March 18, 2024

Via Electronic Submission

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

Re: Notice of Proposed Rulemaking: Protection of Clearing Member Funds Held by Derivatives Clearing Organizations (RIN 3038-AF39)

Dear Mr. Kirkpatrick:

Intercontinental Exchange Inc., on behalf of itself and its subsidiaries (collectively "ICE"), appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") notice of proposed rulemaking relating to Protection of Clearing Member Funds Held by Derivatives Clearing Organizations (the "Proposal").[1]

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

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

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

[1] Protection of Clearing Member Funds Held by Derivatives Clearing Organizations (RIN 3038–AF39), 89 Fed. Reg. 286 (Jan. 3, 2024).
[2] ICUS has elected to be a "subpart C" DCO under Commission Rule 39.31.

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

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

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

ICE appreciates the opportunity to comment on the Proposal. As an operator of DCOs, ICE supports the Commission's goals of ensuring protection of clearing member funds and assets. Nonetheless, ICE believes that existing rules of the ICE DCOs are well designed to provide such protections and it is unclear that there is problem that needs to be solved. DCOs have already considered the importance of the protection of clearing member proprietary funds through the development of their rulebooks with input from their clearing members.[3] It is important that the Commission recognize the protections currently employed by DCOs and ICE is concerned that the Proposal would be disruptive to DCOs and their clearing members and may undermine Commission goals. In addition, the applicability of the Proposal to DCOs organized outside the United States is unclear and could cause significant legal uncertainty for those DCOs and their clearing members. If the Commission determines to proceed with this rulemaking, ICE suggests modifications be made as discussed herein.

1. Segregation of Clearing Member Proprietary Funds.

ICE generally supports proposed Rule 39.15(f)(1), which would require a DCO to separately account for and segregate clearing member proprietary funds and to hold such funds under an account name identifying the funds as proprietary. ICE does not believe it is necessary to obtain such letters in order to provide appropriate segregation for clearing member proprietary funds but understands the Commission's view that such letters may provide additional clarity of the funds' status.[4] Accordingly, ICE also does not object to the proposed requirement under proposed Rule 19.15(f)(2) to obtain a segregation acknowledgment letter from depositories that will hold clearing member proprietary funds and believes that this is consistent with existing DCO practices. ICE agrees with the exception provided in proposed Rule 39.15(f)(2)(i) that no such acknowledgment would be required from a Federal Reserve Bank and with the alternative form of acknowledgment under proposed Rule 39.15(f)(2)(vi) for depositories that are foreign central banks of money center countries.

[3] For example, DCOs treatment of clearing member proprietary funds takes into account that the capital treatment of such funds for clearing members under applicable bank capital rules depends on the manner in which the funds are held, including whether the funds are regarded as bankruptcy remote from the DCO. See, e.g., 12 C.F.R. 217.35(b)(4). ICE also notes that the CEA does not specifically provide for segregation of proprietary funds, or explicitly authorize the Commission to implement such segregation by regulation.

[4] If an acknowledgment letter is to be required, the final rules should contemplate the possibility that modifications to the prescribed form may be necessary for custodians or depositories located outside the United States due to legal requirements and practices in those jurisdictions.

2. DCO Daily Reconciliation Reporting

ICE does not object to proposed Rule 39.15(g), which would require a DCO to reconcile funds daily and confirm (a) the amount of proprietary and customer funds owed to customers and clearing members and (b) their ability to cover such amounts with their segregated accounts. ICE also does not object to proposed Regulation 39.19 which would require a DCO to report to the Commission any discrepancies noticed in the daily reconciliations of proprietary and customer funds. The Commission's proposed reporting requirements are generally consistent with reconciliation processes for house accounts already in place today at ICE's DCOs. However, ICE believes the proposed requirement in Rule 39.15(g)(4)(i) that the reconciliation be approved by a person who did not prepare the initial calculation and reconciliation and does not report to the person who prepared them is unnecessary and overly prescriptive. While ICE is supportive of appropriate separations of duties, ICE believes DCOs should be able to determine the appropriate internal procedures for making and reviewing such calculations.

3. Uses of Clearing Member Proprietary Funds.

Proposed new Rule 39.15(f)(4) would require a DCO to not hold or use proprietary funds of clearing members except as belonging to the clearing member that deposited the funds. The Proposal further states that permitted uses of proprietary funds would "include" (1) the use of a clearing member's proprietary funds to cover amounts owed in respect of the clearing member's customer account as permitted by the DCO's rules and (2) the use of a non-defaulting clearing member's guaranty fund contribution to mutualize losses from another clearing member's default in accordance with the DCO's rules. These two permitted uses are consistent with longstanding practices for DCOs and ICE agrees that they should be permitted under any proprietary fund segregation rule adopted by the Commission.

