HMA | HEALTHY MARKETS ASSOCIATION
A MEMBER ORGANIZATION

October 18, 2023

Via Electronic Mail (rule-comments@sec.gov)

Hon. Gary Gensler, Chair
Hon. Hester Peirce, Commissioner
Hon. Caroline Crenshaw, Commissioner
Hon. Mark Uyeda, Commissioner
Hon. Jaime Lizarraga, Commissioner
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: (1) Petition for Rulemaking For Exemption and No-Action Relief Requests; and

(2) Petition for Revised Order Related to SPIKES Futures (Exch. Act Rel. No. 34-90510)

Dear Commissioners:

The Healthy Markets Association[1] appreciates the opportunity to petition the Commission to (1) timely address the subsequently vacated exemptive order related to SPIKES Futures; and (2) establish clear, consistent, and transparent procedures for requests for exemptive or no-action relief.

Background

Over the course of one week in late July, both the Commission and its sister agency, the Commodity Futures Trading Commission, suffered crippling setbacks in your agencies' abilities to effectively exercise your respective exemptive and "no-action" relief powers.[2]

In each case, the courts held that the respective agency needed to comply with the Administrative Procedure Act, and in each case, the court held that the agency action was likely "arbitrary and capricious."

[1] The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at http://healthymarkets.org.

[2] *Cboe Futures Exch. LLC v. SEC*, No. 21-1038, (D.C. Cir. 2023), *available at* https://cases.justia.com/federal/appellate-courts/cadc/21-1038/21-1038-2023-07-28.pdf?ts=1690556595 and *Clarke, et. al, v CFTC*, No. 22-51124, (5th Cir. 2023), *available at* https://www.ca5.uscourts.gov/opinions/pub/22/22-51124-CV0.pdf.

Collectively, these appellate court losses before the Court of Appeals for the DC Circuit and the Fifth Circuit Court of Appeals demand that both agencies reconsider your processes for reviewing requests for exemptive and no-action relief so that the agencies' actions align with the requirements of the Administrative Procedure Act.

Congress explicitly granted the Commission broad statutory authority to "exempt any person, security, or transaction . . . from any provision" of the Exchange Act "to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."[3]

While one's business interests and political ideologies likely impact the extent to which one may support the exercise of this power, the unquestioned statutory authority exists. But when should the agencies exercise that power? Can it be done by the Commission staff, or should it require a Commission vote? What standards should apply?

The Exchange Act grants the Commission broad powers to, "by rule or regulation, determine the procedures under which an exemptive order under this section shall be granted and may, in its sole discretion, decline to entertain any application for an order of exemption under this section."[4]

Separate from this broad exemptive power, the Commission, like many other agencies, has a long-established practice of offering staff-level "no-action" relief. These staff-level "no-action" letters are procedurally quite different from formal exemptive orders, and have also been legally viewed by the Commission and staff as quite different. For no-action letters, agency staff within a specific division or divisions may promise to not recommend that the Commission enforce the law or rule against a person, firm, or industry, subject to certain conditions.[5] That historically hasn't been viewed as legally

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[3] 15 U.S.C. § 78mm(a)(1), *available at* https://www.law.cornell.edu/uscode/text/15/78mm.

[4] 15 U.S.C. § 78mm(a)(2), *available at* https://www.law.cornell.edu/uscode/text/15/78mm. Notably, there are some differences between the no-action processes of the Commission and the CFTC. For example, while the CFTC has a far less broad statutory authorization for providing exemptions, it has nevertheless adopted broad Commission rules to consider exemptive and no-action relief requests. See 17 CFR § 140.99. And while the Commission may allow third parties to rely upon no-action relief provided to others, the CFTC does not. Compare *No-Action Letters*, SEC, *available at* https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters#:~:text=The%20SEC%20staff%20sometimes%20responds,set%20forth%20in%20the%20request ("In some cases, the SEC staff may permit parties other than the requestor to rely on the no-action relief to the extent that the third party's facts and circumstances are substantially similar to those described in the underlying request.")(last viewed Oct. 9, 2023) and 17 CFR § 140.99 (a)(2)("Only the Beneficiary may rely upon the no-action letter.").

