Regulating through the Back Door at the Commodity Futures Trading Commission

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Abstract

This paper looks at how the Commodity Futures Trading Commission (CFTC) has implemented its mandate under the Dodd-Frank Act. Although the CFTC has imposed many regulations through notice-and-comment rulemaking under the Administrative Procedure Act (APA), it has also used other methods—such as staff letters, guidance, and enforcement actions—to impose binding obligations on regulated persons. These other methods arguably violate the APA and make it more difficult for the public, Congress, and the courts to hold the CFTC accountable for its actions. Even the CFTC's own commissioners are excluded from important policy decisions. As a consequence, the CFTC compromises its ability to regulate effectively.

JEL codes: K2, K4, G1

Keywords: Commodity Futures Trading Commission, CFTC, Administrative Procedure Act, APA, Dodd-Frank, notice-and-comment rulemaking, regulatory process, regulatory accountability, regulatory efficacy

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Hester Peirce

The Commodity Futures Trading Commission (CFTC), once easily lost in the long list of regulatory agencies, has achieved new prominence under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[1] Dodd-Frank, signed into law on July 21, 2010, gave the small agency primary regulatory authority over an important market that had not been directly regulated before—the market in over-the-counter derivatives called "swaps."[2] In addition, the CFTC's authority was expanded in some of its existing areas of jurisdiction.[3] As it exercises these new authorities, the CFTC has the ability to profoundly affect the functioning of global financial markets. At this critical time for the agency, the CFTC's choices about how to regulate matter more than ever before.

With its Dodd-Frank statutory mandate in hand, the CFTC immediately set to work drafting the regulatory framework to implement its new powers. Much of the implementation work has been done through traditional notice-and-comment rulemaking.[4] To fill in the regulatory framework, however, the CFTC has employed other, less procedurally rigorous

[1] Pub. L. No. 111-203, 124 Stat. 1379 (2010).
[2] These new authorities are primarily found in Title VII of Dodd-Frank.
[3] For example, the CFTC's enforcement authority was expanded to include insider trading and antidisruptive practices authority. Dodd-Frank § 746 (adding 7 U.S.C. § 6(c)(a)) and § 747 (amending 7 U.S.C. § 6(c)(a)). As another example, Dodd-Frank gave the CFTC authority to write registration rules for foreign boards of trade. *Id.* § 738 (amending 7 U.S.C. § 6(b)).
[4] As of July 18, 2014—the four year anniversary of Dodd-Frank—the CFTC had adopted 50 Dodd-Frank rules. *Dodd-Frank Four-Year Anniversary Progress Report 5*, DAVISPOLK & WARDWELL, LLP (July 18, 2014), http://www.davispolk.com/sites/default/files/07.18.14.Dodd_.Frank_.Progress.Report.pdf. In connection with its traditional notice-and-comment rulemaking, the CFTC has been criticized for procedural flaws. *See, e.g.*, Jill E. Sommers, Commissioner, CFTC, Speech Delivered Before the Cadwalader Energy Conference (Oct. 11, 2012), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opasommers-24 (noting her "concerns that we are finalizing these very important rules in a way that will not allow them to stand the test of time"). Except to the extent these criticisms have caused the CFTC to look for ways to avoid notice-and comment rulemaking, they are beyond the scope of this article.

rulemaking methods, ranging from staff no-action letters to Commission guidance documents to enforcement actions. This article considers some of these methods and raises questions about how such methods affect the agency's regulatory legitimacy.

This article seeks to enhance the debate about how agencies conduct rulemaking and what the attendant procedural requirements should be. The article argues that, by routinely making rules through means other than notice-and-comment rulemaking, an agency can—as the CFTC has done—undermine the public's confidence in the agency as a regulator. A failure to set ex ante standards establishing clear, uniform, and easy-to-locate expectations for regulated entities erodes that confidence. Moreover, an agency that establishes requirements through a complicated and ever-changing patchwork of rules, guidance documents, letters, and enforcement actions risks appearing fickle and unreliable—characteristics that undermine the agency's ability to establish a compliance culture in the industry it regulates.

Congress may be best positioned to limit the use of backdoor[5] rulemaking by writing narrower rulemaking mandates, providing longer implementation deadlines, monitoring agencies' use of guidance documents and policy statements, and crafting agency-specific statutory controls on how such documents should be formulated and used.

The paper proceeds as follows: Part I provides an overview of rulemaking under the Administrative Procedure Act (APA).[6] Part II summarizes the debate about how different forms of rulemaking can and should be used, and judicial deference to agency rulemaking in its various forms. Part III discusses some of the different non-notice-and-comment rulemaking methods used by the CFTC. Part IV discusses likely reasons the CFTC uses the varying rulemaking

[5] "Backdoor rulemaking" is shorthand used throughout the paper for regulatory obligations developed and imposed outside of the normal rulemaking process. Given that these regulations are often developed without transparency and broad public input, another appropriate term might be "backroom rulemaking."
[6] 5 U.S.C. §§ 551–59, 701–6 (2013).

methods. Part V explains how the use of such rulemaking methods has undermined the CFTC's effectiveness as a regulator. Part VI concludes.

I. Rulemaking under the Administrative Procedure Act

Dodd-Frank—the legislative response to the financial crisis of 2007–2009—delegated a tremendous amount of authority to regulatory agencies.[7] Dodd-Frank imposed 398 rulemaking requirements on all financial regulators, sixty of which belong to the CFTC.[8] Consequently, the procedures regulatory agencies use to put meat on Dodd-Frank's bones are very important. Some parts of the statute mandate notice-and-comment rulemaking.[9] More often, however, Dodd-Frank does not specify the use of notice-and-comment rulemaking.

Agency rulemaking is governed by the Administrative Procedure Act (APA).[10] The APA offers agencies several ways to make rules, which it defines, in relevant part, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ."[11]

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[7] *See, e.g.*, Binyamin Appelbaum, *On Finance Bill, Lobbying Shifts to Regulation*, N.Y. TIMES, June 26, 2010, http://www.nytimes.com/2010/06/27/business/27regulate.html?pagewanted=all&_r=0 (explaining that Dodd-Frank "is basically a 2,000-page missive to federal agencies, instructing regulators to address subjects ranging from derivatives trading to document retention" and observing that " it is notably short on specifics, giving regulators significant power to determine its impact—and giving partisans on both sides a second chance to influence the outcome").

[8] *Dodd-Frank Four-Year Anniversary Progress Report*, DAVISPOLK, *supra* note 4, at 5.

[9] *See, e.g.*, Dodd-Frank § 332 (amending § 7(e)(2)(C) of the Federal Deposit Insurance Act to require the Federal Deposit Insurance Corporation to "prescribe, *by regulation, after notice and opportunity for comment*, the method for the declaration, calculation, distribution and payment of dividends under this paragraph") (emphasis added).

[10] 5 U.S.C. §§ 500–96 (1946).

[11] 5 U.S.C. § 551(4) (2013).

Rulemaking—the "agency process for formulating, amending, or repealing a rule"[12]—can be a formal hearing process,[13] but this method is used rarely by financial regulators and, to date, has not been used in connection with Dodd-Frank. A more common form of rulemaking is the informal "notice-and-comment rulemaking."[14] Informal rulemaking requires an agency to publish a notice of proposed rulemaking in the *Federal Register*, including "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[15] The agency is required to accept and consider "submission[s] of written data, views, or arguments" by "interested persons" before finalizing rules together with "a concise general statement of their basis and purpose."[16] The CFTC has issued many of its Dodd-Frank rules using this method of rulemaking.[17]

Rules formulated under the APA's parameters are "legislative rules" and have the same binding effect as legislation. As Professor Michael Asimow explains, "A legislative rule is essentially an administrative statute—an exercise of previously delegated power, new law that completes an incomplete legislative design."[18]

Notice-and-comment rulemaking benefits agencies, regulated entities, and the public. Regulators typically need input from regulated entities that often have the necessary technical

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[12] 5 U.S.C. § 551(5) (2013).
[13] *See* 5 U.S.C. §§ 556 and 557 (2013). *See also* Aaron L. Nielson, *Rethinking Formal Rulemaking* (Mercatus Ctr. at George Mason Univ. Working Paper, May 15, 2014), *available at* http://mercatus.org/sites/default/files/Nielson_FormalRulemaking_v1.pdf.
[14] *See* 5 U.S.C. § 553 (2013).
[15] *Id.* § 553(b).
[16] *Id.* § 553(c).
[17] For a list that includes these rules, *see* CFTC, Dodd-Frank Final Rules, Final Guidance, Final Exemptive Orders, and Other Final Actions, http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankFinalRules/index.htm (last visited Nov. 24, 2013).
[18] Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383 (1985) (footnote omitted).

expertise to forecast what the consequences of a rule will be for them specifically or the industry as a whole, identify where problems are likely to arise, and suggest potential alternatives. It is also important for an agency to hear from the parties the rules are intended to protect. They may want more, less, or a different type of protection than the agency is proposing. Agencies also can gain useful insights from other interested parties, including other regulators, members of competing industries, and members of Congress. An important part of the process is the discussion among commenters, which can be useful to the agency in weighing the pros and cons of the proposal and different commenters' positions.

Despite these benefits, there are costs, and the APA explicitly permits departures from the notice-and-comment rulemaking process in several instances. Specifically, an agency need not follow these procedures "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[19] Another important category of rules to which the notice-and-comment requirements do not apply is "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[20] Interpretive rules and general statements of policy are known as "nonlegislative rules." This category is large, "rang[ing] from matters published in the Code of Federal Regulations (C.F.R.), which clearly intend to provide definitive guidance to both regulated entities and the public, to letters addressed to particular entities upon their request for guidance to agency memoranda sent to subordinate offices in the agency instructing them how to deal with certain situations."[21]

[19] 5 U.S.C. § 553(b)(B).
[20] *Id.* § 553(b)(A).
[21] William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322–23 (2001).

II. Delineating Rules and the Deference Due to Them

Delineating one type of rulemaking from another has proved fertile ground for debate, particularly as "the danger posed by the growing power of the administrative state"[22] has invited more focus on questions of administrative law. Among the questions at issue are how the line between legislative and nonlegislative rules ought to be drawn, the appropriate level of judicial deference for each, the types of agency actions that should be conducted through legislative rulemaking, and the appropriate level and type of procedural protections in legislative and nonlegislative rulemaking. A brief discussion of some of these debates offers a helpful starting point from which to consider the CFTC's rulemaking practices.

A. Distinguishing Legislative Rules from Nonlegislative Rules

The statutory line between legislative rules and nonlegislative rules (interpretative rules and general statements of policy) is not precise.[23] The U.S. Court of Appeals for the District of Columbia Circuit—which has long experience with challenges to agencies' characterizations of their rulemakings—recently explained the distinction as follows:

> An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule. An agency action that sets forth legally binding requirements for a private party to obtain a permit or license is a legislative rule. (As to interpretive rules, an agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule.) An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how

[22] City of Arlington v. Fed. Communications Comm'n, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).
[23] *See, e.g.*, Nat'l Mining Assoc. v. McCarthy, 758 F.3d 243, 249 (D.C. Cir. 2014) (classifying an agency action "turns out to be quite difficult and confused"); Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1108–9 (D.C. Cir. 1993) (quoting descriptions from prior cases about the line between legislative and nonlegislative rules, including "enshrouded in considerable smog," "fuzzy," "tenuous," "blurred," and "baffling") (citations and internal quotations omitted).

> it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.[24]

The court went on to cite the relevant factors in applying this framework to specific agency documents—"actual legal effect (or lack thereof)"—is "most important," followed by how the agency characterizes the document, and "whether the agency has applied the guidance as if it were binding on the regulated parties."[25] The fact that regulated entities feel bound by a particular document is generally not enough to make it a rule.[26] Instead, the court looks at whether the agency has imposed new obligations on regulated entities, and whether the agency acts as if it is bound by the document.[27] Other important signals of legislative rulemaking are "mandatory, definitive language,"[28] the ability to form the basis of an enforcement action based on the agency document at issue,[29] publication in the *Code of Federal Regulations*,[30] and inconsistency with an existing legislative rule.[31]

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[24] Nat'l Mining Assoc., 758 F.3d at 251–52.
[25] *Id.* at 253.
[26] *Id.* ("But while regulated parties may feel pressure to voluntarily conform their behavior because the writing is on the wall about what will be needed to obtain a permit, there has been no 'order compelling the regulated entity to do anything.'") (quoting Independent Equipment Dealers Assoc. v. EPA, 372 F.3d 420, 420 (D.C. Cir. 2004)).
[27] *See, e.g.*, Gen. Elec. Co. v. Envtl. Protection Agency, 290 F.3d 377, 384 (D.C. Cir. 2002) (holding that an Environmental Protection Agency guidance document that provided two methods for conducting a risk assessment was a legislative rule because "[t]o the applicant reading the Guidance Document the message is clear: in reviewing applications the Agency will not be open to considering approaches other than those prescribed in this document"); McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1322 (D.C. Cir. 1988) (holding that because the model at issue "substantially curtails EPA's discretion in delisting decisions and accordingly has present binding effect," it is a legislative rule).
[28] *See, e.g.*, Community Nutrition Institute v. Young, 818 F.2d 943, 947 (D.C. Cir. 1987). In that case, which considered the Food and Drug Administration's (FDA's) announcement of contaminant thresholds for enforcement actions, the court also placed great weight on the fact that the agency had a process for granting exceptions from the thresholds and agency statements suggesting the thresholds were "not musings about what the FDA might do in the future but rather . . . set a precise level of . . . contamination that FDA has presently deemed permissible." *Id.* at 948.
[29] *See, e.g.*, Pacific Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (noting that "[t]he critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings" and explaining that an agency can rely on a legislative rule as the basis for an administrative proceeding, but not on a policy statement). *See also* American Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109–10 (D.C. Cir. 1993) (explaining that an agency's need to rely on a pronouncement as a basis for an enforcement action helps to distinguish interpretative rules from legislative rules).
[30] American Mining Cong., 995 F.2d at 1109.
[31] *Id.*

The D.C. Circuit's method for deciding whether an agency action is a legislative rule reflects a tension. On the one hand, the court does not want to dissuade agencies from providing guidance to the industries they regulate by forcing them to take all actions by notice-and-comment rulemaking.[32] On the other hand, when agencies impose new obligations, the court suggests agencies generally should adhere to APA requirements for doing so.[33] The fact that an agency's own characterization of a document carries substantial weight in the analysis may give agencies a perverse incentive to classify its rules as guidance, couch them in tentative language, and not publish them in the *Code of Federal Regulations* in the hope of avoiding the legislative rule label. The result could be less predictability for regulated entities and the public, and less accountability for regulators. This tension is also evident in the academic debate about agencies' use of nonlegislative rulemaking.

B. Agencies' Use of Nonlegislative Rulemaking

Academics disagree how much latitude agencies should have in choosing between legislative and nonlegislative rulemaking. One side of the debate is motivated by concerns over compelling behavior without any procedural protections to assess the wisdom, costs, and unintended consequences of doing so. Professor Robert Anthony has taken the position that, if agencies want a particular document to be binding, or if the document is effectively binding, the agency must adopt it using the APA's notice-and-comment procedures.[34] As he puts it, "*Did the agency intend*

[32] The *Community Nutrition* court, for example, characterized its own holding as "narrow" in order not to dissuade agencies from issuing guidance that offers "the not inconsiderable benefits of apprising the regulated community of the agency's intentions as well as informing the exercise of discretion by agents and officers in the field." 818 F.2d at 949.
[33] *See, e.g.*, Am. Hosp. Assoc. v. Bowen, 834 F.3d 1037, 1044 (D.C. Cir. 1987) (explaining that "Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones").
[34] Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1315 (1992).

the document to bind? Has the agency given it binding effect? If the answer to either of these questions is 'yes,' the document should have been issued as a legislative rule."[35] He points to a number of "indicia that nonlegislative documents are binding," including forming the basis for enforcement actions, being "couched in mandatory language," and sometimes offering a safe harbor that has the effect of reforming regulated entities' conduct.[36] The exception to his rule of thumb is for "agency pronouncements [that] interpret specific statutory or regulatory language."[37] Even with respect to interpretations, Anthony recommends that agencies employ notice-and-comment procedures for "substantial" interpretations that expand the agency's jurisdiction, change "the obligations or liabilities of private parties," or change the way the agency "grant[s] entitlements."[38]

Arguments in favor of clamping down on the improper use of nonlegislative rulemaking are particularly compelling because judicial review is not always available for rulemaking that is not considered to be final agency action.[39] The Supreme Court has explained that an action will be considered final if it is "the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature"[40] and is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[41] As Professor William

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[35] *Id.* at 1327 (emphasis in original). *See also* Randolph J. May, *Ruling Without Real Rules—or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303, 1307 (2001) (using an Occupational Safety and Health Administration letter regarding the application of requirements to homes of teleworking employees to illustrate the principle that agencies should not be able to "promulgate a rule with the force of law" without following required procedures).
[36] Anthony, *supra* note 34, at 1328–29.
[37] *Id.* at 1315.
[38] *Id.* at 1377.
[39] The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704.
[40] Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (citing Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 113 (1948)).
[41] *Id.* at 178 (citing Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).

Funk points out, the absence of clear Supreme Court guidance about "when nonlegislative rules are final agency action or are ripe for review and therefore subject to judicial review" has resulted in "allow[ing] the government to extort compliance with its nonlegislative rules."[42]

The other side of the debate is motivated by practical considerations about the useful role that nonlegislative rulemaking can play for agencies and for regulated entities. Professor Asimow acknowledges the binding effect that nonlegislative rules have in practice[43] and the value of the notice-and-comment process.[44] He points out, however, that nonlegislative rules can be very valuable for the agency—as a way to foster consistency in the exercise of the agency's discretion—and for the public—as a source of insight into how the agency will use its discretion.[45] Professor Peter Strauss, who also values nonlegislative rules, embraces the part of the APA that specifically carves out a role for what he calls "publication rules":[46]

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[42] William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1028 (2004). Even if nonlegislative rulemaking is reviewable, "full litigation is much more costly than participating in normal notice-and-comment rulemaking." *See also* Henry N. Butler & Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 HARV. J. L. PUB. POL'Y 579, 620 (2014).

[43] Asimow, *supra* note 18, at 384 ("Although legislative and nonlegislative rules are conceptually distinct and although their legal effect is profoundly different, the real world consequences are usually identical.").

[44] *Id.* at 402–3 (explaining that the notice-and-comment process can be used to "promote[] fundamental democratic values by enhancing the responsiveness of agencies to the interest groups affected by regulation" and as "a source of low-cost information to agency decisionmakers").

[45] *Id.* at 385–88. *See also* William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1028 (2004) (citing transparency and staff control as benefits on nonlegislative rules); Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices* 2 (Bulletin No. 07-02, 2007) [hereinafter *OMB Bulletin*], *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf ("Agencies may provide helpful guidance to interpret existing law through an interpretive rule or to clarify how they tentatively will treat or enforce a governing legal norm through a policy statement. Guidance documents, used properly, can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties.").

[46] Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 804 (2001) (relying on 5 U.S.C. §§ 552(a)(1) and (2)). Section 552(a)(2) provides that

> [a] final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—
>
> (i) it has been indexed and either made available or published as provided by this paragraph; or
>
> (ii) the party has actual and timely notice of the terms thereof.

