October 21, 2019

By Electronic Submission

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

Re: Public Comment on Public Rulemaking Procedures (RIN Number 3038-AE90)

Ladies and gentlemen,

Better Markets, Inc.[1] ("Better Markets") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC") proposal to eliminate Part 13 of its regulations, with the exception of provisions relating to petitions for rulemaking under CFTC Regulation 13.2.[2] Better Markets agrees that rulemaking procedures codified in part 13 provide little value to the public, above and beyond that provided by applicable statutes, including section 553 of the Administrative Procedures Act ("APA"),[3] and applicable case law. The deficiency of current rulemaking procedures is especially apparent, however, with respect to the CFTC's lack of fundamental transparency measures governing so-called ex parte communications during (at least) the pendency of proposed rulemakings. Given the CFTC's acknowledgement that it has not reconsidered its part 13 regulations since 1976,[4] we encourage the CFTC to adopt transparency

[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, one that protects and promotes Americans' jobs, savings, retirements, and more.

[2] Commodity Futures Trading Commission, Public Rulemaking Procedures, 84 Fed. Reg. 49490 (September 25, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-09-20/pdf/2019-20361.pdf. See 17 C.F.R. 13.2. The CFTC proposes to renumber that provision as 17 C.F.R. 13.1.

[3] 5 U.S.C. 551 et seq. The APA requires federal agencies to provide to the public notice and an opportunity to comment on regulatory proposals. 5 U.S.C. § 553(b). More specifically, it 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).

[4] 41 Fed. Reg. 17536 (Apr. 27, 1976).

measures governing such ex parte communications under section 2(a)(12) of the Commodity Exchange Act ("CEA").[5]

I. Ex parte communications between senior CFTC officials and the derivatives industry must be disclosed as part of the administrative record, with sufficient detail concerning the substance of such communications.

When engaging in informal[6] rulemaking, the CFTC must provide the public sufficient notice of statutorily specified information, including the "terms or substance" of proposed rulemakings or "a description of the subjects and issued involved."[7] This notice requirement is intended to ensure interested members of the public have an opportunity to meaningfully comment on proposed rulemakings.[8] The CFTC must judge the sufficiency of notice on whether a proposed rulemaking provides information and time "sufficient to fairly apprise interested parties of the issues involved, so that they may present ***responsive data and argument*** relating thereto."[9] The Attorney General's Manual on the APA has for decades interpreted the APA's informal rulemaking provisions to require notice that is "sufficiently informative to assure interested persons an opportunity to participate intelligently in the rule making process."[10]

The opportunity to meaningfully respond to non-public information that agencies may consider in finalizing proposed actions is a cornerstone principle of administrative law, and such information has been long recognized to include information and arguments introduced to the rulemaking process through ex parte communications.[11] The APA does not prohibit ex parte communications. Indeed, the APA and applicable case law directs the CFTC and other agencies to provide the public an opportunity for meaningful public comment, which may occur through any type of interaction (e.g., verbally in a meeting or in writing through a comment letter).[12] The APA does, however, require the CFTC to abide by a certain level of

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5 7 U.S.C. 2(a)(12).

6 For a brief but useful description of different APA rulemaking processes, see T. Garvey, A Brief Overview of Rulemaking and Judicial Review, Congressional Research Service (March 27, 2017), available at https://fas.org/sgp/crs/misc/R41546.pdf.

7 5 U.S.C. 553(b)(3).

8 See footnote 3 supra.

9 See S. Doc. No. 79-248, at 200 (1946) (emphasis added).

10 See U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 30 (1947), available at https://archive.org/details/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947/page/n29.

11 See 5 U.S.C. 551(14) (defining ex parte communications to mean "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given").

