

Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance

Roberta Romano[†]

An extensive literature has analyzed the accountability of administrative agencies, and in particular, their relationship to Congress. A well-established strand in the literature emphasizes that Congress retains control over agencies by their design, with a focus on the structure and process by which agency decisionmaking is undertaken. This Article examines the relationship between agency structure and decisionmaking across four agencies with similar statutory missions but different organizational structures: the Consumer Financial Protection Bureau (CFPB), with a uniquely independent and controversial structure, and the Commodity Futures Trading Commission (CFTC), Consumer Product Safety Commission (CPSC), and Securities and Exchange Commission (SEC), with more conventional independent commission structures. It presents data consistent with the contention that agency structure influences agency decisionmaking. More specifically, the statistical analysis is robustly consistent with an agency's insulation from Congress being related to its choice of regulatory instrument, as the most independent agency in this study, the CFPB, uses significantly less frequently the most publicly accountable regulatory instrument: notice-and-comment rulemaking. The Article concludes with the analysis's implications for the CFPB's organization and more broadly for administrative reform proposals and the agency design and administrative law literature.

[†] Yale Law School, National Bureau of Economic Research, and European Corporate Governance Institute. I have benefitted from helpful comments of Ian Ayres, John de Figueiredo, Don Elliott, Bill Eskridge, Brian Feinstein, Rainer Haselmann, Gail Henderson, Christine Jolls, Jon Macey, John Matsusaka, Anne Joseph O'Connell, Hester Peirce, Sarath Sanga, Peter Schuck, Holger Spamann, Matt Spitzer, Jed Stiglitz, and participants in the Law and Economics Workshops at the University of Chicago and University of Michigan Law Schools, faculty workshops at the Scalia and Yale Law Schools, 2017 GCGC Conference: Tokyo, 2017 Law and Banking/Finance Conference, CELS 2017, and the NBER Law and Economics Program Workshop. Data collection and analyses were greatly facilitated by use of the Davis Polk Regulatory TrackerTM; I would like to express my gratitude to Gabriel Rosenberg and Davis Polk & Wardwell LLP for making the Tracker's information available in a usable file. I am also grateful to Connor Raso, for identifying where to locate quite difficult to find guidance documents on the SEC's website. Andy Mun, Yale Law School class of 2017, provided superb research assistance, as did law librarians Julie Krishnaswami and Stacia Stein.

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Introduction

A core question in the study of administrative agencies is how, if at all, organizational structure impacts agency decisionmaking. To put that broad question into a more readily testable hypothesis, this Article addresses a specific question: does the extent of an agency’s independence from political control affect the choice of instrument by which it regulates? The Article operationalizes this fundamental question by a comparative analysis, examining whether the more insulated an agency is from accountability to elected representatives, the more frequently it will implement policy by means of an instrument that does

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not require responsiveness to public input and that is not likely to be reviewed by courts, thereby sidestepping procedures that facilitate legislators' ability to monitor administrative action.¹ Such administrative behavior can attenuate the nexus between elected officials and administrative policymaking and could therefore affect policy outcomes where preferences of administrators and officeholders diverge. This issue, then, goes to the core of the administrative state's democratic legitimacy.

The focus of the Article's research design is to identify empirically a connection between agency structure and rulemaking by comparing the regulatory activity of the Consumer Financial Protection Bureau (CFPB) with that of three other agencies with broadly similar regulatory objectives—the Commodity Futures Trading Commission, the Consumer Product Safety Commission (CPSC), and the Securities and Exchange Commission (SEC). The CFPB was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),² Congress's response to the recent global financial crisis, and was provided with an anomalous, politically independent structure that has generated considerable controversy. The ongoing dispute over the agency's structure, years after its establishment, suggests a need for examining empirically whether the dispute over its organization is consequential and whether the current organizational setup is for the better. The three other agencies investigated have more conventional commission structures and funding, which provide, in principle, for tighter mechanisms of political accountability.

The key finding is that the agency that was structured, by a wide margin, to be the most insulated from congressional control, the CFPB, uses significantly less frequently the most publicly accountable regulatory instrument, the notice-and-comment rulemaking process, as established by the Administrative Procedure Act (APA) and elaborated by courts.³ The statute establishes a process by which agencies must provide advance notice of proposed rules, solicit public comments, and respond to those comments when finalizing the proposed rules.⁴ It further provides individuals aggrieved by a rule a right to judicial review.⁵ This administrative process is hypothesized to permit Congress to exercise control over agencies both through information it obtains from the mandated written

1. Mathew McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L., ECON. & ORG. 243 (1987). McCubbins et al. emphasize legislative use of administrative procedures to ensure accountability to the enacting Congress. But their description of the informational role of the notice-and-comment rulemaking process, as discussed in Part I.B, *infra*, by facilitating congressional monitoring of policymaking, impels agencies to be accountable to contemporaneous (i.e., post-enacting) Congresses. Given this Article's focus of analysis on the choice of rulemaking instrument, the relevant Congress with regard to agency accountability is the Congress exercising monitoring and hence sanctioning authority.

2. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1011 (codified at 12 U.S.C. § 5491 (2018)).

3. Administrative Procedure Act, 5 U.S.C. § 553 (2018).

4. *Id.*

5. 5 U.S.C. §§ 702, 704 (2018).

record as well as through an early warning system provided by constituents' exercise of the right to judicial review or commissioner dissents in multimember agencies.⁶

The finding of a significant divergence in choice of regulatory instrument by the agency that is the most independent from political accountability is robust across a variety of comparisons, and it is therefore consistent with the contention that agency design matters for the choice of instrument an agency uses in decisionmaking. Establishing such a relationship robustly has eluded the empirical literature, as it consists in the main of single agency studies, while the few multiagency studies of agency design have not addressed the question, as they do not analyze the relation between organizational design and a broad array of instrument choices.

The Article's research design does have a limitation beyond the small number of agencies under study—the number being restricted by the need to compare agencies with broadly cognate regulatory authority—namely, that the statistical analysis cannot provide an answer to a further question: whether the instrument through which regulation is adopted affects substantive regulatory content. However, there is a literature examining agencies' problematic regulation by guidance through which they can obtain outcomes that would not be available had they used a notice-and-comment rulemaking process,⁷ and the CFPB has engaged in a number of such questionable regulatory actions. Three of the more prominent instances of such CFPB action, which were well-publicized by the business press, are described in the Appendix. These examples provide an interpretive context for the empirical analysis, supporting the contention suggested by the analysis: that agency design matters, that instrument choice matters, and that both matter importantly.

The Article is organized as follows. It begins with a primer on administrative procedure to orient the analysis with regard to the relevant legal framework, followed by an overview of the political science literature on agency design which provides the analytical framework for the Article's research design. It then identifies the salient organizational characteristics of the four agencies under study in relation to their insulation from political accountability. After introducing the data set, the agencies' regulatory activity is compared and analyzed. The Article concludes with an assessment of the analysis' implications for the CFPB's regulatory structure and more generally, for reform proposals addressed to regulatory strategy and the literature on agency design and administrative law.

6. McCubbins et al., *supra* note 1 (describing Congress's design of administrative procedure as a mechanism for control of agency action).

7. For a recent paper citing such work, see William Baude, *Congressional Control over Agencies: The Problem of Coercive Guidance* (May 30, 2016) (unpublished conference draft) (on file with the Hoover Institution).

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I. Administrative Procedure and Literature Review

There is an extensive literature on agency design, informed by public choice theory (also referred to as positive political theory or rational choice theory) and transaction cost economics, that characterizes design as directed at a principal-agent problem of (i) information asymmetry (agencies have superior information about policy); (ii) preference divergence (legislators' and agencies' goals differ); and (iii) commitment (one Congress cannot bind future Congresses to ensure the durability of a policy, reducing the value of legislation to constituents).⁸ A key line of research in this literature focuses on administrative law. This section therefore begins with a sketch of the regulatory tools and related procedural requirements that are available for administrative decisionmaking. It then provides an overview of the slice of the theoretical and empirical literature most pertinent to this Article's focus, the relation between an agency's structural independence and its decisionmaking.

A. A Primer on Administrative Procedure

In 1946, Congress provided a statutory framework for agency action by establishing requirements for rulemaking and adjudication in the APA.⁹ A key innovation of the APA was codification of what has come to be referred to as “informal” rulemaking. Section 553 of the APA, the “‘informal’ rulemaking” provision, sets out a three-step rulemaking process, which requires an agency (i) to provide advance notice of a proposed rule or a problem being investigated; (ii) thereafter to provide the public with an opportunity to submit written comments; and (iii) after consideration of submitted comments, to “incorporate in the rules adopted a concise general statement of their basis and purpose.”¹⁰ This informal rulemaking process, as earlier noted, is referred to as “notice-and-comment” rulemaking, and its fundamental elements can be encapsulated in “three words: information, participation, and accountability.”¹¹ Those elements are interrelated: the political legitimacy of rulemaking, given its management by unelected officials, is said to rest upon public participation under “procedures designed to ensure the rationality of the agency’s decision.”¹² That is, public

8. See Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (summarizing public choice literature on information asymmetry and preference divergence regarding agency design); MURRAY J. HORN, THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION (1995) (combining commitment problem with agency problems in agency design).

9. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 273 (1946) (codified as amended at 5 U.S.C. § 500 et seq. (2018)). Rulemaking and adjudication are the forms of administrative agency action that have formal legal effects on people (i.e., they impose rights and obligations). See, e.g., GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 48 (7th ed. 2016).

10. 5 U.S.C. § 553 (2018).

11. CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 53 (4th ed. 2011).

12. *Id.* at 168.

comments can illuminate gaps in an agency's knowledge and provide an understanding of real-world conditions, as well as assist an agency in gauging a rule's acceptance by those affected.¹³

The statutory procedural requirements in section 553 would appear to be rather minimal (i.e., the notice need not specify the content of a rule, and there is no instruction regarding what constitutes an adequate statement of basis and purpose). However, courts have elaborated upon the statutory requirements over time, formalizing the process such that it is said that it would be "unrecognizable" to the APA's drafters.¹⁴ For example, courts have required the notice to contain "sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment,"¹⁵ including disclosure of "technical studies and data upon which the agency relies" in its rulemaking,¹⁶ and directed agencies to respond, in the statement of basis and purpose, to all serious criticisms and suggestions of comments not taken into account in the final rule.¹⁷ As these judicial emendations facilitate litigation challenging rules, courts' increasing formalization of the notice-and-comment process is thought by some commentators to have disincentivized agencies from engaging in informal rulemaking and resulted in agencies instead increasing their use of less procedurally demanding regulatory alternatives.¹⁸ There is, accordingly, a debate in the administrative law literature over whether these procedural developments have so "ossified" rulemaking as to hinder federal agencies' ability to formulate policy efficiently or are a worthwhile cost of enhancing agencies' democratic legitimacy and accountability.¹⁹

13. *Id.* at 168-69. Consistent with the informational purpose of the APA informal rulemaking procedure, there is considerable evidence that agencies revise proposed rules in light of comments received. *Id.* at 210-14. In reflecting on his experience as director of the Office of Information and Regulatory Affairs (OIRA), which by executive order undertakes a cost-benefit analysis of executive agency rules before they can be finalized, Cass Sunstein states that "the importance of receiving [public] comments may have been the chief lesson I received during my time at OIRA." CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 85 (2013).

14. LAWSON, *supra* note 9, at 308.

15. *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

16. *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (internal quotation marks omitted).

17. *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003) ("Although the FCA is not required 'to discuss every item of fact or opinion included in the submissions' it receives, it must respond to those 'comments which if true, . . . would require a change in [the] proposed rule.'" (citation omitted)). As a result of the judicial amplification of the statutory requirements, a considerable number of lawsuits challenge the adequacy of agency rulemaking notices, rather than the validity of final rules. *See, e.g.*, LAWSON, *supra* note 9, at 388-403.

18. *See* KERWIN & FURLONG, *supra* note 11, at 184 (describing the "use of devices other than rules" as becoming widespread); *see also* Section I.B., *infra* (discussing studies observing a decline in notice-and-comment rulemaking over the time span of the judicial opinions elaborating the statutory requirements).

19. For a discussion of the "ossification thesis," see Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997), and for an empirical study suggesting that the thesis is overstated, see Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified?"*, 20 J. PUB. ADMIN. RES. & THEORY 261 (2009).

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The APA exempts an agency from following notice-and-comment when it finds “good cause” not to do so (defined as when the informal procedure would be “impracticable, unnecessary, or contrary to the public interest”).²⁰ In such circumstances, an agency must provide an explanation in the rule issued of the rationale for its finding.²¹ Rules in this category are adopted without notice and comment, but they are final actions, creating binding rights and obligations on private parties, with equivalent legal consequences to rules issued under the notice-and-comment process, that a person aggrieved by such action has the right under the APA to seek judicial review.²²

Interpretive rules and policy statements, along with rules related solely to agency internal procedures or organization, are also exempt from following the notice-and-comment procedure.²³ These latter actions are referred to as “nonlegislative rules” because they are said not to create legal obligations on private parties, in contrast to rules that do (such as substantive rules adopted through notice and comment, or those avoiding that process under the good cause exemption), which are referred to as “legislative rules.”²⁴ The category of nonlegislative rules is comprised of a variety of agency pronouncements beyond interpretive rules and policy statements, such as letters, manuals, and guidelines—which are often referred to under the rubric of “guidance,” given their advisory nature (although the term “guidance” is also used by agencies to refer to specific regulatory issuances).²⁵

Agency guidance does not formally impose obligations on private parties because it is expressly defined as intended to provide information about an agency’s future position on specific issues (or, as in the case of an interpretive rule, to explain an agency’s understanding of an existing rule, i.e., how it will view private parties’ obligations).²⁶ It is, therefore, not generally deemed by courts to be final agency action, which eliminates private parties’ right to judicial review of the policy under the APA (unless it has been enforced against them for noncompliance).²⁷ Accordingly, this is a crucial distinction for understanding an

20. 5 U.S.C. § 553(b)(B) (2018).

21. *Id.*

22. 5 U.S.C. § 702 (2018) (providing a “[r]ight of [judicial] review” to “a person . . . aggrieved by agency action”); 5 U.S.C. § 704 (2018) (making “[a]ctions reviewable” when there is a “final agency action for which there is no other adequate remedy in a court”).

23. 5 U.S.C. § 553(b)(A) (2018).

24. See William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001).

25. See *id.* at 1349 (criticizing the literature’s use of “guidance” as a catch-all term for nonlegislative rules).

26. See *id.* at 1322.

27. See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 411 (2007); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 343 (2011); see also Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1857, 1860 (2015) (observing that the D.C. Circuit has been “shutting the courthouse door to challenges over policy statements . . . [because] they lack the requisite finality under the APA and dismissing challenges to them

agency's regulatory strategy. If an agency adopts a policy through a legislative rule, then private parties can challenge such an action in court if they believe it to be legally objectionable without having to wait until they have incurred sanctions in an enforcement action.

It is at this point in the description of administrative law jurisprudence that the doctrinal analysis becomes opaque. On occasion, courts have held a challenged guidance (nonlegislative) action to be final action, and thereupon invalidated the action because it was not adopted through a notice-and-comment process.²⁸ When a challenge is successful, the nonlegislative action is characterized as having an effect equivalent to that of final agency action, under the courts' application of a two-part test requiring first, that the challenged action be the "consummation" of an agency's decisionmaking on the issue (i.e., "completed" and "not tentative") and second, that it have "legal consequences," or determines "rights and obligations."²⁹ But even while commentators describe courts' application of the doctrine as a muddle, they invariably conclude that the APA's finality requirement renders it extremely difficult for parties to obtain pre-enforcement judicial review of nonlegislative action, and some suggest that the trend has been to render it increasingly difficult to do so.³⁰

There are further differential legal consequences between legislative and nonlegislative rules. For instance, agencies' authorizing statutes often impose specific strictures regarding factors that an agency must consider when engaging

as unreviewable," and it "recently appears to have made it harder for agency guidance to satisfy the APA's finality requirement").

28. See, e.g., *Croplife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003) (holding that a "directive" imposing a moratorium on the use of third-party human test data in agency decisionmaking processes over pesticide registration was a final agency action); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (holding as final action a nineteen-page, single-spaced guidance document adding detailed monitoring requirements for emissions, under the Supreme Court's two conditions for action to be "final": being (i) "the consummation of an agency's decisionmaking process," having been formed over a long period of time in multiple versions and (ii) one by which "rights or obligations have been determined" or from which "legal consequences will flow," as it required states to take specific action that would affect the petitioning companies).

29. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Of course, where the litigation entails a collateral attack on a guidance document in the context of an enforcement action for noncompliance, the finality issue regarding judicial review is no longer relevant. The finality issue is presented in litigation challenging a guidance document where there has been no formal enforcement action against the complaining party.

30. David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 301, 310 (2010) (noting that "tests applied in these cases could scarcely be called emphatic or predictable" and "doctrines such as standing, finality, ripeness, and nonreviewability of agency inaction . . . combine to make it very difficult to obtain judicial review of permissive . . . agency pronouncements"); Gluck et al., *supra* note 27, at 1857, 1860 (describing how the "D.C. Circuit has been shutting the courthouse door to challenges over policy statements . . . concluding that they lack the requisite finality under the APA and dismissing challenges to them as unreviewable"); Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 374 (2008) (describing it as "difficult if not impossible to challenge agency action at any point prior to an enforcement action" under the current doctrinal standard); Seidenfeld, *supra* note 27, at 334, 376 (considering the case law distinguishing legislative and nonlegislative rules as "confusing" and "inconsistent," but concluding that "nonetheless, the dual inquiry that governs finality predisposes courts to determine that guidance documents are not final more often than is warranted").

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in rulemaking.³¹ A failure to consider those factors adequately can invalidate a legislative rule.³² Those statutory considerations can be given short shrift in guidance pronouncements because an agency need not provide a reasoned explanation for the action and, as a general proposition, can avoid judicial review, given courts' propensity not to characterize guidance as final agency action. Moreover, because agency action in such circumstances does not provide a record of the decisional process, which would permit an evaluation of the quality of decisionmaking by a court that in principle occurs when an aggrieved party challenges a notice-and-comment rulemaking, it renders it even more difficult for parties to challenge the policy substantively, were litigation permitted to proceed.³³

In addition, an agency has greater regulatory flexibility when using guidance not only due to the absence of procedural requirements for adoption but also because the policy can more quickly and easily be refashioned. One of the few constraints courts have imposed on regulatory choice of instrument is to require that an agency's reversal of a rule adopted by a notice-and-comment process must be accomplished through that same procedure.³⁴ Symmetrically, and by contrast, guidance can be reversed without following a notice-and-comment process.

That legal consequences differ across regulatory actions is key for appreciating the arcane complexity of the legal architecture given courts'

31. For example, the statutes authorizing the CFPB and the CFTC require, among other factors, consideration of costs and benefits, and the statutory requirement that the SEC consider market efficiency has been interpreted by courts to require a cost-benefit analysis as well. *See* 12 U.S.C. § 5512(b)(2)(A) (2018) (including in the standards for CFPB rulemaking consideration of "potential benefits and costs to consumers and covered persons"); 7 U.S.C. § 19(a) (2018) (requiring the CFTC to consider "costs and benefits" before promulgating a rule or issuing an order); 15 U.S.C. §§ 77b(b), 78c(f), 80a-2(c) (2018) (requiring the SEC to consider whether an action "will promote efficiency, competition, and capital formation" when engaged in rulemaking); Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 *YALE J. ON REG.* 545, 565-68 (2017) (discussing cases remanding SEC rules for failure to consider costs and benefits).

32. *See, e.g.*, *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (invalidating the SEC's proxy access rule as arbitrary and capricious for inadequate economic analysis that failed to meet the statutory cost-benefit standard); Revesz, *supra* note 31. In addition, the degree of judicial deference accorded to regulatory action differs across the two categories of rules (when judicial review is afforded to a nonlegislative rule). *See infra* notes 33 & 36.

33. The import of the Supreme Court decision in *United States v. Mead*, 533 U.S. 218 (2001), which held that a lower level of scrutiny would be applied to agency action adopted with more demanding procedures (i.e., rules issued in a notice-and-comment process as opposed to guidance documents), is uncertain, as courts have split on whether to defer to the most informal actions. LAWSON, *supra* note 9, at 621, and the Supreme Court itself, even after *Mead*, has applied the higher-level deference of *Chevron*, to nonlegislative rules. Franklin, *supra* note 30, at 320-21. In addition, an empirical study finds that agencies win more than a majority of cases even when courts apply a low deference level. *Id.* at 321 (citing a study finding that agencies prevailed in over sixty percent of cases applying the *Chevron*-predecessor *Skidmore* standard).

34. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) ("[T]he D.C. Circuit correctly read [the statute] to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.").

tendency to defer to an agency's choice of regulatory instrument.³⁵ This tendency permits an agency, through selection of the regulatory instrument, to determine when its policy decisions can more readily be subjected to judicial review. That choice does present an ostensible tradeoff, as the Supreme Court has held that the level of judicial scrutiny should vary with the form of action, such that greater deference is to be afforded to actions taken under more formal procedures, such as notice-and-comment rulemaking, compared to guidance pronouncements.³⁶ Such a tradeoff presumably would incentivize agencies to employ the notice-and-comment process to increase the probability that their policy judgments will be upheld.³⁷ But, contrarily, courts defer to agency interpretations of their own regulations (which are adopted through guidance, not notice-and-comment rulemaking).³⁸ The doctrinal development of deference to agency interpretations of agency rules, without appreciation of the real-world implications of that intellectual move, makes a hash of the presumed tradeoff between regulatory instrument (formality) and judicial review (deference).³⁹

The choice between notice-and-comment rulemaking and guidance is also frequently presented as a tradeoff between regulatory flexibility and effectiveness, on the view that the greater flexibility of guidance compared to notice-and-comment rules is offset by guidance not being legally binding. Although the formal distinction is technically accurate, as numerous commentators have noted, the reality is otherwise, rendering the ostensible distinction quite misleading. As one leading casebook puts it well:

If you are a regulated party, and the agency issues an interpretive rule or policy statement indicating its present view of the law, you will probably make serious efforts to comply with that rule even if it is not formally binding. At a minimum, the rule alerts you to the kind of conduct that the agency regards as worthy of prosecution; at a maximum, the rule may effectively dictate how the agency will

35. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1419 (2004) (finding that courts continue to refuse to review agency choices of policymaking tools).

36. See, e.g., *Mead*, 533 U.S.; *Christensen v. Harris County*, 529 U.S. 576 (2000). Magill, *supra* note 35, contends that courts provide agencies with leeway on the choice of instrument precisely because they can impose different standards of review for those instruments, and, in particular, employ greater deference to more deliberative, i.e., notice-and-comment, rulemaking. She contends that courts thereby constrain agency choice. However, to the extent that, due to the judicial doctrine regarding finality and firms' response to guidance, those other actions are not readily subject to judicial review, agency behavior will not be constrained by the doctrine that courts will apply less deference to regulatory actions adopted with less process. See text accompanying notes 27 & 29 (discussing finality doctrine) and notes 41-42& 80 (discussing firms' response to guidance).

37. See Magill, *supra* note 35. But see Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528 (2006) (contending that agencies play off the judicial approach and select notice and comment for rules that they think courts would evaluate skeptically and contending that agencies use guidance documents for rules that they believe courts would uphold).

38. *Talk America, Inc. v. Michigan Bell Telephone*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring) (referring to "the rule that we defer to an agency's interpretation of its own regulations, a rule in recent years attributed to our opinion in *Auer v. Robbins*"); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

39. See, e.g., *Perez*, 135 S. Ct. at 1211-12 (Scalia, J., concurring) (offering criticism).

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conduct its prosecutorial adjudications. The *practical effect* of such rules on regulated parties may be hard to distinguish from the practical effect of legislative rules.⁴⁰

The unvarnished reality that firms will behave as though guidance pronouncements are, in fact, binding rules is particularly applicable to financial institutions, the focus of this Article's analysis, given the repeated interaction between financial firms and regulators. This interaction facilitates regulators' ability to retaliate on numerous dimensions through supervision and examination, in addition to their ability to bring enforcement actions for noncompliance with a specific policy.⁴¹ Moreover, the licensing feature of financial regulation (i.e., regulators can shut down a bank's lines of business, as well as a bank itself) is a powerful inducement for financial institutions to comply with, rather than challenge, guidance pronouncements.

The divergent legal consequence regarding finality for notice-and-comment rules as opposed to guidance is key for understanding the financial regulation context and the sway the agencies in this study can exercise over regulated entities. A trade association can, for instance, serve as the complainant that seeks pre-enforcement judicial review of a legislative rule, thereby shielding individual financial firms to some extent from potential regulatory retaliation. It cannot do so in the guidance context, where an agency's enforcement of its policy against an entity for noncompliance is the basis for the legal challenge (i.e., there is in this context, obviously, one identifiable litigant).⁴² This firm-shielding function supplements the more conventional explanation of trade association litigation, that it solves a collective action problem where the litigation cost exceeds the benefit one firm would obtain from overturning a rule but is less than the aggregate benefit that would accrue to the industry.

As a consequence, by using guidance strategically instead of notice-and-comment rulemaking, particularly in the financial-entity regulatory context, an agency can obtain the benefit of a rule (regulated entities' compliance), without incurring the procedural costs that are legally supposed to accompany the imposition of obligations on private parties under requirements imposed on regulatory decisionmaking by Congress and courts in order to protect the public and regulated entities from arbitrary and capricious decisions. A critical issue, then, is an empirical one: to what extent can an agency shape its agenda to impose rule-like constraints on conduct while avoiding the procedural protections that are supposed to accompany such activity? But consideration of that inquiry is

40. LAWSON, *supra* note 9, at 422 (emphasis in original).

41. See *infra* note 80 for an elaboration of this point. Illustrations of this behavior in the context of CFPB guidance are provided in the Appendix.

42. For instance, trade associations have been a principal litigant challenging SEC rules. See, e.g., Nat'l Ass'n of Manufacturers v. SEC., 748 F.3d 359 (D.C. Cir. 2014) (conflict minerals disclosure rule); Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (proxy access rule); Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) (one-share-one-vote exchange rule).

not independent of another feature of administrative governance—namely, agency design, the degree to which an agency’s structure is insulated from political accountability.