But see Funk, *supra* note 21, at 1344–46 (arguing that the term "publication rule" is misleading).

> Agency administration is aided when central officials can advise responsible bureaucrats how they should apply agency law. Citizens are better off if they can know about these instructions and rely on agency positions, with the assurance of equal treatment such central advice permits, than if they are remitted to the discretion of local agents and "secret law."[47]

Strauss points out that "[a]dopting regulations would require the time of the agency's limited top-level management and costly formality to create or alter."[48]

Professor Donald Elliott suggests that "[n]otice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."[49] He believes notice-and-comment rulemaking is useful for building a record, but favors other means for the agency to get real input from the public.[50]

As Elliott's colorful description suggests, because legislative rules are by definition binding, academics and courts have spent considerable time perfecting the process used to develop such rules by adding new requirements to make them.[51] If rules are going to bind, they should be the product of a rigorous rulemaking process. Many commentators have concluded that the unintended result of efforts to improve the process has been the "ossification" of the process for making legislative rules.[52] Some argue that, as a result of such ossification, agencies have resorted to using nonlegislative rules, which allow them to achieve nearly the same result as

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[47] Strauss, *supra* note 46, at 808.
[48] *Id.* at 814.
[49] E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).
[50] *Id.* at 1492–93 ("To secure the genuine reality, rather than a formal show, of public participation, a variety of techniques is available—from informal meetings with trade associations and other constituency groups, to roundtables, to floating 'trial balloons' in speeches or leaks to the trade press, to the more formal techniques of advisory committees and negotiated rulemaking.").
[51] *See* Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, n.22–24 (2007) (detailing some of these requirements).
[52] *Id.* at 700–1 ("There is a general consensus that the notice and comment rulemaking process for legislative rules has become 'ossified' over the last few decades as Congress, courts and the executive branch have imposed substantial new procedural requirements on the APA notice and comment process.") (footnotes omitted); Richard J. Pierce, *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1494 (2012) ("Ossification is a real problem that has a wide variety of serious adverse effects.").

a legislative rule without all the hassle.[53] Others disagree that agencies are overusing nonlegislative rulemaking.[54]

C. Judicial Deference to Agency Rulemaking

In addition to ossification, judicial treatment of nonlegislative rulemaking may affect the degree to which agencies use it. While agencies may not be able to bring enforcement actions based solely on nonlegislative rules, courts are likely to give deference to the interpretations embedded in them. For notice-and-comment rulemaking, agencies enjoy the familiar *Chevron* deference.[55] Under *Chevron*, if "Congress has directly spoken to the precise question at issue . . . the court as well as the agency, must give effect to the unambiguously expressed intent of Congress," but "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[56] Under *Chevron*, agencies have enjoyed great deference in interpreting their own statutes through notice-and-comment rulemaking.[57]

The Supreme Court has offered some important guideposts on deference with respect to non-notice-and-comment rulemaking. These guideposts are not always easy to follow, particularly when applied to the many different forms that such rulemaking takes and the various

[53] *See, e.g.*, Johnson, *supra* note 51, at 701 ("agencies are increasingly adopting policies and interpreting laws and regulations through nonlegislative rules") (footnote omitted).
[54] *See, e.g.*, Connor Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L. J. 782, 821–22 (2010) (based on an empirical analysis of five agencies over a ten-year period, concluding that "agencies do not frequently use guidance documents to issue important policies outside of the notice and comment process" and, consequently, "concern over agency abuse of guidance is overwrought").
[55] Chevron U. S. A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
[56] *Id.* at 842–43.
[57] *See, e.g.*, City of Arlington v. Fed. Communications Comm'n, 133 S. Ct. 1863, 1871 (2014) (describing the Court's consistent application of *Chevron* deference to questions of statutory construction).

levels of bureaucracy from which such documents emanate.[58] Generally, agency interpretations taken by means other than notice-and-comment rulemaking are entitled to at least judicial respect, and often judicial deference.

In *Christensen v. Harris County*, the court considered how much deference to give to an opinion letter issued by the Department of Labor's Wage and Hour Division.[59] The majority opinion, distinguishing the letter from an interpretation "arrived at after . . . a formal adjudication or notice-and-comment rulemaking," took the position that "[i]nterpretations such as those in opinion letters—like the interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[60] Instead, these interpretations would get respect under *Skidmore v. Swift & Co.*[61] In *Skidmore*, the Court held,

> [T]he rulings, interpretations and opinions of the Administrator [of the Department of Labor's Wage and Hour Division] under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[62]

In *U.S. v. Mead*, the Supreme Court looked at a tariff classification ruling by the U.S. Customs Service and concluded that, although entitled to some degree of deference, it was not

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[58] Professor Strauss correctly points out the "anthropomorphic tendency to treat agencies as if they were a single human actor." Strauss, *supra* note 46, at 810. While Strauss makes the point to underscore the beneficial role that nonlegislative rules can serve in internal agency communication, the point is also important to the question of who is entitled to make rules that bind people outside the agency. In the context of an agency like the CFTC with a commission structure rather than a single director, this question is particularly important.

[59] Christensen v. Harris County, 529 U.S. 576 (2000).

[60] *Id.* at 587.

[61] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[62] *Id.* at 139. Justice Antonin Scalia, in his concurrence in *Christiansen*, dismissed *Skidmore* as irrelevant in the wake of *Chevron*. In his view, an agency is entitled to *Chevron* deference for any reasonable interpretation of a statute that represents "the authoritative view" of the agency. *Christiansen*, 529 U.S. at 590–91 (Scalia, J., dissenting). Justice Stephen Breyer, in his dissent in *Christiansen*, defended the continuing relevance of *Skidmore*-style deference for instances in which agencies are not engaged in delegated legislative rulemaking. *Id.* at 596–97 (Breyer, J., dissenting).

entitled to *Chevron* deference because it was one of thousands generated each year by many different Customs Service offices.[63] To qualify for *Chevron* deference, however, agency action need not be in the form of notice-and-comment rulemaking:

> [T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded . . . .[64]

The Court underscored this point in *Barnhart v. United States*, in which it considered an interpretation by the Social Security Administration that appeared in various agency documents that were not products of notice-and-comment rulemaking and subsequently—only after the litigation began—in a notice-and-comment rulemaking.[65] The Court explained that "the fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due."[66]

In a concurrence in *Barnhart*, Justice Scalia took the position that the deference question was easy because there was a notice-and-comment rulemaking.[67] In his dissent in *Mead*, he contended that *Chevron* deference is available for all sorts of agency actions, regardless of the formality of the procedure with which they were adopted. In his view, "[a]ny resolution of [statutory] ambiguity by the administering agency that is authoritative—that represents the

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[63] U.S. v. Mead, 533 U.S. 218, 233 (2001). The Court explained that the fact "that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever." *Id.* at 234.
[64] *Id.* at 230–31 (citation omitted).
[65] Barnhart v. United States, 535 U.S. 212 (2002).
[66] *Id.* at 221–22 (citations omitted).
[67] *Id.* at 227 (Scalia, J., concurring) ("The SSA's recently enacted regulations emerged from notice-and-comment rulemaking and merit deference. No more need be said.").

official position of the agency—must be accepted by the courts if it is reasonable."[68] Justice Scalia pointed to the fact that the agency was defending the customs ruling at issue as evidence of the ruling's authoritative nature.[69] Justice Scalia conceded that authoritativeness "may not be a bright-line standard," but

> it is a line that focuses attention on the right question: not whether Congress "affirmatively intended" to delegate interpretive authority (if it entrusted administration of the statute to an agency, it did, because that is how our system works); but whether it is truly the agency's considered view, or just the opinions of some underlings, that are at issue.[70]

As an example of this line-drawing, in *NationsBank v. Variable Annuity Life Insurance*, the Supreme Court unanimously held that a letter from the Senior Deputy Comptroller to NationsBank was entitled to deference.[71] That letter "purport[ed] to represent the Comptroller's position," whereas an earlier letter taking a contrary position purported to represent the position of its author, an agency staffer.[72] In the context of an agency like the CFTC with a commission structure, determining whether a particular statement by the agency is authoritative is particularly difficult.[73]

A recent Supreme Court case, *Wos v. E.M.A.*, highlighted the difficulty of attempting to draw bright lines about the proper degree of deference for agency decisions.[74] The Court concluded that a North Carolina statute conflicted with a Medicaid statute even though a (subsequently disavowed) letter and memorandum from the Centers for Medicare and Medicaid

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[68] Mead, 533 U.S. at 257 (Scalia, J., dissenting).
[69] *Id.* at 258 (Scalia, J., dissenting).
[70] *Id.*
[71] NationsBank v. Variable Annuity Life Insurance, 513 U.S. 251, 254 (1995).
[72] *Id.* at 263.
[73] Before her ascent to the Supreme Court, Elena Kagan argued that "the Court should refocus its inquiry from the 'how' to the 'who' of administrative decision making." David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. L. REV. 201, 204. Under the "who" approach, "[i]f the congressional delegatee of the relevant statutory grant of authority takes personal responsibility for the decision, then the agency should command obeisance, within the broad bounds of reasonableness, in resolving statutory ambiguity; if she does not, then the judiciary should render the ultimate interpretive decision." *Id.* In the case of the CFTC, the relevant delegatee would be the Commission.
[74] Wos v. E.M.A., 133 S. Ct. 1391 (2013).

expressed approval of the statute. The Court noted that those documents "no longer reflect the agency's position" and, citing *Christensen*, pointed out that "at any rate, the documents are opinion letters, not regulations with the force of law."[75] Justice Breyer, in his concurrence, underscored that the agency's current disapproval of the North Carolina law had factored into his decision, and the current disapproval deserved some measure of deference, even though Justice Breyer could not "measure the degree of deference with the precision of a mariner measuring a degree of latitude."[76] As he put it, "[T]he Administrative Procedure Act is not the tax code. And cases that seek to determine whether Congress intended courts to give weight to agency views provide rules of thumb, general principles meant to guide interpretation, not rigid rules that narrowly confine it."[77]

Another wrinkle in the deference discussion is whether an agency's interpretations of its own regulations are entitled to deference. This piece of the deference story is important because agencies issue many guidance documents pertaining directly to their own rules that are only indirectly derived from the statutes under which such rules were promulgated. In *Bowles v. Seminole Rock*, the Supreme Court held that such documents deserve deference.[78] In upholding the administrative interpretation of a regulation promulgated under emergency price control laws, the Court explained that when a case "involves an interpretation of an administrative regulation[,] a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."[79] The Court further explained that "the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or

[75] *Id.* at 1402.
[76] *Id.* at 1403.
[77] *Id.*
[78] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). For a detailed discussion of this case, *see* Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449 (2011).
[79] Bowles v. Seminole Rock & Sand Co., at 413–14.

inconsistent with the regulation."[80] The Court took a similar view in a more recent case, in which it upheld the Department of Labor's interpretation of its own test for assessing whether overtime pay requirements apply.[81]

As Justice Breyer suggests in *Wos*, predicting when courts will defer to an agency's position is difficult. The fact that agency statements that fall short of legislative rulemaking nevertheless command at least some measure of judicial respect and the Court's willingness to defer to agency interpretations of their own regulations likely weigh into agencies' decisions about whether to forgo notice-and-comment rulemaking in favor of quicker, more flexible approaches to making agency policy.

D. Potential Responses to Agencies' Nonlegislative Rulemaking

If a combination of ossification and willingness of courts to defer to a wide range of agency documents has encouraged agencies to resort to using guidance documents instead of legislative rules, one option would be to require agencies to employ informal rulemaking for binding requirements.[82] Another less dramatic option would be to impose more requirements on the process for issuing nonlegislative rules. But if that process becomes "ossified," agencies

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[80] *Id.* at 414.

[81] Auer v. Robbins, 519 U.S. 452 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'") (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359, 104 L. Ed. 2d 351, 109 S. Ct. (1835)).

[82] *See supra* notes 34–38 and accompanying text (discussing Anthony's recommended approach). *See also* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 92-2: AGENCY POLICY STATEMENTS 1, 3–4 (June 18, 1992) (in response to concerns that regulatory agencies were "issu[ing] policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address," recommending that (1) agencies use legislative rulemaking for binding policies, (2) agencies identify binding, legislative rules and the authority under which they are being adopted, (3) policy statements be identified as nonbinding, and (4) agencies provide "a fair opportunity to challenge the legality or wisdom of the document and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials . . . at or before the time the policy statement is applied").

might resort to less transparent and disciplined rulemaking methods.[83] Alternatively, agencies might not provide guidance at all, which could prove even more troubling.[84] Despite such concerns, fears about the widespread use of nonlegislative rulemaking have led to calls for more procedural protections.

Suggested solutions attempt to balance the benefits of nonlegislative rulemaking with the need to protect those subject to the rules as well as the public interest. Professor Funk has called for a requirement that agencies label interpretive rules and general statements of policy as such so that the fact that they are not binding outside the agency is clear.[85] Nonlegislative rules could be challenged on their merits in court and agencies would not get deference.[86] Professor Stephen Johnson, who emphasizes the importance of public participation as a source of agency oversight, information, and legitimacy,[87] recommends allowing "public participation when agencies adopt significant guidance documents," and judicial review for "deregulatory" and "nonenforcement" policies and other otherwise potentially unreviewable policies.[88]

The Office of Management and Budget (OMB), in a 2007 bulletin on "agency good guidance practices," set forth procedures surrounding the issuance of "significant guidance documents."[89] First, agencies should have written procedures for approving such documents. Second, each such document should include basic identifying information and an acknowledgement that it is guidance and should avoid "mandatory language." Third, the

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[83] *See, e.g.*, Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restructuring Agency Use of Nonlegislative Rules*, 37 HARV. J. L. & PUB. POL'Y 523, 550–51 (2014) (arguing that adding procedural protections on nonlegislative rulemaking could cause agencies to seek other rulemaking methods that would be even more difficult to oversee).
[84] *See, e.g.*, Asimow, *supra* note 18, at 409 (arguing that imposing additional procedures "would be a significant disincentive to nonlegislative rulemaking," and would thus cause the "public to lose more than it would gain").
[85] Funk, *supra* note 45, at 1032–33.
[86] *Id.* at 1033–34.
[87] Johnson, *supra* note 51, at 703.
[88] Stephen M. Johnson, *In Defense of the Short Cut*, 60 KAN. L. REV. 495, 538 (2012).
[89] *OMB Bulletin*, *supra* note 45.

guidance should be available on the agency's website along with a way for the public to comment. Fourth, drafts of economically significant guidance documents should be noticed in the *Federal Register*, and the public should be afforded an opportunity to comment.[90]

Professor Nina Mendelson worries that, absent an accountability mechanism like judicial review, good guidance reforms that expand the opportunity to comment might not be sufficient.[91] She is particularly concerned about protecting those parties regulations are intended to benefit, and has made several other reform suggestions, including notifying the public of significant guidance documents and allowing them to petition for their repeal or revision,[92] requiring notice-and-comment rulemaking for "important" policy guidance documents,[93] and forcing agencies to justify departures from guidance documents.[94]

The varied ways that the CFTC makes rules defy neat categorization and simple solutions. Professor Jill Family may well be correct to argue for agency-specific approaches to solving problems related to guidance documents.[95] Suggestions to label guidance documents and to incorporate additional steps (such as opportunity for comment) into the nonlegislative rulemaking process would not be sufficient in the case of the CFTC. The CFTC has used a notice-and-comment process in connection with some of its nonlegislative rulemaking, posts its guidance on its website, and has affixed a nonbinding label to much of it. Despite this, its rulemaking methods continue to raise concerns.

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[90] *Id.* at 20–21.
[91] Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 93 CORNELL L. REV. 397, 450 (2007).
[92] *Id.* at 438–44.
[93] *Id.* at 444–45.
[94] *Id.* at 445–47.
[95] Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency; Immigration Law and Not Really Binding Rules*, 47 U. MICH. J.L. REFORM 1, 52 (2013) (arguing for "an agency-by-agency approach [that] acknowledges that guidance reform should be tailored to the agency").

III. The CFTC and Its Departures from APA Notice-and-Comment Rulemaking

The CFTC governs the commodity futures and swap markets.[96] It is an independent regulatory agency governed by a five-member politically balanced commission, one of whom the president selects to be chairman.[97] The Commodity Exchange Act (CEA) is the CFTC's principle governing statute.[98] Dodd-Frank made substantial changes in the CFTC's authority and gave it numerous rule-writing assignments with aggressive deadlines.[99] The CFTC adopted ninety-two rules from 2010 through 2012, compared to forty-three rules from 2006 through 2009.[100] In addition, its staff issued a total of 167 no-action and other staff letters in 2012 and 2013 and another 110 staff letters in the first eight months of 2014.[101] Many new entities are being drawn into the CFTC's regulatory bailiwick as a result of Dodd-Frank. Because of its status as an independent regulatory agency with a commission structure, its abnormally high level of regulatory activity in recent years, and the large influx of new regulated entities, the CFTC offers a helpful case study on the use and perceived abuse of non-APA rulemaking.

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[96] CFTC, Mission & Responsibilities, http://www.cftc.gov/About/MissionResponsibilities/index.htm ("The mission of the Commodity Futures Trading Commission (CFTC) is to protect market participants and the public from fraud, manipulation, abusive practices and systemic risk related to derivatives—both futures and swaps—and to foster transparent, open, competitive and financially sound markets.") (last visited Feb. 25, 2014).

[97] 7 U.S.C. § 2(a)(2) (providing that "[n]ot more than three of the members of the Commission shall be members of the same political party" and "[t]he President shall appoint, by and with the advice and consent of the Senate, a member of the Commission as Chairman, who shall serve as Chairman at the pleasure of the President").

[98] 7 U.S.C. §§ 1-27f (2013).

[99] *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1379 (2010), Title VII (amending the CEA in numerous places). The "Global Rulemaking Timeframe" was 360 days after the enactment of Dodd-Frank. Dodd-Frank § 712(e) [15 U.S.C. § 8302(e)].

[100] Office of the Federal Register, https://www.federalregister.gov/articles/search#advanced (last visited September 2, 2014) (to view the list of final rules for each time period, click "Range" for "Publication Date" and enter the relevant date ranges; enter "Commodity Futures Trading Commission" for "Agency"; and then click "Search").

[101] CFTC staff letters are *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm. The letters are not uniformly numbered—as might be expected—in ascending chronological order by date. *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter 13-88 (Mar. 29, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-88. This letter is the highest numbered letter for 2013, but was one of the first issued that year. Letters are not always posted immediately to the website, so the number of letters issued in 2014 was changing as this article was being finalized.

The statutorily mandated volume of rulemaking alone is enough to raise concerns about the ability of the public and their representatives in government to oversee the agency's work. Although the CFTC maintained that statutory rulemaking deadlines were flexible,[102] it produced rules quickly.[103] The CFTC's rulemaking speed is a challenge for regulated entities as they seek to participate in the development of, understand, and comply with their new regulatory obligations.

