCO does not have any matters that could have a material impact on the risk profile of the DCO to discuss with its RWG, the DCO should not be forced to convene the RWG on a quarterly basis for the sole purpose of satisfying a regulatory requirement. We believe that the frequency of meetings should be determined based on when topics arise that could have a material impact on the risk profile of the DCO, which will inherently vary across CCPs, thus, demonstrating the inappropriateness of adopting a minimum meeting frequency. This is more efficient and could lead to more active participation in the RWGs, as meetings would not be arbitrarily held when there is nothing to discuss. Consequently, CCP12 recommends that the Commission amend the rule text under § 39.24(b)(12) to remove the requirement to convene the RWG on a quarterly basis.

With respect to the requests for comment on documenting the proceedings of RWG meetings, CCP12 believes a DCO should document the topics discussed (e.g., agenda). This provides each DCO the necessary discretion to determine what is the appropriate level of documentation in order to facilitate a free and open dialogue, while providing for the accountability benefits associated with documentation. Providing DCOs discretion in this area is important, so that the purpose of the RWGs to facilitate the sharing of risk-based input from a diverse group of clearing members and customers is not undermined. This is generally a standard practice of DCOs and as such, we do not believe the CFTC needs to further amend the rule text under § 39.24(b)(12) in this area.

Proposed Amendments to § 39.24(c)

A. Role of RMC Members as Independent Experts – § 39.24(c)(3)

CFTC Request for Comment: *The Commission requests comment on whether requiring RMC members to act as independent experts, neither beholden to their employers' commercial interests nor acting as fiduciaries of the DCO raises any potential legal issues for those members. Specifically, as a matter of corporate law, would RMC members be forced to contend with competing duties or obligations to the DCO and their employer, including any duties or obligations that would foreclose RMC participation? If so, how may the goal of receiving independent, expert opinions be achieved? Should DCOs be required to have policies specific to RMC members for managing conflicts of interest?*

CCP12 response:

As emphasized above, CCP12 believes that the first priority of RMC members should be to provide risk-based input to the DCO. We laud the CFTC for proposing § 39.24(c)(3), as we strongly believe that RMC members' participation in a DCO's governance arrangements must be contingent on the members acting in a manner that prioritizes the safety and efficiency of the DCO and the stability of the broader financial system. An RMC member's obligations cannot and should not be to the commercial interests of the member's employer, as the role of the RMC is to provided risk-based input on the matters that come before it.

In general, DCOs already implement polices that set out the role of RMCs and the duties of their members (e.g., terms of reference). These policies may also be supplemented by the requirement for RMC members to sign NDAs prior to participation. However, we believe that a DCO requires the flexibility to design its own policies for the governance arrangements of RMCs based on the DCO's own unique structure and needs which may result in DCOs implementing various practices to achieve the same objectives with respect to the role and duties of RMC members.

Request for Comment

A. Market Participant Consultation Prior to a Rule Change

CFTC Request for Comment: *The Commission requests comment on whether it should also require a DCO to consult with a broad spectrum of market participants prior to submitting any rule change pursuant to §§ 40.5, 40.6, or 40.10. If so, what constitutes a sufficiently broad spectrum of market participants, and how should the DCO engage that group? Should a DCO be required to consult only on those rule changes that could materially affect the DCO's risk profile?*

In accomplishing effective consultation, is there value to requiring a DCO to respond to market participant feedback? Specifically, where specific risk-based feedback from market participants has not been incorporated in the DCO's decision, should the DCO be required to respond to market participants informing them of the decision and outlining the rationale behind their action? How could such a requirement be tailored to avoid forcing a DCO to respond to excessively detailed or irrelevant comments?

As noted above, Commission regulations currently require a DCO to provide to the Commission a "brief explanation of any substantive opposing views." Should the Commission further clarify the meaning of "substantive" in the context of this requirement? Should a DCO be required to provide the Commission with a report of all opposing views expressed to the DCO? Rather than expecting the DCO to accurately describe opposing views, should the Commission only require a DCO to pass on to the Commission any opposing views expressed to the DCO in writing? Should a DCO be required in its submission to the Commission to respond to opposing views expressed to the DCO? Finally, should the Commission consider additional rules to address a DCO's failure to comply with the full submission requirements of Part 40, such as the imposition of an automatic stay?