12 The courts have stated, for example, that "informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness." Home Box Office, Inc. v. Federal Communications Commission, 567 F. 2d 9 (D.C. Cir. 1977) (per curiam), cert denied, 434 U.S. 829 (1977) at 57. The transparency requirements on ex parte communications permitted in the informal rulemaking context acknowledge the value of public engagement in connection with general policymaking, but constrain such communications consistent with principles of fair and sufficient notice and other core purposes of the administrative rulemaking process (e.g., to ensure reasoned and fair agency decision-making, the adversarial exchange of public views relevant to general policymaking, public accountability, and meaningful judicial review of agency decision-making). In contrast, Congress objected to ex parte communications during the formal rulemaking process enough that it amended the APA to prohibit all ex parte contacts in the hearing-like rulemaking context of 5 U.S.C. 556, 557 (1976). See S. Rep. No. 354, 94th Congr. 1st Sess. 35 (1975) (stating that "[i]nformal rulemaking proceedings . . . will not be affected" by the prohibition on ex parte communications in formal rulemaking) (remarks of Sen. Kennedy). 121 Cong. Rec. 35, 330 (1975).

transparency with respect to substantive contacts during the public comment period but outside of the administrative record. The courts consistently have affirmed that agencies (as well as officials having the potential to influence the substance or adoption of proposed rules) cannot rely upon ex parte information to support final agency action that was not publicly available to other affected parties prior to adoption of the final action.

The D.C. Circuit, for example, has repeatedly affirmed the principle that agency officials cannot engage in ex parte communications during the pendency of a rulemaking without disclosing the participants in and the substance of such communications. It has reasoned that ex parte communications carry the potential to bias administrative rulemaking to favor certain 'in the know' interests, fundamentally undermine the informational purposes, and adversarial nature, of informal rulemaking, and frustrate judicial review by rendering the administrative record incomplete.[13] Most notably, in Home Box Office, Inc. v. Federal Communications Commission ("HBO"),[14] the D.C. Circuit vacated a rulemaking on account of substantive ex parte communications that were not sufficiently disclosed in the administrative record. In doing so, the court reasoned that "adversarial" public comment was critical to reasoned decisionmaking and emphasized the "inconsistency of secrecy with fundamental notions of fairness implicit in . . . the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."[15] In stark contrast to that ideal, the court observed that "the evidence [in the HBO record] [wa]s certainly consistent with often-cited claims of undue industry influence . . . and . . . [the contention that] final shaping of the rules . . . may have been by compromise among the contending industry forces, rather than by exercise of independent discretion in the public interest . . . ."[16]

The HBO holding rests also on the sufficiency of the administrative record available for judicial review. The court expressed concerns that permitting "one administrative record for the public and th[e] court and another for the Commission and those 'in the know'" diminished the judiciary's ability to review whether an agency's final action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[17] The HBO court explained the importance of the administrative record to proper judicial review as follows:

> [T]he public record must reflect what representations were made to an agency so that **relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency [rulemaking]**

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[13] In addition to the courts, the Administrative Conference of the United States has acknowledged each of these concerns in the informal rulemaking context, emphasizing that such communications "have long been controversial because they raise the possibility, or at least the appearance, of undue influence and parallel nonpublic dockets in the administrative decisionmaking." Administrative Conference of the United States, Esa L. Sferra-Bonistalli, Ex Parte Communications in Information Rulemaking, 50 (May 1, 2014), available at https://www.acus.gov/sites/default/files/documents/Final%20Ex%20Parte%20Communications%20in%20Informal%20Rulemaking%20%5B5-1-14%5D_0.pdf.

[14] 567 F. 2d 9 (D.C. Cir. 1977) (per curiam), cert denied, 434 U.S. 829 (1977).

[15] Id at 56.

[16] Id at 53.

[17] See 5 U.S.C. 706. Under U.S. Supreme Court precedent, final agency action may be vacated as arbitrary and capricious if the CFTC does any of the following: (1) relies on factors which Congress has not intended it to consider; (2) entirely fails to consider important aspects of the problem(s) addressed by a rulemaking; or (3) offers an explanation for the rulemaking that runs counter to the evidence presented in the administrative record or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 664, 658 (2007).

