Submitted Electronically

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Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Re: Clearing Agency Resilience and Recovery and Wind-Down Plans (RIN 3235-AN19, File No S7-10-23)

Dear Ms. Countryman,

The International Swaps and Derivatives Association, Inc. ("**ISDA**") and the Futures Industry Association ("FIA", together the "**Associations**") appreciate the opportunity to submit these comments on the Security Exchange Commission's (the "**Commission**") notice of proposed rulemaking (the "**NPR**").

We welcome the opportunity to provide our views on the NPR and are generally very supportive of the proposed rule changes. The efforts by the Commission to enhance the regulatory framework for the recovery and wind-down plans and intraday margin processes of clearing agencies are an important priority for ISDA and FIA members and the general derivatives community.

This response is as comprehensive as was possible in the time available. We will continue analyzing the proposal and will provide new comments to you, as relevant, in the next weeks.

General Comments

We acknowledge that the SEC prefers principle-based regulation, but we believe more prescriptive guidance is necessary on both intraday margin and recovery and wind-down plans in order to provide clearing members and their clients with clear expectations about the how these tools will be used, so clearing participants can better prepare for these scenarios.

Intraday Margin

We welcome widening the guidance on intraday margin, from collecting intraday margin "*in defined circumstances*", to requiring the ability to "*make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility.*"

While we agree that intraday clearing agency margin calls should be "*able to be made on both a scheduled and unscheduled basis*", we propose that intraday margin calls in the ordinary course of business should be scheduled. Unscheduled margin calls should be reserved for extraordinary circumstances, which should be clearly defined ex-ante, to enhance participants' ability to prepare for such situations.

We believe the SEC should specify that intraday margin calls will cover full portfolio re-valuation, including any increase of intraday variation margin, initial margin on new positions, and any change to initial margin on existing positions.

Intraday margin calls can cause procyclical impacts to markets, especially if these calls are unpredictable for clearing participants (clearing members and their clients). We propose that rightsizing the base margin model (the Initial Margin, IM) would mitigate such procyclicality and reduce the need for frequent or more significant intraday margin calls.

Market participants can be exposed to liquidity constraints – for example if they are out-of-the-money intraday and in-the-money/less out-of-the-money at the end of the day – especially during stressed market conditions, as margin is returned with some time lag. We suggest that Clearing Agencies (CAs) should reduce that time lag and promptly return margin to clearing members and their clients to the extent possible – to the extent allowed by constraints that may arise for CAs that clear contracts in several currencies and across time zones – to alleviate these liquidity constraints.

Promoting predictability of margin calls is a key consideration:

- The requirement for a covered clearing agency to have policies and procedures to monitor intraday exposures should also include a requirement to have clear and transparent policies

with regards to the conditions under which a covered clearing agency might call intraday margin, both on a scheduled and unscheduled basis.

- Generally speaking, the more transparency around IM models, the better market participants can anticipate changes. We would recommend the SEC to require additional transparency of IM models, including with respect to:
    - Initial Margin models and parameters
    - Rationale and framework for MPOR
    - Lookback windows
    - Confidence levels
    - Summary of model validation reports
    - Historical IM levels for benchmark products
    - IM sensitivity to extreme volatility at least for benchmark products
    - Parameters update/calibration frequency
    - Floors (or caps) applied if any
    - Applicable procyclicality measures and appetite statement

We also welcome that the NPR further implements guidance in the final report "Resilience of central counterparties (CCPs): Further guidance on the PFMI" (the "**Further Guidance**") issued by the Committee on Payments and Market Infrastructures and the Board of the International Organization of Securities Commissions. We note that in paragraph 5.2.25, the Further Guidance states that "*In designing its governance and operational arrangements for intraday variation margin calls and payments, a CCP should take into account how these arrangements could have adverse implications for the liquidity positions of its participants and the relevant market, particularly when market conditions give rise to large and unexpected changes in current exposure. A CCP should take a holistic approach to structuring and applying its variation margin arrangements*." We would encourage that the SEC proposal reflects this CPMI-IOSCO Further Guidance as well. The Further Guidance also requires an appropriate level of transparency to enable clearing participants to predict margin calls.

Recovery and wind-down plans

Credible recovery plans are key building blocks to make CAs safer, together with CAs' resilience and resolution plans. Therefore, recovery is a high priority for ISDA's membership as users and members of SEC-registered CAs. We welcome further progress on this area given criticality for financial stability. As CAs become even more systemically important, this will be essential. Our comments are intended to further enhance recovery and wind-down plans ("**RWP**") to enable them to achieve these goals.

