

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 13

RIN 3038-AE90

Public Rulemaking Procedures

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (the “Commission”) is issuing a final rule that amends the Commission’s regulations to eliminate the provisions that set forth the procedures 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. The amended regulation is comprised solely of the procedure for filing petitions for rulemakings, as the APA does not address this process.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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. Introduction

Part 13 sets forth procedures for the formulation, amendment, or repeal of rules or regulations insofar as those procedures directly affected 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 that time.

II. The Proposal

On September 20, 2019, the Commission published a Notice of Proposed Rulemaking to amend part 13 of its regulations to eliminate the provisions in part 13 that set forth the process for rulemakings (“NPRM”).⁴ The Commission explained that 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 have created ambiguity and confusion about the procedures to be followed by the Commission in rulemakings.⁵ The NPRM further noted that the APA governs Commission rulemakings and that section 553 of the APA provides for the procedures to be followed by the

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 See Public Rulemaking Procedures, 84 FR 49490 (Sept. 20, 2019)(“NPRM”). 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 NPRM, 84 FR 49490. For example, § 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.

Commission when promulgating formal and informal rulemakings.⁶ Because the APA governs the Commission’s rulemaking process, the Commission stated that it was unnecessary to codify the rulemaking process in a Commission regulation that would be duplicative of the APA.⁷ The Commission solicited comments on all aspects of the NPRM. The comment period closed on October 21, 2019.

III. Comments

The Commission received two comment letters on the NPRM from Better Markets, Inc. and the Administrative Conference of the United States (“Better Markets” and “ACUS”).⁸ The ACUS requested that the Commission consider conforming Commission regulation 13.2 with ACUS’s Recommendation 2014-6, *Petitions for Rulemaking*.⁹ The ACUS in particular calls for the Commission to implement procedures on petitions for rulemaking that (1) include an explanation of the type of data or arguments that would be useful for the agency to evaluate the petition, (2) permit the electronic submission of petitions, (3) invite public comment on petitions for rulemaking, (4) provide a reasoned explanation beyond a brief statement of the grounds for denial and make it public, and (5) leverage online platforms like Regulations.gov to implement the recommendations.

Better Markets agreed with the Commission’s proposal to eliminate the rulemaking procedures codified in part 13, stating that they provide little value beyond

⁶ See 5 U.S.C. 551 et seq.; ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

⁷ NPRM, 84 FR 49490.

⁸ See Better Markets Comment Letter No. 62219 (“Better Markets Letter”), dated October 21, 2019, and ACUS Comment Letter No. 62213 (“ACUS Letter”), dated October 9, 2019, available at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=3030>.

⁹ See ACUS Letter at 1.

that provided by the APA and applicable case law. Better Markets, however, recommended the Commission implement ACUS's Recommendation 2014-4 concerning ex parte communications.¹⁰

IV. Final Rule

The Commission has considered the comments by Better Markets and the ACUS and is adopting part 13, as proposed, with a few modifications.¹¹ The Commission is amending part 13 of its regulations to eliminate the provisions that set forth the process for issuing NPRMs. As noted in the Proposal, part 13 was originally intended to track the APA rulemaking process, but in its current form, part 13 does not fully conform to the APA, creating uncertainties about the procedures to be followed by the Commission in rulemakings. Because the APA governs the Commission's rulemaking process, it is unnecessary to codify the rulemaking process in a Commission regulation that would be duplicative of the APA.¹²

In response to ACUS's comment, the Commission notes that it has had procedures for filing rulemaking petitions since 1976 to ensure that the public is engaged in the rulemaking process at the Commission. Specifically, regulation 13.1 provides instructions as to where the petition should be sent, what information should be included in the petition, and 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

¹⁰ See Better Markets Letter at 5. Better Markets cites to the ACUS Report on Ex Parte Communications in Informal Rulemaking by Esa L. Sferra-Bonistalli, issued on May 1, 2014. ACUS did not comment on the elimination of the rulemaking procedures in part 13.

¹¹ Commission regulation § 13.2 is being renumbered § 13.1.

¹² NPRM, 84 FR 49490.

consistency and transparency in the way that the Commission handles petitions for rulemakings.

The Commission is adopting a change in proposed regulation 13.1 to allow the electronic submission of petitions through the Commission's website, as recommended by the ACUS. Furthermore, it will be the Commission's policy to post the petitions for rulemaking on the Commission's website.¹³ The electronic submissions of petitions will facilitate the submission of petitions for rulemaking and thereby the public's engagement in the Commission's rulemaking process.

The Commission will decide on a case-by-case basis whether to solicit public comment on petitions for rulemaking, e.g., when the Commission seeks to obtain additional information or to corroborate the petitioner's information.¹⁴ Providing the public with an opportunity to view and comment on petitions fosters the public's engagement in the rulemaking process, but this goal may be accomplished without a rule. Indeed, should the Commission initiate a rulemaking pursuant to a petition for rulemaking, the APA requires that it provide the public with an opportunity to participate in the rulemaking.¹⁵ There are also many factors involved in posting petitions and requesting comments, e.g., privacy concerns, trade secrets, and resources, that the Commission will need to consider on a case-by-case basis that are outside the scope of a rule. The Commission will therefore retain its discretion whether to request comments on the petitions. Also, given resource constraints that the Commission may face at any

¹³ The Commission will retain its discretion whether to post petitions that contain confidential information (e.g., trade secrets, CEA section 8 material) and abusive or inappropriate language.

¹⁴ In such cases, the Commission will consider the comments received on a petition for rulemaking.