The problem is exacerbated by the fact that Dodd-Frank gave the CFTC jurisdiction over new classes of entities, many of which have not had direct experience with CFTC regulation and thus may find it particularly difficult to monitor regulatory developments at the CFTC and come into timely compliance with new regulatory obligations. These entities include swap dealers, major swap participants, and swap execution facilities. Many of these firms are also facing new rules from other regulators, including the Securities and Exchange Commission (SEC), federal banking regulators, and international financial regulators. Wading through thousands of pages of rulemaking releases from the CFTC and other regulators is difficult under the best of circumstances. The CFTC's sometimes undisciplined approach to promulgating these new rules has further complicated compliance efforts.

As one example of this approach, the agency embedded a key requirement in a footnote in the preamble to a CFTC rule. The footnote expanded the category of entities required to

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[102] *See, e.g.*, *Oversight of Dodd-Frank Implementation: A Progress Report by the Regulators at the Half-Year Mark, Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 112th Cong., 168 (2011) (response from Gary Gensler, Chairman, CFTC, to written question Q.1 of Senator Richard Shelby) (instead of responding directly to a question about whether the CFTC would object if Congress extended the CFTC's rulemaking deadlines, explaining that "the Dodd-Frank Act and the Commodity Exchange Act (CEA) give the CFTC the flexibility and authority to address the issues relating to the effective dates of Title VII").

[103] *See, e.g.*, Micah Green et al., *Five Key Facts About the SEC's and CFTC's Cross-Border Regulatory Approaches*, 45 BNA INSIGHTS 2297, 2301 (2013), *available at* http://www.pattonboggs.com/ViewpointFiles/54f82bae-44c2-418e-be49-a2a4d13195c4/bbna%20securities%20dec16.pdf ("The CFTC's rapid pace of rulemaking placed a marker for the SEC and global financial regulators.").

register as swap execution facilities—a new type of trading facility created by Dodd-Frank—to include certain facilities that execute or trade swaps that are not mandated to be traded on a swap execution facility.[104] This substantial expansion of the universe of entities required to register by the October 2, 2013, deadline surprised the industry,[105] because it "was not suggested in the CFTC's originally-proposed SEF rules."[106] Its exclusion from the proposal and inclusion as one of 1,148 footnotes in a long final rule probably contributed to industry's delay in realizing its implications.

That example came in a preamble to a rule adopted by APA notice-and-comment rulemaking. Much of the complexity in the CFTC's rulemaking process derives from its use of non-APA rules in place of legislative rules. Some of the CFTC's departures will be discussed below.[107] These examples are not exhaustive, but they illustrate the wide diversity even within backdoor rulemaking.

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[104] Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,475 at n.88 (June 4, 2013) (A "facility would be required to register as a SEF if it operates in a manner that meets the SEF definition even though it only executes or trades swaps that are not subject to the trade execution mandate.").

[105] *See, e.g.*, *One Footnote to Rule Them All: Close Reading of the CFTC's SEF Rules Reveal a Controversial Requirement*, REGTECHFS (Sept. 27, 2013), http://regtechfs.com/one-footnote-to-rule-them-all-close-reading-of-the-cftcs-sef-requirements-reveal-a-controversial-requirement/ ("A new row has emerged between the [CFTC], international regulators, and firms as the definition of who is a Swap Execution Facility (SEF) has been greatly expanded under a controversial footnote in the rules proposal. This discovery will have huge implications for all institutions that trade or execute trades in swaps."); *SEFs Strut Their Stuff*, MARKETSMEDIA.COM (Nov. 18, 2013), http://marketsmedia.com/sefs-strut-stuff/ ("By not tying the clearing mandate to the SEF execution process for intermediaries, the effect of footnote 88 was to move trading away from SEFs."); Joel Clark, *Pressure Mounts on CFTC for Relief on SEF Rules*, FX WEEK (Sept. 13, 2013), http://www.fxweek.com/fx-week/news/2294642/pressure-mounts-on-cftc-for-relief-on-sef-rules ("The requirement caused a sudden rush among FX trading platforms, as most had previously assumed they wouldn't need to register as SEFs until next year at the earliest, once FX products are mandated for clearing and, subsequently, trading on SEFs."); *Not with a Bang*, THE ECONOMIST (Oct. 5, 2013), *available at* http://www.economist.com/news/finance-and-economics/21587231-chaotic-launch-set-electronic-trading-platforms-not-bang ("Existing trading venues assumed they need not worry about registering as an SEF until the later date. Imagine their surprise when they stumbled belatedly on footnote 88 in the CFTC rules, which said that multilateral trading venues for swaps all had to be registered as SEFs from October 2nd.").

[106] Sidley Austin LLP, *SEFs and the CFTC's Latest October Deadlines: Keeping the Dates and Developments Straight*, NEWS & INSIGHTS (Oct. 9, 2013), http://www.sidley.com/derivativesupdate10813/.

[107] This article does not purport to provide a comprehensive list of the CFTC's non-APA rulemaking methods. Others may include, for example, the delegation of regulatory responsibilities to the National Futures Association (NFA)—the quasi-governmental regulator with significant responsibilities in the futures and swaps markets. *See,*

A. The CFTC's Cross-Border Guidance

The agency's handling of its rules related to the extraterritorial application of its swaps regime is one example of non-APA rulemaking. The swaps marketplace spans international borders, making it difficult to determine which nation's rules govern a particular market participant or a particular transaction. Dodd-Frank states that the new swaps regime "shall not apply to activities outside the United States unless those activities . . . have a direct and significant connection with activities in, or effect on, commerce of the United States."[108] The vagueness of "direct and significant connection," combined with the highly internationalized nature of the swap markets, led to calls for the agency to outline its planned extraterritorial reach.[109]

The CFTC and SEC held a joint roundtable and solicited comments on the issue of cross-border application of their rules in August 2011.[110] In May 2013, the SEC, which is governed by different statutory language than the CFTC,[111] proposed rules and interpretive guidance.[112] The

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e.g., Gary Gensler, Chairman, CFTC, Testimony Before the Senate Committee on Banking, Housing, and Urban Affairs (Apr. 12, 2011), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-77 (explaining that "we are working very closely with self-regulatory organizations, including the National Futures Association, to determine what duties and roles they can take on in the swaps markets"). The NFA writes binding rules, but does not employ APA notice-and-comment rulemaking. Moreover, both the NFA and CFTC staffs, as part of the process of approving registrations and registrant rulebooks, also have substantial leverage to impose conditions on entities seeking approval. This indirect rulemaking power is not exercised with any APA procedural protections.

[108] Dodd-Frank § 722(d) (adding 7 U.S.C. § (2)(i)).

[109] *See, e.g.*, Letter from the Futures Industry Association, the International Swaps and Derivatives Association, and the Securities Industry and Financial Markets Association, to David A. Stawick, Secretary, CFTC, 3 (Nov. 4, 2011) (calling on the CFTC and the SEC to "clearly articulate final positions on the extraterritorial application of Title VII before implementation can begin in earnest" because, "[u]ntil that time, market participants will not be able to fully analyze the critical entity structuring issues that allow them to determine which entities to register and prepare for Title VII compliance.").

[110] *See* Joint Public Roundtable on International Issues Relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 44,507 (July 26, 2011) (announcing roundtable and soliciting comments).

[111] Dodd-Frank § 772(b) (amending 15 U.S.C. § 78dd) (providing that SEC's security-based swaps rules shall not "apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States, unless such person transacts such business in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate to prevent the evasion" of its security-based swaps rules).

[112] Cross-Border Security-Based Swap Activities; Reproposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30,967 (May 23, 2013).

CFTC worked faster. It proposed, and ultimately adopted, interpretive guidance and a policy statement, and issued two exemptive orders.[113] The CFTC's final interpretive guidance and policy statement document distinguishes "non-U.S. persons" from "U.S. persons" (which is relevant to whether and how particular swaps regulations apply), outlines the obligations of non-U.S. swap dealers and major swap participants, and indicates which of these requirements can be met through substituted compliance with foreign regulations.

The decision to issue interpretive guidance instead of a legislative rule met with opposition from within the Commission. Chairman Gary Gensler's support for the interpretative approach was grounded in the flexibility with which it could be applied,[114] but his colleagues emphasized its prescriptive nature. Commissioner Jill Sommers—while relieved that the document was slightly tempered from an earlier draft that seemed to be guided by "the 'Intergalactic Commerce Clause' of the United States Constitution"—observed that the Interpretive Guidance was essentially a rule, but "[b]ecause it is not titled a 'Notice of Proposed Rulemaking,' we skirt the requirements of the Administrative Procedure Act and the requirement under [the CEA] that the Commission conduct a cost-benefit analysis."[115] Likewise, her colleague Commissioner Scott O'Malia expressed "strong reservations about the statutory

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[113] *See* Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013) [hereinafter Final Cross-Border Guidance]; Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 43,785 (July 22, 2013) [hereinafter Cross-Border Exemptive Order]; Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013); Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 909 (Jan. 7, 2013); Notice of Proposed Exemptive Order Regarding Compliance with Certain Swaps Regulation, 77 Fed. Reg. 41,110 (July 12, 2012); Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41,213 (July 12, 2012).

[114] Gary Gensler, Chairman, CFTC, Statement of Support (June 29, 2012), http://www.cftc.gov/PressRoom/SpeechesTestimony/genslerstatement062912 (explaining that the "proposed guidance [is] intended to be flexible in application").

[115] Jill E. Sommers, Commissioner, CFTC, Statement of Concurrence: (1) Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, Proposed Interpretive Guidance, and Policy Statement; (2) Notice of Proposed Exemptive Order and Request for Comment Regarding Compliance with Certain Swap Regulations (June 29, 2012), http://www.cftc.gov/PressRoom/SpeechesTestimony/sommersstatement062912.

authority and disagree[d] with the Commission's decision to issue interpretive guidance instead of a formal rulemaking."[116] He explained that, "[a]lthough the Commission has taken great pains to clarify that it is publishing guidance and a policy statement regarding the cross-border application of the swaps provisions of the CEA, certain elements of the Proposed Guidance are written similar to legislative or interpretive rules instead of interpretive guidance."[117] The CFTC received nearly 300 comments.[118]

In a three-to-one vote, the CFTC finalized the proposed guidance and policy statement in July 2013.[119] The nearly eighty-page document looks a lot like a legislative rule. For example, the document includes an interpretation of the term "U.S. person," which includes eight very specific prongs of the sort commonly found in regulatory definitions.[120] The guidance includes specific requirements arising from the CFTC's interpretation of the very general language in section 2(i) of the CEA, the cross-border provision quoted earlier.[121] For example, according to the guidance, "[t]he Commission is of the view that CEA section 2(i) should not be interpreted to apply the daily trading records requirements, with the exception of those found in Commission regulation 23.202(a)(1)."[122] In other words, the CFTC is using an interpretation of the Dodd-

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[116] Scott D. O'Malia, Commissioner, CFTC, Statement of Concurrence: (1) Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, Proposed Interpretive Guidance, and Policy Statement; (2) Notice of Proposed Exemptive Order (June 29, 2012), http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement062912.

[117] *Id.*

[118] *See* Final Cross Border Guidance, *supra* note 113, at n.21 and accompanying text.

[119] *See* Final Cross-Border Guidance, *supra* note 113, at 45,370 (reporting that Chairman Gensler and Commissioners Chilton and Wetjen voted for, and Commissioner O'Malia against, the guidance). Commissioner Sommers stepped down from the Commission before the vote was taken.

[120] *See id.* at 45,316–17.

[121] *See supra* note 108 and accompanying text.

[122] Final Cross-Border Guidance, *supra* note 113, at n.523. CFTC regulation 23.202(a)(1), in turn, mandates that swap dealers and major swap participants "keep pre-execution trade information, including, at a minimum, records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a swap, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media . . . ." 17 C.F.R. § 23.201(a)(1).

Frank cross-border provision to impose a very specific set of regulatory requirements. As another example, the guidance notes that "the Commission interprets CEA section 2(i) so that generally a foreign branch of a U.S. bank could include an office of a foreign bank that satisfies the foregoing Foreign Branch Characteristics," which are also spelled out in the guidance.[123] Similarly, the guidance states that "[c]onsistent with CEA section 2(i) and comity principles, the Commission's policy generally is that eligible entities may comply with a substituted compliance regime under certain circumstances, subject, however, to the Commission's retention of its examination authority and its enforcement authority."[124] The guidance then includes a detailed consideration of the requirements for which substituted compliance—essentially reliance on compliance with equivalent foreign rules—would be permissible, and outlines where compliance with U.S. requirements would be mandatory.[125]

Despite the specificity of the guidance, the CFTC's general counsel's office took the position that the Commission "couldn't go into court and, in a count of the complaint, list a violation of the guidance as an actionable claim."[126] However, possibly suggesting that the guidance would be entitled to judicial deference in an enforcement action based on the statute, the general counsel's office went on to explain that "the guidance does tell market participants what the Commission's current views are about how [the statute] applies in the cross-border context, and the statute gives us that enforcement authority."[127]

Commissioner O'Malia argued that the guidance "impose[d] new obligations" and pointed as evidence to "staff no-action letters [that] have been issued in connection with

[123] Final Cross-Border Guidance, *supra* note 113, at 45,329.
[124] *Id.* at 45,342.
[125] *Id.* at 45,347–64.
[126] CFTC, Transcript of Open Meeting to Consider Final Cross-Border Guidance and Cross-Border Phase-In Exemptive Order, 79 (July 12, 2013), *available at* http://www.cftc.gov/ucm/groups/public/@swaps/documents /dfsubmission/dfsubmission_071213-trans.pdf. (statement of Jonathan Marcus, Office of General Counsel, CFTC).
[127] *Id.* at 79–80.

compliance obligations that have essentially been imposed by the Guidance."[128] No-action letters that promise that the staff will not recommend enforcement action to the Commission based on a departure from the guidance imply strongly that—absent such assurance from the staff (and the Commission's presumed willingness to follow the staff's lead)—the guidance *could* form the basis for enforcement action.

The guidance did form the basis for the analysis underlying six "comparability determinations" in December 2013.[129] The CFTC determined that certain entity-level requirements (such as risk management and recordkeeping rules) of Australia, Hong Kong, Japan, Switzerland, Canada, and the European Union were comparable to CFTC rules.[130] The CFTC also made comparability determinations for certain transaction-level requirements (such as trade confirmations and daily trading records) in Japan and the European Union.[131] These comparability determinations enable swap dealers and major swap participants in those jurisdictions to comply with their comparable home jurisdiction's rules instead of CFTC rules. Rooted in the cross-border guidance, these determinations reinforce the guidance's status as a rule.[132] Because the guidance serves as the touchstone for deciding which rules apply to certain entities and transactions, it is a binding rule on both the CFTC and regulated entities, and should have gone through the requisite process.

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[128] Final Cross-Border Guidance, *supra* note 113, at 45,372. O'Malia also argued that "[l]egally binding regulations that impose new obligations on affected parties—'legislative rules'—must conform to the APA." *Id.*

[129] CFTC, *Comparability Determinations for Substituted Compliance Purposes*, http://www.cftc.gov/LawRegulation/DoddFrankAct/CDSCP/index.htm (last visited Sept. 10, 2014).

[130] *See, e.g.*, Comparability Determinations for Australia: Certain Entity-Level Requirements, 78 Fed. Reg. 78,864 (Dec. 27, 2013).

[131] *See, e.g.*, Comparability Determination for the European Union: Certain Transaction-Level Requirements, 78 Fed. Reg. 78,878 (Dec. 27, 2013).

[132] *See, e.g.*, *id.* at 78,881 ("The Commission's comparability analysis will be based on a comparison of specific foreign requirements against the specific related CEA provisions and Commission regulations as categorized and described in the Guidance.").

The manner in which the CFTC adopted its cross-border guidance, the breadth of the CFTC's interpretation,[133] and its implications for the global swaps market has drawn widespread attention and a lawsuit.[134] Three trade associations asked the court to vacate the CFTC's guidance, which was characterized as an unlawful attempt by the CFTC to evade its rulemaking obligations.[135] They alleged, among other things, that the guidance "binds the CFTC and regulated parties through the use of mandatory language," delineates which entities must register with the CFTC, offers a new categorization scheme for CFTC regulatory obligations, and establishes a regime for recognizing the substitutability of foreign rules for CFTC rules.[136] The plaintiffs pointed out numerous instances in which the Commission and its staff have treated the guidance as binding.[137]

The district court was unmoved. It held that, aside from four pages of the document which interpreted the statute, the rest of the guidance "looks, walks, and quacks like a policy statement."[138] A policy statement is not a reviewable final action, so it cannot be challenged until it is enforced.[139] In reaching the conclusion that the guidance is not a legislative rule, the

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[133] Offering helpful insight into the breadth of the CFTC's view of its jurisdiction, the guidance explicitly embraces the rationale employed by the Supreme Court in *Wickard v. Filburn*, 317 U.S. 111 (1942). Final Cross-Border Guidance, *supra* note 113, at 45,300. In that case, the Court upheld penalties imposed on a farmer for violating federal wheat quotas by consuming home-grown wheat. *Wickard* at 127–28 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.") (citation omitted). Applying that rationale to the swaps market would imply that no transaction in any corner of the world would be small enough for the CFTC to ignore because, together with other transactions, it makes up part of the aggregate global swaps market. This reading would render the statute's "direct and significant" language meaningless. 7 U.S.C. § 2(i) (2012).

[134] Sec. Indus. & Fin. Mkts. Assoc. v. U.S. Commodity Futures Trading Comm'n, No. 13-1916 (PLF), 2014 U.S. Dist. LEXIS 130871 (D.D.C. 2014).

[135] Amended Complaint, Sec. Indus. & Fin. Mkts. Assoc. v. U.S. Commodity Futures Trading Comm'n, No. 13-cv-1916 (ESH) (Dec. 27, 2013), *available at* http://www.sifma.org/uploadedFiles/Correspondence/Legal_Filings/2013/AMENDEDCOMPLAINT-As-Filed-Stamped.pdf?n=43277.

[136] *Id.* at 31–33.

[137] *Id.* at 35–38 (pointing to CFTC staff no-action letters, determinations about the comparability of foreign regulations, and public statements by Chairman Gensler).

[138] Sec. Indus. & Fin. Mkts. Assoc., 2014 U.S. Dist. LEXIS 130871 at *104.

[139] *Id*. at *88.

court pointed to its nonbinding nature and "allow[ance] for flexibility in application to various situations,"[140] and downplayed its mandatory language, complexity, and length.[141] The court noted that the CFTC had not based any enforcement actions on the guidance, and pointed to the agency's promises in the form of the exemptive order and staff letters not to apply the guidance as evidence of the agency's flexibility.[142] The court dismissed the guidance's de facto binding effect by observing that "the 'pressure to voluntarily conform' . . . is part and parcel of many policy statements."[143] As the court saw it, firms are "completely 'free to ignore' [the guidance's] 'writing . . . on the wall' or—as they have to date—to comply voluntarily."[144] The district court's conclusion may not stand on appeal given the lack of clarity about where the line between legislative and nonlegislative rules falls against a particular set of facts.[145] In any case, the district court's opinion illustrates the chasm between judicial concepts of voluntary compliance and the reality for market participants trying to determine whether, and how, U.S. law applies to them.