B. Overview of the Agency Design Literature

Political scientists, using a principal-agent framework, have theorized that Congress creates administrative structures and processes that constrain agencies to implement Congress’s preferred policies. They have identified multiple tools by which Congress can implement its ends. For example, Congress can establish a leadership structure that increases (or decreases) an agency’s insulation from presidential control, or it can specify policy objectives more broadly or narrowly, along with providing instructions regarding considerations to be factored into rulemaking. In addition to such ex ante mechanisms, Congress can deploy ex post controls to discipline agencies, such as oversight hearings, in which it can place demands upon and publicly rebuke and embarrass agency leadership, or the appropriations process, through which it can impose budget reductions or spending restrictions on agencies adopting policies which it finds objectionable.⁴³

This Article focuses on two core mechanisms analyzed in the agency design literature, which are particularly relevant to the comparative analysis of the regulatory activity of the CFPB. First, political scientists emphasize the importance of agency independence, which is largely a function of location within the administrative state (i.e., within or outside of the cabinet bureaucracy), as well as leadership qualifications and terms, as a key issue in agency design.⁴⁴ In a comprehensive study of the politics of agency design, Lewis characterizes the motivation for independent commissions to be insulation of agency decisions from the president.⁴⁵ From a legislature’s perspective, an independent commission with partisan balance is a preferable structure, compared to an agency that is within the executive branch, for mitigating preference divergence (i.e., legislators and agencies’ goals may differ) and commitment problems (i.e., one Congress cannot bind a future Congress to ensure the durability of a policy).⁴⁶ Namely, as a congressional majority’s most severe concern with

43. Congress’s mechanisms of agency control can interact as substitutes such that use of ex ante controls could be traded off against ex post control mechanisms. See Gersen, *supra* note 8, at 338.

44. DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* (2003); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* (John E. Chubb & Paul E. Peterson eds., 1989).

45. LEWIS, *supra* note 44.

46. There is empirical support for the proposition that partisan balance requirements may reduce preference divergence. See Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018) (finding cross-party appointments are ideologically closer to their own party than co-party appointees are to the president and concluding that a partisan balance requirement constrains the president, ensuring divergent views are expressed in agency deliberation that facilitates congressional monitoring); Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory*

respect to preference divergence would relate to an agency whose decisionmaking is dominated by the president of the opposing political party, agencies created under divided government are more likely to be independent commissions situated outside of the executive branch.⁴⁷

Second, in a canonical contribution, McCubbins et al. advanced the thesis that administrative law plays a pivotal function for congressional control of agencies.⁴⁸ They focus most specifically on the APA's notice-and-comment requirement, contending that it mitigates the principal-agent problem of information asymmetry, in the following three ways: 1) most directly, it compels an agency to obtain and then provide relevant information regarding the rulemaking in public; 2) it empowers constituents both to influence policy and, when an agency does not adopt the constituents' and hence, Congress's, preferred policy, to seek the policy's reversal through litigation and/or by notifying Congress; and 3) upon receipt of such alerts, Congress can thereupon apply ex post oversight and sanctions, such as budgetary restrictions, that can be a powerful tool for affecting agency conduct. The setup of the APA, in short, is conceptualized as a mechanism to discipline agencies and mitigate preference divergence between an agency and Congress. This conceptualization is the foundation of the question this Article seeks to answer concerning whether there are institutional constraints on agencies' choice of regulatory instrument: can we identify a relation, specifically an inverse relation, between agencies' use of notice-and-comment rulemaking and their structural independence of legislative control?

McCubbins et al.'s conceptualization of the APA as a mechanism for mitigating the principal-agency problem of the administrative state is not, however, without its skeptics, particularly among administrative law scholars who question whether Congress exercises meaningful control over agencies

Partisan Requirements on Regulation (Am. Law & Econ. Ass'n Annual Meetings, Paper No. 73, 2007) (examining forty years of votes of commissioners of the Federal Communications Commission and finding a "profound" effect of commissioner ideology on votes, "corroborating that partisan requirements genuinely constrain presidents," and that cross-party appointees appear to be more extreme than own-party appointees, "evidenc[ing] congressional influence in the selection and oversight" of the agency).

47. LEWIS, *supra* note 44 (finding a positive correlation between the creation of independent agencies and the size of the majority of the opposition party in the House); see DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATED POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 99, 135 (1999) (finding that Congress accords less discretion to the executive branch under a measure that includes creation of independent agencies as a constraint on discretion, under divided government, measured by both chambers' being controlled by party opposite of president); Patrick Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637 (2017) (criticizing Lewis's study, as the size of the majority of the opposition party in the House is not significant in their analysis, but finding that the creation of independent agencies is statistically significantly positively related to the size of the majority of the opposition party in the Senate).

48. McCubbins et al., *supra* note 1. In referring to the preference of Congress, where an issue is controversial such that preferences across members starkly diverge, the terminology should be understood as referring to the preference of the enacting coalition, congressional majority, or leadership, according to the context.

through the APA as theorized.⁴⁹ Moreover, as Gersen contends, McCubbins et al. overstate Congress's ability to control agencies, because courts accord agencies significant leeway to implement policy without following the safeguards of notice and comment, thereby subverting Congress's administrative design.⁵⁰ But the divergent perspective of McCubbins et al. and their critics is ultimately a disagreement over an empirical claim regarding the relative effectiveness of agency design at producing accountable decisionmaking. Not surprisingly, there is now an empirical literature that investigates this precise issue.

Much of the empirical literature directed at testing the significance of the two key features of agency design of interest—*independence* and *administrative use of notice-and-comment rulemaking*—consists of studies seeking to explain design choice in relation to political conditions (e.g., divided government) when agencies are created. The idea informing such a research agenda is that an agency's structure is specified at the time of its creation and rarely changes thereafter, given the stickiness of legislation. Lewis finds that new agencies are more likely to be independent (measured in terms of location—*independent commission or within the executive branch*—and fixed terms and restrictions on leadership, such as *partisan balance or expertise requirements*) when formed under divided government with large majorities in the House.⁵¹ Corrigan and Revesz find, however, that new agencies are more likely to be independent (as measured by a different set of organizational factors) when formed under divided government with large majorities in the Senate, and not the House.⁵² Nevertheless, the import of the two studies is similar, as they suggest that the strength of a congressional majority facilitates adoption of an organizational structure by which Congress can exert greater control, compared to that of the president, over an agency.

Lewis further finds, as would be intuited, that agencies created by executive order (fifty-seven percent of the data set) are more likely to be organized under presidential control (i.e., not independent) and dramatically so, compared to those created by statute, which are more likely to be independent commissions.⁵³ Both Lewis and Moe also provide, in support of the contention regarding presidential preference for non-independent agencies, anecdotes of maneuvering over the structure of proposed new agencies, in which presidents consistently

49. See Glen O. Robinson, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process*, 75 VA. L. REV. 483, 484-85 (1989).

50. Gersen, *supra* note 8, at 339, 344.

51. LEWIS, *supra* note 44.

52. Corrigan & Revesz, *supra* note 47, at 680 (finding Senate majorities positively associated with creating multimember agencies, agencies with partisan balance requirements, and litigation authority). The seven factors they identify with agency independence are described in Part II.A, *infra*.

53. LEWIS, *supra* note 44, at 126.

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seek executive control (by agency location within the executive branch) in contrast with congressional advocacy for independent commissions.⁵⁴

In addition to studies analyzing the political conditions under which agencies are created, there is a strand in the literature that seeks to demonstrate influence by Congress (or the president) on agency policies. The bulk of those studies analyze the decisionmaking of a single or a few agencies, and, more importantly, few seek to examine the control mechanisms of agency design that are the focus of this Article—agency independence in relation to administrative procedure, that is, the form in which regulatory action is undertaken.⁵⁵ The research questions of two recent studies, by Berry and Gersen and by O’Connell, are most on point for this Article’s focus, as they investigate the relation between agency independence and activity.⁵⁶

Berry and Gersen examine agencies’ awarding of grants to congressional districts from 1984 to 2007, contending that the allocation of funds is a constant decisional context that better permits a comparison of the impact of differences in agency structure on an agency’s responsiveness to political actors than other forms of agency decisionmaking.⁵⁷ They find that there is a presidential effect: districts receive more funds when their representative is a member of the president’s party, when the agency is less independent (as measured by the proportion of political appointees in the agency’s upper echelons). However, for the most independent (i.e., highly insulated) agencies, the representative being a member of the president’s party has no effect on district funding.⁵⁸ They also find congressional influence: there is a significantly positive effect on a district’s funding when its representative is a member of the majority party and the agency has a higher number of Senate-approved appointees.⁵⁹

Although the precise mechanism cannot be identified, Berry and Gersen suggest that principals (Congress and the president) are selecting what they term

54. *Id.*; Moe, *supra* note 44.

55. For a list of such studies, see Christopher R. Berry & Jacob E. Gersen, *Agency Design and Distributive Politics*, 126 *YALE L.J.* 1002, 1006 n.8 (2017).

56. *See id.*; Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 *VA. L. REV.* 889 (2008).

57. Berry & Gersen, *supra* note 55, at 1014, 1018.

58. As the proportion of political appointees (their proxy for presidential control and hence, non-independence) increases by one standard deviation (twenty-two percent), the funds received increase by nearly seven percent when a district moves into the president’s party. *Id.* at 1031-32. There was no effect on district funding by having a representative who was a member or chair of the committee with jurisdiction over an agency.

59. The findings are not robust, however, to alternative independence variables. They mention testing variables that distinguish agencies by whether they were founded during divided government or the number of branches controlled by the Democratic Party at founding, none of which evince the same relation of political responsiveness as the appointee variable. But they do not test variables identifying specific structural features of agencies. Berry & Gersen, *supra* note 55, at 1035. Agencies that are governed by boards or commissions are found to provide more funding to districts of members of the majority party (but not the president’s party), but the finding’s significance is discounted by the authors because there are only four such agencies in the data set, and a commission structure is “virtually coterminous” with other independence variables, such as fixed terms and limits on the president’s removal power (which are not separately investigated). *Id.*

the “‘right type’ of appointee” whose “preferences [are] sympathetic to the principal.”⁶⁰ Namely, agencies with more appointees subject to Senate confirmation would appear to be more responsive to the majority party in the Senate, while agencies with fewer such appointees would appear to be more responsive to the party of the president, as they distribute more funds, respectively, to districts represented by members of the party of their appointer.⁶¹ Berry and Gersen therefore conclude that agency design matters. However, there are few independent commissions in the sample, which suggests that Congress does not use such a structure when it is creating an agency with grant-giving authority, and as a consequence, that the findings may not be relevant for such agencies. Moreover, their findings are not robust across different measures of agency insulation, and in particular, more straightforward definitions of agency independence either have no significant correlation with grants or cannot be satisfactorily examined given the data set, further suggesting that the generalizability of the study to commission and non-grant-giving agencies is problematic.⁶²

The second study, by O’Connell, investigates both the number and form of reported (legislative) rulemakings by the fifteen cabinet departments and thirty-two executive and independent agencies from 1983 to 2003, with a series of hypothesis tests directed at a subset of five independent commissions and five executive branch entities.⁶³ She examines three types of legislative rules: rules adopted by notice-and-comment, interim final rules, and direct final rules. Interim rules are typically adopted under the APA “for cause” exemption to notice-and-comment rulemaking, and are effective immediately on publication, with comments, if solicited at all, to be received *ex post*. A direct final rule is a

60. *Id.* at 1038.

61. *Id.* at 1033.

62. The methodology has limitations. For instance, Berry and Gersen use district-by-agency fixed effects to address the potential confounding effect of agency mission, as opposed to agency structure or political control, that some agencies’ grants will disproportionately go to one party’s districts, i.e., Department of Housing and Urban Development grants tend to go to urban areas, which are more likely to elect Democrats. However, while technically proper, use of a district fixed effect to address the difficulty that agency missions coincide with districts represented by particular parties, is less informative than including specific variables related to districts and agency missions, such as urbanization or demographic data. Besides providing more granular controls, separately including such variables can control for district changes over time, whereas fixed effects treat district characteristics as unvarying over time. This is an important distinction because, for the research design to work, characteristics of a district in terms of what level of grant is appropriate must not have changed when it elects an individual from a different party. Yet it would seem equally, if not more, plausible that a change in the political party of a district’s representative is a function of changing district characteristics which could affect a grant, such as, a change in demographic composition. Such an effect is obscured by the use of a fixed effects approach. Finally there is a relation between agency structure and outcomes that would appear to open the findings to question: agencies that have fewer political appointees also tend to be entitlement agencies, such as the Department of Veterans Affairs and Social Security Administration, which allocate funds (grants) to designated individuals, Berry & Gersen, *supra* note 55, at 1025, which limits such agencies’ ability to adjust grant levels as a district’s representation shifts. Such a phenomenon could bias the results to find less responsiveness in less politicized agencies when it is the grant formula, and not the proportion of political appointees, that is affecting the outcome.

63. O’Connell, *supra* note 56.

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rule that is effective on publication but voided upon receipt of adverse comments thereafter, and thus it is expected to be used for noncontroversial, technical subjects.⁶⁴ While all three types of rules are “legislative” rules, the latter two lack the democratic legitimacy inherent in notice-and-comment rules, as the reasoned deliberation that follows the collection of information from affected parties and facilitates, in principle, congressional efforts to maintain control over an agency’s decisions, is absent.

One of O’Connell’s findings would appear to have pertinence for the empirical analysis of this study. She presents data suggesting that the proportion of notices of proposed rulemaking (regulatory filings that indicate an agency’s plan to engage in a notice-and-comment rulemaking), compared to legislative rules finalized without obtaining comments (direct final rules and interim final rules), has declined over time, although she notes that an “overall” lower proportion of independent agencies’ rulemaking took the form of direct and interim final rules compared to that of executive branch agencies.⁶⁵ Accordingly, when analyzing differences in agencies’ use of specific regulatory instruments in this study, it will be necessary to control for a potential time trend. Otherwise, any finding of a difference across agencies could be mistakenly attributed to organizational structure when it was a temporal effect.⁶⁶

Despite their focus on the impact of agency structure on decisionmaking, neither the Berry and Gersen nor the O’Connell studies go to this Article’s inquiry. The agency decision that Berry and Gersen study does not permit examination of whether agency structure affects the *form* of decisionmaking, that is, whether a more insulated agency will behave so as to attenuate, rather than facilitate public and congressional monitoring of its decisions. Using grant decisions has the benefit, as Berry and Gersen observe, of facilitating cross-

64. Direct final rules have no statutory imprimatur, as such rules do not fit into the APA’s enumerated exemptions, but rather, their use is a practice devised and encouraged by the Administrative Conference of the United States to expedite the adoption of noncontroversial rules. *See id.* at 903. In contrast to the treatment of adverse comments on direct final rules, comments on interim rules need not be taken into account, and typically, interim rules are left as is, in effect becoming final rules. *Id.*

65. *Id.* at 930, 933, 935. O’Connell does not provide statistical tests of whether there is such a trend over time or whether the temporal pattern differs across agency structure. It should also be noted that the number of proposed rulemaking notices per year is not one of continuous decline, but rather, there is an upward surge in the 1990s, and the activity in the decade before and after the surge decade appears to be relatively constant around a level that is only slightly lower in the post-1990 than pre-1990 period, apart from a sharp drop in 2001 that rebounds thereafter. *Id.* at 931 charts 1 & 2.

66. O’Connell also found significant differences in the number of completed notice-and-comment rulemakings dependent upon the political environment, i.e., whether the president was a Democrat or Republican or whether there was unified or divided government. *Id.* at 956-57; *see also* Jason Webb Yackee & Susan Webb Yackee, *Divided Government and U.S. Federal Rulemaking*, 3 REG. & GOVERNANCE 128, 134, 138 (2009) (studying notice-and-comment rulemaking by forty agencies from 1985 to 2005, and finding such activity significantly decreased by executive branch agencies in periods of divided government). Because all of the post-Dodd-Frank years when agency activity is investigated in this study, which commences with the establishment of the CFPB, occurred under a Democrat as president and divided government, whether the political environment would differentially impact agencies with differing degrees of independence from Congress could not be investigated.

agency comparisons, but it also restricts the question that can be answered regarding the impact of agency structure.

O’Connell, by contrast, is examining different forms of agency decisionmaking. But when the issue concerns the relation between agency structure and rulemaking, the more critical comparison, in my view, and hence the focus of this Article, is between the use of legislative and nonlegislative rules, given the significantly different legal consequences that accompany the two types of regulatory activity.⁶⁷ Namely, while interim rules, direct final rules and interpretive rules are all issued without engaging in notice-and-comment, in contrast to interpretive rules, interim and final rules are final agency action. Accordingly, all of the rules in O’Connell’s study offer aggrieved parties the ability to seek judicial review under the APA, and lawsuits involving interim and final direct rules would subject those agency actions to any considerations specifically required by Congress (i.e., meeting a cost-benefit standard).⁶⁸ In short, the considerable advantage of the Unified Agenda, O’Connell’s data source, is its comprehensive coverage of all federal agencies, but it comes at a cost, in this instance, of including only legislative rulemaking. As a consequence, O’Connell’s data set does not permit an assessment of the key dichotomy in agency instrument choice which is the focus of this Article’s inquiry, the implementation of policy through the use of legislative versus nonlegislative rulemaking.⁶⁹

II. Research Design: Comparing Agency Independence across the CFPB,

67. See *supra* text accompanying notes 27-33.

68. However, interim final rules adopted under the APA’s “good cause” exemption to notice-and-comment rulemaking—a determination made by the agency—are exempt from compliance with certain federal statutes, such as the Regulatory Flexibility Act, which requires agencies to detail the impact of a rule on small businesses. 5 U.S.C. § 601(2) (2018) (defining rule to which statute applies as one for which an agency must publish a notice of proposed rulemaking). Of course, guidance and policy statements are also exempt from such compliance.

69. A few studies have examined agencies’ use of guidance rather than rulemaking, with differing conclusions concerning whether agencies behave strategically in making such choices, but because none of these studies seek to associate agency structure with policymaking choice, they are not discussed. See, e.g., James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 LAW & CONTEMP. PROBS. 111 (1994) (concluding that the policymaking choice of the Environmental Protection Agency depends on a variety of factors, such as the cost of obtaining agreement among interested parties on a policy or likelihood of judicial review, such that, guidance is used when negotiation cost or probability of judicial monitoring is high, which are deemed to indicate a strategic choice to evade congressional constraints); Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010) (finding policymaking choice not to be strategic, in a study with various samples consisting of four, ten, or fifteen executive departments and one independent agency, due to the following findings: agencies do not use guidance significantly more in times of divided government than unified government; agencies do not increase guidance at the end of a president’s second term; the number of significant guidance issued is far less than the number of significant rules; and the Bush administration revised only twelve percent of significant guidance documents issued by all previous administrations). In contrast to Raso, this Article cannot similarly identify significant guidance because only executive agencies during the George W. Bush administration were required to provide such characterizations of the guidance they, or their agencies, previously issued, under his Executive Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007), which was revoked by President Obama.

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CPSC, CFTC, and SEC

This study's research design compares the use of legislative and nonlegislative rules by four agencies, the CFPB, CPSC, CFTC, and SEC, in order to analyze the relation between agency independence and choice of instrument for implementing regulatory policy. After introducing the key indicia of agency independence, the section provides the rationale for the agencies to be compared. It then identifies their common and divergent indicia of independence.

A. Criteria of Agency Independence

The most comprehensive effort at identifying agency independence, by Datla and Revesz, enumerates seven distinguishing characteristics.⁷⁰ By defining independence along a continuum of combinations of those features, they seek to replace the prevalent approach in the legal literature, which defines independence by reference to whether the agency has a multimember structure with commissioners serving fixed terms with removal only for cause, with a more nuanced one.⁷¹ Datla and Revesz's seven indicia for assessing agency independence are:

- (i) statutory removal protection;
- (ii) fixed terms for agency leadership (referred to as "tenure specified");
- (iii) multimember (versus single-headed) agency structure;
- (iv) partisan balance requirements for multimember agencies;
- (v) authority to conduct litigation without having to go through the Department of Justice (DOJ);
- (vi) authority to bypass centralized review by the executive branch agency, Office of Management and Budget (OMB), in submitting budget requests to Congress, and in clearing congressional testimony or proposed legislation; and
- (vii) formal adjudication authority.⁷²

In addition to providing a definition of independence that is both more comprehensive and functional, Datla and Revesz's multifactor approach has a further benefit for this Article's inquiry. By isolating those characteristics that the four agencies in this study share, and more particularly, those that the CFPB does not share with the other three agencies, the analysis can focus on specific

70. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 775 (2013).

71. See, e.g., Gersen, *supra* note 8, at 347 (defining the benchmark of independence as leadership serving a fixed term that cannot be removed by the president except for cause); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16-17 (2010) (providing numerous citations and concluding that "[a]ccording to the existing legal literature and case law, the defining hallmark of an independent agency is that it is headed by someone who cannot be removed at will by the president but instead can be removed only for good cause"). The political science literature takes a more functional approach and considers additional factors beyond that of the legal literature, such as location in the bureaucracy. E.g., LEWIS, *supra* note 44.

72. See Datla & Revesz, *supra* note 70, at 786-809.

factors of independence. Namely, to the extent that a significant difference in choice of regulatory instrument between the CFPB and the other cognate agencies is identified, it can be inferred that the CFPB's missing characteristic(s) explain the observed difference. There is a wrinkle, however, in this approach. Datla and Revesz do not include as an indicium of independence a further key distinguishing feature among the agencies included in this study: whether an agency is subject to the congressional appropriations process.⁷³ Accordingly, the analysis will not be able to strip out an effect of the CFPB's rather distinctive financing arrangement from the Datla and Revesz independence characteristics.

B. Selection of Comparable Agencies

To study the relation between agency independence and regulatory strategy, a set of cognate agencies, albeit with differing degrees of structural independence from politics, were identified by two critical criteria. First, the agencies need to share a broadly similar regulatory mission in order to control for differences in jurisdictional subject matter that could require different regulatory strategies, which would muddy the ability to identify a link between structure and decisionmaking. As the CFPB is the focus of the inquiry because of the unusually enduring controversy over its establishment years after its statutory creation, the comparison agencies are drawn from regulators of financial and consumer products. Second, the agencies cannot be executive branch agencies.

Executive agencies are excluded for two related reasons. First, because they are subject to presidential control, they are self-evidently noncomparable in degree of political insulation to nonexecutive agencies such as the CFPB. Second, the rationale for the Article's investigating the relative use of notice-and-comment rulemaking in relation to agency structure is the view of that process as a critical mechanism, given its information-revealing properties, by which Congress exercises control over agencies. By contrast, the president does not need such a mechanism to obtain information regarding agency policy given his immediate control over, and potentially constant communication with, the leadership of executive branch agencies. Accordingly, the incentive to use particular regulatory strategies fundamentally differs between independent and executive branch agencies. Although the combined criteria reduce the number of agencies whose activity can be investigated, they ensure that the analysis will provide a cleaner test of the impact of agency structure on the form of an

73. Datla and Revesz include a tangentially related item that agency budgeting bypasses executive review (item (vi) in the list in the text), which is true as a matter of course for agencies not subject to appropriations, but characterizes a broader set of agencies and thus better serves their purpose both as the number of administrative entities financed outside of the appropriations process is small, and as their principal focus, in contrast to that of this Article, is on measuring agency independence from presidential, rather than congressional, control.

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agency's policymaking than would an analysis including both executive and nonexecutive branch agencies and those with noncognate missions.

The criteria led to the selection of three agencies to compare with the CFPB: the CPSC, CFTC, and SEC. The choice of the CPSC seeks to match agency mission and timing. Namely, the CPSC is an agency with an analogous mission to that of the CFPB: protecting consumers from products deemed harmful. In addition to having cognate missions of consumer protection, upon establishment, both agencies assumed regulatory responsibility for numerous statutes that had been within the purview of a number of existing agencies and executive departments. But while the originator of the idea to create the CFPB had presented the CPSC as the model animating her proposal,⁷⁴ it has a conventional organizational structure for an independent agency, and so is subject to greater congressional control than the CFPB. It therefore permits a well-matched institutional contrast to the CFPB.

An advantage of comparing the CFPB and CPSC is timing in the life cycle of an agency: an agency's activities in its initial years of operation might well vary from those at a more mature stage. It will have to make a host of judgments at the outset regarding its authorizing statutes, including whether to revise any inherited rules and interpretations, as well as issues of first impression under those statutes, which will differ from issues confronted by an established regulator. However, given the forty-plus years separating the two agencies' creation, norms of regulatory practice could have evolved, which would diminish the appropriateness of the comparison. Accordingly, in addition to examining the CPSC's activity in the startup phase, its activity over the identical interval (2011 to 2016) as the initial five years of the CFPB's operation is also investigated.

To the extent that there is a significant difference in instrument choice between the CPSC and CFPB in their initial years, then the second comparison should isolate whether any divergence is due to evolving administrative law conventions rather than a difference in agency structure, by indicating whether the CPSC's usage is consistent over time.⁷⁵ Motivating this concern is commentators' contention that in the 1970s, notice-and-comment rulemaking was less well established than in subsequent years.⁷⁶ If that contention is

74. Elizabeth Warren, *Unsafe at Any Rate: If It's Good Enough for Microwaves, It's Good Enough for Mortgages: Why We Need a Consumer Financial Product Safety Commission*, DEMOCRACY (Summer 2007), <https://democracyjournal.org/magazine/5/unsafe-at-any-rate/> [<https://perma.cc/3NPH-BVLZ>].

75. A consistency comparison for CPSC activity over time is particularly valuable for validating its comparability with the CFPB, as the statute creating the CPSC contained an innovative process for standard-setting that deviated from the APA to provide greater public participation. This experiment was judged a failure (as was the agency in its early years of operation) and the relevant provisions were repealed in 1981. See Moe, *supra* note 44.

76. See Gluck et al., *supra* note 27, at 1792 n.3 (“[T]he Supreme Court’s 1973 decision in *United States v. Florida East Coast Railway Co.* . . . which held that agencies need only use formal, trial-like proceedings in limited circumstances . . . turned agencies to notice-and-comment rulemaking as their primary mode of action.”).

accurate, then consistency in agency use across the two time intervals would not simply mitigate potential concern regarding comparability of agency practice over time but would also add confidence to the import of finding a greater use of informal rulemaking by an agency commencing activity in the 1970s compared to one launched in the 2010s. Because the view that notice-and-comment rulemaking was less well established in the 1970s would predict that the direction of use should be lower in the 1970s, the opposite finding would bolster confidence in interpreting divergent practices across the agencies as indicative of agency design affecting instrument choice. A finding of no difference in CPSC practice over the two intervals could also suggest that there is no or an inconsequential life-cycle effect, or that any such effect is washed out within five years of operation.

The CFPB and CPSC are agencies with comparable missions directed at a different type of product—financial versus physical—and there is a further potentially salient difference that might influence regulatory decisionmaking beyond any difference in organizational structure. Creating the CFPB, as earlier noted, was a component of Dodd-Frank, comprehensive legislation in which Congress placed new and considerable regulatory demands on numerous existing financial market regulators as well as the new entity, in response to the global financial crisis of 2008-09. Accordingly, in an effort to control for potential differences in regulatory climate as well as product, the analysis also includes the SEC and CFTC. Those two agencies' jurisdictional scope encompasses financial products traded in retail markets, and their stated regulatory mission to foster markets and adopt rules protecting market participants parallels that of the CFPB.⁷⁷ In addition, in contrast to the CPSC, those agencies were confronted with extensive regulatory demands through specified delegations in Dodd-Frank, as was the CFPB. But their organizational structure matches that of the CPSC, and hence they provide additional benchmarks for evaluating the CFPB's regulatory decisionmaking.

