THE FOUNDATION FOR SECURE MARKETS®

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By Electronic Delivery

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St. N.W.
Washington, DC 20581

Re: RIN 3038-AF39 Protection of Clearing Member Funds Held by Derivatives Clearing Organizations

Dear Mr. Kirkpatrick:

The Options Clearing Corporation ("OCC") appreciates the opportunity to submit these comments to the Commodity Futures Trading Commission ("CFTC" or "Commission") on the above-referenced proposal ("Proposal" or "Proposed Rules")[1] under the Commodity Exchange Act ("CEA"). In relevant part,[2] the Proposal would require, among other things, (i) that funds of the clearing members of a derivatives clearing organization ("DCO") be segregated from the DCO's own funds and held in a depository that acknowledges, in writing, that the funds belong to clearing members, not the DCO; (ii) that clearing member funds only be invested pursuant to certain defined parameters (specifically, the restriction in existing CFTC Regulation § 1.25); and (iii) that DCOs conduct a daily calculation and reconciliation of the amount of funds owed to customers and clearing members and the amount actually held for customers and clearing members.

I. About OCC

Founded in 1973, OCC is the world's largest equity d clearing organization. OCC operates under the jurisdiction of both the CFTC and the Securities Exchange Commission ("SEC"). As a registered Subpart C DCO under the CFTC's jurisdiction, OCC clears and settles transactions in futures and options on futures. As a registered clearing agency under the SEC's jurisdiction, OCC is the sole clearing agency for equity options listed on national securities exchanges. OCC also provides central counterparty clearing and settlement services for securities lending transactions. In addition, OCC has been designated by the Financial Stability Oversight Council as a systemically important financial market utility ("SIFMU") under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. As a SIFMU, OCC is subject to prudential regulation by the Board of Governors of the Federal Reserve System. OCC is recognized by the European Securities and

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[1] RIN 3038-AF39 Protection of Clearing Member Funds Held by Derivatives Clearing Organizations (Dec. 18, 2023), 89 FR 286 (Jan. 3, 2024) ("Release").

[2] The Proposal also includes certain proposed requirements concerning (i) the holding of assets in certain foreign central banks, and (ii) exemptions from the proposed rules for certain non-US DCOs. OCC does not anticipate being impacted by these provisions, and therefore offers no comments on or objections to them.

Markets Authority as a Tier 1 central counterparty clearinghouse ("CCP") established in third countries under Article 25 of the European Market Infrastructure Regulation. OCC operates as a market utility and is owned by five exchanges.

II. Summary of Comments

OCC supports the Commission's recent actions intended to assess and address the implications of new and untested disintermediated clearing models focused on retail customers. As a systemically important CCP, OCC believes its proven resilience is directly related to the strength and effectiveness of traditionally intermediated cleared markets and the comprehensive and deeply considered regulatory framework that underpins those markets. Among the functions served by regulated FCMs acting as intermediaries through their clearing membership are the maintenance of minimum capital, the provision of AML/KYC and trade review, and a robust layer of cyber resilience. Most relevant to the Proposal, at the core of that traditional framework in cleared derivatives markets is the CFTC's customer funds segregation regime, which promotes market confidence and efficiency by ensuring the separation and safeguarding of end-user funds. The Commission's regulations also provide for appropriate protections for the funds of clearing members in intermediated markets, where those clearing members are sophisticated, regulated market participants. Those protections are detailed in the transparent, comprehensive rulebooks of DCOs, which are themselves subject to regulatory review.

The Commission rightly recognizes that fully disintermediated clearing models, where end-users – including retail customers – clear directly through a DCO as members, lack the core protections of the customer funds segregation regime. However, the potential regulatory gaps created by removing FCM intermediation, particularly for retail customers, extend beyond customer segregation and raise novel issues. The myriad potential complications arising from the direct clearing model were the subject of industry comments in 2022 when an FTX-affiliated entity sought to offer such services,[3] and in mid-2023, the Commission acknowledged many of these potential implications in seeking comment from market participants on the impact of affiliations among certain regulated entities.[4] In light of these far-ranging implications, OCC believes the Commission and the market would be best served by addressing evolving fully disintermediated clearing models through comprehensive rulemaking, rather than through an iterative process that does not address the wide spectrum of regulatory issues presented by novel clearing models that differ from the traditional model used in CFTC regulated markets.

OCC also believes that any rulemaking with which the Commission proceeds to fill regulatory gaps present in disintermediated clearing models should be holistic in addressing these gaps and narrowly applied to DCOs with that particular clearing model. Changes to the existing rules for DCOs using a traditional, FCM-intermediated model risk negatively impacting a framework that has proved effective over time and through periods of significant market stress. With respect to the Proposal,

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[3] *See* Request for Comment on FTX Request for Amended DCO Registration Order ("FTX RFC"), *available at* https://www.cftc.gov/media/7031/CommentFTXAmendedOrder/download.

[4] *See* Request for Comment on the Impact of Certain CFTC-Regulated Entities ("Affiliations RFC"), *available at* https://www.cftc.gov/media/8826/rfcimpactaffiliations062823/download.

OCC believes the DCO core principles and the Commission's existing regulations provide significant protections for clearing member house margin accounts and guaranty fund contributions at intermediated DCOs. The customer fund segregation regime ensures appropriate safeguards for end-user funds at both the FCM and DCO level. Member margin and guaranty fund contributions are effectively protected from loss or misuse, subject to DCOs' strong governance structures and transparent rules agreed to by the sophisticated, regulated entities who comprise the DCOs' membership, and who actively monitor DCOs' adherence to those rules.