The cross-border guidance is an interesting example of backdoor rulemaking because it was adopted through a notice-and-comment process.[146] The CFTC did not necessarily give the comments the same consideration it would have in a legislative rulemaking process. Moreover, the Commission did not conduct the benefit-cost analysis that the CEA requires to aid the

[140] *Id.* at *88.
[141] *Id.* at *93–*94.
[142] *Id.* at *99–*100.
[143] *Id.* at *100–*101 (quoting Nat'l Mining Ass'n, 758 F.3d 243, 253).
[144] *Id.* at *101–*102 (quoting Nat'l Mining Ass'n, 758 F.3d at 253). *National Mining Association* involved a very different set of facts: at issue was an EPA directive to its staff regarding their interactions with states granting Clean Water Act permits.
[145] *See supra* section II.A.
[146] The trade associations that sued the CFTC argued that the guidance violated the APA by not adequately responding to comments. Amended Complaint, *supra* note 135, at 54–55.

Commission in assessing the implications of its rules.[147] By using guidance, the CFTC also retains enforcement flexibility and the ability to change the guidance without going through notice-and-comment rulemaking. The guidance underscores this flexibility by explaining that, "[u]nlike a binding rule adopted by the Commission, which would state with precision when particular requirements do and do not apply to particular situations, this Guidance is a statement of the Commission's general policy regarding cross-border swap activities and allows for flexibility in application to various situations."[148]

As market participants all over the world adjust their legal structure and business practices to conform to the guidance, the knowledge that the CFTC can change or depart from it without a rigorous rulemaking process is unsettling. The precision of the guidance parameters and the CFTC's reliance on them, combined with the CFTC's insistence that they might change, renders the guidance binding on market participants but not on the agency itself. Reform suggestions grounded in convincing agencies to voluntarily provide opportunities for notice-and-comment would not address the concerns raised by the cross-border guidance. The CFTC used a notice-and-comment process but nevertheless produced a troubling nonlegislative rule.

B. Exemptive Orders

The CFTC is authorized to grant exemptions "in order to promote responsible economic or financial innovation and fair competition . . . by rule, regulation, or order, after notice and opportunity for hearing."[149] In conjunction with adopting the cross-border guidance, the CFTC

[147] 7 U.S.C. § 19(a)(1).
[148] Final Cross Border Guidance, *supra* note 113, at 45,297.
[149] 7 U.S.C. § 6(c).

issued an "interim final exemptive order."[150] The order provided additional time for entities affected by the CFTC's new guidance to come into compliance with its terms.[151] The Commission explained that, "[i]n the absence of the Exemptive Order, non-U.S. swap dealers or major swap participants would be required to be fully compliant with the Dodd-Frank regulatory regime without further delay."[152] The exemptive order was not preceded by notice and comment as the CFTC's exemptive authority requires, because "public notice and comment on this Exemptive Order would be impracticable, unnecessary, and contrary to the public interest."[153] Specifically, the Commission pointed to market participants' need for certainty in the context of international regulatory dialogues and developments related to the swaps markets.[154] The CFTC, however, did open a thirty-day comment period *after* the exemptive order took effect for "public comment on any issues that are not fully addressed by the Exemptive Order."[155] Commissioner O'Malia characterized the exemptive order as "a moment of humility," but also noted that it "blatantly ignores the APA-mandated comment periods for Commission action."[156]

The CFTC patterned its interim final exemptive order after interim final rules.[157] The Commission relied on APA Section 553(b)(B) to issue the exemptive order without preceding

[150] Cross-Border Exemptive Order, *supra* note 113.
[151] *See id.* at 43,787 (recognizing "that market participants may need additional time to facilitate their transition to the interpretation of the term "U.S. person") and 43,786 (recognizing "that implementation of the Commission's substituted compliance program would benefit from additional time").
[152] *Id.* at 43,792.
[153] *Id.* at 43,786.
[154] *Id.*
[155] *Id.*
[156] Final Cross-Border Guidance, *supra* note 113, at 45,374 (O'Malia dissent).
[157] Transcript of Open Meeting of the CFTC to Consider Cross-Border Guidance and Cross-Border Phase-In Exemptive Order 119-20 (July 12, 2013) [hereinafter Cross-Border Transcript] (statement of Susan Nathan, Office of the General Counsel, CFTC), http://www.cftc.gov/PressRoom/Events/opaevent_cftcstaff071213 (click on "transcript" link in upper left) (explaining that "[t]his interim final order appears . . . to be an analog to the interim final rule[;] it follows the same process where the action becomes final when published or when voted on, however that works, with a comment period to follow so that if there are egregious errors that need to be addressed, they can be addressed after the fact").

notice and comment.[158] Commissioner O'Malia points out, however, that this provision of the APA cannot be relied upon where there is a statutory notice-and-comment requirement, as is the case with the CFTC's exemptive order authority.[159] Moreover, interim final rules are subject to challenge for absence of notice-and-comment,[160] and presumably an interim final exemptive order is similarly vulnerable to legal challenge.

The CFTC's use of an interim final order seems to defy statutory guidelines for exemptions. The agency could have employed a method that included public comment before the order took effect to help the agency tailor its relief.[161] The CFTC's handling of the exemptive order suggests that relying on agencies to formulate appropriate procedures for incorporating notice-and-comment on an ad hoc basis may not be effective.

C. Staff Letters

The CFTC has made heavy use of staff letters during the Dodd-Frank implementation process. Although often temporary and couched in tentative language, these letters can shape conduct significantly in the same way that a legislative rule would. Staff letters targeted at interpreting existing legal obligations or applying them to an individual regulated entity's circumstances are an expected and normal part of the day-to-day administration of a complex statute that touches the activities of a diverse set of individuals and companies. Many of the CFTC's

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[158] *See* Final Cross-Border Guidance, *supra* note 113, at n.20 and accompanying text.
[159] *Id.* at 45,374 (O'Malia dissent) (citing 7 U.S.C. § 6(c), which allows the CFTC to issue exemptions "after notice and opportunity for hearing").
[160] *See, e.g.*, Tennessee Gas v. Fed'l Energy Reg'y Comm'n, 969 F.2d 1141, 1146 (D.C. Cir. 1992) (holding that the Federal Energy Regulatory Commission had not cited an adequate reason for issuing a rule without first seeking notice-and-comment and explaining that "[t]he clarifications the Commission has had to issue in order to make the rule workable illustrate the wisdom of the APA's requirement that an agency have the benefit of informed comment before it issues regulations that have the force of law").
[161] Cross-Border Transcript, *supra* note 157, at 31 (statement of Scott O'Malia) (noting that he had recommended "a relief package that would have provided for public comment over a month ago").

letters fall into this category.[162] Other recent letters, however, are remarkable for their intentionally broad applicability, creation of new obligations, and material effect on the markets.[163] The use of staff letters to make official CFTC policy is particularly worrisome because they are not the product of a transparent, notice-and-comment rulemaking process, and do not require Commission assent. Staff, rather than politically appointed commissioners, are making substantive policy decisions, and are doing so without input from the full range of interested parties outside the Commission.

As described in CFTC regulations, staff letters are an opportunity for CFTC staff to provide guidance with respect to specific compliance issues. CFTC regulations provide that "[i]ssuance of a letter is entirely within the discretion of the Commission staff."[164] The regulations emphasize the need for the person requesting relief to be precisely identified to the staff.[165] Moreover, the regulations require that relief is to be requested for a "proposed transaction or a proposed activity," not "a hypothetical situation."[166] Underscoring that point, each letter must include a "certification by a person with knowledge of the facts that the material facts as represented in the request are true and complete."[167] In a manner consistent with their intended limited reach, these letters typically do not appear in the *Federal Register* or the *Code of Federal Regulations*. At the end of each letter comes some variant on the following boilerplate

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[162] *See, e.g.*, Letter from Ananda Radhakrishnan, Director, Div. of Clearing and Risk, CFTC, to David H. Kaufman, Morrison & Foerster, CFTC Staff Letter 13-35 (June 10, 2013) (providing no-action relief in connection with clearing requirements to an international economic development entity).
[163] *See, e.g.*, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Staff Advisory No. 13-69 (Nov. 14, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-69 (relating to applicability of transaction-level requirements for swaps).
[164] 17 C.F.R. § 140.99(b)(1) (2013).
[165] *Id.* § 140.99(c)(1) (requiring the name and identifying information of the person requesting the relief and "[t]he name and, if applicable, the National Futures Association registration identification number of each other person for whose benefit the requester is seeking the Letter").
[166] *Id.* § 140.99(b)(4) and (5).
[167] *Id.* § 140.99(c)(3)(i).

disclaimer: "This letter and the positions taken herein represent the views of the Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission."[168] Often the letters also contain a warning that the staff could change its mind without notice.[169]

Regardless of regulatory intentions and boilerplate disclaimers, many of these letters have the same effect as a regulation promulgated by the Commission after notice-and-comment. There usually is an unspoken expectation that the Commission is unlikely to take a course different from the one laid out by the staff.[170]

This section considers the 199 letters that were issued between January 1, 2013, and August 30, 2014, and posted on the CFTC website as of September 15, 2014.[171] CFTC regulations define three types of staff letters: "exemptive letters," "no-action letters," and "interpretative letters."[172] The CFTC also uses two categories of letters not identified in the regulations: "staff advisories" and "other written communication."[173] Figure 1 shows the breakdown of letters by type. Because six letters are categorized as both staff advisories and other written communication, letters that fall into one or both of those categories are grouped

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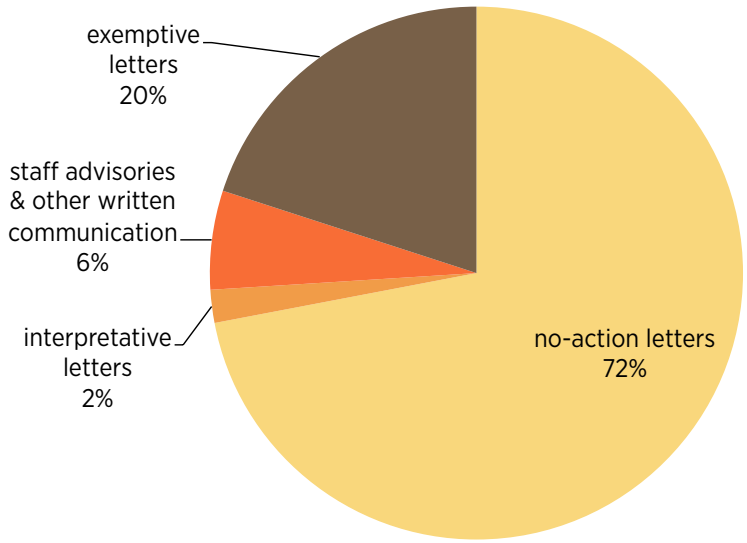
[168] *See, e.g.*, Letter from Ananda Radhakrishnan, Director, Div. of Clearing and Risk, CFTC, Letter No. 13-01, at 5 (Mar. 18, 2014), http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-01.pdf.
[169] *See, e.g.*, Letter from Ananda Radhakrishnan, Director, Div. of Clearing and Risk, CFTC, and Vincent A. McGonagle, Director, Div. of Mkt. Oversight, CFTC, Letter No. 14-50, at 4 (Apr. 18, 2014), http://www.cftc.gov /LawRegulation/CFTCStaffLetters/14-50 ("The Divisions retain the authority, in their discretion, to further condition, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein.").
[170] *See, e.g.*, Silla Brush, *CME, Wall Street Win Delays from CFTC Swap Dealer Rules*, BLOOMBERG, Oct. 12, 2012, http://www.bloomberg.com/news/2012-10-12/cme-wall-street-win-delays-from-cftc-swap-dealer-rules.html (describing the issuance of "a flurry of short-term extensions" through staff letters, to which it is presumed the Commission will adhere).
[171] CFTC, *CFTC Staff Letters: All Letters*, http://www.cftc.gov/LawRegulation/CFTCStaffLetters/AllLetters /index.htm (last visited Sept. 12, 2014). This number is subject to change because the CFTC routinely posts letters long after the date on the letter.
[172] 17 C.F.R. § 140.99(a).
[173] CFTC, *CFTC Staff Letters: Letter Types*, http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm (last visited Sept. 9, 2014).

together in the chart.[174] The CFTC also categorizes one letter in the advisory and other written communication category as a no-action letter, so that letter is counted twice in the chart.[175] As this section discusses, the letter type is relevant in understanding the letter's potential impact.

Figure 1. Letter Type of All Staff Letters, January 2013–August 2014



Exemptive letters. The CFTC staff's routine exemptive letters generally raise no backdoor rulemaking concerns because they offer targeted relief. An exemptive letter is "a written grant of relief issued by the staff of a Division of the Commission from the applicability of a specific provision of the Act or of a rule, regulation, or order issued thereunder by the Commission."[176] In issuing an exemptive letter, the staff acts pursuant to authority delegated to it by the Commission, and the resulting letter "binds the Commission and its staff with respect to the

[174] *See, e.g.*, Letter from Richard A. Shilts, Acting Director, Div. of Mkt. Oversight, CFTC, Staff Advisory No. 13-15 (May 8, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-15 (categorized as both a "staff advisory" and "other written communication").
[175] *See* Letter from Richard A. Shilts, CFTC Staff Advisory No. 13-14 (May 8, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-14.
[176] 17 C.F.R. § 140.99(a)(1).

relief provided therein."[177] Persons other than the one to whom the letter is directed may not rely upon it.[178] Between January 1, 2013, and August 30, 2014, the CFTC staff issued forty such letters out of a total of 199 letters.[179] A typical exemptive letter affords a commodity pool operator a one-time reprieve from filing audited financials, or permission to file an annual report for a new or soon-to-be-defunct pool covering a period longer than a calendar year.[180]

Interpretative letters. Four of the 199 staff letters issued between January 1, 2013, and August 30, 2014, were interpretative letters.[181] According to CFTC regulations, interpretative letters are "written advice or guidance by the staff of a Division of the Commission or the Office of the General Counsel."[182] These letters do not bind the Commission or the staff outside the issuing division or office, but they "may be relied upon by persons in addition" to the person to whom the letter is directed.[183] The advice or guidance contained in these letters can be useful.[184] On the

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[177] *Id.*
[178] *Id.*
[179] This number was tabulated from the CFTC's website. *See* CFTC, *CFTC Staff Letters: Letter Types*, http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm (last visited Sept. 9, 2014) (click on "Exemptive Letters" tab and count letters dated January 1, 2013, through August 30, 2014). Two of the letters categorized as exemptive contain language that suggests no-action relief is being offered. *See* Letter from Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, CFTC, to Anonymous, CFTC Letter No. 14-36 (Feb. 20, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-36; Letter from Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, CFTC, to Anonymous, CFTC Letter No. 14-35 (Feb. 21, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-35. Both letters state that "the Division finds that it is consistent with the purposes of Part 4 and the public interest to provide no action relief to the Pool with respect to the [relevant] requirement . . . ."
[180] *See, e.g.*, Letter from Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, CFTC, to Anonymous, CFTC Letter No. 14-58 (March 31, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-58 (providing relief from the requirement to file and distribute audited financial statements); Letter from Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, to Anonymous, CFTC Letter No. 14-4 (Jan. 16, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-04 (allowing commodity pool operator to file 14-month annual report for newly formed pools).
[181] This number was tabulated from the CFTC's website. *See* CFTC, *CFTC Staff Letters: Letter Types*, http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm (last visited Sept. 15, 2014) (click on "Interpretative Letters" tab and count letters dated January 1, 2013, through August 30, 2014).
[182] 17 C.F.R. § 140.99(a)(3).
[183] *Id.*
[184] *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, to Mary Kay Scucci, Managing Director, Securities Industry and Financial Markets Association, CFTC Letter No. 14-40

other hand, because these letters are crafted without notice-and-comment and Commission-level input, they should be tied closely to the legal requirement under interpretation. These letters sometimes stray. One of the four letters, for example, included an ancillary suggestion that regulated entities take a specific step in addition to what the relevant regulations require.[185] Regulated entities likely will feel obliged to follow this directive—even though it is couched as a suggestion—in order to avoid unwanted staff attention.

No-action letters. The greatest number of staff letters are no-action letters—144 of the 199 staff letters issued between January 1, 2013, and August 30, 2014.[186] In these letters, the staff promises it "will not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order if a proposed transaction is completed or a proposed activity is conducted by the Beneficiary."[187] These letters represent the position of—and are binding on—only the issuing division or office.[188] The CFTC's regulations state that "[o]nly the Beneficiary may rely upon the no-action letter."[189] Some of the CFTC's recent no-action letters fall within these narrow parameters.[190] Many recent

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(Mar. 28, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-40 (interpreting CFTC auditor independence rule to be satisfied by compliance with SEC's auditor independence rule for dual registrants).

[185] *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter No. 14-110 (Aug. 28, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-110 ("As a related matter, the Division notes that it may be appropriate for an FCM to conduct a comparison of the risk profiles of the U.K. banks that are eligible depositories for 30.7 customer funds as part of its process of selecting depositories.").

[186] This number was tabulated from the CFTC's website. *See* CFTC, *CFTC Staff Letters: Letter Types*, http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm (last visited Sept. 11, 2014) (click on "No-Action" tab and count letters dated January 1, 2013, through August 30, 2014).

[187] 17 C.F.R. § 140.99(a)(2) (2013).

[188] *Id.*

[189] *Id.*

[190] *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter No. 14-29 (Mar. 18, 2014), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-29 (promising not to recommend an enforcement action in connection with a university's modified student trading club); Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter

no-action letters, however, look more like generally applicable rules than targeted relief. They effectively modify notice-and-comment rulemakings for broad categories of persons.

The Commission endorses no-action letters, even as individual commissioners express concerns over their lack of involvement in the formulation of the letters. For example, the July 2013 "Path Forward" agreement between the CFTC and the European Union regarding swaps regulation referred to CFTC staff no-action letters.[191] The announcement of that agreement included multiple promises that staff no-action relief would be issued or considered.[192] On the day the agreement was announced, the CFTC staff issued a letter to allow compliance with European risk mitigation rules to serve as a substitute for compliance with CFTC risk mitigation rules.[193] Subsequently, the staff, citing the Path Forward agreement, issued a no-action letter allowing European Union multi-lateral trading facilities to obtain relief from the CFTC's registration requirements.[194] No-action letters such as these reflect close coordination between the chairman, who negotiated the Path Forward, and the staff issuing the letters. The chairman's endorsement is clear.

No. 13-83 (Dec. 20, 2013) (promising not to recommend an enforcement action in connection with a deregistering swap dealer's non-compliance with certain regulations while awaiting approval of its deregistration application).

[191] Cross-Border Regulation of Swaps/Derivatives: Discussions Between the Commodity Futures Trading Commission and the European Union—A Path Forward (July 11, 2013), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr6640-13 (follow "related link" at top right).

[192] *See, e.g.*, *id.* at 2 ("the CFTC's Division of Swap Dealer and Intermediary Oversight plans to issue a no-action letter specifying that where a swap/OTC derivative is subject to joint jurisdiction under US and EU risk mitigation rules, compliance under EMIR will achieve compliance with the relevant CFTC rules"); *id.* at 3 ("[T]he CFTC's Division of Market Oversight plans to amend the no-action letters to permit those FBOTs to list swap contracts, subject to certain conditions. In the future, registered FBOTs will be permitted to list swap contracts for trading by direct access, subject to the same conditions."); *id.* at 5 ("The CFTC will continue to consider granting no-action relief in similar circumstances where a clearing organization seeks to register as a DCO and has not yet completed the registration process.").

