October 5, 2026

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

Re: Conflicts and Affiliations, RIN 3038-AF76

Gus Cap LLC d/b/a DraftKings Market Making ("DraftKings Market Making" or the "Market Maker") respectfully submits this comment letter in response to the Commodity Futures Trading Commission's (the "Commission") Notice of Proposed Rulemaking on Conflicts and Affiliations.[1]

DraftKings Market Making trades event contracts through multiple exchange venues, including Railbird Exchange d/b/a DKeX ("DKeX"). DraftKings Market Making, DKeX, and Gus III LLC d/b/a DraftKings Predictions (an affiliated futures commission merchant) are each wholly-owned subsidiaries of DraftKings Inc.

DraftKings Market Making writes separately because the Proposed Rule's conditions for affiliated market makers will determine whether it can continue operating as a commercially viable liquidity provider. Proposed Section 38.852(c) would affect how it prices risk, allocates capital, and decides whether to maintain affiliated liquidity. DraftKings Market Making therefore has a distinct and immediate interest in these provisions.

DraftKings Market Making supports clear safeguards for conflicts arising from affiliated market structures, including controls, transparency, and auditability. It does not seek exemption from oversight. It asks the Commission to replace categorical execution disadvantage with targeted safeguards that address actual risks without undermining customer access to reliable liquidity.

This letter makes two principal recommendations:

- **First,** the Commission should remove mandatory order-priority subordination and replace it with a non-preference framework that prohibits favoritism without requiring an affiliated market maker to accept inferior execution solely because of common ownership.[2]
- **Second,** the Commission should clarify that bona fide event-market making includes reasonably necessary directional positions and portfolio-based risk management arising from the provision of continuous two-sided liquidity.[3]

I. The Commission Should Replace Mandatory Subordination with Non-Preference

Proposed Section 38.852(c)(1)(i) would require an affiliated market maker's bids and offers to be filled only after all unaffiliated orders resting at the same price, regardless of time priority. DraftKings Market Making asks the Commission to replace that categorical last-fill rule with a non-preference standard: the exchange should apply the same generally applicable trading and

[1] Conflicts and Affiliations, 91 Fed. Reg. 50926 (Aug. 6, 2026) (the "Proposed Rule" or "NPRM").

[2] See proposed § 38.852(c)(1)(i) (order-priority subordination requirement).

[3] See proposed § 38.852(c)(1)(ii)(D) (directional trading limitation).

access rules to similarly situated participants and should not favor or disfavor a participant merely because of its ownership.

A. Adverse Selection and Toxic Flow

Under the proposed subordination rule, an affiliated market maker would be filled at any given price level only after every unaffiliated participant resting at that price has been filled. The last-fill rule would create a systematic adverse selection problem. When incoming orders match against resting liquidity, the participants with better queue priority will get a first look on smaller, more favorable flow that does not impact the quote. This would leave the affiliated market maker to fill orders that are larger, and disproportionally more informed on average, leading to systematic adverse selection.

In quantitative terms, adverse selection manifests as negative mark-to-market performance immediately following a trade. If a market maker buys a contract at 50 cents and the fair value moves to 48 cents within seconds, the market maker has been adversely selected by two cents on that transaction. Under normal queue priority, a market maker's fills are a mix of informed and uninformed flow, and the mark-outs across a portfolio of fills tend to be manageable. Under mandatory last-fill priority, the affiliate would receive a disproportionate share of trades that other participants were better positioned to avoid or absorb.

The adverse selection dynamic is structural and predictable. A rational market maker evaluating whether to quote at a given price level must account for the expected mark-out profile of its fills. Under subordination, that expected profile is systematically worse than the population average, and the market maker must either widen its spread to compensate or reduce its quoting activity. Both choices reduce market quality for customers.

Over thousands of fills, this produces a measurably negative expected value per transaction that no amount of spread widening can fully offset without degrading customer execution quality beyond commercially reasonable levels.

