INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

September 26, 2023

Mr. Christopher Kirkpatrick
Secretary
US Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Ms. Vanessa Countryman
Secretary
US Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: *Derivatives Clearing Organizations Recovery and Orderly Wind-down Plans; Information for Resolution Planning (RIN 3038-AF16); Covered Clearing Agency Resilience and Recovery and Wind-Down Plans (File No. S7-10-23)*

Dear Mr. Kirkpatrick and Ms. Countryman:

The Investment Company Institute[1] appreciates the opportunity to comment on proposals from the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) (together, the "agencies") regarding resilience and recovery and wind-down plans (RWPs) for derivatives clearing organizations (DCOs)[2] and covered clearing agencies

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $32.0 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.8 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

[2] Our comments regarding DCOs focus on the CFTC's proposed amendments to the standards for systemically important derivatives clearing organizations (SIDCOs) and for DCOs that elect to be subject to Subpart C of Part 39 of the CFTC's regulations ("Subpart C DCOs"), given their importance to the derivatives markets and their key role as central clearing counterparties (CCPs).

(CCAs) (together, "clearing entities"), respectively.[3] ICI members—regulated funds[4] ("funds") and their advisers—are customers of clearing members or direct participants of clearing entities and, therefore, have a strong interest in ensuring that clearing entities have robust RWPs in place that provide legal certainty for market participants and prioritize the protection of customers' assets and collateral.[5] ICI therefore supports the agencies' proposals to prescribe the content of clearing entities' RWPs and particularly supports requiring clearing entities to account for the interests of clearing members and their customers.[6]

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[3] Derivatives Clearing Organization: Recovery and Orderly Wind-Down Plans; Information for Resolution Planning, 88 Fed. Reg. 48968 (July 28, 2023) ("CFTC Proposal"), *available at* https://www.govinfo.gov/content/pkg/FR-2023-07-28/pdf/2023-14457.pdf; Covered Clearing Agency Resilience and Recovery and Wind-Down Plans, Exchange Act Release No. 34-97516 (May 17, 2023), 88 Fed. Reg. 34708 (May 30, 2023) ("SEC Proposal"), *available at* https://www.govinfo.gov/content/pkg/FR-2023-05-30/pdf/2023-10889.pdf. ICI, along with several other trade associations, submitted a letter to the SEC requesting an extension of its comment period to align with the CFTC's comment period. *See* Letter from the Futures Industry Association, International Swaps and Derivatives Association, Investment Company Institute (ICI), Managed Funds Association, Securities Industry and Financial Markets Association (SIFMA), and SIFMA Asset Management Group, to Vanessa Countryman, Secretary, SEC (June 28, 2023), *available at* https://www.sec.gov/comments/s7-10-23/s71023-216139-439924.pdf. We subsequently filed a brief letter with the SEC explaining that we planned to submit a single letter to both the SEC and CFTC addressing both the CFTC Proposal and the SEC Proposal, which we do herein. *See* Letter from Nhan Nguyen, Assistant General Counsel, ICI, to Vanessa Countryman, Secretary, SEC (July 17, 2023), *available at* https://www.sec.gov/comments/s7-10-23/s71023-225659-472922.pdf.

[4] The term "regulated fund" refers to both US-registered investment companies, such as mutual funds, ETFs, and other funds regulated under the Investment Company Act of 1940 ("registered funds"), and non-US regulated funds. "Non-US regulated funds" refers to funds organized or formed outside the US that are substantively regulated to make them eligible for sale to retail investors, such as funds domiciled in the European Union and qualified under the UCITS Directive (EU Directive 2009/65/EC, as amended), Canadian investment funds subject to National Instrument 81-102, and investment funds subject to the Hong Kong Code on Unit Trusts and Mutual Funds.