¹⁵ See 5 U.S.C. 553(c).

given time and the subject matters that may be involved, the Commission will not specify a period for responding to petitions for rulemaking and will retain its discretion when to respond to a petition.

Finally, regulation 13.1 only requires that the petition set forth the text of the rule or amendment being proposed or the rule petitioner wishes to have repealed, and the nature of the petitioner's interest. It also provides that the petition may advance arguments in support of the petition. The Commission is of the view that providing a prescriptive approach to the petition's constructs may have the effect of constraining rather than aiding the presentation of data and arguments by petitioners. To be sure, the petitioner should provide sufficient information and data in order for the Commission to make a determination on the petition for rulemaking. In this regard, regulation 13.1 provides that, 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 will be accompanied by a brief statement of the grounds of denial. Nevertheless, in the interest of transparency, the Commission will endeavor to include an explanation on a case-by-case basis when the petition merits it.

The Commission also considered whether to implement rules for ex parte communications in informal rulemaking, as suggested by Better Markets. As Better Markets notes, the APA does not prohibit such communications and indeed "directs ... 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)."¹⁶ Thus, the Commission is not promulgating a rule on ex parte

¹⁶ Better Markets Letter at 2.

communications. In addition, the NPRM did not propose a rule regarding ex parte communications. However, it is the Commission's policy to make public on the Commission's website substantive ex parte communications, both written and oral, that provide significant, material information addressed to the merits of a proposed rule. It is also the Commission's practice to make public on its website all ex parte meetings held on proposed rules, including the names and affiliations of attendees. The Commission is committed to maintaining such transparency in ex parte communications in all informal rulemakings.

Accordingly, this final rulemaking removes regulation §§ 13.1, 13.3, 13.4, 13.5, and 13.6 from part 13 and retains former regulation § 13.2 as regulation § 13.1, as amended. In addition, the Commission is revising the authority citation for part 13. The authority cited for part 13, 7 U.S.C. 4a(j), was incorrect due to subsequent renumbering and it is being changed to 7 U.S.C. 2(a)(12).

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act¹⁷ 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 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

¹⁷ 5 U.S.C. 601 et seq.

promulgating formal and informal rulemakings.¹⁸ Because the APA governs the Commission’s rulemaking process, the final rule does not change how the Commission’s rulemaking process is conducted. Likewise, the final rule will not have a significant economic impact on how small entities would conduct themselves in the promulgation of the Commission’s rules. Part 13, as amended by the final rule will not affect how entities participate in the rulemaking process to submit data, views or arguments. Moreover, the final rule retains the current process for submitting petitions 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 final regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (“PRA”)¹⁹ imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information. This final 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 CEA²⁰ requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in

¹⁸ See 5 U.S.C. 551 et seq.; ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

¹⁹ 5 U.S.C. 3501 et seq.

²⁰ 7 U.S.C. 19(a).

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 final rule removes redundant and potentially confusing provisions. The final rule is a procedural rule that does 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 eliminates any confusion about the rulemaking procedures that apply, and thus makes them more efficient and understandable to the public and market participants. Further, the final rule does not impose costs on the public since the amendments being finalized do 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 changes to part 13 do not affect the protection of market participants and the public as they will continue to enjoy the ability to petition for rulemaking and otherwise participate in the Commission's rulemaking process. Further, as a procedural rule, the final rule will 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 has determined that the final amendments to part 13 have no anticompetitive effects. As the Commission stated in the NPRM, the final rule simply updates part 13 to remove unnecessary and potentially confusing provisions and makes technical changes. The final rule is procedural rule that will not cause a change in behavior that would alter the level playing fields of regulated entities.

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 amends 17 CFR part 13 as follows:

1. Revise part 13 to read as follows:

PART 13—PROCEDURES FOR PETITIONS FOR RULEMAKING

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, by mail or electronically through the Commission website, 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 final 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, DC, on December 11, 2019, by the Commission.

Christopher Kirkpatrick,

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 – Statement of Commissioner Dan M. Berkovitz

I support the final rule to eliminate the obsolete provisions in part 13 of the Commission's regulations that specify procedures for Commission rulemakings. Part 13, adopted by the Commission more than 40 years ago, does not conform fully to the rulemaking procedures required by the Administrative Procedure Act ("APA") and

followed today by the Commission. The repeal of these procedures will avoid potential confusion regarding the Commission's rulemaking process.

Notice and comment rulemaking pursuant to the APA relies on a transparent process and an informed public that is able to participate in agency rulemakings. In conjunction with today's final rule, the Commission is posting on its website a plain-English summary of its rulemaking process.

I am particularly pleased to see that in response to public comments, the preamble to the final rule affirms the Commission's commitment to transparency during the rulemaking process.¹ Specifically, the Commission affirms its policy to post on its website notice of all ex parte meetings held on proposed rules, as well as any significant material information received in such communications. I strongly support these policies, which promote transparency, and aid the public's understanding of, and participation in, the Commission's rulemakings.

In addition, the final rule also preserves the public's right to petition the Commission for the issuance, amendment, or repeal of a rule. It incorporates comments received in response to the proposed rule by allowing for the electronic submission of such petitions through the Commission's website. The preamble to the final rule also establishes a Commission policy of posting petitions for rulemaking on the Commission's website. Each of these measures is a valuable addition to the transparency and accessibility that the public deserves when interacting with the Commission.

¹ See Letter from Better Markets to CFTC, Re: Public Comment on Public Rulemaking Procedures (RIN Number 3038-AE90), October 21, 2019.