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August 10, 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 Incentive-Parity Requirement of Proposed Commission Regulation 38.852(b)(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 incentive-parity requirement of proposed Commission Regulation 38.852(b)(2). As explained below, that provision tests whether an affiliate principal trading firm and unaffiliated members are offered facially comparable terms of participation in a designated contract market's ("DCM") incentive programs. It does not expressly require the DCM to determine whether those terms provide comparable practical or economic access. That distinction matters because the Commission's own cost-benefit analysis for this provision rests on a preliminary assumption—broad, similar practical availability of incentive programs across market makers—that the proposed rule does not require the DCM to measure.

The concern is not that facially identical terms are necessarily unlawful or inherently inadequate. Rather, the concern is that facial identity alone may not establish the practical equality that the Commission appears to assume when evaluating the rule's costs and benefits.

A DCM could, for example, establish identical volume, quoting, uptime, or product-coverage requirements for an affiliate and unaffiliated market makers while setting those requirements at levels that are readily achievable by the affiliate but not reasonably attainable by unaffiliated members. The written terms would be the same. The practical opportunity would not be.

The Commission should therefore amend proposed §38.852(b)(2) to provide an objective means of determining whether facially comparable terms actually provide reasonably comparable access.

II. SUMMARY OF COMMENT

Proposed Commission Regulation 38.852(b)(2) requires that where a DCM offers an incentive or similar program applicable to an affiliate principal trading firm, the DCM must have procedures to ensure unaffiliated members can participate "on terms no less favorable" than those offered to the affiliate.[2]

The Commission has explained that this provision is intended to close "a specific channel through which an exchange could advantage its affiliate," grounded in Core Principle 2's impartial-access requirement and Core Principle 9's execution-of-transactions mandate.[3]

The Commission's cost-benefit analysis for this provision assumes that it will impose little or no cost, reasoning that "DCMs generally already offer similar incentives or similar programs to every market maker."[4]

That assumption is precisely where the proposed rule's facial-terms standard leaves an important question unanswered.

A DCM can publish identical eligibility criteria—volume tiers, minimum quoted size, minimum uptime, maximum permissible spread, or product-coverage thresholds—for every market maker while setting those criteria at levels that, in practical economic terms, only the affiliate can reasonably satisfy. The proposed rule would establish identical written terms, but the resulting access to the economic benefit could nevertheless be materially different.

The undersigned therefore recommends that the Commission supplement the facial-terms requirement with an objective practical-access test and appropriate reporting or review mechanisms.

III. THE INCENTIVE-PARITY CONDITION DOES NOT EXPRESSLY TEST PRACTICAL ACCESS

A. The Rule as Written

Proposed Commission Regulation 38.852(b)(2) requires a DCM to "ensure that unaffiliated members… can participate in such programs on terms no less favorable than those offered to an affiliate principal trading firm."[5]

At a minimum, the provision expressly compares the terms made available to the affiliate and unaffiliated members. It does not expressly require the DCM to determine whether those terms produce comparable practical or economic access.

That distinction is significant.

Where a DCM publishes identical eligibility criteria to all market makers, the written terms may be facially equivalent. But identical written criteria do not necessarily establish equivalent practical access where participants differ materially in their ability to satisfy those criteria.

The issue therefore is not whether the Commission should prohibit identical terms. It is whether identical terms should, standing alone, be sufficient to establish compliance with an incentive-parity requirement intended to prevent an exchange from using its relationship with an affiliate to create an advantage.

B. Facial Neutrality Can Produce Disparate Practical Access

An incentive program's eligibility criteria are rarely a simple binary invitation. They may condition payments or other benefits on variables such as minimum quoted size, minimum uptime, maximum permissible spread, minimum share of trading volume, or minimum participation in particular products.

A DCM designing such criteria has access to information concerning its affiliated firm's trading activity and operational capabilities. The DCM therefore may know precisely what level of activity its affiliate can sustain. A threshold set at or near that capacity can remain facially identical for every market maker while being practically attainable by only the affiliate.

For example, assume an incentive program requires a market maker to maintain specified two-sided quotes for a particular percentage of trading hours and to maintain a specified minimum depth. If an affiliate has substantially greater capital, technological integration, trading capacity, or ability to absorb the associated costs than unaffiliated firms, the same numerical requirements may have very different economic consequences for the participants.

The written terms are identical. The economic opportunity is not necessarily identical.