[5] In their capacity as end-users, ICI members have contributed to several industry efforts to develop and offer sensible recommendations toward achieving these objectives, including as members of a key CFTC Market Risk Advisory Committee (MRAC) subcommittee. *See, e.g.*, CFTC MRAC, CCP Risk and Governance Subcommittee, Recommendations on CCP Governance and Summary of Subcommittee Constituent Perspectives (Feb. 23, 2021) ("CCP Risk and Governance Subcommittee Recommendations"), *available at* https://www.cftc.gov/media/6201/MRAC_CCPRGS_RCCOG022321/download. Notably, individual ICI members contributed to a 2020 industry whitepaper that provides specific recommendations from end-users and clearing members to enhance CCPs' resilience, recovery, and resolution. A Path Forward for CCP Resilience, Recovery and Resolution (Mar. 10, 2020) ("2020 Industry Whitepaper"), *available at* https://www.jpmorgan.com/content/dam/jpm/cib/complex/content/news/a-path-forward-for-ccp-resilience-recoveryand-resolution/pdf-0.pdf. Our comments on the agencies' proposals regarding clearing entity resilience and RWPs are consistent with the principles and recommendations set forth in the 2020 Industry Whitepaper.

[6] While our members generally prefer more principles-based regulatory frameworks, we believe that it is appropriate in this instance to adopt more prescriptive requirements (many of which reflect existing best practices) regarding clearing entities' RWPs. We support additional prescriptive requirements given the lack of consistent risk management improvements among clearing entities and the practice among many of those entities of mutualizing certain risks to clearing members and their customers. *See e.g.*, Opening Statement of Commissioner Summer Mersinger Regarding CFTC Open Meeting on June 7, 2023 (declining to support the CFTC Proposal as it "supplants prescriptions for principles and regulatory constraints for flexibility"), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement060723.

We detail below recommendations to provide greater certainty to market participants, improve market confidence, and seek to ensure that clearing members and their customers will receive fair treatment during a clearing entity's recovery and/or wind-down proceedings. Specifically, we strongly recommend that the agencies:

- Harmonize their proposed amendments for clearing entities' RWPs, given that several key clearing entities are registered with both the CFTC and SEC;[7]
- Prescribe the tools that a clearing entity must use during a recovery or wind-down;
- Ensure that RWPs distinguish between the clearing entity's approaches to default and non-default loss scenarios; and
- Enhance transparency of RWPs and require clearing entities to consider the input from their risk management committees (RMCs) and risk advisory working groups (RWGs).

Further, while we support the SEC's proposed amendments regarding intraday margin, we recommend enhancing the intraday margin collection process by, among other things, limiting CCAs' use of unscheduled intraday margin calls and requiring CCAs to clearly communicate to market participants the thresholds that would trigger an intraday margin call. Finally, we highlight other important areas in which the agencies should take further action to increase the transparency and resilience of DCOs and CCAs.

I. ICI Generally Supports the Proposals for RWPs but Recommends Greater Harmonization Between the Agencies

ICI members, including regulated funds and their advisers, are key participants in central clearing as customers of clearing members of registered clearing entities.[8] As customers of clearing members, regulated funds are subject to initial margin and variation margin requirements calculated by a clearing entity, and thus deposit funds and assets as necessary to meet those requirements. Regulated funds' assets, however, may be unduly exposed to clearing entities' losses, as such entities currently have broad authority to implement recovery and wind-down tools that allocate losses to customers and clearing members. Accordingly, ICI has a strong

[7] We recommend harmonization between the CFTC and SEC's approaches based on four clearing entities that currently are dually registered, which include ICE Clear Credit, ICE Clear Europe, LCH SA, and Options Clearing Corporation (OCC).

