



November 8, 2018

By Electronic Submission

Commodity Futures Trading Commission  
Christopher Kirkpatrick, Secretary  
1155 21<sup>st</sup> Street, N.W.  
Washington, DC 20581

Re: Swap Execution Facilities and Trade Execution Requirement RIN (3038-AE25); Request for Extension of Public Comment Period.

Ladies and gentlemen,

Better Markets, Inc.<sup>1</sup> (“Better Markets”) requests an extension of the Commodity Futures Trading Commission’s (“CFTC”) public comment period for proposed regulations amending core principles and other provisions applicable to swap execution facilities and the trade execution requirement (“SEF Proposal”).<sup>2</sup> Meaningful public input cannot be provided within the 75-day public comment period, and Better Markets therefore requests that the CFTC extend the public comment period for 90 additional calendar days from publication of the proposal in the Federal Register. Better Markets also requests that the CFTC align the public comment period for the post-trade name give-up request-for-comment with the public comment period for the SEF Proposal.<sup>3</sup>

**I. The SEF Proposal’s 75-day public comment period is inadequate given the rulemaking’s length, complexity, and importance and is inconsistent with the Administrative Procedure Act.**

The public comment period for the SEF Proposal must be commensurate with its length, complexity, and importance to provide a meaningful opportunity for public participation in the rulemaking process. The proposal presents a host of policy issues, over hundreds of pages, having the potential to affect transparency in and access to regulated derivatives trading venues, the integrity of financial benchmarks

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<sup>1</sup> 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, one that protects and promotes Americans’ jobs, savings, retirements, and more.

<sup>2</sup> Commodity Futures Trading Commission, RIN 3038-AE25, available at <https://www.cftc.gov/sites/default/files/2018-11/federalregister110518b.pdf>.

<sup>3</sup> Commodity Futures Trading Commission, RIN 3038-AE79, available at <https://www.cftc.gov/sites/default/files/2018-11/federalregister110615a.pdf>. The close nexus of the SEF Proposal and the post-trade name give-up request-for-comment warrants aligning the two public comment periods. The CFTC approved a 60-day public comment period for the request-for-comment.

critical to the functioning of the markets, liquidity formation on U.S.-registered trading venues, and the nature and effectiveness of the self-regulatory framework contemplated for swap execution facilities (“SEFs”) and competing trading venues under the Commodity Exchange Act (“CEA”) and the CFTC’s regulations.<sup>4</sup>

The SEF Proposal, in addition, implicates each of the CFTC’s core statutory mandates: (1) to deter and prevent price manipulation and other disruptions to market integrity; (2) to ensure the financial integrity of derivatives transactions and minimize systemic risk; (3) to protect market participants from fraudulent and other abusive practices, including the misuse of customer assets; and (4) to promote responsible innovation and fair competition among trading venues and market participants.<sup>5</sup> The SEF Proposal also raises issues central to the goals of section 733 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”):<sup>6</sup> promoting trading on SEFs and pre-trade transparency in the swaps markets.<sup>7</sup>

In short, the SEF Proposal has significant potential consequences for the public, market participants, trading venues and other intermediaries, and U.S. and non-U.S. regulators. For these reasons, and others, meaningful public participation in a rulemaking of the length, complexity, and importance of the SEF Proposal requires more than a 75-day public comment period as a matter of good government and administrative law.

**A. The SEF Proposal is too long, complex, and important to permit meaningful public participation in a 75-day public comment period.**

The CFTC’s SEF Proposal is 723 pages long and sets forth 106 enumerated questions, dozens of additional questions on the costs and benefits of many aspects of the proposal, and requests for comment on numerous technical concepts and provisions.<sup>8</sup> The resources required to meaningfully comment on a proposal of this length, complexity, and importance are considerable. Better Markets estimates that giving due consideration and drafting an appropriately informative response to each enumerated question and request for comment—including the concurrent requests on post-trade name give-up<sup>9</sup>—would require approximately five and half months to complete. This estimate accounts for challenges relating to the timing of the public comment period (e.g., year-end activities and concurrent regulatory actions).<sup>10</sup> Remarkably, even a public comment period of that length likely would leave critical issues unaddressed, including cost-benefit analyses on certain proposed provisions.

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<sup>4</sup> See 7 U.S.C. § 5.

<sup>5</sup> *Id.*

<sup>6</sup> Public Law 111-203, 124 Stat. 1376 (2010).

<sup>7</sup> See 7 U.S.C. 7b-3(e).

<sup>8</sup> The CFTC approved publication of the SEF Proposal on November 5, 2018. Better Markets based the analysis in this letter on a cursory review of the Microsoft word version of the document on the CFTC’s website, available at <https://www.cftc.gov/sites/default/files/2018-11/federalregister110518b.pdf>.