CCP12 response:

CCP12 believes that the current Part 40 Regulations are appropriate and that it is sufficient for DCOs to follow their own internal procedures as set out in their individual governance arrangements with respect to the consultation with market participants on rule filings. DCOs already employ governance arrangements that provide for consultation with market participants on rule filings. As referenced above, consistent with current CFTC regulations, market participants already play an active role in a DCO's governance arrangements and the board is also required to make certain that the DCO's design, rules, overall strategy, and major decisions appropriately reflect the legitimate interests of clearing members, customers of clearing members, and other relevant stakeholders. A DCO's governance arrangements will only be further bolstered by the Commission's proposals in the NPR that a DCO's RMC and RWG be consulted on matters that would materially impact the risk profile of the DCO. The CFTC's regulatory framework for DCOs' governance arrangements allow a DCO to design its governance arrangements in a manner that is tailored to its unique offering, while supporting appropriate consultation with market participants. Therefore, CCP12 does not believe that the Commission should require a DCO to consult with a broad spectrum of market participants prior to submitting any rule change pursuant to §§ 40.5, 40.6, or 40.10.

Additionally, CCP12 does not believe that a DCO should be required to respond to market participants feedback, as the current Part 40 Regulations already appropriately requires that a DCO publicly "provide

an explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable" DCO Core Principles, as well as a brief explanation of any substantive opposing views, as further described below. A DCO's rule filings provide market participants, as well as the broader public, with the information that is necessary for understanding the rationale behind a DCO's rule filing. Since a DCO already must assert – or potentially demonstrate, at the behest of the Commission – that its filing is consistent with applicable DCO Core Principles, it is also unclear what the risk management benefit would be of such requirement. Additionally, a requirement to respond to each individual market participant's individual feedback would be overly burdensome and undermine the efficiency of the current Part 40 Regulations. Therefore, CCP12 does not believe that the Commission should require a DCO to respond to market participant feedback, including where feedback from market participants has not been incorporated in the DCO's decision.

With respect to whether it is necessary to define "substantive" for the purposes of comments, CCP12 notes that Part 40 Regulations already require DCOs, as well as other registered entities, to "provide a brief explanation of any substantive opposing views expressed to the registered entity by governing board or committee members, members of the entity or market participants that were not incorporated into the rule, or a statement that no such opposing views were expressed."[3] This longstanding requirement has been deemed sufficient and appropriate and the Commission has not put forward any justification for imposing a different standard for consultation on DCOs than it requires of other registrants. CCP12 also believes that the existing requirements for "substantive opposing views" make an important distinction between substantive and non-substantive or commercially driven views, which are not relevant to risk management decisions and do not need to be solicited, disclosed, or responded to by a DCO. Providing a report to the CFTC of opposing views, regardless of substance, would not provide any regulatory or risk management benefit. Should the Commission desire additional information from the submitting DCO about the views of market participants, it already has the authority to request such information under existing Part 40 Regulations. Therefore, CCP12 does not believe that the Commission should further clarify the meaning of "substantive" in the context of Part 40 Regulations, nor should a DCO be required to provide the Commission with a report of all opposing views expressed to the DCO.

However, if the CFTC does ultimately require the DCO to pass on any opposing views, it should require a DCO to pass on only those substantive opposing views expressed in writing from those individuals/entities identified in Part 40 Regulations. This would allow freer and more candid discussion of proposals at the RMC and RWG.

[3] Code of Federal Regulations, Regulation, Title 17 - Commodity and Securities Exchanges, Chapter I - Commodity Futures Trading Commission, Part 40 - Provisions Common to Registered Entities, 5(a)(8) - Voluntary submission of rules for Commission review and approval, available at Link

B. RMC Member Information Sharing with Firm to Obtain Expert Opinions

CFTC Request for Comment: *The Commission requests comment on whether DCOs should be required to maintain policies and procedures designed to enable an RMC member to share certain types of information it learns in its capacity as an RMC member with fellow employees in order to obtain additional expert opinion. If so, what types of information should be eligible to be shared? What measures should be taken to ensure that confidential information is appropriately protected?*

CCP12 response:

DCOs already commonly allow RMC members to share certain information with other individuals at their institutions subject to their obtaining DCO permission with the stipulation that this information should never be shared for commercial purposes given the role of the RMC. As such, many DCOs have documentation (e.g., rules, policies, and NDAs) in place that govern the sharing of information after permission has been granted. That being said, we do not believe the CFTC should further amend the rule text in the NPR on this point, as the ability to share information provided to RMC members is highly specific to facts and circumstances (e.g., type of information, who the information would be shared with and for what purposes), which would be unique with respect to each instance at a given DCO, as well as across DCOs.

About CCP12

The Global Association of Central Counterparties ("CCP12") is the international association for central counterparties ("CCPs"), representing 40 members who operate over 60 CCPs across the Americas, EMEA, and the Asia-Pacific region.

CCP12 promotes effective, practical, and appropriate risk management and operational standards for CCPs to ensure the safety and efficiency of the financial markets it represents. CCP12 leads and assesses global regulatory and industry initiatives that concern CCPs to form consensus views, while also actively engaging with regulatory agencies and industry constituents through consultation responses, forum discussions and position papers.

For more information, please contact the office by e-mail at office@ccp12.org or through our website by visiting www.ccp12.org.

CCP12 Members