

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 13

RIN Number 3038-AE90

Public Rulemaking Procedures

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Commodity Futures Trading Commission (the “Commission”) is proposing to amend part 13 of its regulations to eliminate the provisions that set forth the procedure for the formulation, amendment, or repeal of rules or regulations. Because the Administrative Procedure Act (“APA”) governs the Commission’s rulemaking process, the Commission believes that it is unnecessary to codify the rulemaking process in a Commission regulation. Part 13, as amended, will be comprised solely of the procedure for filing petitions for rulemakings as the APA does not address this process.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by RIN number 3038-AE90, by any of the following methods:

- Agency website: *http://comments.cftc.gov*;
- Mail: Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581;
- Hand delivery/courier: Same as Mail, above.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in CFTC regulations at 17 CFR part 145.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Herminio Castro, Senior Special Counsel, (202) 418-6705, hcastro@cftc.gov; Dhaval Patel, Counsel, (202) 418-5125, dpatel@cftc.gov; Office of the General Counsel, Commodity Futures Trading Commission, 1155 21st Street, NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Discussion

Part 13 sets forth procedures for the formulation, amendment, or repeal of rules or regulations insofar as those procedures directly affect the public.¹ The Commission promulgated part 13 pursuant to former section 4a(j) of the Commodity Exchange Act (“CEA”),² which is currently section 2(a)(12) of the CEA.³ Section 2(a)(12) states that the Commission is authorized to promulgate such rules and regulations as it deems necessary to govern the operating procedures and conduct of business of the Commission. This section authorizes, but does not require, the Commission to promulgate regulations governing its rulemaking process. The Commission first adopted part 13 in 1976 and has not revised part 13 since.

The Commission would eliminate the provisions in part 13 that set forth the process for rulemakings.⁴ As originally adopted, part 13 was intended to track the APA rulemaking process. However, in its current form, part 13 does not fully conform to the APA, which may create ambiguity and confusion about the procedures to be followed by the Commission in rulemakings.⁵ To be clear, the APA governs Commission rulemakings. Specifically, section 553 of the APA provides for the procedures to be followed by the Commission when promulgating formal and informal rulemakings.⁶ Because the APA governs the Commission’s rulemaking process, the Commission

¹ 17 CFR Part 13.

² See 41 FR 17536 (Apr. 27, 1976); Pub. L. 93–463, Sec. 101(a)(11), 88 Stat. 1391, 7 U.S.C. 4a(j).

³ 7 U.S.C. 2(a)(12).

⁴ The provisions being eliminated are 17 CFR 13.1, 13.3, 13.4, 13.5, and 13.6. 17 CFR 13.2 is being retained and renumbered as 17 CFR 13.1.

⁵ For example, section 13.4(b) allows formal rulemakings to be conducted through oral presentation or written submissions; in contrast, APA sections 556 and 557 require a trial-like process to be followed for formal rulemakings.

⁶ See 5 U.S.C. 551 *et seq.*; Attorney General’s Manual on the Administrative Procedure Act 9 (1947).

believes that it is unnecessary to codify the rulemaking process in a Commission regulation that would be duplicative of the APA.

The Commission would retain regulation 13.2, which is supplemental to the APA. Regulation 13.2 describes the procedures by which anyone who wishes the Commission to consider the issuance, amendment, or repeal of a rule may petition the Commission. Specifically, regulation 13.2 provides instructions as to where the petition should be sent, what information should be included in the petition, and prescribes the manner in which the Commission must respond to such petition. The Commission believes that retaining this provision is necessary as the APA does not address this process. Furthermore, a formalized process for petitions would promote consistency and transparency in the way that the Commission handles petitions for rulemakings.

Accordingly, this proposed rulemaking would remove regulations 13.1, 13.3, 13.4, 13.5, and 13.6 from part 13 and retain and renumber regulation 13.2 as regulation 13.1. In addition, the Commission would revise the authority citation for part 13. The current authority cited for part 13, 7 U.S.C. 4a(j), is incorrect due to subsequent renumbering and is being changed to 7 U.S.C. 2(a)(12).

II. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act⁷ requires federal agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities. This rule would remove unnecessary and potentially

⁷ 5 U.S.C. 601 *et seq.*

confusing provisions of part 13 and update the authority cited. As stated above, section 553 of the APA provides for the procedures to be followed by the Commission when promulgating formal and informal rulemakings.⁸ Because the APA governs the Commission's rulemaking process, the proposed changes would not change how the Commission's rulemaking process is conducted. Likewise, the proposed rule would not have a significant economic impact on how small entities would conduct themselves in the promulgation of the Commission's rules. The amendments being proposed would not affect how entities participate in the rulemaking process to submit data, views or arguments. Moreover, the proposal would retain the current process for submitting petition for rulemakings to the Commission. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act ("PRA")⁹ imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information. This proposed rule does not contain any new collection of information requirements within the meaning of the PRA. Accordingly, the requirements imposed by the PRA are not applicable to this rule.

C. Cost-Benefit Considerations

Section 15(a) of the CEA¹⁰ requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain

⁸ See 5 U.S.C. 551 *et seq.*; Attorney General's Manual on the Administrative Procedure Act 9 (1947).