[5] *See, e.g.*, Letter from Elizabeth Miller and Erin Moore, SEC, Nov. 4, 2019, *available at* https://www.sec.gov/investment/sifma-110419 (offering time-limited no-action relief from the application of the investment adviser registration requirements, subject to specific conditions); *see also*, Letter from Josephine Tao, SEC, Racquel Russell, FINRA, Nov. 30, 2022, *available at* https://www.sec.gov/files/fixed-income-rule-15c2-11-nal-finra-113022.pdf (offering revised no-action relief

binding on the Commission,[6] but market participants often pragmatically treat them as akin to formal exemptions, which are binding on the Commission. While formal exemptions have a more rigorous and transparent process than staff-level no-action relief, the effective result of either is that a person, firm, or industry is typically able to engage in something that may be arguably inconsistent with Commission rules or the law.

The Commission uses exemptive orders, no-action relief letters, and interpretations (including FAQs) to shape the applications of its rules and the law quite often.[7] The Commission staff routinely offers no-action relief to industries in advance of rule implementations in the US[8] and abroad,[9] to corporate issuers seeking to exclude shareholder proposals from proxy materials,[10] or to allow for trading in new, regulated products. These exemption orders, no-action relief letters, and interpretations from the Commission and its staff have become a robust, deep area of "insider rules" that may refine or even defy the otherwise well-known statutes and Commission rules.

The Commission's website for the no-action, exemption, and interpretation letters issued by just the Division of Trading and Markets includes fifty-three headings for areas

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from the application of Rule 15c2-11, subject to specific conditions). We note that this no-action relief is currently the subject of pending litigation by trade associations seeking to vacate the Commission's purported application of Rule 15c2-11 to fixed income securities. *Nat'l Assoc. Of Manuf., et al. V. SEC*, 3:23-cv-00058-GFVT, (E.D.Kent. 2023), *available at* https://documents.nam.org/law/EDKY_Complaint_NAM_v_SEC.pdf.

[6] While the Commission does not include it in its Commission Rules, the CFTC's Rules related to no-action relief explicitly declares "[a] no-action letter binds only the issuing Division or the Office of the General Counsel, as applicable, and not the Commission or other Commission staff. Only the Beneficiary may rely upon the no-action letter." 17 CFR § 140.99 (a)(2).

[7] *Staff No Action, Interpretive and Exemptive Letters*, SEC, *available at* https://www.sec.gov/regulation/staff-interpretations/no-action-letters (last viewed Oct. 6, 2023).

[8] *See, e.g.,* Letter from Josephine Tao, SEC, to Racquel Russell, FINRA, Sept. 24, 2021, *available at* https://www.sec.gov/files/rule-15c2-11-fixed-income--securities-092421.pdf (offering no-action relief prior to the implementation deadline of revisions to Rule 15c2-11).

[9] *See, e.g.*, Letter from Heather Seidel, SEC, to Timothy W. Cameron and Lindsey Weber Keljo, SIFMA Asset Mgmt Group, Oct. 26, 2017, *available at* https://www.sec.gov/divisions/marketreg/mr-noaction/2017/sifma-amg-102617-28e.pdf; Letter from Aaron Gilbride, SEC, to Inv. Company Inst., Oct. 26, 2017, *available at* https://www.sec.gov/divisions/investment/noaction/2017/ici-102617-17d1.htm; and Letter from Elizabeth Miller, SEC, to SIFMA, Oct. 26, 2017, *available at* https://www.sec.gov/divisions/investment/noaction/2017/sifma-102617-202a.htm (subsequently permitted to expire, after it was extended to July 2023).

[10] See, *2022-2023 No-Action Responses Issued Under Exchange Act Rule 14a-8*, SEC, *available at* https://www.sec.gov/corpfin/2022-2023-shareholder-proposals-no-action (last viewed Oct. 9, 2023) (reflecting thirty-eight letters (including rejections of requests) to companies for this most-recent proxy season issued to companies who names begin with the letter "A").

covered, including one simply titled "Other."[11] Similarly, the Corporation Finance website lists dozens of headings, each of which may include a number of letters, such as about fifty letters related to the definition of a security, over one-hundred letters related to the application of Rule 13e4, and nearly twenty no-action letters related to exemptions under Section 3(a)(10).[12]

For both formal exemptive and no-action requests, the process for obtaining the relief often varies across the different relevant divisions (or even offices) of the Commission. Sometimes, the Commission staff conducts robust diligence (i.e., asks hard questions) and sometimes not. Sometimes the staff conditions a no-action letter on the individual, firm, or industry meeting significant, listed, substantive restrictions. Other times, it doesn't.