The CFTC provides a further comparative benefit, for it was created in the 1970s, shortly after the establishment of the CPSC. It thereby has a dual function, as both a life cycle and political environment comparator with the CFPB. In addition, analyzing the CFTC's activity in both time periods tests the consistency of its choice of instrument. In the first period, the CFTC operated as a new agency undertaking its initial statutory implementation, and later, as an

77. See Commodity Exchange Act of 1936 § 3, 7 U.S.C. § 5 (2018); Securities Exchange Act of 1934 §§ 2, 5, 10(b), 15 U.S.C. §§ 78b, 78e, 78j(b) (2018). Both the SEC and CFTC have broader regulatory missions than the CFPB, regulating trading markets and market professionals, not all of which relate to retail investments, with the bulk of the products regulated by the CFTC traded by sophisticated institutions. But even if the CFTC is considerably less oriented toward individual consumers than the CFPB, it provides a useful comparison, because it serves as a control for Dodd-Frank mandates in assessing policymaking choices, while it also functions as an agency life cycle control. I do not analyze activity following the creation of the SEC because it was established in 1934, prior to the APA's enactment, and hence before the informal rulemaking process was devised, rendering the SEC's initial regulatory activity not comparable to that of agencies founded in a later era.

established agency, it confronted the extensive demands of Dodd-Frank. These circumstances were simultaneously experienced by the CFPB.⁷⁸

An additional advantage of comparing the four agencies for the statistical analysis is that they all exercise similar control over regulated entities, either by product gatekeeping (CPSC and CFPB) or ongoing supervisory relationships with regulated entities (CFPB, CFTC, and SEC).⁷⁹ These are regulatory contexts in which guidance can, for all practical purposes, function as a rule for regulated entities, as the earlier quoted Lawson casebook observed, because such entities might well perceive an existential threat from noncompliance as they are at risk of being put out of business by an enforcement action banning a core product or imposing punitive damages with possibly fatal reputational harm.⁸⁰ Hence, there need not be concern in interpreting divergent relative use of guidance and notice-and-comment rulemaking across the four agencies as due to guidance having a differential impact on the behavior of regulated entities, as they should be equally

78. The life cycle comparison between the CFTC and CFPB is not as proximate a match as that between the CPSC and CFPB because the CFTC succeeded one agency operating under one statute, whereas both the CFPB and CPSC consolidated regulatory authority that had been dispersed over a number of entities. The need to manage regulations adopted by diverse agencies implementing dissimilar statutes could call for a different regulatory response than that of the CFTC, with a more homologous predecessor and only one statute to enforce. However, the scope of the CFTC's regulatory jurisdiction was vastly expanded at its founding beyond that of its predecessor, to include new financial derivative products and not solely agricultural commodities, whose heterogeneity would suggest a regulatory context whose requirements more closely parallel those arising from the consolidation of disparate regulatory authority in the CFPB and CPSC.

79. The Office of Comptroller of the Currency (OCC) also regulates entities regulated by the CFPB, with similar supervisory relationships, and previously had responsibility for some consumer financial product protection legislation that Dodd-Frank transferred to the CFPB. But it is excluded from the research design because as an executive branch agency, it is subject to the president's direct sphere of control, rendering it structurally accountable to one of the political branches. Hence, it operates under a different incentive system regarding regulatory choices.

80. See Raso, *supra* note 69, at 803 (arguing that agencies obtain more voluntary compliance from guidance when they have "gatekeeping power over private parties," such as the U.S. Food & Drug Administration, as that power provides "strong incentives" to regulated entities to cooperate). Moreover, financial institutions can be subject to existential threats from cross-agency regulatory action, which exacerbates a perceived need to comply rather than challenge nonlegislative action: namely, noncompliance with CFPB guidance could result in retaliation from a financial institution's prudential banking supervisor, and not solely the CFPB. This is not merely a speculative issue: a telling example involves the CFPB's actions regarding Ally Bank. The CFPB director serves on the Federal Deposit Insurance Corporation Board (FDIC) and the Financial Stability Oversight Council (FSOC), which is comprised of the heads of all of the financial regulatory agencies, and both institutions have important decisional authority over regulated firms. 12 U.S.C. §§ 1812, 5321(b) (2018). Ally Bank settled, rather than challenged, a questionable enforcement action by the CFPB that was based on a problematic guidance document, due to the threat of adverse retaliatory action by other supervisory agencies. Paul Sperry, *Obama Bullied Bank to Pay Racial Settlement Without Proof: Report*, N.Y. POST (Feb. 7, 2016, 5:59 AM), <https://nypost.com/2016/02/07/obama-bullied-bank-to-pay-racial-settlement-without-proof-report/> [<https://perma.cc/NHC4-LA7E>]. At the time of the CFPB action, Ally needed permission from the Federal Reserve (Fed) to remain a financial holding company in order to retain lines of business that were essential for its survival. *Id.* It was also under review by the FDIC for how well it was complying with the Community Reinvestment Act. *Id.* CFPB lawyers met with Fed and FDIC officials and thereafter informed Ally that the company would be assured favorable treatment by the Fed and FDIC were the CFPB action "prompt[ly] and robust[ly] resolved." *Id.* The guidance at issue, which concerns the indirect financing of automobile dealer loans, is discussed in the Appendix.

motivated to comply rather than challenge policies implemented through guidance by any of the agencies.

C. Comparison of Agency Independence Characteristics

The CFPB, CFTC, CPSC, and SEC share four of Datla and Revesz's criteria, diverging on (i) statutory removal restrictions, (ii) multimember structure, and (iii) the partisan balance requirement. The CFPB lacks a multimember structure and, correlatively, a partisan balance requirement. The SEC and CFTC commissioners have fixed terms of office but no formal protection as the agency authorizing statutes have no explicit removal restrictions. However, there would appear to be no practical difference created by the omitted language, as courts and commentators consider SEC (and other independent agency) commissioners to have removal protection despite the statutory lacuna.⁸¹ Apart from the independence characteristics identified by Datla and Revesz, there are a few additional, agency-specific structural differences regarding the agencies' insulation from political accountability to be noted for their potential impact on the empirical analysis. Of these further differences, the most consequential has already been mentioned: the CFPB is not subject to the appropriations process.

81. See, e.g., *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (deciding the case with the understanding that SEC commissioners can be removed only for cause); Datla & Revesz, *supra* note 70, at 789, 833 (citing both securities law scholar and former SEC Chairman William Cary's view of constraint on the president from removing a commissioner despite a lack of a statutory limitation and a federal appellate court decision implying for-cause removal protection for SEC commissioners). Moreover, no president would appear to have behaved differentially toward commissioners of agencies with statutory protection and those without it. The explanation Datla and Revesz advance for such behavior is caution against having to litigate removal, in conjunction with political costs that would accompany any removal. *Id.* at 787, 789. Vermeule describes a constraint on other actors to treat such commissioners as having removal protection as a "convention," an "unwritten political norm," regarding agency independence. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165-66 (2013). The practical implication of both explanations is the same: there is no meaningful difference regarding removal protection for commissioners of multimember agencies located outside of the executive branch whether operating under statutes that are explicit or silent on the subject. It should further be noted that the statutory formulation of the removal restrictions varies somewhat for the CFPB and CPSC, but as Datla and Revesz discuss, such differences are of "limited practical effect" given the absence of judicial interpretations of specific removal clauses. Datla & Revesz, *supra* note 70, at 788. This interpretation is supported by the Supreme Court's very broad interpretation of "good cause" removal in *Bowsher v. Synar*, 478 U.S. 714, 729 (1986) (noting that statutory removal for "good cause" defined as "inefficiency, neglect of duty or malfeasance" permits removal for any "actual or perceived transgression of the principal's will") and *Morrison v. Olson*, 487 U.S. 654, 692 (1988) (stating that "good cause" permits removal for an officer "[not] competently performing his or her statutory responsibilities").

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1. Consumer Financial Protection Bureau

The establishment of the CFPB consolidated in one agency functions that had previously been allocated across seven federal agencies.⁸² As earlier mentioned, it was given a comparatively anomalous autonomous structure for a U.S. administrative agency.⁸³ It is organized analogously to a cabinet department in that it has a single director, but, in contrast to cabinet department secretaries, who serve at the president's pleasure, the CFPB director has statutory removal protection.⁸⁴ The agency is further independent of the executive by location, as it was placed within the Federal Reserve (Fed) System. Despite its location, Fed Board governors may neither intervene in the CFPB's affairs; review or delay implementation of its rules; nor consolidate the bureau, its functions, or its responsibilities with any other office or division of the Fed.⁸⁵

An equally, if not more important, feature that is unique to the CFPB is its funding arrangement: it is independent of both Congress and the president, for it is not subject to the annual appropriations process. The director sets his own budget, which is funded by the Fed (capped at twelve percent of the Fed's total operating expenses).⁸⁶ There are a few other administrative agencies that are not subject to the appropriations process, but they tend to be prudential regulators of financial institutions and have multimember leadership structures, such as the Fed and the FDIC, and far narrower, technical missions.⁸⁷ Both of these

82. 12 U.S.C. § 5491 (2018); Leonard J. Kennedy et al., *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1142-43 (2012).

83. A number of commentators have highlighted the CFPB's anomalous structure. See Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 703-09 (2013); Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25, 75-83 (2014); Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856 (2013).

84. 12 U.S.C. § 5491(b)(1), (c)(3) (2018).

85. *Id.* § 5492(b)(2).

86. *Id.* § 5497(a), (c).

87. See Datla & Revesz, *supra* note 70, at 793 tbl.3 (listing agencies with multimember structures); U.S. GEN. ACCOUNTING OFFICE, GAO-02-864, SEC OPERATIONS: IMPLICATIONS OF ALTERNATIVE FUNDING STRUCTURES 11-12 (2002) (listing agencies with truly independent funding). The OCC is not a multimember organization, but in contrast to the CFPB, the Comptroller serves at the pleasure of the president with no restrictions on removal and, like the Fed and FDIC, it has a more technical mission than the CFPB, being a prudential regulator. The CFPB's financing arrangement was explained in the Senate report accompanying the bill that became Dodd-Frank as necessary to avoid political pressure in the appropriations process that was said to have limited the effectiveness of the Office of Federal Housing Enterprise Oversight (OFHEO), which regulated the government-sponsored entities (GSEs) securitizing and guaranteeing mortgages. S. Rep. No. 111-176, at 163 (2010). The comparison is a rationalization of a decision made for other ends, as the agencies have nothing in common. OFHEO's function—overseeing the GSEs—was not allocated to the CFPB, so whatever pressure OFHEO experienced would not be relevant to the CFPB's activities. In addition, OFHEO's successor agency, the Federal Housing Finance Agency, created in 2008 with a single-director, independently-financed structure, in contrast to the CFPB, has a far more circumscribed mission as a prudential regulator, as did OFHEO, paralleling other independently funded financial agencies. Moreover, as the GSEs are now operating in receivership, their extensive political lobbying activities and lavish campaign contributions have ended.

differences from the CFPB's structure—multimember leadership and narrow, technical mission—are critical for appreciating how those agencies' setup could maintain greater political accountability despite Congress's ceding budgetary authority, in contrast to that of the CFPB.

First, in contrast to the CFPB's single-director structure, the prevalent structure for agencies exempt from the appropriations process is a multimember agency. That feature is consistent with multimember commissions tending to be preferred by Congress when establishing an agency under divided government. No doubt, that preference is due to an expectation that such an agency will be more responsive to its objectives than those of the president, and such an expectation could provide as well the rationale for entrusting an agency to act with financial independence.⁸⁸ Second, and more important, such agencies also tend to have a narrow technical mission—prudential regulation and the setting of monetary policy. Circumscribing the scope of agency authority mitigates accountability issues and thereby limits potential abuse otherwise generated by independence from the appropriations process.⁸⁹ The CFPB's expansive grant of authority to “ensur[e] that all consumers have access to markets for consumer financial products and services” that are “fair, transparent, and competitive,” is the antithesis of a narrow, technical mission.⁹⁰

There is, moreover, a widely acknowledged distinction between the mission of the Fed and that of the CFPB as it relates to the need for independence. The core and well-accepted rationale for the independence of a central bank from political accountability is to resolve a problem of time-inconsistency: elected officials, whose horizon is short given the length of terms in office, have an incentive to press for low interest rates to benefit constituents in the short term, even when such a monetary policy would lead to an undesirable longer term outcome of increased inflation and poor economic performance.⁹¹ An independent central bank is believed to be able to withstand political pressure and thereby credibly commit to focus on the performance of the economy in the long run. Paul Tucker, a former central banker in the United Kingdom, contends

88. LEWIS, *supra* note 44, at 60, 126 (finding that agencies created in divided government are more likely to be independent commissions when there is a large majority in Congress); Corrigan & Revesz, *supra* note 47 (finding similarly); *see also* EPSTEIN & O'HALLORAN, *supra* note 47, at 97, 135 (observing that Congress delegates less to the executive branch under divided government, where one component in the delegation index is the location of the agency, e.g., whether the agency is an independent commission, independent agency, in the cabinet or executive branch, etc.); *supra* Section I.B (summarizing studies on agency responsiveness to Congress). In addition, as noted earlier, a multimember structure can facilitate constituent and congressional monitoring from information about decisionmaking provided in commissioner dissents, and thereby better align agency and congressional policy preferences. *See supra* text accompanying note 6.

89. Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1823-24 (2012).

90. 12 U.S.C. § 5511(a) (2018).

91. *See* Helge Berger et al., *Central Bank Independence: An Update of Theory and Evidence*, 15 J. ECON. SURVEYS 3 (2001).

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that a need for credible commitment more generally is the key rationale for creating fully independent agencies, that is, agencies insulated from “day-to-day politics.”⁹² That widely-accepted rationale for central bank independence, as well as Tucker’s more general thesis, is inapposite for the CFPB, as there is no such divergence between time horizon and social welfare in legislators’ policy preference. Nor is there an otherwise evident need for credible commitment in the consumer protection context, and, indeed, none of the predecessor agencies whose authority over consumer financial products was consolidated in the CFPB had such an organizational structure.

Although the CFPB director must file semi-annual reports with Congress, there is minimal leverage that Congress can bring to bear to influence the agency to alter policies that it finds objectionable, given its lack of budgetary control—which is a key disciplining technique due to the stickiness of the legislative status quo.⁹³ Congress, for example, extensively—and successfully—uses limitation riders in appropriations bills, which range from forbidding issuance of specific regulations to curtailing everyday decisions regarding statutory implementation, along with other “extralegal” techniques, such as accompanying nonstatutory directives regarding spending, to constrain agencies’ actions.⁹⁴ Appropriations riders are a particularly effective means for a legislative majority to exercise control because they have a privileged legislative status (i.e., they are subject to special floor rules preventing minority holdup).⁹⁵

2. Consumer Product Safety Commission

The CPSC was established in 1972 with expansive authority over all consumer products, and enforcement responsibility for a multitude of preexisting product safety statutes, as well as a more comprehensive new statute creating it, similar to the authorizing statute of the CFPB. It would appear to have the most extensive jurisdiction of the four agencies, as it has jurisdiction over more than “a million producers and sellers” of “an estimated ten thousand” products.⁹⁶ Of

92. PAUL TUCKER, *UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE* (2018).

93. Senate rules that permit a minority to block legislation do not apply in the budget reconciliation process. If the CFPB were to require additional funds beyond those obtained from the Fed and fines that it imposes on regulated entities, then it would have to request a supplemental congressional appropriation, which would then provide an opportunity for Congress to exert influence. Zywicki, *supra* note 83, at 888-89. As of yet, a director has not put forth a budget that exceeds those funding sources.

94. See MICHAEL W. KIRST, *GOVERNMENT WITHOUT PASSING LAWS* (1969); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766 (2010). For example, approximately 300 limitation riders were written into appropriations bills in the House of Representatives per year from 1993 to 2002, affecting agency decisions from forbidding issuance of regulations to curtailing everyday decisions regarding statutory implementation. MacDonald, *supra* note 94, at 767-69.

95. MacDonald, *supra* note 94, at 767.

96. Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 43 (1982). As earlier noted, the only distinction between the CPSC and the SEC and CFTC concerns the removal power: the chair of the CPSC serves a

all of the agencies in the study, it is the only one possessing all seven of the Datla and Revesz criteria.

The CPSC's authorizing statute contained a novel regulatory procedure: a public participation process for setting safety standards that provided what were considered to be unprecedented legal rights (i.e., rights going beyond those enumerated in the APA) to the public to petition the agency to create standards, as well as to participate in the early stages of standard development through an "offeror" process requiring the agency to solicit and use individuals outside of the agency to develop initial drafts of a standard.⁹⁷ But as fewer safety standards were implemented in the agency's early years than had been anticipated, the regulatory experiment was abandoned for hindering the adoption of standards, and the novel public participation features were repealed in 1981, leaving the agency's standard-setting subject solely to the APA.⁹⁸ As the statistical analysis uses relative, rather than absolute, counts of categories of agency action, it controls for distortions in the comparison created by a potentially lower level of overall activity due to impediments to policy implementation created by the failed public participation experiment.

3. Commodity Futures Trading Commission

The CFTC was created as an independent commission in 1974, assuming jurisdiction over derivative products previously regulated by a bureau within the Department of Agriculture.⁹⁹ Similar to the CPSC, the agency's regulatory

fixed term, and along with the CPSC commissioners can be removed by the president only for "neglect of duty or malfeasance in office but for no other cause," 15 U.S.C. § 2053(a) (2018), in contrast to the chairs of the SEC and CFTC, who explicitly serve at the pleasure of the president, with no statutory language regarding removal for SEC and CFTC commissioners. While CPSC commissioners might appear to have greater insulation than the CFPB director because "inefficiency" is not included as a reason for removal in the CPSC's defining statute, Datla and Revesz persuasively maintain that variation in statutory removal language has no practical impact. *See* Datla & Revesz, *supra* note 70, at 788.

97. 15 U.S.C. §§ 2056(d) & 2059(e) (repealed 1981). After the offeror provided a draft, the agency was then to finalize the standard in a conventional notice-and-comment procedure, along with holding a hearing at which oral testimony could be received. As Schwartz describes, the CPSC was authorized to hold public hearings and conduct investigations in response to petitions and required to act on a petition within 120 days, plus to "promptly commence" proceedings to ban a product or develop a safety standard upon granting a petition. If it denied a petition, a petitioner had the right to go to court and the court was to consider the denial *de novo*, although the judicial review provision's applicability was delayed for three years to permit the new Commission to establish priorities. Schwartz, *supra* note 96, at 45-46.

98. *Id.* at 35. For an explanation of the failure of the procedure from a political economy perspective, see Moe, *supra* note 44.

99. The creation of an independent agency was opposed by farm interests and Republican House members, who preferred to retain the agency within the cabinet. The Republican minority lost on a party-line vote, at a time of divided government, an outcome consistent with the earlier discussed political science literature indicating that independent agencies tend to be created in such a political environment to strengthen congressional vis-à-vis presidential control. *See* Roberta Romano, *The Political Dynamics of Derivative Securities Regulation*, 14 YALE J. ON REG. 279, 342-43 (1997). Although the CPSC was also created in a period of divided government, its independent regulatory structure had been the recommendation of a national commission established by congressional resolution in 1967. *See* Schwartz, *supra* note 96, at 36.

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authority was altered over the two time intervals in which activity is examined in this Article. Under its original statute, the CFTC had to approve all proposed futures contracts and commodity exchange rules, and a few years after its establishment, Congress further required the agency to employ a notice-and-comment process, paralleling APA informal rulemaking, to approve all commodity exchange rules that it deemed “economically significant.”¹⁰⁰ These requirements were repealed in 2000.¹⁰¹

There is a rather unusual distinction between the CFTC and other agencies that would seem to render it potentially subject to greater congressional control. It was established as a sunset agency, that is, it must be periodically reauthorized to remain in operation. This feature puts it at the opposite end of the spectrum of agency funding from the CFPB, with the SEC and CPSC somewhere in the middle. The latter two agencies can be subjected to congressional discipline through the appropriations process for regulatory activity Congress finds objectionable, whereas the CFPB is free from any such potential control. The CFTC, in contrast, has an additional hurdle of undergoing periodic reauthorization, in which, at least in theory, there is a recurring possibility of being shut down in the absence of an affirmative congressional vote on its renewal.

Because funds are appropriated annually to non-sunsetting agencies such as the SEC and CPSC, one could plausibly contend that there is scant distinction between the politics of appropriations versus reauthorization. But while budget reductions or periodic threats thereof can be expected in the scheme of things, a move to zero appropriation for those agencies, which would be the budgetary analogue to non-reauthorization, has never been contemplated by Congress. Equally true, given its forty-plus years of operation, the possibility of eliminating the CFTC seems as improbable as a zero appropriation for the SEC or CPSC.¹⁰² Congressional deliberations on its reauthorization have, in fact, focused on tweaking expansions or contractions of its authority, rather than its existence.¹⁰³ Still, anticipation of upcoming reviews could, at the margin, provide the CFTC with an incentive to be more responsive to Congress than are the other agencies.

Accordingly, if Congress prefers notice-and-comment rulemaking, as implied by the McCubbins et al. framework, because it provides it with greater

100. 7 U.S.C. § 7a (12) (2006), as amended by Pub. L. No. 95-405, § 12, 92 Stat. 870, 871 (1978) (repealed 2010).

101. Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, § 110, 114 Stat. 2763A-384 (2000) (Appendix E). As discussed in Part III, the statistical analysis is run both with and without the actions approving exchange rules and futures contracts that were adopted under the requirements that were subsequently repealed, to retain consistency in the comparisons.

102. Although the CFTC’s reauthorization has often been subjected to delay, with the agency given temporary extensions while legislators negotiate revisions to its authorizing statute or have more pressing matters on the agenda, abolishing the agency would appear never to have been seriously considered. Romano, *supra* note 99.

103. See generally *id.* (discussing CFTC reauthorizations from the 1970s through 1990s).

leverage over an agency compared to other forms of policymaking, then sunseting should incentivize the CFTC to use that congressionally-favored regulatory instrument more frequently than other agencies, particularly as reauthorization approaches. Although the Article's data set does not consist of a time series of sufficient length to investigate that intriguing timing issue, if being subject to sunset has a significantly greater impact on an agency's independence than being subject to annual appropriations, then we should observe a difference in behavior between the CFTC and the other agencies. If, however, there is no substantial difference regarding an agency's independence between being subject to reauthorization or annual appropriations, then the CFTC would be expected to behave no differently from the SEC and CPSC.

4. Securities and Exchange Commission

The SEC, a New Deal agency created in 1934, has no idiosyncratic features regarding independence that deviate from the Datla and Revesz indicia, in contrast to the CFPB and CFTC, and as earlier mentioned, lacks only one, statutory removal protection (as is also true of the CFTC).¹⁰⁴ The SEC has, however, from early on been characterized as indistinguishable from independent agencies with removal protections,¹⁰⁵ and, as earlier noted, commissioners are widely perceived to have removal protection by courts and commentators.

5. Summing Up the Comparative Assessment of Agencies

The CFPB's distinctive absence, among the agencies under study, of a multimember structure from the Datla and Revesz criteria of independence makes possible identification of an impact on agency policymaking of a specific structural characteristic of independence in the empirical analysis. However, given the agency's other critical distinctive feature of being independent of the appropriations process, the empirical analysis will not be able to isolate whether a difference in behavior between the CFPB and the other agencies is due to the divergence in leadership structure or funding, or a combination of the two. In addition, if a more granular level of independence than that identified by reference to the Datla and Revesz criteria affects an agency's choice of policy

104. The timing of the SEC's authorizing statute provides a possible explanation of the somewhat puzzling absence of removal protection: it was enacted following a Supreme Court decision holding that limitations on the president's removal power were unconstitutional, but prior to a subsequent decision upholding for cause limits on the removal of independent agency commissioners. Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781, 783, 785 (2013) (noting that the SEC was created after *Myers v. United States*, which "appeared to hold that Congress could not limit the President's removal power," but before *Humphrey's Executor v. United States*, which held that it could, and so it is "unsurprising that [the statute] had nothing to say about removal").

105. *Id.* at 785 (citing 1940 treatise classifying the SEC in the same category as agencies with removal protection, notwithstanding the SEC's authorizing statute's silence).

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tools, then we would expect, on a continuum of political insulation given the differences between the CFTC, CPSC, and SEC, a progressive increase in the use of less politically accountable nonlegislative rules moving from the CFTC (which must be reauthorized) to the SEC and CPSC and then to the CFPB (the most autonomous agency).

If, however, being subject to periodic reauthorization does not impact administrators' behavior differentially from those who are subject to the appropriations process, then the location on the continuum of activity for the CFTC would approximate that of the SEC. By contrast, if multimember leadership structure is more critical than other independence features, then we would expect to find no discernible distinction in behavior among the three bipartisan commissions—the CPSC, SEC, and CFTC—but a striking differentiation between those agencies and the CFPB. Such a finding would also hold if the sole factor affecting agency accountability was whether or not it was subject to congressional appropriations.

III. Analysis of Agency Rulemaking

The regulatory activity analyzed in this Article is generated from a data set consisting of 1,116 actions taken by the CFPB, CFTC, CPSC, and SEC. After describing the data set's construction, summary statistics are presented. Thereafter differences in type of regulatory activity across agencies and over time are analyzed. The data are entirely consistent with the hypothesis that the agency most insulated from Congress, the CFPB, uses the notice-and-comment process significantly less frequently than the other agencies.

A. Data Set Construction and Summary Statistics

All rulemaking and guidance activity undertaken by the CFPB, CFTC, CPSC, and SEC from the first month in which the CFPB took regulatory action, April 2011, through May 2016, were identified by consulting the following sources: agency websites and annual reports, the Federal Register, Unified Agenda, and the Davis Polk Regulatory TrackerTM. Action by the CFTC and CPSC was also collected from the earliest month of their regulatory activity, April 1975 and June 1973, respectively, through May 1980 and July 1978, respectively, intervals matching the number of months of CFPB activity in its initial years of operation.

Enforcement actions are excluded from the analysis because of measurement and tractability issues, even though they can be consequential as agencies on occasion do undertake substantive policy initiatives through such activity.¹⁰⁶ The omission of enforcement activity is, however, mitigated by the

106. For instance, according to a study of SEC reporting of enforcement actions, year-to-year data is not reliable: the practice of joining defendants in one action or bringing separate actions

inclusion of all agency guidance documents, because significant policy initiatives implemented through enforcement actions quite often work hand in glove with issuance of guidance. Agencies can use such a combination of instruments to facilitate compliance by specifying the parameters of appropriate conduct. For instance, the illustrations in the Appendix of the CFPB's significant policymaking through guidance were accompanied by enforcement actions, although the temporal sequence can vary as to which regulatory initiative comes first.