B. One-Sided Retail Flow in Event Markets

Event markets, particularly prediction markets, exhibit a distinctive flow characteristic that exacerbates the adverse selection problem described above: retail order flow is frequently and substantially directionally imbalanced. In traditional derivatives markets, flow tends to be relatively balanced across both sides of the order book, driven by hedging demand, spread trading, and diverse institutional participation. Retail participants in event markets often have strong directional preferences driven by sentiment, fandom, or public attention.

Consider a contract on the outcome of a nationally televised sporting event. When a popular team is favored, retail participants disproportionately buy contracts on that team's victory. The market maker, in order to maintain continuous two-sided quotations, must be willing to sell contracts on the favored outcome even when the preponderance of incoming flow is on the buy side. This means the market maker warehouses directional exposure as a necessary incident of providing two-sided liquidity. In a well-functioning market, the market maker manages this exposure through spread adjustment, inventory management, and hedging.

DraftKings Market Making has observed this pattern repeatedly across event markets. The degree of directional imbalance in retail event market flow is materially greater than what a typical equity or commodity market maker would experience. Instead of protecting customers, subordination degrades the market maker's ability to manage this imbalance, thereby reducing the depth and reliability of liquidity available to customers.

C. Event Contracts Present Material Gap Risk

Event contracts are binary instruments whose values are determined by discrete outcomes. Unlike equity or commodity prices, which typically move in small, continuous increments, event-contract probabilities can move sharply on a single piece of information. A contract trading at 30 cents can move to 70 cents in a matter of seconds when new information becomes available, such as a key injury report, a policy announcement, or a real-time event development. These abrupt, large-magnitude price movements are often referred to as "gapping," and they are a defining characteristic of event markets.

For a market maker, gapping creates a specific and acute risk. When the market maker has resting quotes at a price that is rendered stale by new information, it is exposed to being filled at a price that no longer reflects fair value. This is commonly called being "run over." In deeper, more continuous markets such as listed equities, the magnitude of adverse price movement following a fill is typically modest, and market makers can adjust their quotes with relative speed. In event markets, the magnitude of adverse movement can be 20, 30, or 40 cents on a one-dollar contract, and the movement can happen faster than quote-adjustment systems can respond.

Subordination exacerbates the negative effects of gapping for an affiliated market maker. Event contracts experience rapid and substantial probability shifts during live events, and the risk of adverse gapping is a primary consideration in pricing and quoting strategy. A rule that systematically positions the affiliated market maker as the last-filled participant at every price level during these gap events would impose losses that cannot be offset by the more favorable flow that is predominantly benign. The Market Maker would respond by widening quoted spreads to levels that erode the value proposition of the market for all participants.

D. New and Niche Markets Are Already Loss Leaders

New, niche, and thinly traded markets are especially vulnerable. DraftKings Market Making may quote these markets as an investment in market development, not as stand-alone profit centers; initial liquidity is intended to attract participation and build depth over time. Mandatory subordination would make those launch-period economics still less viable, discouraging product development and reducing customer choice.

Market making is also a portfolio business. More balanced flow in higher-volume markets helps support quoting in thinner markets, while fixed costs for trading systems, data, connectivity, compliance, personnel, and capital are incurred across the operation. Subordination would impair the balancing side of that portfolio while leaving fixed costs in place. The predictable customer effects are wider spreads, shallower liquidity depth, fewer commercially viable contracts, and less reliable liquidity on the regulated U.S. platform.

These effects are not limited to a single contract. If an affiliated market maker is systematically confined to adversely selected fills in liquid markets and cannot recover the costs of supporting new or niche markets, the portfolio may no longer support broad, continuous quoting. The Commission's recognition that affiliated market makers may provide initial liquidity in new markets is therefore important to the cost-benefit analysis.[4]

[4] See Proposed Rule preamble (discussing affiliated market makers' role in providing initial liquidity in new markets).

E. Overhead Costs and Commercial Viability

Operating an affiliated market-making business requires substantial fixed-cost investment in dedicated trading systems, risk-management infrastructure, data feeds, connectivity, compliance systems, personnel, and capital reserves. These overhead costs are generally not variable; they are incurred regardless of whether the market maker quotes in ten markets or ten thousand markets. They represent the minimum investment required to operate a market-making business at a professional standard, with the technology, controls, and governance that both the Commission and the market maker's own risk management require.