While the standards and processes are inconsistent, some parts of the process are generally predictable. Perhaps the most important aspect for firms or trade associations seeking exemptive or no-action relief is to hire a lawyer with strong connections to the relevant agency staff (often, a former SEC official) to seek the relief. Then, after all the questions are asked and answered and the skids are greased, the relief is often "formally" requested in a cursory public document outlining the issues and then granted in a similarly cursory reply. These two summary documents are typically the sum total of the records that are made public – and that publication is typically made only after the agency's or the staff's decision is made. Typically, few, if any, of the thorny issues are robustly considered in a public record in advance of a decision by the agency.

While the process facially lacks any semblance of transparency and accountability to those not engaged in the process (including the public), it is often opaque to parties seeking relief. Because so much of the process is not part of a formal public record or standardized, parties may work for months or years to answer questions and work through issues with staff, only to be simply told "no," without detailed thoughts or explanations.

The Commission or staff analysis included in the exemptive orders or no-action relief letters is often extremely limited– typically spanning just a few paragraphs. Formal, written responses by the Commission or staff are typically made within days (sometimes, hours) of when the written requests are received – typically foreclosing any thoughtful, public consideration of the issues.[13]

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[11] *Division of Trading and Markets No-Action, Exemptive, and Interpretive Letters*, SEC, *available at* https://www.sec.gov/divisions/marketreg/mr-noaction (last viewed Oct. 6, 2023).

[12] *Division of Corporation Finance No-Action, Interpretive and Exemptive Letters*, SEC, *available at* https://www.sec.gov/corpfin/corpfin-no-action-letters (last viewed Oct. 6, 2023).

[13] Compare Letter from Navneet Chugh, Chugh LLP, to Ted Yu and Christina Chalk, SEC, Dec. 20, 2022, *available at* https://www.sec.gov/files/softsol-final-exemption-letter-122022.pdf to Letter from Ted Yu, SEC, to Vrinda Agarwal, Chugh LLP, Dec. 22, 2022, *available at*

We understand that exemption requests – and particularly staff-level no-action decisions – have not generally been historically viewed as agency actions that would give rise to the requirements of the Administrative Procedure Act. We further recognize that the processes for considering and acting upon formal exemptive relief requests (which may be granted at the Commission-level) and staff-level "no-action" relief requests are different.

However, as the Fifth Circuit Court noted in its reversal of the CFTC's rescission of a "no action" letter, the practical impacts of both on market participants is often the same – an entity may engage in some activity (or not) in a manner that would otherwise be contrary to the law or Commission rules. Often, these actions may be viewed by market participants – and potentially courts – as granting, modifying, conditioning, or withdrawing a license,[14] and thus may be viewed as giving rise to agency obligations regarding processes and analyses pursuant to the APA.

The Commission's processes for receiving, reviewing, analyzing, and acting upon exemptive and "no-action" requests have generally never been models of transparency, consistency, or accountability. And the Commission's existing processes for receiving, reviewing, analyzing, and deciding exemptive and "no-action" relief requests is facially inadequate to consistently and reliably meet that new burden.

The Commission's Exemptive Process Led to Inadequate Public Analysis, and Its Reversal is Harming Investors and the Markets

In November 2020, the Commission adopted an Order Granting Conditional Exemptive Relief, Pursuant to Section 36 of the Securities Exchange Act of 1934 with Respect to Futures Contracts on the SPIKES™ Index.[15] That decision was challenged in court by the incumbent monopolist in volatility products, Cboe Futures Exchange. In July 2023,

https://www.sec.gov/corpfin/softsol-india-13e4-122222 (illustrating how the agency's order was adopted just two days after the initial request – during the holiday season, when Commission staff are often working in limited capacities).

[14] *Clarke, et. al, v CFTC*, Civ. 22-51124, (5th Cir. 2023), *available at* https://www.ca5.uscourts.gov/opinions/pub/22/22-51124-CV0.pdf.