While it is implied by the Proposal that a DCO could use a clearing member's proprietary funds to cover amounts owed by the clearing member for its proprietary account, ICE believes the Commission should explicitly provide for this in the Proposal. ICE is also concerned that proposed Rule 39.15(f)(4) may interfere with the potential use of clearing member proprietary funds for certain liquidity management purposes. Currently, DCOs have the authority under their rules to borrow against proprietary funds provided by clearing members or engage in repurchase or similar financing transactions to support liquidity needs of the DCO, subject to any conditions set forth in the DCO's rules. These liquidity resources support regulatory liquidity requirements applicable to DCOs under Commission Rules 39.11 and 39.33.[5] It is unclear whether proposed Rule 39.15(f)(4)[6] would permit the continued use of proprietary funds as liquidity resources in this way.[7] If the rule were interpreted to prohibit the use of proprietary funds for such liquidity purposes, it would significantly burden the liquidity and cash management operations of DCOs and could make it difficult for them to comply with Rules 39.11 and 39.33. Moreover, such an interpretation could require DCOs to accept only cash as margin and guaranty fund contributions,

[5] See, e.g., ICC Rule 402(j); ICUS Rule 502(g). Such rules contain various conditions and limitations on the circumstances in which such funds are used, in order to protect non-defaulting clearing members against loss of the value of their proprietary funds.

[6] Similar questions arise with respect to proposed Rule 39.15(f)(3)(ii), which would prohibit a DCO from using proprietary funds to secure or guarantee the obligation of, or extend credit to, the DCO.

[7] The statement in proposed Rule 39.15(f)(4) that the permitted uses "include" those listed provides a DCO with some flexibility but ICE believes that further clarity as to what is or is not permitted in this area would be appropriate.

with resulting liquidity burdens on clearing members. Consequently, ICE requests the Commission revise proposed Rule 39.15(f) to state explicitly that proprietary funds may be used to secure, qualifying liquidity resources in accordance with the rules of the DCO.[8]

4. Investments of Proprietary Funds.

Proposed Rule 39.15(e)(3) would provide that a DCO could invest proprietary funds only in a manner that would be permitted for customer funds under Commission Rule 1.25. Although ICE supports the existing requirement in Rule 39.15 that investments of clearing member assets be made only in instruments with minimal credit, market and liquidity risks, ICE believes the proposed amendment would be unnecessarily restrictive. Although DCOs have managed investments within the Rule 1.25 limits for customer funds, extending those requirements to proprietary funds would pose difficulties for DCOs.

Rule 1.25 is very restrictive on the investment of non-USD balances in foreign sovereign debt, even if the Commission's adopts its recently proposed Rule 1.25[9] amendments. While those limitations may be justified for customer funds, ICE does not believe the benefit of the restrictions would outweigh the potential difficulties for DCOs when it comes to investment of proprietary funds. Given the larger balances involved, it may be difficult for DCOs to source sufficient investments in the limited categories of sovereign debt eligible under Rule 1.25 to permit full investment of proprietary fund balances in non-USD currencies. A decreased ability to invest proprietary funds in sovereign debt securities either directly or through repurchase agreements, would require DCOs to maintain larger balances in commercial bank deposits. That result is inferior from a risk perspective, as holding proprietary funds in unsecured deposits at a commercial bank increases credit risk as compared to investing such funds through direct investments and repurchase agreements in high-quality sovereign debt.

Even for USD investments, Rule 1.25 significantly limits the permissible counterparties for repurchase transactions. Much of the liquidity in the Treasury repo market is available from non-US banks or dealers that do not technically qualify as eligible counterparties under Rule 1.25(d)(7). Removing the ability to transact repos involving proprietary funds with such entities will make it more difficult for DCOs to invest proprietary fund balances in the repo market. While DCOs have been able to manage this risk for the customer account, ICE is concerned that there may not be sufficient capacity from Rule 1.25 eligible counterparties for the additional balances that would be required if the rule applies to proprietary balances.

Overall, ICE does not believe it is necessary to restrict investment of proprietary funds within the Rule 1.25 limitations. The existing Rule 39.15 limitations to invest funds only in instruments with minimal credit, market and liquidity risks should be sufficient protection. DCOs are capable of assessing the instruments that meet this standard and relevant DCO investment policies are subject to Commission review. If the Commission nonetheless determines to subject proprietary fund investments to Rule 1.25 or other specific limitations, ICE respectfully requests that the Commission (1) expand the list of permissible investments to include any sovereign debt

[8] Similarly, some DCOs currently pledge participant funds to support credit facilities used to provide financial resources for the DCO to cover participant defaults. If the proposed rule is interpreted to prohibit such arrangements, those DCOs could need to fundamentally restructure their default resources. the Commission clarify the Proposal to permit continued use of participant funds in this manner.