Beyond these questions about the premise underlying the Proposal, OCC also has concerns about the potential negative impact of certain elements of the Proposed Rules. Specifically:

- **The Proposed Rules could limit DCOs' risk management tools:** Proposed Regulation § 39.15(f)(3)(ii) would prohibit DCOs from using proprietary funds to "secure or guarantee the obligation of, or extend credit to," the DCO. Similarly, proposed Regulation § 39.15(f)(4) would limit the use of proprietary funds as belonging to the contributing clearing member, and further define that term to include either covering customer margin deficits or "to mutualize the losses resulting from a default by a clearing member." OCC agrees that preventing misuse of proprietary funds, and the commingling of those funds with the funds of the DCO, is an important regulatory objective. However, notwithstanding the Commission's stated intent not to interfere with DCOs' existing risk management programs, the proposed restrictions may unnecessarily limit the circumstances that could lead to settlement failures and the resulting effects. A default by a clearing member is but one of the circumstances that could result in losses or liquidity shortfalls for which a DCO would seek to use its guaranty fund. For example, the Proposed Rules could be interpreted as preventing DCOs from using or borrowing against a guaranty fund to address losses or liquidity shortfalls arising from the failure of a settlement bank, liquidity provider, investment counterparty, or other securities or commodities clearing organization at which proprietary funds may be held. Rules permitting such uses are currently in place in the industry. Indeed, OCC's rulebook permits such uses and has been filed with the Commission, as well as approved by the SEC, OCC's primary regulator, as an appropriate means of managing risk.[5] As described in further detail below, an intermediated DCO should have the flexibility instead to use proprietary funds in a manner consistent with the DCO's rules, which are transparent and subject to regulatory review, and on which the sophisticated, regulated entities that are members of the DCO are provided opportunities to provide feedback and input.
- **Additional clarity is needed for dual registrants:** As a dual-registrant, OCC clears both futures contracts (subject to CFTC regulation) and equity options (subject to SEC regulation), and many clearing members clear both types of products. Pursuant to long-standing practice and rules filed with both regulators, OCC collects margin from clearing members on a portfolio basis, rather than on a product-by-product basis, and member margin for both securities and futures products is generally held in the same account.

[5] *See* notes 27-29, *infra*.

These practices benefit members and the market by facilitating more accurate risk measurement and management. Similarly, OCC has for over 20 years maintained a single guaranty fund for its members, which provides both operational and risk management benefits to OCC, its members, and the markets it serves. The Proposed Rules do not explicitly address these circumstances and could create uncertainty for dual registrants attempting to comply with the segregation requirements. As such, the proposal could disrupt DCOs' well-established operational and risk management practices, particularly where a primary regulator has approved those practices. OCC respectfully requests that the Commission state clearly that such practices are compatible with any new rules imposed on DCOs.

- **The Commission must ensure that third parties will not attempt interfere with DCO default management:** As proposed, Regulation § 39.15(f)(4)(ii) states that "*No person*, including any [DCO] *or any depository*, that has received proprietary funds for deposit in a segregated account. . . may hold, dispose of, or use any of the funds as belonging to any person other than the clearing members" of the DCO (emphasis added). The open-ended "no person" and explicit inclusion of a depository could be interpreted to suggest that third parties can and should be responsible for ensuring that a DCO is using proprietary funds in a manner consistent with the Commission's rules. Such language creates the potential for a third party to disrupt a DCO's default management processes for which a DCO must rely on banks and other depositories that hold proprietary funds to comply with their contractual obligations within prescribed timeframes measured in minutes. Such disruption could interfere with or prevent the effective management of such a default, creating risk to the DCO, its members, and the broader financial system. We request that the Commission clarify that DCOs (including their employees and affiliates) are solely responsible for ensuring compliance with any final rule.

III. Overview of OCC's Clearing Model and Treatment of Member Funds

As a Covered Clearing Agency clearing securities and a DCO clearing futures contracts, in both cases pursuant to a traditional intermediated clearing model, OCC treats its obligations to safeguard member and customer funds with the utmost seriousness, as reflected in OCC's conservative structure and margin and investment policies. These policies are aligned not only OCC's responsibilities as a SIFMU and the fundamental incentive structure of traditional CCPs, but also to the effective framework of existing rules and standards. This section briefly reviews OCC's existing structure and its treatment of clearing member funds, to provide important context and background for our comments on the Proposal.

OCC clears securities and futures products listed and traded on 19 exchanges. As of the date of this letter, OCC has over 100 clearing members clearing securities and futures transactions. All of OCC's clearing members are sophisticated, regulated entities; OCC's rules restrict membership to FCMs, broker-dealers, banks, and certain foreign securities firms, all of whom must meet stringent requirements for available financial resources and operational capabilities as a condition of

membership. These requirements are established in OCC's rules and bylaws, which are publicly available and with which all clearing members are required to comply.

OCC's regulatory status and the transparency of OCC's rules ensure they are subject to robust oversight from regulators and scrutiny from clearing members (among other stakeholders). As a Covered Clearing Agency regulated by the SEC and a Subpart C DCO regulated by the CFTC, OCC must file proposed changes to its rules or bylaws with the SEC and the CFTC. OCC must also file advance notice of proposed changes to its rules, procedures, or operations that could materially affect the nature or level of risks presented by OCC. In developing changes to its rules or bylaws, OCC seeks input from clearing members when it believes they may be significantly affected by the proposed change. Members also have an opportunity to comment on the proposed change once filed with the appropriate regulator(s). This mechanism is designed to provide OCC participants with the opportunity to help OCC make its clearing and settlement arrangements efficient and effective in serving its participants' needs.

OCC's rules require every clearing member to establish and maintain an account at one of several OCC-designated banks ("Clearing Banks"),[6] and to authorize OCC to withdraw funds from that account in accordance with OCC's rules. OCC assesses margin at least once daily, which it collects by withdrawing the appropriate amount from members' accounts and transferring those funds to accounts that OCC maintains at either a depository institution ("Custody Bank") or at the Federal Reserve. Pursuant to CFTC rules, futures customer margin is generally held at a Custody Bank in segregated accounts.[7] Clearing member margin is generally held in OCC's account at the Federal Reserve, commercial banks or, with respect to securities, at the Depository Trust Company ("DTC"), where it is held on a commingled basis pursuant to OCC's rules.[8]

OCC maintains a single mutualized guaranty fund for both equity and non-equity products,[9] which it refers to as the "Clearing Fund." Clearing Fund cash contributions are collected from clearing

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[6] OCC maintains a list of Clearing Banks that are approved for use by members, pursuant to minimum standards established in OCC's rules. *See* OCC Rule 206. OCC's detailed assessment and monitoring processes for such banks are described in OCC's rule-filed Third-Party Risk Management Framework, which is available to members on OCC's website. *See* Third-Party Risk Management Framework, *available at* https://www.theocc.com/getmedia/68a1ea2d-ddae-4a93-a309-100bf70a0f28/Third-Party-Risk-Management-Framework.pdf.

[7] OCC obtains an appropriate acknowledgment letter from each Custody Bank holding customer segregated assets, as required by CFTC Regulation § 1.20. *See* 17 CFR Part 1 § 1.20(d).

