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August 8, 2026

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: RIN 3038-AF76 — Conflicts and Affiliations; Docket No. CFTC-2026-1686; Comment on the Proposed Order-Priority Subordination Condition of the Affiliate Market Maker Exception (Proposed Commission Regulation 38.852(c))

Dear Secretary Kirkpatrick:

I. INTRODUCTION

The undersigned respectfully submits this comment in response to the Commission's Notice of Proposed Rulemaking, *Conflicts and Affiliations*, 91 Fed. Reg. 50,926 (Aug. 6, 2026).[1]

This comment addresses a single, narrow issue within the Proposal: the order-priority subordination condition of the proposed Market Maker Exception to Commission Regulation 38.852(b). As explained below, that condition, while well-intentioned, regulates only one stage of the price formation process on a central limit order book ("CLOB") and can be circumvented at an earlier stage without any violation of the rule as proposed. The undersigned respectfully requests that the Commission amend the condition as described in Part IV below before adopting a final rule.

[1]Conflicts and Affiliations, Notice of Proposed Rulemaking, 91 Fed. Reg. 50,926 (Aug. 6, 2026) (RIN 3038-AF76; Docket No. CFTC-2026-1686) ("NPRM" or "Proposal").

II. SUMMARY OF COMMENT

The Commission has observed that certain designated contract markets ("DCMs") with affiliated market makers have voluntarily adopted "adjustments to the traditional price-time priority execution method" on their CLOBs as a conflicts-of-interest safeguard.[2] The Proposal would codify a version of this practice: an affiliated market maker relying on the Market Maker Exception must have its orders filled last at every price level, regardless of time priority, and must maintain continuous two-sided quotations without establishing directional positions outside of that quoting obligation.[3]

This order-priority subordination condition governs the sequence in which resting orders at a common price are filled. It does not, and by its terms cannot, govern the affiliate's ability to set the price at which trading occurs in the first instance. An affiliated market maker that continuously reprices ahead of the existing book — offering a marginally better bid or offer before an unaffiliated participant can match it — never enters a contested queue at a common price level. Subordination has nothing to subordinate, because no tie exists to break. The affiliate captures the same execution advantage the condition was designed to eliminate, without the condition ever being triggered.

The undersigned respectfully recommends that the Commission extend the subordination principle to price-setting conduct, through one or both of the mechanisms described in Part IV.

[2]NPRM, 91 Fed. Reg. at 50,932–33 (describing existing voluntary affiliated-market-maker safeguards, including "adjustments to the traditional price-time priority execution method on central limit order books").
[3]Proposed Commission Regulation § 38.852(c)(1)(i) (as set forth in the amendatory text of the NPRM) provides: "[The designated contract market shall] ensure that its trading matching system, including any price/time priority matching algorithm, does not favor the affiliate market maker. 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." The Commission states that it proposes this condition principally under Core Principle 9 (Execution of Transactions), Core Principle 2 (Compliance with Rules), and Core Principle 16 (Conflicts of Interest). NPRM § III.B (narrative discussion of proposed § 38.852(c)(1)(i)); NPRM amendatory text § 38.852(c)(1)(i) (codified text).

III. THE PROPOSED SUBORDINATION CONDITION DOES NOT REACH PRICE-SETTING CONDUCT

A. How Price-Time Priority Matching Operates on a CLOB

A CLOB matches resting bids and offers according to price priority first and time priority second. The best-priced order on each side of the book — the highest bid, the lowest offer — trades first. Only among multiple orders at the identical best price does the system fall back to a first-in-time rule to determine sequence. This is the ordinary operation of every CLOB-based exchange, including the Commission-regulated DCMs subject to this Proposal.

B. The Subordination Condition Regulates Queue Position, Not Price Formation

The proposed subordination condition intervenes only at the second stage of this process — the tie-break among orders resting at a common price. It requires that, when the affiliate and an unaffiliated participant are both resting orders at the same price, the affiliate's order yields. It does not intervene at the first stage — price formation — at all.

This is a material gap because an affiliated market maker subject to a continuous two-sided quoting obligation[4] is, by design, positioned to be at or near the best price on the book at nearly all times. A market maker that continuously reprices to remain at or ahead of the prevailing best bid and offer will, in the ordinary course, be the sole order at its price level rather than one of several orders resting at a common price. Under those circumstances, the subordination condition is not triggered — not because the affiliate has violated it, but because the condition's predicate (a tie at a common price level) does not arise. The affiliate wins the trade by virtue of having set the best price, a channel the Proposal does not address.

