



November 24, 2015

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

Re: Rules to be Reviewed Pursuant to the Regulatory Flexibility Act (File No. S7-21-15)

Dear Sir:

Better Markets<sup>1</sup> appreciates the opportunity to comment on the above-captioned proposed rule (“Proposed Rule” or “Proposal”) issued by the Securities and Exchange Commission (“SEC” or “Commission”).<sup>2</sup>

The Regulatory Flexibility Act (“RFA”)<sup>3</sup> requires agencies to review certain rules every ten years to “determine whether . . . rules . . . should be continued without change, or should be amended or rescinded . . . to minimize any significant economic impact of the rules upon a substantial number of . . . small entities.”<sup>4</sup> Accordingly, the SEC has published a list of rules for review and assessment of whether they should be preserved in their current form, scaled back, or perhaps even abrogated.

As indicated in the Release, the SEC has decided to expand its RFA rule review in ways that the RFA does not contemplate. To ensure that the rule review process is balanced and that it serves the interests of investors as much as small businesses, the SEC should similarly exercise its discretion to evaluate whether any rule under review should be fortified, not just weakened or jettisoned.

## **COMMENTS**

The basic purpose of the RFA is to ensure that rules are appropriately tailored so that they continue to accomplish their intended ends while minimizing negative consequences

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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> Rules to be Reviewed Pursuant to the Regulatory Flexibility Act, 80 Fed. Reg. 65,973 (Oct. 28, 2015) (to be codified at 17 C.F.R. chapter II).

<sup>3</sup> Codified at 5 U.S.C. §§ 600-611.

<sup>4</sup> 5 U.S.C. § 610(a).

on small entities over the long time horizons during which they are in effect. Indeed, the RFA provides that: “It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor . . . . to fit regulatory . . . . requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.”<sup>5</sup> Put another way, the objective of the RFA is not to undermine the broad purposes of the rules that it affects, but to ensure that those rules are carefully crafted to achieve their objectives without unduly disrupting the operations of small businesses and other small entities. The statutory statement of purpose further explains that: “[t]o achieve this principle, agencies are required to solicit and consider flexible regulatory proposals.”<sup>6</sup>

The RFA enumerates a number of considerations that must be addressed in the periodic assessment of rules, including:

- the continued need for the rule;
- the nature of complaints or comments received concerning the rule from the public;
- the complexity of the rule;
- the extent to which the rule overlaps, duplicates, or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and
- the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.<sup>7</sup>

This type of rule review may be beneficial from time to time to ensure that small entities are not unnecessarily subject to regulatory requirements. However, the SEC has seen fit to expand the scope of the assessments that it performs under the RFA. In fact, in connection with this current rule review, and as a matter of general policy, the SEC has elected to go well beyond the enumerated requirements of the RFA.<sup>8</sup>

First, the Commission has expanded the review process by examining rules that are not subject to review under the RFA because they do not have a significant impact on small businesses.<sup>9</sup> Second, the Commission has ratcheted up the rigor of the review process by choosing to consider factors beyond those enumerated in the RFA. For example, the proposal is “particularly solicit[ous]” of public comment on whether rules affect small businesses in new or different ways than when they were first adopted.<sup>10</sup> As a result, the

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<sup>5</sup> PL 96-354 (S 299), PL 96-354, SEPTEMBER 19, 1980, 94 Stat 1164.

<sup>6</sup> *Id.*

<sup>7</sup> *See* 5 U.S.C. § 610(c).

<sup>8</sup> Securities Act Release No. 6302, 46 Fed. Reg. 19,251 (Mar. 20, 1981); 80 Fed. Reg. at 65,973.

<sup>9</sup> “The list below is . . . . broader than that required by the RFA, and may include rules that do not have a significant economic impact on a substantial number of small entities.” 80 Fed. Reg. at 65,973.

<sup>10</sup> 80 Fed. Reg. at 65,973.

rules under inspection in this proposal are subject to a more expansive and searching standard of review than the RFA prescribes.

If the Commission is intent on expanding the scope of the rule review process to ensure that regulations are not unduly burdensome or anachronistic in their effect on small businesses, then it can and should perform the same exercise to ensure that regulations are continuing to fully achieve their intended purposes with respect to protecting investors and the integrity of our markets. As the business landscape changes unpredictably with the passage of time, regulations are at least as likely to become easy to evade or too weak as they are to become too onerous. This commonsense reality should be reflected in the template for any rule review designed for the benefit of our capital markets and to advance the interests of investors—those whom the securities laws aim to serve.

The RFA counsels flexibility in attempting to strike the balance between serving the social goals of federal regulation and scaling those regulations to the meet the fluid needs of the small business community. Given that the Commission is already conducting a review that exceeds a set of narrow statutory parameters, it follows that the proposed rule review should be appropriately balanced in form. The rule review process should, here and always, include a commensurate assessment of whether regulations are too **weak** and need to be **fortified or expanded** to ensure that investors and the capital markets are receiving adequate protection under the securities laws. Best intentions notwithstanding, conducting a one-sided rule review that focuses disproportionately on the potential harmful consequences of regulation and neglects to consider needed regulatory enhancements could produce results that run counter not only to the securities laws but also to the basic goals of the RFA: improving our regulatory regime.

## CONCLUSION

We hope these comments are helpful as the Commission finalizes the Proposal.

Sincerely,



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