[15] *Order Granting Conditional Exemptive Relief, Pursuant to Section 36 of the Securities Exchange Act of 1934 ("Exchange Act") with Respect to Futures Contracts on the SPIKES™ Index*, SEC, Exch. Act Rel. No. 90510, Nov. 24, 2020, *available at* https://www.sec.gov/files/rules/exorders/2020/34-90510.pdf.

the Court of Appeals for the DC Circuit held that the Commission's 2020 Exemptive Order was "arbitrary and capricious,"[16] and vacated it.

The Disparate Treatment of the VIX and SPIKES is Unsupported

Two decades ago, the Commission and the CFTC issued an extremely short joint order to declare that VIX futures listed on Cboe Futures Exchange are not security futures.[17] A few weeks later, in a separate order spanning a whopping ten pages, the Commission staff (purportedly exercising its delegated authority from the Commission) granted accelerated approval for Cboe to list VIX-related options.[18] Both the VIX Exemptive Order and the VIX Approval Order contained extremely limited legal analysis. For example, the "Discussion" of the Joint VIX Exemptive Order is four paragraphs long, and all of the findings and analyses in the VIX Approval Order were contained in less than three pages, double-spaced. And even then, the VIX Approval Order explicitly declared:

> In approving the CBOE's proposed rule change, the Commission is not determining whether the volatility indexes are "narrow-based" security indexes as that term is defined in the Act. Moreover, the Commission notes that the CEA does not apply to the volatility index options CBOE proposes to list and trade.[19]

There is absolutely no way that the written record for those orders could support that the decisions were "reasonable" under the standard applied by the DC Circuit Court of Appeals today. Nevertheless, the products were allowed to come to market.

Since then, the Commission has declined to revisit its decision, despite some notable problems with the VIX product (*see, e.g.*, the 2018 Volmageddon).[20] Nevertheless,

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[16] *Cboe Futures Exch. LLC v. SEC*, No. 21-1038, (D.C. Cir. 2023), *available at* https://www.cadc.uscourts.gov/internet/opinions.nsf/0/AE71F05E317FB70C852589FA00516D8A/$file/21-1038-2009980.pdf.

[17] *Joint Order Excluding Indexes Comprised of Certain Index Options from the Definition of Narrow-Based Security Index pursuant to Section 1a(25)(B)(vi) of the Commodity Exchange Act and Section 3(a)(55)(C)(vi) of the Securities Exchange Act of 1934*, SEC, Exch. Act Rel. No. 49469, Mar. 25, 2004, *available at* https://www.sec.gov/files/rules/exorders/34-49469.htm.

[18] *Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Relating to Options on Certain CBOE Volatility Indexes*, SEC, Exch. Act Rel. No. 34-49563, Apr. 14, 2004, *available at* https://www.sec.gov/files/rules/sro/cboe/34-49563.pdf ("VIX Approval Order"). We find it remarkable that the Commission staff was empowered to exempt such a then-novel product from the application of the securities laws without express consideration by the Commission nor detailed, reasoned analysis.

[19] VIX Approval Order, at 7.

[20] Phil Davis, *Volmageddon and the Failure of Short Volatility Products (Summary)*, CFA Institute, May, 20, 2021, *available at*

despite the limited analysis in the public record by the primary regulators and the concerning market events related to the VIX, it has become a heavily traded product. Investors want volatility products, and the VIX is essentially the only one available.

For more than fifteen years, Cboe enjoyed an unchallenged monopoly on volatility products that was protected, in large part, by it having obtained the Joint VIX Exemptive Order from the Commission and CFTC.

However, several years ago, in an effort to offer competition to the VIX, the Minneapolis Grain Exchange, together with Miami International Holdings, began working on its SPIKES product, which is similar to the VIX, but calculated using different methodologies, which are intended to address some of the perceived shortcomings with the VIX.

But a primary obstacle for SPIKES Futures has been obtaining the same regulatory status as the product with which it is designed to compete, the VIX.

In 2019, the CFTC said that it thought SPIKES Futures would be a futures product. MGEX self-certified it and began trading it later that year. However, shortly thereafter, we understand that Commission staff indicated that the Commission had privately taken the view that the product was a security future and asked MGEX to halt the product from trading. The Commission did not formally take action against MGEX or declare its views pursuant to any public filing or document, but instead did so pursuant to confidential communications with MGEX.

