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CLIENT ALERT

Potential New Conflicts of Interest Rules for Affiliates of CFTC-Regulated Entities

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On July 30, 2026, the CFTC approved a notice of proposed rulemaking (the "Proposal") that would establish new requirements governing relationships between CFTC-regulated entities and their affiliates. The Proposal addresses conflicts of interest that arise when a designated contract market ("DCM"), derivatives clearing organization ("DCO"), or swap execution facility ("SEF") is affiliated with a futures commission merchant ("FCM"), a principal trading firm such as a market maker or liquidity provider, or a clearing member. Comments will be due 60 days after the Proposal is published in the Federal Register, which is scheduled for August 6, 2026.

Set forth below is a summary of the principal requirements that the Proposal would impose, organized by entity type. A more detailed client alert will follow. Key framing points: nearly every obligation runs to the registered entity rather than to the affiliate itself, and the definitions turn on trading activity rather than on registration status, so an FCM that also trades proprietarily on an affiliated DCM would be subject to both of the first two sets of requirements below.

DCM with an Affiliate Principal Trading Firm (Including a Market Maker or FCM Trading as Principal)

- **Default prohibition on affiliate principal trading.** Under proposed Regulation 38.852(c), an affiliate principal trading firm may not trade on the affiliated DCM unless two conditions set forth in paragraph (c)(1) are satisfied at all times. An affiliate that satisfies all applicable requirements is defined as an "affiliate market maker"; the status is lost the moment any requirement ceases to be met.
- The two conditions are:
    - **Condition 1: Order-priority subordination.** The DCM's trade matching system must fill the orders of all unaffiliated members before those of the affiliate at the same price, without regard to time priority. The affiliate's bids and offers are filled last at every price level. Proposed Reg. 38.852(c)(1)(i).
    - **Condition 2: Part 40 market maker program.** Any market maker or incentive program filed under Part 40 that applies to the affiliate must require continuous two-sided quotations in each product, specify minimum quoting hours and permissible bid-ask spread limits, state performance standards and consequences of failure, and prohibit directional proprietary positions other than in connection with the affiliate's quoting obligation. Proposed Reg. 38.852(c)(1)(ii).
- In addition to these two conditions, the DCM must satisfy the following requirements in connection with the affiliate's trading:
    - **Independent verification.** The DCM **must** designate an independent third-party regulatory service

provider ("RSP") to conduct Regulation 38.604 financial surveillance of the affiliate, review and monitor the DCM's compliance with its own conflicts procedures, and certify annually to the Commission and the DCM's board that each condition is satisfied. The DCM remains responsible for the RSP's performance. Proposed Reg. 38.852(c)(2).

  - Notably, Regulation 38.604 is oriented toward financial surveillance of FCMs and the protection of customer funds; the Proposal would require the RSP to apply it to the affiliate market maker "as if" it were an FCM, even though a proprietary trading firm that is not an FCM or introducing broker typically is not subject to DCM minimum financial requirements. The Commission has requested comment on whether a tailored financial resources standard would be more effective than the Regulation 38.604 cross-reference.

- **Per-session point-of-transaction disclosure.** Before a customer enters any orders in a session, the DCM must present a notice disclosing the affiliate's presence and the subordination condition. The notice must be in plain language, presented in full rather than by reference or link, and may not be dismissed without the customer's affirmative acknowledgment. The DCM must require its intermediary participants and any other operator of an electronic order-entry interface to deliver the notice as well. Proposed Reg. 38.852(c)(3).

- **Incentive parity.** If the DCM offers a Part 40 incentive or similar program applicable to affiliate principal trading firms, unaffiliated members must be able to participate on terms no less favorable. Proposed Reg. 38.852(b)(2).

DCM with an Affiliate FCM that does not trade on a principal basis

- **Conflicts procedures.** The DCM must maintain procedures for identifying, addressing, and managing conflicts of interest involving the affiliate, addressing at a minimum: applications and systems, personnel, office space, documentation of each conflict and its resolution, and disclosure of the affiliation in the DCM's rulebook and on its website. Proposed Reg. 38.852(b)(1).