[193] Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter No. 13-45 Corrected (July 11, 2013), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-45.

[194] Letter from Vincent McGonagle, Director, Div. of Mkt. Oversight, CFTC, and Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter No. 14-16, at 8 (Feb. 12, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-16 (explaining that the Division of Market Oversight "interprets the Path Forward Statement as . . . stating that the CFTC will provide conditional, time limited no-action relief for [multi-lateral trading facilities] from the trade execution and registration requirements" of the CEA).

Because of his unique role, the CFTC chairman has greater ability than the other commissioners to weigh in on substantive no-action letters before they are issued. The CEA gives the chairman the sole authority to exercise "the executive and administrative functions of the Commission, including functions of the Commission with respect to the appointment and supervision of personnel employed under the Commission."[195] It is not surprising, therefore, that former CFTC Chairman Gensler defended the practice of using staff letters. Acknowledging that the number of letters had swelled in recent years, he pointed out that "regulatory commissions, not just this one, have used staff no-action type letters probably for a few decades."[196]

The chairman's colleagues may not even be aware of staff letters until they are released. Former CFTC Commissioner Bart Chilton, while supporting the use of no-action letters because "they allow us . . . to be more nimble and quick," called for a better process with respect to no-action letters "so that we do find out ahead of time."[197] Former Commissioner O'Malia agreed that the no-action process is "a very nimble tool," but noted that "on the other hand, it is an end-run around some of these transparent and rulemaking processes."[198] CFTC Commissioner Mark Wetjen likewise objected to the substitution of staff no-action letters for "formal commission action," and called for similar future actions to be taken with "the full input of the commission and legal force of a commission action."[199]

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[195] 7 U.S.C. § 2(a)(6)(A).
[196] Cross-Border Transcript, *supra* note 157, at 97 (statement of Gary Gensler, Chairman, CFTC). The chairman explained that to an "inventory of 700 no-action letters . . . over the last 20 or so years[,] over these last four years, we've probably added another 100 to 150." *Id.*
[197] Cross-Border Transcript, *supra* note 157, at 98 (statement of Bart Chilton, Commissioner, CFTC).
[198] *Id.* at 99 (statement of Scott O'Malia, Commissioner, CFTC).
[199] Mark P. Wetjen, Commissioner, CFTC, Statement at Public Meeting of the CFTC (July 17, 2013), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/wetjenstatement071213. Commissioner Wetjen was responding to the issuance of no-action letters—the substance of which he supported—to "allow Eurex and LCH SA to clear U.S. dealer swaps pending completion of their applications to register with the commission" and "find[] the various risk-mitigation requirements under EMIR to be 'essentially identical.'" *Id.*

Figure 2 depicts certain characteristics of no-action letters released between January 1, 2013, and August 30, 2014. As the figure illustrates, no-action letters are diverse. The bulk of the recent no-action letters relate to Dodd-Frank implementation. Most are temporary, or as the CFTC describes them, "time-limited." As a consequence, many of the letters simply renew expiring relief.[200] Approximately twenty-five of the 144 no-action letters from January 2013 through August 2014 related to the registration status of foreign entities, such as derivative clearing organizations.[201] Although letters that look like rules defy precise identification, a rough count suggests that about one-third of the no-action letters effectively amend Commission rules by temporarily or permanently adjusting requirements imposed through notice-and-comment rulemaking in substantive ways for broad registrant populations.[202] Only sixty-one of the letters appear to limit the relief to the person asking for it; the rest of the letters offer broadly applicable relief.[203] Requests

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[200] *See, e.g.*, Letter from Vincent McGonagle, Director, Div. of Mkt. Oversight, CFTC, to Richard Swift, Chief Executive Officer, Yieldbroker Pty Ltd., CFTC Letter No. 14-105 (Aug. 11, 2014), *available at* http://www.cftc .gov/LawRegulation/CFTCStaffLetters/14-105; (providing relief expiring Nov. 15, 2014); Letter from Vincent McGonagle, Director, Div. of Mkt. Oversight, CFTC, to Richard Swift, CFTC Letter No. 14-70 (May 14, 2014), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-70 (providing relief expiring Aug. 15, 2014); Letter from Vincent McGonagle, Director, Div. of Mkt. Oversight, CFTC, to Richard Swift, CFTC Letter No. 13-76 (Dec. 20, 2013), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-76 (providing relief expiring May 16, 2014); Letter from Vincent McGonagle, Director, Div. of Mkt. Oversight, CFTC, to Richard Swift, CFTC Letter No. 13-59 (Oct. 30, 2013), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-67 (providing relief expiring December 1, 2013); Letter from David Van Wagner, Chief Counsel, CFTC, and Nancy Markowitz, Deputy Director, Div. of Mkt. Oversight, CFTC, to Richard Swift, CFTC Letter No. 13-59 (Sept, 30, 2013), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-59 (providing relief expiring November 1, 2013).

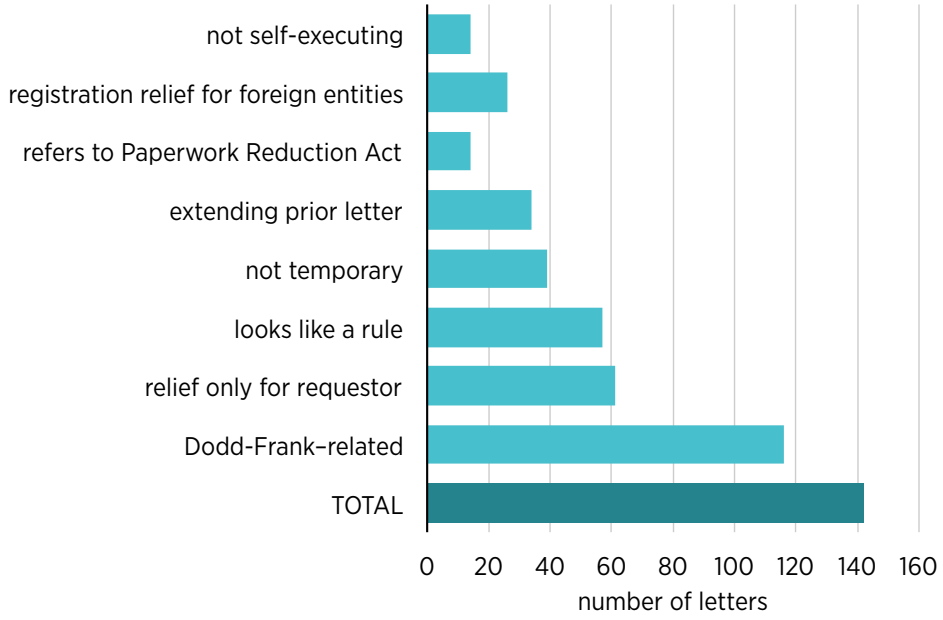
[201] *See, e.g*., Letter from Ananda Radhakrishnan, Director, Div. of Clearing and Risk, CFTC, to David Gilberg, Sullivan & Cromwell LLP (June 25, 2014), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-85 (extending expiring no-action letter to permit LCH.Clearnet Ltd. to continue clearing certain swaps).

[202] *See, e.g.*, Letter from Ananda Radhakrishnan, Director, Div. of Clearing and Risk, CFTC, and Vincent McGonagle, Director, Div. of Mkt. Oversight, CFTC, CFTC Letter 14-50 (Apr. 18, 2014), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-50 (providing temporary no-action relief to allow designated contract markets to correct errors and resubmit trades without violating the prohibition on pre-arranged trading); Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter 13-33 Corrected (June 27, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-33 (providing non-time-limited no-action relief to eliminate certain external business conduct and trading relationship documentation requirements for swap dealers and major swap participants in connection with "intended to be cleared" swaps).

[203] *Compare* Letter from Vincent McGonagle, Director, Div. of Mkt. Oversight, CFTC, to Richard Swift, Chief Executive Officer, Yieldbroker Pty Ltd., CFTC Letter No. 14-105 (Aug. 11, 2014), http://www.cftc.gov/Law Regulation/CFTCStaffLetters/14-105 (relief for Yieldbroker) *with* Letter from Richard Shilts, Acting Director, Div.

often come from industry organizations[204] rather than specific firms or individuals, as anticipated in the regulations governing staff letters.[205] Even where the identity of the requestor is clear, which it often is not, the relief frequently extends to persons other than the requestor.[206]

Figure 2. No-Action Letters, January 2013–August 2014



The fact that many of the no-action letters apply to parties other than the requestor raises concerns. The letters contain no indication that non-requesting parties have been consulted about

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of Mkt. Oversight, CFTC, CFTC Letter No. 13-08 (Apr. 5, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-08 (relief for all non-swap dealers and non-major swap participants).

[204] *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter No. 13-29 (June 21, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-29 (request from National Futures Association for relief from fingerprinting requirements for certain non-U.S. associated persons of Commission registrants).

[205] *See* 17 C.F.R. § 140.99(a)(3)–(5) (describing the requirements governing a request for a staff letter).

[206] *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter No. 13-40 (June 27, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-40 (responding to a request from the International Swaps and Derivatives Association, but noting that the "relief provided in this no-action letter is available to all" swap dealers and major swap participants); Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter No. 13-33 Corrected, n.1 (June 27, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-33 ("Although the relief contained herein was requested by ISDA and AMG on behalf of their members, such relief is available to all swap market participants that enter into swaps intended to be submitted for clearing contemporaneously with execution, subject to the conditions set forth herein.").

the conditions pursuant to which relief will be made available. An APA rulemaking, by contrast, invites broad input from interested parties. If the no-action letters simply afforded relief without conditions, there would not be as much cause for concern. However, the CFTC staff frequently conditions no-action relief on precise and numerous requirements.[207] Sometimes the relief is contingent upon adherence to representations made in the requestor's letter, but request letters are not made public with the staff's no-action letter.[208]

Almost all the no-action letters condition relief on compliance with specific requirements, but some impose significantly more onerous requirements than others. A subset of letters is not self-executing: entities seeking to rely on the relief must file a request—typically by email—with the CFTC staff.[209] The conditions in some letters are extensive enough that the staff offers no-action relief on the no-action relief; in other words, the staff promises not to recommend an enforcement action for entities working on becoming compliant with the no-action letter's conditions.[210]

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[207] *See, e.g.*, Letter from Ananda Radhakrishnan, Director, Div. of Clearing and Risk, CFTC, and Vincent A. McGonagle, Director, Div. of Mkt. Oversight, CFTC, CFTC Letter No. 13-66 (Oct. 25, 2013), http://www.cftc.gov /LawRegulation/CFTCStaffLetters/13-66 (conditioning relief for swap execution facilities with respect to the resubmission of erroneous trades on twelve conditions, including mandated changes to swap execution facilities' rulebooks).

[208] *See, e.g.*, Letter from Rick Shilts, Acting Director, Div. of Mkt. Oversight, CFTC, CFTC Letter No. 13-36 (June 27, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-33 (explaining that "position is based upon the representations contained in [the International Swaps and Derivatives Association's] December 13, 2012 request letter and it should be noted that any different, changed, or omitted material facts or circumstances may require a different conclusion or render this no-action letter void").

[209] *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter 13-64, at 2 (Oct. 17, 2013), http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-64.pdf (requiring certain non-U.S. swap persons choosing not to count certain swap transactions toward the rule's de minimis threshold to provide the staff certain written representations within 48 hours of executing the swap); Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, to Karrie McMillan, Gen. Counsel, Inv. Co. Inst., et al., CFTC Letter No. 13-51, at 8 (Sept. 5, 2013), http://www.cftc.gov/ucm/groups/public/@lrlettergeneral /documents/letter/13-51.pdf ("This no-action relief is not self-executing. Rather, a [commodity pool operator] that is eligible for this relief must file a claim to perfect the use of this relief consistent with the procedures set forth below."); Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter No. 13-37, at 5 (June 27, 2013), http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-37.pdf (identifying as one of the conditions for relief that "claims for relief must be filed with the Division using the email address dsionoaction@cftc.gov, with the subject line of such email 'Floor Trader,' prior to July 1, 2013").

[210] *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter 13-39 (June 27, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-39 (in recognition of the fact "that the conditions of the no-action relief described above may require [swap dealers] and Registrant Intermediaries to

One no-action letter offered temporary relief from a requirement that entities report information about their counterparties in swap transactions.[211] Such a requirement placed firms at risk of violating foreign privacy laws. In order to qualify for the relief, an entity would have to "submit[] a formal written request" to the relevant foreign regulator that describes the entity's obligations under CFTC rules, "request[] that the non-U.S. regulator . . . specifically identify any statutes or regulations that would prohibit" reporting the required information, "request that the non-U.S. regulator . . . specifically address the applicability of such statutes or regulations" under three different scenarios, and "[o]btain a formal response to the Request [in English] from the relevant non-U.S. regulator or governing authority within 60 days from the issuance of" the no-action letter.[212] In other words, the CFTC staff, through its no-action letter, placed direct obligations on CFTC registrants to obtain—and an indirect obligation on foreign regulators to provide—carefully prescribed information by a specific deadline. Because this letter imposes substantive requirements on firms and effectively on foreign governments, this is the type of action that would be more appropriate for formal commission action through a legislative rulemaking.

Another letter offers no-action relief for swap dealers and major swap participants not in compliance with certain external business conduct requirements and swap trading relationship documentation requirements if they satisfy a number of conditions.[213] The lengthy list of conditions includes the execution and retention of written "fallback agreements" between the

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complete new documentation and provide certain notices to qualify for such relief," the staff promised not to recommend an enforcement action for non-adherence to those conditions for approximately three weeks).

[211] Letter from Richard A. Shilts, Acting Director, Div. of Mkt. Oversight, CFTC, to Robert Pickel, CEO, Int'l Swaps and Derivatives Assoc., CFTC Letter No. 13-41 (June 28, 2013), http://www.cftc.gov/LawRegulation /CFTCStaffLetters/13-41.

[212] *Id.* at 6 (footnotes omitted).

[213] Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter No. 13-33 Corrected, n.1 (June 27, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-33.

swap dealer or major swap participant and its counterparties that contain specific terms about how swaps will be treated if they are not accepted for clearing.[214] In light of newly issued staff guidance, a subsequent letter removed that condition.[215]

Indicative of the attendant compliance burden, several no-action letters directly cite the Paperwork Reduction Act (PRA), which governs government "information collections."[216] An information collection under the PRA includes government requests for information, recordkeeping and reporting requirements, and government directives to provide information to third parties.[217] The statute covers collections of information applicable to at least ten people.[218] The PRA requires agencies to publish information collections (including a burden estimate) for comment in the *Federal Register* and to obtain approval from the Office of Management and Budget (OMB).[219] Some of the CFTC's letters promise to, "by separate action, prepare an information collection request for review and approval by" the OMB.[220] It does not appear that the staff applied for OMB approval in connection with these specific no-action letters.[221] Other letters cite to an approved information collection that covered the process for *requesting* a staff

[214] *Id.* at 12 ("For the avoidance of doubt, no [swap dealer] or [major swap participant] may fail to comply with the External [Business Conduct Standards] or the swap trading relationship documentation requirements in reliance on this letter unless it shall first have entered into a fallback agreement that meets the conditions of this letter with the applicable counterparty (or its duly authorized representative).").
[215] *See* Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter 13-70, at 2 (Nov. 15, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-70. The guidance and its effect on the letter is discussed below. *See infra* note 272 and accompanying text.
[216] 44 U.S.C. § 3501 *et seq.* (2013).
[217] *Id.* § 3502(3)(A)(i).
[218] *Id.*
[219] 44 U.S.C. § 3507.
[220] *See, e.g.*, Letter from Richard A. Shilts, Acting Director, Div. of Mkt. Oversight, CFTC, CFTC Letter No. 13-08, at 5 (Apr. 5, 2013), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-08.
[221] Even if the CFTC applied simultaneously for approval, it is not clear how those no-action letters satisfied the PRA requirements that "the collection of information display[] a currently valid OMB control number" and that "the agency inform[] potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number." 5 C.F.R. § 1320.10.

letter.[222] The CFTC's request for OMB approval predated the flood of Dodd-Frank letters and did not envision the burdens embodied *in* those letters.[223] In a subsequent renewal request, the CFTC asked the OMB to increase the approved burden hours because things had changed post–Dodd-Frank:

> [T]he burden increase is attributable [in part] to collection requirements contained within issued exemptive and no-action letters providing regulatory relief. Historically, most exemptive, no-action, and interpretive letters were sought by and issued to an individual party (or fewer than ten persons) that may have been subject to discrete collections of information in a letter in order to obtain the benefit of it, which collections were excepted from the application of the PRA. Since the implementation of the Dodd-Frank Act, however, these letters more frequently have been sought by and issued to large groups of similarly situated persons, typically to entire industries or industry subgroups.[224]

The CFTC takes the position that people would voluntarily incur the increased burdens associated with staff letters in order to free themselves "from some or all of the burdens associated with other collections of information," meaning burdens imposed by CFTC regulations.[225] However, complying with the conditions in a no-action letter is the only option in instances where compliance with the relevant regulation would be impossible for technological or legal reasons.[226]

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[222] *See, e.g.*, Letter from David Van Wagner, Chief Counsel, Div. of Mkt. Oversight, CFTC, and Nancy Markowitz, Deputy Director, Div. of Mkt. Oversight, CFTC, CFTC Letter 13-58, at 4 (Sept. 30, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-58 (relying on "Collection 3038-0049 ('Procedural Requirements for Requests for Interpretative, No-Action and Exemptive Letters')."").

[223] *See* Agency Information Collection Activities: Notice of Intent to Renew Collection 3038–0049, Procedural Requirements for Requests for Interpretative, No-Action, and Exemptive Letters, 75 Fed. Reg. 60,087 (Sept. 29, 2010) (requesting approval only for information collection associated with requesting staff letters, not complying with the conditions in them).

[224] Agency Information Collection Activities; Notice of Intent to Renew Collection: Procedural Requirements for Requests for Interpretative, No-Action, and Exemptive Letters, 78 Fed. Reg. 79,408, 79,409 (Dec. 30, 2013). In 2013, the CFTC requested approval for 28,478 hours annually. *Id.* at 79,410. In its 2010 request, the CFTC requested approval of a 1,050 hour annual burden. 75 Fed. Reg. at 76,705.

[225] 78 Fed. Reg. at 79,409.

[226] *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC NAL 13-29, at 2 (June 21, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-29 (providing no-action relief in connection with fingerprinting requirement for non-U.S. associated persons because of limitations of foreign counterpart finger print record repository and because "concerns have been raised by the industry that, in other jurisdictions, requiring the submission of fingerprints may contravene privacy laws").

