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September 28, 2023

Re: Request for Comment on the Impact of Affiliations on Certain CFTC-Regulated Entities

Established in 1971, Public Citizen is a national, not-for-profit, non-partisan, research and advocacy organization representing the interests of household consumers. Our Energy Program Director, Tyson Slocum, serves on the CFTC's Energy and Environmental Markets Advisory Committee, and the Market Risk Advisory Committee. Financial details about our organization are on our web site.¹

Public Citizen offers a reply to the CFTC request for comment on whether derivatives clearing organizations, designated contract markets and swap execution facilities should be allowed to operate with affiliated intermediaries—such as futures commission merchants or other market participants— and whether those affiliations present financial conflicts of interest that can be successfully mitigated.² Our short answer is they cannot be successfully mitigated, and the CFTC must therefore establish rules prohibiting derivatives clearing organizations, designated contract markets and swap execution facilities from operating with affiliates in CFTC-jurisdictional markets.

This issue of affiliate interactions is important because under the Commodity Exchange Act, derivatives clearing organizations, designated contract markets and swap execution facilities have responsibilities for supervising market participants. If a derivatives clearing organization, designated contract market or swap execution facility is affiliated with an intermediary or other market participant, it presents a financial conflict of interest that interferes with supervisory responsibilities, resulting in anti-competitive effects, potential abuse of nonpublic information, and erosion of public confidence in the impartiality of derivative markets.

As part of any rulemaking that establishes prohibitions of derivatives clearing organizations, designated contract markets and swap execution facilities from operating with affiliates in CFTC-jurisdictional markets, the Commission may need to clarify affiliation standards.

For example, the Federal Energy Regulatory Commission spent nearly two years to determine whether JP Morgan Chase & Co was affiliated with a large portfolio of energy and infrastructure assets, and, now as resolved by FERC, JP Morgan is deemed to control those holdings.³ Corporate affiliate structures are increasingly complex and frequently opaque, leaving regulators unable to easily untangle questions of affiliation.

¹ www.citizen.org/about/annual-report/

² www.cftc.gov/PressRoom/PressReleases/8734-23

³ www.citizen.org/article/september-2023-pc-letter-to-the-federal-reserve-on-jp-morgan/



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To assist the CFTC in accurately establishing affiliation, we suggest that it require all derivatives clearing organizations, designated contract markets and swap execution facilities to produce publicly-accessible affiliate maps that clearly identify all upstream ownership over 5%. In addition, the CFTC should compel disclosure of LLC agreements of all Commission-jurisdictional entities, as such agreements clearly establish which entities have legal rights and powers over the LLC.

Finally, as part of any affiliation determination, the Commission should verify whether CFTC-jurisdictional entities are in compliance with Section 8 of the Clayton Act, which prohibits interlocking boards of directors and officers for entities engaged in commerce.⁴ To ensure compliance with the Clayton Act, CFTC-jurisdictional entities should disclose the names of members of the board of directors and their affiliations.

Respectfully submitted,

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⁴ 15 USC § 19(a).