<sup>9</sup> See *supra* fn. 3.

<sup>10</sup> There are multiple federal holidays during the public comment period, and Better Markets and other public interest organizations are presently considering comments on more than a dozen proposals across the federal financial regulatory agencies. The resources of Better Markets and other public interest organizations pale in comparison to the resources of the industry affected by such rulemakings. As we note *below*, a public comment period that is commensurate with the length, complexity, and importance of the proposed rulemaking is critical to ensuring an appropriate *balance* of evidence, substantive comments, and perspectives in the administrative record.

In addition, a cursory examination of the SEF Proposal reveals that the CFTC may not have addressed a number of relevant public policy issues warranting regulatory consideration. Addressing these critically important issues will require yet additional time. The SEF Proposal's effects, moreover, potentially depend on the interaction of the proposed provisions with existing regulatory provisions under the derivatives, securities, and banking laws, making informed public comment a complex analytical undertaking not limited to consideration of the SEF Proposal in isolation.

Adopting final regulations based on the SEF Proposal, without affording a meaningful 90-day extension of the public comment period, would be inappropriate, procedurally unsound, and inconsistent with the letter, spirit, and intent of the Administrative Procedure Act and applicable case law, as discussed below. In addition, as a matter of public policy and procedural fairness, a proposed rulemaking giving rise to issues that have the potential to affect the safety and soundness of the derivatives market structure must benefit from the type of considered public input that arises only from an open and deliberative rulemaking process.

In this regard, Better Markets recognizes that the CFTC Chairman has devoted an enormous amount of time and effort to thinking about and developing his many ideas related to the critically important and complex issues raised by the SEF Proposal. It also appreciates the CFTC Chairman's publication of extensive white papers and related public engagement, transparently outlining his view of issues in and related to the SEF Proposal. Considering the time (literally, years) and effort required to develop the current SEF Proposal, the 75-day comment period for the public to thoughtfully consider, digest and respond to its substantive provisions is manifestly insufficient. An extended public comment period, on the other hand, would be consistent with a transparent rulemaking process that weighs evidence, contentions, and issues raised by a broad cross-section of the public, without prejudicing the CFTC's ability to issue a final rule in the near future.

## **B. The SEF Proposal does not provide fair and sufficient notice under the Administrative Procedure Act.**

The Administrative Procedure Act ("APA") requires federal agencies to provide to the public notice and an opportunity to comment on regulatory proposals.<sup>11</sup> In interpreting the APA's notice-and-comment requirements, the courts have repeatedly affirmed that "[t]he opportunity for comment must be a meaningful opportunity,"<sup>12</sup> meaning that agencies must provide "enough time with enough information to comment and for the agency to consider and respond to the comments."<sup>13</sup> The legislative history makes clear, too,

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<sup>11</sup> 5 U.S.C. § 553(b). The APA directs federal agencies to give interested persons an opportunity to participate in rulemakings through the submission of written data, views, or arguments to be considered in the agency's deliberative process. 5 U.S.C. § 553(c). Rulemakings must provide sufficient factual detail on the legal basis, rationale, and supporting evidence for regulatory provisions such that interested parties are "fairly apprised" of content, the reasoning of the agency implementing them, and the manner in which such regulations foreseeably may affect their interests. See, e.g., Mid Continent Nail Corporation v. United States, 846 F.3d 1364, 1373-1374 (Jan. 27, 2017); U.S. Telecom Ass'n v. F.C.C., 825 F.3d 674, 700 (June 14, 2016), citing Honeywell Int'l, Inc. v. E.P.A., 372 F.3d 441, 445 (June 29, 2004); Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259-1260 (May 24, 2005); Am. Medical Ass'n v. Reno, 57 F.3d 1129, 1132-1133 (June 27, 1995); Florida Power & Light Co. v. U.S., 846 F.2d 765, 771 (May 13, 1988). Better Markets intends to separately file public comments addressing the substance of the SEF Proposal; however, the current length of the public comment period prejudices our ability to do so as thoroughly and thoughtfully as the many issues presented warrant.

<sup>12</sup> Rural Cellular Ass'n v. F.C.C., 588 F.3d 1095, 1101 (Dec. 11, 2009); see also, e.g., Am. Medical Ass'n v. Reno, 57 F.3d 1129, 1132-1133 (June 27, 1995) (stating that the APA's notice-and-comment requirements "serve important purposes of agency accountability and reasoned decisionmaking" and "impose a significant duty on the agency" to "allow for meaningful and informed comment").