[8] ICI's members use centrally cleared derivatives in various ways. Such derivatives offer funds considerable flexibility in structuring their investment portfolios. For example, a fund may use centrally cleared derivatives to hedge its positions or certain risk they present, equitize cash that it cannot immediately invest in direct equity holdings, manage its cash positions, or adjust portfolio duration, all in accordance with the investment objectives stated in the fund's prospectus.

interest in bolstering the risk management frameworks of clearing entities to ensure the strongest protections for customer collateral and funds.[9]

ICI supports the agencies' proposals to prescribe the contents of a clearing entity's RWP, which would ensure that clearing entities have robust RWPs in place and promote greater consistency across different plans.[10] Strengthening the standards that govern clearing entities' RWPs is a critical step in bolstering those entities' risk management policies and practices. Effective RWP standards could help protect clearing members' customers by reducing uncertainty if a clearing entity's ability to serve as a going concern becomes questionable or the clearing entity fails. Accordingly, we strongly support the proposed requirements for a clearing entity to account for the interests of clearing members and their customers in its RWP, which include:

- A description of the processes that the clearing entity will use to guide its discretionary decision-making relevant to the RWPs, and the process to identify and manage the diversity of stakeholder views and any conflicts of interest.[11]
- A description of the tools that the clearing entity would use in a recovery or wind-down scenario, including an assessment of the associated risks from the use of each tool to non-defaulting clearing members and their customers.[12]

[9] *See, e.g.*, Letter from Sarah A. Bessin, Associate General Counsel, and Nhan Nguyen, Assistant General Counsel, ICI, to Christopher Kirkpatrick, Secretary, CFTC, and Vanessa Countryman, Secretary, SEC (Oct. 7, 2022) ("ICI 2022 CCP Governance Letter"), *available at* https://www.sec.gov/comments/s7-21-22/s72122-20145227-310507.pdf; Letter from Dorothy M. Donohue, Acting General Counsel, ICI, to Kevin M. O'Neill, Deputy Secretary, SEC (May 21, 2014) ("ICI 2014 CCA Comment Letter") (recommending certain governance requirements for covered clearing agencies), *available at* https://www.sec.gov/comments/s7-03-14/s70314-9.pdf. *See also* Letter from Sarah A. Bessin, Associate General Counsel, ICI, to Christopher Kirkpatrick, Secretary, CFTC at 20 (July 13, 2020) ("ICI Part 190 Bankruptcy Letter") (requesting DCO governance processes that ensure that loss allocation, recovery, and wind-down rules are promulgated as part of a consultative process involving market participants), *available at* https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=29391.

[10] Both the CFTC and SEC point to international guidance and standards issued by the Committee on Payments and Market Infrastructure and the International Organization of Securities Commissions (CPMI-IOSCO), and the Financial Stability Board (FSB). ICI previously offered its perspective in the development of those standards. *See, e.g.*, Letter from Patrice Bergé-Vincent, Managing Director, ICI Global, to the Secretariat to the Financial Stability Board, at 5 (July 29, 2020) ("ICI 2020 Letter to FSB"), *available at* https://www.fsb.org/wp-content/uploads/ICI-Global-3.pdf; Letter from Patrice Bergé-Vincent, Managing Director, ICI Global, to the Secretariat to the Financial Stability Board (Feb. 1, 2019), *available at* https://www.fsb.org/wp-content/uploads/ICI-Global-2.pdf.

[11] *See* CFTC Proposed Rule 39.39(c)(7).

[12] *See* CFTC Proposed Rule 39.39(c)(4)-(5); SEC Proposed Rule 17ad-26(a)(5).

- Procedures for testing the viability of the recovery and wind-down plans annually, including a requirement that clearing members and, when practicable, other stakeholders (such as customers), participate in such testing.[13]

We urge the agencies, however, to coordinate with one another more closely and harmonize, to the fullest extent practicable, their respective proposed requirements for RWPs.[14] We note that several clearing entities are registered with both the CFTC and SEC, with more to likely become dually registered in the future. Therefore, it would be highly impractical and ineffective to administer differing sets of RWP requirements. In particular, the agencies take different approaches regarding their level of prescriptiveness[15] and differ regarding certain non-substantive matters.[16] We can think of no justifiable rationale for such differences to exist between the agencies' proposed approaches, which may cause confusion and redundancy regarding the standards for RWPs and result in inefficiencies. Harmonization would better facilitate compliance and promote consistency, certainty, and efficiency in the planning for and management of recovery and wind-down scenarios by clearing entities, to the ultimate benefit of all relevant market participants.