These overhead costs can only be justified if the market-making operation can access sufficiently balanced flow to generate revenue that covers both the variable costs of trading (adverse selection, inventory risk, capital charges) and the fixed costs of the business (technology, personnel, compliance, data). Under subordination, the variable costs of trading increase because adverse selection is systematically worse, and the fixed costs remain unchanged. The gap between revenue and cost widens, and at some point, a rational commercial actor must conclude that the investment is not commercially reasonable.

F. Adverse Impacts of Subordination

DraftKings Market Making recognizes that the Commission has designed the Proposed Rule to advance the conflict of interest, customer protection, and market integrity objectives reflected in the Core Principles. Although the subordination requirement may achieve the Commission’s conflict-of-interest objectives, it does so at the risk of degrading markets and, consequently, customers’ use of them.

If affiliated liquidity becomes uneconomic, market participants will experience wider bid-ask spreads, shallower order book depth, fewer available contracts, and reduced access to regulated United States markets. These are not speculative harms. They are the direct and predictable consequences of removing or degrading a primary source of liquidity in markets where unaffiliated market makers do not consistently quote. DraftKings Market Making is, for many contracts on DKeX, the sole provider of continuous two-sided liquidity. If that liquidity is withdrawn because the economics of exchange-wide subordination make it irrational to continue providing it, there is no unaffiliated replacement standing by.

There is also a meaningful risk that, if affiliated liquidity on regulated U.S. platforms is degraded, customer activity will migrate to less regulated or offshore venues that do not provide the same level of customer protection, market integrity, or regulatory oversight. The Commission has an interest in ensuring that regulated U.S. markets remain competitive and attractive to retail participants. Conditions that make those markets less liquid and more expensive for customers work against that interest.

Prediction markets have a distinctive market structure that makes affiliated liquidity especially important. Unlike traditional futures markets with a small number of highly liquid benchmark contracts, prediction markets involve large numbers of short-lived, thinly-traded contracts on diverse topics. Unaffiliated market makers, which typically focus on the highest-volume contracts where the economics are most favorable, will not consistently quote in hundreds or thousands of low-volume event contracts. The affiliated market maker's willingness to quote across the full product suite, including loss-leader markets, is a function of its integrated business model and its long-term interest in market development. Remove the economic viability of that model, and the breadth of liquidity disappears.

The Commission's own preamble recognizes this exact point.[5] DraftKings Market Making agrees and respectfully submits that the final rule should not eliminate the economic basis for that function.

II. Directional Positions Are Integral to Bona Fide Event-Contract Market Making

Proposed Section 38.852(c)(1)(ii)(D) would limit the affiliated market maker's ability to take directional proprietary positions except in connection with maintaining two-sided quotations.[6] DraftKings Market Making supports distinguishing bona fide market making from speculative proprietary trading, but the final rule should expressly recognize that directional exposure can be a necessary byproduct of providing liquidity in event markets.

A. Retail Flow Creates Systematic Directional Pressure

As discussed in Section I.B above, retail order flow in event markets is rarely balanced. Popular outcomes attract disproportionate retail interest, and this creates systematic directional pressure on the market maker. When a contract on a widely followed event outcome is trading at 60 cents and retail flow is heavily concentrated on the buy side, the market maker must sell contracts to provide liquidity. Those sales reflect the need to absorb an imbalance in customer flow, not a speculative view that the outcome will not occur.

The market maker therefore accumulates a directional position as a direct and unavoidable consequence of its market-making activity. This position reflects the mechanics of absorbing one-sided retail flow, not proprietary speculation. A strict "nondirectional" requirement that does not account for this reality would force the market maker to withdraw its quotes whenever flow becomes too one-sided, which is precisely when customer liquidity needs are greatest. DraftKings Market Making asks the Commission to clarify that positions accumulated through the ordinary course of providing two-sided quotations, including the directional exposure that results from absorbing imbalanced customer flow, are bona fide market making.

