By Electronic Submission

October 7, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Proposed Rule – Clearing Agency Governance and Conflicts of Interest
File Number S7–21–22

Dear Ms. Countryman:

Better Markets[1] appreciates the opportunity to comment on the proposed rule, Clearing Agency Governance and Conflicts of Interest ("the Proposal").[2] Clearing agencies play a vital, if less visible, role in maintaining the health and efficiency of the securities markets and ultimately of the American financial system. These institutions operate in the interests and under the influence of a variety of stakeholders, including the shareholders or other owners of the clearing agency, the financial institutions that serve as clearing participants, entities that participate indirectly, third-party vendors to the clearing agencies, the clearing agencies' own management, and, finally, the individual and institutional investors who rely on a fair, efficient, and stable clearing mechanism for their trading activities.

The interests of these various parties pull clearing agencies in competing directions, and they pose distinct and competing problems for sound management and financial system stability. Relying on governance reforms, the Proposal is an admirable effort to address these conflicts and to ensure that clearing agencies perform their vital functions, operate fairly and transparently, and

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[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

[2] Clearing Agency Governance and Conflicts of Interest, 87 Fed. Reg. 51,812 (proposed Aug. 23, 2022) (to be codified at 17 C.F.R. pt. 240) (the "Proposal").

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pose minimal risk to the financial system. Better Markets supports the basic thrust of the Proposal, though we believe it can be meaningfully improved in the final rule.

Particularly with respect to security-based swaps markets, the Proposal represents a long-overdue return to address foundational problems of market power. Section 765 of the Dodd-Frank Act directed the SEC to mitigate conflicts of interest in these markets, in part by adopting rules that may include limits on control of or voting rights in clearing agencies that clear security-based swaps.[3] While the Commission made an early effort to meet that mandate in its Regulation MC proposed rule,[4] it has let that proposal linger for far too long. Now, the Proposal would replace many of the most effective remedies of Regulation MC with governance-based rules that simply do not address all of the harms arising from the market concentration that continues to prevail. To remedy these problems, the Commission must not only implement the governance reforms in the Proposal but also return to some of its initial regulatory interventions—and, indeed, should supplement them with more direct actions against the market power of large participants in certain derivatives markets.

BACKGROUND

Clearing agencies have often been likened to the "plumbing" for capital markets.[5] They do their work outside the public's attention, but their function is indispensable to the larger financial system. More specifically, these agencies ensure that investors actually receive the securities or funds for which they have contracted; they take on counterparty risk so that investors may focus on trading; they establish risk management systems to prevent or ameliorate defaults; and they act as depositories for securities. And by doing so, clearing agencies help the financial system operate more smoothly and with less risk.

At the same time, clearing agencies' central position means that they also concentrate counterparty risk; the clearing agency itself is a counterparty to all participants.[6] For that reason, how well clearing agencies can and will handle extreme volatility is a critical policy concern. That concern points, in turn, to questions about the governance structure and management of the clearing agencies.[7] Academic observers have long pointed out the conflicts of interest created by the competing interests of several powerful constituencies within clearing agencies: the ownership, the management, and the largest market participants.[8] Each of these constituencies can use their

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[3] 15 U.S.C. § 8343(a).

[4] *See generally* Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges With Respect to Security-Based Swaps Under Regulation MC, 75 Fed. Reg. 65,881 (proposed Nov. 26, 2010) (hereinafter Regulation MC Proposal).

[5] Gary Gensler, Chairman, Secs. & Exch. Comm'n, *Statement on Proposal to Enhance Clearing Agency Governance*, SEC (Aug. 8, 2022), https://www.sec.gov/news/statement/gensler-statement-proposal-enhance-clearing-agency-governance-080822.

[6] *See* Proposal, 87 Fed. Reg. at 51,818.

[7] *See id.* at 51,818–19.

[8] *See, e.g.*, Kristin N. Johnson, *Governing Financial Markets: Regulating Conflicts*, 88 WASH. L. REV. 185, 221–24 (2013).

influence over the clearing agency's board to push risk, cost, or barriers to entry onto each other, the more numerous smaller participants, or entities that participate indirectly through correspondent clearing.

The Commission has made intermittent attempts to address these concerns since the passage of Dodd-Frank. In 2010, the Commission proposed Regulation MC to address conflicts of interest in security-based swap clearing agencies, as well as other entities in markets for security-based swaps; this proposal was intended to fulfill the Commission's mandate to mitigate such conflicts under Section 765 of Dodd-Frank.[9] Regulation MC focused primarily on conflicts created by dominant clearing participants and offered clearing agencies a choice between two regulatory options to mitigate those conflicts.[10]

The first option, the Voting Interest Focus Alternative, barred any participant from controlling more than 20% of the clearing agency's voting or ownership interests.[11] The same option barred more than 40% of the clearing agency's voting or ownership interests from being held by participants in the aggregate,[12] and it further required independent directors to make up at least 35% of the clearing agency's board, among other mandates.[13]

The second option, the Governance Focus Alternative, required a majority of board directors to be independent, not just 35%.[14] And while it allowed any one participant no more than 5% of the voting or ownership interests in a clearing agency, it imposed no limits on the aggregate interests of participants.[15] Ultimately, though, the Commission did not finalize the proposed Regulation MC, so neither option became law.

Two years later, the Commission finalized new standards for minimum risk management practices in all clearing agencies.[16] While this rule included a variety of requirements, it operationalized them primarily as broad mandates to have written policies and procedures to enact sound risk management principles.[17] The Commission issued enhanced standards for systemically important clearing agencies in 2016, again through a broad, principles-based approach.[18] That rule did not directly address conflicts of interest.[19]

Since its last update to the regulatory framework for registered clearing agencies in 2016, the Commission has "observed and learned from recurring tensions among incentive structures in

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9 Regulation MC Proposal, 75 Fed. Reg. at 65,882–83.
10 *See id.* at 65,893–94.
11 *See id.* at 65,894.
12 *See id.* at 65,895.
13 *See id.* at 65,896.
14 *See id.* at 65,899–900.
15 *See id.* at 65,900.
16 *See* Clearing Agency Standards, 77 Fed. Reg. 66,219, 66,224 (Nov. 2, 2012).
17 *See id.* at 66,228–29.
18 *See* Standards for Covered Clearing Agencies, 81 Fed. Reg. 70,786, 70,791–92, 70,800–01 (Dec. 12, 2016).
19 *See id.* at 70,804.

the area of clearing agency governance."[20] The potential for misaligned incentives for a variety of entities within or related to a clearing agency—including its owners, management, and participants—threaten to undermine effective risk management in clearing and settlement, with implications for broader financial markets that depend on those services.[21] These concerns have been highlighted by recent market stresses arising from the COVID-19 pandemic frenzy over "meme" stocks like GameStop.[22]