Rather than combatting the agency in court, MGEX voluntarily stopped trading SPIKES on November 29, 2019, to work with the agencies to obtain sufficient regulatory clarity to move forward.[21]

We understand that MGEX requested the Commission and CFTC adopt a joint order deeming the product a future, like they had done with Cboe over a decade earlier. We understand that MGEX and its affiliate provided the Commission and the CFTC with significant information to support such an order. Nevertheless, a joint order didn't happen. We understand that MGEX continued to work through the issues with the Commission staff.

Then, in November 2020, approximately a year after MGEX began working with the Commission staff, the Commission adopted a 29-page SPIKES Exemptive Order declaring that SPIKES Futures are security futures, but then exempting them from the

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https://rpc.cfainstitute.org/en/research/financial-analysts-journal/2021/volmageddon-failure-short-volatility-products (summarizing Patrick Augustin, Ing-Haw Cheng, and Ludovic Van den Bergen, Volmageddon and the Failure of Short Volatility Products, *Financial Analysts Journal, Q3* 2021).

[21] SPIKES Futures Update: December 6, 2019, MGEX, Dec. 6, 2019, *available at* https://www.miaxglobal.com/sites/default/files/spikes-files/SPIKES_Futures_Statement_12062019.pdf.

application being a narrow security future, in reliance on the agency's broad exemptive powers.[22] The result was to give SPIKES Futures trading the same tax and margin treatment as its competitor, the VIX Futures. In reliance on the agency's action granting the exemptive relief, MGEX re-launched its SPIKES Futures product, and trading restarted on December 14, 2020.[23]

Cboe Futures Exchange, however, decided to seize the opportunity to use the courts to block its new competitor, and petitioned the DC Circuit to vacate the SPIKES Exemptive Order. Rather than welcome competition, the Cboe sought to use the government to protect its monopoly business.

The DC Circuit ruled that "[t]he agency's explanation must be clear enough that the agency's 'path may reasonably be discerned,'" and that "the agency may not 'entirely fail[] to consider an important aspect of the problem.'"[24] It then found that, "the [SPIKES] Exemptive Order is arbitrary and capricious because the SEC failed adequately to explain its rationale and failed to consider an important aspect of the problem."[25] Very specifically, the Court found that "[t]he SEC did not adequately explain why SPIKES futures must be regulated as futures to promote competition with VIX futures,"[26] even though the Court separately found that "security futures are more heavily regulated and taxed than other futures."[27]

While the *public* request and *public* granting documents for most of the exemptive and no-action relief granted by the Commission and staff over the past several decades have contained limited details, the 29-page SPIKES Exemptive Order was far more detailed than most – including the analogous Joint VIX Exemptive Order or VIX Approval Order.[28] The Commission should be immediately concerned with the robustness of its existing practices, given the paucity of information contained in many of the hundreds of exemptive orders and no-action letters available on the Commission's website.[29]

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[22] *Order Granting Conditional Exemptive Relief, Pursuant to Section 36 of the Securities Exchange Act of 1934 ("Exchange Act") with Respect to Futures Contracts on the SPIKES™ Index*, SEC, Exch. Act Rel. No. 90510, Nov. 24, 2020, *available at* https://www.sec.gov/files/rules/exorders/2020/34-90510.pdf (SPIKES Exemptive Order).

[23] *SPIKES Futures Start Trading on MGEX*, Markets Media, Dec. 16, 2020, *available at* https://www.marketsmedia.com/spikes-futures-start-trading-on-mgex/.

[24] *Cboe Futures Exchange v. CFTC*, at 2.

[25] *Cboe Futures Exchange v. CFTC*, at 2.

[26] *Cboe Futures Exchange v. CFTC*, at 2.

[27] *Cboe Futures Exchange v. CFTC*, at 5.

[28] Compare Joint VIX Exemptive Order and VIX Approval Order with SPIKES Exemptive Order.

[29] *See generally, Staff No Action, Interpretive and Exemptive Letters*, SEC, *available at* https://www.sec.gov/regulation/staff-interpretations/no-action-letters (last viewed Oct. 6, 2023).