The consequences of an overly rigid directional restriction are severe. If the market maker cannot hold directional exposure that arises from providing liquidity, it must either stop quoting when flow becomes imbalanced or offset the exposure immediately through aggressive hedging that itself may move the market against customers. Neither outcome serves the Commission's objective of ensuring that customers have access to deep, reliable liquidity in event markets. The restriction should distinguish between speculative directional trading and inventory accumulation that is the natural consequence of market-making activity.

B. Bona Fide Market Making Requires Inventory Management

Market making extends beyond posting bids and offers. It encompasses the risk management activities needed to maintain continuous two-sided quotations over time. These activities include inventory management (adjusting positions to maintain desired exposure levels), hedging (taking offsetting positions in correlated contracts or markets), correlation management (monitoring and adjusting exposure across related contracts), cross-market hedges (using positions in one market to offset risk in another), portfolio-level exposure management (aggregating and managing risk across all markets in which the market maker quotes), and

[5] See Proposed Rule preamble (discussing affiliated market makers' role in providing initial liquidity in new markets).

[6] See proposed § 38.852(c)(1)(ii)(D) (directional trading limitation).

position unwinds (closing out positions that are no longer consistent with the market maker's risk parameters).[7]

Each of these activities may, at any given moment, create a directional position in a particular contract. A hedge in a correlated contract necessarily creates directional exposure in the hedging instrument. An inventory-management trade that reduces exposure in one contract may increase exposure in another. Portfolio-level rebalancing may require taking directional positions across multiple contracts simultaneously. These are standard market-making activities, and each is necessary to maintain the continuous two-sided quotations that the Commission expects affiliated market makers to provide.[8]

The directional trading restriction as currently drafted does not clearly encompass all activity reasonably related to providing and maintaining two-sided quotations. DraftKings Market Making recommends that the Commission clarify in the final rule that bona fide market making activity includes all inventory management, hedging, correlation management, cross-market hedging, portfolio-level exposure management, and position unwinds that are reasonably related to the market maker's obligation to provide continuous two-sided quotations. The current text is susceptible to an interpretation that would sweep in legitimate risk management and expose the market maker to compliance risk for engaging in ordinary market-making operations.

III. Targeted Controls Can Address Conflict Risk

DraftKings Market Making supports controls that address the risks the Commission has identified—information leakage, preferential access, undisclosed advantages, and inadequate surveillance—without imposing a mechanical execution penalty. The framework should include information barriers between exchange functions and market-making personnel, systems and personnel separation, written conflicts procedures, independent governance, incentive parity, and independent oversight.

These controls should be prospective and risk based. The exchange and its affiliate should document the safeguards adopted, identify responsible oversight personnel, and maintain procedures for escalation, remediation, and periodic testing.

The operative standard should be neutrality: the affiliated market maker should receive no preferential treatment in execution, market data, fees, connectivity, or access to information, but should not be required to accept worse treatment solely because of ownership. That approach is consistent with impartial-access principles and avoids converting a rule against favoritism into mandatory disfavor.

Auditability would make the framework enforceable. Policies and procedures should be written and available for Commission review, with records sufficient to test execution treatment, fill patterns, access terms, information barriers, and governance decisions. Periodic review and Commission-accessible audit trails would directly address the conflict risks at issue more effectively than last-fill treatment.

The Commission could further require reasonable reporting and independent review of compliance with these controls, tailored to the size, activity, and risk profile of the affiliated operation. This would preserve accountability while avoiding requirements untethered to the actual conflict risks presented by event contract market making.

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[7] See proposed § 38.852(c)(1)(ii) (market-making obligations).

[8] See Proposed Rule preamble (requesting comment on the appropriate scope of the directional-trading limitation and its relationship to bona fide market-making activity).