- **Appendix B acceptable practices.** Proposed guidance would call for: logically separate trading platform, surveillance, and recordkeeping systems; controls across all other systems to prevent improper sharing of nonpublic information; monitoring for affiliate access; no shared staff except administrative and Core Principle 20 (Systems Safeguards) functions; separate office space with physical barriers; and a carve-out permitting information sharing only if the information is shared with all market participants or relates solely to the affiliate or its customers.

- **Intra-day financial surveillance.** The DCM *may* designate (as opposed to being required to do so for an affiliate trading as principal) an independent RSP for Regulation 38.604 surveillance of the affiliate FCM. If it does not, it must maintain conflicts procedures covering the same five categories. The Proposal does not mandate the use of an RSP in this context. Proposed Reg. 38.606(b).

- **Mandatory independent SRO for periodic supervisory program.** An SRO with an affiliate FCM must designate an independent third-party SRO to conduct the Regulation 1.52(c) supervisory surveillance of that affiliate. This requirement reaches beyond the DSRO function. Proposed Reg. 1.52(c)(1)(i)(C).

- **Examination staff reporting line.** Examination staff must report directly to the board of directors or to a designated committee or officer responsible for regulatory compliance, and if to an officer, that officer must in turn report to the board. Proposed Reg. 1.52(c)(1)(i)(B).

- **Information barrier.** The SRO may not access the affiliate FCM's nonpublic information and may not share non-public information obtained from the supervisory program of its non-affiliate member FCMs with the affiliate, except as necessary for Regulation 1.52 or Part 38 compliance. Proposed Reg. 1.52(c)(1)(i)(D).

- **DSRO prohibition.** A DSRO may not perform the DSRO function for its own affiliate FCM. This codifies existing voluntary practice. Proposed Reg. 1.52(d)(2)(ii)(C)(1)(ii).

- **Surveillance frequency.** Regulation 38.604 would be amended to require the DCM to monitor each FCM's customer-position obligations "throughout the day" rather than "continuously," confirming that the obligation is intra-day and risk-based.

DCO with an Affiliate Clearing Member

- **Conflicts procedures.** The DCO must maintain procedures for identifying, addressing, and managing conflicts of interest involving the affiliate, addressing at a minimum: applications and systems, personnel, office space, and documentation of each conflict and its resolution. Proposed Reg. 39.25(d).

- **Public disclosure.** The DCO must disclose the existence of, and its relationship with, any affiliate clearing member. The disclosure must also appear in the DCO's rulebook. Proposed Reg. 39.21(c)(9).

- **Acceptable practices.** A new Appendix D to Part 39 would provide acceptable practices substantially identical to the guidance proposed for DCMs described above.

- **Alternatives under consideration.** The Commission has also invited comments on two alternatives that, if adopted, would impose more stringent requirements: (i) requiring a DCO to exhaust an affiliate clearing member's default fund contributions before exposing other clearing members to losses, and (ii) codifying a non-preference principle requiring equal treatment of all clearing members regardless of affiliation.

New FCM Obligations

- **Customer disclosure.** Amended Regulation 1.55(k)(5) would require an FCM to disclose any affiliate relationship it has with a SEF, DCM, or DCO, together with the risks that the relationship creates. The content of the disclosure is not prescribed. This is the only new obligation that the Proposal would impose directly on an FCM.
- **DSRO election**. An FCM would gain the right to elect NFA as its DSRO. Under existing rules, the Joint Audit Committee assigns each FCM's DSRO.

Other Provisions

- **SEFs.** New Regulation 37.1201 would impose parallel conflicts procedures on SEFs with affiliate market participants, with an affiliate introducing broker expressly named in the definition. The Appendix B separations applicable to DCMs would apply as well. The affiliate principal trading conditions described above do not extend to SEFs, although the Commission has requested comment on whether they should.
- **DCM governance.** New Regulation 38.853 would codify existing acceptable practices on board composition (35 percent public directors), the Regulatory Oversight Committee, and disciplinary panel composition.

Selected Issues Identified for Comment

- The Proposal also requests comments regarding the following alternative proposals: a flat prohibition on affiliate principal trading (no market maker exception), a volume or sunset cap on top of subordination, and codification of quoting parameters in rule text.

Please let us know if you have any questions about the Proposal, if we can assist you in evaluating its application to your structure, or if you would like assistance preparing or reviewing a comment letter.