This is not merely a hypothetical concern distinct from the Commission's own analysis. The Commission's cost estimate for this provision is expressly conditioned on its "preliminary" understanding that similar programs are already broadly available, and the Commission has invited comment on whether that understanding is inaccurate and whether more substantial costs should be considered.[6] Request for Comment 11 asks directly: "Is the Commission correct that DCMs offer similar incentives or programs to most, if not all market makers?"[7]

A facial-terms test cannot fully answer that question. The relevant empirical question is not simply whether the same program is nominally available to multiple market makers. It is whether unaffiliated members can reasonably access the same economic benefits under the program.

The Commission should therefore consider requiring DCMs to maintain and, where appropriate, provide information sufficient to establish that incentive-program thresholds are reasonably attainable by unaffiliated members and are not merely facially identical.

C. The Parity Requirement Should Clearly Reach the Material Economic and Trading Benefits Associated With Market-Maker Status

Market-maker and trading incentive programs are subject to the Commission's Part 40 filing requirements. The Commission has expressly stated that it views such programs as "rules" under

§40.1 and requires registered entities to submit the terms and conditions of market-maker and trading incentive programs pursuant to Part 40.[8]

The issue here is therefore not whether a DCM can avoid Part 40 simply by labeling a market-maker program differently. Rather, the question is whether the proposed §38.852(b)(2) clearly reaches the entire economic and trading advantage package that an affiliate principal trading firm receives through its market-maker status.

That question matters because market-maker arrangements can include benefits that are not limited to a conventional incentive payment. Kalshi's own CFTC-filed rulebook, for example, states that market makers may receive financial benefits, reduced fees, differing position limits and Position Accountability Levels, and enhanced access.[9] Its Rule 4.5 further provides that, on specified contracts, market makers may have Position Accountability Levels ten times those applicable to non-market makers.[10]

These provisions do not establish that Kalshi has violated the proposed rule, nor does the undersigned take any position on whether any particular benefit would independently constitute an "incentive or similar program" for purposes of proposed §38.852(b)(2). They demonstrate something narrower and important: market-maker status can carry material economic and trading advantages beyond the amount of a conventional incentive payment.

The Commission should therefore clarify that the parity requirement applies to material economic or trading advantages provided to an affiliate principal trading firm because of its market-maker or liquidity-provider status, regardless of whether a particular benefit takes the form of a program payment, fee differential, position parameter, access arrangement, or another component of the market-maker program.

This approach would be consistent with the Commission's longstanding treatment of market-maker and trading incentive programs as matters subject to Part 40 and Commission oversight. The Commission has explained that such programs can implicate Core Principles concerning execution, fair and equitable trading, and unreasonable restraints of trade.[11]

The issue is also consistent with the Commission's existing impartial-access framework. Section 38.151(b) requires DCMs to provide impartial access, including impartial, transparent and nondiscriminatory access criteria and comparable fee structures for persons receiving equal access to or services from the DCM.[12] The Commission has explained that this comparable-fee requirement is intended to prevent discriminatory fee structures from being used as a competitive tool, while recognizing that legitimate differences may exist among categories of participants and that market making may justify a fee discount.[13]

The proposed incentive-parity provision should work in concert with that existing framework rather than create an opportunity for a DCM to provide an affiliate with a material economic advantage through one component of market-maker status while treating the facially identical terms of a separate incentive provision as sufficient evidence of parity.

A pending putative class action against Kalshi has separately alleged that certain market makers receive advantages associated with their contractual and technological relationship with the exchange, including reduced fees, differing position limits, and enhanced access. Kalshi has disputed those allegations.[14] The undersigned cites the litigation only to demonstrate that the categories of advantage identified above are the subject of an actual market dispute, not as evidence that the allegations are true.

The more important evidence is the exchange's own rulebook, which expressly recognizes these categories of market-maker benefits.

The Commission should make clear that a DCM may not satisfy the substance of the proposed parity requirement merely by separating a material affiliate advantage from the portion of the market-maker arrangement that the DCM identifies as an incentive program. The relevant inquiry should be whether the affiliate's material economic and trading advantages associated with market-maker status are available to unaffiliated members on terms that are genuinely no less favorable.

IV. RECOMMENDED AMENDMENTS

The undersigned recommends that the Commission amend proposed Commission Regulation 38.852(b)(2) through the following three mechanisms. Each would address the practical-access and scope issues described above without altering the Proposal's broader framework.

1. Participation-Data Disclosure

The Commission should require a DCM offering an incentive or similar program applicable to an affiliate principal trading firm to disclose, on a periodic basis, the number of members that qualify for each payout tier of the program and the number that actually receive payment under it, distinguishing the affiliate principal trading firm from unaffiliated members.

This disclosure would directly address the empirical question the Commission has already posed through Request for Comment 11 and its cost-benefit analysis. It would allow the Commission to determine whether facially comparable terms are producing reasonably comparable access to the program's benefits.