OVERVIEW OF THE PROPOSAL

Where past Commission efforts focused on broad principles, the Proposal seeks to offer "specific and defined parameters and requirements for governance for all registered clearing agencies."[23] These include "new governance requirements on board composition for independent directors, nominating committees, risk management committees, conflicts of interest, board obligations to oversee service providers for critical services, and an obligation to formally consider stakeholder viewpoints."[24]

The centerpiece of the Proposal, and the regulatory approach on which the other parts of the Proposal build, is a mandate for director independence. Under the Proposal, independent directors must comprise a majority of the clearing agency's governing board, and independence is defined broadly as the lack of a "material relationship," whether or not "compensatory," to the registered clearing agency or its affiliates.[25] The Proposal identifies a series of specific scenarios in which such a relationship exists and a director, therefore, cannot be considered independent.[26] But for clearing agencies in which participants hold most voting rights, only 34% of directors must be independent.[27]

Under the Proposal, authorized board committees must generally have the same share of independent directors, but it also prescribes additional requirements for two specific committees. First, each registered clearing agency must have a nominating committee, written processes, and fitness standards for evaluating and selecting directors.[28] The nominating committee must have a majority of independent directors (even if the clearing agency is owned by participants) and must also be chaired by an independent director.[29] The committee must consider each nominee's expertise, availability, and integrity; how that nominee would complement other board members; the diversity, skills, knowledge, experience, and perspectives of the board as a whole; and how the full board would represent the views of clearing agency owners and participants, including

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[20] Proposal, 87 Fed. Reg. at 51,814.
[21] *See id.*
[22] *See id.*
[23] *Id.*
[24] *See id.*
[25] *Id.* at 51,820.
[26] *Id.* at 51,820–21.
[27] *Id.* at 51,820.
[28] *See id.* at 51,828.
[29] *Id*.

participants of varying sizes, business lines, and business models.[30] The nominating committee must further consider the views of stakeholders beyond owners and participants.[31] Finally, it must also evaluate a nominee's known material relationships with the clearing agency, its affiliates, owners, participants, or other stakeholders.[32]

The Proposal would also mandate a risk management committee, which must "be able to provide a risk-based, independent, and informed opinion on all matters presented to it for consideration in a manner that supports the safety and efficiency of the registered clearing agency."[33] The clearing agency must regularly reconstitute this committee, and the committee must always include representation for both owners and participants.[34]

In addition to these structural reforms, the Proposal would mandate some new processes. First, each clearing agency must have written procedures to solicit and consider, on a regular basis, the views of participants and other stakeholders as to material developments in the agency's governance and operations.[35] The agency must also implement policies to identify, document, and mitigate existing or potential conflicts of interest for directors or senior management.[36] And it must have policies to require each director to promptly document and disclose any relationship or interest that could reasonably affect her independent judgment.[37]

Finally, the Proposal requires the clearing agency to create written policies to manage relationships with and management oversight of critical service providers.[38]

SUMMARY OF COMMENTS

The Proposal tackles important incentive problems within clearing agencies—problems that ultimately implicate the stability of the financial system. Furthermore, the Proposal lays a sound analytical basis by distinguishing between the stakeholders or other parties responsible for director conflicts of interest. The consequences of undue influence by owners, senior management, and major participants are not identical, and each set of interests must be dealt with in its own way.

The Proposal provides a multi-faceted approach to director independence and diverse stakeholder input, and it is certainly a strong method of mitigating conflicts of interest rooted in the interests of senior management. However, it is at best an incomplete remedy to the conflicts of interest arising from the clearing agency owners; we therefore urge the Commission to add skin-

[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 51,830–31.
[34] *Id.* at 51,831.
[35] *Id.* at 51,838.
[36] *Id.* at 51,833.
[37] *Id.*
[38] *See id.* at 51,835–37.

in-the-game requirements to redress those problems fully. Other, smaller refinements to the Proposal can further improve independence from clearing agency ownership.

The more fundamental problem is the influence of participants who dominate certain concentrated markets. This was the key focus of proposed Regulation MC, but it is only addressed indirectly by parts of the Proposal and, even then, weakly. The better course, as we explain below, is to modify the Proposal's core concept of director independence to include independence from participants, not merely owners or management. On top of that change, the Commission should also restore previously proposed limits on participant ownership and financial incentives to lock in market dominance; these are necessary, at least for situations where a few major participants control an underlying market. Ultimately, unhealthy participant influence boils down to a problem of market structure or organization, not merely problems of internal corporate structure, and the final rule must therefore apply solutions rooted in that structure.

COMMENTS

I. Clearing agency governance has direct implications for the health and stability of the financial system.

A. Clearing agency governance implicates systemic risk.

As the Proposal recognizes, the sound operation of clearing agencies is important to the wider financial system,[39] a fact underscored by the designation of the largest agencies as systemically important financial market utilities.[40] A clearing agency serving as a central counterparty can reduce risk for clearing participants by standing in the shoes of each counterparty and guaranteeing the obligations of each to the other.[41] This aspect of central clearing, contractual novation, creates an immediate buffer against the consequences of one party's default by placing the equity of the clearing agency behind the trade.[42]

Central clearing can also reduce risk through two other mechanisms. First, the clearinghouse can impose risk-management measures on its members.[43] These measures might include restrictions on which prospective participants can access clearing services, margin

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[39] *See id.* at 51,838–39.

[40] *See* Bd. of Governors of the Fed. Rsrv. Sys., *Designated Financial Market Utilities*, FEDERAL RESERVE (Jan. 29, 2015), https://www.federalreserve.gov/paymentsystems/designated_fmu_about.htm.

[41] *See, e.g.*, Charles K. Whitehead, *Regulating for the Next Financial Crisis*, 24 PAC. MCGEORGE GLOB. BUS. & DEV. L. J. 3, 26 (2011); *see also* 17 C.F.R. § 240.17Ad-22(a)(2) ("Central counterparty means a clearing agency that interposes itself between the counterparties to securities transactions, acting functionally as the buyer to every seller and the seller to every buyer.").

[42] *See, e.g.*, Adam J. Levitin, *Response: The Tenuous Case for Derivatives Clearinghouses*, 101 GEO. L. J. 445, 453 (2013).

[43] *See id.* at 454.

requirements, setoffs, position limits, or reporting requirements.[44] These measures can help address the various risks of participant behavior before those risks materialize.