[9] Investment of Customer Funds by Futures Commission Merchants and Derivatives Clearing Organizations, 88 Fed. Reg. 81236 (Nov. 23, 2023).

denominated in the relevant currency of the proprietary funds and (2) expand the list of permitted repo counterparties for USD denominated repurchase transactions and repurchase transactions in other currencies to include any foreign bank or foreign securities dealer located in a money center jurisdiction.[10]

5. Investment Losses.

Proposed Rule 39.15(e)(3) would provide that a DCO bear "sole responsibility" for losses resulting from the investment of proprietary funds. ICE believes this mandatory allocation of responsibility is inappropriate. ICE DCOs have adopted detailed provisions for the treatment of investment losses for margin and guarantee fund assets, which may in some cases allocate losses to clearing members. Such arrangements have been the result of consultations and negotiations between DCOs and their clearing members, have been incorporated into DCO rules and have been filed with and reviewed by the Commission through the Part 40 rule submission process. ICE does not believe it is appropriate to modify or prohibit such arrangements through this rulemaking.

Further, ICE believes that the proposal would make it difficult or impossible for a DCO to engage in recovery and resolution planning related to investment losses as required under Commission Rule 39.39. That rule requires a DCO to have viable plans to allocate a range of general business losses that the DCO may experience including investment losses. A DCO is not financially in the position to guarantee the performance of all investments it may make with proprietary funds or to reimburse from its own capital all potential investment losses that may occur. In an extreme investment loss scenario, a DCO would need the flexibility to allocate losses to clearing members to fully allocate the loss. While a DCO could manage such risks by not investing proprietary funds in securities, ICE does not believe this approach would be beneficial from a risk perspective to either DCOs or their clearing members. As such, ICE recommends removing this provision from any final rule such that DCOs may adopt appropriate means of allocating investment losses between the DCO and its clearing members.

To the extent the Commission determines to adopt this requirement, ICE requests that the Commission clarify that the limitation only apply where the DCO is making investments in its discretion and not in circumstances where the DCO is following investment direction or authorization provided by clearing members. This approach would be consistent with the approach the Commission has taken with respect to losses from investment of customer funds under Rule 1.29(b).

6. Commingling with Other Products.

The Proposal would permit commingling of proprietary funds held by a DCO in connection with futures contracts traded on a DCM, foreign futures and cleared swaps together in a single account consistent with current practice for DCOs and the Part 190 regulations. However, the Proposal does not address whether or to what extent a DCO may commingle such proprietary funds with proprietary assets that may be held by a DCO in connection with other products. Certain DCOs

[10] ICE also notes that some DCOs engage in cleared repurchase transactions, as a sponsored member of the Fixed Income Clearing Corporation, for assets in proprietary accounts. Rule 1.25, because of its counterparty limitations, does not currently permit the use of cleared repo. Although the final SEC rules relating to treasury clearing will not require a DCO to clear repos, ICE believes that cleared repo may provide advantages in terms of liquidity and credit risk over bilateral repos. Accordingly, ICE believes that any investment limitations for proprietary funds should also permit such transactions.

may currently commingle proprietary funds with assets relating to proprietary positions in spot contracts, forward contracts, securities, or other instruments. ICE Clear Credit, for example, currently clears proprietary positions for swaps and security-based swaps and holds related margin in a single account.

It is unclear from the Proposal whether such commingling would be permitted, or whether Commission approval for such commingling would be needed.[11] ICE believes that the Proposal should be revised to permit a DCO to continue to commingle products and related margin in a single account.[12] To the extent the Commission believes specific approval for existing activities would be needed, any final rules should provide a clear procedure for obtaining such approval and a transition period to avoid disrupting existing operations while such approval is obtained.

7. Treatment of Deliveries and Settlement Payments.

The Proposal does not clearly address the treatment of property provided by a clearing member or received by the DCO on behalf of a clearing member in connection with physical delivery under a contract or so-called delivery margin provided in respect of such physical deliveries (collectively, "delivery property"). As the Commission has noted in other contexts, it is often the case that deliveries under futures contracts, whether for the house account or customer account, are made outside of segregation and thus house and customer deliveries and receipts in physical settlement may in practice be commingled. The Proposal does not appear to alter current delivery practices, but the definition of proprietary funds may be broad enough to encompass some delivery property. ICE does not believe any change in such practices is necessary and it would be an inappropriate result to require segregation for deliveries in the house account but permit customer account deliveries to be made in an unsegregated delivery account. As such, ICE urges the Commission to clarify that the definition of proprietary funds and related segregation requirements does not apply to such delivery property.