The Commission need not require public disclosure of confidential trading information. The essential requirement is that the Commission receive sufficient information to determine whether the program is broadly accessible in practice.

2. Threshold Calibration and Reasonable Attainability Review

Where an incentive program's eligibility criteria are structured around a quantitative threshold—such as a minimum volume share, quoted size, uptime requirement, spread, or product-coverage requirement—the Commission should require the DCM to demonstrate that the threshold was not established by reference to the affiliate principal trading firm's own historical trading activity

and is reasonably attainable by unaffiliated members participating under substantially comparable market conditions.

The Commission could further require the DCM to maintain records showing whether unaffiliated members have demonstrated an ability to reach the relevant tiers during a defined look-back period.

This approach would provide the "no less favorable terms" standard with an objective practical benchmark without requiring the Commission to determine that an unaffiliated member must actually receive the same payout as an affiliate in every circumstance.

The relevant inquiry should be whether the opportunity is reasonably available to unaffiliated members—not whether an unaffiliated member has necessarily achieved the same trading volume or economic scale as the affiliate.

3. Scope Clarification for Fee, Position-Limit, Position-Accountability, Access, and Other Trading Differentials

The Commission should clarify that the incentive-parity requirement applies to any material differential fee schedule, position limit, position-accountability level, access arrangement, or other material trading parameter that a DCM extends to an affiliate principal trading firm on account of market-maker or liquidity-provider status, regardless of the form, label, or mechanism through which the differential is provided.

The Commission should further clarify that a DCM's baseline procedures for ensuring impartial access to any material trading advantage tied to market-maker status—whether or not the particular advantage is separately characterized as an incentive payment—remain subject to the general conflicts-of-interest procedures of proposed §38.852(b)(1).

This would prevent a DCM's structuring of an affiliate's market-maker benefits into separate components from eliminating the protections that otherwise would apply to an equivalent economic or trading advantage.

The objective is not to prohibit legitimate market-maker arrangements. It is to prevent the parity requirement from becoming dependent upon the regulatory label or contractual form through which a material advantage is delivered.

Absent these clarifications, a DCM could potentially provide an affiliate with material advantages through fee schedules, position limits, position-accountability levels, access arrangements, or other trading parameters while maintaining facially identical incentive-program terms.

Each mechanism would address a question that the Commission's own cost-benefit analysis, Request for Comment 11, or the proposed rule's defined scope currently leaves open, without altering the remainder of proposed Commission Regulation 38.852(b) or the Proposal's broader framework.

V. EXISTING CIVIL-PENALTY AUTHORITY ALREADY REACHES A DCM'S FAILURE TO ENFORCE THIS CONDITION

The undersigned does not propose that the Commission create new penalty authority to enforce proposed §38.852(b)(2). None is necessary.

Section 6b of the Commodity Exchange Act, 7 U.S.C. §13a, already authorizes the Commission to assess a civil penalty where a registered entity is not enforcing or has not enforced its rules of government made a condition of its designation or registration, as well as where the registered entity otherwise violates the Act or Commission rules.[15]

A DCM that maintains a proposed incentive-parity rule but fails to enforce it against conduct that provides an affiliate with materially more favorable practical access would therefore potentially implicate the Commission's existing Section 6b authority.

The Commission's regulations also provide for inflation-adjusted civil monetary penalties.[16] The undersigned does not suggest that the Commission adopt any new penalty structure or attempt to impose a penalty formula not contained in the statute.

Rather, the adopting release should confirm that a DCM's failure to enforce the incentive-parity requirement—including a failure to enforce the practical-access protections ultimately adopted by the Commission—constitutes a failure to enforce its rules within the meaning of Section 6b.

That clarification would remove unnecessary uncertainty concerning the relationship between proposed §38.852(b)(2) and the Commission's existing enforcement authority, without asking the Commission to create any new penalty authority.

VI. CONCLUSION

The proposed incentive-parity requirement addresses an important and legitimate conflict-of-interest concern. The undersigned supports that objective.

The concern identified in this comment is narrower: facially identical eligibility terms do not necessarily establish comparable practical or economic access to an incentive program. That distinction is particularly important because the Commission's own cost-benefit analysis assumes that similar incentive programs are already broadly available to market makers.

The Commission should therefore ensure that the final rule does not treat facial parity as sufficient evidence of practical parity.

The Commission can address this concern without restructuring the Proposal. Requiring participation data, establishing an objective reasonable-attainability standard for quantitative thresholds, and clarifying that functionally equivalent market-maker benefits cannot escape the parity requirement merely because they are provided through another mechanism would materially strengthen the proposed rule.

The undersigned respectfully requests that the Commission incorporate these amendments when adopting a final version of proposed §38.852(b)(2).