Second, when these mechanisms are inadequate, the clearing agency can deploy measures to spread and absorb any losses. As an initial measure, the agency can attempt to auction the positions of the defaulting participant to those not defaulting.[45] If a shortfall persists, the clearing agency can proceed through the successive steps of the "default waterfall."[46] The waterfall begins with seizure of the defaulter's margin, and then proceeds to tap the defaulter's contributions to a guaranty fund, a contribution typically tied to the volume or risk appetite of the participant's clearing activities.[47] At this point, the next relief usually comes from the clearing agency's own funds, known as "skin in the game."[48] Academic literature indicates, however, that skin-in-the-game funding is relatively minor compared to the member-endowed guaranty fund.[49] And once that funding is exhausted, the waterfall next consumes the guaranty fund contributions of non-defaulting participants.[50] The clearing agency then has the right to levy additional "assessments" on non-defaulting members once the guaranty fund has been depleted.[51] After that point, only the clearing agency's own equity is left to absorb any remaining loss from the default.[52] The following diagram illustrates the default waterfall sequence:

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44 *See id.* at 454–58.

45 *See, e.g.*, Paolo Saguato, *The Ownership of Clearinghouses: When "Skin in the Game" Is Not Enough, the Remutualization of Clearinghouses*, 34 YALE J. ON REG. 601, 620 (2017).

46 *See, e.g.*, *id.* at 620–23.

47 *See, e.g.*, *id.* at 620–21.

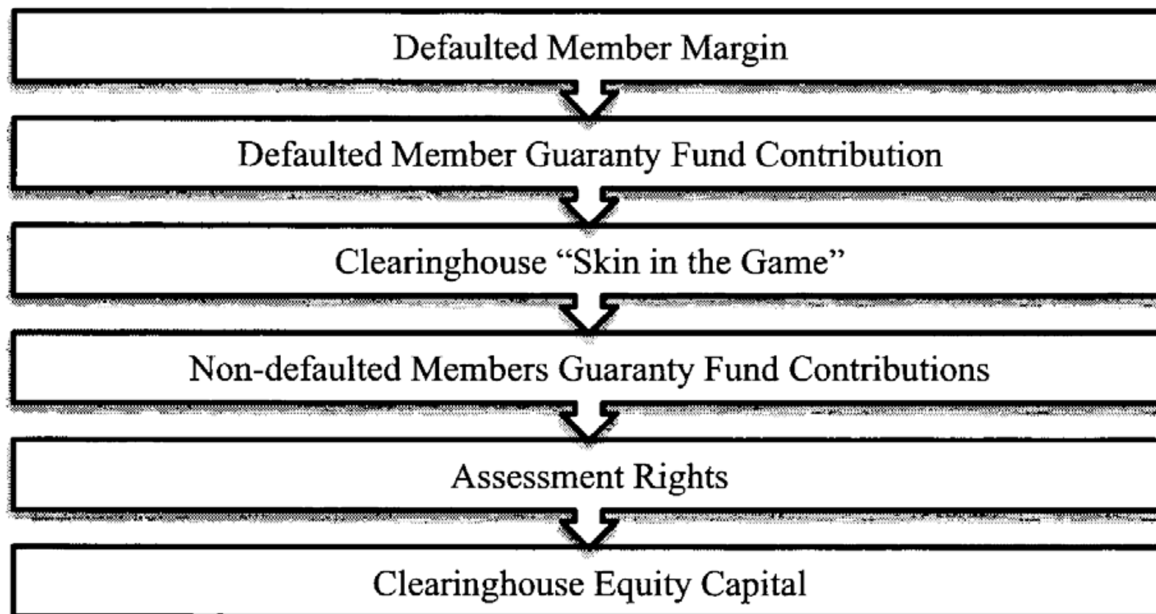
48 *See, e.g.*, *id.* at 621–22.

49 *See id.* at 622.

50 *Id.*

51 *Id.* at 623.

52 *Id.*



[53]

The waterfall is an intricate, layered defense that can reduce systemic risk when properly calibrated and applied.[54] But, as the Commission notes in the Proposal, a poorly designed or poorly governed clearing agency can increase the vulnerability of the financial system by concentrating risk and tying it to the fate of the agency.[55] Anecdotal experience with prior defaults indicates that the downstream impacts on the clearinghouse and its members can vary widely and depend significantly on the agency's policies and vigilance.[56] Especially for a systemically important clearing agency, threats to its solvency are likely to bill taxpayers via a federal bailout. Clearing agency governance is thus a matter bearing on the broader public interest.

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[53] *Id.* at 620 fig. 2.

[54] *See, e.g.*, Levitin, *Response: The Tenuous Case for Derivatives Clearinghouses*, *supra* note 42, at 453.

[55] *See* Proposal, 87 Fed. Reg. at 51,841.

[56] *See* Sarah Bell & Henry Holden, *Two defaults at CCPs, 10 years apart*, BIS (Dec. 16, 2018) (describing losses passed on to members after the default of a commodity-trading participant in Nasdaq Clearing AB while other international clearinghouses managed to absorb trillions of dollars in Lehman swap defaults using only margin), https://www.bis.org/publ/qtrpdf/r_qt1812x.htm; John W. McPartland & Rebecca Lewis, *The Goldilocks Problem: How to Get Incentives and Default Waterfalls "Just Right"*, 41 ECON. PERSPECTIVES 1, 3–4 (2017) (describing "political" shocks to participant dealers whose guaranty fund contributions were used to alleviate a $190 million default in Korea), https://www.chicagofed.org/-/media/publications/economic-perspectives/2017/ep2017-1-pdf.pdf?sc_lang=en.

B. Clearing agencies face potential misalignments of incentives that threaten to undermine effective governance.

The Proposal appropriately identifies at least three potential misalignments of incentives within a clearing agency.[57]

First, the board is tasked with the oversight of corporate officers managing daily affairs, and a failure to carry out that task can produce misaligned incentives facing management. Corporate officers might engage in activities to line their own pockets at the expense of the clearing agency, perhaps even up to the point of fraud or other activity.[58] More prosaically, management might simply be tempted to engage in imprudently risky behavior—like the introduction of new, riskier products to the clearinghouse—or empire-building, and the board is the primary line of defense against such behavior.[59] If those same officers hold seats on the board, or if those officers have financial leverage over directors, the board is unlikely to prove an effective check.

Second, the shareholders of the clearing agency gain the profits from the agency's clearing activities, yet the participants, through the layers of the default waterfall like margin, bear much of the risk associated with those profits.[60] Owners thus have an incentive to weaken risk management methods in the pursuit of higher revenues, or they might compensate for their own greater risk appetite by seeking to impose higher guaranty fund contributions, assessments, or other effective taxes on the participants who will bear most of the loss.[61] And unlike most corporate shareholders, the owners of a clearing agency might be sufficiently few in number to overcome collective action barriers and pursue these incentives.[62] To the extent that directors' interests are aligned with those of clearing agency owners, they might enable the imposition of these costs.

