



# BETTER MARKETS

**Via email ([foiapa@sec.gov](mailto:foiapa@sec.gov))**

October 18, 2018

Freedom of Information Act Officer  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: Freedom of Information Act Request – Records relating to investor testing

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the FOIA regulations of the Securities and Exchange Commission (“Commission”), 17 C.F.R. § 200.80, Better Markets requests that the Commission, including all of its offices, divisions, or components, make the records described herein available to Better Markets.

We are also asking the Commission to process this request on an expedited basis and to waive all of the fees otherwise chargeable for the search, review, duplication, and production of the documents. The requested records relate to core provisions of a proposed rule that will have a profound influence on millions of investors; the records will provide important insights into potentially serious flaws in the Commission’s rulemaking process; and the Commission is intent on finalizing the rule as soon as possible, thus creating an urgent need for the public to have access to the records without delay.

## **INTRODUCTION**

As described with more specificity below, Better Markets is seeking Commission records relating to any investor testing that has been or is being conducted in connection with three rule proposals issued in April of this year (cited in full below, the “Proposals”). The Proposals address the standards of conduct applicable to financial professionals who provide investment advice to retail customers, and they require advisors to make new disclosures that are intended to reduce investor confusion about those standards. How these rules are written is a matter of enormous public concern, as numerous studies show that advisors with conflicts of interest are costing millions of American investors billions of dollars in lost savings every year because those advisors are allowed under current rules to recommend overpriced and under-performing investments to their clients to generate commissions, fees, and bonuses.

The Proposals rely heavily on enhanced disclosure as a means of addressing these conflicts of interest, and they are premised on the notion that better educating investors about the different advisory services that financial professionals offer and the duties they owe can better protect investors from the damaging impact of conflicts of interest. However, from the moment the Proposals were released, the disclosure provisions—as well as many others—drew heavy criticism, casting the new disclosures as unhelpful and confusing. These defects were apparent on the face of the Proposals, and even some of the SEC Commissioners voiced early concerns about the efficacy and clarity of the proposed disclosures. Those concerns have been amplified in numerous comment letters and they have actually been confirmed through independent testing. *See* Consumer Federation of America, “Independent Testing Shows SEC’s Proposed Customer Relationship Summary Form May Add to Investor Confusion” (Sept. 12, 2018) (releasing independent testing results showing that the proposed disclosures will confuse, and perhaps even mislead, investors); Comment Letters of Better Markets on Regulation Best Interest and Form CRS, cited *infra*.<sup>1</sup>

It also became apparent upon release of the Proposals that the Commission had not relied upon investor testing when it drafted the disclosure provisions. Rather, Commission officials repeatedly explained that the Commission’s Office of the Investor Advocate either was conducting or would be conducting such testing and would be releasing the results at some unspecified time in the future. *See* statements of Chairman Clayton, Commissioners Piwowar and Pierce, and Director Redfearn cited below. Thus, the public does not know the status of a critically important investor testing protocol, the timeline for release of the testing results, or the findings of the testing.

Better Markets is accordingly submitting this FOIA request to gain access to information about this testing process. That information will provide important insights into the workings of a government agency; the quality and robustness of the investor testing; why the testing was conducted only after the rules were written and not beforehand; and the quality and caliber of any final rules based in whole or in part on that testing process.

Finally, the matter is urgent, warranting expedited processing. It appears that the Commission is intent on finalizing the Proposals as quickly as possible. *See* Patrick Temple-West, “SEC’s Clayton Said to Push for Vote on Investment Advice Regulations,” Politico Pro (Sept. 20, 2018). Thus, without access to at least some of the testing results in the near future, the public may not have an adequate opportunity to assess the disclosure provisions in light of those results before the Proposals become final. And, the public may be unable to offer further comment on the proposed disclosures that could shape the final form of the Proposals. A coalition of public interest organizations previously attempted to address this problem by urging the Commission to delay the comment deadline for the Proposals until at least 90 days following public release of the testing results. *See* Letter from 23 public interest organizations to Chairman Clayton (May 21, 2018), available at <https://consumerfed.org/testimonial/public-interest-groups-call-on-sec-to->

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<sup>1</sup> Input gathered by the SEC itself at a series of roundtables the agency hosted in various cities during June and July of this year also revealed that investors viewed the Form CRS as confusing, incomplete, or both. *See* transcripts of all six roundtable discussions, available at <https://www.sec.gov/comments/s7-08-18/s70818.htm#transcripts>.

[delay-comment-deadline-for-best-interest-regulatory-proposal/](#). However, that request received no response from the Commission.