> **proceedings**. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented.
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> Moreover, where . . . an agency justifies its actions by reference only to information in the public file **while failing to disclose *the substance* of other relevant information that has been presented to it**, a reviewing court cannot presume that the agency has acted properly . . . but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary.[18]

The court's interest in disclosures relating to ***the substance*** of ex parte communications and not solely ***the existence*** of such communications is noteworthy.[19]

The D.C. Circuit case law applying, distinguishing, extending, and even narrowing HBO in the four decades since it was decided is considerable, fact intensive, and beyond the scope of the present comment letter. However, under the APA and applicable case law, the CFTC in no way would be statutorily or judicially precluded from taking appropriate regulatory action to codify transparency measures and procedural safeguards intended to address the critical public interest concerns noted by the HBO court. Even in subsequent holdings adverse to the HBO holding in certain respects, the courts have repeatedly affirmed the need for agencies to abide by fundamental notice principles within the informal rulemaking process,[20] albeit most strictly where there is a conflicting claim to licensing or some other valuable regulatory privilege.[21]

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[18] 567 F. 2d 9 (D.C. Cir. 1977) (per curiam), cert denied, 434 U.S. 829 (1977) at 54 (emphasis added).

[19] Judicial review, and related concerns about the fairness of the rulemaking process and sufficiency of notice to the public, require not only disclosure of the fact of an ex parte communication but also the content of that communication in enough detail to permit a meaningful public response.

[20] In Action for Children's Television v. FCC ("ACT"), for example, the court held that a petitioner failed to exhaust administrative remedies as required by statute and therefore declined to invalidate a determination by the Federal Communications Commission not to finalize a proposed regulation. 564 F.2d 458 (D.C. Cir. 1977). The court also declined to apply the HBO standard on ex parte communications retroactively. Id at 474. In doing so, the court's consideration of principles relating to ex parte communications is noteworthy. First, the court disapprovingly cited the substantial ex parte communications that had occurred with the FCC chairman in that case, emphasizing that it was "not insensitive to [the petitioner]'s disenchantment with what it considered to be the agency's undue deference to the interests of those it was intended to regulate." Id at 472. It also iterated previous "warn[ings] that 'when Congress creates a procedure that gives the public a role in deciding important questions of public policy, that procedure may not lightly be sidestepped by administrators.'" Id. In addition, the court declined to overrule or narrow prospective application of HBO; indeed, the court's opinion seems most interested in establishing coherent, rather than new, precedent. For example, the court explains its previous Van Curler precedent as follows: "**We do not propose to argue that [the] Van Curler [precedent] stands for the proposition that ex parte contacts always are permissible in informal rulemaking proceedings—they are of course not**—but we do think it can be read as supporting the proposition that ex parte contacts do not per se vitiate agency informal rulemaking action, but only do so if it appears from the administrative record under review that they may have materially influenced the action ultimately taken." Id at 476 (emphasis added). **In short, the clear import of ACT is that ex parte communications presenting substantive information considered by an agency in formulating its final regulations could invalidate a rulemaking, absent a meaningful opportunity for the public to comment on such substance as part of an administrative record reviewable by the court.** In dicta, though, the court did note that the APA was silent on the issue of ex parte communications in informal rulemaking, reasoning that "[i]f Congress wanted to forbid or limit ex parte contact *in every case* of informal rulemaking, it certainly had a perfect opportunity of doing so when it enacted the Government in the Sunshine Act." Id at 475, fn. 28 (emphasis added). Better Markets does not advocate for an outright prohibition on ex parte communications.

[21] The courts have been especially exacting in their review of ex parte communications that inform rulemakings involving conflicting private claims to licensing or other valuable privileges. In Sangamon Valley Television Corp. v. United States, for example, the D.C. Circuit invalidated an FCC rulemaking that allocated television channels. 269 F.2d 221 (D.C. Cir. 1959). The court observed that a significant number of ex parte communications occurred with a specific interested party and affected rulemaking outcomes without the substance of any such communications being included in the administrative record. In that case,

For this reason, Better Markets requests that the CFTC promptly implement all pertinent recommendations in the Report on Ex Parte Communications in Informal Rulemaking[22] issued by the Administrative Conference of the United States ("ACUS"), an "independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure."[23] The ACUS report provides a summary overview of dozens of existing agency regulations codifying best disclosure practices for ex parte communications and recommends, among other measures, the following: (1) formal adoption of written ex parte communications procedures and/or policies that incorporate broad definitions of ex parte communications;[24] (2) adoption of regulatory requirements that agencies disclose at least the fact of all ***pre***-notice-of-proposed-rulemaking ex parte communications;[25] (3) adoption of regulatory requirements that agencies disclose the **substance** of ***post***-notice-of-proposed-rulemaking ex parte communications,[26] such that the public has a meaningful opportunity to participate in the rulemaking process through responsive comments; and (4) adoption of a time limitation on all such required ex parte disclosures.[27]

II. The reported ex parte communications in the context of the CFTC's proposed rulemaking on swap execution facilities highlight the importance of reasonably detailed disclosure to balanced administrative decisionmaking.