<sup>13</sup> Prometheus Radio Project v. F.C.C., 652 F.3d 431, 450 (July 7, 2011); see also, e.g., Florida Power & Light Co. v. U.S., 846 F.2d 765, 771 (May 13, 1988) (affirming that the APA's notice provisions require agencies "not only [to] give adequate time

that the APA’s minimum 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.”<sup>14</sup> The courts and Congress agree, in other words, that public comment periods must be commensurate with the length, complexity, and significance of rulemakings.

In addition, the courts have held that the sufficiency of the notice-and-comment process must be informed by the APA’s purposes: (1) to ensure regulations are tested via exposure to diverse public comment; (2) to ensure fairness to affected parties; and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.<sup>15</sup> Noting that good process can affect the quality of rulemaking outcomes, the courts also have been guided by the principle that a fair opportunity to comment requires agencies to maintain “a flexible and open-minded attitude towards [their] own rules”<sup>16</sup> and seek requisite information for informed administrative decision-making.

The SEF Proposal’s short public comment period prejudices meaningful participation in the rulemaking process. First, the public comment period does not afford Better Markets or the public at large a fair opportunity to give due consideration to the complexities and substantive merits of the 723-page proposal and respond to the CFTC’s legal, economic, and other analyses in a thoughtful and informative manner. It is noteworthy that the CFTC does not provide a rationale for the brevity of the public comment period (including, in particular, the decision to afford a shorter public comment period than was provided during the two-and-a-half-year rulemaking process for the final SEF rulemaking).<sup>17</sup> Absent a compelling

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for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully”). In Prometheus, the Third Circuit Court of Appeals held that the Federal Communications Commission (“FCC”) did not provide adequate notice of a rulemaking under the APA and noted that the FCC failed, in relevant part, to provide “sufficient time” for interested parties to submit responsive information to a request-for-comment by the agency’s chairman. Although the court’s holding turned on other grounds, its concern about the length of the public comment period is instructive in light of the procedural steps taken by the FCC. The FCC initially permitted a 90-day comment period and extended that period for an additional 60 days. In addition, the FCC commissioned 10 economic studies and held six public hearings before the FCC’s chairman published a New York Times Op-Ed bringing attention to the proposal and setting an additional 28-day deadline for responses. See Prometheus, 652 F.3d at 453 (affirming that “[t]he APA requires that the public have a meaningful opportunity to submit data and written analyses regarding a proposed rulemaking” and stating “commenters did not have sufficient time to do so” though there was not a challengeable agency action on elements of the rulemaking’s procedural history).

<sup>14</sup> H.R. Rep. No. 1980, 233, 259, Administrative Procedure Act, Report of the Committee on the Judiciary House of Representatives (May 3, 1946). Executive Order 12866, as amended, though not specifically applicable to the agencies, also includes a presumptive 60-day minimum public comment period and suggests further that formal rulemaking may be appropriate for “complex determinations.” See Executive Order (“E.O.”) 12866, Sec. 6. Centralized Review of Regulations, 58 Fed. Reg. 190 (Oct. 4, 1993), as amended by E.O. 13258 and E.O. 13422 (2017).

<sup>15</sup> Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (May 24, 2005); see also, e.g., American Coke and Coal Chemicals Institute v. E.P.A., 452 F.3d 930, 938 (July 11, 2006); Environmental Integrity Project v. E.P.A., 425 F.3d 992, 996 (Oct. 7, 2005); Prometheus Radio Project v. F.C.C., 652 F.3d 431, 449 (July 7, 2011); Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 35 (Mar. 25, 1977) (stating that the APA’s procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule”).

<sup>16</sup> Federal Express Corp. v. Mineta, 373 F.3d 112, 120 (July 2, 2004); McLouth Steel Products. Corp. v. Thomas, 838 F.2d 1317, 1325 (Feb. 5, 1988); see also, e.g., Rural Cellular Ass’n v. F.C.C., 588 F.3d 1095, 1101 (Dec. 11, 2009) (stating that “[t]he opportunity for comment must be a meaningful opportunity” and that “to satisfy this requirement, an agency must . . . remain sufficiently open-minded”).