Documents for all identified regulatory activity were reviewed and classified as rules or guidance following the description appearing in the Federal Register or agency website (i.e., the agency's own characterization).¹⁰⁷ Table 1 provides an overview of all identified activity by agency. Table 2 tallies the subset of activity from Table 1 that is used in the analysis. Rules are divided into two broad categories, those adopted by following the notice-and-comment procedure and those that were not—that is rules and other final action, such as orders, that are effective upon publication without prior notice and solicitation of comments.¹⁰⁸

based on one investigation is inconsistently applied over time and across regional offices, and there is double- or triple-counting (follow-on administrative actions imposing industry bars or registration revocations are counted as well as the underlying federal court or administrative adjudication of liability). Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 934-35 (2016). Quite apart from accuracy of counts, it would further not be practicable to review the thousands of enforcement actions that were brought by agencies within the sample periods in order to differentiate which ones should be included for possibly supplanting notice-and-comment rulemaking by constituting new policy initiatives versus excluded as garden variety cases.

107. In a few instances an agency used multiple characterizations for a guidance action, (e.g., an SEC document was identified as an interpretive release on one website page and as a concept release on another); using one category or the other has no impact on the statistical analysis, however, because, given small numbers in the guidance categories, it aggregates them into a single guidance category. Where a single regulatory action consists of both a rule and a guidance component, it is classified as a rule, so that statistical tests would be conservatively biased with regard to the relative use of rules versus guidance. The unit of analysis is an agency action, which is more straightforwardly measured than a possible alternative of each issue contained within an action as the unit. But as a check on whether agencies vary dramatically, and systematically, in adopting few rules with many issues versus many single-issue rules, differential patterns which could distort a comparison using actions as the analytical unit, summaries of all documents for the CFPB, CFTC, and CPSC were read to gauge the number of issues, and the vast majority contained only one, without appreciable divergence across agencies, suggesting that it is improbable that the analysis is biased by using an action rather than issue count. Namely, the percentage of significant actions as reported in Table 2 that relate to one issue is 90 percent for the CFPB, 84 percent for the CFTC and 90 percent in its initial years, 79 percent for the CPSC and 80 percent in its initial years. The majority of notice-and-comment rules were also single-issue, and the proportion similarly did not differ greatly across agencies in the post-Dodd-Frank period at 66 percent for the CFPB, 67 percent for the CFTC and 75 percent for the CPSC, albeit variation was higher in the period of initial operation for the CFTC at 93 percent and the CPSC at 75 percent.

108. CFTC approvals of exchange rules that, as earlier noted, were required to employ a notice-and-comment process, are separately tallied in the tables and not included in the tally of notice-and-comment rules, but they are counted as notice-and-comment rules in the statistical analysis. Proposed rules are not included in the data set for two reasons. First, exclusion avoids what would otherwise result in double counting notice-and-comment rules, once when proposed and comments are solicited and again when the rule is finalized. Second, as some proposed rules are never adopted, it would be misleading to include such proposals as they never had legal consequences.

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Non-notice-and-comment rules include both interim final rules and direct final rules, which are the rules, along with notice-and-comment promulgations, investigated by O’Connell in her study. The tables separately indicate the number of actions in those two subgroups for comparative purposes with O’Connell’s analysis, but they are also included in the tables’ tally of “non-notice-and-comment” rules.¹⁰⁹ Only the CPSC issued any direct final rules. The infrequent use of such an instrument is consistent with O’Connell’s observation that “independent agencies [were] not the greatest users of direct final rulemaking.”¹¹⁰

The non-notice-and-comment rule category includes a diverse set of final agency actions that are neither interim nor direct final rules. The most numerous types of action in this category are CPSC orders approving third-party-devised safety standards and revising third-party testing accreditations, and CFTC approvals of futures contracts. Given the large number of such actions on the CPSC and CFTC regulatory dockets, they are separately itemized in the tables, but as with interim and direct final rules, they also are included in the tables’ tally of non-notice-and-comment rulemakings.¹¹¹

Agency guidance can be issued in many formats. The tables tally guidance documents using an agency’s own classification.¹¹² While the tables provide granularity with respect to the type of guidance document, no value-added is

109. As indicated in the tables, agencies sometimes solicited comments for interim rules upon their adoption, but in nearly all instances, interim rules were left as is and many were never noticed as implemented as final rules. The six CPSC rules that amended criteria for accepting third party accreditation of testing product compliance with agency safety standards functioned administratively similarly to interim rules in that they were effective immediately on publication, with comments solicited *ex post*, and finalized without significant alteration.

110. O’Connell, *supra* note 56, at 933.

111. Although the CFTC, as earlier discussed, solicited public comments for all of the futures contract proposals in advance of approval, this activity is not included in the notice-and-comment rulemaking category because the agency was not required to use that process and hence had no obligation to respond to comments, as it would have to do were it acting under the APA’s notice-and-comment procedure.

112. In the absence of a designation, guidance action is identified in the tables by its substance (for example, CFTC release of internal reports). A limited number of guidance letters are included in the data set: two CFTC letters that were published in the Federal Register and industry letters are included which appeared on agency websites as staff guidance interpreting statutes or regulations. Those letters were identified as policies on which regulated entities could rely but not as statements by the commission and as subject to alteration at any time. No-action letters can on occasion affect a broad class of entities and in such instances function more as significant regulatory initiatives than individual relief. *See, e.g.,* Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921 (1998) (discussing SEC use of no action letters); Hester Peirce, *Regulating Through the Back Door at the Commodity Futures Trading Commission* 39-50 (Mercatus Working Paper, George Mason University, 2014) (discussing CFTC use of no action letters). Nonetheless, no-action letters were excluded given both the infeasibility of reviewing the multitude of no-action letters issued by the agencies in order to identify which would have policy consequences, and the fact that a majority of no-action letters are directed at individual (non-rule-like) requests, and therefore do not involve new policy initiatives. *See* Peirce, *supra*, at 42 (finding that a rough count of CFTC no-action letters issued in 2013-14 suggests that one-third amended rules temporarily or permanently to adjust requirements imposed by notice-and-comment rulemakings).

gained by differentiation.¹¹³ As indicated in the tables, agencies sometimes solicit comments on guidance documents at the time of issuance, typically explicitly noting that comments are not required under the APA (as they also do when soliciting comments on what they determine to be APA-exempt legislative rules). As with interim rules in which comments are sought *ex post*, such guidance documents are rarely thereafter revised.

As indicated by comparing Tables 1 and 2, a sizeable proportion—one-third (237 of 717)—of rules not subject to notice-and-comment consist of nonsubstantive regulatory activity, such as technical corrections for spelling, punctuation, or cross-reference mistakes in previously published rules, extensions of effective dates, and rules related to an agency’s internal organization or procedures, which, as earlier noted, fall within the APA’s notice-and-comment exemptions.¹¹⁴ The tabulations in Table 2 eliminate these housekeeping rules as they lack substantive policy content and would distort the effort to investigate the use of alternative forms of regulatory activity to implement substantive policy.¹¹⁵ Similarly, the Table also excludes guidance pronouncements deemed nonsubstantive (i.e., those merely summarizing an existing rule and neither interpreting a rule nor announcing a new policy initiative). As with exempt rules, an appreciable proportion of guidance falls into this category (49 percent, or 195 of 399).

113. All guidance documents are combined into one guidance category in several subsequent tables and figures and the statistical analysis, given the small numbers in individual categories and idiosyncrasies in guidance classification across agencies (i.e., only the SEC issued guidance denoted “concept releases”). Moreover, the key legal effect of guidance documents is identical regardless of their classification: as mentioned earlier, all guidance is exempt from APA notice-and-comment requirements and, as a general proposition, not subject to pre-enforcement judicial review, in contrast to rules. Hence, there would be no value added to distinguish across forms of guidance in the analysis of agencies’ activity.

114. 5 U.S.C. § 553(a)(2) (2018) (making notice-and-comment section not applicable to matters relating to “agency management or personnel”). Rules that extend effective dates may well significantly impact regulated entities, but they are excluded because they do not contain new policy initiatives and inclusion could bias downward an agency’s use of notice-and-comment, as extensions are exempt rules that typically extend rules that were adopted by notice-and-comment. In addition, many extensions, if included, would result in double-counting policy initiatives. For example, eleven of fifteen rule extensions adopted by the SEC, which issued the most extensions, were continuances of extensions of four rules.

115. Appendix Table A1 maps the construction of Table 2 from Table 1. As indicated in that table, the largest categories of nonsubstantive rules consist of technical corrections (97) and amendments (47 rules). The most frequent technical amendment is a rule adjusting a statutory asset size exemption threshold in accordance with changes in inflation. Two notice-and-comment rules are excluded from Table 2 because they fit the definition of nonsubstantive rules applied to determine which non-notice-and-comment rules to exclude: one, adopted by the CFTC in its initial years of operation, related solely to internal agency practice; the other, adopted by the CFPB, was a technical amendment delaying a rule’s effective date. An action is included in Table 2 if there is any ambiguity about whether to classify it as inconsequential. Elimination of nonsubstantive rules and guidance further puts agencies on a more common footing for the analysis, as some nonsubstantive rules are agency-specific and their inclusion would distort a comparative analysis. For instance, the SEC publishes as rules updates to its Edgar file manual (which contains instructions for firms’ submission of required informational filings electronically); there is no analogue in the other agencies’ regulations, and as indicated in Table A1, these 21 non-notice-and-comment rules comprise 16 percent of total SEC rulemakings.

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As Table 2 indicates, there are 684 agency actions, of which 480 (70 percent) are rules and 204 (30 percent) are guidance, which constitute the data set used in the statistical analysis.¹¹⁶ Of the regulatory activity reported in the table, 295 are rules adopted by notice-and-comment proceedings, which is a substantial majority of aggregate rulemaking (about 61 percent), albeit less than half (43 percent) of total regulatory activity.

Figures 1 and 2 present graphically the use of regulatory instrument by agency, showing, respectively, the number and percentage of activity, by agency, divided into three categories: notice-and-comment rules; all other rules (i.e., notice-and-comment-exempt rules, including interim and direct final rules, and other non-notice-and-comment rule-like categories of final agency action); and guidance (i.e., all nonlegislative action). As visual inspection suggests, the proportion of notice-and-comment rulemaking varies markedly across agencies, ranging from 29 percent (CFPB) to 58 percent (SEC and CPSC). These data underscore the continued pertinence of O’Connell’s observation that agencies still “engage in a significant volume of notice-and-comment rulemaking,”¹¹⁷ bolstering the suggestion in Yackee and Yackee’s study that the ossification objection to notice-and-comment rulemaking is overstated.¹¹⁸

The far greater use of notice-and-comment compared to interim rulemaking by the agencies (with the CFPB being the notable outlier) is consonant with O’Connell’s further finding that only a small proportion of independent agencies’ rulemaking consists of interim final rules.¹¹⁹ Only the CFPB, at approximately 35 percent of total rules, comes within the range of the proportion of interim rules issued by the most frequent users of such a regulatory instrument reported by O’Connell (a range of 34.2 to 49.4 percent), and even then it is at the lower end.¹²⁰ Somewhat more than half (15 of 25) of the CFPB’s use of interim final rules was to implement the transfer of regulatory authority from predecessor agencies (i.e., those agencies’ existing rules were adopted as interim final rules by the CFPB, with little substantive change). Although the CPSC did not identify the mechanism by which it transferred predecessors’ regulations as interim final rules, both agencies’ rationale for those rules’ being exempt from notice-and-comment requirements was the same: the transferred regulations did not add new

116. If the CFTC’s 39 exchange rule and futures contract approvals are excluded from the analysis, given their origination in the private sector, in contrast to actions undertaken on the agency’s initiative, then the proportion of rules and guidance reported in the text is minimally impacted, shifting to, respectively, 66 percent and 34 percent.

117. O’Connell, *supra* note 56, at 936.

118. Yackee & Yackee, *supra* note 19, at 279 (concluding study’s findings “can be viewed most generally as failing to support the ossification thesis, at least as to the vast bulk of rule-making,” being “largely disconfirming [of] ossification, or at least providing little evidence in support of it”).

119. O’Connell, *supra* note 56, at 935.

120. *Id.* at 934 (showing proportion of interim rules as a percentage of agency rulemaking of the five most frequent users of interim rules).

requirements and providing for notice and comment was therefore “unnecessary” under the APA’s “good cause” exemption.¹²¹

Table 3 shows the breakdown of agency activity by year, indicating as well the activity agencies undertook in reference to a provision in Dodd-Frank.¹²² It indicates that agency activity varies over time and that, for agencies subject to Dodd-Frank (the CFPB, CFTC, and SEC), the bulk of their notice-and-comment proceedings were concentrated on implementing that statute. Indeed, many of their non-notice-and-comment rulemaking and guidance pronouncements also were issued under Dodd-Frank provisions. As a proportion of an agency’s regulatory action over the post-Dodd-Frank period, 71 percent of CFPB activity, 75 percent of CFTC activity, and 56 percent of SEC activity referenced a provision in Dodd-Frank as the statutory basis for the action. These data underscore the extensive regulatory demands upon agencies generated by Dodd-Frank.

Figure 3 plots regulatory activity in three categories (notice-and-comment rule, non-notice-and-comment rule, and guidance) over time for each agency, for the four agencies in aggregate in 2011 to 2016, and only notice-and-comment rulemaking for all agencies separating out rules referencing Dodd-Frank and those that do not. Although in the aggregate there would appear to be a downward trend in notice-and-comment rulemaking, it is not consistently declining across individual agencies. This is in contrast to a decline reported by O’Connell from the 1990s to early 2000s.¹²³ The difference in findings might be

121. For a CPSC example, see Procedures for the Development of Flammability Standards & National Advisory Committee for the Flammable Fabrics Act, 39 Fed. Reg. 40,758, 40,759 (Nov. 20, 1974) (to be codified at 16 C.F.R. §§ 1607, 1609 (1976)) (“Since no new requirements are added by this revision and transfer, notice and public procedure are not prerequisites to this issuance.”). Regarding the CFPB, see Bur. Of Consumer Financial Protection, Truth in Lending (Regulation Z), 12 C.F.R. § 1026 (2012); Interim Final Rule, 76 Fed. Reg. 79,767, 79,770 (Dec. 22, 2011) (to be codified at 12 C.F.R. § 1026 (2012)). The CFPB provided additional rationales, such as the transferred rules’ having originally been adopted by notice and comment. *Id.*

122. Three SEC rules and one CPSC rule in its years of initial operations were issued in the month of December but were not published in the Federal Register until the following January; Table 3 and Figure 3 classify those rules in the earlier year.

123. Despite the visual suggestion of a potential downward trend, as reported in Part III.B, *infra*, there is not a statistically significant negative relation between year of adoption and use of notice and comment. In an article focused solely on rulemaking during party transitions that extends the data set of her earlier work, O’Connell confirms the earlier study’s finding of less frequent rulemaking activity in the initial year of a new administration and suggests as the explanation the considerable time required for a new administration to staff an agency due to delays experienced in the nomination and confirmation process. Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 495-97 (2011). The activity of the agencies under study in this Article would not appear to comport with that finding. As indicated in Figure 3, there is a spurt in rulemaking by the CPSC in the first year of the Carter presidency, whereas the CFTC’s rulemaking, more consistent with O’Connell’s data, does not begin to increase substantially until the administration’s second year. However, the sizeable increase in CFTC activity in 1979 (the Carter administration’s third year) is largely due to a 1978 amendment to the CFTC’s authorizing statute which, as previously noted, required the agency to employ notice and comment for approval of economically significant exchange rules (which account for fifteen of the twenty-six notice-and-comment rules that year). There was also a larger number of proposed futures contracts (eight) in 1979 than in other years. As both types of action originate in activity by the private-sector (commodity exchanges), the increase in CFTC action would not, therefore, seem to be best

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an artifact of an uptick in notice-and-comment rulemaking due to Dodd-Frank requirements: the non-Dodd-Frank rulemaking trend appears to decline a bit over the interval (whether the rulemaking of the agency with no Dodd-Frank requirements, the CPSC, is separately tracked or combined with the other three agencies' non-Dodd Frank notice-and-comment rules), while notice-and-comment rulemaking related to Dodd-Frank increases through 2013 and then, although declining overall, blips slightly up in 2015. Of course, it is not self-evident that one should predict from O'Connell's finding that notice-and-comment rulemaking would continue to decline more than a decade later, rather than stabilize at a lower level. I therefore hesitate to conclude that Dodd-Frank's increased regulatory requirements explain differences in findings regarding a time trend in informal rulemaking without additional years of observations.

B. Statistical Analysis

Crosstabulations were computed to assess, as a first cut, whether there is a significant difference in agencies' use of notice-and-comment rules. As indicated in Table 4, all permutations comparing agencies that include the CFPB indicate that notice-and-comment activity is significantly different from what would randomly be expected, whether the CFPB is compared to (i) all agencies, including the CFTC and CPSC in both the post-Dodd-Frank period and their initial years of operation; (ii) all agencies in the post Dodd-Frank time interval; (iii) only agencies subject to Dodd-Frank in the post-Dodd-Frank period (i.e., SEC and CFTC); (iv) only the CFTC and CPSC in their years of initial operations; and the first three comparisons but grouping all the non-CFPB agencies together. Chi-square tests that compare observed to expected frequencies of events (here, notice-and-comment rulemaking) reject the hypothesis that the proportions are identical for all agencies.

But when the CFPB is removed from the crosstabulation, there is no significant difference in use of notice and comment from what we would expect to occur randomly (all chi-square tests are insignificant, indicating that the null hypothesis of no difference in activity cannot be rejected). Accordingly, simple univariate tests indicate that the CFPB uses notice-and-comment rulemaking significantly less frequently than the other agencies under investigation.¹²⁴ Of course, these tests do not control for timing, which affected agency policymaking

explained as a function of the easing of staffing difficulties that had occurred in the beginning of a new administration.

124. An asterisk in the table indicates whether the reported statistics are significant when adjusted for the number of multiple comparisons. Applying a Bonferroni adjustment for nineteen chi-square tests (the number of comparisons in the table), the appropriate confidence interval to retain a global interval of .05 is .002632 (a chi-square value of 18.4526, computed by interpolating the values in the chi-square distribution tables for .002 and .005). *See, e.g.,* PAUL E. GREEN, *ANALYZING MULTIVARIATE DATA* 221-23, 235 n.22 (1978) (calculating Bonferroni adjustment). As indicated, the adjustment does not alter any statistically significant results in the table for the unadjusted crosstabulations of notice-and-comment rulemaking and agency but would render insignificant several of the unadjusted results of significance for the crosstabulations of notice-and-comment rulemaking and year.

in O’Connell’s study, and for which a multivariate analysis is required. But they do suggest that the previously discussed nuanced differences in agency structure among the CFTC, SEC, and CPSC are not factors that affect an agency’s choice of rulemaking instrument, compared to the overarching distinctive structural difference between those agencies and the CFPB (i.e., being subject to the appropriations process or having a multimember leadership structure with a bipartisan balance). Given a consistent finding that there is no significant difference in the other agencies’ notice-and-comment rulemaking as a group, and intra-agency over time, their activity is aggregated in the multivariate analysis that follows.

There is no systematic relation in the use of notice-and-comment rulemaking over time. As indicated in Table 4, chi-square tests of crosstabulations between year and notice-and-comment use are nearly all insignificant. Consistent with visual inspection of the data in Figure 3, there is no identifiable temporal pattern in notice-and-comment use in these data, in contrast to that observed by O’Connell in her data set.

Table 5 presents results of maximum likelihood logit regressions of the probability that a regulatory activity follows a notice-and-comment proceeding.¹²⁵ The explanatory variables include a CFPB indicator variable that equals 1 if the adopting agency is the CFPB, and 0 otherwise; an indicator variable for whether an agency referenced a provision of Dodd-Frank as the statutory basis for the action; and year dummies for year of adoption, where year 1 is the omitted dummy variable and years are represented in “event” time as years 1-6 to maintain the life-cycle comparison, given different years when activity was undertaken by the CFTC and CPSC in their initial years of operation.¹²⁶

125. The maximum likelihood logit regression estimates the function:

$\Pr(y = 1) = F(\beta_0 + \beta_n X_n)$, where $F(\cdot) = e^{\cdot} / (1 + e^{\cdot})$ is the cumulative logistic distribution. All statistical analyses were conducted in Stata and estimated using Huber-White robust standard errors. Because, in contrast to courts that are constrained by precedent, there is no constraint—legally or otherwise—on agencies when adopting a new policy to follow past or concurrent regulatory strategies, the regulatory actions are independent.

126. Because orders are considered adjudications and not rules, JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 707 (3d ed. 2017), the regressions in the table were also run excluding orders. There is no change in significance, sign, or magnitude of the results from those reported in the tables when orders are excluded from the analysis. In addition, a substantial proportion (close to one-third) of rules adopted by the CFTC in its initial years of operation were responses to private party activity (approval of futures contracts and exchange rules), and, as earlier noted, the agency’s required approval of those matters was eliminated a decade before the post-Dodd-Frank period. Accordingly, the model in Table 5 in which the CFTC’s activity in its years of initial operation are included was also estimated, dropping observations for actions approving futures contracts and exchange rules. In the reestimated regression neither the sign nor significance of any of the independent variables differ from those reported in the table, and the coefficient magnitudes are similar. For the four regulatory actions adopted in December but not published in the Federal Register until the following January, see *supra* note 122, the reported regressions classify those observations in the earlier year of agency approval, but all results are unchanged when the regressions are re-estimated using the Federal Register publication year instead for those observations.

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The model is run for all agencies in both time intervals (model 1), and then only for agency activity taking place in 2011 to 2016 (i.e., excluding observations from the initial years of operation of the CFTC and CPSC), to eliminate noise in the estimation of the year variables arising from including regulatory activity undertaken in a different environment (model 2). Finally, a model is run excluding all CPSC activity and that of the CFTC in its initial years, thereby including only activity of the three agencies subject to Dodd-Frank rulemaking requirements in the post-Dodd-Frank interval (the CFPB, CFTC, and SEC) (model 3). This latter model eliminates the possibility of a misleading inference regarding the impact of Dodd-Frank that could be affected by the presence of a number of observations on which it could have no influence (i.e., the regulatory activity of the CPSC or of the CFTC in its initial years).

As the table indicates, the statistical findings are not affected by which model is estimated. All models fit well. In particular, the hypothesis that the coefficient of all of the explanatory variables is zero, i.e., that the regression model is insignificant, can be rejected (the likelihood ratio chi-squared statistics are significant at less than one percent). Most important, notice-and-comment regulatory activity is significantly negatively related to the adopting agency's being the CFPB in all models.¹²⁷

Notice-and-comment rulemaking is also significantly positively related with an action's referencing a provision in Dodd-Frank. But Dodd-Frank-related activity is not the cause of the differential regulatory activity between the CFPB and the other agencies: in regressions of the models in the table that omit all activity referencing Dodd-Frank, the dummy variable for the CFPB is still significantly negative at less than one percent in the samples of models 1 and 2 and less than two percent in the sample of model 3. Dodd-Frank regulatory requirements are therefore not driving the results. Accordingly, the analysis is consistent with the hypothesis that agency design matters. More specifically, it is consistent with the hypothesis motivating this Article's inquiry, that the more insulated an agency is from political accountability, the less likely it is to employ notice-and-comment rulemaking to implement its mission.¹²⁸

The regressor coefficients of the best-performing model of the three models in Table 5 (i.e., model 3, which has the highest percentage of correct

127. All three models were also estimated clustering the observations by agency and the results are unchanged: the CFPB indicator is significantly negative and the Dodd-Frank indicator significantly positive, both at less than one percent, while the year dummies are insignificant.

128. Because there was no bureau director until January 2012, when President Obama made a recess appointment, and Dodd-Frank limited the agency's ability to regulate nonbanks in the absence of the initial appointment of a director, *see, e.g.*, CONGRESSIONAL RESEARCH SERVICE, THE EARLY AGENDA OF THE CFPB: THE NONBANK SUPERVISION PROGRAM 3-4 (2012), the three regression models in Table 5 were reestimated omitting the 2011 observations (in parallel omitting 1975 observations for the CFTC and 1973 observations for the CPSC in model 1), to eliminate the possibility that the CFPB's lower likelihood of using notice-and-comment rulemaking is due to reticence to act in the absence of a director. But, that is not an explanation for the observed significant difference regarding rulemaking: the sign and significance of the independent variables are unchanged in all three models when the earlier months' activity is omitted.

classifications and best goodness-of-fit of the first three models and is estimated only on actions by agencies subject to Dodd-Frank, the CFPB, CFTC, and SEC in the post-Dodd-Frank interval) can be transformed into odds ratios. The ratios indicate how much more likely an action will be a notice-and-comment rule when it has the characteristic of the specific independent variable, holding all other variables constant. The transformation into odds ratios therefore provides interpretive content to the statistical significance of the variables that is easier to appreciate. The ratio for the CFPB indicator variable is .2826 and for the Dodd-Frank indicator variable, 7.0852. The odds are, therefore, 28 percent less likely for an action to be a notice-and-comment rule if the agency is the CFPB, holding everything else constant. In addition, the odds are over seven times more likely that an action is a notice-and-comment rule if the subject matter relates to Dodd-Frank, holding all else constant. The odds ratio computation provides a striking, as well as more readily comprehensible, indication of how anomalous the CFPB's mode of decisionmaking has been.

An alternative, seemingly plausible interpretation of the findings could relate to agency expertise. An agency could be less likely to employ notice-and-comment rulemaking when it is resource rich, on the view that an agency lacking sufficient resources to obtain information on its own regarding appropriate policy would find public input provided by notice-and-comment essential to do its work. This hypothesis is not, however, supported by the data. Table 5 also reports the results of the first three regression models reestimated (models 4, 5, and 6) to include a per capita resources variable. The resources per capita variable is constructed by dividing an agency's budget in millions of dollars by the number of agency employees.¹²⁹ As the table indicates, the available resources per capita variable is insignificant when the CPSC is included (models 4 and 5) but significantly positive when the CPSC is excluded (model 6), while the CFPB and Dodd-Frank indicator variables remain significantly negative and positive, respectively.¹³⁰ Controlling for resources does not alter the finding that the CFPB uses notice and comment significantly less frequently than the other agencies. Hence, contrary to the internal information hypothesis as the

129. The agencies' number of employees were obtained from the U.S. Office of Personnel Management (the 2010s data are available online, *Federal Human Resources Data*, U.S. OFFICE OF PERSONNEL MGMT., <https://www.fedscope.opm.gov/> [<https://perma.cc/AX9G-4NQ5>], while the 1970s data were obtained directly from the agency). As the 1970s data were available only as of September, for consistency, that is the data used for all agencies over all time intervals. But models 5 and 6 were also estimated using year-end employee data and the results are unchanged. Data on agency budgets—identified as Fed transfers for the CFPB and appropriations for the other agencies—were obtained and confirmed from multiple sources: enacted appropriations statutes, agency websites, and appendix volumes of the Office of Management and Budget's annual volumes on the U.S. government budget. The SEC has by far the largest budget, compared to the other agencies. At well over a billion dollars, it is ten times greater than the lowest budget in the same time interval, the CPSC's, which is not much above \$100 million. But as the agencies with the greater budgets also have much larger staff, per capita resources are not as variable as the raw dollar amounts. Appendix Table A2 provides the agencies' budgets and number of employees.

