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Christopher Kirkpatrick, Secretary

Commodity Futures Trading Commission

Three Lafayette Centre 1155 21st Street, NW

Washington, DC 20581

Re: Conflicts and Affiliations, RIN 3038-AF76 (Docket No. CFTC-2026-1686) — Comment on Proposed Commission Regulation 38.852(c)(1)(i) as Applied to Request-for-Quote Execution

Dear Secretary Kirkpatrick:

Brubaker Public Relations, Inc. respectfully submits this comment in response to the Commission's Notice of Proposed Rulemaking, "Conflicts and Affiliations" (RIN 3038-AF76), specifically regarding proposed Commission Regulation 38.852(c)(1)(i), the order-priority subordination condition applicable to affiliate market makers on designated contract markets ("DCMs").

This comment addresses a single, narrow issue: **as drafted, proposed § 38.852(c)(1)(i) does not establish an ascertainable standard governing an affiliate market maker's participation in request-for-quote ("RFQ") execution.**

More importantly, the provision appears to permit two materially different and directly contrary readings of the same rule text.

Under one reasonable reading, an affiliate market maker **cannot participate in RFQ execution at all**, because the condition imposed by § 38.852(c)(1)(i) cannot be satisfied in an RFQ environment.

Under another reasonable reading, an affiliate market maker **may participate in RFQ execution without the order-priority restriction meaningfully constraining that activity**, because the specific mechanism the rule uses to prevent preferential treatment—price/time priority—does not exist in a conventional RFQ.

That is the central issue presented by this comment. **The rule appears to contain both a red light and a green light for affiliate RFQ trading, depending on which reasonable reading of the text is applied.** The Commission should resolve that ambiguity in the final rule rather than leave DCMs, affiliate market makers, and Commission staff to determine its meaning after the fact.

The Rule as Written

Proposed § 38.852(c)(1)(i) requires that a DCM permitting an affiliate market maker to trade "ensure that its trading matching system, including any price/time priority matching algorithm, does not favor the affiliate market maker."

The provision then states:

"Specifically, the designated contract market's trade matching system shall fill the bid or offer of any unaffiliated member before the bid or offer of the affiliate market maker at the same price, without regard to the time priority of the affiliate principal trading firm's order. The bids and offers of the affiliate principal trading firm shall be filled last at every price level."

This is the operative priority safeguard in the proposal against an affiliate market maker receiving favorable execution treatment.

The difficulty is that the provision is written around a particular mechanical feature of trading: **a price/time priority queue in which orders at the same price can be filled before or after one another.**

The Commission's definition of the entity governed by the provision, however, is not limited to trading through that mechanism. Proposed § 38.852(a) defines an "affiliate principal trading firm" as a member that "trades on a principal basis, as a market maker, liquidity provider, or otherwise, for its own account" on the DCM. Nothing in that definition limits the activity to continuous order-book trading.

An affiliate responding to an RFQ therefore falls within the definition just as plainly as an affiliate continuously quoting on a central limit order book ("CLOB").

The Red-Light / Green-Light Problem

A conventional bilateral or multi-dealer RFQ does not operate through a continuous resting order book or a price/time priority queue.

There is no resting bid or offer at a price level waiting to be "filled first" or "filled last."

That creates the central ambiguity.

Reading One: Red Light — Affiliate RFQ Trading Is Not Permitted

Proposed § 38.852(c) is structured as an exception to a general prohibition. An affiliate principal trading firm may trade on a DCM only if it satisfies every applicable condition in paragraph (c). The proposal further provides that if any of those conditions cease to be satisfied, the affiliate principal trading firm would be required to cease trading activity.

Under this reading, the specific mechanical test in § 38.852(c)(1)(i) is what gives content to the requirement that the matching system "does not favor" the affiliate.

But an RFQ has no price/time priority mechanism through which the affiliate can be placed behind an unaffiliated participant at the same price or "filled last at every price level."

The condition therefore has no operational referent in an RFQ.

If the condition cannot be satisfied, it is not satisfied.

Under this reading, the affiliate market maker cannot qualify for the exception in § 38.852(c) when trading through an RFQ. The practical result is a **red light: affiliate RFQ trading is prohibited.**

Nothing in the proposal expressly says that.

Reading Two: Green Light — Affiliate RFQ Trading Is Not Meaningfully Constrained by § 38.852(c)(1)(i)

There is, however, another reasonable reading.

Under this interpretation, the general requirement that the trading matching system "does not favor" the affiliate remains the governing standard, while the sentence beginning "Specifically" describes how that standard operates in a CLOB using price/time priority.

If no price/time priority mechanism exists in an RFQ, there is no order queue through which an affiliate can be moved ahead of an unaffiliated participant.

The specific priority mechanism therefore simply does not apply.

Under this reading, the absence of a price/time queue means there is no mechanism to violate the specific priority requirement. The affiliate may respond to the RFQ, submit the best quote, and receive the trade without having to overcome an order-priority rule that does not exist in that execution method.

The practical result is a **green light: affiliate RFQ trading remains permissible because the proposal does not establish an alternative RFQ-specific priority mechanism.**

Again, nothing in the proposal expressly says that either.

Both Readings Are Reasonably Available From the Text

The significance of this issue is not that one interpretation necessarily must prevail over the other.