<sup>17</sup> Better Markets’ request for a 90-day extension of the public comment period for the SEF Proposal is informed by substantial previous experience participating in the CFTC’s rulemakings, including the final SEF rulemaking adopted in 2013. The CFTC proposed a combination of regulations, guidance, and acceptable practices for the registration, oversight, and regulation of SEFs in January 2011, providing an initial 60-day public comment period. See Core Principles and Other Requirements for Swap

and legally cognizable rationale, informed administrative decision-making should not depend on the ability or willingness of the public to undertake a seemingly insurmountable task, in particular for a discretionary rulemaking in which a single page of the 723-page release could have significant access and transparency implications for the derivatives market structure and greatly affect the interests of the public, market participants, and registered entities.<sup>18</sup>

In addition, Better Markets would like to provide meaningful responses to a significant number of the hundreds of questions and specific requests for comment. The opportunity for notice and comment must mean something more than merely letting the public know that there are important policy questions under consideration; as a matter of administrative law, there must be a meaningful opportunity for the public to respond to the noticed questions in a considered manner. Contrast the short public comment period for the SEF Proposal with the time required to develop the proposed regulations from the issuance of the CFTC Chairman’s *Swaps Regulation 2.0: An Assessment of the Current Implementation of Reform and Proposals for Next Steps* white paper.<sup>19</sup> The CFTC—having hundreds of employees, significant knowledge of the marketplace and related issues, and administrative expertise—nevertheless deliberated on the initial proposal for at least six months. That is understandable. Better Markets requests that the public be given less than that amount of time—but nevertheless a *sufficient* amount of time—to permit meaningful public input on the same set of market structure issues and alternatives considered by the CFTC staff, including the interaction of the proposed provisions with existing provisions of derivatives, securities, and banking laws.

Better Markets notes that public participation 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. Better Markets intends to submit separate comments on substantive provisions of the proposal; however, maximizing the value of such comments frequently means compiling new data and addressing data and analyses that are hidden from public view, especially given the confidential treatment of certain trading information that could be germane to the SEF Proposal.

The current 75-day public comment period is simply too short for that kind of analysis and denies the public a meaningful opportunity to provide useful context, commentary, data, and other information

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Execution Facilities, 76 Fed. Reg. 1214 (proposed Jan. 7, 2011), available at <https://www.gpo.gov/fdsys/pkg/FR-2011-01-07/pdf/2010-32358.pdf>. Based on public requests, and other information, the CFTC extended the public comment period for the proposed SEF rulemaking for an additional month in May 2011. See Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 25274 (May 4, 2011), available at <https://www.gpo.gov/fdsys/pkg/FR-2011-05-04/pdf/2011-10884.pdf>. The CFTC also requested additional comment in connection with two public roundtables in May 2011, to provide the public an opportunity to comment on implementation of section 733 of Dodd-Frank Act (among other provisions). See Joint Public Roundtable on Issues Related to the Schedule for Implementing Final Rules for Swaps and Security-Based Swaps Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 23221 (Apr. 26, 2011), available at <https://www.gpo.gov/fdsys/pkg/FR-2011-04-26/pdf/2011-10158.pdf>. The CFTC’s final SEF regulations were published on June 4, 2013. See Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33476 (June 4, 2013), available at <https://www.gpo.gov/fdsys/pkg/FR-2013-06-04/pdf/2013-12242.pdf>.

<sup>18</sup> A public comment period of sufficient length would be especially critical to the public’s ability to submit data, studies, and other information essential to the “exchange of views, information, and criticism between interested persons and the agency” and to support or challenge the “range of alternatives” included in the administrative record. *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35-36 (Mar. 25, 1977). Denying a meaningful opportunity to develop such studies, data, and other information for the administrative record deprives the public of meaningful participation in the rulemaking process.

<sup>19</sup> It has been even longer—more than three and half years—since the CFTC Chairman first published his white paper on SEF-related issues in 2015. See J. Christopher Giancarlo, Commissioner, U.S. Commodity Futures Trading Commission, *Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank* (January 29, 2015), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/sefwhitepaper012915.pdf>.

that serves the purposes of the APA’s notice-and-comment requirements. It also interferes with the development of a robust administrative record, diminishing the quality of public participation and potentially thwarting judicial review in a manner that is statutorily suspect. In short, it is inconsistent with the letter and spirit of the APA.

**II. Conclusion**

The SEF framework is a cornerstone financial reform intended to increase pre-trade transparency, support impartial access to the markets, diversify liquidity, and facilitate sound risk management within regulated marketplaces. The public comment period for the SEF Proposal should not be reduced to a formalistic exercise that gives the appearance, but not the reality, of meaningful public input into the rulemaking process.

Better Markets strongly suspects that the extended public comment period would provide an opportunity for meaningful comment in a number of areas of *agreement* and *disagreement* with the CFTC’s SEF Proposal. **The value of public comment lies not only in identifying concerns about a proposed rule but also the elements that should be preserved**, often in the face of substantial industry opposition. In each case, the CFTC would be well served by a more fully developed administrative record that meaningfully provides perspectives, evidence, and considerations pertinent to final regulations from a broad cross-section of the public.

Sincerely,



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