As figure 3 shows, staff no-action letters are not released evenly over time, but are concentrated in particular months. The staff often issues letters very shortly before a critical implementation date or just before a prior no-action letter is expiring.[227] For example, many letters are clustered around the key compliance dates of July 1, 2013—effective date for internal business conduct and reporting rules for swap dealers and major swap participants—and October 2, 2013—the date when trading was supposed to move to swap execution facilities.[228] April 10, 2013, was an important date for end user swap reporting with respect to which no-action relief was provided.[229] At the end of June 2014, the staff issued a number of no-action letters to extend prior letters that were expiring on June 30, 2014.[230]

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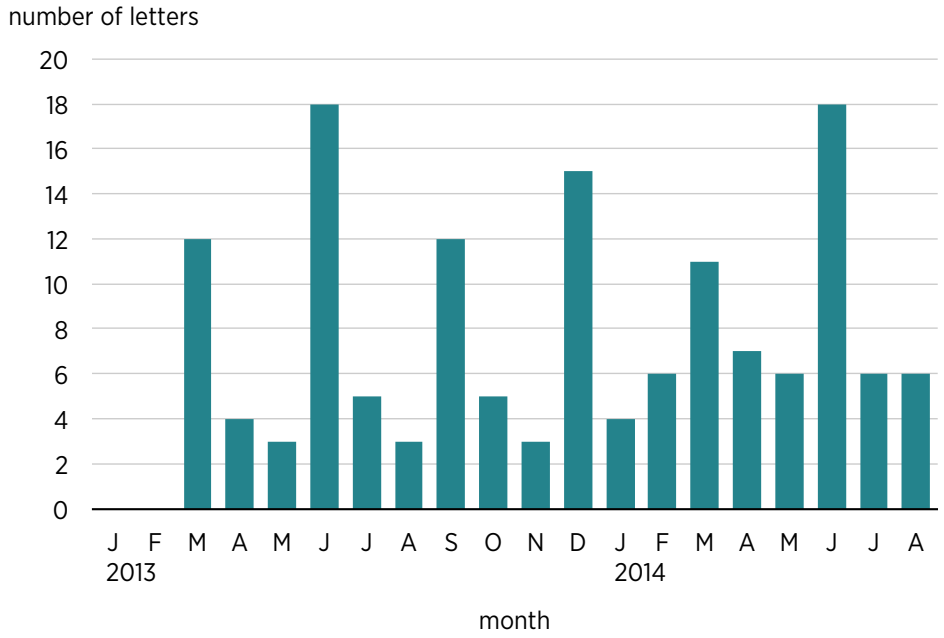
[227] *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, and Vincent A. McGonagle, Director, Div. of Mkt. Oversight, CFTC, to Timothy W. Cameron, Securities Industry and Financial Markets Ass'n, et al., CFTC Letter 13-77, at 2-3 (Dec. 21, 2013), http://www.cftc.gov/LawRegulation /CFTCStaffLetters/13-77 (providing no-action relief for asset manager participants of swap execution facilities from the requirement to record oral communications, which takes effect December 21, 2013). *See also* Simpson, Thacher & Bartlett LLP, *Simpson Thacher Memorandum: CFTC Issues Last-Minute Deadline Extension for Derivatives End-Users with Respect to Dodd-Frank Swap Reporting Rules and No-Action Relief from Certain Inter-Affiliate Swap Reporting Requirements* 1 (Apr. 12, 2013), http://www.stblaw.com/content/publications/pub1600.pdf (in reference to CFTC Letters 13-09 and 13-10, explaining that the CFTC "recently issued two no-action letters that provide last-minute relief for many derivative end-users with respect to new transaction reporting requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act").

[228] *See* Latham & Watkins, *CFTC Issues Guidance, Exemptions in Advance of SEF Rule Compliance Date* (Client Alert No. 1549, Oct. 17, 2013); Latham & Watkins, *CFTC Issues Series of No-Action Letters as Compliance Deadlines Approach* (Client Alert No. 1547, July 2, 2013).

[229] *See* CFTC, *Q & A—On Start of Swap Data Reporting*, http://www.cftc.gov/ucm/groups/public/@newsroom /documents/file/startreporting_qa_final.pdf (undated document). *See also* Letter from Richard A. Shilts, Acting Director, Div. of Mkt. Oversight, CFTC, CFTC Letter 13-10 (Apr. 9, 2013), http://www.cftc.gov/LawRegulation /CFTCStaffLetters/13-10 (delaying key swap reporting requirements for end users).

[230] *See, e.g.*, Letter from Ananda Radhakrishnan, Director, Div. of Clearing and Risk, CFTC, to David Gilberg, Sullivan & Cromwell LLP (June 25, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-85 (extending expiring no-action letter to permit LCH.Clearnet Ltd. to continue clearing certain swaps). In June 2014, the staff also issued ten no-action letters not stemming from Dodd-Frank, but providing no-action relief for commodity pool operators delegating their obligations to someone else. *See* Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, Form of Reply for CFTC Letter No. 14-75, 14-76, 14-77, 14-78, 14-79, 14-80, 14-81, 14-82, 14-83, and 14-84 (June 2, 2014), http://www.cftc.gov/LawRegulation /CFTCStaffLetters/14-75thru14-84.

Figure 3. No-Action Letters by Month, January 2013–August 2014



The relief afforded in many of the no-action letters is unobjectionable and frequently is necessary to make hastily crafted rules workable. Nevertheless, the practice of relying on these letters as a substitute for full Commission notice-and-comment rulemaking sets a troubling precedent. The implication is that if the Commission adopts an unworkable rule, the staff can rewrite the rule in a no-action letter.[231] The Commission treats staff no-action letters as a substitute for Commission action.[232] Commissioner O'Malia correctly asked, in connection with decisions about which CFTC regulations should apply to non-U.S. entities, "By allowing substituted compliance to be addressed through a no-action letter, is the Commission implying

[231] *See, e.g.*, Letter from Vincent A. McGonagle, Director, Div. of Mkt. Oversight, CFTC, to Robert Pickel, CFTC Letter 14-26 (Mar. 6, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-26 (providing temporary no-action relief from trade execution requirements for cleared inter-affiliate swaps while staff "assess[es] whether applying the trade execution requirement to interaffiliate swap transactions would promote pre-trade price transparency in the swaps market"). Exempting inter-affiliate swaps from execution requirements makes logical sense, but the staff suggests that it can usurp the Commission's authority in making such a determination.
[232] *See, e.g.*, Final Cross-Border Guidance, *supra* note 113, at 45,353 ("The Commission intends that a finding of essentially identical generally would be made through Commission action but in appropriate cases could be made through staff no-action.").

that, *e.g.*, the Bank of Japan should accede to, *e.g.*, decisions of the CFTC Division of Swap Dealer and Intermediary Oversight?"[233]

Professor Donna Nagy, in her excellent overview of the SEC's use of staff no-action letters, explains that "[t]he SEC can often command the same respect from the regulated community regardless of whether it proceeds officially, through the issuance of SEC rules, orders, or releases, or unofficially, through the no-action letter process."[234] Some courts also offer respect, although Nagy describes courts' treatment of no-action letters as "sheer confusion."[235] She goes on to identify a number of concerns that arise when the SEC chooses the no-action letter route: (1) no-action letters become a substitute for "authoritative pronouncements on which the public and, by extension, courts, can rely for guidance"; (2) it "is often a highly inefficient method of policymaking"; (3) shutting the public out of the policymaking process can facilitate regulatory capture and undermine regulatory quality; and (4) no-action letters that create new substantive requirements should be subject to notice-and-comment rulemaking under the APA.[236] The concerns Nagy identifies with respect to SEC no-action letters are equally applicable in the CFTC context.

Staff advisories and other written communication. In addition to the three letter types described in CFTC regulations, the CFTC issues two other letter types: "staff advisories" and "other written communication."[237] During the period from January 2013 through August 2014, the staff issued nine of each of these letter types out of a total of 199 staff letters, but seven letters fall into

[233] Final Cross Border Guidance, *supra* note 113, at 45,373 (O'Malia dissent).
[234] Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 957 (1998).
[235] *Id.* at 979.
[236] *Id.* at 957–60.
[237] Commodity Futures Trading Comm'n, CFTC Staff Letters, http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm (last visited Sept. 14, 2014).

both categories.[238] Eight of these letters relate to Dodd-Frank. The CFTC obliquely defines a "staff advisory" as "a public notice by a Division informing interested parties of existing legal obligations under the Act and Commission regulations, as well as, providing additional clarification on an issue that a Division deems appropriate to issue in order to further general understanding of the Act and Commission regulations."[239] It defines "other written communication" as "[l]etters that don't fall into any of the [other] categories."[240] This definition is puzzling, because most recent letters characterized as "other written communication" were also characterized as "advisories." Regardless of how they are defined, some of these letters raise backdoor rulemaking concerns because of their substantive impact on the marketplace.

One letter—classified as both an "advisory" and "other written communication"—had particularly far-reaching effects.[241] That letter made clear that, contrary to what many market participants believed, non-U.S. swap dealers cannot not rely on substituted compliance to satisfy transaction-level requirements if they "regularly use personnel or agents located in the U.S. to arrange, negotiate, or execute a swap with a non-U.S. person."[242] The letter "undermines a legal interpretation Wall Street had found buried in a footnote, number 513, in [the CFTC's cross-border guidance]. Banks relied on the footnote to keep swap deals off electronic platforms and away from the agency's rules . . . ."[243] In response to adverse reactions to the advisory, the CFTC

[238] This number was tabulated from the CFTC's website. *See* CFTC, *CFTC Staff Letters: Letter Types*, http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm (last visited Sept. 9, 2014) (click on "Staff" tab and count letters within each subcategory dated January 1, 2013, through August 30, 2014).
[239] *See* Commodity Futures Trading Comm'n, CFTC Staff Letters, http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm (last visited Sept. 14, 2014).
[240] *Id.*
[241] Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Staff Advisory No. 13-69 (Nov. 14, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-69.
[242] *Id.* at 2.
[243] Silla Brush & Robert Schmidt, *Wall Street Bid on Cross-Border Swaps Quashed by U.S. Regulator*, BLOOMBERG, Nov. 15, 2013, http://www.bloomberg.com/news/2013-11-14/wall-street-bid-on-cross-border-swaps-quashed-by-u-s-regulator.html.

staff issued another no-action letter to give swap dealers until January 14, 2014, to come into compliance with the advisory.[244] In addition, the CFTC took the highly unusual step of publishing a request for comment on the advisory in the *Federal Register*.[245] The Commission noted that the advisory did not purport to represent the views of the Commission and "invited[d] comment on whether the Commission should adopt the Staff Advisory as Commission policy."[246] Turning the standard practice of staff interpreting Commission documents on its head, the Commission also asked for comment on how it should interpret certain terms in the staff advisory.[247] Commissioner O'Malia, in his dissent, cited the request for comment as an "abrogate[ion of] the Commission's fundamental legal obligations under the [APA]."[248] He called on the CFTC "to do away with the reflexive rule implantation process via staff no-action and advisories that are not voted on by the Commission."[249]

In another example of an advisory that imposes substantive obligations, the staff issued a letter related to Gramm-Leach-Bliley Act security safeguards.[250] Although couched as "recommended best practices" to comply with the relevant statute and regulations,[251] the document is written in prescriptive terms. For example, firms are told that they "should develop,

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[244] Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter 13-71 (Nov. 26, 2013), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-71. The staff subsequently extended that relief. *See* Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter No. 14-74 (June 4, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-74 (extending relief until Dec. 31, 2014); Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter 14-01 (Jan. 3, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-01 (extending relief until Sept. 15, 2014).

[245] Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States, 79 Fed. Reg. 1347 (Jan. 8, 2014).

[246] *Id.* at n.6 and 1348.

[247] *Id.* at 1349.

[248] *Id.* (O'Malia, dissenting).

[249] *Id.*

[250] Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, to All CFTC Regulated Intermediaries, CFTC Staff Advisory No. 14-21 (Feb. 26, 2014), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-21.

[251] *Id.* at 1.

implement, and maintain a written information security and privacy program . . . which requires it to, at a minimum," take nine steps.[252] These steps include making an employee of sufficient seniority responsible for privacy and security, engaging in risk documentation, implementing and testing safeguards, training staff, testing third parties biannually, and reporting to the board of directors annually.[253] To underscore the strength of the staff's recommendations, the staff closes the letter with a warning "that the Division will enhance its audit and review standards as it continues to focus more resources on [Gramm-Leach-Bliley] Title V compliance."[254]

Staff advisories are helpful for regulated entities, particularly during a period of rapid rule implementation and major changes in the regulatory framework.[255] The CFTC staff, however, has resorted to using such letters to make far-reaching policy decisions that belong in the purview of the Commission, and should be made in the light of public notice and comment.

D. Other Staff Guidance

The CFTC also makes policy through the issuance of other miscellaneous staff documents, typically styled as "frequently asked questions (FAQs)" or "staff guidance."[256] The staff issued nine of these documents in connection with Dodd-Frank implementation between January 1,

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[252] *Id.* at 2.
[253] *Id.* at 2–4.
[254] *Id.* at 4.
[255] *See, e.g.*, Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Advisory No. 13-79 (Dec. 23, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-79 ("provid[ing] guidance on . . . potential new advisory obligations" and "inform[ing] the newly expanded class of [commodity trading advisors] and those previously exempt [commodity trading advisors] that are now subject to registration as to the general regulatory framework").
[256] Although the CFTC's website states that "[s]taff advisories may be issued in the form of a 'frequently asked questions' document," FAQs are not labeled or numbered the way staff advisory letters are. CFTC, *CFTC Staff Letters: Letter Types*, http://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm (last visited Sept. 9, 2014). For this reason, they are omitted from the earlier tallies of staff letters.

2013, and August 30, 2014.[257] As with staff advisories, these documents can be useful guides to firms as they try to navigate the new regulatory environment. In June 2014, for example, the CFTC staff, as part of an inter-agency staff effort, issued a set of FAQs related to compliance with Dodd-Frank's Volcker Rule.[258] In other cases, however, these documents do more than provide guidance about policy decisions already made by the Commission. They include new, substantive policy decisions that would seem more appropriately made at the Commission level after notice-and-comment.

On November 15, 2013, for example, the CFTC's Division of Market Oversight issued a guidance document addressed to "[a]ll CFTC Registered Swap Execution Facilities and Applicants for Registration as a Swap Execution Facility."[259] Swap Execution Facilities (SEFs), created by Dodd-Frank to trade swaps, must register with the CFTC. The document includes useful guidance for SEFs, such as a promise to work out arrangements with foreign regulators for SEFs that also are registered in another country, and a reminder that SEFs "may make changes to their rulebooks at any time."[260] The document also introduces some new requirements, including one that is applicable not to SEFs, but to clearing members that guarantee swaps executed on an SEF. The guidance tells these clearing members (to whom the guidance was not addressed) that they must agree to allow SEFs to have jurisdiction over them.[261] Steven Lofchie, a swaps expert,

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[257] *See* Dodd-Frank Staff Guidance, Questions and Answers, Memoranda, and Letters, http://www.cftc.gov/Law Regulation/DoddFrankAct/GuidanceQandA/index.htm (last visited Sept. 14, 2014). Letters, which were discussed in the previous section, are excluded from this count.

[258] CFTC, *CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions Regarding Certain Requirements Under Section 13 of the Bank Holding Company Act of 1956 and Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds* (June 9, 2014), http://www.cftc.gov/LawRegulation/DoddFrankAct/GuidanceQandA/ssLINK /volckerrule_faq060914.

[259] Memorandum from Division of Market Oversight to All CFTC Registered Swap Execution Facilities and Applicants for Registration as a Swap Execution Facility (Nov. 15, 2013), http://www.cftc.gov/LawRegulation /DoddFrankAct/GuidanceQandA/ssLINK/dmosefguidance111513 [hereinafter SEF General Guidance].

[260] *Id.* at 3, 5.

[261] *Id.* at 3.

explained that the guidance suggests the CFTC "may have jurisdiction over SEFs everywhere in the world (even where no U.S. person can trade directly on the SEF) and over every clearing member of every such SEF."[262] He notes the impropriety of making such a declaration in the form of "guidance," issued without warning or consultation, and not a rule.[263]

This was the CFTC's second staff guidance document for SEFs in as many days. CFTC Chairman Gensler underscored the significance of the changes in the first guidance document: in a speech summarizing and expressing approval of the guidance, he noted that "this does mean a paradigm shift from the business models of the past."[264] That guidance relates to the important subject of access to SEFs.[265] It effectively prohibits a number practices commonly employed by swap trading platforms, including the imposition of limits on the types of entities permitted to trade and other practices central to their functioning. These changes, taken together with the CFTC staff's broad reading of the entities that are required to register as SEFs,[266] will have far-reaching effects on the swaps marketplace. Again Lofchie, noting the lack of administrative process, commented that "[t]he tone of the guidance suggests it is meant to be a rule and not merely a suggestion." He asked, "[I]s it a rule issued in violation of the Administrative Procedure Act? Will SEFs be subject to disciplinary action if they do not follow the Division's

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[262] Steven Lofchie, *CFTC Issues Further Guidance on Application of Its Rules to SEFs*, CENTER FOR FINANCIAL STABILITY BLOG (Nov. 19, 2013), http://centerforfinancialstability.org/wp/?p=3429.
[263] *Id.*
[264] Gary Gensler, Chairman, CFTC, Remarks at Swap Execution Facility Conference (Nov. 18, 2013), http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-152.
[265] Memorandum from the Divs. of Clearing and Risk, Mkt. Oversight, and Swap Dealer and Intermediary Oversight, CFTC, to All CFTC Registered Swap Execution Facilities and Applicants for Registration as a Swap Execution Facility (Nov. 14, 2013), http://www.cftc.gov/LawRegulation/DoddFrankAct/GuidanceQandA/ssLINK/dmostaffguidance111413.
[266] *See, e.g.*, SEF General Guidance, *supra* note 259, at n.8 and accompanying text ("expect[ing] that a multilateral swaps trading platform located outside the United States that provides U.S. persons located in the U.S. . . . with the ability to trade or execute swaps on or pursuant to the rules of the platform, either directly or indirectly through an intermediary, will register as a SEF or DCM" and setting forth the "factors that would be relevant in evaluating the SEF/DCM registration requirement").

guidance?"[267] Another commentator underscored the magnitude of the change effected by the guidance when he noted that "this is actually a pretty big deal and removes much of the freedom we believed SEFs to have in setting their own rules."[268]

Other staff guidance makes similarly dramatic changes. On September 26, 2013, the CFTC staff issued guidance that, among other things, redefined what "as soon as technologically practicable" means in the context of clearing swaps once they have been executed.[269] The guidance cut the time from sixty seconds to ten.[270] This significant change took the industry by surprise.[271] In a subsequent no-action letter, the staff highlighted the significance of another piece of that guidance by modifying conditions on existing no-action relief "in consequence of statements in" the guidance.[272] The same guidance was also featured in another no-action letter that was conditioned, in part, on compliance with the guidance.[273]

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[267] Steven Lofchie, *CFTC Issues Staff "Guidance" on Impartial Access to SEFs*, CENTER FOR FINANCIAL STABILITY BLOG (Nov. 15, 2013), http://centerforfinancialstability.org/wp/?p=3411.
[268] Kevin McPartland, *Impartial Access: The CFTC Isn't Messing Around This Time*, KEVINONTHESTREET.COM (Nov. 19, 2013), http://kevinonthestreet.com/impartial-access-the-cftc-isnt-messing-around-this-time/.
[269] Memorandum from Divs. of Mkt. Oversight and Clearing and Risk, CFTC, to All CFTC Registered Futures Commissions Merchants, et al. 4–5 (Sept. 26, 2013), *available at* http://www.cftc.gov/LawRegulation/DoddFrankAct/GuidanceQandA/ssLINK/stpguidance [herinafter Straight-Through Processing Guidance].
[270] *Id.* at 5 ("DCR previously interpreted 'as soon as technologically practicable' to be 60 seconds. . . . '[A]s soon as technologically practicable' is now within 10 seconds. Therefore, DCOs clearing swaps that are executed competitively on or subject to the rules of a DCM or SEF and are accepting or rejecting trades within 10 seconds after submission are compliant with the timing standard of Regulation 39.12(b)(7).").
[271] *See, e.g.*, Letter from Timothy W. Cameron and Matthew J. Nevins, Managing Directors, Asset Management Group, Securities Industry and Financial Markets Assoc. to Ananda Radhakrishnan, Director, Division of Clearing and Risk, et al., 2–3 (Oct. 25, 2013) ("The change in interpretation of 'as soon as technologically practicable' from 60 to 10 seconds was an unexpected and substantial decrease in the time now expected for clearing certainty. . . . The changes described in the STP Guidance create considerable concern around swap trades that do not clear within 10 seconds but would be accepted within 10 and 60 seconds. We do not believe that these trades should suddenly be put at risk.").
[272] *See* Letter from Gary Barnett, Director, Div. of Swap Dealer and Intermediary Oversight, CFTC, CFTC Letter 13-70, at 2 (Nov. 15, 2013), *available at* http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-70. Those statements related to the void *ab initio* status of intended-to-be-cleared swap transactions that fail to be cleared. *Id.* at 2. The guidance provided that, with respect to certain trades, "the Divisions believe that any trade that is executed on a [swap execution facility] or [designated contract market] and that is not accepted for clearing should be void *ab initio*." Straight-Through Processing Guidance, *supra* note 269, at 5.
[273] Letter from Ananda Radhakrishnan, Director, Div. of Clearing and Risk, CFTC, and Vincent A. McGonagle, Director, Div. of Mkt. Oversight, CFTC, CFTC Letter 14-50, at 3–5 (Apr. 18, 2014), http://www.cftc.gov/LawRegulation/CFTCStaffLetters/14-50.