The importance of disclosing the substance of ex parte communications in sufficient detail to permit meaningful public comment is best demonstrated by the extensive ex parte communications—and minimal disclosed information—in connection with the CFTC's proposal on swap execution facilities and related execution issues.[28] In that rulemaking, CFTC officials held dozens of meetings with industry representatives focusing on the substance of the proposed regulations during the period from November 26, 2018 through January 11, 2019. With one exception, these meetings and/or discussions were held during the pendency of the public comment period for the proposals. Even if the public comment files include a

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the president of the interested company repeatedly contacted commissioners, (1) holding meetings "in the privacy of their offices;" (2) having "every commissioner at one time or another as his luncheon guest;" and (3) even gifted "turkeys to every commissioner" in two consecutive years during the rulemaking period. Id at 223-224. Noting that the public could not oppose or question arguments or data that it does not know exists, the court agreed with the Department of Justice, which intervened and argued that "whatever the proceeding may be called it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege." Id at 224. Although the allocation of privileges was affected by rulemaking and not an adjudicatory proceeding, the court and DOJ agreed that "basic fairness requires such a proceeding to be carried on in the open." Id.

22 See Administrative Conference of the United States, Esa L. Sferra-Bonistalli, Ex Parte Communications in Information Rulemaking, 82 (May 1, 2014), available at https://www.acus.gov/sites/default/files/documents/Final%20Ex%20Parte%20Communications%20in%20Informal%20Rulemaking%20%5B5-1-14%5D_0.pdf.

23 The website for the Administrative Conference of the United States can be found at the following link: https://www.acus.gov/.

24 See Administrative Conference of the United States, Esa L. Sferra-Bonistalli, Ex Parte Communications in Information Rulemaking, 82-88 (May 1, 2014).

25 Id.

26 Id.

27 Id.

28 The public comment file for Swap Execution Facilities and Trade Execution Requirement, 83 Fed. Reg. 61946 (proposed Nov. 30, 2018), can be found at the following link: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2936. The public comment file for Post-Trade Name Give-Up on Swap Execution Facilities, 83 Fed. Reg. 61571 (published Nov. 30, 2018), can be found at the following link: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2935.

notation of all such ex parte meetings (which is not possible to verify), they offer insufficient descriptions of the meetings and/or the discussions that were almost certainly considered during the rulemaking process. The "Additional Information" entries simply state that the participants engaged in either a "Discussion of SEF reform proposal" or a "Discussion of SEF proposal," or slight variations of those entries. Such minimal, pro forma four- and five- word ex parte meeting and/or discussion descriptions are essentially meaningless and certainly provide insufficient content for the public to meaningfully address comments made by interested parties largely outside of the administrative record.

This type of meager record is antithetical to what should be an open and deliberative administrative process. It does not afford the public any opportunity to provide meaningful public comment responsive to any assertions, data, and arguments that may have been presented ex parte during the pendency of rulemakings. It raises the specter of a demonstrably unfair and non-transparent rulemaking process, as concerned the HBO court, in which there is one record for the public (and any reviewing court) and another record for the CFTC and those privileged industry participants who are "in the know." Full disclosure of the fact and ***substance*** of ex parte meetings and/or discussions therefore is an urgent matter of public interest.

II. Conclusion

Unfortunately, the CFTC's rulemaking regulations do not address timely publication of ex parte communications, including the substance of such communications and the participants involved. For the reasons explained by the HBO court, discussed above, ex parte communications carry the potential to bias administrative rulemaking to favor certain 'in the know' interests, fundamentally undermine the informational purposes, and adversarial nature, of informal rulemaking, and frustrate judicial review by rendering the administrative record incomplete. Better Markets therefore respectfully requests that the CFTC, at a minimum, codify the ACUS recommendations relating to ex parte communications during the pendency of informal rulemakings.

Sincerely,

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