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[13] The CFTC's proposed rule states that DCOs "shall *consider* including external stakeholders that the plan relies upon, such as service providers, to the extent practicable." *See* CFTC Proposed Rule 39.39(c)(8) (emphasis added). The SEC's proposed rule, on the other hand, states that the testing procedures must require CCA's "*participants* and, when practicable, other stakeholders to participate" in such testing. *See* SEC Proposed Rule 17ad-26(a)(8) (emphasis added). We recommend that the agencies harmonize their approach and explicitly require such testing to include participation of clearing members and, when practicable, their customers, as well as other stakeholders.

[14] We note that Section 712(a)(1) of the Dodd-Frank Act requires the CFTC, "before commencing any rulemaking…regarding [DCOs] with regard to swaps, [to] consult and coordinate to the extent possible with the [SEC] and the prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible." Section 712(a)(2) similarly requires the SEC, "before commencing any rulemaking regarding… clearing agencies with regard to security-based swaps, [to] consult and coordinate to the extent possible with the [CFTC] and prudential regulators for purposes of assuring regulatory consistency and comparability, to the extent possible."

[15] For example, while the CFTC appropriately includes in its proposed rule text ten elements that a DCO must address regarding its recovery and wind-down tools, *see* CFTC Proposed Rule 39.39(c)(4)-(5), the SEC merely provides as guidance nine similarly worded elements that a CCA "should" address regarding such tools. *See* SEC Proposed Rule 17ad-26(a)(5). The SEC should align its approach with that of the CFTC by integrating those elements into its rule text, including a required assessment from a CCA of the associated risks from the use of each recovery and wind-down tool to non-defaulting clearing members and their customers.

[16] While the CFTC Proposal would require DCOs to inform both the CFTC and clearing members when the recovery plan is initiated or wind-down plan is pending, *see* CFTC Proposed Rule 39.39(b)(2), the SEC Proposal would require notification solely to the SEC when the CCA "is considering initiating a recovery or wind-down." *See* SEC Proposed Rule 17ad-26(a)(7). The SEC should also require RWPs to include procedures for informing both the respective supervisory agency and clearing members when the CCA is considering initiating a recovery or wind-down plan and when it has done so.

II. The Agencies Should Prescribe the Tools that a Clearing Entity Must Use During a Recovery or Wind-Down

ICI appreciates the agencies' objectives in amending the RWP requirements. We urge the agencies, however, to further prescribe the tools and methodologies that a clearing entity must use during a recovery or wind-down scenario. The agencies suggest that the proposals are intended to strengthen and reinforce existing RWPs by requiring new elements to be included, codifying elements that typically are included in RWPs, and revising certain information that must be included in an RWP.[17] The proposals also promote greater consistency in the content of these RWPs across different clearing entities. Notwithstanding these objectives, which we support, an RWP must ensure protection for non-defaulting customers' assets. Specifically, any exposures and liabilities of non-defaulting customers to the clearing entity should be limited, ascertainable, and manageable. Specifying the recovery and wind-down tools that a clearing entity must deploy in those scenarios would be most effective in achieving this important objective.[18]

Unfortunately, the proposals continue to provide broad discretion to a clearing entity to determine its recovery and wind-down tools, which effectively sanctions the use of tools that may result in the inappropriate allocation of non-defaulting customer' assets. We discuss these concerns and our recommendations further below. In addition, we recommend that the agencies require greater transparency regarding the content of RWPs, including by ensuring that clearing entities consider the input of their RMCs and RWGs regarding those plans.

a. RWPs Should Distinguish Treatment of Default Loss and Non-Default Loss Scenarios

ICI strongly recommends that the agencies require the tools that a clearing entity can use in a recovery or wind-down ensure that clearing entities and their shareholders are meaningfully responsible for covering losses in a default scenario and fully responsible for non-default losses.[19] Further, the agencies should require clearing entities to clearly delineate in their RWPs the respective policies, procedures, and tools (together, "tools") that the clearing entity can use

[17] *See* SEC Proposal at 34709; CFTC Proposal at 48969.