The potential substantive impact of guidance was highlighted when the withdrawal of several FAQs—allegedly prompted by one lawsuit—formed the basis for another lawsuit.[274] If FAQs are the stuff of which lawsuits are made, they are more than mere interpretations of existing regulatory obligations. The CFTC responded to the lawsuit by describing FAQs as "nonbinding staff interpretation[s]," and concluding that, because the documents were not binding, "the CFTC was not required to engage in notice-and-comment rulemaking before reaching conclusions that differed from statements in the Staff FAQ."[275] The CFTC argued that the withdrawn FAQs—"appear[ing] on the agency's website for only a brief period, from October 11, 2012 to November 28, 2012"—were "more like fleeting advice by agency staff" than "authoritative, definitive agency statements."[276] Moreover, the CFTC argued, "[t]he Staff FAQ was inconsistent with previous Commission statements."[277] The CFTC's defense points to a larger problem with staff guidance: because it is so easy for the Commission or the staff to disown staff guidance, that guidance cannot serve as the basis for predictable standards to govern markets.

Staff guidance typically includes a boilerplate disclaimer similar to that included in staff no-action letters: "This Guidance, and the positions taken herein, represent the views of the Divisions only, and do not necessarily represent the views of the Commission or of any

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[274] Complaint, DTCC Data Repository (US) LLC v. CFTC, No. 2013cv00624 ¶ 83 (May 2, 2013), http://www.dtcc.com/~/media/Files/Downloads/press/dtccvcftc.pdf (alleging that "[t]he CFTC's withdrawal of the FAQs, approval of [Chicago Mercantile Exchange] Rule 1001, and the ICE Rule 211 certification have directly affected and injured, continue to directly affect and injure, and will continue to cause additional injury to DTCC's market participant-owners by causing them to develop duplicative infrastructure for CME's SDR, ICE's SDR, and others"), *dismissed in part*, DTCC Data Repository v. Commodity Futures Trading Comm'n, 2014 U.S. Dist. LEXIS 30195 (D.D.C. Mar. 10, 2014). *See also* CFTC, Frequently Asked Questions (FAQs) on the Reporting of Cleared Swaps (Oct. 11, 2012), *available at* http://www.cftc.gov/LawRegulation/DoddFrankAct/GuidanceQandA/ssLINK/clearedswapreportingredline_fa (striking several FAQs and their responses).

[275] DTCC Data Repository LLC v. Commodity Futures Trading Comm'n, 1:13-cv-00624, *dismissed in part*, DTCC Data Repository v. Commodity Futures Trading Comm'n, 2014 U.S. Dist. LEXIS 30195 (D.D.C. Mar. 10, 2014), Defendant's Reply Memorandum 2 (Aug. 28, 2014), *available at* http://business.cch.com/srd/DTCCvCFTC090214.pdf.

[276] *Id.* at 8 (internal quotation marks omitted).

[277] *Id.* at 9.

other office or division of the Commission."[278] Because of the important role these documents play in the Dodd-Frank implementation process, the use of staff documents shifts from politically accountable agency leadership to unaccountable agency staff. The absence of Commission participation, public notice-and-comment, and rigorous analysis in issuing them is troubling.

E. CFTC Rulemaking by Enforcement

The CFTC also has engaged in non-notice-and-comment rulemaking through enforcement settlements. The recent enforcement cases related to manipulation of the London Interbank Offered Rate (LIBOR) and other benchmark interest rates illustrate this phenomenon.[279] Benchmark interest rates are compiled daily using inputs from a predetermined group of banks about the rates at which they can borrow. Private industry banking associations, such as the British Bankers' Association and the European Banking Federation, presided over the setting of these benchmarks, which serve as the basis for interest rates in many contracts, including loans and derivatives. Traders at some of the participating banks manipulated their submissions to

[278] SEF General Guidance, *supra* note 259, at 5. *But see* CFTC, Frequently Asked Questions (FAQs) on the Reporting of Cleared Swaps (Oct. 11, 2012) (omitting such a disclaimer).

[279] *See, e.g.*, In the Matter of Lloyds Banking Group PLC, CFTC Docket No. 14-18 (July 28, 2014), *available at* http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enflloydsorderdf072814.pdf; In the Matter of Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A., CFTC Docket No. 14-02 (Oct. 29, 2013), *available at* http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfrabobank 102913.pdf; In the Matter of ICAP Europe Limited, CFTC Docket No. 13-38 (Sept. 25, 2013); In the Matter of Royal Bank PLC and RBS Securities Japan Ltd., CFTC Docket No. 13-14 (Feb. 6, 2013), *available at* http://www.cftc.gov /ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfrbsorder020613.pdf; In the Matter of UBS AG and UBS Securities Japan Co., Ltd., CFTC Docket No. 13-09 (Dec. 19, 2012), *available at* http://www.cftc.gov/ucm /groups/public/@lrenforcementactions/documents/legalpleading/enfubsorder121912.pdf; In the Matter of Barclays PLC, Barclays Bank PLC and Barclays Capital Inc., CFTC Docket No. 12-25 (June 27, 2012), *available at* http://www .cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder062712.pdf.

benefit trading positions that they or traders held.[280] The discovery of the manipulation of these benchmark rates raised the concerns of regulators here and abroad.

The CFTC brought its first benchmark interest rate enforcement action in 2012.[281] In that settlement order and each subsequent one, the CFTC imposed a sizeable monetary penalty and included a long list of undertakings. For example, the settling bank must base its submission on specific factors and sub-factors, subject to five permissible "adjustments and considerations."[282] The bank must maintain, for five years, detailed records of each submission and all the considerations, models, methods, data, and communications related to each submission.[283] The bank must develop specific policies and procedures and establish training programs for all relevant employees that include, as appropriate, seven prescribed elements.[284] These undertakings are extremely detailed and prescriptive. They have the look and feel of legislative rules, but were not the product of a notice-and-comment rulemaking process. All the settlements include virtually identical undertakings.

This common set of undertakings appears to have been the product of negotiations with the first bank to settle—Barclays—and, based on the near identical nature of the undertakings, appears largely not to have been open for negotiation in later settlement talks.[285] The

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[280] For a brief overview of the scandal, *see* Christopher Alessi and Mohammed Aly Segie, *Understanding the Libor Scandal* (Council on Foreign Relations Backgrounder 2013), http://www.cfr.org/united-kingdom/understanding-libor-scandal/p28729. For a brief overview of LIBOR, see Edward V. Murphy, LIBOR: Frequently Asked Questions (Cong'l Research Service 2012), *available at* www.fas.org/sgp/crs/misc/R42608.pdf.

[281] The theory underlying the CFTC's cases turns on its treatment of benchmark interest rates as commodities. Manipulating or attempting to manipulate the prices of, disseminating false information about, and employing a manipulative or deceptive device in connection with commodities are prohibited under the CEA. *See* Gary Gensler, Chairman, CFTC, Remarks Before the Economic and Monetary Affairs Committee of the European Parliament 15 (Sept. 24, 2012) (describing the CFTC's authority relevant to benchmark interest rates).

[282] *See, e.g.*, Barclays Settlement, *supra* note 279, at 32–34.

[283] *Id.* at 35–37.

[284] *Id.* at 38–40.

[285] *But see* ICAP Settlement, *supra* note 279 (in settlement with an interdealer broker, including different undertakings than settlements that involved banks).

undertakings likely will become the industry standard, especially if—as is expected—similar settlements follow.[286]

Even without additional settlements, the CFTC built into the undertakings requirements that will shape the new process for setting benchmarks in a particular way. The agreements state that, "[t]o the extent [the settling bank] is or remains a contributor to any Benchmark Interest Rate, [the settling bank] agrees to make its best efforts to participate in efforts by current and future Benchmark Publishers, other price reporting entities and/or regulators to ensure the reliability of Benchmark Interest Rates," and then set forth six specific categories within which they must "encourage" the achievement of specific objectives.[287] In this way, the CFTC has asserted standard-setting authority over global benchmark interest rates that are coordinated overseas—a step that appears designed to shape other regulators' efforts. The CFTC's undertakings have formed the basis for recommendations in the United Kingdom.[288] Establishing standards without the benefit of deliberative, notice-and-comment rulemaking prevents interested parties, including foreign regulators and the public, from contributing to the formulation of appropriate benchmark-setting policies.

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[286] *See Rabobank Faces Second-Biggest Fine in LIBOR Scandal*, REUTERS, Oct. 23, 2013, *available at* http://www.reuters.com/article/2013/10/23/rabobank-libor-idUSL5N0ID2ZJ20131023 (reporting that "more than a dozen banks and brokerages are being investigated by regulators and anti-trust watchdogs worldwide for manipulating benchmark rates such as Libor and Euribor").

[287] *See, e.g.*, Barclays Settlement, *supra* note 279, at 41–42. The six categories are methodology, verification, investigation, discipline, transparency, and formulation. *Id.*

[288] *See, e.g.*, The Wheatley Review of LIBOR, FINAL REPORT 29 (2012), http://cdn.hm-treasury.gov.uk/wheatley_review_libor_finalreport_280912.pdf (including in a set of recommendations arising from an independent review commission by the government of the United Kingdom "submission guidelines [that] are closely modelled on the undertakings proposed by the Commodity Futures Trading Commission (CFTC) in their settlement with Barclays Bank Plc," and a recommendation "that banks should begin to create their LIBOR submissions by taking account of these guidelines immediately").

IV. The CFTC's Reasons for Using Backdoor Rulemaking

The CFTC's likely reasons for using means other than legislative rulemaking to set policy are a mixture of expedience fueled by outside pressure and accountability avoidance. The CFTC is juggling heavy rulemaking responsibilities under Dodd-Frank, short statutory deadlines, and an internally generated desire to act quickly. Each of these factors tips the balance in favor of using nonlegislative rulemaking.

A. Expedience

From the day it became law, there has been tremendous political and public pressure to get Dodd-Frank rules written.[289] The progress of different agencies is tracked, reported upon, and compared.[290] Treasury Secretary Jack Lew expressed the political urgency around Dodd-Frank rule implementation in mid-2013 when he stated that "[f]rom my first hours as Treasury Secretary, I have been dedicated to stepping on the accelerator for the implementation of Dodd-Frank," and promised that "[g]oing forward, we will measure our progress in weeks and months, not in years."[291]

The high-stakes nature of the CFTC's current regulatory agenda is centered on addressing one perceived cause of the 2007–2008 financial crisis: over-the-counter derivatives.[292] As a consequence, the CFTC's implementation progress has attracted a tremendous amount of

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[289] *See, e.g.*, Brady Dennis, *Congress Passes Financial Reform Bill*, WASH. POST, July 16, 2010 ("Although the hard-fought legislative battle concluded Thursday, the task of working out the details of scores of new regulations and adapting to the new regulatory landscape was already underway across much of the federal government.").
[290] *See, e.g.*, *Dodd-Frank Progress Report*, *supra* note 4.
[291] Jacob J. Lew, Treasury Secretary, Remarks Before the Delivering Alpha Conference (July 17, 2013), *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2016.aspx.
[292] *See, e.g.*, Gary Gensler, A Transformed Marketplace: Remarks at a D.C. Bar Event (Dec. 11, 2013), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-154 ("Five years ago, the unregulated swaps market was at the center of the crisis."). *But see* Peter Wallison, *Credit Default Swaps Are Not to Blame* (Amer. Enterprise Inst. June 1, 2009), *available at* http://www.aei.org/article/economics/financial-services/credit-default-swaps-are-not-to-blame/.

attention.[293] Given the technical complexity of many of the issues, people tend to pay more attention to how quickly rules are being made than to how they are made and how effective and workable such rules are.

The CFTC has issued a lot of legislative rules in a short time.[294] In the process, however, it has left significant gaps to be filled and errors to be corrected through staff guidance or other nonlegislative rulemaking means. Professor Nagy has suggested that the SEC relies on no-action letters in part because they serve as "an escape hatch from the fuzzy standards often set out in SEC releases or announced through litigated proceedings," and "alleviate[] some of the pressure placed on the SEC by market participants calling for additional safe harbor rules."[295] The CFTC is able to count as final rules those that leave many key details to be worked out in staff letters and guidance.

The CFTC also is regulating in unfamiliar territory, as swaps were not in the CFTC's mandate before Dodd-Frank.[296] The agency's very crowded APA rulemaking docket increases the likelihood of mistakes in and omissions from these rules. The CFTC relies on the staff to extend compliance deadlines and provide relief from rules that are unworkable. There is no slack built into the rulemaking timeline for substantive, corrective rules, so backdoor rulemaking has become a release valve.

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[293] *See*, *e.g.*, Mike Konczal, *A Regulator's Race Against Time*, WASH. POST WONKBLOG, June 22, 2013, *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/22/a-wall-street-regulators-race-against-time/ (describing the importance of the CFTC's responsibilities under Dodd-Frank and Chairman Gensler's attempts to expedite the rulemaking process).

[294] *See Dodd-Frank Progress Report*, *supra* note 4.

[295] *See* Nagy, *supra* note 234, at 952.

[296] *See, e.g.*, CFTC, Dodd-Frank, Statement of Gary Gensler, http://www.cftc.gov/lawregulation/doddfrankact /index.htm (last visited Sept. 14, 2014) ("The Wall Street reform bill will—for the first time—bring comprehensive regulation to the swaps marketplace. Swap dealers will be subject to robust oversight. Standardized derivatives will be required to trade on open platforms and be submitted for clearing to central counterparties.").

The CFTC is not alone among agencies in making choices based on expedience. Other agencies face similar decisions even in routine times. Expedience dictates that many agency actions are not undertaken through notice-and-comment rulemaking. To the degree it exists, ossification of the rulemaking process makes nonlegislative rulemaking even more attractive. Professor Richard Pierce explains that, by employing an "eminently practical . . . approach," agencies "use[] the procedurally superior, but slow and expensive rulemaking process" for "core issue[s]," and "the faster and more flexible option of issuing interpretative rules" for "details of implementation."[297] The CFTC has made this calculus in its Dodd-Frank rulemaking. Now that the backdoor rulemaking habit is deeply ingrained, the CFTC may have difficulty breaking it when normal times return.

B. Accountability Avoidance

As the CFTC shapes its Dodd-Frank jurisdiction, it also may wish to avoid accountability in order to maintain maximum autonomy in designing the new regulatory framework. Backdoor rulemaking allows the agency to do so. Accountability for Commission rulemaking normally comes from several places, including the five commissioners, the public, the courts, Congress, and the CFTC's statutory benefit-cost mandate.

The CFTC is governed by a five-member, politically balanced commission.[298] This structure ensures diverse input into Commission rulemakings. Sometimes, however, achieving

[297] Richard J. Pierce, *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 554 (2000). *See also* Raso, *supra* note 54, at 798–805 (discussing potential reasons for choosing guidance documents over legislative rules, including budget considerations, avoidance of political attention, judicial review, and procedural requirements associated with legislative rulemaking).
[298] 7 U.S.C. § 2(a)(2).

agreement among the five commissioners is difficult.[299] Because the CFTC staff reports to the chairman, he may be able to exert greater control over approaches that are staff-driven than rulemakings that require compromise with his colleagues. As discussed in the section on staff letters, CFTC commissioners have expressed concern about being excluded from the process. All forms of staff action run the risk of failing to incorporate critical insights from the commissioners.

Along with the commissioners, the public serves as a check in the notice-and-comment rulemaking process. Using nonlegislative rulemaking limits the amount of public feedback that the CFTC receives. On the one hand, the CFTC recognizes that market participants, academics, and other experts can be helpful sources of information, particularly for an agency regulating in an area in which it has not previously been engaged.[300] On the other hand, reviewing and responding to letters can be time-consuming and troublesome, particularly if the letters raise new issues or question the feasibility of the Commission's approach. In legislative rulemaking, the agency would have to consider these comments. Rulemakings can generate hundreds or thousands of letters, and the Commission may feel compelled to actively reach out to the public for additional input on legislative rules through roundtables and other meetings.[301] Staff letters, by contrast, often are the product of discussions with an industry organization, but there is no mechanism for ensuring that industry concerns were adequately taken into account. Even more

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[299] *See, e.g.*, Silla Brush & Robert Schmidt, *How the Bank Lobby Loosened U.S. Reins on Derivatives*, BLOOMBERG (Sept. 4, 2013), http://www.bloomberg.com/news/2013-09-04/how-the-bank-lobby-loosened-u-s-reins-on-derivatives.html (discussing, among other issues, internal dissensions at the CFTC).

[300] *See, e.g., Examining the Agencies' Overall Implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs, 113th Cong., 1st Sess, 14 (2013) (statement of Gary Gensler) ("I think we have all benefited at the CFTC by the 39,000 comments that we have gotten on our various rules.").

