



BETTER MARKETS

April 1, 2020

The Honorable Heath P. Tarbert
Chairman
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Tolling of Public Comment Periods for Pending CFTC Regulatory Actions.

Chairman Tarbert,

Better Markets, Inc. (“Better Markets”)¹ respectfully requests that the Commodity Futures Trading Commission (“CFTC”) toll all public comment periods for pending rulemakings and other CFTC releases and actions unrelated to the ongoing COVID-19 pandemic and economic crisis. The unprecedented circumstances relating to the COVID-19 pandemic have compelled Better Markets, and dozens of other public interest organizations,² to focus limited resources on immediate priorities necessitated by the expanding reach and increasingly adverse public health, economic, and other consequences of the COVID-19 pandemic.

Informed, thoughtful, and comprehensive public comments are critical to the CFTC’s administrative decision-making, serve as a critical safeguard against unintended consequences, and provide regulatory certainty by best ensuring the CFTC’s regulations account for material data, arguments, and policy concerns. The participation of public interest organizations, in particular, in the rulemaking process not only ensures a meaningful exchange of information but also a meaningful balance of information that is necessary to informed administrative decision-making and public discourse on key issues affecting U.S. derivatives markets.

Unfortunately, the extraordinary disruptions arising from the COVID-19 pandemic in many cases have impacted, and undoubtedly will continue to impact, our ability to meaningfully participate in the rulemaking process and give sufficient consideration to the significant number of lengthy, complex, and important current, and planned, proposals by the CFTC (and other U.S. financial regulators). These constraints are not solely internal to our organization. For example, we have been severely limited in our

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 See Better Markets et al., [Request for 90-Day Tolling \(Extension\) of Public Comment Periods During the COVID-19 Pandemic](https://ourfinancialsecurity.org/wp-content/uploads/2020/03/Request-for-90-Day-Tolling-of-Public-Comment-Periods-During-the-COVID-19-Pandemic.pdf) (Mar. 20, 2020) (expressing similar views on behalf of dozens of public interest organizations), available at <https://ourfinancialsecurity.org/wp-content/uploads/2020/03/Request-for-90-Day-Tolling-of-Public-Comment-Periods-During-the-COVID-19-Pandemic.pdf>.

ability to obtain advice, data, industry perspectives, and other information that would otherwise inform policy views and comments. From our conversations with personnel at other public interest organizations, dealer banks, and market infrastructure firms, it is clear that Better Markets is not alone in these challenges. Indeed, we appreciated your recent comments that the CFTC itself has had to “pivot” resources to “take this [COVID-19] challenge head on.”³

These current circumstances and the thus-far regrettable decision not to toll public comment periods for a reasonable period of time—at least during the most critical and disruptive phase of the COVID-19 pandemic—therefore denies the public a meaningful opportunity to provide useful context, commentary, data, and other information that serves the fundamental purposes of the notice-and-comment requirements under the Administrative Procedures Act (“APA”).⁴ It also interferes with the development of a robust administrative record, diminishing the quality of public participation, CFTC decision-making, and judicial review.

There is precedent for our request. In response to recent past disruptions to operations, the CFTC has issued orders tolling public comment periods and other procedural time limits for the duration of relevant incidents.⁵ Those disruptions were considerably less disruptive and dramatically shorter in duration than the current COVID-19 pandemic. However, if the CFTC is not be amenable to the open-ended tolling provided in such precedent given the unknown extent of effects and duration of the COVID-19 pandemic, we suggest at least an initial tolling of public comment periods for a 90-day period.

We note that in the last two weeks (or so) alone, you have pro-actively authorized and publicly endorsed multiple no-action letters issued by CFTC staff as part of the CFTC’s response to the COVID-19 disruptions. These actions have provided relief from regulatory requirements applicable to specific regulated entities that may have been impacted by COVID-19 disruptions (some of whom remain unnamed) and in some cases, provided relief to entire classes of industry registrants.⁶ These actions demonstrate that

³ Statement of Heath P. Tarbert, CFTC Chairman, Bloomberg TV, [CFTC Provides Temporary Relief to Market Participants During Crisis, Says Chairman](https://www.bloomberg.com/news/videos/2020-03-25/cftc-provides-temporary-relief-to-market-participants-during-crisis-says-commissioner-video) (Mar. 25, 2020), available at <https://www.bloomberg.com/news/videos/2020-03-25/cftc-provides-temporary-relief-to-market-participants-during-crisis-says-commissioner-video>.

⁴ The APA requires that agencies provide to the public notice and an opportunity to comment on regulatory proposals. In interpreting the APA’s notice-and-comment requirements, the courts have repeatedly affirmed that the opportunity for comment must be a meaningful opportunity, meaning that agencies must provide enough time with enough information to comment and for the agency to consider and respond to the comments. The APA’s legislative history makes clear, too, that statutory notice requirements are not sufficient as to “[matters] of great import, or those where public submission of facts will be either useful to the agency or a protection to the public,” in which case rulemakings must “naturally be accorded more elaborate public procedures.” H.R.Rep.No.1980,233,259, [Administrative Procedures Act, Report of the Committee on the Judiciary House of Representatives](#) (May 3, 1946). The courts and Congress agree, in other words, that public comment periods must be commensurate with the length, complexity, and significance of rulemakings.