We welcome that the Commission has informed their work based on existing RWPs submitted by clearing agencies and by participating in the work of global standard setters. We also welcome coordination and alignment with rules from other U.S. authorities.

It is generally not appropriate for clearing members or participants to bear non-default losses ("**NDLs**") because they are not responsible for choices that led to these losses (e.g. investment losses, operational issues, cyber-attacks etc). Therefore, CAs' rulebooks and recovery plans should make clear that CAs bear responsibility for NDLs. Regulators should also require CAs to manage, monitor and hold sufficient capital against NDLs to ensure that such losses do not disrupt a CAs' ability to perform their obligations.

We note that the Commission already has a rule (17Ad-22(e)(15)) requiring CAs to hold sufficient liquid net assets to cover general business losses. RWPs should also be required to demonstrate CAs' ability to cover such losses.

We are mindful of the importance of supervisory cooperation, especially in a crisis. Therefore we believe that domestic and international authorities, including supervisors and resolution authorities, should cooperate closely both in the rulemaking process and when reviewing recovery plans of CAs and DCOs.

The Associations welcome the introduction of more prescriptive rules for RWPs in this NPR, especially as the NPR states that the recovery plans of CAs do not consistently contain all required elements.

CAs' RWPs should be transparent, predictable, and include safeguards on recovery tools to ensure that the proposed use of recovery tools is credible and would not have further destabilizing consequences if deployed during stress.

CAs' RWPs and the results of annual testing requirements should be made available to market participants to provide an appropriate level of transparency for participants, which will enable participants to prepare for the actions described in the RWPs and improve the reliability and smooth functioning of the plans.

It is important for clearing members, who underwrite the risk of CAs, to have a say in the governance and decision-making process of a CA. This role should include having the opportunity to review and comment on recovery plans.

We believe the SEC should incorporate compensation of clearing members that cover losses during recovery or wind-down to the NPR requirements for CAs' RWPs, including in any resolution event that follows an unsuccessful attempt to complete such a process. Indeed, if a CA relies on loss allocation borne by clearing participants to continue its services and earn clearing fees, clearing participants should be entitled to compensation, for example in the form of a share of future profits

of the CA, as without clearing participants sharing these losses, there would not be any future profits.

Recovery tools and provisions should be designed in a way that allows clearing participants to limit their liability to the CA and to ensure that the recovery tools can only be used in a limited manner (in time and dollar value) to ensure that the impact of such tools is predictable and reliable during stress, and do not further destabilize the market.

And finally, the NPR remains silent on the need for a second tranche of CA own-funds capital in the default waterfall (so-called Skin-In-The-Game). We believe that it is important for a CA to maintain a second tranche of equity that is applied to losses, before the CA allocates losses above the funded default resources to its clearing participants, in order to achieve better alignment of incentives between the main stakeholders, i.e. the CA and its Clearing Members.[1]

With regards to orderly wind-down, the Associations believe that wind-down plans should include an ability for participants to move positions to another CA. We welcome that this is addressed in the proposed rules, through a requirement for clearing agencies to include procedures for informing the SEC *"as soon as practicable"* ahead of initiating a recovery or orderly wind-down. These procedures should also set out how the CA will ensure a timely information of the clearing members as well, ahead of initiating any measure from the plan.

This response covers the positions of our members on the buy-side and sell-side. The paper does not reflect the views of many CAs, and many of the CCPs are in disagreement with these views.

[1] This is present in EU and UK regulation, as set out under Article 9(14) of the EU CCP Recovery and resolution regulation and in the UK, the Bank of England has the power to require CCPs to hold a second tranche of skin-in-the-game.

Request for Comment

A. Amendments regarding Risk Management

1. Should Rule 17Ad-22(e)(6) be amended to require that covered clearing agencies have policies and procedures reasonably designed to monitor intraday exposures and to require that monitoring to occur on an ongoing basis? Do commenters have views on what constitutes an ongoing basis, and does it differ for products cleared or markets served by a covered clearing agency? For example, would an ongoing basis in the equity market be different than in the security-based swaps market?

We agree with this proposed amendment.

We see benefit in deferring such assessment to the clearing agencies but would argue that every 15 minutes should be the absolute minimum – and that clearing agencies should aim for monitoring exposures more frequently than that, as appropriate given the type of products cleared. Generally, clearing agencies should inform members about the level of risk with a similar frequency as the clearing agencies monitors intraday risk, to allow members to anticipate intraday margin calls.