[18] We appreciate the CFTC's proposed guidance noting that a DCO's recovery and wind-down tools should "meet[] standards designed to protect indirect participants (*e.g.*, client end-users)." CFTC Proposal at 48979.

[19] The CFTC, for instance, proposes to define "default losses" as credit losses or liquidity shortfalls created by the default of a clearing member with respect to its obligations to cleared transactions. The CFTC would then define "non-default losses" as those from any cause, other than default losses, that may threaten the DCO's viability as going concern. Non-default losses would include, among other things, losses arising from: (1) general business risk, (2) custody risk, (3) investment risk, (4) legal risk, and (5) operational risk. *See* CFTC Proposal at 48973, CFTC Proposed Rule 39.2.

during a recovery or wind-down caused by a non-default loss scenario versus one caused by a default loss scenario. These tools should, among other things, ensure that a clearing entity designates a material amount of its own capital (*i.e.*, "skin in the game") to cover default and non-default losses, as well as limit any allocation of default losses to non-defaulting customers.[20]

It is especially critical that any clearing entity's RWP prioritize the protection of non-defaulting customers' assets instead of seeking to use them to cover losses attributable to the clearing entity or other clearing participants, *i.e.*, refraining from appropriating those assets to cover losses in a recovery or wind-down. Non-defaulting customers have no control over the clearing entity's risk management and do not contribute to its distress. Accordingly, in a default loss scenario, we strongly support the use of recovery and wind-down tools that primarily rely on the resources of the entities ultimately responsible for the losses and the failure of the clearing entity's risk management function: the clearing entity itself, its shareholders, and any defaulting participants.

We are concerned, however, that the agencies' proposals would continue to provide clearing entities with unbridled authority to inappropriately allocate default losses to non-defaulting customers through tools such as partial tear-ups (PTUs) or variation margin gains haircutting (VMGH).[21] As ICI has noted previously, such tools pose a serious risk to non-defaulting customers.[22] Accordingly, we urge the agencies to specify that a clearing entity may only use PTUs and/or VMGH as tools of last resort and only if a resolution authority authorizes and supervises their use. Moreover, the agencies should limit clearing entities' use of PTUs only to transactions that may be too illiquid to close (*e.g.*, when the market price cannot be ascertained), and limit the duration of entities' use of VMGH (*e.g.*, no more than a day) as well as the amount of margin that could be subject to such haircutting.

In a non-default loss scenario, clearing members and their customers should not bear the cost, as they typically are not responsible for the decisions that caused such outcomes. Notably, funds and other customers of clearing members play no meaningful role in the day-to-day risk management process of the clearing entity and, therefore, are unable to control and mitigate the clearing entity's exposure to non-default risks. The agencies should ensure that a clearing entity's recovery and wind-down tools reflect the principle that the clearing entity and its

[20] The 2020 Industry Whitepaper further discusses these policies, procedures, and tools, and provides additional recommendations to address issues related to CCP resilience, recovery, and resolution. We support the industry whitepaper's recommendations, which include proposed changes to CCP "default waterfalls." 2020 Industry Whitepaper at 2-10.

[21] *See* CFTC Proposal at 48979; SEC Proposal at 34722.

[22] PTUs and VMGH are essentially mechanisms to transfer assets of non-defaulting customers to the clearing entity and its shareholders and enable a clearing entity to return to a matched book at the expense of the contract holder, which loses the rights it negotiated and paid for when the clearing entity accepted the contract for clearing. *See* ICI 2020 Letter to FSB at 5.

shareholders are responsible for non-default losses, as such losses result directly from business decisions of the clearing entity's management.