8. Exclusion for Non-US DCOs.

ICE supports the intent of the Proposal to exclude non-US DCOs from the proprietary segregation requirements but is concerned that the test proposed by the Commission for whether the segregation requirements apply is unworkable.[13] As drafted, Rule 39.15(h) would exclude application of the segregation requirements for a DCO organized outside the United States that "would, in the event of its insolvency, be subject to a foreign proceeding" as defined in the Bankruptcy Code in the jurisdiction of organization. It may be impossible to know in advance whether a non-US DCO "would" be subject to a foreign proceeding if it were to become insolvent. It could be the case that a DCO *may* be subject to a foreign proceeding, and it may be likely that

[11] We note in this regard that Commission Rule 39.15(b) permits commingling of certain products in the customer account, subject to approval by the Commission of a rule submitted under Rule 40.5.

[12] ICE notes in this regard that from a bankruptcy perspective, all contracts cleared by a registered DCO are treated as "commodity contracts" for purposes of the Bankruptcy Code. 11 U.S.C. 761(4)(F).

[13] ICE is concerned with the Commission's statement in footnote 51 that the Commission may reconsider exclusions for non-US DCOs under Part 39 and Part 190, in a future rulemaking. This statement introduces legal uncertainty for non-US DCOs, as non-USDCOs may not readily be able to comply with the requirements in the Proposal due to particular legal and regulatory requirements of their home countries. If the Commission determines to apply the provisions in the Proposal to non-US DCOs as part of a future rulemaking, ICE believes it may be necessary to modify aspects of the rules to avoid significant disruption of non-US DCOs operations. ICE therefore urges the Commission to be cautious about taking any such step.

it would be subject to a foreign proceeding. But a DCO could not be certain whether it would be subject to a foreign proceeding unless and until it is insolvent, and a proceeding is commenced. It should also be noted that a non-US DCO may potentially be subject to proceedings in more than one jurisdiction depending on where it has activities and/or where it maintains assets.

ICE notes that in using this formulation, the Commission is attempting to track language used in Part 190 of its regulations. However, the Part 190 test applies where the DCO is insolvent and relevant proceedings have been commenced. In context of the Proposal, the DCO would have to attempt to predict the path of an insolvency proceeding at a time when it is not insolvent. In ICE's view, this would at a minimum create significant and unnecessary uncertainty as to whether the segregation requirements apply.

As a result, ICE would suggest that the exemption in proposed Rule 39.15(h) instead apply to any DCO that is organized and has its principal place of business[14] outside the United States. Such a test, or a similar formulation, would be easier for a DCO to administer and provide a non-US DCO with certainty as to whether the proprietary segregation requirements apply. Further, the test would not exclude DCOs that are organized offshore but are operated from the United States and accordingly would be likely to be subject to a US insolvency proceeding and not a foreign proceeding.

9. Considerations for Non-Intermediated DCOs.

ICE understands the Commission's concerns with the protection of participants' funds in the context of direct, or non-intermediated, clearing models. ICE agrees with the general principle of fund segregation for direct participants. As the Commission is aware, ICE operates a non-intermediated clearing model at ICE NGX. ICE NGX has developed an approach for holding participant funds that is generally consistent with the requirements of the Proposal and is more protective of participant funds in certain respects. ICE NGX maintains a separate bank account for each participant and does not commingle funds of multiple participants. Each separate account is identified and titled as being for the benefit of the participant. Further, the separate account structure allows each participant to have visibility into the account balances. Although this approach goes beyond what would be required under the Proposal, ICE believes it could be a useful model for the protection of participant funds for other non-intermediated DCOs, particularly those with institutional market participants. At the same, ICE believes that non-intermediated models are continuing to evolve and that different DCOs may need segregation arrangements tailored to their particular mix of products and participants. As a result, ICE urges the Commission to avoid unnecessarily prescriptive requirements for the segregation for participant funds in non-intermediated models.

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ICE appreciates the opportunity to comment on the Proposal and the engagement of the Commission and its Staff in the rulemaking process. ICE supports the Commission's goals of

[14] ICE notes that "principal place of business" is a test used in other Commission regulations, one with which market participants have become familiar. See, e.g., Rule 23.23(a)(23). As an alternative to the principal place of business, the Commission could also reference the DCO's center of main interests, which is a similar concept used in insolvency laws. See, e.g., 11 U.S.C. 1502. ICE believes either approach would permit the DCO to make a determination, with appropriate certainty, as to whether or not it is subject to the exemption from the segregation requirements.

providing appropriate protections to proprietary funds provided by clearing members to DCOs, and respectfully requests that the Commission consider its comments in light of those goals.

Sincerely,

Elizabeth King
Global Head of Clearing & Chief Regulatory Officer
Intercontinental Exchange, Inc.

cc: Honorable Chairman Rostin Benham
Honorable Commissioner Christy Goldsmith Romero
Honorable Commissioner Kristen N. Johnson
Honorable Commissioner Summer Mersinger
Honorable Commissioner Caroline D. Pham