[301] *See, e.g.*, End-User Exemption to Clearing Requirement for Swaps, 77 Fed. Reg. 42,559, 42,560 (July 19, 2012) (noting that the "Commission received approximately 2,000 comment letters, approximately 1,650 of which were form letters . . . , and Commission staff participated in approximately 30 *ex parte* meetings and teleconferences concerning the rulemaking").

troubling, other interested parties—whether other regulated parties who will be covered by the letter or customers or counterparties of parties covered by the letter—likely will have no say in the formulation of staff letters that may nevertheless affect them.[302] In formulating policy through nonlegislative means, the CFTC staff can consult with people of its choosing, and do so with less transparency than is required in a notice-and-comment rulemaking under the APA.[303]

Making policy through backdoor methods also may make it easier for the CFTC to avoid accountability in the courts,[304] although there are potential pitfalls to such an approach. The CFTC has faced several challenges to its legislative rules.[305] Under the APA, only an agency action "made reviewable by statute and final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[306] The Commission could argue that guidance documents adorned with disclaimers are not final agency actions open to a court challenge. The D.C. Circuit, however, has ignored a similar disclaimer and reviewed the agency guidance document bearing it.[307]

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[302] *See* Nagy, *supra* note 234 (observing that "policymaking through the no-action letter process often involves a private negotiation between the SEC staff and the requestor (frequently a professional association or industry group lobbying on its membership's behalf)").

[303] For a discussion of the parameters governing agencies' external communications regarding rulemakings under the APA, *see* Esa L. Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemakings* (Admin. Conf. of the U.S., Final Report, May 1, 2014), *available at* http://www.acus.gov/sites/default/files/documents/Final%20Ex%20Parte%20Communications%20in%20Informal%20Rulemaking%20%5B5-1-14%5D_0.pdf. The report concludes in part that "*Ex parte* communications made after publication of [a notice of proposed rulemaking] must be publicly disclosed, to ensure an adequate record for judicial review." *Id.* at 5.

[304] *See, e.g.*, Sec. Indus. & Fin. Mkts. Assoc., 2014 U.S. Dist. LEXIS 130871 at *103 (with regard to the CFTC's cross-border guidance, explaining that "the CFTC's decision to provide such a non-binding policy statement benefits market participants and cannot now, all other things being equal, be turned against it").

[305] *See, e.g.*, Bloomberg L.P. v. CFTC , 949 F. Supp. 2d 91, (D.D.C. 2013) (challenging 17 C.F.R. § 39.13(g)(2)(ii), a rule regarding minimum liquidation times); Int'l Swaps & Derivatives Ass'n v. United States CFTC, 887 F. Supp. 2d 259 (D.D.C. 2012) (challenging CFTC's position limits rule), appeal dismissed by Int'l Swaps & Derivatives Ass'n v. CTFC, 2013 U.S. App. LEXIS 22618 (D.C. Cir., Nov. 6, 2013).

[306] 5 U.S.C. § 704 (2013). Subjecting every agency decision to judicial review would be unworkable. *See, e.g.*, Strauss, *supra* note 46, at 820–21 (arguing that permitting review of advice from "lower staff echelons" "would threaten both a diversion of agency resources, perhaps into forcing final judgment about this question at a time when other issues have more important claims on agency resources, and work to discourage the practice of providing guidance at all").

[307] *See, e.g.*, Appalachian Power v. Envtl. Protection Agency, 208 F.3d 1015 (D.C. Cir. 2000) (observing that, aside from the boilerplate disclaimers to the contrary, the EPA guidance document in dispute "reads like a ukase" in that "[i]t commands, it requires, it orders, it dictates"; and holding that this "is final agency action, reflecting a settled agency position").

The "final agency action" requirement serves as a more formidable barrier to challenging a staff-promulgated document than a nonlegislative rule voted on by the Commission. Recently, in partially dismissing the challenge to the CFTC's withdrawal of a set of FAQs, the court suggested that the withdrawal "might not be 'agency action' at all," since "[t]he FAQs plainly state that they reflect the views of Commission staff, not of the Commission itself."[308] Even if the prospects of success in court were good, the need to maintain a good relationship with the CFTC and keep the staff guidance channel open will dissuade regulated entities from challenging CFTC staff guidance documents.

Congress plays an important role in overseeing agencies, and has a deep interest in seeing its statutory mandates brought to life through the rulemaking process. Because Dodd-Frank directed the agencies to adopt hundreds of rules, Congress has played an active role in monitoring agencies' efforts. For example, the House Financial Services Committee maintains an "online resource to keep track of" Dodd-Frank's "400-plus regulatory mandates."[309] When policy is made at the staff level or through other means of nonlegislative rulemaking, it is more difficult for oversight committees to track. Brought to light because of their broad policy implications, some of the CFTC's most high-profile nonlegislative rulemaking activities have attracted attention from Congress.[310] In general, however, policies made through legislative rulemaking are more likely to draw congressional scrutiny.[311]

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[308] DTCC Data Repository v. Commodity Futures Trading Comm'n, 2014 U.S. Dist. LEXIS 30195, *11 (D.D.C. Mar. 10, 2014).
[309] House Comm. on Fin. Servs., Oversight of Dodd-Frank Implementation, http://financialservices.house.gov/dodd-frank/ (last visited Sept. 15, 2014).
[310] *See, e.g.*, Douwe Miedema, *House Republicans Chide U.S. Regulator over Swaps Rules*, REUTERS (Nov. 15, 2013), available at http://www.reuters.com/article/2013/11/15/derivatives-regulator-republicans-idUSL2N0J01MD20131115 (reporting that Frank Lucas, Chairman of the House Agriculture Committee, questioned the legality of making swaps policy through a staff advisory).
[311] *See* Raso, *supra* note 54, at 808 (noting that "in many cases . . . an increase in oversight hearings may actually be a response to high-profile legislative rulemakings").

Another form of accountability comes in the form of the CFTC's statutory mandate to conduct a benefit-cost analysis "before promulgating a regulation . . . or issuing an order."[312] The CFTC interprets this requirement as applying only to notice-and-comment rulemaking.[313] The statute requires the CFTC to evaluate "[t]he costs and benefits of the proposed Commission action . . . in light of" five considerations, including "protection of market participants and the public" and "the efficiency, competitiveness, and financial integrity of futures markets."[314] The CFTC has faced internal and external criticism for the manner in which it has carried out this mandate.[315] It has also witnessed the SEC's multiple defeats in court for failing to conduct proper economic analysis in connection with its rulemakings.[316] Consequently, the CFTC is under pressure to perform more thorough benefit-cost analyses in connection with its rulemakings. A well-conceived and carefully crafted analysis might demonstrate that the Commission's chosen

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[312] 7 U.S.C. §19(a)(1).

[313] Data Repository LLC v. U.S. Commodity Futures Trading Comm'n, 1:13-cv-00624, *dismissed in part*, DTCC Data Repository v. Commodity Futures Trading Comm'n, 2014 U.S. Dist. LEXIS 30195 (D.D.C. Mar. 10, 2014). (suggesting that there is no case law in support of the proposition that "the CFTC, or any agency, [is] required to consider costs and benefits outside of notice-and-comment rulemaking").

[314] 7 U.S.C. § 19(a)(1).

[315] *See, e.g.*, Jill E. Sommers, Commissioner, CFTC, Speech Before the Institute of International Bankers, Annual Washington Conference (Mar. 7, 2011), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony /opasommers-13 ("The proposals we have issued thus far contain cursory, boilerplate cost-benefit analysis sections in which we have not attempted to quantify the costs because we are not required to do so under the Commodity Exchange Act. . . . From a good government perspective, while it is true that the Commodity Exchange Act does not require the Commission to quantify the cost of a proposal, or to determine whether the benefits outweigh the costs, the Act certainly does not prohibit the Commission from doing so. We simply have chosen not to."); Letter from Scott D. O'Malia, Commissioner, CFTC, to Jeffrey Zients, Director, Office of Management and Budget (Feb. 23, 2012) (expressing concerns over the quality of the CFTC's economic analysis), *available at* http://www.cftc.gov /About/Commissioners/ScottDOMalia/omalialetter022312; Letter from Committee on Capital Markets Regulation to Timothy Johnson, Chairman, Senate Committee on Banking, Housing, and Urban Affairs, et al. (Mar. 7, 2012) (expressing concerns over the quality of benefit-cost analysis by the CFTC and other regulators); Letter from Richard C. Shelby, Ranking Member, Sen. Comm. on Banking, Housing, and Urban Affairs, et al. to Gary Gensler et al. 1 (Feb. 15, 2011) (urging the CFTC and other federal financial regulators to conduct more "rigorous analyses of the costs and benefits of their rules and the effects those rules could have on the economy"); Sec. Indus. & Fin. Mkts. Assoc., 2014 U.S. Dist. LEXIS 130871 at *124 ("Even considering Section 19(a)'s flexible requirements and the deferential standard of review to be applied, however, the Court agrees with plaintiffs that the CFTC failed to conduct adequate cost-benefit analyses for the Title VII Rules. The CFTC failed to acknowledge, let alone 'consider' and 'evaluate,' the costs and benefits of those Rules' extraterritorial applications. None of the CFTC's arguments justifies this failure.").

[316] *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011); Equity Inv. Life Ins. Co. v. SEC, 572 F.3d 890, 909 (D.C. Cir. 2006); Chamber of Commerce v. SEC, 412 F.3d 133,145 (D.C. Cir. 2005).

regulatory approach will impose more costs than it will generate benefits. The Commission may prefer to make policy unencumbered by considerations of costs and benefits as it does in nonlegislative rulemakings. In sidestepping the accountability that comes through benefit-cost analysis, the CFTC runs the risk of imposing unintended costs on the markets.[317]

V. Backdoor Rulemaking Undermines the CFTC's Regulatory Effectiveness

A regulatory agency's ability to carry out its mission effectively turns in part on the confidence that regulated entities, political officials, courts, and the general public place in that regulator. That confidence, in turn, derives from the agency's procedurally rigorous, predictable, transparent, deliberative approach to fulfilling its mandate. The CFTC, in its implementation of Dodd-Frank, has cut corners in its policymaking and thus has compromised its legitimacy and effectiveness as a regulator.

A. The CFTC's Rulemaking Process Is Not Procedurally Rigorous

The CFTC has cut procedural corners by failing to comply with the APA and its own requirements. Too often, in lieu of a full notice-and-comment rulemaking, the CFTC has used Commission or staff guidance documents to prescribe and proscribe actions by regulated entities. These documents are not the products of a thorough notice-and-comment rulemaking process, and are not subjected to a benefit-cost analysis. The scenario that the court described in

[317] *See, e.g.*, Jill E. Sommers, Commissioner, CFTC, Speech Before the Cadwalader Energy Conference (Oct. 11, 2012), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opasommers-24 (explaining that "after-the-fact clarifications [by CFTC staff] may require market participants to integrate completely new processes into their businesses, all done . . . without an "opportunity [for the public] to comment on either the specific method of compliance or the costs associated with it").

Appalachian Power Co. v. Environmental Protection Agency is playing out at the CFTC, albeit in a more compressed timeframe:

> Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.[318]

As the court in *Chamber of Commerce v. Occupational Safety and Health Administration* noted, "the procedural obligations under the APA [should not be treated as] meaningless ritual" and "highhanded agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action."[319]

The benefit-cost analysis prescribed by the CFTC's organic statute also is not a "meaningless ritual," but an important way of identifying and mitigating unintended consequences of regulation. Particularly in areas in which the CFTC is developing new expertise, a careful economic analysis can identify ways in which a new regulatory obligation might alter the markets or harm consumers. Bypassing such benefit-cost analysis impairs the CFTC's ability to design rules that achieve statutory objectives and anticipate problems before they occur.

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[318] 208 F.3d 1015 (D.C. Cir. 2000) (footnote omitted).

[319] 636 F.2d 464, 470 (1980) (citation omitted). *See also* Jerry Brito, *"Agency Threats" and the Rule of Law: An Offer You Can't Refuse*, 37 HARV. J. L. PUB. POL'Y 553, 568 (2014) (observing that "[a]s much as one would like to have omniscient and benevolent angels for regulators, unfortunately only 'fallible men' are available, which is why the regulatory process is not a luxury").

B. The CFTC's Rulemaking Process Is Not Predictable or Transparent

The CFTC does not employ a predictable, transparent policymaking approach that facilitates industry compliance. Finding and keeping track of the voluminous and shifting Dodd-Frank requirements, complex conditions for exemption, and ever-changing implementation deadlines is difficult.[320] The Commission's use of a combination of legislative rules, Commission guidance documents, staff letters, and enforcement actions makes it even harder for entities to understand how the regulatory framework applies to them. Regulated firms earnestly seeking to comply with the CFTC's framework must piece together the regulatory mandates scattered throughout these documents. People who are potentially affected by Commission rules do not know which documents they need to review, let alone which ones are binding on them. Unlike legislative rules, which appear in the *Federal Register* and the *Code of Federal Regulations*, many of the CFTC's nonlegislative rules do not.[321] As Commissioner O'Malia explained, that means "you've got to go to our website, you've got to check it out, you've got to go through the 100 or so [letters] that we found [and ask] oh, does this apply to the rule that I'm looking at in the Code of Federal Regulations or not?"[322] Staff guidance documents deferring compliance deadlines often appear just days before a rule is to take effect, which spawns uncertainty in the markets.[323] This lack of predictability is particularly troublesome for companies that have not

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[320] By one measure, swap dealers and major swap participants—two of the new categories of registrants—have a total of 4323 tasks under Dodd-Frank. *Dodd-Frank Progress Report*, *supra* note 4, at 13 (identifying 716 business/trading tasks, 811 technology tasks, 1325 operations tasks, 1024 legal tasks, and 447 records tasks).

[321] The failure to include letters that are broadly applicable in the *Federal Register* violates the principle underlying the APA that, "[t]o the extent that an agency, however, enunciates such statements of general policy in the form of speeches, releases or otherwise, the Act requires them to be published in the Federal Register." Tom C. Clark, Attorney General, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 22 (1947), *available at* http://www.law.fsu.edu/library/admin/1947ii.html.

[322] Cross-Border Transcript, *supra* note 157, at 100 (statement of Scott O'Malia, Commissioner, CFTC).

[323] *See, e.g.*, Kevin McPartland, *October 2nd Should Be Boring (Unless the CFTC Kills Electronic Trading)*, KEVINONTHESTREET.COM (Sept. 27, 2013), *available at* http://kevinonthestreet.com/october-2nd-should-be-boring-unless-the-cftc-kills-electronic-trading/ ("[G]iven the multiple previous CFTC swap-related rule implementations, it's reasonable to assume that the CFTC will provide no-action relief on this rule and others that would disrupt the

been regulated by the CFTC before, are overseas, are not financial companies, or do not have large regulatory staffs.

No clear logic governs the CFTC's choice of policymaking method. Binding mandates emerge from all corners of the agency, in many different forms. There are no clear criteria for how the Commission staff chooses whether to use a notice-and-comment rulemaking, or which of the different types of staff guidance to use. The Commission's cross-border guidance looks like a legislative rule, but the Commission chose a less formal procedure to produce it. Although a "no-action letter" is intended only to bind the issuing staff division and provide relief to the person who asked for it, the staff and the Commission routinely treat these letters as binding on whole industries and as formal expressions of Commission policy.[324]

C. The CFTC's Rulemaking Process Is Not Deliberative

The CFTC's backdoor rulemaking approach also undermines the deliberative process. The CFTC's methods preclude substantive discussion among the agency's commissioners and between the CFTC and the public. The CFTC is, by design, a deliberative body. Its five commissioners, who bring their diverse backgrounds and political affiliations to the table, are charged with making its policy decisions. The agency's use of backdoor rulemaking, however, means that some or all of the agency's commissioners are not involved in policy development.

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market in the short term. . . . Expect such CFTC moves to make some fireworks the day or two before October 2, as this kind of relief often posts in the eleventh hour before the rules are set to take effect which leaves little time for the market to react; better late than never, I guess."). *See also* Final Cross-Border Guidance, *supra* note 113, at 45,373 (O'Malia dissent) ("Not only are they an improper tool to get around formal Commission action, their prolific use is a reflection of the ad-hoc last minute approach that has been far too prevalent lately at the Commission. I cannot emphasize enough: the Commission must stop this approach and get back to issuing policy in a more formal, open, and transparent manner.").

[324] *See supra* section III.C ("Staff Letters").

The CFTC has the potential to influence staff decisions, but—unless the chairman opts to include them—the other commissioners are left out.

Nonlegislative rulemaking also limits the public's opportunities to weigh in on rulemaking. The CFTC routinely employs staff letters that are crafted without notice or comment from anyone outside the agency except the party applying for relief. Likewise, enforcement settlements are the product of negotiation between the entity being disciplined and the CFTC staff. Even the Cross-Border Guidance did not benefit from full deliberation since, in casting it as guidance, the CFTC sought to excuse itself from the strictures of the APA regarding interactions with the public. As Professor Anthony has observed, "The acceptability and therefore the effectiveness of a final rule are elevated by the openness of the procedures through which it has been deliberated and by the public's sense of useful participation in a process that affects them.[325]

The CFTC's heavy reliance on rulemaking methods other than the plodding, predictable, APA notice-and-comment rulemaking process compounds uncertainty at a time when radically transforming markets crave clear, carefully crafted rules to guide that transformation. The CFTC's lack of procedural rigor, predictability, transparency, and open deliberation compromise the public's ability to rely on the agency, and therefore its ability to regulate the swaps and futures markets.

VI. Conclusion

In order to further the discussion about the use of non-notice-and-comment rulemaking methods by regulatory agencies, it is useful to consider the issue in the context of a particular regulatory

[325] *See, e.g.*, Anthony, *supra* note 34, at 1373–74 (footnote omitted).

agency. This article has sought to do that with respect to the CFTC. The CFTC was charged with imposing a new regulatory framework on the swaps marketplace—a large task with many complex pieces and tremendous outside pressure to work fast and aggressively. The CFTC should have consistently employed a transparent, deliberative rulemaking process under the direction of the five commissioners with substantial input from all affected parties, oversight by Congress, and clear avenues for judicial review. Instead, it has used a confusing, ad hoc rulemaking process that excludes important viewpoints, foils oversight efforts, aggravates regulatory compliance burdens, and undermines its ability to effectively regulate the swaps and futures markets.

The CFTC's Dodd-Frank implementation experience, however, offers useful lessons. Agencies should not conclude that they must make every decision by notice-and-comment rulemaking under the APA. Naturally, in the case of a multi-member body like the CFTC, the entire Commission cannot and should not be involved in making every agency decision. Such an approach would bog down the day-to-day functioning of the agency. Staff have to make determinations about how particular facts should be treated under existing policy under the general guidance of the chairman. However, when a decision is made for the purpose of materially revising an agency rulemaking or effecting substantial changes across an entire industry, the Commission should be involved. With respect to matters such as extensions of compliance dates, consensus would generally be easy to achieve. The need to obtain Commission approval should help to ensure that extensions are appropriately long and conditioned on reasonable requirements directly related to the matter at hand. Likewise, adjustments to make a given rule workable under circumstances not foreseen during the rulemaking process can be achieved through short rulemakings or exemptive orders.

Congressional oversight committees, with their deep knowledge of the agencies they oversee, may be best suited to monitor and develop guidelines for agencies' use of backdoor rulemaking methods. These guidelines should be tailored to the unique circumstances of the agency and the industries and markets that agency regulates. One simple and important way in which Congress can encourage agencies to use more inclusive and deliberate regulatory approaches is to provide agencies more generous and realistic rulemaking deadlines, as well as more carefully drawn rulemaking mandates.