Third, and perhaps most importantly, clearing agency participants face different incentives with respect to risk management or default waterfall obligations.[63] As the Commission has rightly noted, larger participants stand to gain from anti-competitive conduct against smaller participants; that conduct might take the form of either barriers to access or discriminatory requirements for

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57 *See* Proposal, 87 Fed. Reg. at 51,815–16.

58 *See, e.g.*, Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 137–38 (2010).

59 *See* Proposal, 87 Fed. Reg. at 51,822.

60 *See, e.g.*, Paolo Saguato, *Financial Regulation, Corporate Governance, and the Hidden Costs of Clearinghouses*, 82 OHIO ST. L. J. 1071, 1102–03 (2021).

61 *See id.*

62 *See* Proposal, 87 Fed. Reg. at 51,823 ("In this sense, registered clearing agencies are not organized in a way that reflects the corporate ownership of the typical publicly traded company, where the shareholder base is a dispersed population that may have coordination problems, and therefore the scope of inquiry cannot end simply at whether a director is independent from management alone. Rather, the owners of a registered clearing agency reflect a few key groups, who may be owners or participants of the clearing agency, and board composition will thus necessarily reflect these different stakeholder groups and their views on risk management.").

63 *See, e.g.*, *id.* at 51,843.

contributions to the guaranty fund or other risk management mechanisms.[64] Similar barriers might be erected against indirect participants to the clearinghouse.[65] Participant influence over directors might enable these anti-competitive results.

Better Markets has long noted special concerns about participant conduct in the market for derivatives clearing.[66] As we noted over ten years ago, "trading volume is highly concentrated in a small number of derivatives dealers in each of the derivatives markets," with five banks amassing 97% of market share at that time.[67] This concentration gives the dealer oligopoly undue influence over the clearing agencies used for these products, and specifically over the agencies' treatment of other, smaller participants. The Proposal recognizes that only token progress has occurred on this front; some derivatives markets are still highly concentrated in a few dominant participants.[68] The power of these dominant firms is only magnified when they also take ownership stakes in a clearing agency.

Indeed, the market power of certain derivatives dealers is likely the greatest risk to effective clearing agency governance and risk management, as Better Markets has explained in detail through prior comments.[69] The warped incentives created by these dealers' dominance should be the highest priority as the Commission reviews and revises the Proposal.

II. **The Proposal's independent majority requirement is a crucial measure to reduce harmful conflicts, but it must be strengthened.**

The independent board requirement is a central and positive reform in the Proposal. However, even accompanied by the other provisions in the Proposal, it will fail to address the full range of conflicts of interest within clearing agencies. It must be strengthened in a number of ways, as detailed below, through both refinement of the proposed language and through the addition of supplemental measures along the lines of Regulation MC.

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64 *See id.*

65 *See id.* at 51,815–16.

66 *See* Better Markets, Comments: Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges With Respect to Securities-Based Swaps Under Regulation MC (File Number S7-27-10) (Nov. 26, 2010) (hereinafter Regulation MC Comments), https://www.bettermarkets.org/sites/default/files/SEC-%20Comment%20Letter-%20DCO,%20SEF%20Conflicts-%2011-26-10.pdf.

67 *See id.* at 2.

68 *See* Proposal, 87 Fed. Reg. at 51,816 ("[O]ver 90 percent of the total notional amount of the U.S. market in credit derivatives is concentrated in four U.S. commercial banks.").

69 *See, e.g.*, Better Markets, Regulation MC Comments, *supra* note 66, at 2–4, 6–10, incorporated by reference as if fully set forth herein.

A. The independent majority requirement is a sound response to management conflicts of interest.

We fully endorse the foundation of the Proposal, namely, that "[a] majority of the members of the board of directors of a registered clearing agency must be independent directors."[70] The board plays a critical role in overseeing the development of effective risk management policy. Not only does the board appoint and remove the officers who implement daily risk management, but it also shapes the mandate and scope of the nomination committee, risk committee, or other delegated bodies.[71] Thus, this aspect of the Proposal is perhaps its central feature and one on which other aspects depend.

We also note that the independent majority requirement is fully consistent with the Commission's statutory mandates. The Exchange Act requires each registered clearing agency to have the organizational structure and capacity "to facilitate the prompt and accurate clearance and settlement of . . . transactions for which it is responsible" and "to carry out the purposes of" Section 17A of the Act.[72] Those purposes include the protection of investors,[73] a goal incompatible with circumstances that aggravate systemic risk. Furthermore, the Commission has special authority to regulate conflicts of interest when security-based swap dealers have ownership stakes in clearing agencies.[74] An independent board serves all of these goals.

The Proposal defines independence as the absence of a "material relationship with the registered clearing agency or any affiliate thereof."[75] As the Commission correctly recognized, this conception is "common across the financial industry and across public companies more generally,"[76] as illustrated by its adoption in similar requirements for listing on the New York Stock Exchange.[77] An independent majority is clearly considered a best practice, and that should hold true for clearing agencies as well as other market participants.

The proposed definitions are also well-calibrated to address the classic conflicts of interest generated by the influence of senior management. The plain meaning of a relationship "with the registered clearing agency" would include compensation as a senior officer or other employee.[78] The Proposal reinforces this point by further explicitly precluding the independence of any director with a compensated "employment relationship . . . other than as a director."[79] These proposals

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70 Proposal, 87 Fed. Reg. at 51,856 (to be codified at 17 C.F.R. § 240.17Ad-25(b)).

71 *See, e.g.*, Paolo Saguato, *The Ownership of Clearinghouses*, *supra* note 45, at 634–35.

72 15 U.S.C. § 78q-1(b)(3)(A).

73 *See id.* § 78q-1(a)(1)(A).

74 *See id.* § 8343(b).

75 Proposal, 87 Fed. Reg. at 51,856 (to be codified at 17 C.F.R. § 240.17Ad-25(a)).

76 *Id.* at 51,822.

77 N.Y. Stock Exch., LISTED COMPANY MANUAL §§ 303A.01–.02, https://nyseguide.srorules.com/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-69.

78 Proposal, 87 Fed. Reg. at 51,856 (to be codified at 17 C.F.R. § 240.17Ad-25(a)).

79 *Id.* at 51,857 (codified at 17 C.F.R. § 240.17Ad-25(f)).

ensure not only ensure that the board has a voice independent of management but that management should not have undue sway over board decisions.