## **REQUESTED RECORDS**

Please provide copies of all of the following records:

1. All records relating to any investor testing conducted by the Commission; the Commission's Office of the Investor Advocate; the Division of Investment Management; the Division of Trading and Markets; the Office of General Counsel; and any other offices, divisions, or components of the Commission; or any outside contractors or organizations acting on behalf of, or at the direction of, the Commission, where such investor testing has been or is being conducted in connection with the following regulatory releases (collectively, the "Proposals"):
  - a. Regulation Best Interest (File No. S7-07-18), 83 Fed. Reg. 21574 (May 9, 2018);
  - b. Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles (File No. S7-08-18), 83 Fed. Reg. 21416 (May 9, 2018);
  - c. Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation (File No. S7-09-18), 83 Fed. Reg. 21203 (May 9, 2018).
2. This request includes, but is not limited to, all records that constitute, describe, contain, identify, reflect, or relate to any:
  - a. organizations and individual persons involved in the testing, including but not limited to, any outside organizations hired, retained, or paid to conduct investor testing;
  - b. requests for proposals related to the testing and responses thereto;
  - c. methodologies used in the testing;
  - d. forms of questionnaires or similar documents, including but not limited to scripts used in the testing;
  - e. completed questionnaires or similar documents collected as part of the testing;
  - f. results of the testing, including but not limited to, any verbatim statements, views, or other feedback gathered from persons involved in the testing;

- g. compilations, summaries, or analyses of the results of the testing;
  - h. any discussions or determinations as to when to conduct the testing relative to the drafting of the rule proposal;
  - i. any discussions or determinations as to whether and when to release the results of the testing.
3. This request also includes, but is not limited to, records relating to the investor testing referred to by the following Commission officials in the following instances:
- a. Jay Clayton, Chairman, SEC, Statement on Public Engagement Regarding Standards of Conduct for Investment Professionals Rulemaking (Apr. 24, 2018), *available at* <https://www.sec.gov/news/public-statement/public-engagement-standards-conduct-investment-professionals-rulemaking> (“[T]he SEC’s Investor Advocate is in the process of performing investor testing, and we anticipate making the results of that investor testing available in the public comment file”);
  - b. Michael S. Piwowar, Commissioner, SEC, Statement at Open Meeting on Form CRS, Proposed Regulation Best Interest and Notice of Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers (Apr. 18, 2018), *available at* <https://www.sec.gov/news/public-statement/statement-piwowar-041818> (“I also look forward to the results of the investor testing, which our Office of Investor Advocate will conduct, related to this topic”);
  - c. Hester M. Pierce, Commissioner, SEC, Statement at the Open Meeting on Standards of Conduct for Investment Professionals (Apr. 18, 2018), *available at* <https://www.sec.gov/news/public-statement/statement-peirce-041818> (“[T]he prescribed language and model forms in today’s package are not, in my opinion, a model of clarity. That said, my opinion matters less than the opinion of investors who will use them. I look forward to seeing the results of our own and others’ investor testing of the forms.”);
  - d. Brett Redfearn, Director of Division of Trading and Markets, SEC, Remarks at the FINRA Annual Conference (May 22, 2018), *available at* <https://www.sec.gov/news/speech/redfearn-remarks-finra-annual-conference-052218> (“The Office of Investor Advocate is also in the process of performing

investor testing, and we anticipate making the results of that investor testing available in the public comment file.”).

If it is your position that the requested records exist but that those records (or portions thereof) are exempt from disclosure for any reason, please identify the records or portions thereof that are being withheld and state the basis for the denial for each such record or portion thereof. Additionally, please provide all nonexempt portions of the requested records. Better Markets further requests that any records produced in response to this request be provided in electronic form wherever possible.

### **REQUEST FOR EXPEDITED PROCESSING**

We request expedited processing of this request. Expedited processing is appropriate where an organization primarily engaged in disseminating information has an urgent need to inform the public about an actual or alleged Federal Government activity. *See* 17 C.F.R. § 200.80(d)(7). Better Markets is a public interest advocacy organization primarily engaged in disseminating information and advocacy about the regulation of the financial markets and financial market participants, and it has an urgent need to inform the public about an actual or alleged Federal Government activity. Specifically, Better Markets has an urgent need to inform the public about investor testing that high-level officials of the Commission have repeatedly indicated is being or will be performed. Better Markets also has an urgent need to inform the public about the possibility that the Commission will finalize a critically important set of rules without having conducted adequate investor testing to ensure that the rules will achieve their stated investor protection objectives.

Furthermore, the rulemaking process is apparently drawing to conclusion, and if the records are not produced as soon as possible and on an expedited basis, then their release may not occur in time to adequately enlighten members of the public regarding the testing results before the Proposals become final. In that event, the public may be deprived of a meaningful opportunity to attempt to offer further comment on the Proposals in light of the results. While the Commission *may* decide to re-open the comment period so members of the public might address the testing results once they are released, it is not clear whether, when, and for how long the Commission might do so. In accordance with the Commission’s FOIA regulations, 17 C.F.R. § 200.80(d)(7)(ii), the undersigned certifies the foregoing to be true and correct to the best of his knowledge and belief.