2. Should Rule 17Ad-22(e)(6) be amended to require that covered clearing agencies have policies and procedures reasonably designed to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility?

We fully support the new rule.

We support scheduled calls during ordinary course of business, but there should be a possibility of unscheduled calls if the situation warrants.

3. Should the Commission prescribe particular risk thresholds for intraday margin calls? If so, what should those thresholds be and what is the basis for those thresholds, and should the threshold applicable to particular asset classes (e.g., equities, fixed income, options, etc.) be determined jointly or separately?

We believe that it would be difficult to prescribe risk thresholds for intraday margin calls in regulation for a set of diverse asset classes. To make the threshold simple and effective, we propose for the regulation to define minimum requirements. CAs may decide for lower risk thresholds.

Generally, there should be no thresholds for scheduled intraday margin calls. For unscheduled, ad-hoc calls there could be a reasonable threshold to avoid unnecessary calls and to limit procyclicality.

These thresholds could be linked to the margin period of risk ("MPOR"): the shorter the MPOR is, the more it makes sense to call for ITD VM on a scheduled basis.

Other dimensions for the risk thresholds could be the size of the Skin-In-The-Game ("SITG" – the smaller the SITG, the lower the thresholds), and the current Initial Margin ("IM") on account (the larger the current IM is in relation to a day's price movement, the higher the thresholds can be).

Intraday margin calls can include an IM component for new positions or during intraday volatility increases and a Variation Margin ("VM") component to cover intraday market movements and resulting losses. Intraday call should cover full portfolio revaluation (VM, IM on new positions, IM changes on existing trades due to market moves).

4. Should the Commission identify additional circumstances that may warrant intraday margin calls beyond when the products cleared or markets served display elevated volatility? If so, what should those circumstances be?

While volatility would be the main trigger, there could be other drivers, for instance expected external events, such as Brexit or central bank actions.

As mentioned in Question 3, new positions would increase IM and could warrant an intraday margin call to cover the risk for these additional positions.

5. Do commenters believe that certain participants of covered clearing agencies, including, for example, participants with less capital or using smaller settlement banks, could face operational challenges or pricing disadvantages, if proposed Rule 17Ad-22(e)(6)(ii) were to result in more frequent margin calls?

We acknowledge that there might be smaller customers who will have less access to intraday liquidity. However, prudent risk management of the CA should not be hindered by less

sophisticated players. Participants should ensure they can meet intraday obligations. We do not see how less capital of a market participant could be a reason not to cover their intraday losses or increased risk to the CA. Alternatively these participants could have buffers at CAs to avoid the intraday calls.

Many central counterparties ("**CCP**") in the futures world do have several scheduled intraday margin calls. Usually, clients who cannot access intraday liquidity or are operationally not in the position to satisfy these calls in time, have arrangements with their clearing member to make these calls for them.

6. Should Rule 17Ad-22(e)(6)(iv) be amended to expand its scope to encompass other substantive inputs to a covered clearing agency's risk-based margin system? Should the Commission identify any particular types of substantive inputs or further specify what types of inputs should be included within the scope of the rule?

We believe that the rules around substantive inputs should be principles based. One of these principles could be that every input that affects margin requirements by [x]% is deemed substantive.

7. Should Rule 17Ad-22(e)(6)(iv) be amended to state that the procedures used when price data or other substantive inputs are not readily available or reliable should ensure that the covered clearing agency can continue to meet its obligations under Rule 17Ad-22(e)(6)?

It is paramount that CAs are able to meet their obligations and manage risk for the market. While clearing agencies should already have procedures and provisions for this case, we believe that it would be helpful if the rules were amended to make this requirement explicit.

8. Should Rule 17Ad-22(e)(6)(iv) be amended to further describe that the procedures used by a covered clearing agency when price data or other substantive inputs are not readily available or reliable shall include the use of price data or substantive inputs from an alternate source or the use of an alternate risk-based margin system?

While we believe that the obvious response to the non-availability of price data or other substantive inputs is to use alternate sources, we would not want to restrict innovation of the CA and be overly prescriptive. Key is that CAs have policies and procedures that provide a credible fallback should their primary sources of price information and other substantive inputs fail.

9. Do commenters have views on whether the Commission should require that any alternate source should be independent of third party providers, that is, within the sole control of the covered clearing agency?