⁹ 5 U.S.C. 3501 *et seq.*

¹⁰ 7 U.S.C. 19(a).

orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of the futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

As discussed above, the proposed rule removes redundant and potentially confusing provisions. The proposal is a procedural rule that would not make any substantive change to the Commission rulemaking process. By simplifying the rules setting forth the procedures to be followed in rulemaking proceedings, the Commission will eliminate any confusion about the rulemaking procedures that apply, and thus make them more efficient and understandable to the public and market participants. Further, the proposed rule should impose no costs on the public since the amendments being proposed should not alter how the public participates in the rulemaking process to submit data, views or arguments.

Because the APA governs the Commission's rulemaking process, the proposed changes would not affect the protection of market participants and the public as they would continue to enjoy the ability to petition for rulemaking and otherwise participate in the Commission's rulemaking process. Further, as a procedural rule, the proposal would not impact the efficiency, competitiveness, and financial integrity of the futures markets, price discovery, or sound risk management practices. Finally, it is in the public interest to make the Commission's rulemaking procedures more efficient and understandable to the public and market participants.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the CEA, in issuing any order or adopting any Commission rule or regulation. The Commission does not anticipate that the proposed amendments to part 13 will result in anticompetitive behavior as the Commission would simply be updating part 13 to remove unnecessary and potentially confusing provisions and making technical changes.

List of Subjects in 17 CFR Part 13

Administrative practice and procedure, Rulemaking procedures.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 13 as set forth below.

1. Revise part 13 to read as follows:

PART 13—RULEMAKING PROCEDURES

Sec.

13.1 Petition for issuance, amendment, or repeal of a rule.

Authority: 7 U.S.C. 2(a)(12).

§ 13.1 Petition for issuance, amendment, or repeal of a rule.

Any person may file a petition with the Secretariat of the Commission for the issuance, amendment or repeal of a rule of general application. The petition shall be directed to Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, and shall set forth the text of any proposed rule or amendment or shall specify the rule the repeal of which is sought. The

petition shall further state the nature of the petitioner’s interest and may state arguments in support of the issuance, amendment or repeal of the rule. The Secretariat shall acknowledge receipt of the petition, refer it to the Commission for such action as the Commission deems appropriate, and notify the petitioner of the action taken by the Commission. Except in affirming a prior denial or when the denial is self-explanatory, notice of a denial in whole or in part of a petition shall be accompanied by a brief statement of the grounds of denial.

Issued in Washington, D.C., on September 16, 2019, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Public Rulemaking Procedures—Commission Voting Summary and Commissioner’s Statement

Appendix 1—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2— Concurring Statement of Commissioner Rostin Behnam

I respectfully concur with the Commodity Futures Trading Commission’s (the “Commission” or “CFTC”) proposal to amend part 13 of the Commission’s Regulations (the “Proposal”). The Proposal aims to succinctly and unambiguously confirm that the

Commission’s rulemaking process is governed by the Administrative Procedure Act (“APA”).

As explained in the Proposal, the provisions of part 13 were originally adopted in 1976 as a replacement for the Rules of Practice of the CFTC’s predecessor agency, the Commodity Exchange Authority, which would remain in effect “unless and until” terminated, modified, or suspended by the CFTC. In condensing the APA framework into part 13, the CFTC¹ perhaps went further than needed to both ensure the public’s awareness of the new agency’s purview and to provide it the clearest understanding of the means to initiate and participate in the rulemaking process. However unnecessary it may seem at today’s point in the digital age, directly providing interested persons a truncated version of the applicable operating rules so that they may exercise their rights to participate in the rulemaking process and hold their regulators accountable was laudable. Eager to effectuate its mandate and build its regulatory footprint, the Commission clearly understood the value in ensuring the barriers to participation were few.

I am pleased today that the Commission has chosen to publish the Proposal for public comment. The removal of the part 13 regulations viewed as duplicative of the APA’s statutorily prescribed procedures for agency rulemakings and adjudications—which is almost part 13 in its entirety—could be accomplished without engaging the public in notice-and-comment on grounds that such regulations are strictly technical and administrative in nature. However, the Commission has recognized the importance of ensuring that as we move forward in improving the efficacy of our regulations, they remain current and reflective of our statutory mandate, which includes adhering to

¹ Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 411, 88 Stat. 1389, 1414 (1974).

process and providing transparency. Whereas here we are preparing to remove the rules setting forth the Commission's interpretation as to the application of the requirements of the APA with regard to information rulemaking²—with the intent to rely exclusively and unambiguously on the APA, it will be useful to hear from the public as to whether there remain matters of importance that ought to be considered before we move forward.

This Proposal is consistent with the Department of Treasury's October 2017 Report on Capital Markets in which it encouraged the CFTC to make full use of its ability to solicit public comment in order to better signal to the public what information may be relevant.³ To say that the various provisions of part 13 are unnecessary does not mean they are useless. To the extent part 13 may in some instances accord more elaborate procedures than the APA sets as the minimum, I hope that the Commission is alerted thereto.

While I have some concerns about the guidance and plainly written information to be lost upon the almost wholesale elimination of part 13, I am pleased that the Chairman and the Commission staff will be publishing a primer on the Commission's rulemaking process to ensure that our governing procedures remain accessible to all interested persons.

² See 5 U.S.C. 553.

³ U.S. Department of the Treasury, *A Financial System That Creates Economic Opportunities: Capital Markets* at 218 (Oct 2017), <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf>.