[8] *See* OCC Rule 604(d). Clearing Fund cash and clearing member margin are held in the same account at the Federal Reserve Bank of Chicago, pursuant to OCC's rules and regulatory approval. *See* OCC Rules 604(d) and 1002(c). *See also* The Options Clearing Corporation; Notice of Filing of Proposed Rule Change Concerning the Commingling of Certain Non-Customer Margin Assets with Clearing Fund Contributions in The Options Clearing Corporation's Account at the Federal Reserve Bank of Chicago, Securities Exchange Act Release No. 34-89590 (Aug. 18, 2020), 85 FR 52176 (Aug. 24, 2020) (SR-OCC-2020-10); OCC Rule Filing SR-OCC-2020-010 Rule Certification [pursuant to CFTC Regulation § 40.6] (Aug. 28, 2020), *available at* https://www.cftc.gov/sites/default/files/filings/orgrules/20/08/rule082820occdco001.pdf.

[9] *See infra,* note 35 and associated text.

member Clearing Bank accounts and deposited primarily at OCC's Federal Reserve account.[10] The conditions under which OCC may use Clearing Fund cash are defined in OCC's rules, pursuant to rules filed with OCC's regulators, and posted on OCC's website, as well as summarized in OCC's qualitative PFMI disclosures. OCC's Clearing Fund covers credit risk and liquidity shortfalls in the event or in anticipation of a Clearing Member suspension (i.e., default), or the failure of any bank, securities or commodities clearing organization, or investment counterparty to perform its obligations to OCC. To achieve these purposes, OCC is authorized, under certain defined conditions, to either use the cash in the Clearing Fund or pledge the assets of the Clearing Fund as collateral for borrowing. Any use of the Clearing Fund is subject to clearly defined governance processes that are described in OCC's rules concerning default management.

OCC follows a conservative investment strategy, with the primary objective to preserve principal and maintain adequate liquidity. This strategy is defined in OCC's rule-filed Cash and Investment Management Policy ("Investment Policy") and is consistent with existing CFTC rules and the DCO core principles.[11] Pursuant to the Investment Policy, clearing member margin cash is typically maintained in accounts at a Federal Reserve Bank or OCC-approved depository bank, and portion invested overnight in U.S. Government securities through reverse repurchase agreements with large institutional investment counterparties. The interest or gain on such reverse repurchase investments accrues to the benefit of OCC, which, given its industry utility model, uses the revenue to offset expenses and thereby benefit clearing members by allowing for reduced clearing fees, clearing fee holidays or clearing fee refunds. Clearing Fund cash is typically maintained at a Federal Reserve Bank and any interest earned accrues to the benefit of clearing members,[12] subject to a cash management fee established in OCC's rule-filed fee schedule.[13] Customer segregated funds are maintained in segregated accounts at the Federal Reserve and commercial banks.

IV. **The Commission Should Address the Novel Risks Posed by Fully Disintermediated Clearing Models Through Holistic, Narrowly-Tailored Rulemaking, Rather than Risking Disruption of the Effective and Resilient Model of Traditional DCOs**

OCC strongly supports rulemaking to address regulatory gaps arising from fully disintermediated clearing models. As each of the Commissioners recognized during the open meeting in which the

[10] OCC's rules also permit the investment of Clearing Fund cash in Government securities. *See* OCC Rule 1006(c). However, pursuant to OCC's Cash and Investment Management Policy, OCC's policy is to deposit Clearing Fund assets at the Federal Reserve or commercial banks. *See* The Options Clearing Corporation; Notice of Filing of Proposed Rule Change Concerning the Options Clearing Corporation's Cash and Investment Management (Securities Exchange Act Release No. 34-93916 (Jan. 6, 2022), 87 FR 1819 (Jan. 12, 2022) (SR-OCC-2021-014); Rule Certification Concerning OCC's Cash and Investment Management Policy [pursuant to CFTC Regulation § 40.6] (Feb. 1, 2022), *available at* https://www.cftc.gov/sites/default/files/filings/orgrules/22/02/rule020122occdco001.pdf.

[11] *See* Securities Exchange Act Release No. 94304 (Feb. 24, 2022), 87 FR 11776 (Mar. 2, 2022) (SR-OCC-2021-014).

[12] The Investment Policy provides that the policy of depositing Clearing Fund at the Federal Reserve Bank is subject to an exception approved by the Chief Executive Officer or Chief Operating Officer in emergency situations (such as a disruption at a Federal Reserve Bank) when necessary or advisable for the protection of the Corporation or otherwise in the public interest to continue to facilitate the prompt and accurate clearance and settlement of confirmed trades or other transactions and to provide OCC's services in a safe and sound manner. *See supra*, note 9.

[13] *See supra* note 8.

Proposal was discussed and voted on, disintermediated clearing raises novel issues in a variety of critical areas. Unfortunately, the Proposal only addresses one of these areas, and only through an overbroad application of new rules and requirements impacting all DCOs, not just the disintermediated DCOs where retail investor funds may be at risk. The Commission's approach risks disrupting the framework currently in place for traditional, intermediated DCOs, which has proved resilient and effective through significant periods of market stress. The Commission should instead engage in a comprehensive rulemaking to address the myriad issues attendant to the disintermediated model and apply it narrowly to DCOs with this model. Traditional, FCM-intermediated clearing leverages a comprehensive set of regulatory obligations and established market practices at both the FCM and DCO levels to provide stability, resilience, and safety for end-users, clearing members, and the broader financial system. In addition to the customer funds segregation regime, the CEA, CFTC rules, and other applicable laws also provide for AML/KYC (by FCMs), limitations on approved depositories for customer funds, bankruptcy priority for customers, performance guarantees by well-resourced intermediaries, and separation of functions to align incentives for oversight and monitoring, including as a result of FCMs' function as agents for their customers. These features are not present in direct clearing models. In 2022, the risks posed by the absence of many of these protections was the focus of substantial industry comment in response to the FTX RFC.[14] OCC's comments on the FTX RFC focused on the potential systemic risks posed by the proposal as a result of the proposed deviations from the risk management and customer protection measures present at traditional DCOs.[15] Subsequently, in mid-2023, following the collapse of FTX and the withdrawal of its application to amend its DCO registration, the Commission's staff sought comment on the impact of affiliations between certain CFTC-regulated entities in the Affiliations RFC. In response, several industry commenters focused on the importance of the separation of functions between FCMs and DCOs, and the strength of the traditional model of central clearing through independent, regulated intermediaries.[16]

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[14] *See, e.g.,* comments from FIA ("we submit that the FTX Proposal requires a thorough analysis by the Commission, to the extent that the model might lack and thereby do away with certain of the protective elements built into the system. At a minimum, we submit that any approved model should provide at least the status quo level of customer protections and market integrity protections as exist in the traditional clearing model, and may very well warrant a heightened level of protections. . .); NFA ("Given that FTX's proposal, if approved, would disrupt Congress' well-planned regulatory framework, NFA does not believe the proposal can be implemented unless Congress specifically amends the CEA to define how DCOs. . . would permit retail customers to trade margined derivatives products on a non-intermediated basis and also establish the necessary and critical protections for customers engaging in these transactions."); and CCP Global ("FTX's proposal appears to include a number of risk management shortcomings and inconsistencies when compared with the PFMIs.") *All comments available at* https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7254.