IV. Independent Review and Regulatory Service Provider Certification

Proposed Section 38.852(c)(2) would require an affiliated market maker to be subject to independent third-party review and annual certification of its compliance with the conditions of the rule.[9] DraftKings Market Making does not oppose the concept of independent review. The Market Maker has significant concerns about the scope, cost, and practical implementation of the review as currently proposed, particularly as it relates to the importation of financial-surveillance concepts designed for a fundamentally different type of regulated entity.[10]

More fundamentally, the Proposed Rule's reference to the Section 38.604 financial surveillance framework raises concerns about fit and proportionality. DraftKings Market Making recognizes that the proposal excludes customer-related aspects of Section 38.604 when applying that framework to an affiliate market maker. Even with that carveout, however, Section 38.604 is an FCM-oriented financial surveillance framework designed around the oversight of intermediaries subject to minimum financial standards and customer protection obligations. A principal trading firm that trades only its own capital and does not carry customer funds presents a different risk profile, particularly when it trades fully collateralized event contracts. The relevant questions are whether the firm has adequate financial resources to meet its market making obligations, whether it complies with applicable exchange rules, and whether the affiliated exchange's conflicts procedures are operating as designed. A tailored financial resources and conflicts review standard would address those risks more directly than importing Section 38.604 by analogy and then carving out the customer-related portions.

DraftKings Market Making recommends that the independent review be focused on the conflicts controls, non-preference standards, and market making obligations that would be specific to the affiliated market maker's role. The review should assess whether information barriers are appropriately designed, implemented, and tested; whether the market maker receives no preferential treatment in execution or data access; whether the market maker is fulfilling its quoting obligations; and whether the documentation and governance requirements of the rule are being satisfied. This scope would be meaningful, verifiable, and directly relevant to the conflict risks the Commission seeks to address.

DraftKings Market Making also notes that the Proposed Rule does not include a phased implementation timeline for the independent-review requirement. Given the substantial infrastructure investment required, DraftKings Market Making recommends that the Commission provide an implementation period of not less than twelve months following the effective date of the final rule, with interim compliance measures such as self-certification and Commission-accessible audit trails serving as a bridge during the implementation period. This would allow market makers to build the necessary infrastructure without disrupting existing market-making operations.

V. No Analogues Exist for Order-Priority Subordination

A. SEC Treatment of Affiliated Market Makers

The Securities and Exchange Commission's framework provides a useful point of comparison for evaluating the CFTC's proposed approach. Under the Exchange Act, national securities exchanges must comply with requirements including fair representation, due process, and

[9]See proposed § 38.852(c)(2) (independent third-party review and certification).

[10]See Proposed Rule preamble ((noting potential NFA-related annual fee assessments of $100,000 to $150,000 and separately estimating that data-intensive certification could involve $500,000 in implementation costs, $1,000,000 in software costs, and $700,000 in annual cloud costs).

nondiscrimination.[11] When exchanges have affiliated entities that participate as market makers or routing brokers, the SEC has consistently addressed the associated conflict risks through non-discrimination conditions, information barriers, and independent self-regulatory organization oversight, not through mandatory order-priority subordination.

More broadly, Regulation NMS and Regulation ATS establish comprehensive frameworks for addressing conflicts of interest in exchange and alternative trading system operations, including provisions related to fair access, order protection, and market-data distribution.[12] Neither framework mandates order-priority subordination based solely on affiliation.

The proposed CFTC subordination requirement is materially more prescriptive than any SEC analogue. No SEC-regulated exchange has been required to subordinate the orders of an affiliated market maker or routing broker to all unaffiliated orders at the same price as a condition of the affiliated entity's participation. DraftKings Market Making respectfully submits that the SEC framework demonstrates that non-preference, information barriers, and independent oversight are sufficient to address affiliate conflict risks without imposing execution penalties.[13]

B. International Comparisons

Affiliated market makers operate under common control with marketplace operators in other major jurisdictions, and no jurisdiction of which DraftKings Market Making is aware has adopted a mandatory order priority subordination requirement comparable to the one proposed by the Commission. In Canada, for example, marketplace regulation under National Instrument 21-101 addresses the handling of orders by marketplace-affiliated dealers, but the Canadian framework does not require that affiliated orders be filled after all unaffiliated orders.[14] In certain Canadian marketplace contexts, same-broker interaction rules actually result in *prioritizing* the matching of client orders with the affiliated dealer's inventory.