### **REQUEST FOR FEE WAIVER**

Better Markets further requests a fee waiver in connection with this request for records. Such waivers are appropriate where the requester demonstrates that (1) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) disclosure of the information is not primarily in the commercial interest of the requester. 17 C.F.R. § 200.80((g)(12). Both of these conditions are satisfied here. In addition, all six of the factors that the Commission considers when evaluating such requests weigh in favor of the waiver. *Id.*

1. Disclosure of the information requested is likely to contribute significantly to public understanding of the operations or activities of the government.

This request for records seeks to shed light on any investor testing that has been or is being conducted by the Commission in connection with one of the most consequential set of rule Proposals in recent memory. Those Proposals purport to strengthen the standards of care and loyalty that brokers must observe when they provide advice about securities investments to retail customers, thereby reducing the impact of financial professionals' conflicts of interest that have cost millions of American investors billions of dollars in lost savings every year, for decades.

The Proposals center largely on providing disclosures to investors that are intended to enable investors to make more informed choices when selecting different financial professionals. The Commission has indicated that investor testing of at least some of the disclosures contained in the Proposals would be undertaken. As yet, however, no testing results, methodologies, or other details surrounding the testing have been made public. That information is likely to provide important insights into the efficacy of the proposed disclosures, which will ultimately affect countless American investors who must rely on the Commission to protect them from financial professionals' conflicts of interest. Prompt access to this information is important to help ensure that the public can fully evaluate the Proposals before the Commission finalizes them.

2. Disclosure of the request information is not primarily in the commercial interest of Better Markets.

Disclosure will not further any commercial interests of the requester, as Better Markets is a nonprofit organization that has no commercial interest in this matter.

3. Each of the six factors in the Commission's FOIA rules weighs in favor of a fee waiver.

- a. *The subject of the requested records concerns the identifiable operations or activities of the government, with a connection that is direct and clear, not remote or attenuated* – The subject of the requested records is investor testing, which multiple high-level Commission officials have specifically identified as an important step in the process of promulgating and finalizing an historically important set of rule Proposals. The requested records have a direct and clear connection to the activities of government.

- b. *The disclosable portions of the requested records are meaningfully informative about government operations or activities and are likely to contribute to an increased public understanding of those operations or activities* – The requested records will shed light on meaningful aspects of the rulemaking process, including whether the Commission has conducted investor testing as publicly announced, whether the testing is effective by design, and whether the results of the testing actually support the substance of the Proposals.

- c. *Disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to*

*just the individual understanding of Better Markets* – Insight into the status and results of the Commission’s investor testing will inform millions of American investors who have a stake in the quality of the final rules that result from the Proposals. Moreover, Better Markets has a high level of expertise in the subject area, *see, e.g.*, Better Markets comment letters on the Proposals, available at <https://bettermarkets.com/rulemaking/better-markets-comment-letter-sec-regulation-best-interest>, and at <https://bettermarkets.com/rulemaking/better-markets-comment-letter-sec-form-crs>. Furthermore, Better Markets has the ability and the intention to effectively convey information gathered from the requested records to the public. *See generally* [www.bettermarkets.com](http://www.bettermarkets.com).

d. *The disclosure of the requested records is likely to contribute significantly to the public’s understanding of government operations or activities and will significantly enhance that understanding* – Release of the requested records will provide a unique and valuable insight into the Commission’s rulemaking process and the role that the investor testing played, or did not play, in developing the Proposals. That insight will be especially valuable, as it will shed light on the workings of a federal agency confronted with evidence that its rule Proposals, and specifically the disclosure provisions, are flawed in material respects, as revealed by independent investor testing already conducted. *See, e.g.*, data cited *supra* at 2.

e. *There is no commercial interest at stake* – Better Markets has no commercial interest that would be furthered by the requested disclosure, nor is it acting on behalf of any person with such a commercial interest.

f. *The public interest in disclosure is greater than any commercial interest in disclosure* – Better Markets is a non-profit organization dedicated entirely to promoting the public interest in the financial markets. Its public interest role is demonstrable from all of its activities over the course of the past eight years. Moreover, Better Markets plays a prominent role in disseminating information about financial market regulation in the news media, and it should therefore benefit from the same type of presumption afforded to news media requesters under the Commission’s FOIA rules, namely, that it serves the public interest. *See* 17 C.F.R. § 200.80(g)(12)(iii)(B). And, the public interest in disclosure that Better Markets seeks to promote through this request necessarily outweighs any commercial interest in disclosure, since there is no such commercial interest.

#### 4. Conclusion

In light of the foregoing considerations, Better Markets is entitled to a waiver of fees. However, if a waiver is denied, please advise us of the amount of any proposed search, review, and duplication charges prior to conducting those activities.

**CONTACT INFORMATION FOR REQUESTER**

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**CONCLUSION**

Thank for your prompt attention to this FOIA request. If you have any questions regarding this request, please do not hesitate to contact me directly, preferably via the email address set forth above.

Sincerely,



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Cc: Chairman Jay Clayton  
Commissioner Kara M. Stein  
Commissioner Robert J. Jackson, Jr.  
Commissioner Hester M. Peirce  
Commissioner Elad L. Roisman