Importantly, the DC Circuit Opinion did not question the Commission's authority to grant exemptive relief, nor did it assess or make any findings regarding the Commission's or staff's analysis that was not part of the written, public record. The DC Circuit Opinion didn't question whether the Commission or staff undertook the sufficiently relevant analysis behind closed doors, but rather took issue with the Commission's failure to sufficiently document such analysis so as to provide outsiders with sufficient information to determine whether the agency's action was reasonable.

Immediate Action is Necessary

As a result of the DC Circuit's decision to vacate the SPIKES Exemptive Order, the SPIKES Futures product is likely to have to be pulled again from the marketplace. The immediate impacts of the decision are thus to (1) harm investors, (2) discriminate against a current market participant, and (3) stifle competition for an incumbent monopolist.

At the time of the DC Circuit's decision to vacate the SPIKES Exemptive Order, MGEX and investors had already come to rely upon the agency's decision. Thus, unfortunately, the DC Circuit's decision to vacate the SPIKES Exemptive Order created immediate harm to investors and MGEX.

The DC Circuit Opinion creates discrimination between different, similarly situated market participants. As previously stated, the SPIKES Exemptive Order effectively put the SPIKES Futures on par with another product that was awarded an exemptive order two decades ago. Yet, that Joint VIX Exemptive Order, which gave rise to the VIX's effective monopoly – was not challenged or subject to this standard. And the public administrative record used to support the initial Joint VIX Exemptive Order was far more vacuous than the Commission's consideration for the SPIKES Exemptive Order.

The DC Circuit Opinion creates an undue burden on competition with the VIX products, and effectively preserves a monopoly by Cboe Futures Exchange.

The Commission should, consistent with its mission to protect investors, promote competition, and promote capital formation, act promptly to mitigate these harms. Luckily, MGEX worked with the Commission staff for a full year to get the SPIKES Exemptive Order, and while the SPIKES Exemptive Order doesn't include all the supporting details, the reality is that the Commission staff almost certainly collected and considered all of the relevant details (aka sufficient information to support the finding that the determination was "reasonable").

Thus, the Commission would be well-advised to take all of its staff's prior work (that wasn't included in the SPIKES Exemptive Order) and essentially paper the record for a new exemptive order, but this time showing its work. This would both cure the defect

identified by the DC Circuit, and allow the Commission to fulfill its mission in this critical juncture.

The Commission Should Broadly Address Its Exemptive and "No-Action" Processes

The Commission, like its sister agency, the CFTC, is currently having its various actions challenged in court. In addition to the judicial second-guessing of exemptive actions, there is an increasing likelihood that courts will consider challenges to agencies' no-action relief processes. In fact, we understand that the Commission is currently facing a legal challenge to its determinations and subsequent no-action relief related to the application of Rule 15c2-11.[30]

One very recent case suggests that judicial scrutiny of no-action relief may dramatically impact the use of this regulatory tool. In particular, on July 21st, the Court of Appeals for the Fifth Circuit held that the CFTC's rescission of a no-action letter regarding the PredictIt political gambling site was "likely arbitrary and capricious."[31]

On the one hand, agency staff-level no-action relief letters have historically been, by design, not viewed as final actions by an agency (with respect to either the Commission or the CFTC), and so not subjected to the Administrative Procedure Act requirement. As the Fifth Circuit noted, the no-action letter was simply a statement that the DMO "will not recommend enforcement action to the [CFTC] for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order."[32] Again, we appreciate that no-action letters have historically not been viewed as binding other divisions, much less the Commissioners (the people who are collectively statutorily empowered to take action for the agency). And that no-action letters have historically been viewed as modifiable or revocable at any time for any reason.

On the other hand, no-action letters are often effectively permissions for market participants to do something (or not do something), which would otherwise violate a law or agency rule. For example, the 2017 SIFMA No Action letter on investment research payments allowed brokers to accept cash payments in Europe for research, and not have to register with the Commission as an investment adviser.[33]

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[30] See, *Nat'l Assoc. Of Manuf., et al. V. SEC*, 3:23-cv-00058-GFVT, (E.D.Kent. 2023), *available at* https://documents.nam.org/law/EDKY_Complaint_NAM_v_SEC.pdf.