Ultimately, clarifying who should bear the cost for non-default losses and distinguishing between the tools used for default and non-default loss scenarios would help reduce uncertainty and maintain market confidence, particularly if the agencies also enable greater transparency and participant input into the content of RWPs.[23] Moreover, delineation between default and non-default losses would help the agencies more readily verify that a clearing entity is using appropriate tools and resources during a recovery or wind-down.

III. The Agencies Should Enhance Transparency of RWPs and Require Consideration of RMC and RWG Input

It is critical for clearing members and end-user customers, such as funds, to have greater transparency into the content of RWPs. Such transparency could allow participants to determine the extent of their potential liabilities and predictably manage exposures to a clearing entity. Importantly, increased transparency could facilitate input from participants that may serve to enhance a clearing entity's risk management functions. While requiring clearing entities to maintain and submit RWPs for regulatory purposes provides the agencies with needed visibility and can increase confidence in cleared markets, such requirements alone fail to provide these important benefits to market participants.

At a minimum, we recommend that the agencies leverage their respective governance reforms for clearing entities to enable greater transparency and participant input into RWPs. Specifically, the agencies should explicitly state, or otherwise clarify, that a clearing entity's board must consult with its RMC when developing or amending its RWP.[24] Such consultation would be consistent with the CFTC's recently adopted requirements for RMCs and RWGs—the CFTC's DCO governance rule, for instance, requires a DCO's board to consult with its RMC on matters that would materially affect the DCO's risk profile, which include material changes to the DCO's "default procedures."[25] Developing and maintaining an RWP is an inherent part of a

[23] *See infra* Section III.

[24] *See* CFTC Proposed Rule 39.39(c)(7)(i); SEC Proposed Rule 17ad-26(a)(9).

[25] CFTC Rule 39.24(b)(11); *see* Governance Requirements for Derivatives Clearing Organizations, 88 Fed. Reg. 44675 (July 13, 2023), *available at* https://www.govinfo.gov/content/pkg/FR-2023-07-13/pdf/2023-14361.pdf. The SEC similarly proposed to require an RMC to assist the CCA's board in overseeing the CCA's risk management, although the SEC did not specify the matters that would require consideration by the RMC. *See* Clearing Agency Governance and Conflicts of Interest, Exchange Act Release No. 34-95431 (Aug. 8, 2022), 87 Fed. Reg. 51812, 51833 (Aug. 23, 2022), *available at* https://www.govinfo.gov/content/pkg/FR-2022-08-23/pdf/2022-17316.pdf. We recommended that that SEC harmonize its approach with the CFTC in this respect. ICI 2022 CCP Governance Letter at 4-5.

clearing entity's risk management function[26] and precisely the type of matter on which RMCs and RWGs are intended to provide input.

Clearing members and end-users participating in RMCs[27] would have the opportunity to review RWPs, as well as the means to formally convey their risk-based concerns and recommendations regarding those plans. Mandatory consultation would also enable the clearing entity's board to be more informed when reviewing and approving RWPs. For similar reasons, we also recommend that the agencies treat "material changes to recovery and wind-down plans" as a risk-based matter that must be presented for consideration to RMCs and RWGs. Further, we recommend requiring a clearing entity to include participation of the RMCs and RWGs in the testing of the recovery and wind-down plans,[28] as the market participants on those bodies would possess relevant perspectives and input to ensure that the tests are properly calibrated and administered.

In addition to providing greater transparency of RWPs to RMCs and RWGs, we also recommend that the agencies provide greater transparency of RWPs to a broader range of interested market participants, including clearing members and end-users generally.[29] At a minimum, clearing members and customers should be aware of the criteria that may trigger implementation, the tools and strategies that a clearing entity plans to use, and the source of capital or funds to be applied in a recovery or wind-down scenario. Providing access to these material portions of RWPs would help market participants have a more complete understanding of the risks presented by clearing with a particular clearing entity and allow them to better manage their exposures. Such enhanced transparency is especially important, given the limited number of clearing entities

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[26] As the CFTC states, recovery planning "concerns those aspects of risk management and contingency planning which address the extreme circumstances that could threaten the DCO's viability and financial health." CFTC Proposal at 48969. Likewise, the CFTC notes that requiring all DCOs to maintain and submit orderly wind-down plans would strengthen DCOs' risk management practices. *Id.* at 48973.