Other commenters might claim that an independent majority will come at the cost of reduced technical expertise on the board. But this is a classic and unpersuasive refrain. The minority of directors who are not—or may not be—independent are one source of expertise. In addition, the board can call on outside professional advisors as needed. In any event, the supposed benefits of additional expertise on the board are outweighed by the governance and risk-management costs of a majority of conflicted directors. If anything, a corporate officer who also seeks a board seat likely poses a higher risk of empire-building for personal prestige; he is actively arrogating more power to himself.[80] Finally, as a failsafe, the board must still ensure that it "ha[s] appropriate experience and skills to discharge [its] duties and responsibilities" whether or not a majority of directors is free from conflicts of interest.[81]

B. While helpful, the proposed independent majority requirement must be strengthened to more fully address conflicts presented by clearing agency owners, including through skin-in-the-game mandates.

In several ways, the Proposal makes significant progress in addressing prospective conflicts of interest arising from the incentives of clearing agency ownership. First, the Proposal wisely defines independence to preclude material relationships not only with the clearing agency but also with "any affiliate" of the agency, where "affiliate" is defined to include any entity that "directly or indirectly controls" the agency.[82] We interpret this definition to capture at least entities that have a formally controlling voting stake in the agency. We also interpret a material relationship with the clearing agency itself to include director compensation tied to clearing agency equity, revenue, volume, or scope of products, any of which might induce the director to permit too much risk.[83] Furthermore, independence is also incompatible with side payments or sweetheart jobs from controlling shareholders.[84]

These aspects of the Proposal should be beneficial. It requires no special expertise to understand that a director beholden to ownership will tend to vote in the interests of ownership—even if sound, objective judgment would require her to do otherwise. The result in that scenario

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80 *See, e.g.*, Yaron Nili, *Out of Sight, Out of Mind: The Case for Improving Director Independence Disclosure*, 43 J. CORP. L. 35, 42, 42 n.29 (2016) ("Empire building is the phenomenon of managers wishing to expand the corporate group under their control by mergers and acquisitions (M&A) or other methods, even when it is not to the benefit of shareholders."). In the context of clearing agencies, empire-building might take the form of an overly risky emphasis on growing transaction volumes or introduction of new products to the clearinghouse.

81 17 C.F.R. § 240.17Ad-22(e)(2)(iv).

82 Proposal, 87 Fed. Reg. at 51,856 (to be codified at 17 C.F.R. § 240.17Ad-25(a)).

83 *See* Saguato, *Financial Regulation, Corporate Governance, and the Hidden Costs of Clearinghouses*, *supra* note 60, at 1132.

84 *See* Proposal, 87 Fed. Reg. at 51,857 (to be codified at 17 C.F.R. § 240.17Ad-25(f)(2)–(3), (4)) (barring independent investors from employment relationships, payments, or partner interests with holders of controlling voting interests).

is that the merits of the risk policies or management actions under review will recede in the face of personal benefits. Moreover, the mere possibility of obtaining further personal benefits might induce directors to divert attention away from diligent governance to the pursuit of individual gain. Risk management will suffer the owner-driven conflicts of interest described above and in the Proposal,[85] with all the attendant implications for systemic risk and impacts on the real economy.

Nonetheless, an independent majority requirement is unlikely to resolve all owner-related conflicts of interest. First, as the Commission recognized in the Proposal, "ultimate approval of a director would remain in the hands of [clearing agency] owners."[86] Owners will therefore retain significant influence over directors, independent or otherwise, and will perhaps sometimes remove directors precisely because they exercise independent judgment. That might be especially true where clearing agency participants—generally sophisticated, well-resourced corporate entities—make up much or all of a clearing agency's ownership.

At the same time, independent directors must also observe fiduciary duties. These duties are admittedly broad and can grant directors considerable discretion in how best to serve the corporation over the long term.[87] But directors are still constrained to some degree to act in the service of shareholder value,[88] and they will undoubtedly have that obligation in mind when reviewing risk priorities.

A fuller solution to owner conflicts, then, is to align their incentives more closely with those of other stakeholders. In particular, the Commission should require clearing agency owners to have "skin in the game," including a share of liability in the default waterfall.[89] The Commission has identified this approach as a reasonable alternative in the Proposal.[90] There is simply no substitute for direct incentives to align owner influence with effective risk management. In fact, the Commission appears to recognize that fact. Not only does the Proposal describe skin-in-the-game mandates as "reasonable," but it gives no reason to reject such requirements other than the fact that its governance proposals might also be of help.[91] Academic literature suggests that voluntary owner capital commitments are likely minimal,[92] and increasing the clearing agency's

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[85] *See, e.g.*, *id.* at 51,842–43.

[86] *Id.* at 51,823.

[87] *See, e.g.*, Jackson C. Esker, *Corporate Social Responsibility: Can a Corporation Be Responsible If its Only Responsibility is to the Shareholders?*, 106 IOWA L. REV. 1961, 1966–70 (2021) (describing the business judgment rule and its application to long-term shareholder value).

[88] *See id.* at 1970 (citing, *inter alia*, *Frederick Hsu Living Tr. v. ODN Holding Corp.*, 2017 WL 1437308, at *17 (Del. Ch. Apr. 14, 2017)).

[89] The skin-in-the-game share of the default waterfall would occur prior to losses of non-defaulting members and would be separate from the clearing agency's equity capital. *See* Saguato, *The Ownership of Clearinghouses*, *supra* note 45, at 620 fig. 2.

[90] Proposal, 87 Fed. Reg. at 51,851.

[91] *Id.*

[92] *See* Saguato, *Financial Regulation, Corporate Governance, and the Hidden Costs of Clearinghouses*, *supra* note 60, at 1132–33; *The Ownership of Clearinghouses*, *supra* note 45, at 622 ("However, on average, the clearinghouse's 'skin in the game' in the 'default waterfall' is

skin in the game is not mutually exclusive with governance-based remedies like those in the Proposal.[93]

Skin-in-the-game requirements do require calibration and should not be used as a complete shield from participant contributions to the default waterfall.[94] But the calibration problems should be surmountable, and the Commission can take a principles-based approach as it has for other aspects of clearing agency operations.[95]

C. The Proposal must also address dominant participant problems through more prescriptive measures like those of Regulation MC and through amendments to the independent majority requirement.