[15] *See* Letter from John Davidson, dated May 11, 2022 (discussing, among other things, increased systemic risk and weakened investor protections that would result from FTX's direct clearing model), *available at* https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=33596.

[16] *See, e.g.,* comments of CME ("The CEA presupposes that SRO functions are performed by entities that are legally distinct from the market participants whose activities Congress has determined should be subject to an SRO's oversight. . . We believe this separation between registered entities on the one hand and market participants on the other hand is an important foundational element of the CEA's long-established, effective regime for market regulation. . ."); ISDA ("Another arrangement could be to combine the DCO and the FCM into one entity that

With this proposal, the Commission would address only one of the issues raised by emerging direct clearing models, and would do so through a rule that will impact all DCOs, irrespective of their clearing model. As detailed below, beyond protecting the funds of retail investors clearing directly with a DCO, the Proposal would impose a broad range of new requirements and restrictions on DCOs, some of which run counter to common industry practices relating to the use of guaranty funds to ensure daily settlement *prior* to the occurrence of a clearing member default. The existing framework for the treatment of proprietary funds at intermediated DCOs is well-understood by market participants and provides both safety for members and flexibility for DCOs. Taking a broad-brush approach to filling the narrow regulatory gap that the Commission has identified carries a risk of undermining that framework and could lead to unintended consequences for DCOs' ability to prevent events with potentially systemic impacts.

Rather than proceed with this approach, OCC recommends that the Commission instead replace the Proposal with one that addresses the range of novel issues and regulatory gaps arising from disintermediated clearing, including the interaction between direct clearing and the Commission's bankruptcy-related rules under Part 190, while being narrowly focused on those DCOs that use such a model. In so doing, the Commission would have the opportunity to incorporate the comprehensive and constructive feedback provided by industry participants in the FTX and Affiliations RFCs.

V. For Traditional DCOs, Transparent Rulebooks Consistent with Existing Regulations and International Guidance Provide Appropriate Protections for Proprietary Funds

Two separate provisions of the Proposed Rules would prescribe the manner in which a DCO could use member funds contributed to a guaranty fund. Proposed Regulation § 39.15(f)(3)(ii) would, as part of a general rule against commingling of proprietary funds with those of the DCO, prohibit a DCO from "us[ing] proprietary funds to secure or guarantee the obligation of, or extend credit to, the [DCO]." Proposed Regulation § 39.15(f)(4)(i) would impose a general prohibition against using proprietary funds "except as belonging to the clearing member that deposited the proprietary funds." The Proposed Rule would then, in proposed Regulation §§ 39.15(f)(4)(i)(A) & (B), provide a purportedly non-exhaustive list of uses that would qualify "as belonging to clearing members." Proposed Regulation § 39.15(f)(4)(i)(A) would permit the use of proprietary funds to guarantee or cover deficits in customer accounts, and proposed Regulation § 39.15(f)(4)(i)(B) would permit the use of non-defaulting clearing members' proprietary funds "being held as a guaranty fund to mutualize the losses resulting from a default by a clearing member to cover such losses in accordance with the [DCO's] rules and its agreement(s) with its clearing members." It is the combined impact of 39.15(f)(3)(ii) and 39.15(f)(4)/39.15(f)(4)(i)(B) that is of particular concern. As proposed, those provisions appear to permit only a narrow set of uses for proprietary funds, and in particular clearing member contributions to a mutualized guaranty fund. Specifically, the Proposed Rule appears to limit the use of such funds to the mutualization of losses from realized defaults,

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provides the functions of FCM and DCO, without the separation. This could streamline default management processes, but care would be needed that all protections that the current structure provides for customers, other market participants, the wider market and financial stability would still be available, which would require extensive new rulemaking.") *All comments available at* https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7401.

without permitting other standard, risk reducing uses such as borrowing against the guaranty fund, using the guaranty fund in anticipation of a formal default, or using the guaranty fund to ensure daily settlement in the event of the failure of certain depositories or counterparties to meet their obligations to OCC.

In the Proposal, the Commission states that it does not intend that the proposed restrictions on the use of proprietary funds "interfere with or alter DCOs' risk management programs."[17] Nevertheless, the combined effect of several of the Proposed Rules would be to do just that. By narrowly defining the permitted uses of a DCO's guaranty fund – and the members' contributions to that fund – the Proposed Rules would foreclose DCOs' use of its guaranty fund as a key risk management tool in certain circumstances that do not involve a formal default. For traditional, FCM-intermediated DCOs, the permitted uses of the guaranty fund are the product of rules that have been subject to input from the DCO's sophisticated members, as well as a rule filing process involving providing the opportunity for further regulator – and in certain instances, public – input. Indeed, in OCC's case, the relevant rules have been explicitly approved by OCC's primary regulator following the opportunity for public comment, as well as filed with the Commission. In OCC's view, for FCM-intermediated DCOs, restricting DCOs' use of guaranty fund contributions to those uses authorized in the DCO's rules provides appropriate protections to members while not unduly impinging on DCOs' risk management capabilities.

A review of the relevant provisions of OCC's rules illustrates the impact the Proposal would have on an established, traditional FCM-intermediated DCO. OCC's rules include detailed provisions governing the investment and use of member funds contributed to the Clearing Fund, which are primarily located in Chapter X of OCC's rulebook ("Clearing Fund Rules"). These rules are transparent to members, the regulators, and the public, and are aligned with existing CFTC rules, DCO Core Principles, and the PFMIs. For example, consistent with DCO Core Principle D(iii) and existing Regulation § 39.15(c), which require a DCO to hold member funds in a manner that minimizes risk of loss or delay in access to the funds, OCC Rule 1002(c) authorizes OCC to either invest Clearing Fund contributions in government securities or deposit the funds with an approved custodial bank;[18] consistent with existing Regulation § 39.15(b)(2), Rule 1002(c) further authorizes OCC to commingle the funds of multiple members.