Respectfully submitted,

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FOOTNOTES

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").
2. Proposed Commission Regulation §38.852(b)(2), as set forth in the amendatory text of the NPRM: "if the designated contract market offers an incentive or similar program filed under Part 40 of the Commission's regulations that applies to affiliate principal trading firms, the designated contract market must have procedures to ensure that unaffiliated members of the designated contract market can participate in such programs on terms no less favorable than those offered to an affiliate principal trading firm."
3. NPRM §III.B (Incentive parity—Proposed Commission Regulation 38.852(b)(2)) ("This requirement complements the principles-based procedures requirement in proposed Commission Regulation 38.852(b)(1) by closing a specific channel through which an exchange could advantage its affiliate.") The Commission cites Core Principle 2, including its impartial-access requirement, and Core Principle 9 as legal authority for the proposed regulation.
4. NPRM §VI (Cost-Benefit Considerations) ("The proposed incentive parity requirement of 38.852(b)(2) would likely impose limited, if any, direct costs because, as the Commission preliminarily understands, DCMs generally already offer similar incentives or similar programs to every market maker.").
5. Proposed Commission Regulation §38.852(b)(2), supra note 2.
6. NPRM §VI (Cost-Benefit Considerations) ("The Commission… requests public feedback on whether the Commission's understanding that DCMs offer similar incentives or programs to most, if not all market makers is not accurate, and that more substantial costs should be considered.").
7. NPRM §IV (Requests for Comment), Request 11 ("Is the Commission correct that DCMs offer similar incentives or programs to most, if not all market makers?").
8. *Provisions Common to Registered Entities*, 76 Fed. Reg. 44,776, 44,777–78 (July 27, 2011). The Commission stated that it continued to view market-maker and trading incentive programs as "agreements . . . corresponding" to a "trading protocol" within the §40.1 definition of "rule" and therefore required all market-maker and trading incentive programs to be submitted to the Commission pursuant to Part 40. The Commission also explained that such programs fall within its oversight authority because they may implicate, among other things, Core Principles 9, 12, and 19.

9. KalshiEX LLC, *Rulebook*, Version 1.18, Rule 4.3 (Market Maker Benefits), filed with the Commodity Futures Trading Commission (July 2025). Rule 4.3 provides that market makers may receive financial benefits, reduced fees, differing Position Limits and Position Accountability Levels, and enhanced access in accordance with applicable market-maker programs.
10. Id., Rule 4.5 (Market Maker Position Accountability Levels). Rule 4.5 provides that, for contracts where a market maker has quoting obligations, the market maker may have Position Accountability Levels ten times the Position Accountability Levels applicable to non-market makers, unless otherwise specified.
11. *Provisions Common to Registered Entities*, 76 Fed. Reg. at 44,777–78, supra note 8. The Commission explained that market-maker and trading incentive programs can implicate Core Principle 9's requirements concerning competitive, open and efficient execution, Core Principle 12's requirements concerning fair and equitable trading, and Core Principle 19's prohibition on unreasonable restraints of trade.
12. 17 C.F.R. §38.151(b). The provision requires a DCM to provide members, persons with trading privileges, and independent software vendors with impartial access to its markets and services, including access criteria that are impartial, transparent, and applied in a nondiscriminatory manner, and comparable fee structures for persons receiving equal access to or services from the DCM.
13. *Core Principles and Other Requirements for Designated Contract Markets*, 77 Fed. Reg. 36,612, 36,672–73 (June 19, 2012) (adopting §38.151(b)). The Commission explained that the comparable-fee requirement was intended to prevent discriminatory access fees from being used as a competitive tool, while recognizing that DCMs may establish different categories of participants and that market making may constitute a legitimate basis for a fee discount.
14. See Matt Rybaltowski, "Class action suit vs Kalshi raises the temperature in heated prediction market rift," *iGaming Business* (Dec. 2, 2025), describing a putative class action filed in the U.S. District Court for the Southern District of New York in which plaintiffs alleged that certain market makers received advantages associated with their contractual and technological integration with Kalshi, including reduced fees, differing position limits, and enhanced access. Kalshi disputed the allegations. The undersigned cites the litigation only to demonstrate that the categories of advantage identified above are the subject of an actual market dispute, not as evidence that the allegations are true.
15. Commodity Exchange Act §6b, 7 U.S.C. §13a. Section 6b provides that if a registered entity is not enforcing or has not enforced its rules of government made a condition of its designation or registration, or if the registered entity otherwise violates the Act or Commission rules, the Commission may, upon notice and hearing on the record, order the entity to cease and desist and assess a civil penalty.
16. 17 C.F.R. §143.8.