A clearing agency being forced to use an alternate source of price data or other inputs suggests that a critical situation has already arisen. In such a situation, we would counsel against restricting choices in an emergency situation by requiring that the alternate source should be independent of third-party providers. However, we believe that it is important to ensure that the primary and alternate sources are not correlated, for instance not being produced by the same supplier (even on an indirect basis).

D. Contents of Recovery and Wind-Down Plans

10. Should the Commission adopt proposed Rule 17ad-26 to prescribe the contents of a covered clearing agency's recovery and wind-down plans?

Yes, we believe that more granular rules would support making clearing agencies' recovery and wind-down plans more comparable and ensure each plan includes all important elements.

11. Does proposed Rule 17ad-26 adequately identify and describe the elements that a covered clearing agency would be required to include in its RWP? If other elements should be included, please identify such elements and explain why they should be included. If certain elements should not be included, please identify such elements and explain why they should not be included.

The proposed rule does include most required elements. However, we would also like to see a requirement for a clearing agency to provide compensation to clearing participants (clearing members and/or their clients) for any loss sharing arrangement. This compensation could for instance consist of a claim of future income of the CA, as without clearing participants sharing these losses, there would not be any future profits.

We also believe that recovery and wind-down plans need to ensure that clearing participants' liability is limited and that certain tools can be used within monetary and time limits (e.g. 1-day VMGH of up to $1million per participant).

12. Are there any other elements that should be included in a covered clearing agency's RWP to facilitate the planning processes of a resolution authority? If so, please identify such elements and explain how they should help facilitate resolution planning.

This question is mostly addressed to the resolution authority.

However, we would like to note that there should be appropriate transparency to clearing participants over the recovery plans, wind-down plans and resolution plans. Only if these plans are well known by clearing participants, these clearing participants can manage to the actual plans, instead of assuming the worst outcome and act accordingly. Such actions from clearing members due to the lack of information sharing could undermine and be detrimental to the clearing agency's ongoing recovery or wind down.

Therefore, we recommend the SEC to consider discussing the involvement of a Resolution Authority to help market participants understand the implications and process for recapitalization in either scenario.

13. Should the Commission set more prescriptive requirements with respect to any of the elements of a covered clearing agency's RWP? If so, what should the Commission require, and why?

We agree with the approach set out in the proposed rules – i.e. setting out the key elements that clearing agencies should consider in designing their RWP. This would ensure that all CAs will perform a thorough analysis that covers all key questions when drafting a RWP, whilst there is no prescriptiveness as to the tools, the order of tools or other outcomes of the analysis are. We would however also encourage more prescriptiveness on certain aspects, such as the requirement for CAs to hold a second tranche of Skin-In-The-Game, the prohibition of Initial Margin Haircutting, the requirement for compensation and a requirement to be specific on how NDLs are covered.

We also would like to see a requirement that the RWP is shared with clearing members and other affected stakeholders. Should the RWP contain confidential analysis, this could be redacted.

We also believe that the RWP should be signed off by the risk management committee.

14. Are there other elements that a covered clearing agency should consider in its RWP that would better align the incentives of various stakeholders and hence facilitate a productive collaboration among them in a recovery and wind-down event?

Please see our response to question 11: we believe that there should be a requirement for a clearing agency to provide compensation to clearing participants (clearing members and/or their clients) for any loss sharing arrangement. This compensation could for instance consist of a claim of future income of the CA, as without clearing participants sharing these losses, there would not be any future profits.

We believe there should also be a requirement for a clearing agency to hold a second tranche of Skin-In-The-Game, following the EU and UK approaches.

We would also like to point out the Incentive analysis that the Associations published in 2019[2].

[2] https://www.isda.org/2019/03/15/ccp-recovery-and-resolution-incentives-analysis/

15. As discussed above, in 2016, CFTC staff issued guidance with respect to the contents of recovery and wind-down planning. Do commenters believe that there are any aspects of that guidance which should be codified in the Commission's proposed Rule 17ad-26? If so, please identify such aspects and explain why they should be included.

We note that the CFTC, concurrently to the SEC's proposal, is also proposing to codify elements of its 2016 guidance with respect to the contents of recovery and wind-down planning. We would suggest that the SEC coordinates with the CFTC to ensure the requirements for RWPs between the SEC and the CFTC are aligned.

The new regulations should refer to the guidance to ensure this is followed by the RWP of clearing agencies.

We see some elements that warrant codification in this proposal – at least with regards to compensation; ensuring a limited use of recovery tools under regulatory oversight, in the interest of the whole markets; limiting assessments to avoid further procyclicality; sufficiency of clearing agency's own pre-funded resources; explicit exclusion of Initial Margin Gains Haircutting; and a clear description of how clearing agencies would address non-default losses.