With respect to the risk management functions of the Clearing Fund, the Clearing Fund Rules authorize OCC to use member funds deposited in the Clearing Fund for two broad purposes: i) to cover costs associated with the failure of a clearing member or clearing members to meet certain obligations;[19] and ii) to reimburse any loss to OCC caused by the failure of any bank, securities or commodities clearing organization, or investment counterparty to perform any obligation to OCC when due as a result of its bankruptcy, insolvency, receivership, suspension of operations, or similar event, to the extent not otherwise covered ("Counterparty Failure").[20] Moreover, the Clearing Fund

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[17] Release at 290.

[18] Pursuant to the Investment Policy, OCC's policy is to deposit Clearing Fund assets at the Federal Reserve or commercial banks. *See supra*, note 8.

[19] *See* OCC Rule 1006(c).

[20] *See* OCC Rule 1006(b).

Rules authorize OCC to effect borrowing or other transactions using Clearing Fund deposits as collateral to obtain funds to address any of the circumstances described above, pursuant to a determination by the Chairman, CEO, or COO of OCC.[21] In addition, the Clearing Fund Rules explicitly contemplate borrowing to meet obligations arising out of the default or suspension, *or in anticipation of the potential default of suspension*, of a clearing member or action taken by OCC to address such an actual or potential default of suspension.[22] With respect to any Counterparty Failure, OCC may borrow against the Clearing Fund when it "reasonably believes it necessary to borrow to meet its liquidity needs for daily settlement as a result of the failure of any bank, securities or commodities clearing organization, or investment counterparty to perform any obligation to [OCC] when due."[23] The Clearing Fund Rules also contain detailed provisions for the replenishment of the Clearing Fund,[24] as well as the repayment of any borrowings.[25]

OCC's Clearing Fund Rules are a critical part of OCC's overall risk and default management frameworks. The Clearing Fund Rules have been reviewed and approved on multiple occasions by the SEC, OCC's primary regulator, as well as filed with the Commission pursuant to part 40.6 of the Commission's rules. Indeed, OCC's rules have explicitly permitted OCC to borrow against the Clearing Fund since 2004,[26] and to do so in anticipation of a formally declared member default since 2013,[27] while the ability to borrow against the Clearing Fund has been identified as a core "Enhanced Risk Management Tool" in OCC's rule-filed Recovery and Wind-down Plan since at least 2018.[28] Similarly, the Clearing Fund Rules have long permitted the use of the Clearing Fund to

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21 *See* OCC Rule 1006(a).
22 *See* OCC Rule 1006(f).
23 *Id.*
24 *See* OCC Rules 1005 and 1006(h).
25 *See* OCC Rule 1006(f).
26 *See* The Options Clearing Corporation; Order Granting Approval of a Proposed Rule Change Relating to Borrowing Against the Clearing Fund, Securities Exchange Act Release No. 34-50526 (Oct. 13, 2004); 69 FR 610701 (Oct. 20, 2004), File No. SR-OCC-2004-13 ("The proposed rule change should allow OCC to more readily have the liquidity it may need in the event of a clearing member default and does not otherwise affect the rights and obligations of OCC or its members regarding the clearing fund. Accordingly, because the proposed rule change is designed to help assure that OCC will be able to meet its settlement obligations and does not jeopardize the integrity of OCC's clearing fund, it is designed to assure the safeguarding of securities and funds which are in the custody or control of OCC or for which OCC is responsible."); Rule Filing SR-OCC-2004-13 Rule Certification [pursuant to CFTC Regulation § 40.6] (Jun. 21, 2004), *available at* https://www.cftc.gov/sites/default/files/files/submissions/rules/selfcertifications/2004/rul062304occ001.pdf.
27 *See* The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Clarify OCC's Existing Policy Regarding Use of Clearing Fund Assets in Anticipation of a Clearing Member Default, Securities Exchange Act Release No. 34-70935 (Nov. 25, 2013), 78 FR 72135 (Dec. 2, 2013), File No. SR-OCC-2013-20 (concerning addition of interpretive language to OCC's rules to clarify that OCC's authority to use its Clearing Fund "applies to both situations in which a clearing member default or suspension that has already occurred, and in anticipation of potential default or suspension of a clearing member"); Rule Filing SR-OCC-2013-20 Rule Certification [pursuant to CFTC Regulation § 40.6] (Nov. 4, 2013), *available at* https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul110413occ001.pdf.
28 *See* The Options Clearing Corporation; Order Approving Proposed Rule Change, as Modified by Partial Amendment No. 2, Concerning Updates to and Formalization of OCC's Recovery and Orderly Wind-Down Plan, Securities Exchange Act Release No. 34-83918 (Aug. 23, 2018), 83 FR 44091 (Aug. 29, 2018), File No. SR-OCC-2017-021.

ensure daily settlement in the event of a bank's or other counterparty's failure to perform on its obligations to OCC, a tool that the SEC found was consistent with OCC's regulatory obligations and described as "promoting prompt and accurate clearance and settlement of securities transactions" and "designed to provide OCC with additional tools to address a foreseeable, temporary liquidity shortfall to prevent the unwinding, revoking, or delaying of same-day settlement should that scenario materialize."[29] It appears that other DCOs,[30] as well as other SEC-regulated CCPs,[31] include similar authorities in their rulebooks.