The result is a rule that binds only in the comparatively rare case where an affiliate and an unaffiliated participant happen to quote the identical price simultaneously, while leaving untouched the far more common case in which the affiliate's superior speed or informational

[4]Proposed Commission Regulation § 38.852(c)(1)(ii)(A) requires that any market maker or incentive program applicable to the affiliate market maker "require an affiliate market maker to maintain continuous two-sided quotations in each product in which it is obligated to make a market." Proposed Commission Regulation § 38.852(c)(1)(ii)(D) further requires that "the affiliate market maker does not make bids or offers, or enter into transactions, inconsistent with [the maintenance of a fair and orderly market], including by taking directional proprietary positions other than in connection with its obligation to maintain two-sided quotations." NPRM amendatory text § 38.852(c)(1)(ii)(A), (D).

position allows it to set a marginally better price ahead of unaffiliated competition. That is precisely the execution advantage the Commission's conflicts-of-interest framework is intended to prevent.

IV. RECOMMENDED AMENDMENTS

The undersigned recommends that the Commission refine proposed Commission Regulation 38.852(c) through the following two mechanisms, either or both of which would extend the existing subordination principle to the price-setting stage without unduly restricting legitimate price discovery:

1. Minimum Price Improvement (MPI) Threshold. The Commission should provide that an affiliated market maker's quote does not obtain immediate price priority over a prevailing unaffiliated quote unless it improves that price by a meaningful increment, to be defined by the Commission by reference to the DCM's minimum tick size. An affiliate order that improves the prevailing price by less than that increment would not receive priority on the basis of its new price; instead, it would be treated as matching the existing best price and would fall into the subordinated queue that proposed Regulation 38.852(c) already establishes. This mechanism is deliberately asymmetric: a token, one-tick improvement — the improvement pattern most readily available to a market maker seeking only to avoid the subordination queue rather than to compete on price — would not escape subordination, while a genuinely competitive price improvement would remain unrestricted. The Commission has explained that it proposes the subordination condition principally under Core Principle 9 (Execution of Transactions), together with Core Principle 2 (Compliance with Rules) and Core Principle 16 (Conflicts of Interest).[5] Core Principle 9's interest in a competitive, open, and efficient execution process counsels in favor of this asymmetric design over a flat cap on affiliate price improvement, which could be read to restrict legitimate competitive quoting alongside the token improvements the condition is intended to reach.

[5]NPRM § III.B (Condition 1: Order-priority subordination—Proposed Regulation 38.852(c)(1)(i)) ("The Commission proposes this condition principally under Core Principle 9 (Execution of Transactions), Core Principle 2 (Compliance with Rules), and Core Principle 16.") (citing CEA § 5(d)(2), (9), (16), 7 U.S.C. § 7(d)(2), (9), (16)).

2. Unaffiliated Priority Window. In the alternative, or in addition, the Commission should require that when an affiliated market maker posts an improved price that does clear the MPI threshold, existing unaffiliated participants at the prior best price be afforded a brief, defined window (to be set by the Commission) in which to match that improved price before the affiliate may execute against an incoming order at the new level. This affords unaffiliated participants a meaningful opportunity to compete for the improved price rather than losing the trade to the affiliate's structural speed advantage as a matter of course.

Either mechanism extends the Commission's subordination principle to the price-setting stage identified in Part III, without imposing an undifferentiated speed bump on ordinary market quoting. The undersigned submits that this amendment can be adopted as a targeted addition to proposed Commission Regulation 38.852(c) without altering the remainder of the Market Maker Exception or the Proposal's broader framework. Part V below addresses a further circumvention path — sequenced order actions — that should be addressed in the same amendment so that it cannot be defeated by a change in the form of the affiliate's conduct.

V. AGGREGATE SAFEGUARDS AGAINST MULTI-STEP EVASION

A single-order test, however well designed, must be paired with an aggregate safeguard. An affiliated market maker could attempt to remain within the literal terms of the MPI threshold and Unaffiliated Priority Window while nonetheless obtaining the prohibited advantage through a sequence of actions: observing the unaffiliated best price, improving it by the minimum qualifying increment, executing, canceling or replacing its quote, and repeating the process. Each individual action, viewed in isolation, could satisfy Part IV. The sequence as a whole would reproduce the same execution advantage Part IV is designed to eliminate.

Rather than requiring DCM surveillance staff to reconstruct and evaluate individual cancellation-and-replacement chains order by order, the Commission should adopt an aggregate, auditable statistic keyed specifically to this evasion pattern: the percentage of an affiliated market maker's top-of-book fills, within a defined rolling window, that are attributable to a repricing, cancellation, or replacement sequence rather than to a single order maintained at a stable price. The Commission should set a maximum threshold for that percentage as a condition of the Market Maker Exception. Tying the aggregate measure to sequence-attributable fills — rather

than to the affiliate's total executed volume or overall market share — keeps the safeguard anchored to the specific conflict-of-interest concern the subordination condition addresses, consistent with the Commission's Core Principle 16 authority for this rulemaking, rather than operating as an undifferentiated volume or market-share limit that could sweep in legitimate, non-evasive market-making activity and invite a challenge that the measure exceeds the conflicts-of-interest rationale underlying this Proposal.

VI. CONCLUSION

The undersigned appreciates the Commission's attention to the conflicts of interest raised by affiliated market maker relationships on DCMs, and respectfully requests that the Commission consider the amendments described above in developing a final rule.

Respectfully submitted,

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