16. Should the Commission also require that a covered clearing agency's RWP set forth a viable strategy for its recovery and/or orderly wind-down, to ensure that a covered clearing agency take into account how the items included in the RWP fit together as a cohesive whole and that the RWP takes into account a covered clearing agency's unique characteristics and circumstances, including ownership and governance structures, effect on direct and indirect participants, membership base, markets served, the risks inherent in products cleared, and risk management needs. Would such a requirement be beneficial, or are these elements already captured by the proposed rule text?

Yes, the RWP of a clearing agency should absolutely "*set forth a viable strategy for its recovery and/or orderly wind-down, to ensure that a covered clearing agency take into account how the items included in the RWP fit together as a cohesive whole and that the RWP takes into account a covered clearing agency's unique characteristics and circumstances, including ownership and governance structures, effect on direct and indirect participants, membership base, markets served, the risks inherent in products cleared, and risk management needs*."

Without considering all these aspects, the RWP of a clearing agency will likely not be sufficiently effective.

17. With the additional requirements in proposed Rule 17ad-26, would a covered clearing agency retain an appropriate amount of discretion to consider the specific characteristics of the covered clearing agency when creating its RWP?

We believe that the proposed Rule 17ad-26 is sufficiently high-level and principle-based, ensuring the proposed rule will not hamper a clearing agency. This rule would provide sufficient guidance while not restricting a clearing agency, allowing them to consider the specific characteristics of the covered clearing agency when creating its RWP.

18. Do commenters agree with the proposed definition of "service provider", including the distinction between third parties and affiliates, and the proposed definition of "affiliate"?

We do agree with these definitions, which are very wide.

19. Do commenters agree that the RWP should identify and describe the covered clearing agency's critical payment, clearing, and settlement services and address how the covered clearing agency would continue to provide such critical services in the event of a recovery and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down? Should the Commission further define "staffing" to specify that it refers to particular positions or offices within the covered clearing agency?

We do agree that the identification of critical services is key. The evaluation of how these services can be sustained during recovery or wind-down scenarios will greatly influence various aspects of the RWP, including staffing. The emphasis should be placed on determining the staffing (but also other) requirements based on the needs to ensure continuity of service, rather than determining specific definitions. For instance, we would also recommend including disclosures of external sources of liquidity (such as lenders, creditors, liquidity providers) and when applicable, where they sit in the waterfall.

20. Do commenters agree that the RWP should identify and describe a covered clearing agency's critical service providers, specify to which services such service providers are relevant, and address how the covered clearing agency would ensure that such providers can be legally obligated to perform in the event of a recovery or orderly wind-down, including consideration of contractual obligations with such service providers and whether those obligations are subject to alteration or termination as a result of initiation of the recovery and orderly wind-down plan?

Please see above: The analysis of how critical services can continue should lead the clearing agency to the identification not only of critical staff, but also critical service providers. The question "what do I have to do to keep these services going" should result also in the review of contractual obligations. We, however, welcome the Commission's inclusion of all these considerations as it assists the clearing agency in focusing on the crucial questions that must be addressed within the RWP.

21. Do commenters agree that the proposed rule should require that the covered clearing agency identify the scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services as a going concern, including uncovered credit losses (as described in paragraph I(4)(viii) of 17 CFR 240.17Ad-22), uncovered liquidity shortfalls (as described in paragraph(e)(7)(viii) of 17 CFR 240.17Ad-22), and general business losses (as described in paragraph (e)(15) of 17 CFR 240.17Ad-22)?

We agree that the proposed rule should require the covered clearing agency to identify scenarios that might prevent the clearing agency from providing its critical services. Analyzing these scenarios will allow the clearing agency to better plan ex ante for all eventualities and is in line with international best practice. We propose to make the list of scenarios more granular (see response to question 22).

