



December 4, 2015

Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Amendments to the Commission's Rules of Practice (File No. S7-19-15)

Dear Secretary Fields:

Better Markets<sup>1</sup> appreciates the opportunity to comment on the above-captioned proposed rule ("Proposed Rule") issued by the Securities and Exchange Commission ("Commission"). The Proposed Rule updates the Commission's Rules of Practice to require electronic submission of documents in administrative proceedings.<sup>2</sup>

Although the Proposed Rule is an important first step to improve the public's access to filings in administrative proceedings, it does not do enough to accomplish its stated goal. The Commission should establish a system like PACER, adopted by the federal courts, to give the public complete, direct, and timely access to those records.

### **COMMENTS**

As an organization dedicated to transparency, oversight, and accountability in the financial markets, we are pleased that the Commission is developing an electronic-filing system for administrative proceedings and we support the corresponding updates to its Rules of Practice. We particularly support the stated aim of the Proposed Rule. As explained in the Release, it is "intended to enhance the accessibility of administrative proceedings by ensuring that filings and other information concerning administrative proceedings are more readily available to the public."<sup>3</sup> The Release also observes: "The Commission believes that electronic submissions will enhance the transparency of administrative proceedings by providing a quicker way for the Commission to make records available to the public."<sup>4</sup>

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<sup>1</sup> Better Markets, Inc. is a nonprofit organization that promotes the public interest in the domestic and global capital and commodity markets. It advocates for transparency, oversight, and accountability in the financial markets.

<sup>2</sup> See Release No. 34-75977, 80 Fed. Reg. 60082 (Oct. 5, 2015).

<sup>3</sup> *Id.* at 60083.

<sup>4</sup> *Id.*

Improvements to the existing system are certainly warranted. The current process for affording public access to documents in administrative proceedings is unnecessarily incomplete, ad hoc, and time-consuming. Traditionally, the Commission's Website limited publication to documents issued by administrative law judges and the Commission, including decisions, orders, opinions, and settlements. It did not include the parties' pleadings, memoranda, or evidentiary materials. In a positive recent development, "the Commission now posts on its Website more types of documents associated with administrative proceedings, such as **significant** pleadings filed by parties."<sup>5</sup>

But the collection of posted documents is still quite incomplete. Moreover, the selection of which documents to post appears to be ad hoc and leads to occasionally curious results. For example, it is not uncommon to see on a partial docket a reply memorandum of law without that party's original memorandum or the other party's opposition memorandum.<sup>6</sup> For unposted documents, the Commission's Website instructs: "If you wish to review filings that are not online, . . . you can make a request by following the instructions available at How to Make a Freedom of Information Act (FOIA) or Privacy Act Request."<sup>7</sup> Without access to the docket, it is difficult to know what documents are missing and what may be worth a FOIA request. And if a FOIA request is necessary, the process can, of course, take weeks and require a significant expenditure of time and expense by both the Commission and the interested member of the public.

The Proposed Rule represents an improvement over the status quo because it modernizes the Commission's administrative proceedings and will benefit parties who are familiar with electronic-filing systems. But the Proposed Rule falls short because it will not afford direct public access to the dockets and documents of the electronic-filing system. Although it is unclear from the Proposed Rule's preamble, it appears that the Commission envisions a lack of direct public access. According to the Release, with the new system, "[t]he Commission's response to document requests is expected to be more time- and cost-effective due to the efficiency of electronic retrieval and the fact that sensitive information will have been redacted in advance."<sup>8</sup> From this description, it appears that little change is envisioned to the process by which the public may access records in an administrative proceeding. For those documents that are unselected for online publication, members of the public will still have to depend on the Commission to retrieve them.

There is a better way. The federal courts developed Public Access to Court Electronic Records ("PACER") to permit the public to view with great speed and low cost the entire dockets and documents of federal cases in its online case-management and electronic-case-

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<sup>5</sup> *Id.* at 60083 n.1 (emphasis added).

<sup>6</sup> *See, e.g.*, Administrative Proceeding File No. 3-15773, *In re Appl. of Sec. Info. & Fin. Mkts. Ass'n*, available at <http://www.sec.gov/litigation/apdocuments/ap-3-15773.xml> (reply memorandum dated Nov. 5, 2014 is available, but neither of the two previous memoranda that it heavily references is available).

<sup>7</sup> Administrative Proceeding Documents, available at <http://www.sec.gov/litigation/apdocuments.shtml>.

<sup>8</sup> 80 Fed. Reg. at 60087.

filing system ("CM-ECF").<sup>9</sup> With the exception of sensitive material that is redacted or under seal, the public has complete, convenient, immediate, and inexpensive access to judicial records. The federal courts publish not an ad hoc smattering of documents but every document, a practice that permits the public to fully understand the factual and legal basis for any judicial decision. Such public access is "fundamental to a democratic state" because it "serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally."<sup>10</sup>

This approach offers multiple advantages to the Commission. First, it would afford the public comprehensive, not ad hoc or selective, access to the documents in an administrative proceeding. Second, publication of the full docket resolves the otherwise difficult conundrum of guessing what unposted documents of interest might exist in order to identify them in a FOIA request. Third, it will save the Commission the expense of reviewing the hundred or so FOIA requests it receives each year. Indeed, if the public's access to those documents that are unselected for online publication by the Commission continues to require a FOIA request, the Proposed Rule will do little "to make records available to the public promptly."<sup>11</sup> Fourth, the Proposed Rule already provides, in great detail, a process for ensuring that sensitive personal information is unavailable on the electronic-filing system, so public access does not implicate confidentiality concerns. Finally, establishing such a system for administrative proceedings would be economically feasible. Any marginal expense associated with making the new system publicly accessible could be recouped by a modest fee for access (PACER charges \$0.10 per page up to a certain number of pages).

In short, the Commission should follow this model, which has a proven track record of affording timely, convenient, affordable, and full access to adjudicatory records.<sup>12</sup> Once the electronic-filing system for the Commission's administrative proceedings is operative, the public will be permitted, at little or no cost, to access all documents in all proceedings. Direct public access to the Commission's administrative dockets and their documents will greatly serve the public interest by increasing the transparency of critical governmental functions. It will also serve the bar by building a larger base of pleadings and other information. To achieve that goal, the Commission should ensure that, just as with the federal courts, the public may directly access the electronically filed documents as soon as the new system is operative.

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<sup>9</sup> CM-ECF was originally developed, like the Commission's electronic-filing system, to facilitate the parties' submissions to the courts and the courts' ability to manage cases. PACER was developed separately for libraries and only later moved online. Today, it is fully integrated with CM-ECF, permitting the public to access litigation documents that are uploaded by parties.

<sup>10</sup> *United States v. Hubbard*, 650 F.2d 293, 315 & n.79 (D.C. Cir. 1980).

<sup>11</sup> 80 Fed. Reg. at 60083 n.1.

<sup>12</sup> Resources permitting, the Commission should thereafter endeavor to publish all previously filed documents that do not contain sensitive personal information, beginning with open cases and working backward chronologically.

**CONCLUSION**

We hope that this comment is helpful as the Commission finalizes the Proposed Rule and considers the operation of the new electronic-filing system.

Sincerely,



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