OCC's Clearing Fund Rules protect member funds against misuse and investment loss, while allowing for certain limited risk-management related uses of those funds pursuant to detailed rules and conservative governance and risk controls. The rules have been approved by OCC's regulators, and OCC's sophisticated, regulated members have – even beyond the rule filing process - ample opportunity, through OCC's governance process, to provide input to OCC on its rules and risk management framework.[32] The Commission is right to recognize that retail customers clearing directly with a DCO will likely not be in a similar position, nor have the same perceived incentive,[33]

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[29] In approving the relevant rule changes, the SEC found that they were consistent with Securities Exchange Act § 17A(b)(3)(F), which requires, *inter alia*, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, and Securities Exchange Act Rule 17Ad-22(e)(7)(viii), which requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to, as applicable, effectively measure, monitor, and manage liquidity risk that arises in or is borne by the covered clearing agency, including measuring, monitoring, and managing its settlement and funding flows on an ongoing and timely basis, and its use of intraday liquidity by, at a minimum, addressing foreseeable liquidity shortfalls that would not be covered by its liquid resources and seek to avoid unwinding, revoking, or delaying the same-day settlement of payment obligations. The Options Clearing Corporation; Order Approving Proposed Rule Change Concerning Liquidity for Same Day Settlement, Securities Exchange Act Release No. 34-82309 (Dec. 13, 2017), 82 FR 60262 (Dec. 19, 2017), File No. SR-OCC-2017-017; *See also* Rule Filing SR-OCC-2017-017 [pursuant to CFTC Regulation § 40.6] (certifying that OCC's rule changes concerning the its authority to borrow against the Clearing Fund to address a temporary liquidity issue impacting daily settlement are consistent with DCO Core Principles B, E, and L, and existing CFTC regulations).

[30] *See, e.g.,* Nodal Clear Rule 3.36(a) (permitting the use of guaranty fund cash to enable the clearinghouse to promptly meet all of its payment obligations to members); ICE Clear US Rule 301(f) (permitting the clearinghouse to "assign, transfer, pledge, repledge or otherwise create a lien on or security interest in, the Guaranty Fund and/or the cash, securities and other property held in the Guaranty Fund to secure the repayment of funds borrowed by the [clearinghouse]").

[31] *See, e.g.,* National Securities Clearing Corporation ("NSCC") Rule 4, Sec. 2 (authorizing NSCC to use its Clearing Fund "to provide liquidity to the Corporation to meet its settlement obligations, including. . . through the direct use of cash in the Clearing Fund or through the pledge or rehypothecation of pledged Eligible Clearing Fund Securities in order to secure liquidity.") As discussed in Section VI.A, below, should the Commission proceed with the Proposal, additional clarity would be required with respect to the impact of the Proposed Rules on dual registrants such as OCC, given the potential for conflict with measures that the SEC has determined represent appropriate risk management arrangements.

[32] We note that the Commission recently adopted rules imposing structural and procedural governance requirements on DCOs. *See* Governance Requirements for Derivatives Clearing Organizations, 88 FR 44675 (Jul. 13, 2023) ("DCO Governance Rules"). The DCO Governance Rules are intended to ensure that DCOs receive input and feedback from members and customers on certain risk-based matters impacting the DCO. In light of those new rules, the Commission should have increased confidence that the sophisticated members of traditional, FCM-intermediated DCOs will have the opportunity to provide input on a DCO's clearing fund rules.

[33] A disintermediated DCO will likely have significantly more members, each with smaller positions, than is the case for a traditional, FCM-intermediated DCO.

to analyze and provide input on a DCO's rules, and that regulatory guardrails may be appropriate to protect such customers. However, beyond already existing prudential requirements, there is no such need to constrain traditional, FCM-intermediated DCOs from adopting and implementing risk management strategies pursuant to appropriate governance procedures tailored to their unique structures.

The Commission should avoid disrupting FCM-intermediated DCOs' existing default- and risk-management arrangements with a rule meant to address risks presented by direct clearing.

VI. If the Commission Proceeds with the Proposal, Certain Provisions Should be Amended Prior to the Adoption of Any Final Rule

As noted above, OCC recommends that the Commission instead adopt a narrowly tailored rule to address regulatory gaps raised by disintermediated clearing models, and that any such rule address those issues comprehensively. Should the Commission determine to proceed with the Proposal, however, OCC offers the following comments to identify and address significant concerns about the potential impact of the Proposal on OCC and other traditional, intermediated DCOs.

A. The Commission Should Provide Additional Clarity on the Manner in Which the Proposed Rules Would Impact Dual Registrants

Proposed Regulation § 39.15(f)(1) would require a DCO to "separately account for and segregate all proprietary funds as belonging to clearing members" and to "deposit proprietary funds under an account name that clearly identifies the funds as belonging to clearing members and shows that the funds are segregated" as per the Proposed Rule. OCC is concerned that, as proposed, Regulation § 39.15(f)(1) could be read to restrict OCC's ability, as a dual registrant, to maintain accounts for members that include margin covering both futures as well as securities positions cleared through OCC. Such accounts provide additional risk management and operational benefits for OCC, while also facilitating members' ability to hedge across multiple markets. OCC therefore encourages the Commission to ensure that any final rule explicitly accommodate the ability of OCC – and any other dual registrant similarly situated – to continue to use such accounts for its members.

As proposed, "proprietary funds" would be defined in Regulation § 39.2 as, with respect to member margin, "money, securities, and property. . . to margin, guarantee, or secure contracts for future delivery. . ." Proposed Regulation § 39.15(f)(1), in turn, would require the segregation of "proprietary funds." By referencing the defined term "proprietary funds," proposed Regulation § 39.15(f)(1) could be interpreted to suggest that member margin for futures products must be segregated from the same member's margin for non-futures products (e.g., equity options). Such a requirement would disrupt OCC's established practices. With respect to member accounts, OCC's practice, as clearly stated in its rules, regulatory filings, and public PFMI disclosures,[34] is to

[34] *See* The Options Clearing Corporation Disclosure Framework for Financial Market Infrastructures ("OCC PFMIs") at 57: "OCC is both a DCO and a registered securities clearing agency, and therefore also maintains an 'internal cross-margining program' permitting the cross-margining of certain SEC-regulated products cleared by OCC with CFTC products also cleared by OCC. In the case of proprietary positions of a clearing member, cross-margining is

calculate margin each day independently for each account maintained by a clearing member based on a full portfolio basis, a conservative practice intended to provide a high level of assurance that the overall value of cleared products in the account, plus collateral posted as margin, are sufficient to cover the value of funds owed to members. Similarly, in the proprietary accounts of members participating in OCC's cross-margin program with CME ("Proprietary X-M Accounts"), margin is calculated on the basis of all products held in the Proprietary X-M Account. In no accounts are customer funds or member funds ever commingled with the funds of OCC, or are futures customer funds commingled with member funds.