22. Should the Commission instead identify particular scenarios that a covered clearing agency has to address in its RWP? If so, should the Commission include any or all of the following scenarios: (i) credit losses or liquidity shortfalls created by single and multiple clearing member defaults; (ii) liquidity shortfall created by a combination of clearing member default and a failure of a liquidity provider to perform; (iii) settlement bank failure; (iv) custodian or depository bank failure; (v) losses resulting from investment risk; (vi) losses from poor business results; (vii) financial effects from cybersecurity events; (viii) fraud (internal, external, and/or actions of criminals or of public enemies); (ix) legal liabilities, including those not specific to the covered clearing agency's business as a covered clearing agency; (x) losses resulting from interconnections and interdependencies among the covered clearing agency and its parent, affiliates, and/or internal or external service providers; (xi) losses resulting from interconnections and interdependencies with other covered clearing agencies; and (xii) losses resulting from issues relating to services that are ancillary to the covered clearing agency's critical services? Should the Commission require consideration of 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 covered clearing agency, are particularly relevant to its business? Does this set omit any potential additional scenarios?

As proposed in our response to question 21, we support a more granular list of scenarios that the clearing agency should consider. While we believe that the proposed list of scenarios is comprehensive and in line with CPMI-IOSCO guidance on recovery of financial market infrastructures, paragraph 2.4.5[3], this list should however be a minimum and not limitative: the clearing agency needs to add any other scenarios that might be relevant for the markets and/or product it clears, and needs to consider the impact of a combination of default and non-default loss scenarios occurring concurrently[4]. In addition, we recommend that the SEC consider greater transparency around the distinction between default and non-default losses and the tools at the CA's disposal under each of these scenarios.

As to the combination of scenarios, most likely, a CA is required to invoke recovery or wind-down plan during market stress, where potentially simultaneous shocks hit the CA. While the clearing agency could decide what combinations of shocks/scenarios might be relevant for recovery planning, it could be a worthwhile analysis to see if the recovery plans would still be viable under a combination of these scenarios.

[3] Recovery of financial market infrastructures (bis.org)

[4] Please also see our paper on CCP Non-Default Losses (https://www.isda.org/a/dM9TE/FIA-ISDA-CCP-Non-Default-Losses-final.pdf).

23. With respect to scenarios, should the Commission also require that the RWP include an analysis that includes: (i) a description of the scenario; (ii) the events that are likely to trigger the scenario; (iii) the covered clearing agency's process for monitoring for such events; (iv) the market conditions, operational and financial difficulties and other relevant circumstances that are likely to result from the scenario; (v) the potential financial and operational impact of the scenario on the covered clearing agency 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 (vi) the specific steps the covered clearing agency 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?

Yes, we believe there are benefits for clearing agencies to perform such analysis, to ensure that the RWP is appropriate and reliable. The elements described above are all important aspects to be considered as part of the planning exercise. We would also recommend that such plans are tested in detail ex-ante.

As set out in the CPMI-IOSCO Guidance on Recovery of financial market infrastructures[5], paragraph 2.4.9, we would suggest that in the analysis of the relevant recovery tools to be implemented in a particular scenario, the RWP also includes an analysis of the impact and associated risks arising from the use of the tools on the clearing agency's participants and markets more generally.

As with other aspects of these plans, the proposed list can only be a minimum. The clearing agency needs to add any other elements that might be relevant for the markets and/or products it clears.

24. Do commenters believe that the Commission should prescribe any particular tools that a covered clearing agency must include in its RWP, such as a cash call, gains-based haircutting, or full or partial tear-up? If so, please identify such tools and explain why they should be required.

The Associations have compiled a list with recovery tools as part of the incentive analysis. We believe that the clearing agency should be free to select the right or most appropriate tools for the markets and products it clears without any regulation constraints. For instance, Variation Margin Gains Haircutting ("VMGH") is a tool that might be considered appropriate for futures and options but is not suitable for repos or cash securities clearing. VMGH might also not be an appropriate

[5] Recovery of financial market infrastructures (bis.org)

tool during resolution. We would however encourage the Commission, in line with regulations in the EU and UK, to explicitly exclude certain tools from the recovery toolbox, including but not limited to Initial Margin Haircutting. In addition, while CAs should be at liberty to choose their recovery tools, the Commission should place certain restrictions on these tools (use of VMGH and partial tear-ups for limited period of time and absolute dollar amounts, need for compensation when applied etc.).

25. Proposed Rule 17ad-26 would also require that the RWP identify triggers but does not prescribe a list of specific triggers. Should the Commission prescribe any particular triggers, whether qualitative or quantitative? For example, should the Commission require that a covered clearing agency should consider using the exhaustion of its prefunded resources as a trigger?

While we believe that the ultimate list of triggers will be specific to the scenarios that have been identified by the clearing agency, there will be a generic list of triggers that will apply to all clearing agencies. Exhaustion of prefunded resources would be an example of such a trigger. Another could be a failed auction. We propose for the Commission to provide a list of triggers that are required to be covered in the RWP, and ideally another list of triggers that a clearing agency should consider. For this second list, a clearing agency could determine (yet explain) that a trigger is not relevant for the products cleared and/or markets served by the clearing agency.