130. These results are the same if the budget amounts are used instead of the per capita amounts. If the number of employees is used instead, it is insignificant in all three regression models.

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explanation of the findings of the first three regression models reported in Table 5, we can conclude that an agency's having greater available resources does not substitute for use of notice-and-comment rulemaking but rather, if there is a relationship, it is apparently the precise opposite, leading to more frequent use of such a procedure.

There is no systematic association between year and adoption of notice-and-comment rules (i.e., only one year indicator variable is significant in one model).¹³¹ The effect of year 1 is included in the constant term, which is significantly negative, indicating that as the baseline case, year 1 has fewer notice-and-comment rulings than other years, but there is no further evidence of a declining—or increasing—trend in the adoption of notice-and-comment rules. As a robustness check, the three regressions were rerun using one year variable with the values 1-6 identifying the year of the action's adoption and with values equal to the actual year of adoption. Both of these alternative specifications of the year variable were insignificant in all three models, supporting the inference that there is no time trend in notice-and-comment rulemaking.

Finally, there is a question whether Dodd-Frank's imposition of numerous deadlines on regulatory mandates could explain the CFPB's less frequent recourse to notice-and-comment rulemaking rather than its more politically insulated structure. Gersen and O'Connell, for instance, find that there is a statistically significant higher percentage of interim final rules among rules with deadlines than without (12 percent compared to 8 percent), although they do not report whether there is a significant effect of deadlines on notice-and-comment rules.¹³² An inference from their analysis is that deadlines could encourage an agency to favor rulemaking that avoids the notice-and-comment process, as that would facilitate more expeditious implementation of mandated policy to meet a deadline. As the CFPB was not the only agency subject to Dodd-Frank deadline requirements, there is a comparative benchmark against which to assess whether urgency to meet deadlines, and not structural independence, explains its anomalous behavior.

Attempting to meet Dodd-Frank deadlines does not explain the difference in the CFPB's behavior regarding use of notice-and-comment rulemaking from the other agencies. Dodd-Frank imposed markedly fewer rulemaking deadlines on the CFPB than on either the CFTC or SEC, with statutory directives imposing mandated rulemaking with deadlines of 16, 41, and 69, respectively.¹³³ Table 6 tallies agencies' rulemaking activity associated with Dodd-Frank deadlines. Not

131. Moreover, tests of whether the coefficients were not the same for all of the year dummies were insignificant for all three models, indicating that the hypothesis that notice-and-comment activity was not significantly different across time cannot be rejected.

132. Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 943 (2008). They examine rulemaking from 1987 to 2003, in which the bulk of the data set consists of rules issued by executive branch agencies.

133. The Davis Polk Regulatory Tracker™ was used to identify the Dodd-Frank provisions requiring rulemaking with statutory deadlines for each agency.

only does it indicate that agencies with greater notice-and-comment activity had more statutory deadlines to meet, but it also indicates that the vast majority of statutory directives requiring deadlines were met with notice-and-comment rulemaking, a finding at odds with Gersen and O’Connell’s analysis.

As a test of whether the CFPB dealt with the statutory burden differently from other agencies, model 3 was reestimated to include an interaction term between the Dodd-Frank and CFPB indicator variables to capture any such divergence. The interaction term was, however, insignificant, while the effect of the separate indicator variables for the CFPB and Dodd-Frank were unchanged—they are still significantly negative and positive, respectively. This finding is consistent with the demands of Dodd-Frank not being the explanation of the CFPB’s anomalous regulatory behavior.

As Table 6 indicates, agencies adopted multiple rules under Dodd-Frank provisions with a deadline, and some rules related to multiple deadline provisions. Model 3 of Table 5 (the model with only actions by agencies affected by Dodd-Frank) was re-estimated with a deadline indicator variable equaling 1 for any rule that was identified as implementing a provision in Dodd-Frank that imposed a deadline on the required rulemaking, and then with a “first” deadline indicator variable equaling 1 only for the first rule issued under such a provision. In their respective regressions, both deadline variables were significantly positively related to notice-and-comment rulemaking (at less than one percent), while the significance of the other variables in the reported regressions without deadline variables was not affected.

To investigate further whether the CFPB was differentially affected by deadlines, interaction variables between each of the deadline variables and the CFPB dummy were constructed. Neither interacted variable was significant. Accordingly, the hypothesis that the CFPB’s significantly lower probability of using notice-and-comment rulemaking compared to other agencies is a function of urgency for meeting statutory deadlines can be rejected. This finding provides further support for the most plausible and parsimonious explanation of the CFPB’s distinctive regulatory behavior being a function of difference in administrative structure, its lack of multimember leadership, and independent source of funding.

IV. Implications for Agency Design

The key empirical finding—that the agency structured to be the most independent from political accountability engaged significantly less frequently in notice-and-comment rulemaking than three other cognate, albeit less politically insulated, agencies is altogether consistent with an extension of the McCubbins et al. insight regarding the import of administrative law, that agency structure can reduce the efficacy of congressional oversight by facilitating avoidance of notice-and-comment rulemaking. Of course, this is not to say that for any specific policy issue a wide variety of considerations do not influence an

agency's choice of regulatory instrument.¹³⁴ The contention informed by the empirical analysis is that, at the margin, an agency that is more independent will be more apt to engage in less-constrained policy formulation (i.e., forgoing use of notice-and-comment rulemaking) because in such a context it can suffer fewer adverse consequences from engaging in that behavior. After all, notice-and-comment rulemaking requires greater effort, as it is cumbersome and time-consuming from an agency's perspective, and a leadership that is confident in its policy judgments and largely unchecked by political constraints can minimize its use. This section analyzes the implications of this Article's core finding regarding the CFPB's discrepant use of notice-and-comment rules, initially for the ongoing controversy over the CFPB's structure, and then more broadly, albeit more briefly, for reform proposals regarding agencies' use of notice-and-comment rulemaking and the literature on agency design and administrative law more generally.

A. Organization of the CFPB

A rationale often invoked for rejecting legislative proposals to restructure the CFPB along more conventional lines is that the agency is doing just fine because it “has produced a relatively small number of major new rules through a deliberate process.”¹³⁵ This explanation is quite misleading. The problem with such an assessment is that it misperceives the legal landscape. As the statistical analysis demonstrates and as the case studies in the Appendix illustrate, the CFPB has employed much more frequently than other independent agencies guidance and exempt rules, instruments far from the deliberation that is either explicitly or implicitly being lauded. Only 25 percent of the CFPB's significant regulatory activity was effected by a notice-and-comment rule (compared to 58 percent by the SEC, 50 percent by the CFTC and 43 percent in its years of initial operations, and 58 percent by the CPSC and 48 percent in its years of initial operation). Another metric evidencing the CFPB's anomalous behavior is that the odds that a regulatory action is undertaken by notice-and-comment rulemaking are 28 percent lower if the agency is the CFPB rather than the other agencies, all else held constant. In a nutshell, the data indicate that the quality of the CFPB's decisionmaking, and hence the appropriateness of its current organization, could not be accurately assessed by referencing only its notice-and-comment rulemaking because that is simply not the sole, or even major, arena in which the agency's regulatory initiatives are taking place, as illustrated by the case studies in the Appendix.

134. See E. Donald. Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490 (1992).

135. Ingo Walter, *Rebalancing Consumer Protection in the Trump Era*, in REGULATING WALL STREET: CHOICE ACT VS. DODD-FRANK 161 (Matthew P. Richardson et al. eds., 2017) (quoting approvingly Harvard economist John Y. Campbell, *Consumer Financial Protection: In Need of Protection*, ECONOFACT (Feb. 23, 2017), <https://econofact.org/consumer-financial-protection-in-need-of-protection> [<https://perma.cc/E378-C7PM>]).

1. Putting the Republican Opposition to the CFPB's Structure in Context

From the outset, following a party-line vote on the Dodd-Frank legislation in which the CFPB was established, its anomalous independent structure has been an ongoing point of contention, with bills regularly introduced by Republicans to reorganize the agency more conventionally and thereby subject it to greater political accountability.¹³⁶ The continuing effort by opponents of the CFPB to restructure the agency is a tame version of a pattern in U.S. political history: agency terminations upon changes in administration have been quite common occurrences.¹³⁷

The Republican Party's opposition is, no doubt, informed by the agency's regulatory mission, which could financially burden important constituents in their political coalition, and the theoretical and statistical analysis suggests that Republican efforts to restructure the agency along conventional independent commission lines would have real bite. Not surprisingly, the bulk of the Republican bills would have transformed the CFPB into a multimember, bipartisan-balanced commission subject to the appropriations process. Such a reorganization would have the effect of rendering the CFPB more attentive to congressional preferences, which would include, of course, Republican preferences.

But in June 2017, the Republican House took a different reformatory tack, passing a bill that would reorganize the CFPB more along the lines of an executive branch agency, by retaining the single-director structure but eliminating the position's statutory removal protection and, as included in the earlier bills, subjecting the agency to appropriations.¹³⁸ It is more than a

136. For a summary of eleven Republican proposals introduced in the 113th Congress (the penultimate session under the Obama administration) proposing a restructuring of the CFPB to increase congressional oversight offered under divided government, see Andrew J. Buczek & Haydn J. Richards, Jr., *House Financial Services Subcommittee Holds Legislative Hearing on CFPB Proposals*, LEXOLOGY (May 27, 2014), <https://www.lexology.com/library/detail.aspx?g=dbcf7196-d051-4445-b0b5-153b85d5e39d> [<https://perma.cc/7RV8-XXYX>]. In the newly formed 115th Congress commenced in January 2017, five bills were introduced to restructure, or eliminate the agency in the session's first two months. See CFPB Accountability Act, S. 387, 115th Cong. (2017) (subjecting CFPB to the regular appropriations process); Repeal CFPB Act, S. 370, 115th Cong. (2017) (eliminating CFPB by repealing statute creating it); H.R. 1031, 115th Cong. (2017) (same); Consumer Financial Protection Board Act, S. 105, 115th Cong. (2017) (reorganizing agency into bipartisan commission); H.R. 1018, 115th Cong. (2017) (same).

137. As Lewis observes, "Administrative agencies never escape the politics that created them. Coalitions that formed to create a new agency attempt to protect and oversee the new agency over time. The political opponents of a new agency, however, having failed to prevent the agency's creation, try to destroy it if they have the opportunity. History is replete with examples." LEWIS, *supra* note 44, at 142 (citations omitted). Lewis analyzes the durability of all 437 agencies created from 1946 to 1997, 60 percent of which were terminated. *Id.* at 142, 156. In a statistical analysis of agency termination, he finds that the probability of an agency created under unified government being terminated when there is a change to unified government of the other party is 240 percent higher than if no party change had occurred. *Id.* at 156. The advent of a new president of a different party from his predecessor increases the probability of an agency's termination by approximately 39 percent. *Id.*

138. Financial CHOICE Act, H.R. 10 § 711, 712, 115th Cong. (2017). The acting director of the agency has endorsed the Act's proposed alteration of its structure to be more accountable

coincidence that the shift in position occurred when a Republican had assumed the presidency and there was no longer divided government. The notable change in Republican approach is consistent with the political science finding mentioned earlier, that agencies created during spells of divided government are more likely to be independent commissions, while those created in periods of unified government are more likely to be located within the executive branch.¹³⁹

From the perspective of congressional exercise of control over agencies, the reformulated Republican approach would keep the CFPB politically accountable to Congress through its appropriations authority, albeit with greater control in the president by virtue of his ability to remove the director, than to Congress, when contrasted with a multimember, bipartisan commission. Whatever the substantive merit of the Republican Party's shift in preferred organization when contrasted to a commission structure, the key fact is that, had the bill been enacted, compared to the present arrangement, the agency would have been rendered more accountable to elected officeholders.

2. Why Accountability and Performance Could Improve with a More Conventional Structure

If the CFPB had the more conventional structure of a multimember commission subject to the appropriations process, then given the empirical findings regarding how such agencies tend to behave, Congress would have available more effective tools for gathering information regarding CFPB policy initiatives and for disciplining it were it to disapprove of the agency's activity. For instance, as regulatory activity could be expected to follow a notice-and-comment process more frequently, Congress would be less likely to have to undertake time-consuming investigations, in which internal documents have to be pried from an agency well after an initiative's implementation in order to gain an appreciation of what would appear to be an errant policy from Congress's perspective, as was the situation with the CFPB's initiative on automobile dealer

by subjecting it to the appropriations process and to greater control by the president. *Message from Mick Mulvaney, Acting Director, in SEMI-ANNUAL REPORT OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION 1, 1-2* (Apr. 2018), https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report_spring-2018.pdf [<https://perma.cc/2SKR-BGUE>].

139. See *supra* notes 51-52 and accompanying text. It might also have been influenced by a federal appellate court decision remedying its finding that the CFPB's structure was unconstitutional by holding that the director's post must be subject to removal at will by the president, although that holding was subsequently reversed by an en banc decision. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *vacated and remanded*, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). More recently, a federal district court in another circuit held the agency unconstitutional, adopting, without discussion, the opinion of the dissenters in the D.C. Circuit's en banc decision, but it had no effect on the defendant company because, while dismissing the CFPB as a party, the New York State Attorney General was permitted to pursue the litigation. *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, No. 17-cv-890, 2018 U.S. Dist. LEXIS 104132, at *5, 102-06 (S.D.N.Y. June 21, 2018).

loans discussed in the Appendix.¹⁴⁰ While the acting director has not engaged in similar behavior to that of his predecessor, suggesting that would not be a present concern, without agency reorganization, there is always the possibility, if not likelihood, of reversion to past regulatory practice with a change in leadership.

More important, short-circuiting notice-and-comment rulemaking attenuates public participation in rulemaking and the public's ability to challenge a rule in court. This has a negative impact on Congress's capacity to engage in agency oversight for two reasons. First, Congress receives considerably less information concerning the reasoning for an agency initiative when it is not undertaken through notice and comment as there is no public record of agency decisionmaking detailing public reaction and agency responses. Second, given the reduced ability of members of the public to participate in the rulemaking process or to seek legal redress, constituents will not be as readily able to pull fire alarms,¹⁴¹ notifying legislators that something is amiss in the regulatory process and pointing out perceived pitfalls in a rulemaking. Accordingly, a change in CFPB structure that would increase its use of the notice-and-comment process would have a beneficial impact on Congress's capacity to monitor the agency.

Moreover, when a multimember commission engages in notice-and-comment rulemaking, the agency should be able to craft a more durable policy than a single director.¹⁴² Information generated from a broad range of constituents, indicating what features of a proposed rule might be problematic from their perspective and how those issues could satisfactorily be addressed, would be filtered through commissioners' multiple viewpoints and not just that of a single individual whose perspective and experience are inherently more limited. As a consequence of the partisan balance requirements for commissions, it is far more probable that a well-recognized benefit of group decisionmaking, reduction in errors of judgment from the evaluation and combination of divergent views, will come into play than the equally well-recognized potential cost, the aggravation of errors from a "groupthink" dynamic where diversity of

140. An intensive congressional investigation in the future under the current organizational setup might not provide much information, however, as CFPB staff, aware that an adversarial Congress could obtain and publicly release embarrassing internal memoranda, could respond by avoiding providing the director with candid written assessments so as not to leave a problematic paper or electronic trail.

141. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (describing how Congress exercises fire-alarm oversight of agencies through setting up administrative procedures that citizens and interest groups can use—i.e., pull a fire alarm—to inform Congress of perceived regulatory problems).

142. In offering design principles for an agency fully insulated from political branches in day-to-day operations, as is the CFPB, Paul Tucker advocates a multimember decisionmaking structure, pointing out, in criticism of the CFPB's failure to meet that criterion, presciently given this Article's findings, that the "single-policy-maker structure" is not likely to "ensure that a steady course is maintained through different political administrations." TUCKER, *supra* note 92, at 313.

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viewpoints and independent thought is absent.¹⁴³ As earlier noted, partisan balance requirements are consequential, resulting in appointment of commissioners with inherently diverse viewpoints.¹⁴⁴ Accordingly, rules so produced should not only be of higher quality but also should be more politically acceptable by regulated entities as well as the broader public.

Relatedly, multimember commissions have an incentive to seek consensus because that adds value to a policy initiative: although courts generally tend to defer to agency decisions, a nonunanimous rule will have a lower likelihood of being upheld by a court than a unanimous rule. That is because dissents accompanying a nonunanimous and contentious rule can communicate information regarding the quality of a decision, such as highlighting a failure to address significant issues identified by public comments, and thereby buttress a litigant's challenge to a rule.¹⁴⁵ By contrast, such information would be absent for a court reviewing a policy adopted by means of compromise and consensus. Moreover, a rule adopted under a bipartisan consensus informed by a broad array of public comments regarding the proposal would be less subject to challenge in court in the first place, as it would be more readily accepted by both regulated entities and the public at large.

The potential benefit of consensus on judicial review should similarly impact legislative review. Bipartisan agreement on a commission could, for instance, lead Congress to feel less need to engage in extensive monitoring, such as holding high-visibility hearings, as constituents should be less likely to pull fire alarms. Such an outcome, in turn, would have a positive feedback effect on the agency, as hearing preparation and appearances are time-consuming and can distract an agency's leadership, diminishing the effectiveness of the agency's ongoing activities. The positive signals that consensus-based rulemaking provide

143. See JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004) (discussing the literature on group decisionmaking). Sunstein and Hastie analyze the quality of group decisionmaking, providing the conditions, along with numerous examples, under which group decisions can and do go wrong. CASS R. SUNSTEIN & REID HASTIE, *WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER* (2015). Nonetheless, they do not suggest that decisionmaking by an individual—the CFPB structure—would generally do better than that by a group, and many of the problems they identify occur in groups whose members are homogeneous or those whose majorities suppress minority views, improbable scenarios for a bipartisan commission setting where the group inherently has diverse perspectives. That is because diversity is a necessary condition, or as they put it, of “immense importance,” for improving the quality of group decisions and avoiding the potential pitfalls of groupthink. *Id.* at 104. For an additional justification for regulatory decisions to be made by committees and not by a single individual with respect to agencies where a need for credible commitment requires independence from political authorities, such as central banks, see TUCKER, *supra* note 92, at 106-07. His contention is that with a single decisionmaker, it is “too easy” to appoint a political ally, an individual with preferences matching those of the political appointer, rather than the societal preference, such as, to avoid time inconsistency, that is the rationale for agency independence in a credible commitment regulatory context.

144. See Feinstein & Hemel, *supra* note 46.

145. See, e.g., *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (referring to commissioners' dissents in one of its reasons for striking down an SEC rule). For a discussion of the importance of a multimember commission to reach a compromise and the damaging effect of dissents on judicial review of a rule, see Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 *YALE J. ON REG.* 289 (2013).

to courts, legislators, and the public that policy has been formulated with care through bipartisan deliberation and compromise cannot, of course, arise when it is set by a single decisionmaker.

In sum, notice-and-comment rulemaking provides an agency with valuable information from members of the public and interest groups providing comments from diverse perspectives and with practical experience related to issues under consideration, improving the quality of decisionmaking as well as increasing a policy's acceptance by the citizenry, and particularly by regulated entities. An agency is forewarned of the concerns of those who would be affected by a rule and can thereby adapt it, if warranted, to facilitate the rule's acceptance and thereby ensure effective implementation and enforcement.¹⁴⁶ Does such a scenario imply that regulators are captured by the regulated industry? To the contrary, studies of notice-and-comment rulemaking find that, while industry is typically the source of most comments (or if fewer in absolute number, then it provides the most technically and substantively informed comments), particularly in the pre-proposal stage which could aid in shaping a rule that is advanced for formal comment, investigations of this issue have not concluded that industry dominates regulatory outcomes.¹⁴⁷ Because there is less transparency in non-notice-and-comment rulemaking, those modes of regulation would quite plausibly be more susceptible to regulatory capture than the notice-and-comment process, as they do not create a public record of interest groups' input that can be monitored as easily by organizations with widely diverging perspectives or as effectively evaluated by courts.

An administrative design that encourages the use of an open and transparent process that is the essence of notice-and-comment rulemaking would, in my judgment, be especially desirable in politically contentious times by reassuring citizens that high quality policy decisions will be generated following consideration of multiple viewpoints. Of course, not all regulatory actions require an elaborate process, and in times of exigencies, a more rapid response is necessary, which is the function of interim rules. But in the context of significant policy initiatives, following a notice-and-comment procedure should be deemed the gold standard of administration, as it inherently produces decisions of higher quality and with greater democratic accountability, and hence legitimacy, than other regulatory instruments.

146. KERWIN & FURLONG, *supra* note 11, at 168-69.

147. *See id.* at 212 (summarizing small number of studies on this issue, which focus on EPA rulemaking, and concluding "no easy generalization" can be made regarding industry influence); Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 82-84 (2013) (analyzing preproposal stage agency contacts and comments on the Volcker rule and, despite providing evidence of the banking industry's more informative technical comments, not concluding there was capture, given a small number of important, informed "countervailing voices" also weighed in).

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3. Why Would Congress Adopt a Structure which It Cannot Control?

A seeming puzzle follows from what has been asserted regarding the superiority of multimember commissions: why would legislators voluntarily limit their ability to influence an agency's policymaking? Did Congress just get what it was seeking in the CFPB's anomalous regulatory decisionmaking? In a superficial sense, the answer is yes. After all, one Congress chose to establish such a structure. But the congressional majority's expectation regarding the impact of its administrative design for the CFPB on regulatory behavior is, at best, obscure.

For instance, the organization of the CFPB swung back and forth throughout the legislative process from an individual director to a multimember structure, suggesting legislators' uncertainty and disagreement regarding the optimal design and its rationale. The original House bill created an agency led by a single director with an oversight board consisting of the leaders of other agencies, but it was modified in committee to a commission structure. This structure was, in turn, further modified on the floor to begin with a single director and convert into a five-member commission with partisan balance within two years of the transfer of regulatory authority from existing agencies to the new one.¹⁴⁸

The Senate bill that replaced the House bill and was approved in conference, however, reverted back to a single director format. Although there was some discussion of agency structure in a House committee hearing and on the floor during deliberations on Dodd-Frank, the official legislative history (i.e., House, Senate, and Conference committee reports) does not make any reference to a rationale for the final agreed-upon structure. The Senate report did reference the rationale for the agency's anomalous funding, as a need to respond to what it considered the cause of ineffectiveness of OFHEO, the Office of Federal Housing Enterprise Oversight, which regulated the government-sponsored entities ("GSEs") securitizing mortgages: "repeated Congressional pressure" in the appropriations process.¹⁴⁹ But as earlier noted, an analogy between the OFHEO and CFPB is mistaken, as the CFPB could not possibly experience the political pressure brought to bear on OFHEO as it has no connection whatsoever to the GSEs that OFHEO regulated, and that were completely, and arguably corruptly, tied into Congress through munificent campaign contributions and constituent support by community organizers and activists.¹⁵⁰

148. H.R. 4173, 111th Cong. §§ 4101-03 (2009) (as introduced in the House); Brief for Current and Former Members of Congress as Amici Curiae Supporting Respondent at 18-19, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) [hereinafter Brief]. The change was explained as a compromise between the original bill and the House Energy and Commerce Committee's amendment to a commission structure when considering the bill. *Id.*

149. S. Rep. No. 111-176, at 163 (2010).

150. See *supra* note 87 (noting the comparison between the OFHEO and CFPB). For a primer on the munificent campaign contributions, political connections, national publicity campaigns, and intense lobbying of Congress by the GSEs, see GRETCHEN MORGENSON & JOSHUA ROSNER, RECKLESS

Democratic members of Congress have subsequently advanced two rationales for the CFPB's setup in a brief filed in response to litigation over the constitutionality of the agency's structure. They assert that they chose a single director over a multimember commission for "speed and decisiveness" of regulatory action and to avoid regulatory capture.¹⁵¹ The latter contention can be readily dismissed: there is absolutely no evidence that a multimember agency is more prone to capture than a single individual-led agency. Quite to the contrary, the opposite contention is far more plausible: it is easier to capture one individual than a multimember entity, where interest groups must not only coopt more individuals to succeed, but also individuals of sharply differing ideological persuasions. Moreover, this characterization is informed by more than a simple appeal to intuition: partisan balance requirements, as earlier noted, have been found to have a significant impact, resulting in appointment of commissioners with highly diverse viewpoints, and do not function as mere window dressing by which presidents appoint members of the opposition party whose positions are closest to those of their own party.¹⁵²

The other rationale in the Democrats' brief in support of the CFPB's constitutionality, speed in implementation, is, on the surface, a plausible explanation.¹⁵³ The Democratic Party leadership, no doubt, made a calculation that a single director could more quickly implement the party's agenda during the agency's formative years, as there would be no need to achieve consensus among diverse commissioners, and thereby would rectify what it perceived to be a source of failure contributing to the global financial crisis. From that point of view, the agency design would ensure that the determination of initial policies would be formulated solely by an individual who shared their understanding of what needed to be accomplished. But while the choice of organization is, of course, intentional, the consequence of the choice regarding the instruments by which the agency's policies are implemented was, in all likelihood, altogether not anticipated.

Namely, there is no reason to assume that Democrats intended that the agency's anomalous structure would result in its conducting a large proportion of its regulatory initiatives as guidance rather than through notice-and-comment rulemaking. Not surprisingly, there is, for instance, nothing in the legislative record expressing even an inkling regarding how such an agency would implement its policy initiatives, which could have provided the only pertinent wisps from which to glean state of mind with regard to the counterfactual. Just as a number of commentators today misperceive the legal landscape and impact

ENDANGERMENT: HOW OUTSIZED AMBITION, GREED, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON 68-71 (2011).

151. Brief, *supra* note 148, at 13, 19.

152. Feinstein & Hemel, *supra* note 46; Ho, *supra* note 46.

153. Brief, *supra* note 148, at 16, 20.

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of the CFPB's structure when lauding its rules, elected officials did not fully appreciate the consequences of the organizational structure that they had devised.