"[T]he proposed rule does not prohibit directors who, among other things, receive compensation from participants from meeting the definition of independent director."[96] The Commission made no attempt to distinguish among types of participants or among markets served by clearing agencies. This represents a notable departure from previous Commission proposals that included participant ties in the independence analysis.[97]

More fundamentally, as with owner-driven conflicts, the problem of participant power likely cannot be solved by independent directors alone. "Clearinghouses, exchanges, and other market-infrastructure providers all depend upon fee income based on trading volume. . . . [A]ccess to volume is extremely valuable to market-infrastructure providers and is a considerable source of market power for dealers. Large dealers are therefore able to extract terms from market-infrastructure providers that smaller dealers cannot hope to receive."[98] In other words, the largest participants in the most concentrated markets do not necessarily need personal influence over a director to the extent they have economic leverage over the clearing agency as a whole.

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modest: it varies between 5 and 12 percent of the total value of the guaranty fund provided by the members. But, when compared to the firm's equity, the shareholders' 'skin in the game' is in the range of 0.3 to 1 percent. When compared to the market capitalization of the infrastructural group they belong to, this number drops to a minimum of 0.1 to 0.7 percent."); *see also* Paolo Saguato, *The Unfinished Business of Regulating Clearinghouses*, 2020 COLUM. BUS. L. REV. 449, 488–91, 488 tbls. 2–5 (2020).

93 *See* Saguato, *Financial Regulation, Corporate Governance, and the Hidden Costs of Clearinghouses*, *supra* note 60, at 1128–33.

94 *See* McPartland & Lewis, *The Goldilocks Problem*, *supra* note 56, at 9.

95 *See generally* 17 C.F.R. § 240.17Ad-22.

96 Proposal, 87 Fed. Reg. at 51,820.

97 *See* Regulation MC Proposal, 75 Fed. Reg. at 65,928 (to be codified at 17 C.F.R. § 242.700(1)(j)(iii)).

98 Sean J. Griffith, *Governing Systemic Risk: Towards A Governance Structure for Derivatives Clearinghouses*, 61 EMORY L. J. 1153, 1192 (2012).

1. The Commission should include limits on ownership and financial incentives.

The Proposal itself recognizes more prescriptive interventions, including ownership limits along the lines of the former Regulation MC proposal.[99] The Commission should restore those limits to the final rule, at least with respect to markets highly concentrated in the hands of a few dominant participants. Furthermore, the Commission should add a new prescriptive measure: restrictions on commercial arrangements for volume or influence.

In prior rulemakings, the Commission proposed at least two limitations on the ownership or voting rights in clearing agencies held by participants.[100] The Commission did not include such limitations in the Proposal under the view that current regulations sufficiently protect small participants and because it believed that "bright-line ownership limits are easy to manipulate, for example by obfuscating beneficial ownership or by getting extremely close to the limit."[101]

Neither reason should discourage the Commission from returning to limitations on ownership rights in the final rule. Neither the Proposal nor current regulations are sufficient to check the power of dominant participants in highly concentrated markets; furthermore, the Commission does not attempt to explain why any additional protection would run afoul of its statutory mandates.

And as to participant evasion of ownership limits, if the Commission is concerned about participants "getting extremely close to the limit,"[102] it need only set the limit farther back from any threshold of formal or *de facto* control. We explained in our prior comments to the Commission that, at least in some of the most vulnerable markets, a limit of 25% on the aggregate voting rights of all participants would likely provide sufficient cushion, and we incorporate those comments here.[103] Similarly, if the Commission is concerned about "obfuscati[on of] beneficial ownership," it should simply add additional measures to penalize evasive tactics or define indirect ownership or control.

Additionally, the Commission should act to curtail volumetric fee discounts, rebates, or revenue sharing. These practices are the mechanisms through which dominant participants lock in influence over clearinghouses, as Better Markets has extensively explained in prior comments.[104] We urge the Commission to take these actions to curb participant dominance in some clearing agencies.

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[99] *See* Proposal, 87 Fed. Reg. at 51,851.
[100] *See id.* (discussing the Voting Interest and Governance Interest Alternatives proposed under Regulation MC).
[101] Proposal, 87 Fed. Reg. at 51,851.
[102] *Id.*
[103] *See* Better Markets, Regulation MC Comments, *supra* note 66, at 16.
[104] *See id.* at 18–20.

2. The Commission should require director independence from dominant participants.

The Commission can and should amend the proposal to require a majority of directors independent from participants—or at least participants with market dominance. The proposed regulations on nominating committees, for instance, ask not merely whether a nominee has a "known material relationship with the registered clearing agency or an affiliate thereof" but also whether it has any such relationship with "a participant."[105] Similarly, the Commission's prior Regulation MC proposal defined an independent director as one with no material relationship to "a participant in the security-based swap clearing agency."[106] The Commission should therefore amend the definition of "independence" in the Proposal to encompass ties to participants with meaningful market power in a particular product. That amendment could come in the form of a special definition of a large or dominant participant, but the Commission could simply instead identify the most concentrated markets (primarily derivatives) and require independence from participants in those markets. These better requirements should be supported, as the Proposal suggests, through additional mandates for public, easily accessible disclosures of director relationships.[107]

We disagree with the Proposal's claims that past regulatory efforts have solved the problem of market dominance.[108] For instance, while the current Rule 17Ad-22 includes some high-level principles to promote access to clearing services,[109] some of these principles are sufficiently elastic that they do not serve as effective anti-competitive barriers[110] Moreover, anecdotal evidence from abroad suggests that clearing agencies can give prominent participants less scrutiny in meeting risk management requirements.[111]

Indeed, the Commission's own staff has recently documented ongoing concerns that "small and medium-sized" entities have struggled to maintain access.[112] The staff's report further indicates that smaller participants in some derivatives markets have accepted reduced access due to the costs of participating in auctions, the default waterfall, or other aspects of the clearing

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105 Proposal, 87 Fed. Reg. at 51,856 (to be codified at 17 C.F.R. § 240.17Ad-25(c)(4)(iv)).

106 Regulation MC Proposal, 75 Fed. Reg. at 65,928 (to be codified at 17 C.F.R. § 242.700(1)(j)(iii)).

107 *See* Proposal, 87 Fed. Reg. at 51,851 (discussing proposed disclosures in machine-readable language).

108 *See id.* at 51,844 (claiming that Rule 17Ad-22 mitigates divergent incentives among participants).

109 *See id.* (citing 17 C.F.R. § 240.17Ad-22(b)(5)–(b)(7) and (e)(18)).

110 *See* 17 C.F.R. § 240.17Ad-22(b)(7) (permitting "reasonable membership standards").

111 *See The Unfinished Business of Regulating Clearinghouses*, *supra* note 92, at 451 ("Einar Aas, one of Norway's richest men, blew a €114 million hole in the €166 million guaranty capital fund of Nasdaq Clearing, a derivatives clearinghouse—a financial firm that insures its members and users against the risk of default. The failure of the clearinghouse to effectively monitor Mr. Aas's trading positions resulted in more than two-thirds of the firm's available financial resources being used to cover the losses and stabilize the Nordic energy markets.").