[27] The CFTC requires RMCs and RWGs to include representatives from clearing members and customers of clearing members. CFTC Rule 39.24(b)(11). The SEC's CCA Governance Proposal, on the other hand, would require RMCs to include representatives of CCA "owners and participants," but not specifically end-users. As noted above, ICI strongly supports the CFTC's approach to RMCs and RWGs and encourages the SEC to adopt rules that are consistent with the CFTC's final rules.

[28] *See* CFTC Proposed Rule 39.39(c)(8); SEC Proposed Rule 17ad-26(a)(8).

[29] The CFTC Proposal does not address the fundamental issue that DCOs' RWPs remain non-public and are not subject to notice and public comment. *See* Bankruptcy Regulations, 86 Fed. Reg. 19324, 19373 (Apr. 13, 2021) (recognizing that the CFTC does not require DCO's RWPs to be made public, and that "in implementing the DCO's [RWPs] the trustee would be implementing plans that, prior to the bankruptcy, were subject to the [CFTC's] supervision, but may not have been transparently available to clearing members or their customers"), *available at* https://www.govinfo.gov/content/pkg/FR-2021-04-13/pdf/2020-28300.pdf. The SEC Proposal, on the other hand, notes that CCAs' RWPs and material changes thereto are subject to public comment and SEC review. SEC Proposal at 34729. We observe, however, that the plans are not published in a centralized manner and that CCAs generally request confidential treatment for their plans.

offering access to certain markets as well as the agencies' current (and potential)[30] clearing mandates for certain products.[31]

IV. SEC's Proposed Amendments Related to the Collection of Intraday Margin

We generally support the SEC's proposed amendments that would identify specific instances in which a CCA needs to have policies and procedures to collect intraday margin, such as the breach of specific thresholds or in times of elevated volatility.[32] The proposed amendments, provided they are accompanied by clear communication to market participants of specific risk thresholds and thresholds for "elevated volatility" for each CCA, would provide greater certainty for those that may be subject to intraday margin calls. We offer additional recommendations to further enhance the intraday margin collection process, which may involve both initial and variation intraday margin.[33]

First, we recommend that the SEC require CCAs to clearly distinguish between the collection of initial versus variation intraday margin. This would help market participants better understand the reasons behind the intraday margin call, as well as how it relates to their ongoing positions and potential future obligations. Moreover, while we support scheduled/predictable event-driven and routine collection of intraday margin based on price changes or position changes, we strongly believe that there should be limits on the use of unscheduled (*i.e.*, ad hoc) intraday margin calls. Permitting CCAs to issue ad hoc intraday margin calls in an unrestricted manner risks unnecessarily raising market participants' costs of managing their margin obligations. For instance, the unpredictability of such margin calls means that funds must keep a portion of their assets in highly liquid assets in anticipation of potential ad hoc intraday margin calls, which may lower returns for fund investors. To address these concerns, the SEC should restrict CCAs' use

[30] *See* Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities, Exchange Act Release No. 34-95763 (Sept. 14, 2022), 87 Fed. Reg. 64610 (Oct. 25, 2022), *available at* https://www.govinfo.gov/content/pkg/FR-2022-10-25/pdf/2022-20288.pdf.

[31] Ultimately, we believe that transparency and due diligence concerns should take precedence over the clearing entities' claims for confidentiality, even if that necessitates clearing members and end-users signing non-disclosure agreements to mitigate any confidentiality concerns.

[32] The SEC specifically proposes to amend Rule 17Ad-22(e)(6)(ii) under the Securities Exchange Act of 1934 ("Exchange Act") to require that a CCA's margin system include the authority and operational capacity to make intraday margin calls as "frequently as circumstances warrant, including when risk thresholds specified by the CCA are breached or when the products cleared or markets served display elevated volatility."