[31] See *Clarke, et. al v CFTC*, (5th Cir. July 21, 2023), *available at* https://cases.justia.com/federal/appellate-courts/ca5/22-51124/22-51124-2023-07-21.pdf?ts=1689982262.

[32] *Clarke*, at 3 (citing to 17 CFR § 140.99).

[33] Letter from Elizabeth Miller, SEC, to SIFMA, Oct. 26, 2017, *available at* https://www.sec.gov/divisions/investment/noaction/2017/sifma-102617-202a.htm.

Similarly, a 2014 no-action letter issued by CFTC staff effectively permitted individuals loosely associated with Victoria University in New Zealand to operate PredictIt, a website for gambling on US elections.[34]

Over the past several decades, the Commission staff and CFTC staff have released hundreds of no-action letters, fundamentally reshaping the applications of their own agency's rules and laws – often with limited public analyses.

For example, in 2014, Victoria University of Wellington in New Zealand sought and received a no action letter from the CFTC for operating what became "PredictIt," a website used for gambling on elections, legislative action, and other things. The CFTC staff's 2014 no action letter to PredictIt (like many others) declared that it:

- "represent[ed] the views of DMO only,"[35]
- "d[id] not necessarily represent the positions or views of the Commission or any other division or office of the Commission,"[36] and
- could be subsequently modified, suspended, or terminated at the staff's discretion.[37]

The CFTC staff had granted the relief, based upon the premise that it was for "academic research," and the letter was subject to a number of staff-negotiated limits, such as how much could be wagered per bettor.[38] And so it went – with PredictIt becoming a popular, generally unregulated election gambling site (that was arguably acting as a "for profit" enterprise).

Eight years later, the CFTC staff withdrew the no action letter, stating that "[t]he University has not operated its market in compliance with the terms."[39] PredictIt and several individuals associated with the gambling site (but not Victoria University) sued the CFTC, arguing that the rescission was "arbitrary and capricious" and that it was effectively a withdrawal of a license without following proper procedural steps.

In a somewhat surprising decision, the Fifth Circuit Court of Appeals ruled that a no-action letter (1) was an "agency action" under the Administrative Procedure Act, and

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[34] Letter from Vincent McGonagle, CFTC, to Neil Quigley, Victoria University of Wellington, Oct. 29, 2014 ("PredictIt No-Action Letter").
[35] PredictIt No-Action Letter, at 5.
[36] PredictIt No-Action Letter, at 5-6.
[37] PredictIt No-Action Letter, at 6.
[38] PredictIt No-Action Letter, at 4.
[39] Letter from Vincent McGonagle, CFTC, to Professor Margaret Hyland, Ph.D., Victoria University of Wellington, Aug. 4, 2022, ("Predict It Rescission Letter").

(2) can be a "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."[40]

As applied, the CFTC's staff-level no-action letter could be subject to the Administrative Procedure Act, which then means that the granting, modification, and revocation of that letter might have to comply with the APA. It is difficult to identify any discernible difference between the PredictIt No-Action Letter's "form of permission" and many of the hundreds of no-action letters issued by the Commission.

Further, however, the Fifth Circuit Court of Appeals found that (1) the PredictIt No-Action Letter was an "agency action" under the Administrative Procedure Act, and (2) the recission of the 2014 letter was "likely arbitrary and capricious because the agency gave no reasons for it."[41] Lastly, the court enjoined the CFTC from shutting down PredictIt.

Put another way, a non-transparent, staff-level decision based on limited public information to grant the PredictIt No-Action Letter in 2014 was found to be binding upon the entire CFTC eight years later.[42] Further, any changes or revocation to that decision would require robust public analysis – even despite the recipient facially violating its terms and the fact that the letter was granted without the benefit of such thorough consideration.