112 *See* SEC Div. of Trading & Mkts., STAFF REPORT ON REGULATION OF CLEARING AGENCIES 21 (2020).

agency.[113] And it remains particularly unclear whether a clearing agency dominated by a few participants would apply some aspects of the waterfall, particularly assessment fees, in an unfair manner; the odds of that outcome are difficult to know until the event occurs. The incentives for large participants to undermine competition persist and will remain in place. So long as those incentives persist, the Commission's governance reforms should keep participant market power in mind—and in check.

The Commission has noted that participant representatives might bring some level of "technical expertise" to the board.[114] But this can be true for small participants as well as large, and the definition of independence can simply carve out a role for smaller entities. Even without such a size-based exception, the board is still likely able to rely on the technical skills of outside advisors hired to review information provided by management or other entities.

3. The Commission should reconsider the carve-out for participant-controlled clearing agencies.

The Commission proposes to relax the independent majority requirement for clearing agencies where participants hold most of the voting rights.[115] In those cases, the Commission instead proposes to require that independent directors constitute just over one-third of the board.[116] This exception to the baseline rule might be unobjectionable if owner-driven conflicts of interest were at issue; those conflicts might disappear if the set of owners and participants entirely overlapped.

Again, however, the Commission must keep the risks of dominant participants at the forefront. The voting control might be held not by all participants in a diffuse manner but by a small oligopoly of the most powerful participants. In such cases, the independent majority requirement would ameliorate participant conflicts by reducing director relationships with that oligopoly (since they are also owners). But, with the proposed exemption, dominant participants would not only have market power but also greater influence over the board. This would be a perverse result.

We have recommended above that the Commission modify the conception of independence to bar director relationships with large participants (or perhaps with all participants in highly concentrated markets). If the Commission makes that change, it would have no reason to carry through the reduced requirements for participant-owned clearing agencies, and the 34 percent independence threshold should be abandoned.

113 *See id.*
114 Proposal, 87 Fed. Reg. at 51,819.
115 *See id.* at 51,826.
116 *See id.*

D. The Commission should refine the independence requirement in other ways.

1. A supermajority of independent directors may be necessary.

The Proposal is correctly premised on the fact that independence will mean little if it applies only to a minority of the full board; a majority of compromised directors will simply override the protests of those exercising independent judgment.[117] In fact, however, a simple majority of independent directors may be insufficient. Indeed, an independent majority should be the *minimum* requirement. Independence for more than a bare majority might be necessary if the clearing agency's articles of incorporation or bylaws require supermajorities for a quorum or vote.[118] Supermajority provisions could easily allow an interested group of directors to block board efforts to reform current risk management.

The final rule should therefore identify situations in which more than a majority of directors must be independent unless the Commission establishes that no active, registered clearing agency employs or could employ supermajority mechanisms to block reforms by independent directors. The final rule could do so by defining the term "majority" to include any supermajority required for a quorum or board action as defined by the clearing agency's corporate charter.

2. The Commission should broaden the definition of "material relationship" to include an appearance of conflict.

The proposed definition of a "material relationship" is appropriately broad and flexible; it needs those qualities to respond to the unending variety of financial transactions or other opportunities or inducements that an interested party might extend to a director. It is also helpful that the Commission has targeted relationships that "*could* affect the independent judgment" of the director.[119]

However, the final rule must account for any interests that create the objective *possibility* of a conflict; a director should not be able to disclaim a conflict merely by invoking personal preferences or subjective judgment. There must be a heavy presumption that indications of a conflict of interest will impact directors' judgment.

The Commission should therefore add to the definition any relationships that create a reasonable appearance of clouding the director's judgment. The Proposal explains that "[t]rust

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117 *See, e.g.*, Regulation MC Proposal, 75 Fed. Reg. at 65,901 ("The presence of a majority of independent directors . . . is intended to reduce the ability of non-independent directors to influence the operation of the security-based swap clearing agency in favor of their own self-interests and to promote open and fair access, product eligibility, and sufficient risk management standards.").

118 *See, e.g.*, Del. Code Ann. tit. 8, § 141(b) ("The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number.").

119 Proposal, 87 Fed. Reg. at 51,856 (emphasis added) (to be codified at 17 C.F.R. § 240.17Ad-25(a)).

among market participants in the national system for clearance and settlement, particularly in times of market stress, necessarily depends on trust in the ability of registered clearing agencies to more effectively manage the risk flowing from that market stress."[120] The mere appearance of bias will erode that trust even if hidden or unknown circumstances prevent any truly material conflict of interest. In other domains, professional rules and governance requirements impose similar requirements, and clearing agencies should do the same. The Proposal itself incorporates a similar concept elsewhere under the guise of "potential" conflicts,[121] and the final rule should follow suit here.

Additionally, it is not clear from the Proposal who at the clearing agency will determine when a relationship meets the proposed definition. If the board itself does so, the Proposal risks inviting the fox into the hen house; a board currently filled with compromised directors will generally grant each other a free pass. But putting conflict determinations in the hands of senior management might invite similar problems. Director independence, after all, is intended to prevent management-related conflicts of interest if nothing else. Therefore, we suggest that the clearing agency should be required to retain either (1) a disinterested compliance officer, appropriately shielded from influence by senior management, participants, or other entities, or (2) an independent, qualified outside professional whose sole task for the agency is to evaluate director conflicts and who is accountable for bad-faith decisions.

3. The definition of "affiliate" should be broadened.

We understand the term "affiliate" to be included in the concept of independence at least in part to capture the influence of clearing agency owners. Nevertheless, the definition of "affiliate" is overly restrictive. While it would presumably capture holding companies, including multiple levels of holding companies, the term is still limited to entities that "control" the clearing agency. This limitation is concerning because an agency's voting rights might be distributed across a modest number of powerful shareholders, none of which is able to exert formal "control" on its own but which is able to collude with the others to exercise control. The final rule should address this scenario. It could do so through a concept of effective or *de facto* control, but the simpler, more administrable path would be to supplement the concept of an affiliate with that of an owner or shareholder. The latter entities are the true targets and the drivers of powerful conflicts of interest.

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120 *Id.* at 51,819.

121 *Id.* at 51,834 (discussing potential conflicts and equating them to "close cases, where another director, manager, employee, or observer might perceive a conflict of interest, in order to more effectively manage actual conflicts and help ensure the integrity of decisions made in the governance of the clearing agency").