A key objective for the Democratic majority in establishing a single-director agency was, no doubt, to create an agency that would rapidly and durably implement their policy agenda, which would thereby survive a possible turnover in party control of Congress or the presidency. Indeed, achieving that objective was apparently perceived to be so critical that the Democratic majority was willing to tie its hands by forfeiting the ability to exercise control over the agency through the appropriations process and partisan balance requirements to prevent presidents from filling a commission with only individuals of their viewpoint. But quite ironically, the plan boomeranged: by the CFPB's having resorted less frequently to notice-and-comment rulemaking, the election cycle has rendered its initiatives less durable, thereby placing in jeopardy the accomplishment of the majority's objective (that their appointee's policies would be hardwired into the administrative apparatus and thereby withstand the fortunes of the election cycle). This is because, as earlier discussed, guidance can be reversed upon a change in agency leadership with relative ease, in contrast to policies implemented through notice and comment, which can be reversed solely by using that more arduous process once again, with judicial examination of the new rationale.¹⁵⁴

It is, in fact, telling that the greater speed of agency action that the Democrats asserted in their brief to be the rationale for the agency's design is not in the least related to reducing time consumed in the use of the regulatory instrument. Rather, it is associated solely with the number of decisionmakers, that is, the ability of one individual to act quickly, because the individual need act solely to implement her own decision, and thus can avoid the ever-possible "gridlock" generated by the need to reach a consensus, or at least a majority decision, from among a group of bipartisan commissioners.¹⁵⁵

An apt and instructive analogue of how readily policies can be reversed when decisions rest with one individual can be observed in the pattern of rescission of executive orders, actions that can be characterized as a presidential analogue to agency guidance. Upon assumption of office, presidents routinely

154. See *supra* note 32; *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29 (1983) (rejecting agency's rescission of safety standard for inadequately explaining the decision). A further irony is Democrats' expression of frustration at their inability to discipline the acting director's reversal of many of his predecessor's policies, incoherently denying that the agency has the political independence that they were all too happy to provide when the director was their nominee. See Ronald L. Rubin, *Elizabeth Warren's Sad Sick Joke*, NAT'L REV. (Apr. 3, 2018), <https://www.nationalreview.com/2018/04/elizabeth-warren-attacks-mick-mulvaney-leadership-cfpb/> [<https://perma.cc/P87V-GV9B>]; Elizabeth Warren, *Republicans Remain Silent as Mulvaney's CFPB Ducks Oversight*, WALL ST. J. (Mar. 28, 2018), <https://www.wsj.com/articles/republicans-remain-silent-as-mulvaney-cfpb-ducks-oversight-1522273696> [<https://perma.cc/K5D4-MQLR>]; Lydia Wheeler, *Mulvaney Fires Back after Warren Questions CFPB Leadership*, THE HILL (Apr. 5, 2018), <http://thehill.com/regulation/administration/381789-mulvaney-fires-back-after-warren-questions-cfpb-leadership> [<https://perma.cc/ED7P-EKP8>].

155. Brief, *supra* note 148, at 16.

reverse with a pen many of their predecessor's executive orders, not only those concerning policies where their parties' positions dramatically diverge but also subjects on which there is, in fact, bipartisan consensus.¹⁵⁶

As the history of executive order reversals indicates, when one individual is at the helm, with few constraints, policy reversals can be, and are in fact, executed rapidly. By contrast, in a multimember agency setting, where commissioners have staggered terms, a new chair would need to obtain the support of other commissioners, who might well have endorsed the earlier policy when it was adopted, in order to alter its course. Lacking both the procedural hurdle that renders policies adopted by notice and comment far more durable than guidance and the multimember structure lending greater stability to regulatory initiatives, the next CFPB director, with an appointment occurring in a context of a unified Senate and presidency of the opposite political party to the one that established the agency, will be able to reconfigure or reverse many of the policy initiatives that were implemented over the CFPB's initial years. It strains credulity to consider such a scenario to be remotely what legislators had in mind when they designed the agency with its unusually independent structure. The very insulation the majority provided to the agency ironically appears to have inadvertently contributed to weakening the aim of the administrative structure legislated for the CFPB: to adopt resilient regulation that would outlive the initial director and turnover in the party controlling Congress and the presidency.

Although a critical explanation for why an agency would avoid notice-and-comment rulemaking, as described in the Appendix regarding automobile financing, is the understanding that a particular policy could not legally be successfully adopted through its use, individual incentives—human nature as we know it—surely also have a role to play. The behavior of the agency's initial director, who resigned before the expiration of his term in order to seek a high state political office, informs this conjecture. For an individual with political ambition, the position of director of a highly visible government agency could be an attractive vehicle for furthering a political career.

The interest of a director with political ambition could well be at odds with that of the enacting legislators, despite sharing their overall objectives for the agency, as a political reputation could be advanced by taking decisive, highly visible action through guidance and related enforcement actions, of the kind detailed in the Appendix. Such high-profile actions can garner media attention,

156. See Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1505-07 (2002) (providing a history of executive orders, revised by each president, related to executive branch review of agency rules using cost-benefit standard); Suzanne Malveaux, *Sources: Obama May Use Executive Order Reverse Abortion Policy*, CNN POLITICS (Jan. 19, 2009), <http://politicsticker.blogs.cnn.com/2009/01/19/sources-obama-may-use-executive-order-reverse-abortion-policy/> [<https://perma.cc/4V52-XQ3X>] (summarizing a series of presidents reversing predecessors' executive orders related to abortion policies).

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and important voting constituents might find them attractive, although they come at the cost of less policy durability than regulating through the more cumbersome rulemaking process. The enacting legislative majority, which, no doubt, expected the implementation of durable policy that would advance its regulatory agenda through its choice of agency structure, surely did not appreciate such a possibility.

Whatever the Democratic Party leadership may have specifically thought it was achieving when designing the CFPB, the incentive to avoid notice-and-comment rulemaking provided by the agency's anomalous structure can best be characterized as the kind of unintended consequence that often accompanies legislation enacted in response to a crisis.¹⁵⁷ In such a legislative context, when urgency is considered to be of the essence for devising policy solutions, mistakes are invariably made as it is impossible to think through with care the implications of policy decisions, not least of which are choices related to institutional design.

As there has only been one director of the CFPB over the interval of regulatory activity investigated in this Article, the finding that the agency was significantly less likely to use notice-and-comment rulemaking compared to other agencies is, of course, a function of that individual's preference. But it suffices to say that there could not as readily have been a "Richard Cordray" (i.e., one individual's) effect were the CFPB a more conventionally structured agency. While the agency's acting director disassociated himself from his predecessor's mode of governance and in fact opposed the agency's organizational setup as a member of Congress, the issue is whether it is best practice to retain an institutional design that demonstrably can adversely impact the quality of regulatory decisionmaking, as well as its political legitimacy, due to the vagaries of a single individual's preferences.

B. Regulatory Reform Proposals and the Agency Design Literature

The literature critiquing agencies' use of guidance to formulate policy rather than following a notice-and-comment process has generated a veritable cottage industry of reform proposals directed at altering agencies' incentives to employ guidance compared to notice-and-comment rulemaking or at eliminating the ability to choose between them entirely. A noncomprehensive list, to convey a sense of the range of proposals, includes: requiring all significant policies to be adopted through notice-and-comment rulemaking; requiring agencies to provide an explanation for their choice of an alternative instrument to notice and comment, a decision that would be reviewable by a court; providing citizens with the right to petition agencies to repeal or amend guidance, with the agency's

157. See Romano, *supra* note 83.

response reviewable by a court; and requiring substantive judicial review of all nonlegislative rules upon issuance.¹⁵⁸

Most of the proposals rely on an expanded scope of judicial review to deter use of guidance in place of notice-and-comment rulemaking, and all of the proposals share a perspective that is at odds with this Article's findings: they contemplate operating across the board, in a one-size-fits-all type of approach, whereas the Article's data suggest that more apt solutions would be more flexibly focused on adapting the level of review to specific differences in agency design. Moreover, such an approach, by identifying objective and easily identifiable institutional criteria that courts could focus on for benchmarking an agency's regulatory performance, would provide greater certainty regarding judicial decisions, which is especially of value for business planning, in a doctrinal area that is widely thought to be an intellectual morass.

For instance, courts, as a rule of thumb, should be more wary of regulatory policies promulgated by an agency more insulated from political accountability, such as an agency structured as the CFPB, compared to an agency subject to greater congressional control, i.e., one with a more conventional organization.¹⁵⁹ In the latter case, there is a greater likelihood that someone who is responsible to the electorate is engaging in oversight and focused on the quality of decisionmaking. Hence, at a minimum, the decision would be subject to greater democratic legitimacy. In addition, in the multimember commission context, courts should be attentive to a lack of consensus and should evaluate with care the substance of dissents and the context in which they arise. As earlier mentioned, dissents can provide valuable information regarding the quality of agency decisionmaking. However, the information value may depend on the decisional context, as when consensus is not an agency norm and commissioners are repeatedly at war, dissents may be less informative signals of poorly formulated policy.

These fact-based criteria for setting the level of judicial deference will, no doubt, require judgment, but as they are simple procedural presumptions, the approach would not tax judges' institutional competence or unduly burden them when conducting a review. Still, even a more nuanced judicial review of agency

158. See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidance, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992) (arguing that all significant policies must be adopted through notice and comment, with an exception for agency interpretations that do not add any substantive terms); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 544 (2003) (proposing a “preference for notice-and-comment rulemaking for implementing broad statutory requirements and interpreting ambiguous statutes unless [an agency] offer[s] an explanation for their choice of [an alternative],” to which a “reviewing court should defer . . . if reasonable”); Mendelson, *supra* note 27, at 438-39 (proposing to require notice of guidance issuance and a right for citizens to petition the agency to revise or repeal the guidance, with judicial review of agency response); Seidenfeld, *supra* note 27 (proposing to subject all nonlegislative rules to substantive judicial review upon issuance).

159. Cf. TUCKER, *supra* note 92, at 357 (suggesting need for greater judicial review of decisions of fully insulated agencies that fail to meet his design precepts for maintaining democratic legitimacy and accountability).

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action that would vary in relation to the structural characteristics of agencies and foster higher quality notice-and-comment rulemaking does not fully address the problem of political accountability. As unelected officeholders with life tenure, federal judges are not any more politically accountable than agency officials, and they are arguably less so when contrasted with conventional independent agencies that are subject to some degree of congressional oversight. However, at the margin, judicial review can have a salutary effect on agencies if the inquiry is thoughtfully structured.

Moreover, because agencies that are not subject to the appropriations process but have focused, narrow technical missions, such as the Fed, do not present as severe an accountability issue as does an agency with a broad jurisdictional scope, such as the CFPB, courts would not need to apply the same scrutiny to their regulatory activity, despite their equal political insulation. As earlier noted, agencies' narrow and technical jurisdiction mitigates concern over political accountability, as the realm of regulatory action is circumscribed, and a court should be able to assess whether the action taken is reasonably within its legislated authority, without extensive inquiry into the record.¹⁶⁰ However, additional scrutiny should apply were such an agency to take an unusual course of action, at least in ordinary times, that has significant distributional consequences. For, as Tucker contends, in seeking to identify criteria for designing agencies that are fully independent of daily politics, such as central banks, that would be consistent with democratic government, policies that have large distributional consequences and tradeoffs are more appropriately set by elected officials than by politically unaccountable regulators (or elected officials should approve the specific exercise of such unconventional policies by the agencies).¹⁶¹

Several implications can further be drawn from the statistical analyses for the literature on agency design. First, the findings support Gersen's critique of McCubbins et al.'s thesis that by overlooking judicial deference to agency choice of instrument, they misjudge the degree to which administrative structure and process can function as a control mechanism, for this tool is effective only if agencies consistently employ the notice-and-comment process. The CFPB has been able to operate largely beyond Congress's purview and is thus a poster child for an agency of the sort that McCubbins et al.'s thesis implies does not exist. However, the agency could also be said to be the proverbial exception that proves the rule, as the far greater frequency of use of notice-and-comment rulemaking by the three other agencies with conventional structures whose activity is analyzed in this Article is consonant with their operating implicitly under the shadow of a meaningful level of congressional oversight and control. Of course, it is not possible to conclude from the Article's analysis whether there ought to be even greater use of notice-and-comment rulemaking than at present. While

160. See *supra* note 89 and accompanying text.

161. See TUCKER, *supra* note 92, at 473-74, 558, 569.

that is an important question warranting further inquiry, surely not all or the vast majority of regulatory activity need be adopted by notice-and-comment rulemaking, as the best approach could well be a function of the context. For example, there is no compelling, a priori rationale to expect that the efficacious regulatory response would be identical in substantive areas as disparate as tax, health and safety, and financial regulation.

Second, the data support Datla and Revesz's contention that removal protection should not be viewed as the sole or key defining characteristic of agency independence. Agencies operating with the sole difference among the Datla and Revesz independence criteria being the presence of statutory removal protection—the CPSC, CFTC, and SEC—did not significantly differ in the frequency of their use of the most politically accountable regulatory mechanism. Were statutory removal protection itself a consequential factor with regard to an agency's perception of its independence, then we would expect to have observed a divergence in the use of regulatory instruments between the CPSC and the other two agencies. Rather, consistent with Datla and Revesz's analysis, the data suggest that removal protection matters only in conjunction with other design characteristics, such as leadership structure or financing arrangement.

Third, the balance of findings provides support for skeptics of the regulatory "ossification" thesis, whose advocates contend that the regulatory process is broken or severely stressed due to the requirements of notice-and-comment rulemaking that impede agencies' ability to formulate effective and timely regulation. The agency with the lowest volume of notice-and-comment rulemaking (the CFPB) produced the second-highest volume of regulatory activity, which would seem to be consistent with the ossification perspective that notice-and-comment rulemaking takes an inordinate amount of agency cost and time (as it could be said to indicate that by less frequent recourse to that instrument, the agency was able to engage in a greater number of regulatory actions). However, the three other agencies that implemented a significantly higher proportion of activity through notice-and-comment rulemaking than the CFPB still undertook a considerable amount of regulatory activity. In addition, the direction of the difference in the level of overall activity between those agencies and the CFPB is not consistent (that is, in two of the five possible pairwise comparisons of agency activity between the CFPB and another agency, the other agency has a higher level of activity than the CFPB).

More importantly, contrary to the ossification contention, there is not a significant declining time trend in notice-and-comment rulemaking over the period studied, nor is there a significant difference in its use across time for the two agencies whose activity was tracked over two intervals separated by several decades. Accordingly, consistent with other studies,¹⁶² these findings imply that we would not appear to be suffering from an ossified regulatory process. Rather,

162. O'Connell, *supra* note 56; Yackee & Yackee, *supra* note 19.

use of the notice-and-comment apparatus would appear to present no serious impediment to agencies for implementing regulation.

Finally, the empirical analysis suggests that there would be more value added were administrative law scholarship to shift its attention away from doctrinal debates over the constitutionality of the administrative state and the rather court-centric view of the field, and toward addressing the evergreen master institutional question: how do we mitigate the principal-agent problem that goes to the heart of the governance of the administrative state?¹⁶³ To put it in a nutshell, the formalistic doctrinal claims display a simplistic understanding of the federal bureaucracy as an undifferentiated entity (whether the perspective is that the administrative state is unconstitutionally untethered from political accountability or that it is operating constitutionally under the president's thumb).¹⁶⁴ Consequently, that literature cannot address the reality that is underscored by this Article's data, that differences in agency governance

163. The constitutional discourse is exemplified by the polar normative positions staked out by Hamburger and Vermeule. Compare PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (criticizing the constitutionality of the administrative state), with Adrian Vermeule, *No (Review of Philip Hamburger, Is Administrative Law Unlawful?)*, 93 *TEX. L. REV.* 1547 (2015) (criticizing Hamburger's conclusions), and ADRIAN VERMEULE, *LAW'S ABNEGATION* (2016) (defending elements of the administrative state).

164. Hamburger views the administrative state as illegitimate, informed by his reading of constitutional history that citizens can only be bound by legislation enacted by Congress and the president as set forth in the Constitution. HAMBURGER, *supra* note 163. In contrast, in joint work with Posner, Vermeule advocates the practical efficacy and normative desirability of "unbound" executive authority—that is, of presidential power—which is exercised administratively, that necessarily operates without legal constraint and is checked from becoming despotic solely by public opinion and reelection. ERIC R. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2011).

While Hamburger's objection that administrative action is not enacted by Congress and the president, is, of course, formally true, it is quite often a distinction without a difference because administrators are incentivized to adopt policies that match the preferences of the elected officials who appoint them, and because Congress has the capacity to discipline wayward agencies whose rules do not comport with its preferences. For instance, in accordance with the election cycle, agency activity shifts without the need for new congressional majorities or presidents to enact legislation instructing agencies regarding what to do. See B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 *AM. POL. SCI. REV.* 801, 821 (1991) (explaining that agencies adjust policies when new congressional majorities and presidents are elected). To the extent that Congress fails, on occasion, to exercise adequate control, that is a political, not administrative law, failure, best addressed by elected officeholders' reform of their institutions.

A difficulty for Posner and Vermeule's unbounded executive hypothesis is that the president does not, in fact, have meaningful control over a good chunk of the administrative state, given the numerosity, scale, and scope of independent agencies. Posner and Vermeule attempt to downplay the significance of this institutional reality for their thesis by contending that in practice there is no difference in presidential control of executive branch and independent agencies, because presidents appoint commissioners who share their policy preferences and require independent and executive branch agencies to coordinate their action. But this assertion fails upon examination: presidents have no means of exercising ex post control over such commissioners, given their removal protection, in contrast to Congress's control of the purse and oversight authority, and partisan balance requirements prevent presidents from filling commissions solely with individuals sharing their policy preferences. In addition, they provide no data indicating that the two types of agencies behave similarly either regarding rulemaking or responsiveness to the president rather than Congress. In addition, casual empiricism suggests that the regulatory activity of commissions is invariably carried out independently, without coordination with executive branch agencies. For instance, none of the actions by the independent agencies analyzed in this Article were taken in coordination with an executive branch agency according to the public record.

arrangements can have significant consequences for the efficacy of administrative decisionmaking and correlatively for its democratic legitimacy. A takeaway from the Article's analysis should be that scholarly attention would provide greater value were it to focus on the forms of agency organization and decisionmaking, to evaluate which administrative structures are most effective for obtaining higher quality and politically accountable decisions.

Conclusion

An extensive literature has debated the accountability of administrative agencies and their relationship to Congress. A well-established strand in the literature emphasizes that Congress retains control over agencies by their design and, in particular, by the structure and process by which agency decisionmaking is undertaken. This Article has examined the relationship between agency structure and decisionmaking across four agencies with similar statutory missions, the CFPB, with a uniquely independent structure, and the CFTC, CPSC, and SEC, with a more conventional organizational design. It has presented data consistent with the thesis that agency structure influences regulatory strategy. Namely, the statistical analysis is in accordance with an agency's insulation from Congress being related to its choice of regulatory instrument, as the most independent agency in this study, the CFPB, uses significantly less frequently the most publicly accountable regulatory instrument of notice-and-comment rulemaking.

The findings do not imply that every time the CFPB uses an alternative instrument it is acting strategically to evade legislative constraints, nor that the three other agencies never engage in problematic regulatory decisions to avoid scrutiny. Furthermore, no claim is made, let alone suggested, regarding an optimal level of notice-and-comment rulemaking. Rather, the point is a far more modest, nuanced one that, on the margin, the more insulated an agency, the less likely it is to use the more politically accountable regulatory instrument, and from the perspective of democratic accountability, informed by a principal-agent framework between Congress and the administrative agencies it creates, that should be a worrisome outcome.

The finding of the CFPB's significantly less frequent use of notice-and-comment rulemaking is consistent with Gersen's insight that the canonical work by McCubbins et al. has, at times, a flavor of a heroic understanding of the effectiveness of Congress's oversight through the APA: such oversight works effectively only if agencies actually use, where appropriate, the structure and process that Congress has devised, and that is not always the case. But given the correlative finding that multimember commissions subject to the appropriations process do use notice-and-comment rulemaking quite regularly through time, the Article's findings do conform with the overall gist of McCubbins et al.'s core insight that agencies (those with such an organizational and funding structure) would appear to operate in the shadow of a meaningful measure of congressional

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control. The level of the agencies' notice-and-comment activity further suggests that the frequently expressed view that the process has led to the ossification of the administrative state is not supported.

There is, at least, one "meta" policy implication from this study regarding promoting more democratically accountable agencies. If Congress wishes independent agencies with broad jurisdictional authority to follow notice-and-comment rulemaking where practicable, then when designing such an agency, Congress should rely on its long- and well-established agency structure, a multimember commission, with partisan balance and subject to the appropriations process, in preference to a structure akin to that of the CFPB. The more conventional commission structure provides Congress with tools to exercise oversight and hence to discipline a potentially wayward agency. Reorganizing the CFPB along conventional independent agency lines would therefore be a salutary step toward bringing the agency back within the conventional understanding of democratic accountability animating the APA by increasing the incentive to engage in the regulatory gold standard, notice-and-comment rulemaking. Reconfiguring the CFPB's governance along the lines of the Financial CHOICE Act that passed the House in 2017 (i.e., as an agency led by a single director serving at the will of the president and subject to congressional appropriations) would also render the agency more politically accountable. That outcome, when viewed from the standpoint of democratic legitimacy, would be beneficial, although this Article's data do not speak to the decisionmaking of such an agency structure or the relative benefit of such an arrangement compared to a multimember commission structure.

Appendix. Illustrations of the CFPB's Strategic Use of Guidance

The CFPB's statistically significant less frequent use of notice-and-comment rulemaking than the other agencies under study in this Article does not, of course, indicate whether the agency is using guidance to bypass the notice-and-comment process and thereby avoid statutory strictures Congress placed on rulemaking activity. But such behavior would be altogether consistent with such an interpretation of the data. Nor would such a use indicate that the regulatory outcome would, in fact, be different were a different regulatory instrument employed. However, this Appendix provides three illustrations, publicized in the business press, that evince the CFPB's strategic use of its administrative authority through its choice of policy instruments, and that suggest that the choice of instrument does, indeed, affect substantive outcomes.

A. Automobile Dealer Loans

One of the most notable examples of the CFPB's use of guidance where rulemaking would conventionally be called for involves the regulation of

automobile dealer loans. This CFPB activity has been the subject of congressional investigations and internal documents revealed a deliberately strategic, and what could reasonably be said to be lawless, use of guidance as a regulatory strategy.¹⁶⁵ In December 2017, the U.S. Government Accountability Office, in response to a legislative inquiry, determined that the guidance was a rule that should have been submitted to Congress for review under the Congressional Review Act (CRA), which establishes an expedited legislative process by which Congress can reverse an agency's rulemaking by passing a joint disapproval resolution that is signed by the president.¹⁶⁶ That determination restarted the CRA's sixty-day clock for congressional action and in May 2018, five years after its adoption, following the procedure outlined in the CRA, the guidance was repealed.¹⁶⁷

The genesis of the guidance was the CFPB staff's belief that automobile dealers charged higher interest rates to women and minorities (African-Americans and Hispanic-Americans) than to white men. But they possessed no actual sales data to support this belief, as the race and ethnicity of car buyers are not recorded. The agency therefore employed a statistical analysis using proxies for race and ethnicity, such as surnames and zip codes, to estimate discriminatory dealer practices.¹⁶⁸ Dodd-Frank, however, expressly prohibited the agency from regulating automobile dealers.¹⁶⁹ Accordingly, in order to circumvent Congress's prohibition, the agency resorted to regulating "indirect auto lenders" by issuing a fair lending guidance bulletin to banks—which are subject to its authority—that indicated that the CFPB would enforce anti-discrimination laws

165. UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING, H. FIN. SERV. COMM. REPUBLICAN STAFF REP., 114th Cong. (1st Sess. 2015) [hereinafter HOUSE STAFF REP.].

166. Letter from Thomas H. Armstrong, General Counsel, GAO, to Senator Toomey, B-329129 (Dec. 5, 2017), <https://www.gao.gov/assets/690/688763.pdf> [<https://perma.cc/C25Z-5VP9>]; 5 U.S.C. §§ 801-808 (2018).

167. Neil Haggerty, *Trump Makes Repeal of CFPB Auto Lending Rule Official*, AM. BANKER (May 21, 2018), <https://www.americanbanker.com/news/trump-makes-repeal-or-cfpb-auto-lending-rule-official> [<https://perma.cc/X5Y4-WSCM>].

168. Kim B. Perez, *The CFPB "Indirectly" Regulates Lending Through Auto-Dealers*, 18 N.C. BANK. INST. 399, 418 (2014) (showing that the CFPB guidance bulletin relied on mathematical proxies for race and ethnicity, using Social Security Administration and Census Bureau data to estimate the probability someone is of a racial or ethnic minority based on their surname and geographic location, and then used the proxies to determine where consumers might experience discrimination based on interest rates that proxy-determined minorities received); Editorial, *Your Car Dealer Must Be a Racist*, WALL ST. J., Nov. 15, 2013, at A14. The external consultant hired by the agency to assist in the analysis was said to be a firm associated with the plaintiffs' bar and thus not a disinterested party with respect to the methodology employed. See Ronald L. Rubin, *The Rogue Regulator*, WEEKLY STANDARD (Feb. 15, 2016), <https://www.weeklystandard.com/ronald-l-rubin/the-rogue-regulator> [<https://perma.cc/ZK8M-CEAJ>]. Not surprisingly, the methodology employed produced much higher estimates of the number of minorities receiving discriminatory loans than did statistical methods used by other experts, and indeed was known by the agency to, in fact, grossly overstate the numbers. See *id.*; HOUSE STAFF REP., *supra* note 165.

169. 12 U.S.C. § 5519 (2018). The statute contains exceptions to the exclusion of auto dealers from the CFPB's regulatory authority, but none of the exceptions apply to the subject of the guidance, namely auto loans that a dealer provides through a bank or that are securitized.

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against banks that purchased auto loans from auto dealers who discriminated.¹⁷⁰ As there was no evidence of intentional discrimination, the agency stated in the bulletin that a disparate impact would be sufficient to find a violation.¹⁷¹

The guidance further strongly suggested that banks could avoid an enforcement action if they imposed controls on and monitored dealer markups and then took “prompt corrective action” against noncompliant dealers, or, better yet, if they charged flat fees to eliminate dealer discretion in the setting of interest rates.¹⁷² The discretionary approach was the industry practice regarding dealer compensation (lenders shared profits with dealers as a function of the dealer’s markup of a loan’s interest rate).¹⁷³ Banks quite rationally responded to the guidance, which was provided in the shadow of an implicit supervisory threat of adverse regulatory action if they did not comply, by informing dealers that if they did not comply, they would impose flat fees (which was the CFPB’s objective).¹⁷⁴

The guidance bulletin contained a number of problematic legal interpretations. For instance, the discrimination standard that the CFPB applied in the bulletin was a disparate impact rather than disparate treatment (i.e., intent) standard, a controversial position given Supreme Court jurisprudence at the time requiring intent.¹⁷⁵ Equally, if not more, problematic was the CFPB’s interpretation in the bulletin of who is a “creditor” under the fair lending law. Although the agency contended that it was not reinterpreting or making new “law,” in order to contend that there was no need for following rulemaking procedures, the interpretation was quite novel, as neither auto dealers’ markups nor indirect lenders had previously been understood to fall within the statutory definition.¹⁷⁶

170. CFPB BULL. 2013-02, INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT (2013). As the bulletin stated, it applied to “all indirect auto lenders within the jurisdiction of the Consumer Financial Protection Bureau (CFPB), including both depository institutions and nonbank institutions.”

171. *Id.*; *CFPB to Hold Auto Lenders Accountable for Illegal Discriminatory Markup*, CONSUMER FIN. PROT. BUREAU (Mar. 21, 2013), <https://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-to-hold-auto-lenders-accountable-for-illegal-discriminatory-markup/> [<https://perma.cc/9U9B-PJKZ>].

