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August 9, 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 Independent Third-Party Regulatory Service Provider Requirement of the Affiliate Market Maker Exception (Proposed Commission Regulation 38.852(c)(2))

Dear Secretary Kirkpatrick:

I. INTRODUCTION

The undersigned 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: the independent third-party regulatory service provider ("RSP") requirement of the proposed Market Maker Exception, Commission Regulation 38.852(c)(2). As explained below, the term "independent" in that provision is defined only in the corporate-structure sense and does not reach a distinct, equally material sense of independence — financial dependency arising from the RSP's own compensation relationship with the designated contract market ("DCM") whose affiliate it is certifying. The Commission has itself identified financial dependency as the precise concern that necessitates independent

[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").

verification in the first place; the undersigned respectfully submits that the same concern should be addressed in how the RSP itself is selected and compensated.

II. SUMMARY OF COMMENT

Proposed Commission Regulation 38.852(c)(2) requires a DCM that permits an affiliate market maker to trade to designate an independent third-party RSP to conduct financial surveillance of the affiliate, monitor the DCM's conflicts-of-interest compliance, and annually certify to the Commission that the affiliate market maker satisfies the exception's conditions.[2] The Commission's own explanation for requiring this independent verification is that "an exchange cannot credibly verify its own compliance" where its affiliate market maker "has the potential to, directly or indirectly, financially benefit the exchange."[3]

That rationale, applied consistently, extends to the RSP itself. As proposed, the DCM selects the RSP, compensates the RSP, and determines whether to renew the engagement. An RSP whose continued retention depends on the DCM's satisfaction with its findings faces the same category of financial incentive the Commission has identified as disqualifying for the DCM's own self-verification — yet the rule does not test for it. The undersigned recommends that the Commission close this gap through a targeted amendment to proposed Commission Regulation 38.852(c)(2).

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[2]Proposed Commission Regulation § 38.852(c)(2) (as set forth in the amendatory text of the NPRM) provides: "Independent verification. A designated contract market that permits an affiliate market maker to trade on the designated contract market shall designate an independent third-party regulatory service provider to: (i) comply with the requirements of § 38.604 of this part with respect to the affiliate market maker as if the affiliate market maker were a futures commission merchant (except to the extent § 38.604 applies with respect to customers); (ii) review and monitor the designated contract market's compliance with its conflicts of interest procedures promulgated under paragraph (b)(1) of this section; and (iii) annually certify to the Commission and the designated contract market's board of directors or other designated committee or officer responsible for regulatory compliance that the affiliate market maker satisfies each of the conditions set out in paragraph (c)(1) of this section and that the designated contract market is operating in compliance with its conflicts of interest procedures as required under paragraph (b)(1) of this section...." NPRM amendatory text § 38.852(c)(2)(i)–(iii) (omitting the final sentence of subsection (iii), requiring that the certification include supporting written documentation and analysis, as not relevant to the issue addressed in this comment).

[3]NPRM § III.B (Independent verification and certification—Proposed Regulation 38.852(c)(2)) ("[U]nlike the optional engagement contemplated [in Commission Regulation 38.606] for surveillance of an affiliate FCM, § 38.852(c)(2)(i) would require an independent provider, because the affiliate market maker has the potential to, directly or indirectly, financially benefit the exchange and the Commission has preliminarily determined that an exchange cannot credibly verify its own compliance in these circumstances.") (citing CEA § 5(d)(11), (16), 7 U.S.C. § 7(d)(11), (16)).

III. THE INDEPENDENCE REQUIREMENT DOES NOT REACH FINANCIAL DEPENDENCY

A. The Commission's Own Rationale for Requiring Independent Verification

The Commission was explicit about why independent verification is necessary here, and not merely optional as it is for surveillance of an affiliate futures commission merchant under the existing Commission Regulation 38.606 framework: because the affiliate market maker "has the potential to, directly or indirectly, financially benefit the exchange," the Commission "has preliminarily determined that an exchange cannot credibly verify its own compliance in these circumstances."[4] The premise is that a party with a financial stake in a favorable outcome cannot be relied upon to certify that outcome objectively.

That premise applies with undiminished force to the RSP itself once the RSP's own compensation depends on the DCM it is certifying. The Commission's rationale is not specific to the DCM-affiliate relationship as a category; it is a general proposition about financial incentives undermining credible self-verification. An RSP that is selected, paid, and subject to non-renewal by the DCM under review has a financial stake in the outcome of its own certification in exactly the sense the Commission has already found disqualifying.

B. The Rule Does Not Test for the Financial-Dependency Gap It Identifies

Proposed Commission Regulation 38.852(c)(2) requires only that the RSP be "independent" and a "third-party," without further definition in the operative text. By contrast, the existing RSP framework in Commission Regulation 38.606, which proposed § 38.852(c)(2)(i) builds upon, requires that an RSP engaged under that provision be "a registered futures association or a registered entity," with its appointment "governed by a written agreement that specifically documents the services to be performed as well as the capacity and resources of the RSP."[5] No comparable eligibility floor appears in the text of proposed § 38.852(c)(2). A DCM would

[4]NPRM § III.B (Independent verification and certification—Proposed Regulation 38.852(c)(2)) ("[T]he Commission has preliminarily determined that an exchange cannot credibly verify its own compliance in these circumstances."). See supra note 3.