The significance is that **both interpretations are reasonably available from the text as drafted, and they produce radically different compliance consequences.**

A DCM, an affiliate market maker, and a Commission examiner could confront the same RFQ transaction and reasonably disagree about whether § 38.852(c)(1)(i) permits it.

The red-light interpretation treats the absence of a price/time mechanism as the reason the condition cannot be satisfied.

The green-light interpretation treats that same absence as the reason the specific priority mechanism does not apply.

The same drafting feature—the absence of a price/time queue in an RFQ—therefore supports opposite practical outcomes.

That is not a minor drafting issue. It goes directly to the scope of the proposed exception for affiliate principal trading firms.

Why the Ambiguity Matters in Practice

This ambiguity is likely to produce a predictable result.

If a market participant must choose between interpreting an unclear provision as prohibiting a revenue-generating activity or interpreting it as permitting that activity, the participant has an obvious incentive to adopt the latter interpretation.

That does not require an assumption about the intentions of any particular firm. It is simply the foreseeable consequence of leaving a material compliance question unresolved.

If the Commission intends the red-light interpretation, the rule should say so.

If the Commission intends the green-light interpretation, the rule should say so—and should explain what protections against preferential treatment apply to RFQ execution.

Leaving both readings available creates uncertainty precisely where the proposal is intended to impose a structural restriction on conflicts between a DCM and its affiliate market maker.

The Commission Has Already Identified the Problem

The ambiguity is particularly significant because the Commission's own proposal recognizes that non-CLOB execution presents a problem.

The preamble states that the Commission is aware that a DCM may operate a trade matching system other than a CLOB, including an RFQ mechanism, and asks whether the proposed subordination provision adequately addresses such circumstances.

Request for Comment 43 separately asks whether order-priority subordination is compatible with SEF execution methods, while Request for Comment 45 asks whether subordination is technically and operationally feasible across the matching systems in use.

The Commission's cost-benefit analysis likewise asks whether the costs associated with § 38.852(c)(1)(i) would apply in a similar manner to a DCM operating a different trade matching system.

The Commission has therefore already identified the underlying question: **how does a rule built around order-priority subordination operate when the relevant execution mechanism does not have order priority?**

What the proposal does not do is answer that question.

The Commission should not leave the answer to be inferred later through examination, surveillance, or enforcement.

RFQ Execution Is Not a Hypothetical Concern

The issue is not merely theoretical.

The Commission's own release identifies RFQ execution as an example of a non-CLOB matching mechanism and cites a DCM's publicly posted description of its combination-contract ("combo") product in discussing such mechanisms.

The Commission has therefore already placed in the administrative record the fact that RFQ execution can be used for combination products and other products for which conventional continuous order-book trading may not be the execution mechanism.

This makes the drafting question especially important.

If the Commission intends § 38.852(c)(1)(i) to impose meaningful restrictions on affiliate market makers regardless of execution method, the final rule should establish a mechanism through which those restrictions can actually be applied to RFQ transactions.

Recommended Resolution

The Commission should resolve the red-light/green-light ambiguity expressly in the final rule.

If the Commission intends to prohibit affiliate market makers from participating in RFQ execution, it should state that directly.

If, instead, the Commission intends to permit affiliate market makers to participate in RFQ execution, the final rule should establish an RFQ-specific mechanism capable of implementing the same underlying anti-preferential-treatment principle that the proposed order-priority provision implements for CLOB trading.

At a minimum, that mechanism should provide that:

- any quote submitted by an affiliate market maker in response to an RFQ is transmitted to the requesting party simultaneously with, and without any informational or latency advantage over, quotes from unaffiliated respondents;
- the DCM's rules require reasonable solicitation of unaffiliated respondents, where such respondents are reasonably available, before an affiliate market maker's quote may be accepted; and
- the disclosure obligations of proposed § 38.852(c)(3) apply to RFQ transactions on the same basis as CLOB transactions.

The first two requirements would provide an RFQ equivalent to the basic concern addressed by order-priority subordination in a CLOB: preventing the affiliate from receiving an informational, timing, or access advantage that an unaffiliated participant does not receive.

The third would ensure that the transparency requirements proposed by the Commission do not depend on the particular execution mechanism used.

The point is not that these are necessarily the only possible safeguards. The point is that **some ascertainable RFQ-specific compliance mechanism is necessary if the Commission intends the affiliate market-maker exception to apply to RFQ execution.**

Conclusion

The proposed rule should not leave the regulated community to choose between a red-light interpretation that effectively prohibits affiliate RFQ trading and a green-light interpretation under which the proposal's principal order-priority safeguard has no defined application to RFQ execution.

Both readings are reasonably available from the text as drafted.

The Commission has itself recognized that non-CLOB execution methods raise questions about the applicability and feasibility of the proposed subordination requirement. The final rule should resolve those questions directly.

We respectfully urge the Commission to make clear whether affiliate market makers may participate in RFQ execution and, if they may, to establish an RFQ-specific mechanism that provides an ascertainable means of demonstrating compliance with the anti-preferential-treatment requirement.

The central point is simple: **a regulated party should not have to determine whether the rule is a red light or a green light by guessing which of two reasonable readings the Commission will apply after the transaction occurs.**

The final rule should provide one answer.

Respectfully submitted,

Steven G. Brubaker

Mobile Gambling Analyst

President, Brubaker Public Relations, Inc.

Stevengbrubaker@gmail.com

PO Box 212

Chatham IL 62629-0212