From the time of its initial registration as a DCO in 2001,[35] OCC has maintained the Clearing Fund as a single guaranty fund across all markets for which it provides clearing services, including futures products, securities products, and stock loan activity.[36] OCC's margin and stress testing systems allow for offsets between positions in futures products regulated by the CFTC with certain securities derivatives regulated by the SEC in order to permit the calculation of a single margin requirement and a single Clearing Fund requirement for the clearing member across the jurisdictional boundary based upon the net risk of positions that may be hedging or offsetting each other. Accordingly, OCC believes that any proposed rule that would require OCC to split its Clearing Fund between securities participants and commodity participants would be a significant change for the industry it serves,

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essentially automatic since proprietary accounts of a clearing member are not subject to segregation requirements, and proprietary positions of a clearing member in both SEC and CFTC-regulated products can be carried in the clearing member's 'firm' account at OCC," *available at* https://www.theocc.com/risk-management/pfmi-disclosures. Consistent with the Commission's current framework, customer segregated account margin is calculated daily on a gross basis using a SPAN-based model. *See* OCC PFMIs at 52: ("While OCC uses SPAN to calculate initial margin requirements for each segregated futures account on a gross basis, OCC's Rules also require it to simultaneously calculate what the margin requirements would be for the account on a net basis utilizing STANS. If at any time OCC observes that the initial margin requirement for the account calculated under STANS on a net basis exceeds the requirement calculated under SPAN on a gross basis, OCC collateralizes this risk exposure by applying an enhanced margin requirement in the amount of such difference.") *See also,* OCC Rule 601(e).

[35] OCC established its combined guaranty fund in 2000, pursuant to regulatory approval. *See* The Options Clearing Corporation; Order Approving a Proposed Rule Change to Merge the Equity and Non-Equity Elements of OCC's Clearing Fund - Securities Exchange Act Release No. 42897 (June 5, 2000), 65 FR 36750 (June 9, 2000) (SR–OCC–99–9). OCC became a registered DCO in late 2001 and has maintained a single Clearing Fund for futures products and securities options since that time. Indeed, the CFTC's Order of Registration was conditioned on SEC approval of a rule filing by OCC that explicitly provided that "[b]road-based index futures and futures options thereon would be covered by the same clearing fund that stands behind all options and security futures cleared by OCC [and] [c]learing activity in commodity futures and futures options would be taken into consideration in calculating the amount of a clearing member's contribution in the same way that activity in other contracts is considered." *See* Order of Registration, *In the Matter of the Application of The Options Clearing Corporation for Registration as a Derivatives Clearing Organization* (Dec. 10, 2001) (conditioning approval on, *inter alia*, SEC approval of SEC File No. SR-OCC-2001-16), *available at* https://www.cftc.gov/sites/default/files/files/opa/press01/opaoccorder11-30.pdf; The Options Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to Clearing Certain Commodity Futures and Options Thereon, Securities Exchange Act Release No. 34-45152 (Dec. 12, 2001), 66 FR 65770 (Dec. 20, 2001), File No. SR-OCC-2001-16.

[36] *See* OCC Rule 1003(b).

increasing operational complexity and potentially raising costs for participants,[37] without an identifiable risk management benefit. OCC has filed numerous rule changes concerning the operation of the Clearing Fund with the CFTC since that time.[38] As also noted above, Clearing Fund cash is typically held in OCC's account at the Federal Reserve Bank of Chicago,[39] where it is held until needed for default management purposes pursuant to OCC's rules.

Were OCC required to segregate member futures margin from those members' securities-related margin, it would impose serious operational burdens, while altering OCC's fundamental approach to risk management. Such a change would harm OCC and its members, impose significant costs, and reduce collateral efficiency at the potential expense of systemic liquidity. OCC does not believe this was the Commission's goal in crafting the Proposal. Therefore, OCC respectfully requests that the Commission provide clarity in any final rule that account structures providing for portfolio margining at dual registrant DCOs. Should the Commission or its staff believe more information on OCC's account structure or margining practices would be helpful in assessing this request, OCC would be happy to provide it.

B. The Commission Should Amend Proposed Regulation § 39.15(f)(4)(ii) to Avoid Creating the Potential for Unnecessary Disruption in DCOs' Default Management Processes

Proposed Regulation § 39.15(f)(4)(ii) states that "**No person**, including any derivatives clearing organization **or any depository**, that has received proprietary funds for deposit in a segregated account, as provided in this section, may hold, dispose of, or use any [sic] the funds as belonging to any person other than the clearing members of the derivatives clearing organization which deposited

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[37] In addition to the costs associated with establishing and maintaining separate funds, which may include implementing cross-margin programs to appropriately calibrate member contributions to actual risk levels, members would also be required to provide minimum initial contributions to *both* funds, rather than just to a single fund as they do now. *C.f.* ISDA White Paper: CCP Best Practices (Jan. 2019) at p. 14 ("Implementing meaningful minimum default fund contributions that incentivize active participation in the default management process and limiting the number of assessments as they can be pro-cyclical"), *available at* https://www.isda.org/a/cigME/CCP-Best-Practice.pdf.

[38] *See, e.g.,* Rule Filing SR-OCC-2019-009 Rule Certification [pursuant to CFTC Regulation § 40.6] (certifying rule changes concerning enhancements to OCC's Clearing Fund and stress testing methodology), *available at* https://www.cftc.gov/sites/default/files/filings/orgrules/19/11/rule111919occdco001.pdf; Rule Filing SR-OCC-2011-10 Rule Certification [pursuant to CFTC Regulation § 40.6] (certifying rule changes concerning the determination of the size of the Clearing Fund), *available at* https://www.cftc.gov/sites/default/files/filings/orgrules/19/11/rule111919occdco001.pdf.

[39] OCC currently commingles Clearing Fund cash and member margin funds in its master account at the Federal Reserve Bank of Chicago. *See* OCC Rules 604.18 and 1002.04; Rule Filing SR-OCC-2020-010 Rule Certification [pursuant to CFTC Regulation § 40.6] (certifying that the rules permitting commingling promote compliance with Core Principle F because "the ability to maintain Specified Cash Margin Assets that are non-customer assets and cash Clearing Fund contributions in this account at the same time would provide OCC with an additional approved custodian for such assets that would appropriately safeguard those assets and minimize the risk of loss or delay in OCC's access to them"), *available at* https://www.cftc.gov/sites/default/files/filings/orgrules/20/08/rule082820occdco001.pdf. Member margin funds are segregated into a subaccount to segregate the member margin transaction activity from the Clearing Fund transaction activity. A requirement to hold member margin assets and the Clearing Fund in separate, individually labeled accounts may require changes to OCC's account structure at the Federal Reserve Bank.

the funds" (emphasis added). In analyzing this provision pursuant to Section 15(a) of the CEA,[40] the Release states that "[t]he proposed rule would benefit market participants by helping to ensure that their funds are protected and available for their use. Additionally, the proposed rule would promote sound risk management by helping to ensure that clearing member funds are readily available for permitted risk management uses by a DCO, such as in the event of a customer shortfall or clearing member default."[41] The wording of the proposed regulation, however, suggests that other people and entities – in particular, depository institutions and their employees – should be responsible for policing a DCO's use of proprietary funds. Were it to adopt such a rule, the Commission risks creating the potential for unnecessary disruption during a DCO's time-sensitive default management process and thereby jeopardize the availability of the funds at the precise moment when they are needed for risk management purposes. For this reason, OCC urges the Commission to clarify, in any final rulemaking, that responsibility for ensuring compliance with the Commission's rules on the use of proprietary funds lies solely with the DCO.