26. Should the Commission prescribe that a covered clearing agency's RWP also identify criteria that could show when recovery is successful and the covered clearing agency would return to normal operations?

These criteria could help focusing on the planning process to ensure performance of all required actions.

General criterion could be that no recovery or wind-down trigger applies anymore, and the clearing agency complies with all requirements, including resources replenished to the appropriate levels.

There might be additional criteria depending on each scenario, for instance the completion of a default management process and allocation of all defaulter's positions after a failed auction.

27. With respect to the requirement to identify and describe the process that the covered clearing agency uses to monitor and determine whether the criteria that would trigger implementation of the RWP have been met, including the governance arrangements applicable to such process, should the Commission require that the description also include identification of any areas in which the covered clearing agency could exercise discretion?

We agree that the clearing agency should have discretion for certain triggers, for instance the failure of a settlement bank, as long as there are sufficient backup provisions and the clearing agency has not lost more money than available in the clearing agency's excess equity. Other triggers should however be automatic, for instance the depletion of prefunded resources. As set out in the CPMI-IOSCO Guidance on Recovery of financial market infrastructures[6], one area in which the covered clearing agency could exercise discretion could be in relation to losses arising from general business risk. As set out in the CPMI-IOSCO Guidance, these triggers should "occur early enough to provide sufficient time for the plan to be implemented" and they should also "lead to a pre-determined information-sharing and escalation process".

We propose that the general assumption is that triggers are automatic, unless the clearing agency makes the determination that, for certain triggers, discretion is appropriate. This determination should include an analysis of how the clearing agency can sustain its operations, considering the available resources in the event that the clearing agency opts not to activate the recovery or wind-down procedures.

28. Proposed Rule 17ad-26(a)(5) would require the covered clearing agency to identify and describe the rules, policies, procedures, and any other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down to address the scenarios identified in the recovery and wind-down plan. Should the Commission also require that a covered clearing agency's RWP include any or all of the following: (i) a description of the tools that the covered clearing agency would expect to use in each scenario; (ii) the order in which each tool would be expected to be used; (iii) the time frame within which the tool would be used; (iv) the governance and approval processes and arrangements within the covered clearing agency 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 covered clearing agency (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 the tools; (vii) the roles and

[6] Recovery of financial market infrastructures (bis.org)

responsibilities of all parties, including non-defaulting participants; (viii) whether the tool is mandatory or voluntary; and (ix) an assessment of the associated risks from the use of each tool to non-defaulting clearing members and their customers, linked financial market infrastructures, and the financial system more broadly? Should the Commission require the covered clearing agency to estimate the potential size of the resources that the covered clearing agency would expect to receive from each tool?

Clearing agencies might retain discretion over parts of the recovery plan. For instance, a clearing agency might have several tools to address a particular scenario and could decide which of these tools or resources to utilize, or the order in which they are utilized based on the actual circumstances. However, we do however note that the more predictability a waterfall has, the better this would be for market participants involved (as they can model and reserve against this). We would therefore suggest that the CA indicates an order in which it would apply certain tools, and when the order deviates during recovery it is with the explicit consent of its regulator.

However, we believe that the Commission's questions should be considered during the development of the recovery plan. Therefore, while we agree that discretion in the use of tools might be helpful, the clearing agency should produce a plan that includes all the points in question 28. The plan could also include where the clearing agency management can or cannot make use of discretion. For instance, while there could be a reasonable case for discretion on which tools or resources to utilize, or the order in which this is completed, there is no discretion allowed in the governance processes.

In addition, CAs should have an adequate amount of their own capital at risk, at different points in the waterfall (i.e. a second layer after clearing member assessments or second tranche of Skin-In-the-Game) to align incentives.

29. Proposed Rule 17d-26 would require that the RWP address how the identified tools, procedures, or other resources would ensure timely implementation of the RWP. Do commenters agree with the need to ensure timely implementation? Should the Commission specify that timely implementation means that a covered clearing agency is able to deploy the tools identified in its plan as needed and when appropriate, for example, that it has identified the appropriate escalation and approval processes to use a particular tool or resource?

We would argue that in many recovery scenarios, time will be of the essence. Even in a slow-burning scenario like business losses, there should be timely implementation.