4. The definition of "family member" should be expanded as well.

The term "family member" should include, for purposes of independence, at least first cousins. Many people have sufficiently close bonds with first cousins that those cousins could serve as proxies for material relationships between directors and outside entities.

III. The Commission should strengthen or supplement the committee and procedural requirements in the Proposal.

Beyond the independent majority mandate, the Proposal adds requirements for nominating and risk committees, as well as procedural measures, to provide an "additional mitigation layer to help ensure that registered clearing agencies are designed, managed, and operated under a robust governance framework."[122] While these aspects of the proposal are generally laudable, they are also generally drafted as broad, principle-based measures. The discretion inherent in this approach will make these additional measures vulnerable to weaknesses in the foundational layer of the Proposal—the independent majority requirement.[123] This is another reason to ensure that any final regulation includes the skin-in-the-game requirements, ownership limits, restrictions on financial incentives, and modifications to the independent director mandate described in Part II above. Beyond that, the committee and procedural provisions in the Proposal should be separately strengthened in a number of respects.

A. Requirements for the nominating committee and consideration of participant or stakeholder views depend heavily on the independence requirement and should be strengthened.

Consider the nominating committee. Like the full board, this committee must have a majority of independent directors and even be chaired by an independent director.[124] This carries the same conception of independence for the full board, namely, one that frees a director only partly from the influence of ownership and that does not even attempt to exclude the influence of participants. Consequently, the nominating committee might itself be beholden to powerful inside interests, particularly those of large participants in security-based swaps or other highly concentrated markets.

That possibility suggests that the application of the high-level standards entrusted to the nominating committee could be compromised. For instance, representatives of large participants might discount the "expertise" of potential nominees from smaller participants, and they might be too willing to find "diversity" among an oligopoly of large dealers.[125] Even an express duty to examine representation across participants of different "strategies, models, and sizes" is to some

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122 *Id.* at 51,814.

123 *See, e.g.*, *id.* at 51,830 (noting that the Proposal "would give the nominating committee discretion to determine how to consider the views of other stakeholders").

124 *Id.* at 51,856 (to be codified at 17 C.F.R. § 240.17Ad-25(c)(1))

125 *Id.* (to be codified at 17 C.F.R. § 240.17Ad-25(c)(4)(i)).

degree manipulable;[126] a committee or board dominated by large participants might be satisfied with a token director for all other members, if they do not exclude them entirely on some pretext. Smaller participants would not necessarily have a measure of real power or control on the board, even when they might be numerous.

Nothing in the Proposal necessarily gives the voices of these entities any real weight. The risk of these compromised outcomes is only heightened by the fact that the nominating committee is generally obliged only to consider, document, or take into account various qualities or information.[127] Although more direct regulation is likely the best solution, as discussed above, a second-best solution is to mandate some degree of board participation for smaller participants or other stakeholders that might suffer the consequences of market power.

The Proposal also calls for written policies "reasonably designed to solicit, consider, and document . . . consideration of the views of participants and other stakeholders . . . regarding material developments" in clearing agency governance and operations.[128] This mandate, unfortunately, does nothing to remedy the potential vulnerabilities in the nomination process or the broader independence requirement. For starters, it does not specify consideration of *small* participants or even a certain range of participant views, and, ultimately, the application of mere "consideration" requirements is subject to influence by boards beholden to dealers sitting at the top of concentrated markets. Only more prescriptive interventions can remedy that underlying problem, as discussed above.

B. The same is true for the risk committee requirement.

We have similar concerns about the risk committee. The Proposal extends the duty to create a risk management committee to all registered clearing agencies, covered or not; gives the risk committee a clear, well-defined mandate; and requires it to provide opinions in terms of objective risk analysis.[129] All well and good. But the Proposal also requires representation on the committee for "owners and participants."[130]

Here, again, the Proposal fails to distinguish between, on the one hand, large participants who exercise market power over the clearing agency and might skew access or risk requirements in their favor, and, on the other hand, other, smaller participants. Furthermore, it might well be the case, as the Commission posits, that a risk committee "will benefit from the diverse perspectives and expertise that representatives from owners and participants can provide."[131] But that diversity needs to be genuine and can only be strengthened by guaranteeing enough representation for smaller entities to check the largest players. That representation must remain

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126 *Id.* (to be codified at 17 C.F.R. § 240.17Ad-25(c)(4)(ii)).
127 *See id.* (to be codified at 17 C.F.R. § 240.17Ad-25(c)(4)).
128 *Id.* at 51,857 (to be codified at 17 C.F.R. § 240.17Ad-25(j)).
129 *See id.* at 51,831.
130 *See id.* at 51,856 (to be codified at 17 C.F.R. § 240.17Ad-25(d)(1)).
131 *See id.* at 51,832.

consistent even if the risk committee continually reconstitutes its membership.[132] The final rule should ensure that risk committee regulations achieve this goal.

C. The Commission can strengthen requirements for identifying, disclosing, and addressing conflicts of interest.

We commend the Proposal for requiring written policies to identify, document, disclose, and mitigate conflicts of interest.[133] This aspect of the Proposal is congruent with Better Market's prior remarks on proposed rules for covered clearing agencies; policies of the sort required by the Proposal are the minimum measures that a clearing agency should implement.[134] But we urge two further refinements.

First, the Proposal is vague on exactly how a clearing agency should "mitigate or eliminate" conflicts.[135] It should instead specify that agency policies should require recusal unless or until a conflict has been fully eliminated.[136] Second, the clearing agency must have policies "*reasonably* designed" to prompt disclosure of relationships that "*reasonably* could affect the independent judgment of . . . the director."[137] This double layer of reasonableness review seems unnecessary and likely to be too generous towards clearing agencies and their boards. The Proposal should instead require clearing agencies to affirmatively oblige directors to disclose any material relationships.

CONCLUSION

We appreciate the Commission's consideration of our comments, and we hope they are helpful as the Commission finalizes the Proposal.

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[132] *See id.*
[133] *See id.* at 51,833.
[134] *See* Better Markets, Comments: Proposed Standards for Covered Clearing Agencies, File No. S7-03-14 at 6 (May 27, 2014), https://www.bettermarkets.org/sites/default/files/SEC-%20Covered%20Clearing%20Agencies-%205-27-14.pdf.
[135] *See* Proposal, 87 Fed. Reg. at 51,857 (to be codified at 17 C.F.R. § 240.17Ad-25(g)(2)).
[136] *See* Better Markets, Comments: Proposed Standards for Covered Clearing Agencies, *supra* note 134, at 6.
[137] Proposal, 87 Fed. Reg. at 51,857 (to be codified at 17 C.F.R. § 240.17Ad-25(h)) (emphasis added).

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