⁵ See, e.g., CFTC, [Order of the Commodity Futures Trading Commission Relating to the Continuation, Shutdown, and Resumption of Certain Commission Operations in the Event of a Lapse in Appropriations](#), Notice of Order; Final Order (Oct. 1, 2013) (providing that “the Commission will not be processing or reviewing filings for Commission discretionary or mandatory approval or any other actions that are not directly related to the safety of human life or the protection of property,” ordering that “all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations,” and “extending the comment periods for . . . rules, and for any other matters that may be subject to a request for comment by the Commission, until one business day after the Commission is able to resume full operations”), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-24084a.pdf>.

⁶ See, e.g., CFTC Division of Swap Dealer and Intermediary Oversight, [Re: No-Action Positions for Futures Commission Merchants and Introducing Brokers to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic](#), CFTC Letter No. 20-03 (Mar. 17, 2020); CFTC Division of Swap Dealer and Intermediary Oversight, [Re: No-Action Positions for Swap Dealers to Facilitate Physical Separation of Personnel in Response to the COVID-19](#)

the CFTC has the resources and authority it needs to take appropriate action to toll public comment periods as necessary to preserve the integrity of the rulemaking process.

The CFTC should not be expected to indefinitely “delay” administrative priorities, including its planned rulemakings. However, a reasonable tolling of public comment periods would in no way jeopardize the CFTC’s rulemaking priorities. To the contrary, it would serve the interests of ensuring quality public participation in and quality administrative decision-making as a result of rulemaking processes. In addition, tolling public comment periods would not prevent the CFTC’s staff from continuing work on rulemaking priorities. The CFTC’s staff undoubtedly would continue to consider the detailed public comments already filed in response to recently closed proposals, and the CFTC undoubtedly would promptly take up any reasonably postponed rulemakings once the significant disruptions associated with the COVID-19 pandemic diminish.

Furthermore, in our view, the COVID-19 pandemic has led to market and other consequences that warrant careful consideration and perhaps reconsideration of the CFTC’s priorities. The tolling of public comment periods would facilitate the CFTC’s reallocation of critical senior staff, in particular, to intermediary and markets monitoring functions and provide additional resources for assessment of whether pending and planned proposals should remain priorities in light of the market disruptions and realities resulting from the COVID-19 pandemic.

The public comment process should not be reduced to a formalistic exercise that gives the appearance, but does not reflect the reality, of meaningful public input. The CFTC would be well served by a more fully developed administrative record for pending rulemakings that meaningfully provides perspectives, evidence, and considerations from a broad cross-section of the public, including industry and public interest organizations.

Pandemic, CFTC Letter No. 20-06 (Mar. 17, 2020); CFTC Division of Swap Dealer and Intermediary Oversight, Re: No-Action Positions for Retail Foreign Exchange Dealers to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic, CFTC Letter No. 20-05 (Mar. 17, 2020); CFTC Division of Swap Dealer and Intermediary Oversight, Re: No-Action Positions for Floor Brokers to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic, CFTC Letter No. 20-04 (Mar. 17, 2020); CFTC Division of Swap Dealer and Intermediary Oversight, Re: No-Action Positions for Certain Members of Designated Contract Markets and Swap Execution Facilities to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic, CFTC Letter No. 20-02 (Mar. 17, 2020); CFTC Division of Market Oversight, Re: No-Action Positions for Swap Execution Facilities to Facilitate Physical Separation of Voice Trading in Response to the COVID-19 Pandemic, CFTC Letter No. 20-07 (Mar. 17, 2020); CFTC Division of Market Oversight, Re: No-Action Positions for Swap Execution Facilities to Extend Submission Timeframes for Annual Compliance Reports and Fourth Quarter Financial Reports in Response to the COVID-19 Pandemic, CFTC Letter No. 20-08 (Mar. 17, 2020); CFTC Division of Market Oversight, Re: No-Action Relief to Designated Contract Markets to Facilitate Physical Separation of Personnel in Response to the COVID-19 Pandemic, CFTC Letter No. 20-09 (Mar. 17, 2020); CFTC Division of Swap Dealer and Intermediary Oversight, Re: No-Action Position for Excluding Certain Commodity Swaps from Major Swap Participant Registration Threshold Calculation of an Insured Depository Institution, CFTC Letter No. 20-10 (Mar. 20, 2020); CFTC Division of Swap Dealer and Intermediary Oversight, Re: No-Action Positions for Commodity Pool Operators in Response to the COVID-19 Pandemic, CFTC Letter No. 20-11 (Mar. 20, 2020); and CFTC Division of Swap Dealer and Intermediary Oversight, Re: No-Action Position for Foreign Brokers Exempt Pursuant to Commission Regulation 30.5 to Handle U.S. Futures Market Orders in Response to the COVID-19 Pandemic, CFTC Letter No. 20-12 (Mar. 31, 2020).

Sincerely,



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