Addressing how timely implementation could be ensured would include an analysis of the required timelines, which would be helpful to guide ex-ante planning. We recommend the implementation

of rigorous governance around the use of any tools or emergency powers, in consultation with regulators, especially to assess systemic risk implications.

That being said, we agree with the general principle "*timely implementation means that a covered clearing agency is able to deploy the tools identified in its plan as needed and when appropriate, for example, that it has identified the appropriate escalation and approval processes to use a particular tool or resource*".

30. Proposed Rule 17ad-26(a)(7) would require procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down. Should the Commission instead or additionally require that the procedures provide for informing the Commission when the triggers set forth in proposed Rule 17ad-26(a)(5) have been met? Should the Commission also require notification to the covered clearing agency's participants and/or other stakeholders in the event of recovery or orderly wind-down, or initiation of the RWP?

We would assume that the Commission is sufficiently hands-on that it would be very much interested if a recovery trigger has been met. This would enable the Commission to prepare and to position staff and other resources while the clearing agency is still going through their governance procedures.

The clearing agency's participants and/or other stakeholders should be notified at minimum if any recovery or wind-down action affects their business in any way. For instance, if the recovery plan includes a cash call or any other financial contribution or allocation, participants should be informed as soon as possible so they can prepare and act accordingly, for instance by de-risking. On the other hand, if the recovery scenario addresses a business risk that can be addressed by a contribution by the clearing agency's parent, clearing participants do not need to be informed immediately.

31. Should the Commission prescribe a particular form of notice for informing the Commission, consistent with the requirement in proposed Rule 17ad-26(a)(7)? For example, should the Commission require written notice, or would telephonic notice be sufficient?

While the key is to notify the Commission, we would assume that both sides would feel better protected if this notification is made in a way that leaves an audit trail and can be better directed. I.e., while an email to a prescribed email address or distribution list at the Commission leaves a

record and helps the Commission to trigger the right processes involving the right staff, a phone call might not reach the right person or could be missed. For instance, another staff can pick up the phone for a colleague and is not aware of the urgency of the situation nor any next steps to be taken.

32. Proposed Rule 17ad-26(a)(8) would require procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans and specifying the procedures for, as appropriate, amending the plans to address the results of the testing. Do commenters agree with this proposed requirement? Should the covered clearing agency be required to mandate that participants participate in testing? Similarly, should the covered clearing agency be required to mandate that other stakeholders participate in testing unless the covered clearing agency determines that it would be impracticable to do so? Should testing be less frequent? For example, should testing occur at least every 24 months?

We agree that the plans need to be tested on a regular basis. A test every twelve months would be in line with the requirements to test default procedures. These two test requirements could be combined into one test.

We do not propose that the clearing agency needs to test every recovery scenario every year, but should pick material and significant scenarios and endeavor to test different scenarios and/or different parts of the plan each year.

We do agree that participants and other stakeholders should be included in these regular tests if any action is required from them as part of the recovery plan. This should be in line with the notification requirement (see our response to question 30). If the participation of clearing participants and other stakeholders is helpful for the test, the clearing agency should be required to mandate their participation. However, such testing should not become unduly onerous for market participants. In addition, it should be considered that testing is done simultaneously with other CAs, given the significant overlap in member base at CAs.

Lastly, we believe that regulators review and challenge the scenarios and these output of the test against the adequacy of the CA resources.

Any conclusions of the test are not only to be shared with regulators but also with risk advisory committees to ensure all participants can learn from this and collective thought can be placed on enhancing the procedures going forward.

33. Proposed Rule 17ad-26(a)(9) would require procedures for reviewing and approving a covered clearing agency's RWP by the board of directors at least every twelve months. Should the Commission impose a more, or less, frequent review cycle? And if so, why? Should the Commission require review and approval by the board of directors of an RWP following material changes to the covered clearing agency's operations that would significantly affect the viability or execution of the plans?

Given the importance of a RWP plan for the clearing agency's business, we agree that the board of directors should review and approve the RWP every twelve months. This would ideally be done after each test, so that the board of directors can assess the results and adequacy of the test and any subsequent change to the RWP.

We also agree that the board of directors should review and approve the RWP after material changes.

* * *

ISDA and FIA appreciate the opportunity to submit these comments on the Commission's Consultation.

If ISDA or FIA can be of any help in this process, we hope that you will not hesitate to contact the undersigned.

Sincerely,

Ulrich Karl
Head of Clearing Services
[redacted]

Jacqueline Mesa
Senior Vice President
Global Policy
[redacted]

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