While the Fifth Circuit's decision regarding the rescission of the PredictIt No-Action Letter is not immediately directly binding upon the Commission, it is persuasive precedent that strongly suggests that the Commission's own no-action letters may be viewed similarly.[43]

Long-Term Lesson from the Courts: Show Your Work

The recent DC Circuit Court of Appeals and Fifth Circuit Court of Appeals decisions referenced above should have profound implications for the Commission and the CFTC, as well as those seeking exemptive and no-action relief. If no-action relief is now viewed as subject to judicial second-guessing under the Administrative Procedure Act, the agencies should ensure that their considerations of those requests are sufficiently public

[40] *Clarke*, at 8.
[41] *Clarke*, at 18.
[42] We also note that, despite the clear terms of the CFTC's rules related to no-action letters, this letter was being relied upon by parties *other than* the initial beneficiary to which the letter was initially provided. See 17 CFR § 140.99 (a)(2)("Only the Beneficiary may rely upon the no-action letter.").
[43] We also note that a dissenting judge in the *PredictIt* decision took the more common, historical view towards no-action letters, declaring that the CFTC's no-action letters should not be challengeable under the APA because they are not a "final agency action," because "they neither mark the consummation of the agency's decision-making process nor determine Appellants' legal rights or obligations." *Clarke*, at 23 (dissent of Judge James Graves, Jr.).

and detailed to ensure that courts (and the public) can have confidence that they are "reasonable."

Neither the Commission nor CFTC have generally sought to ensure the granting, modification, or recession of no-action letters would comply with the APA before. Doing that would require an unprecedented amount of economic analysis and procedural process. In theory, it could mean that every request for exemptive and no-action relief, or any changes to the terms of such relief (including rescission) would be sent out for detailed public comment, and be subject to detailed on-the-record analysis by the relevant agency.

That just isn't how things have been done before for exemptive and no-action relief – in sharp contrast to the agencies' approaches to adopting or revising their rules. Put another way, adding, revising, or withdrawing a rule may be a years-long, public process with material public comments and hundreds of pages of agency and staff analysis. Yet exempting a person, firm, or industry from the application of that rule could be done with effectively no public engagement or analysis, and perhaps without the public even knowing who specifically is taking advantage of it.

Applying protections afforded by the Administrative Procedure Act to exemptive and no-action requests could itself become another one-way deregulatory ratchet. It is not hard to imagine an agency under one leadership determining to simply grant no-action relief requests without meeting the requirements of the APA, but because those letters may not be challenged by a party with standing to complain (aka, the party receiving it is pleased, and others may not have the interest or capability to pursue action in court to object), they would become effective.

We might think of this as how the Commission and CFTC first granted the Joint VIX Exemptive Order and the Commission provided the VIX Approval Order decades ago. We see no credible distinction to support the Commission's actions in the Joint VIX Exemptive Order or VIX Approval Order, given the court's reasoning in vacating the SPIKES Exemptive Order. But, alas, that water is already under the bridge.

However, if an agency ever changes its leadership or otherwise revises its views and decides to modify or rescind the exemptive or no-action relief, it would likely have to jump through significant procedural hoops to do so (because that decision to take away the privileged would almost certainly be challenged in court – like happened with PredictIt).

In our view, the Commission and the CFTC should very quickly move to adopt and revise their respective Commission Rules for the public consideration of exemptive and no-action relief requests. The agencies should be required to show their work and truly justify the decisions, which we think will make for a more consistent application of the law and more accountable agencies. In particular, all requests and communications

between the Commission or staff and the requesting party should be public, and the agency should establish clear standards through which those applications may be reviewed, as well as timelines within which the Commission or staff commit to respond to the requesting party.

Put simply, the Commission's processes for receiving, reviewing, analyzing, and acting upon exemptive and "no-action" requests must be more transparent to the public and the parties seeking relief, consistent, and accountable.

If the agency does nothing to improve its process holistically, we suspect that the Commission and its staff will find that any decisions to grant, modify, or rescind an exemptive or no-action will likely be subject to robust legal challenge. And more high-profile losses in the courts are nearly guaranteed.

Conclusion

Exemptive and no-action relief are important tools of the Commission and the CFTC, but they must be used consistently, transparently, and reliably. The Commission should promptly seek to mitigate investor harm, alleviate discrimination, and restore competition to the VIX by adopting a revised exemptive order for SPIKES Futures and revise its exemptive and no-action relief request processes to ensure that its decisions are consistent, transparent, and reliable. Should you have any questions or seek further information please contact me at (202) 909-6138.

Sincerely,

Tyler Gellasch
President and CEO

Cc: Vanessa Countryman, Secretary, Securities and Exchange Commission