



BETTER MARKETS

March 31, 2020

The Honorable Joseph M. Otting
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street NW
Washington, DC 20219

Re: Tolling of Comment Periods For All Regulatory Actions.

Dear Comptroller Otting:

Given the unprecedented circumstances as a result of the COVID-19 health and economic crisis, Better Markets¹ requests that you immediately toll all comment periods that expired on March 1, 2020 and all pending rulemaking, concept releases, guidance, and all other regulatory actions not related to COVID-19. Better Markets, and many other public interest organizations,² are compelled to focus their limited resources on engaging and supporting policymakers' responses that aim to safeguard the lives and most fundamental economic welfare of the American people. This is necessitated by the raging global pandemic and economic crisis, resulting in significant constraints on our already limited resources.

These extraordinary business disruptions have negatively impacted our ability to study the many lengthy, complex, and important proposals put forth by your agency and by other regulators, and they have severely limited our ability to obtain advice, information, or perspectives that could inform our comment letters. Carefully analyzed, informed, meaningful, thoughtful, and comprehensive comment letters help promote good policymaking and protect American consumers, retirees, and the integrity and stability of the markets—goals that you, as regulators, are charged with pursuing.³

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

² See "Request for 90-Day Tolling (Extension) of Public Comment Periods During the COVID-19 Pandemic," a joint-letter from 46 public interest organizations (March 20, 2020), available at <https://ourfinancialsecurity.org/2020/03/joint-letter-5/>.

³ The Administrative Procedures Act ("APA") requires that agencies provide to the public notice and an opportunity to comment on regulatory proposals. 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," meaning that agencies must provide "enough time with enough information to comment and for the agency to consider and respond to the comments." *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 450 (3d Cir. 2011); See also, e.g., *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988) (affirming that the APA's notice provisions require agencies "not only [to] give adequate time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties

We note that the participation of public interest organizations, such as Better Markets, in the rulemaking process not only ensures a meaningful exchange of information but also creates an important balance of information that is necessary for informed administrative decision-making and public discourse. Our review of the public comment files on a number of pending proposals and those that expired after March 1, issued by various agencies, confirms our concerns that public interest organizations are, by-and-large, not being heard from since they—given their limited resources and broad public interest mandates—are focusing on mitigating the grave threats now facing the American way of life. At the same time, we note that many of these comment files already contain the submissions of industry representatives, their trade groups, and lobbying organizations, and law firms paid to pursue the narrow interests of regulated entities.

We further note that in the preceding two weeks, you have pro-actively and forcefully granted various types of widespread regulatory relief and taken other favorable actions for various industry participants. This has demonstrated that you have all the necessary authorities to approve targeted and wholesale relief. That same consideration is owed to public interest organizations.

The current circumstances and your thus-far regrettable and unjustifiable decision to not toll the comment periods, denies the public a meaningful opportunity to provide useful context, commentary, data, and other information 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 legally suspect. In short, it is inconsistent with the letter and spirit of the APA.

The proposals you are considering relate to some key aspects of the regulatory framework. All of us—regulators, public interest organizations, regulated entities, consumers, savers and retirees, other policymakers, etc.—would benefit from reflecting upon the new realities post-

to comment meaningfully”). In Prometheus, the court 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 FCC 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 with respect to elements of the rulemaking’s procedural history). The APA’s legislative history makes clear, too, that 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.” H.R.Rep.No.1980,233,259, Administrative Procedures Act, Report of the Committee on the Judiciary House of Representatives (May 3, 1946). The courts and Congress agree, in other words, that public comment periods must be commensurate with the length, complexity, and significance of rulemakings. See also Letter to Board of Governors of the Federal Reserve System et al., Re: Request for 90-Day Tolling (Extension) of Public Comment Periods During the COVID-19 Pandemic (Mar. 20, 2020), available at https://bettermarkets.com/sites/default/files/Request_for_90-Day_Tolling_of_Public_Comment_Periods_During_the_COVID-19_Pandemic.pdf.

COVID-19, and to assess whether your pending proposals, and those whose comment periods expired on or after March 1, 2020, still remain relevant and effective post-COVID-19.

The public comment process should not be reduced to a formalistic exercise that gives the appearance, but not the reality, of meaningful public input into the rulemaking process. In light of the current circumstances, an extended public comment period is necessary to provide an opportunity for meaningful comment in a number of areas of agreement and disagreement. 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 all cases, the regulators 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.

Notwithstanding this request—which we urge you to honor—we hereby expressly reserve all rights to supplement this submission as and when time, resources, and circumstances permit.

Sincerely,



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