DraftKings Market Making acknowledges that international comparisons must be made with caution, as different jurisdictions have different market structures, regulatory traditions, and policy priorities. But the apparent absence of a mandatory subordination requirement elsewhere suggests that the global regulatory consensus, to the extent one exists, is that affiliate conflict risks can be effectively managed through controls, non-discrimination standards, and oversight, without requiring the type of categorical execution penalty set forth in the Proposed Rule. The U.S. derivatives markets do not require a uniquely restrictive approach.

VI. Corporate Restructuring Costs

If order-priority subordination makes affiliated market making commercially unviable, firms in DraftKings Market Making's position face a binary choice: cease market-making operations or restructure the corporate relationship so that the market maker is no longer an "affiliate" of the exchange for purposes of the rule. DraftKings Market Making submits that both options impose significant costs that the Commission should account for in its cost-benefit analysis.

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[11] See Exchange Act § 6; § 19(b) (rule-filing requirements); Regulation NMS; Regulation ATS.

[12] See 17 C.F.R. § 242.600 et seq. (Regulation NMS); 17 C.F.R. § 242.300 et seq. (Regulation ATS). Neither framework mandates order-priority subordination based solely on affiliation.

[13] See Proposed Rule preamble (discussing the Commission's consideration of alternatives to order-priority subordination, including non-preference and neutrality approaches).

[14] See Canadian Securities Administrators, National Instrument 21-101, Marketplace Operation, Part 6 (order-handling provisions for marketplace-affiliated dealers).

Corporate restructuring to eliminate the affiliated relationship might require spinning off either the market maker or the exchange into a separate corporate entity with separate ownership. DraftKings' Market Making affiliate, DKeX, submitted commentary on the direct costs of such a spin off.[15]

Beyond the direct costs, however, corporate restructuring would reduce the market quality benefits of integrated market design, including benefits to customers. Subject to appropriate conflicts controls, an affiliated market maker and exchange can coordinate on market development and structure, operational readiness, and liquidity support. That coordination matters most for new, niche, or thinly traded contracts. In those markets, a market maker may provide liquidity not because the individual contract is independently profitable, but because supporting a broader product catalogue helps the exchange build a deeper and healthier market over time. If that broader alignment is eliminated, customers are likely to see fewer listed contracts with meaningful liquidity, less depth, wider spreads, and more limited choice, because only the contracts that are independently commercially feasible for unaffiliated market makers will receive meaningful quoting support. DraftKings Market Making sees this dynamic in practice when other exchanges seek liquidity support for illiquid contracts that would not be commercially reasonable to quote absent a broader strategic relationship or market-development plan. The benefits of integration, which the Commission acknowledges in the preamble, would be lost.

The Commission should account for these restructuring costs and the loss of integration benefits in its cost-benefit analysis. If the practical consequence of the rule is to force restructuring rather than to improve market quality, the Commission should consider whether less restrictive alternatives, such as a non-preference standard with robust controls, can achieve the same regulatory objectives at lower cost.

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DraftKings Market Making supports clear rules that address actual affiliate conflict risks through controls, transparency, and auditability. But those rules should preserve rather than undermine the liquidity that customers need.

DraftKings Market Making respectfully asks the Commission to make two changes in the final rule: (1) remove mandatory order priority subordination and replace it with a non-preference framework that prohibits preferential treatment without affirmatively disadvantaging the affiliate; and (2) clarify that bona fide event market making permits reasonably necessary directional positions and portfolio-based risk management.

These changes would better protect customers by preserving competitive pricing, depth, product choice, and access to regulated U.S. event markets, while allowing the Commission to address conflicts through established safeguards. DraftKings Market Making appreciates the opportunity to comment and welcomes further dialogue with the Commission and its staff on a final rule.

Respectfully submitted,

DraftKings Market Making

[15]Railbird Exchange, LLC d/b/a DKeX, *Re: Conflicts and Affiliations, RIN 3038-AF76* (Oct. 5, 2026).