172. CFPB BULL. 2013-02, *supra* note 170, at 4 (conduct included in nonexclusive list of “steps” institutions “may” take for “limiting fair lending risk in indirect auto lending”).

173. *Id.* at 4-5.

174. Perez, *supra* note 168; *Your Car Dealer Must Be a Racist*, *supra* note 168. The agency brought enforcement actions against four banks under the Bulletin. Perez, *supra* note 168, at 399 & 399 n.5.

175. Perez, *supra* note 168, at 424. As Perez notes, the statutes under which the Supreme Court had upheld a disparate impact are those that contain the word “affect,” language not contained in the lending statute. *Id.* at 423. She further notes that the federal government’s litigation strategy at the time was generally to avoid taking disparate impact cases before the Supreme Court, such that when the Court granted certiorari on a disparate impact challenge, the government would settle the case to avoid a possible adverse decision. *Id.* at 424.

176. *Id.* at 413-14. The CFPB’s claim regarding the lack of novelty was provided in response to a query from members of Congress concerning why it had acted on the subject by issuing a guidance rather than a rule. *Id.* at 412-13.

More important than the guidance's apparent reliance on questionable legal interpretations, internal documents indicated that the CFPB staff had discussed adopting a rule to end dealer discretion regarding interest rates. They rejected doing so, however, because they believed that they did not have the legal authority to write such a rule, and that a rule would therefore be subject to political repercussion or court challenge by automobile dealers.¹⁷⁷

A further reported concern of the CFPB staff was that the more transparent rulemaking process would require it to "disclos[e] its proxy method used to determine a disparate impact," exposing it to public comment and critique.¹⁷⁸ As the staff was no doubt aware, federal courts require the disclosure of the data on which a proposed rule relies under their interpretation of what constitutes a "meaningful opportunity to participate in" rulemaking as required by the APA.¹⁷⁹ In short, a notice-and-comment process would have revealed, as internal documents subsequently indicated, that the statistical method used was "prone to significant error" and that known factors affecting interest rates not related to race were not controlled for in the analysis, which when included, produced dramatically different results.¹⁸⁰ While a notice-and-comment rulemaking might therefore have produced a quite different substantive rule compared to the policy

177. As the staff put it, "There are several concerns with a rulemaking approach. First, the legal authority for all of the potential rulemakings is unclear given our lack of authority over dealers. Second, the Bureau would face considerable pressure from external groups if it sought to regulate or ban the practice of markup itself The rule could be perceived as an attempt to circumvent our lack of regulatory authority over auto dealers, and that presents both legal and political risks that our rule could be overturned by a court or by Congress." CONSUMER FIN. PROT. BUREAU, BRIEFING MEMORANDUM FOR THE DIRECTOR, AUTO FINANCE DISCRIMINATION INITIATIVE UPDATE MEETING 5 (Apr. 4, 2013), https://financialservices.house.gov/uploadedfiles/april_3_2013_-_briefing_memo_randum_-_auto_finance_discrimination_initiative_update_meeting.pdf [https://perma.cc/F9AD-7W9Z] [hereinafter CFPB MEMO].

178. Rachel Witkowski, *The Inside Story of the CFPB's Battle Over Auto Lending*, AM. BANKER (Sept. 24, 2015) (citing CFPB staff internal memo), <https://www.americanbanker.com/news/law-regulation/the-inside-story-of-the-cfpbs-battle-over-auto-lending-1076940-1.html> [https://perma.cc/VP68-S3ZB]. The agency's internal documents acknowledged that its methodology overestimated the number of African-Americans by 20 percent, while a private sector report found a 41 percent overestimation, as the methodology estimated that 11 percent of an applicant pool was African-American when the actual share was 7.8 percent. HOUSE STAFF REP., *supra* note 165, at 29. Another report indicated that only half of the individuals identified by the agency's methodology as African-Americans were actually African-Americans. *Id.* at 30. The director of the Bureau was informed of the misestimation, and that a public document issued by the agency understated the error rate, and he still permitted use of the flawed methodology to impose liability in enforcement actions against banks, computing penalties based on incorrect numbers. *Id.*

179. MANNING & STEPHENSON, *supra* note 126, at 738.

180. HOUSE STAFF REP., *supra* note 165, at 3. As internal memoranda put it, "[W]e have reason to believe that our proxy [methodology] is less accurate in identifying the race/ethnicity of particular individuals than some proprietary proxy methods that use nonpublic data" and that there would be "serious risk" that a "methods announcement [would] provid[e] fodder to defendants to show how our methods are inferior to other proprietary proxies," and "[i]f we choose not to publish, we will be more likely to consult an outside expert for litigation purposes and our internal methodological deliberations will not be discoverable." *Id.* at 27 (quoting CFPB draft memorandum (emphasis added)). Moreover, the Bureau director authorized enforcement actions despite having been informed that when the staff had reestimated its models including standard controls (such as individual credit scores), disparities in interest rates fell by half, information which was withheld in settlement negotiations. *Id.* at 38.

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contained in the guidance document, had the output of such a process replicated the guidance on the same data revealed in the House investigation, a successful court challenge would surely have followed.¹⁸¹

Finally, the crux of the agency's objection was dealers' use of interest rate markups. But the staff provided an additional, telling rationale for not pursuing a rule to prohibit the practice: there was "little principled basis on which to distinguish [automobile dealers'] markup from other, similar practices that are ubiquitous in retail transactions."¹⁸²

Given the agency structure, the CFPB staff was able to outline the legal difficulties that would arise in a notice-and-comment rulemaking to the bureau director and plot out an alternative strategy without apprehension that the flawed data and analysis flowing from it would be publicly revealed, thereby impeding the agency's ability to proceed. Such a strategy would, however, have had a much lower probability of success had the CFPB been a multimember entity. That is because it is likely that a commissioner would have publicly objected to such a guidance, given the diversity of perspective a partisan balance requirement creates in a commission's membership, revealing the problematic legal and statistical analysis supporting the action. Regulated entities would have thereby been provided with information helpful for challenging any action the agency might have brought against them for non-compliance. While banks might still have settled such action, they would either have settled for far lower sums, or have been better positioned to litigate successfully with reduced apprehension of being subject to a supervisor's retaliation, given a commission's divided opinion and the attendant publicity that would flow from a dissent.

The glimpse into the agency's internal deliberation afforded by Congress's investigation (and in a few media reports prior to the congressional activity) highlights the conflict between agency independence and accountability, suggesting that the extensive political insulation of the CFPB facilitates its use of guidance strategically to evade standards imposed by Congress. The balance between these competing concerns has not been properly struck as neither the public revelation of the agency's internal machinations nor Congress's investigation had any impact on the CFPB's subsequent behavior. The guidance remained in full force and effect for five years until the repeal by Congress under the CRA. It is most probable that if, for instance, the CFPB had been subject to the appropriations process, then the policy would not have lasted as long, as

181. Besides the difficulty of justifying the policy given the flawed data analysis, it seems probable that the cost-benefit criteria would not have been easily satisfied as the dealer compensation policy promoted by the guidance may well increase lending costs. As Perez notes, if dealer discretion on rates is maintained, then banks must engage in costly monitoring, imposing costs that will increase the rate of interest banks require, and if instead discretion is replaced with flat fees, then dealers will lose the flexibility of trading interest rates off against purchase price, with the upshot that they will be less likely to offer lower purchase prices. Perez, *supra* note 168, at 426-27.

182. CFPB MEMO, *supra* note 177, at 4.

Congress would have disciplined the agency early on by adopting an appropriations rider prohibiting use of funds to enforce the policy.¹⁸³

B. Credit Card Add-ons

The CFPB's use of guidance to regulate credit card add-ons provides an additional illustration of how the agency's policymaking sidesteps congressional instructions regarding its rulemaking considerations. The CFPB staff believed that credit card add-ons, such as payment for lost wallet protection, had little or no value and should not be sold.¹⁸⁴ Rather than engage in notice-and-comment rulemaking to determine whether that was in fact the situation, the agency published guidance, a list of "expectations" regarding what it would look for in evaluating the products banks offered, and then brought three enforcement actions against credit-card providers for improper marketing in light of those expectations.¹⁸⁵

In response to those agency actions, the three largest banks, followed by other institutions (none of whom were the subject of the enforcement actions), "voluntarily" cancelled the products.¹⁸⁶ Withdrawal of the products, was, no doubt, the agency's objective from the outset. Yet such action would contravene the CFPB's statutory directive, which, instructs the agency to consider the "potential benefits and costs to consumers and covered persons [financial institutions], including the potential reduction of access by consumers to consumer financial products or services resulting from such rule."¹⁸⁷ Drafting a guidance setting forth a set of "expectations" with which it was not possible to

183. Such action would likely to have been taken because in November 2015, a bipartisan bill passed the House that would have revoked the indirect auto financing guidance and required the agency to use a notice-and-comment procedure for any future regulation of the subject. See John Irwin, *U.S. House Passes Bill Revoking CFPB Auto Lending Guidance*, AUTOMOTIVE NEWS (Nov. 18, 2015), https://www.autonews.com/article/20151118/FINANCE_AND_INSURANCE/151119809/u.s.-house-passes-bill-revoking-cfpb-auto-lending-guidance [<https://perma.cc/TQK9-ZRQ2>]. President Obama indicated that he would veto the legislation, and it did not move forward in the Senate.

184. Although the agency's objections to the products were stated in terms of the use of "deceptive" or "high-pressure" marketing tactics, *What Are Credit Card Add-on Products?*, CONSUMER FIN. PROT. BUREAU (Mar. 1, 2013), <https://www.consumerfinance.gov/ask-cfpb/what-are-credit-card-add-on-products-en-1541/> [<https://perma.cc/TPM4-X9WU>], the detailed procedures it identified for banks' marketing of such products to not be considered deceptive were so burdensome that it is plain that the agency's true goal was to eliminate the products entirely, an objective that was achieved. By 2016, the agency eliminated the term "deceptive" from its website.

185. CONSUMER FIN. PROT. BUR., *MARKETING OF CREDIT CARD ADD-ON PRODUCTS* (2012), http://www.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf [<https://perma.cc/KL6M-JML7>]; Karen Weise, *The Consumer Finance Watchdog Is Having an Impact*, BLOOMBERG BUSINESSWEEK (Jan. 10, 2013) (noting enforcement actions and discussing guidance), <https://www.bloomberg.com/news/articles/2013-01-10/the-consumer-finance-watchdog-is-having-an-impact>. The three banks subject to the enforcement actions—one of which was for failure to supervise a third-party vendor and not for any failures in its own marketing—were required to pay in aggregate \$101.5 million in fines and \$435 million in refunds to customers. *Id.*

186. Weise, *supra* note 185.

187. 12 U.S.C. § 5512(b)(2)(A)(i) (2018).

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comply enabled the agency to avoid having to consider and justify the potential reduction in consumer access to the product as Congress directed in Dodd-Frank, which could have been difficult to do in a notice-and-comment rulemaking.

C. Mortgage Marketing Services Agreements

A third illustration of the CFPB's choice of regulatory instrument as a mechanism to evade Congress's rulemaking constraints involves its regulatory approach to marketing services agreements in real estate transactions. The Real Estate Settlement and Procedures Act (RESPA), one of the statutes whose enforcement was transferred to the CFPB in Dodd-Frank, prohibits giving or accepting a fee or kickback for referrals of real estate settlement services involving a federally related mortgage loan.¹⁸⁸ But fees paid by lenders to real estate entities for marketing services actually rendered, such as advertising or promotional services, at fair market value, are legitimate payments and not prohibited by the statute.¹⁸⁹ Marketing services agreements are ubiquitous in real estate transactions, having been used for decades. The CFPB staff, however, apparently perceived all such arrangements as disguised payments for referrals (i.e., illegal notwithstanding the statute) and as providing no benefits to consumers but, rather, as harming them by limiting competition.

In October 2015, following a "warning" issued regarding its view of the legality of marketing services agreements a few months earlier in July, the CFPB issued a compliance bulletin addressing the agreements in relation to RESPA, indicating its "grave concerns" over their use, emphasizing the "legal and compliance risks" that they presented to mortgage industry participants and stating that it would "continue actively scrutinizing" the use of such agreements.¹⁹⁰ The Mortgage Bankers Association (MBA) characterized the guidance as directed at eliminating marketing services agreements, legal or not, from the marketplace, providing the following perspective on the guidance to its members: "Coming as it does after enforcement and other actions by the CFPB on marketing services agreements, MBA believes that the (CFPB's) bulletin is short on actual guidance, and can only be interpreted as a series of warnings to lenders against MSAs."¹⁹¹ The MBA further noted that the bulletin "diverge[d]

188. 12 U.S.C. § 2607 (a) (2018).

189. 12 U.S.C. § 2607 (c) (2018).

190. CFPB COMPLIANCE BULL. 2015-05, RESPA COMPLIANCE AND MARKETING SERVICES AGREEMENT 5 (Oct. 8, 2015); Trey Garrison, *CFPB Doubles Down against Marketing Services Agreements*, HOUSINGWIRE (Oct. 8, 2015), <https://www.housingwire.com/articles/35303-cfpb-doubles-down-against-marketing-services-agreements> [<https://perma.cc/JP6D-ACK8>].

191. Ben Lane, *MBA Issues Warning: CFPB Is Coming for Marketing Services Agreements*, HOUSINGWIRE (Oct. 14, 2015), <https://www.housingwire.com/articles/35343-mba-issues-warning-cfpb-is-coming-for-marketing-services-agreements> [<https://perma.cc/ZDN2-ENGH>].

from previous interpretations” of RESPA, and “notably” lacked “any guidance on how to properly construct a [mortgage servicing agreement].”¹⁹²

The agency could not be clearer in conveying its view that lenders—entities subject to its jurisdiction—should not enter into marketing services agreements. In fact, two large mortgage lenders, Wells Fargo and Prospect Mortgage, had already responded to the not so veiled threat upon issuance of the “warning” and exited all such agreements because of “regulatory uncertainty” generated by the CFPB’s actions, including its reinterpretation of RESPA.¹⁹³ Upon the bulletin’s release, Bank of America soon followed suit and announced it was discontinuing use of the arrangements as well.¹⁹⁴

The agency’s approach to these contractual arrangements parallels its approach toward credit card add-ons: rather than engage in notice-and-comment rulemaking, it issues guidance with which firms will find it daunting, if not impossible, to comply, albeit in this instance using vagueness with regard to the acceptable standard of conduct rather than stringency of acceptable terms. The agency’s reinterpretation of RESPA (disregarding the statutory safe harbor for payment in compensation for nonreferral services rendered) could have been undertaken by notice-and-comment rulemaking, but that was what the agency apparently sought to avoid, for as the MBA noted, the rulemaking context would have provided a “full opportunity for public comment.”¹⁹⁵

192. *Id.* The CFPB had been reinterpreting the statute in enforcement actions brought before the guidance was itself issued, and the validity of the reinterpretation, as well as its retroactive application to contracts written under the prior interpretation, were issues raised in litigation in which a federal appellate court held the agency’s structure to be unconstitutional, as well as invalidating the new interpretation of the rule. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016). On rehearing by the full Court of Appeals, the panel’s unconstitutionality holding was reversed, but its rulings striking down the agency’s statutory interpretation and retroactive application were reinstated as the decision of the court. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

193. Trey Garrison, *CFPB to Mortgage Industry: Get Out of MSAs*, HOUSINGWIRE (July 30, 2015) <https://www.housingwire.com/articles/34641-cfpb-to-mortgage-industry-get-out-of-msas> [<https://perma.cc/9QSI-T3L4>]. They left the market in response to the agency’s July “warning.” *Id.*

194. Ben Lane, *CFPB, Regulatory Concerns Drive Bank of America Out of MSAs*, HOUSINGWIRE (Oct. 14, 2015), <https://www.housingwire.com/articles/35351-cfpb-regulatory-concerns-drive-bank-of-america-out-of-msas> [<https://perma.cc/4QQJ-WD38>].

195. Lane, *supra* note 191.

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Tables and Figures

Table 1. Agency Policymaking Activities Overview

Rulemaking Format	CFPB	SEC	CPSC	CPSC initial	CFTC	CFTC initial	Total
All Activity	232	244	67	170	205	198	1116
All Rulemaking	108	130	58	143	113	165	717
Notice-and-comment rules	40	52	33	58	70	44	297
Statutory required notice- and-comment exchange rule	n.a.	n.a.	n.a.	n.a.	n.a.	18.	18
Non-notice-and-comment rules	68 (26)	78 (8)	25	85 (14)	43 (3)	103 (23)	402 (74)
Interim rule	26 (26)	13 (7)	0	11 (10)	2 (2)	2 (2)	54 (47)
Direct final rule	0	0	7	0	0	0	7
Accreditation Revision	n.a.	n.a.	6 (6)	n.a.	n.a.	n.a.	6 (6)
Order	0	1	0	0	10 (1)	2	13 (1)
Futures contract approval	n.a.	n.a.	n.a.	n.a.	n.a.	21 (21)	21 (21)
All Guidance	124	114 (10)	9 (7)	27 (11)	92 (1)	33 (3)	399 (32)
Guidance	100	100 (2)	6 (5)	n.a.	62	4 (1)	272 (8)
Policy statement	12	3 (2)	2 (1)	20 (10)	1	8 (1)	46 (14)
Interpretive Rule or release	4	4 (1)	1 (1)	7 (1)	2 (1)	9	27 (4)
Concept release	n.a.	5 (5)	n.a.	n.a.	n.a.	n.a.	5 (5)
Industry letter or letter to Congress	8	2	n.a.	n.a.	27	2	39
Advisory committee creation information	n.a.	n.a.	n.a.	n.a.	n.a.	3	3
Release of reports	n.a.	n.a.	n.a.	n.a.	n.a.	3 (1).	3 (1)
Annual privacy report	n.a.	n.a.	n.a.	n.a.	n.a.	4	4

Notes: This table tallies the form of regulatory activity undertaken by four federal agencies, the Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission (CPSC), and Commodity Futures Trading Commission (CFTC). Agency activity is tracked from April 2011 (first action by the newly established CFPB) through May 2016 for the first three and fifth columns; the fourth column, CPSC_initial, tracks activity from June 1973 (first action by the then-newly established CPSC) through July 1978, matching the number of months in which the CFPB's initial activity is tracked, and the sixth column, CFTC_initial, tracks activity from April 1975 (first action taken by the then newly-established CFTC) through May 1980, matching the number of months in which the CFPB's initial activity is tracked. Activity tallied excludes enforcement actions, decisions on

petitions, issuance of advisory opinions, no-action letters, and guidance directed to consumers. “n.a.” indicates a type of activity that is not applicable to an agency. A number in parentheses indicates the number of actions in the non-notice-and-comment rule or guidance category that were effective on publication with solicited comments to follow the effective (i.e., publication) date, except for futures contracts, for which the CFTC solicited comments before it determined to approve a proposed contract, the action tallied being notices of proposed contracts and not final approvals (which were not included in the Federal Register). Fifteen CFPB interim rules are transfers of regulation from other agencies, and four CPSC_initial notice-and-comment exempt rules are transfers of regulation from other agencies. The CPSC direct final rule count includes one rule that was withdrawn due to receipt of adverse comments.

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Table 2. Significant Agency Policymaking Activities Overview

Rulemaking Format	CFPB	SEC	CPSC	CPSC initial	CFTC	CFTC initial	Total
All Activity	133 (64)	89 (65)	57 (42)	120 (83)	140 (74)	145 (86)	684 (414)
All Rulemaking	72	59	51	94	80	124	480
Notice-and-comment rule	39	52	33	58	70	43	295
Statutory required notice-and-comment exchange rule	n.a.	n.a.	n.a.	n.a.	n.a.	18	18
Non-notice-and-comment rules	33 (25)	7 (4)	18 (6)	36 (14)	10 (3)	63 (23)	167 (75)
Interim rule	25 (25)	4 (4)	0	11 (10)	2 (2)	2 (2)	44 (43)
Direct final rule	0	0	7	0	0	0	7
Accreditation Revision	n.a.	n.a.	6 (6)	n.a.	n.a.	n.a.	6 (6)
Order	0	0	0	0	6	2	8
Futures contract approval	n.a.	n.a.	n.a.	n.a.	n.a.	21 (21)	21 (21)
All Guidance	61	30 (9)	6 (3)	26 (11)	60 (1)	21 (2)	204 (26)
Guidance	44	18 (1)	3 (1)	0	31	2 (1)	98 (3)
Policy statement	7	3 (2)	2 (1)	19 (10)	1	8 (1)	40 (14)
Interpretive rule	3	4 (1)	1 (1)	7 (1)	2 (1)	9	26 (4)
Concept release	n.a.	5 (5)	n.a.	n.a.	n.a.	n.a.	5 (5)
Release of reports	n.a.	n.a.	n.a.	n.a.	n.a.	0	0
Industry letter or letter to Congress	7	0	0	0	26	2	35

Notes: This table tallies the form of regulatory activity, eliminating nonsubstantive activity, undertaken by four federal agencies, the Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission (CPSC), and Commodity Futures Trading Commission (CFTC). Agency activity in the first three and fifth columns is tracked from April 2011 (first action by the newly established CFPB) through May 2016; the fourth column, CPSC_initial, tracks activity from June 1973 (first action by then newly established CPSC) through July 1978, matching the number of months in which the CFPB's initial activity was tracked, and the sixth column, CFTC_initial, tracks activity from April 1975 (first action taken by the then newly-established CFTC) through May 1980, matching the number of months in which the CFPB's initial activity is tracked. Activity tallied excludes enforcement actions; petitions; advisory opinions; no-action letters and consumer guidance; rules that are not substantive in content, such as technical corrections, technical amendments, and extensions of effective or compliance

dates; and rules related to internal organization or procedure. Detail on the excluded material is provided in Appendix Table A1. “n.a.” indicates a type of activity that is not applicable to an agency. A number in parentheses indicates the number of actions in the non-notice-and-comment rule or guidance category that were effective on publication with solicited comments to follow the action’s effective (i.e., publication) date, except for futures contracts, for which the CFTC solicited comments before it determined to approve a proposed contract, the action tallied being notices of proposed contracts and not final approvals (which were not included in the Federal Register). Fifteen CFPB interim rules are transfers of regulation from other agencies, and four CPSC notice-and-comment exempt rules are transfers of regulation from other agencies. The CPSC direct final rule count includes one rule that was withdrawn due to adverse comments.

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Table 3. Agency Regulatory Activity over Time and in Relation to Dodd-Frank Requirements

	Year 1 (9 mos.)	Year 2	Year 3	Year 4	Year 5	Year 6 (5 mos.)
CFPB						
Notice-and-comment rule	0	6 (6)	21 (20)	5 (5)	7 (6)	0
All other rules	18 (18)	6 (4)	6 (4)	1	0	2 (2)
Guidance	5 (2)	13 (9)	15 (6)	10 (4)	14 (5)	4 (3)
CPSC_initial						
Notice-and-comment rule	6	10	4	8	22	8
All other rules	8	4	5	5	12	2
Guidance	2	1	5	4	8	6
CPSC						
Notice-and-comment rule	8	7	5	5	4	4
All other rules	7	2	4	0	5	0
Guidance	1	1	2	1	0	1
SEC						
Notice-and-comment rule	12 (10)	12 (10)	11 (8)	6 (4)	8 (5)	3 (2)
All other rules	4 (3)	0	1 (1)	1 (1)	0	1
Guidance	8	5 (2)	1	6 (1)	7 (2)	3 (1)
CFTC_initial						
Notice-and-comment rule	4	7	5	14	26	5
All other rules	9	13	8	11	14	8
Guidance	6	5	6	0	2	2
CFTC						
Notice-and-comment rule	20 (18)	22 (22)	18 (18)	2 (2)	4 (3)	4 (2)
All other rules	1 (1)	1 (1)	2 (2)	2 (2)	1	3 (1)
Guidance	2 (1)	16 (8)	19 (19)	12 (3)	8 (2)	3

Notes: This table tallies the form of regulatory activity, eliminating nonsubstantive activity, undertaken by four federal agencies, the Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission (CPSC), and Commodity Futures Trading Commission (CFTC) over time. Years 1-6 for the CFPB, CFTC, CPSC, and SEC are April 2011 (first action by the newly established CFPB) through May 2016; for CPSC_initial, June 1973 (first action by then newly established CPSC) through July 1978; and for CFTC_initial, April 1975 through May 1980 (first action by then newly established CFTC), matching the number of months

in which the CFPB's initial activity was tracked. Numbers in parentheses indicate the number of the respective regulatory action taken in conjunction with a provision of Dodd-Frank. CFTC futures contract proposals are included in the "all other rules" category, while CFTC statutory-required notice-and-comment exchange rules are included in the "notice-and-comment" category. Activity tallied excludes enforcement actions; petitions; advisory opinions; no-action letters and consumer guidance; rules that are not substantive in content, such as technical corrections, technical amendments, and extensions of effective or compliance dates; and rules related to internal organization or procedure. Detail on the excluded material is provided in Appendix Table A.1.

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Table 4. Notice-and-Comment Rulemaking Crosstabulations.

Crosstabulation	Chi-squared	Probability	Sample
N & C rule and Agency	25.7421 (5) *	0.0	All agencies, both times (684)
	21.1103 (2) *	0.0	CFPB, CFTC, SEC (362)
	7.7146 (4)	0.103	SEC, CFTC and CPSC both times (551)
	1.9489 (2)	0.377	CFTC, SEC, CPSC (286)
	1.5522 (1)	0.213	CFTC and SEC (229)
	1.8039 (1)	0.179	CFTC (both times) (285)
	1.4143 (1)	0.234	CPSC (both times) (177)
	10.0585 (2)	0.007	CFPB, CFTC and CPSC initial period (398)
N & C rule and Year	3.4124 (5)	0.637	All agencies, both times (684)
	10.6329 (5)	0.059	CFPB, CFTC, SEC (362)
	21.2294 (5) *	0.001	CFPB (133)
	24.7601 (5) *	0.0	CFTC (140)
	16.6498 (5)	0.005	CFTC initial period (145)
	6.4786 (5)	0.262	CFTC both times (285)
	7.0724 (5)	0.215	SEC (89)
	4.9716 (5)	0.419	CPSC (57)
	5.2647 (5)	0.384	CPSC initial period (120)
	6.4034 (5)	0.269	CPSC both times (177)
	21.2418 (5) *	0.001	CFPB, CFTC and CPSC initial period (398)

Notes: This table presents contingency table chi-squared tests crosstabulating an indicator variable for notice-and-comment rules against either agency or year. The agencies are Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission (CPSC), and Commodity Futures Trading Commission (CFTC) tracked over approximately six years. The time period is April 2011 (first action by the newly established CFPB) through May 2016; activity by the CPSC and CFTC is also tracked from June 1973 and April 1975, respectively (first action by the agencies when established) through July 1978 and May 1980, respectively; when only this period is used for these agencies' observations, it is referred to as "initial period." When "both times" appears in the table, all CPSC and CFTC observations are included in the crosstabulation. Numbers in parentheses in column 2 are the chi-square degrees of freedom; numbers in parentheses in column 4 are the number of observations in the crosstabulation. The reported probabilities are not adjusted for multiple comparisons.

