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February 5, 2018

Chairman J. Christopher Giancarlo  
U.S. Commodity Futures Trading Commission  
1155 21st Street, NW  
Washington, DC 20581

Dear Chairman Giancarlo,

I am writing in my capacity as a member of the Commission's Energy and Environmental Markets Advisory Committee, and as an employee with Public Citizen, a national not-for-profit research and advocacy organization representing the interests of our more than 400,000 members and supporters across the United States.

I am concerned about the Commission's decision to include as part of civil settlement proceedings against three financial institutions—Deutsche Bank,<sup>1</sup> HSBC<sup>2</sup> and UBS<sup>3</sup>—a waiver from the Dodd-Frank “bad actor” provisions that disqualify offenders from certain securities offerings when a company is the subject of a final order finding a “violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct.”<sup>4</sup>

Specifically, I am troubled by statements a CFTC representative made to the media indicating that the Commission included the waivers for the purpose of reaching “settlements with the banks more quickly. Otherwise...the banks would have wanted to apply for waivers from the bad actor rule before finalizing and announcing the settlement agreements.”<sup>5</sup>

The bad actor disqualification provisions are not part of federal law to be used as a bargaining chip to entice violators to settle with regulators more quickly. The bad actor provisions are critical tools of enforcement to hold violators accountable for their actions, to send a strong message of deterrence to other entities that might be contemplating breaking the law, and to protect consumers and investors from “bad actors” that have a likelihood of committing future harm due to their misconduct.

It is especially worrying that the Commission combined the waiver from the bad actor disqualification rules as part of the settlement, rather than as a separate action. Any Commission action on whether to apply or grant a waiver from the bad actor disqualification rules should be subject to a public notice and comment, given the severe risks such bad actors pose to consumers, investors and other market participants. Folding such a waiver into the settlement itself not only invites the perception that the waiver was a part of a “deal” to quickly reach a

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<sup>1</sup> [www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfdeutschebankagorder012918.pdf](http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfdeutschebankagorder012918.pdf)

<sup>2</sup> [www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfhsbcsecuritiesorder012918.pdf](http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfhsbcsecuritiesorder012918.pdf)

<sup>3</sup> [www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfusbagorder012918.pdf](http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfusbagorder012918.pdf)

<sup>4</sup> 17 CFR § 230.262(a)(3)(ii)

<sup>5</sup> Emily Flitter, “Settlements for 3 Wall Street Banks Hold a Silver Lining,” *The New York Times*, February 1, 2018, [www.nytimes.com/2018/02/01/business/banks-settlements-waiver-cftc-sec.html](http://www.nytimes.com/2018/02/01/business/banks-settlements-waiver-cftc-sec.html)

settlement, but also robs the affected public from being able to weigh in on the significant problems posed by such bad actors.

If the Commission erroneously deems it proper to include bad actor waivers as part of a negotiation with financial institutions accused of misconduct, then the least the agency can do is remove any individuals representing such companies from any and all of the Commission's Advisory Committees. For example, Edward Pla of UBS serves on the Commission's Market Risk Advisory Committee,<sup>6</sup> and Jason Vitale of Deutsche Bank serves on the Commission's Foreign Exchange Markets Subcommittee.<sup>7</sup> It is unseemly to allow representatives of companies involved in violation of the Commission's rules to continue providing formal advice, counsel and access to the Commission through service on an Advisory Committee. They should both be removed from such service.

Respectfully submitted,

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Commissioner Rostin Behnam

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<sup>6</sup> [www.cftc.gov/About/CFTCCcommittees/MarketRiskAdvisoryCommittee/mrac\\_members](http://www.cftc.gov/About/CFTCCcommittees/MarketRiskAdvisoryCommittee/mrac_members)

<sup>7</sup> [www.cftc.gov/About/CFTCCcommittees/GlobalMarketsAdvisory/gmac\\_femmembers](http://www.cftc.gov/About/CFTCCcommittees/GlobalMarketsAdvisory/gmac_femmembers)