[33] We note that our recommendations align with those described in the CFTC's Market Risk Advisory Committee discussion paper on CCP margin methodologies. *See* CFTC Market Risk Advisory Committee, CCP Risk and Governance Subcommittee, Recommendations Regarding CCP Methodologies (Feb. 23, 2021), *available at* https://www.cftc.gov/media/6206/MRAC_CCPRGS_DPBPCCPMM022321/download.

of unscheduled intraday margin calls only to instances of extreme and urgent circumstances, accounting for prevailing market conditions.

We further strongly recommend requiring CCAs to effectively communicate to market participants the thresholds that would trigger both scheduled and ad hoc intraday margin calls. This would enhance the ability of market participants, including funds, to prepare for such margin calls, as well as improve their ability to actively track and monitor liquidity demands.

V. The Agencies Must Continue to Address Other Aspects of the Regulatory Framework for Clearing Entities

We urge the agencies to continue to move forward with important regulatory reforms to address several other areas related to clearing entities, many of which have been explored in depth through the CFTC's Market Risk Advisory Committee and the CCP Risk and Governance Subcommittee.[34] Establishing greater regulatory oversight of clearing entities in these areas would help to ensure that they have proper policies and procedures to mitigate the possibility of having to wind down in the case of a loss.[35] These areas include (i) CCP margin methodologies; (ii) CCP transparency and disclosures; (iii) CCP liquidity risk and stress testing; and (iv) CCP capital and skin-in-the-game.[36] We urge the CFTC and SEC to take action on these additional issues, some of which are characterized by a lack of consensus between clearing entities and market participants. Acting in these areas is critical to provide greater transparency into CCP risk management, enhance CCP resiliency, increase certainty for market participants, provide more robust customer protections, and support the stability of the broader financial system.

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[34] CFTC Market Risk Advisory Committee, CCP Risk and Governance Subcommittee, Discussion regarding DCO Capital and Skin-in-the-Game (July 13, 2021), *available at* https://www.cftc.gov/media/6181/MRAC_CRGCapitalSITGFinalPaper071321/download; CFTC Market Risk Advisory Committee, CCP Risk and Governance Subcommittee, DCO Stress Testing and Liquidity Areas for Discussion (July 13, 2021), *available at* https://www.cftc.gov/media/6186/MRAC_CRGStressTestingLiquidityFinalPaper071321/download.

[35] Examples of such oversight should include ensuring proper capitalization, engaging in regular stress testing, and properly assessing risk (*e.g.*, through development of appropriate margining models).

[36] We have offered our perspectives on these issues to other regulators. *See, e.g.*, Letter from Jennifer Choi, Chief Counsel, ICI Global, to BCBS, CPMI, and IOSCO Secretariats (Jan. 26, 2022), *available at* https://www.bis.org/bcbs/publ/comments/d526/ici_consultativereporton.pdf (supporting recommendations to enhance transparency of CCP initial margin models and governance practices); ICI 2020 Letter to FSB (recommending changes to Financial Stability Board guidance regarding CCP recovery and resolution).

We hope that this information and recommendations are helpful to the agencies as they work to finalize the proposals. If you have any questions, please contact Sarah Bessin at sarah.bessin@ici.org or Nhan Nguyen at nhan.nguyen@ici.org.

Regards,

/s/ Sarah A. Bessin

Sarah A. Bessin
Deputy General Counsel

cc: The Honorable Rostin Behnam
The Honorable Kristin N. Johnson
The Honorable Christy Goldsmith Romero
The Honorable Summer K. Mersinger
The Honorable Caroline D. Pham

Clark Hutchison, Director, Division of Clearing and Risk
Commodity Futures Trading Commission

The Honorable Gary Gensler
The Honorable Mark Uyeda
The Honorable Jaime Lizárraga
The Honorable Hester M. Peirce
The Honorable Caroline A. Crenshaw

Haoxiang Zhu, Director, Division of Trading and Markets
Securities and Exchange Commission