[5]See NPRM § II.B (discussing Commission Regulation 38.606) (an RSP engaged under that framework must be "a registered futures association or a registered entity," and its appointment "must be governed by a written agreement that specifically documents the services to be performed as well as the capacity and resources of the RSP with respect to the services performed"). No comparable eligibility criterion appears in the text of proposed § 38.852(c)(2).

therefore satisfy the letter of the independence requirement by engaging any third party not under its ownership or control — including a private firm whose entire business relationship with that DCM consists of the engagement being certified, and whose continued retention depends on delivering findings the DCM finds acceptable.

The Commission has recognized this gap itself. Request for Comment 51 asks "How 'independent' should be defined for the third-party RSP, and whether the framework in Commission Regulation 38.606 affords sufficient capacity for this function."[6] Separately, Request for Comment 55.iv asks commenters to identify "who are the most likely entities to perform this independent third-party RSP role," including whether the role would most likely be filled by the National Futures Association ("NFA") or whether other entities would enter the market in this capacity.[7] The undersigned submits that the answer to both questions bears directly on whether the certification required by proposed § 38.852(c)(2)(iii) will be credible in practice, and that the final rule should resolve the question directly rather than leave "independent" undefined.

IV. RECOMMENDED AMENDMENTS

The undersigned recommends that the Commission amend proposed Commission Regulation 38.852(c)(2) to address financial dependency through the following two mechanisms:

1. Registered-Entity Anchor, with a Rotation Alternative for Other RSPs. The Commission should provide that an RSP engaged under proposed § 38.852(c)(2) satisfies the independence requirement without further condition where it is a registered futures association (such as NFA) or another registered entity whose funding is not derived primarily from its engagement by the DCM under review — consistent with the eligibility floor the Commission already applies to RSPs under Commission Regulation 38.606. Where a DCM instead engages a private, non-registered RSP, the Commission should require mandatory rotation of that RSP after a defined

[6]NPRM § IV (Requests for Comment), Request 51 ("How 'independent' should be defined for the third-party RSP, and whether the framework in Commission Regulation 38.606 affords sufficient capacity for this function.").
[7]NPRM § IV (Requests for Comment), Request 55.iv (requesting comment on "[t]he nature and estimated cost of engaging an independent third-party RSP to perform the surveillance, monitoring, and certification required by proposed Commission Regulation § 38.852(c)(2), including any market-capacity considerations," and asking commenters to "identify who are the most likely entities to perform this independent third-party RSP role" and "[w]ould it most likely be NFA? Would other entities enter the market in this capacity?").

term (for example, three years), so that a private RSP's continued retention cannot itself become the basis for an ongoing financial relationship the certification is meant to police. In either case, the RSP's compensation should not be contingent upon the substance or outcome of its surveillance, monitoring, or certification; a private RSP's revenue should not vary based on whether its findings favor the DCM.[8]

2. Fee and Tenure Disclosure. In addition, the Commission should require that the annual certification submitted under proposed § 38.852(c)(2)(iii) be accompanied by disclosure of the RSP's compensation arrangement with the DCM, the percentage of the RSP's total revenue represented by that engagement, and the length of its engagement to date. This disclosure would directly inform the record the Commission is already assembling through Request for Comment 55.iv regarding the cost and market structure of RSP engagements, and would allow the Commission, unaffiliated market participants, and the public to assess the certification's credibility on an ongoing basis rather than relying solely on the RSP's formal, ownership-based independence.

Either mechanism would extend the Commission's own stated rationale for requiring independent verification — that a party with a financial stake in the outcome cannot credibly self-certify — to the RSP relationship itself, closing a gap the Commission has already identified through Requests for Comment 51 and 55.iv. The undersigned submits that this amendment can be adopted as a targeted addition to proposed Commission Regulation 38.852(c)(2) without altering the remainder of the Market Maker Exception or the Proposal's broader framework.

[8]The undersigned notes, by way of regulatory analogy rather than as a proposal to adopt securities-law requirements wholesale, that Section 203 of the Sarbanes-Oxley Act of 2002 requires rotation of the lead and concurring audit partners on a public company audit after five consecutive years, followed by a cooling-off period, to preserve auditor independence from an ongoing client relationship. 15 U.S.C. § 78j-1(j); SEC, Strengthening the Commission's Requirements Regarding Auditor Independence, Release No. 33-8183 (Jan. 28, 2003). The Commission may find the underlying principle instructive: rotation requirements address financial dependence that arises from a continuing engagement, independent of whether the reviewing party is formally "independent" in the ownership sense.

V. 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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