* indicates a chi-squared value that is significant when applying a Bonferroni adjustment, i.e., for nineteen comparisons, to retain a global

confidence interval of 95 percent (.05 significance), the probability is adjusted to .0026, which, interpolating from chi-squared distribution tables reporting probability values of .002 and .005, is a chi-squared value of 18.4526.

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Table 5. Logistic Regressions of the Probability of Notice-and-Comment Rulemaking

	Model 1: All agencies, all years	Model 2: All agencies, 2011-16	Model 3: Dodd-Frank agencies, 2011-16	Model 4: All agencies, all years	Model 4: All agencies, 2011-16	Model 6: Dodd-Frank agencies, 2011-16
CFPB indicator	-1.4563 (.2259) **	-1.3881 (.2352) **	-1.2638 (.2517) **	-1.3591 (.2414) **	-1.3874 (.2488) **	-2.423 (.3634) **
Dodd-Frank indicator	1.2658 (.1976) **	1.3137 (.2274) **	1.9580 (.3024) **	1.4550 (.2361) **	1.3142 (.2320) **	2.4014 (.3503) **
Year 2 dummy	.2825 (.2521)	.1397 (.2970)	.1066 (.3228)	.3019 (.2546)	.1492 (.3150)	-.6188 (.3916)
Year 3 dummy	.2069 (.2630)	.2623 (.3133)	.3212 (.3500)	.2333 (.2671)	.2632 (.3465)	-.9769 (.4476) *
Year 4 dummy	.2865 (.2920)	-.2669 (.3882)	-.3949 (.4410)	.3172 (.2940)	-.2659 (.4314)	-1.7106 (.5266) **
Year 5 dummy	.6609 (.2573) *	.0918 (.3601)	.3467 (.4206)	.6605 (.2580) *	.0925 (.3812)	-.4743 (.5574)
Year 6 dummy	.1797 (.3268)	-.0876 (.4513)	-.2678 (.5436)	.2084 (.3294)	-.0866 (.4865)	-1.7172 (.6593) **
Resources per capita				-1.1168 (.7756)	-.0180 (2.7217)	28.8026 (5.2197) **
Constant	-.6528 (.1995) **	-.5943 (.2598) *	-1.3010 (.3576) **	-.5363 (.2133)	-.5899 (.7319)	-9.7856 (1.5980) **
Likelihood ratio chi-squared statistic	61.97 **	60.50 **	67.59 **	62.42 **	60.50 **	79.07 **
Pseudo R-squared statistic	.0711	.1127	.1662	.0731	.1127	.2323
Correctly classified	62.57%	66.59%	70.44%	63.89%	66.59%	73.20%
Pearson chi-squared (goodness of fit) statistic	46.4 **	45.79	47.87 **	108.02 **	89.62 **	43.18 *
nob	684	419	362	684	419	362

Notes: This table presents the results of logistic regressions of agency activity, where the dependent variable equals 1 if the activity is a notice-and-comment rule, 0 for all other rules and guidance activity. Agencies are Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission (CPSC) and Commodity Futures Trading Commission (CFTC). Activity is tracked from April 2011 (first action by the newly established CFPB) through May 2016; activity by the CFTC and CPSC is also tracked from April 1975 and June 1973, respectively (first action by the then newly established CFTC and CPSC) through May 1980 and July 1978, respectively. Model 1 uses observations of all agencies over both time periods; model 2 uses observations for only 2011-2016, excluding observations of the activity of the CFTC and CPSC in 1975-80 and 1973-78, respectively; model 3 uses observations only for agencies subject to Dodd-Frank (CFPB, CFTC and SEC), excluding all activity of the CPSC and CFTC activity in 1975-80. CFPB indicator variable equals 1 if the agency is the CFPB, 0 otherwise;

Dodd-Frank indicator variable equals 1 if the activity was undertaken under a provision in Dodd-Frank; year 2 through year 6 dummies are dummy variables for the year in which the action was taken in event time (that is, the first year of activity for an agency, for example, 2011, 1973 and 1975, are all treated as year 1, and so forth), where year 1 is the omitted dummy variable; resources per capita is the agency's budget in millions divided by the number of employees, where for the CFPB the budget is the amount of funds transferred from the Federal Reserve and for the other agencies it is the amount appropriated by Congress. Numbers in parentheses are robust standard errors; ** significant at $< .01$; * significant at $< .05$. Likelihood ratio chi-squared statistic tests the null hypothesis that all coefficients except that of the constant term are zero; Pearson chi-squared (goodness of fit) statistic tests observed against expected outcomes.

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Table 6. Dodd-Frank Mandated Rulemakings with Deadlines

	CFPB	CFTC	SEC
Dodd-Frank provisions requiring adoption of a rule with a deadline	16	41	69
Dodd-Frank provisions requiring a rule with a deadline for which there has not yet been final action (of those provisions, number for which a rule has been proposed)	3 (0)	3 (3)	15 (8)
Number of rules adopted related to a deadline	24	33	35
Number of rules adopted related to a deadline but excluding multiple rules adopted under a single Dodd-Frank provision (i.e., number that are first rule adopted under a provision)	8	18	25
Number of N&C rules related to a deadline provision	21	31	29
Number of Interim rules related to a deadline provision	2	1	1
Number of other non-N&C (i.e., exempt) rules related to a deadline provision (of those, number of nonsignificant rules)	0	1	3 (2)
Number of guidance documents related to a deadline provision	1	0	1
Number of rules related to a deadline provision adopted outside of sample period (of those, number that are first rule adopted under a provision)	n.a.	5 (3)	6 (6)

Notes: The data source for identification of Dodd-Frank provisions requiring rules subject to deadlines, and of the rules adopted under those provisions, is the Davis Polk Regulatory Tracker. The Tracker, and hence the table, count each subsection of a provision in Dodd-Frank with a deadline as a separate requirement, i.e., section 619 (the Volcker Rule) accounts for seven required rulemakings with a deadline for the SEC. A rule adopted by an agency may relate to multiple provisions identified in the Tracker as requiring rules with deadlines but is counted only as one rule in the table, i.e., one SEC rule is related to all seven of the Volcker rule entries. An agency may also adopt multiple rules for a single provision requiring a rule with a deadline, i.e., there are two SEC rules adopted for each Volcker rule entry. With the exception of row 4, which counts only the first rule adopted for any provision, the counts in the table include all rules related to a provision. “N&C” stands for a rule adopted using notice and comment; “n.a.” for not applicable. The sample period is from April 2011 (the first regulatory action taken by the CFPB) to May 2016; all SEC rules adopted outside of the sample were issued before April 2011, while two of the out-of-sample CFTC rules were issued after May 2016.

Table A1. Construction of Table 2 from Table 1 (Detail of Insignificant Agency Activity)

Rulemaking Format	CFPB	SEC	CPSC	CPSC initial	CFTC	CFTC initial	Total
All Rulemaking	108	130	58	143	113	165	717
Technical corrections	10	7	3	37	22	18	97
Technical amendments	24	11	0	9	1	2	47
Effective date extensions	1	15	4	3	2	2	27
Internal organization and procedures	0	13	0	0	6	18	37
Edgar manual updates	n.a.	21	n.a.	n.a.	n.a.	n.a.	21
Other	1	4	n.a.	n.a.	2	1	8
Significant rulemaking	72	59	51	94	80	124	480
All Guidance	124	114	9	27	92	33	399
Staff summary and discussion of rules, internal procedures, corrections, general letters and FAQs	40	60	0	0	32	3	135
Statutory-required list defining rural counties for exemptions from mortgage rules	8	n.a.	n.a.	n.a.	n.a.	n.a.	8
Statutory-required list defining covered depository institutions	15	n.a.	n.a.	n.a.	n.a.	n.a.	15
Other	0	0	0	1	0	5	6
Small entity compliance guide	n.a.	24	n.a.	n.a.	n.a.	n.a.	24
Record system guidance	n.a.	n.a.	3	n.a.	n.a.	4	7
Significant Guidance	61	30	6	26	60	21	204

Notes: This table presents information on the nonsubstantive regulatory activity undertaken by four federal agencies, the Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission, and Commodity Futures Trading Commission (CFTC). Agency activity in the first three and fifth columns is tracked from April 2011 (first action by the newly established CFPB) through May 2016; the fourth column, CPSC initial, tracks activity from June 1973 (first action by then newly established CPSC) through July 1978, matching the number of months in which the CFPB's initial activity was tracked and the sixth column, CFTC initial, tracks activity from April 1975 (first action taken by the then newly-established CFTC) through May 1980, matching the number of months in which the CFPB's initial activity is tracked.. The tallies show the action by regulatory type that are excluded from Table 1 to construct Table 2 (significant agency activity). "n.a." indicates a type of activity that is not applicable to an agency. Technical corrections consist of corrections in spelling, punctuation, citations and cross-

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references. An example of a technical amendment is a rule adjusting asset size exemption thresholds (e.g., 21 CFPB rules); a few technical amendments are technical corrections to rule amendments. Two notice-and-comment rules are eliminated from Table 1, one CFTC rule in its initial years of operation and one CFPB rule, because they pertained to nonsubstantive matters, respectively, internal procedure and extension of an effective date. The rule in the “other” category for the CFPB was an interim rule addressing how states were to provide notice to the CFPB warning it of actions or proceedings they were taking, and was characterized as insignificant because it had no bearing on private parties/regulated entities; the two rules in the “other” category for the CFTC consist of a rule identifying an entity designated to provide swap dealer id numbers and a rule eliminating references to entities eliminated under Dodd-Frank, and the “other” category rule for CFTC_initial concerns document privacy; the four rules in the “other” category for the SEC consist of a rule noticing a temporary rule’s expiration, a rule noticing the effective date of a rule that had been held in abeyance due to litigation, an interim final temporary rule that maintained the status quo to delay the effectiveness of a change made by Dodd-Frank until a notice-and-comment rule could be adopted, and an order indicating an inflation adjustment required by Dodd-Frank entered simultaneous with a notice of a notice-and-comment rule-making for how to calculate future inflation adjustments. The guidance in the “other” category for the CPSC concerns postponement of the effective date of a policy and procedures statement concerning substantial product hazards, and for the CFTC concerns advisory committee creation and release of reports; record system guidance includes annual privacy reports.

Table A2. Agency Resources

		CFPB	CFTC	CPSC	SEC	CFTC (initial)	CPSC (initial)
2011	Employees	663	697	543	3853		
	Budget	\$162	\$202.675	\$115.018	\$1185		
2012	Employees	970	702	525	4058		
	Budget	\$343	\$205.294	\$114.5	\$1321		
2013	Employees	1335	666	523	4221		
	Budget	\$518	\$205.294	\$114.5	\$1321		
2014	Employees	1443	688	532	4341		
	Budget	\$534	\$215	\$118	\$1350		
2015	Employees	1529	747	549	4578		
	Budget	\$485	\$250	\$123	\$1500		
2016	Employees	1648	716	567	4721		
	Budget	\$565	\$250	\$125	\$1605		
1973	Employees						424
	Budget						\$1.215
1974	Employees						974
	Budget						\$30.9
1975	Employees					357	1067
	Budget					\$4.168	\$36.954
1976	Employees					435	930
	Budget					\$11.483	\$39.564
1977	Employees					460	968
	Budget					\$13.085	\$39.759
1978	Employees					470	996
	Budget					\$13.95	\$40.461
1979	Employees					477	
	Budget					\$15.836	
1980	Employees					462	
	Budget					\$16.617	

Notes: This table presents the number of employees and budget (in millions) for the Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission (CPSC), and Commodity Futures Trading Commission (CFTC), averaged over the six years 2011-16, and for the CFTC and CPSC over 1975-80 and 1973-78, respectively, in the columns identified in parentheses as “initial”. Sources: U.S. Office of Personnel Management, Federal Human Resources Data, available at <https://www.fedscope.opm.gov>; CFPB annual financial reports for fiscal years 2011-2016, available at “Financial Reports,” CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/about-us/budget-strategy/financial-reports/> [<https://perma.cc/YH83-VSS5>]; omnibus budget reconciliation bills enacted by Congress for fiscal years 2011-2016, available at <https://www.congress.gov>, and OFFICE OF MGMT. & BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, APPENDIX, for fiscal years 1975-82.

Figure 1

Figure 1. Form of Agency Policymaking

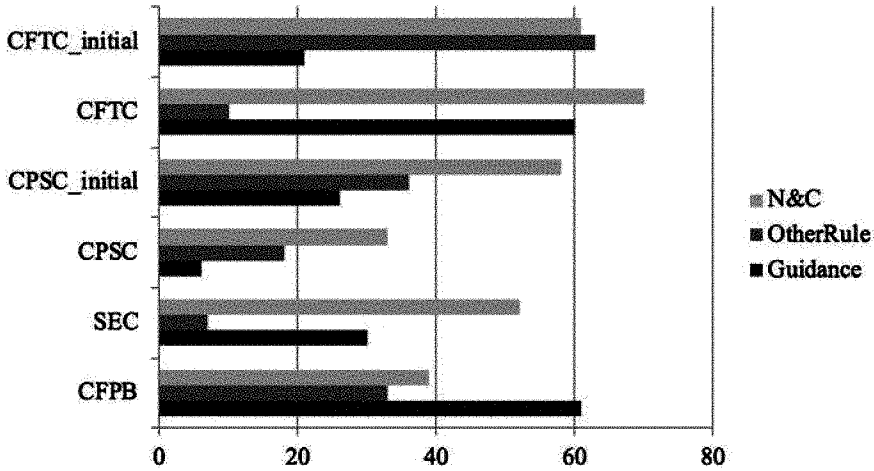


Figure 2

Figure 2. Percentage N&C of Significant Policymaking Activity by Agency

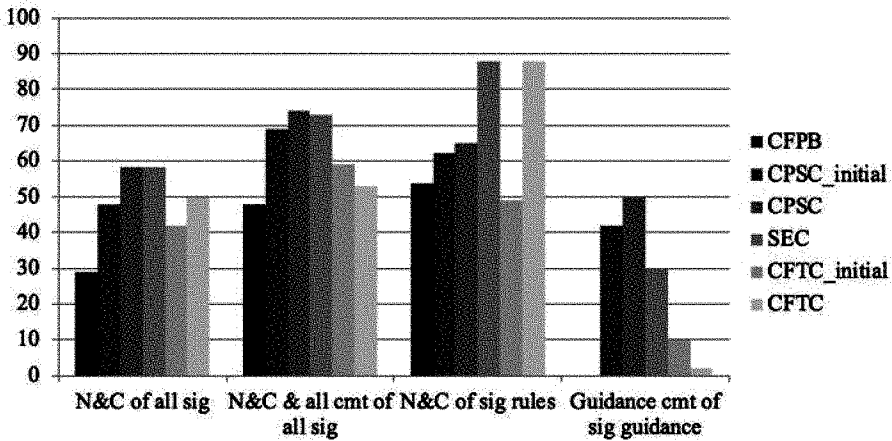


Figure 3a

Figure 3a. CFPB Regulatory Activity over Time

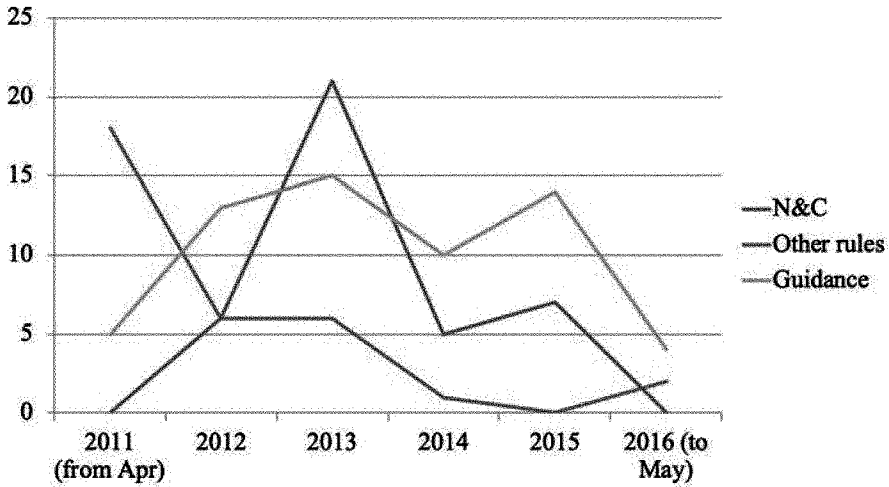


Figure 3b

Figure 3b. SEC Regulatory Activity over Time

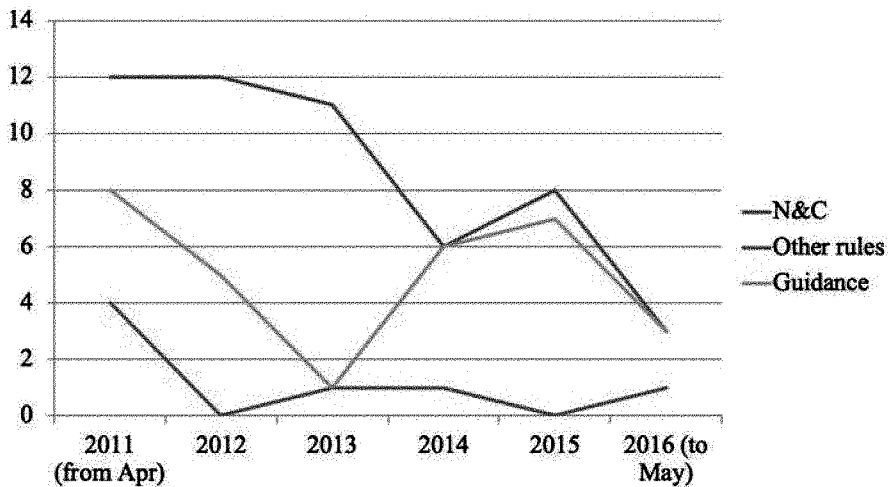


Figure 3c

Figure 3c. CPSC Regulatory Activity over Time

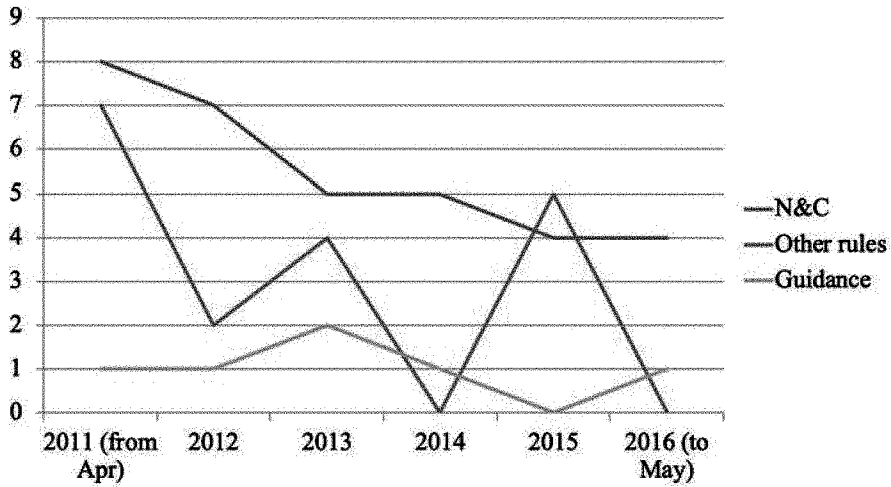


Figure 3d

Figure 3d. CPSC Initial Regulatory Activity over Time

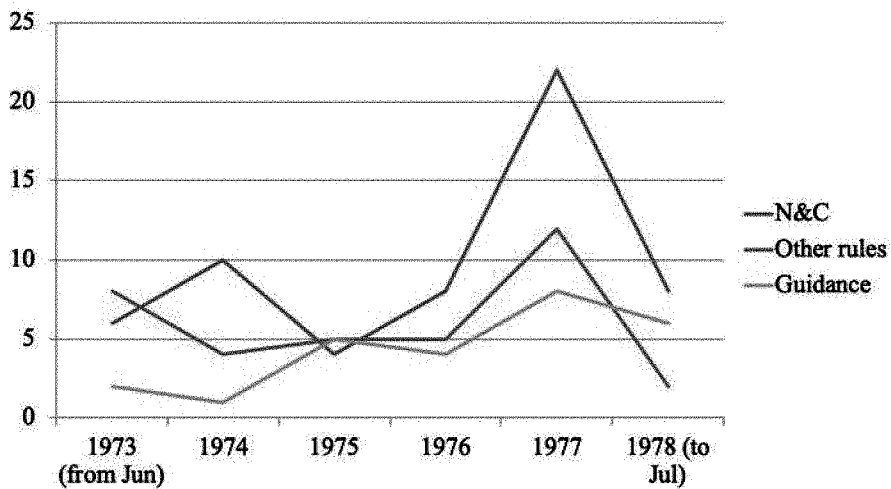


Figure 3e

Figure 3e. CFTC Regulatory Activity over Time

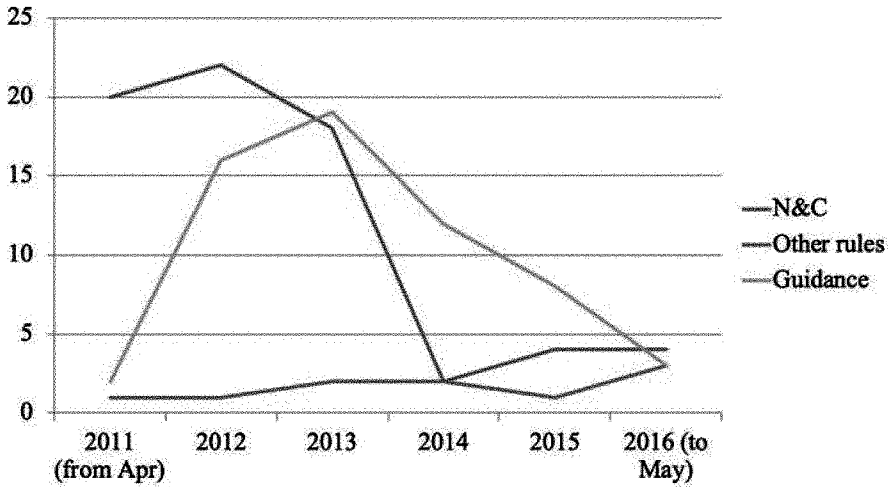


Figure 3f

Figure 3f. CFTC Initial Regulatory Activity over Time

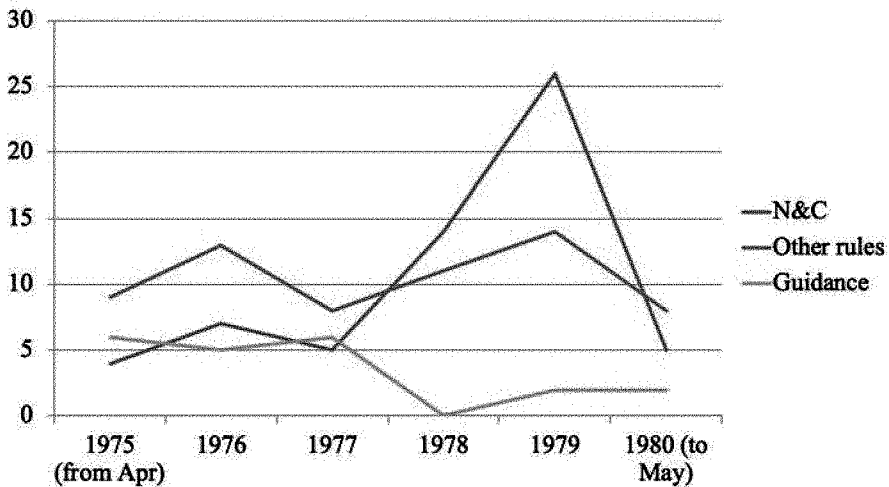


Figure 3g

Figure 3g. Four Agencies' Regulatory Activity over Time

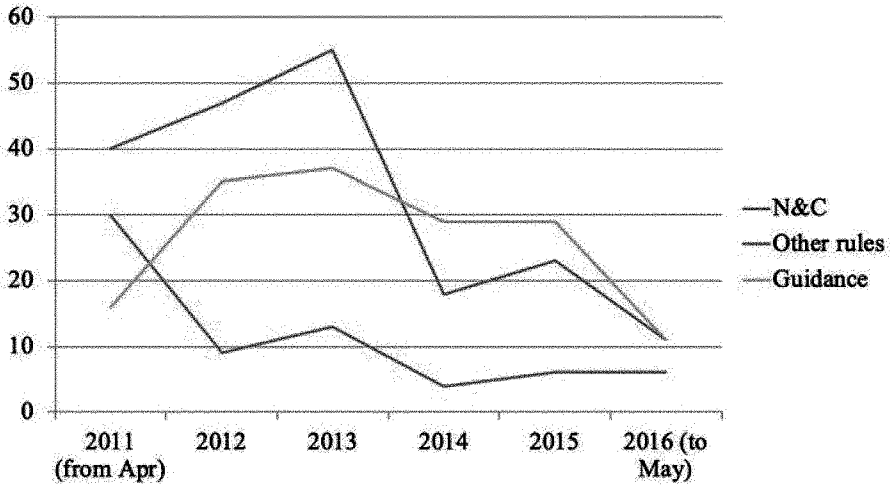


Figure 3h

Figure 3h. Four Agencies' N&C Activity over Time, Dodd-Frank v. non-Dodd-Frank

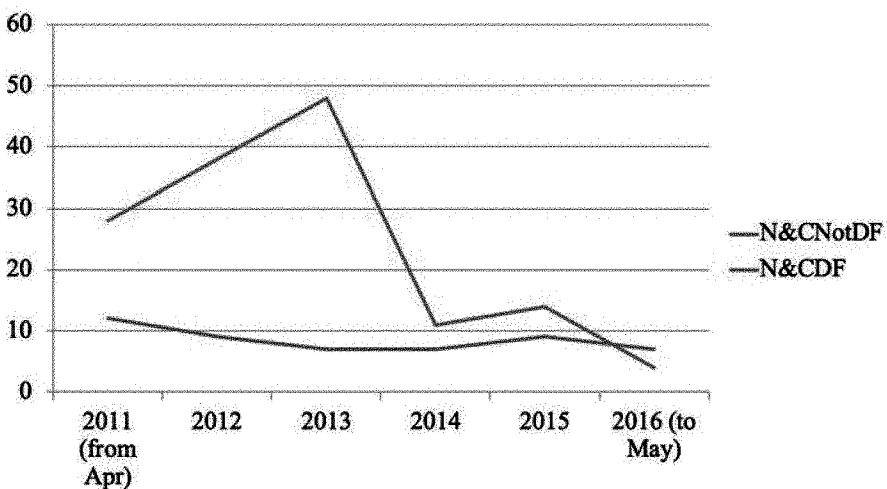


Figure 3i

Figure 3i. Four Agencies' N&C Activity over Time, Dodd-Frank vs. non-Dodd-Frank