Protection of clearing member funds used to manage the risk of shortfall or default is among the highest responsibilities of a DCO, and OCC's conservative investment and segregation policies reflect the seriousness with which it approaches that responsibility. However, it is equally important that the DCO be able to deploy those funds if and when required to pursuant to the DCO's rules and default management procedures.[42] A DCO – through its rules, policies and procedures, and controls, all of which are subject to regulatory oversight – is best positioned to ensure that any use of proprietary funds is consistent with those guardrails. A depository (and by extension, its employees), by contrast, does not and cannot know in real time what events are occurring at a DCO that may require a withdrawal of cash from an account holding proprietary funds. In managing a potential default situation, a DCO must be able to rely on banks and other depositories that hold proprietary funds to comply with their contractual obligations to the DCO within prescribed timeframes measured in minutes. Proposed Regulation § 39.15(f)(4)(ii) suggests that the depository (and each of its employees working on the DCO's account) would have an independent duty to investigate and verify the use to which any proprietary funds were being put any time the DCO sought to move or withdraw such funds. Even the perception that such a rule may impose such requirements for depositories and their employees has the potential to disrupt a DCO's default management efforts and thereby create risk to the DCO, its members, end users, and the broader financial system.

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[40] Section 15(a) requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA, taking into consideration five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. *See* 7 U.S.C. § 19(a).

[41] Release at 297 (discussing proposed Regulation § 39.15(f)(4) in its entirety).

[42] *See, e.g.,* CCP Risk Management Recovery and Resolution – Aligning CCP and Member Incentives (World Federation of Exchanges White Paper) (Oct. 21, 2015) ("A CCP being unable to take appropriate action to manage risk in fast-moving market conditions increases risks to non-defaulting clearing members, their customers and the financial system as a whole"), *available at* https://www.world-exchanges.org/storage/app/media/regulatory-affairs/Recent%20publications%202015/ccp-risk-management-recovery-and-resolution-aligning-ccp-and-member-incentives-21-october-2015.pdf.

For these reasons, OCC recommends that the Commission eliminate from any final rule the references to "no person" and "or any depository" in connection with the restrictions on the use of proprietary funds. The Commission could achieve this outcome by simply removing proposed Regulation § 39.15(f)(4)(ii) from any final rule. Proposed Regulation § 39.15(f)(4)(i) already defines the limitations on a DCO's use of proprietary funds. While, as explained elsewhere in this letter, proposed Regulation § 39.15(f)(4)(i) itself would require significant alteration in any final rule, if it were retained in any form, it would impose the same restriction on DCOs as would 39.15(f)(4)(ii), rendering the latter redundant.

C. A Traditional, FCM-Intermediated DCO Should Have the Flexibility to Use Proprietary Funds as Permitted by the DCO's Rules

As discussed above, OCC's rules – like those of other FCM-intermediated DCOs – include strictly defined parameters for the use of proprietary funds, in transparent rulebooks subject to regulatory review and pursuant to well-defined governance processes that allow for the input of OCC's sophisticated, institutional membership. While those rules ensure that proprietary funds can only be used for critical, risk-management functions and related expenses, certain of those potential uses do not fall within the narrow confines of what the Proposal would permit. If the Commission determines to proceed with a rulemaking that impacts all DCOs, not just those using a direct-clearing model, it should recognize the differences between those models by permitting, for DCOs not engaged in direct clearing, the use of proprietary funds in accordance with the DCO's rules and its agreement with the relevant clearing member. Specifically, in proposed Regulation § 39.15(f)(3)(ii), as applicable to DCOs that do not offer direct clearing,[43] we suggest that the Commission add the phrase "other than in accordance with the DCO's rules and its agreements with its clearing members" at the end of the language as proposed. Proposed Regulation § 39.15(f)(4)(i), as applied to FCM-intermediated DCOs, could be changed in the following manner:

> (4) *Limitation on use of proprietary funds.* (i) A derivatives clearing organization shall not hold, use or dispose of proprietary funds except as belonging to the clearing member that deposited the proprietary funds, or as otherwise authorized by the DCO's rules and its agreement(s) with the clearing member. The use of proprietary funds as belonging to clearing members may include, but is not limited to:
>
> (A) A derivatives clearing organization may use the proprietary funds belonging to a clearing member to guarantee or cover deficits in a customer account of that

[43] As noted above, OCC believes the Commission should adopt a rule that is narrowly focused on DCOs with a direct clearing model. To the extent that the Commission proceeds with a rule impacting all DCOs but seeks to differentiate the treatment of DCOs with different clearing models in certain provisions, there are policy considerations attendant to both the definition of each clearing model and how the rules should apply to each that would necessitate additional opportunity for public input through additional notice and comment rulemaking. We therefore do not propose here any specific definitional language or means of designating particular provisions applicable to particular DCOs.

> clearing member in accordance with the derivatives clearing organization's rules and its agreement(s) with the clearing member; and
>
> (B) A derivatives clearing organization may use non-defaulting clearing members' money, securities, or property that is being held as a guaranty fund ~~to mutualize the losses resulting from a default by a clearing member to cover such losses~~ in accordance with the derivatives clearing organization's rules and its agreement(s) with its clearing members.

VII. Conclusion

OCC thanks the Commission for the opportunity to provide comment on the Proposed Rules. If you have any questions, please do not hesitate to contact Andrew Feller, Associate General Counsel, at 202.971.7238, or afeller@theocc.com. OCC would be pleased to provide the Commission with any additional information or analyses that might be useful in determining the content of the final rules.

Sincerely,

Megan Malone Cohen
General Counsel and Corporate Secretary