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

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Abstract

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

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A core question in the study of administrative agencies is how, if at all, does organizational structure impact agency decisionmaking? To put that broad question into a more readily testable hypothesis, this paper addresses a specific question, does the extent of an agency's independence from political control affect the choice of instrument by which it regulates? The paper operationalizes this fundamental question by a comparative analysis, examining whether the more insulated an agency is from accountability to elected representatives, the more frequently it will implement policy by means of an instrument that does not require its responsiveness to public input and that is not likely to be reviewed by courts, thereby sidestepping procedures that facilitate legislators' ability to monitor administrative action.[1] Such administrative behavior can attenuate the nexus between elected officials and administrative policymaking, and could therefore affect policy outcomes where preferences of administrators and officeholders diverge. This issue, then, goes to the core of the administrative state's democratic legitimacy.

The focus of the paper's research design is to identify empirically a connection between agency structure and rulemaking by comparing the regulatory activity of the Consumer Financial Protection Bureau ("CFPB"), with that of three other agencies with broadly similar regulatory objectives, the Consumer Product Safety Commission ("CPSC"), Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC"). The CFPB was

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

established by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[2] Congress's response to the recent global financial crisis, and provided with an anomalous politically independent structure that has generated considerable controversy. The three other agencies have more conventional commission structures and funding, which provide, in principle, for tighter mechanisms of political accountability.

The key finding is that the agency that was structured, by a wide margin, to be the most insulated from congressional control, the CFPB, uses significantly less frequently the most publicly accountable regulatory instrument, the notice-and-comment rulemaking process, which is referred to as informal rulemaking, as established by the Administrative Procedure Act ("APA") and elaborated by courts.[3] The statute establishes a process by which agencies must provide advance notice of proposed rules, solicit public comments and respond to those comments when finalizing the proposed rules.[4] It further provides individuals aggrieved by a rule a right to judicial review.[5] This administrative process permits Congress to exercise control over agencies both through information it obtains from the mandated written record as well as through an early warning system provided by constituents' exercise of the right to judicial review or commissioner dissents in multimember agencies.[6]

The finding of a significant divergence in choice of regulatory instrument by the agency

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

[3] Administrative Procedure Act, 5 U.S.C. § 553.

[4] Id.

[5] 5 U.S.C. §§ 702 and 704.

[6] McCubbins, et al., supra note 1 (Congress designs administrative procedures as a mechanism for control of agency action).

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

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

The paper is organized as follows. It begins with a primer on administrative procedure to orient the analysis with regard to the relevant legal framework, followed by an overview of the political science literature on agency design which provides the analytical framework for the paper's research design. It then identifies the organizational characteristics of the four agencies

[7] For a recent paper citing such work, see William Baude, Congressional Control over Agencies: The Problem of Coercive Guidance, manuscript (May 30, 2016).

under study in relation to their insulation from political accountability. After introducing the data set, the agencies' regulatory activity is compared and analyzed. The paper concludes with an assessment of the analysis' implications for the CFPB's regulatory structure and more generally, reform proposals addressed to regulatory strategy and the literature on agency design.

I. Administrative Procedure and Literature Review

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

A. A Primer on Administrative Procedure

In 1946, Congress provided a statutory framework for agency action, by establishing

[8] Jacob E. Gersen, Designing Agencies, in Daniel A. Farber and Anne Joseph O'Connell, eds., Research Handbook on Public Choice and Public Law (2010) (summary of public choice literature on information asymmetry and preference divergence regarding agency design); Murray J. Horn, The Political Economy of Public Administration (1995) (combining commitment problem with agency problems in agency design).

requirements for rulemaking and adjudication in the APA.[9] The APA distinguishes between what has come to be referred to as "formal" and "informal" rulemaking. Section 553 of the APA, the "informal" rulemaking" provision, sets out a three-step rulemaking process, which requires an agency (i) to provide advance notice of a proposed rule or a problem being investigated; (ii) thereafter to provide the public with an opportunity to submit written comments; and (iii) after consideration of submitted comments, to "incorporate in the rules adopted a concise statement of their basis and purpose."[10] This informal rulemaking process, as earlier noted, is referred to as "notice-and-comment" rulemaking, and its fundamental elements can be encapsulated in "three words, information, participation and accountability."[11] Those elements are interrelated: the political legitimacy of rulemaking, given its management by unelected officials, is said to rest upon public participation under "procedures designed to ensure the rationality of the agency's decision," that is, public comments can illuminate gaps in an agency's knowledge and provide an understanding of real-world conditions, as well as assist an agency in gauging a rule's acceptance by those affected.[12]

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[9] Pub. L. 79-404, 60 Stat. 273 (1946).5 U.S.C. § 500 et seq. Rulemaking and adjudication are the forms of administrative agency action that have formal legal effects on people (i.e., impose rights and obligations). E.g., Gary Lawson, Federal Administrative Law 48 (7th ed. 2016).

[10] 5 U.S.C. § 553.

[11] Cornelius M. Kerwin and Scott R. Furlong, Rulemaking: How Government Agencies Write Law and Make Policy 53 (4th ed. 2011).

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

The statutory procedural requirements in section 553 would appear to be rather minimal (i.e., the notice need not specify the content of a rule, and there is no instruction regarding what constitutes an adequate statement of basis and purpose). However, courts have elaborated upon the statutory requirements over time, formalizing the process such that it is said that it would be "unrecognizable" to the APA's drafters.[13] For example, courts have required the notice to contain "sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment,"[14] including disclosure of "technical studies and data upon which the agency relies in its rulemaking,"[15] and directed agencies to respond, in the statement of basis and purpose, to all serious criticisms and suggestions of comments not taken into account in the final rule.[16] As these judicial emendations facilitate litigation challenging rules, courts' increasing formalization of the notice-and-comment process are thought to have disincentivized agencies from engaging in informal rulemaking and resulted instead in agencies increasing their use of less procedurally demanding regulatory alternatives.[17] There is, accordingly, a debate in the administrative law literature over whether these procedural developments have so "ossified"

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[13] Lawson, supra note 9, at 308.

[14] E.g., Greater Boston Television Corp.v. FCC, 444 F. 2d 841, 851 (D.C. Cir. 1995).

[15] Chamber of Commerce v. SEC, 443 F.3d 890, 899 (D.C. Cir. 2006).

[16] Louisiana Federal Land Bank Assn', FLCA v. Farm Credit Administration, 336 F.3d 1075, 1080 (D.C.Cir. 2003) ("Although the FCA is not required 'to discuss every item of fact or opinion included in the submissions' it receives . . . it must respond to those 'comments which if true, ... would require a change in [the] proposed rule.'"). As a result of the judicial amplification of the statutory requirements, a considerable proportion of litigation challenges the adequacy of agency rulemaking notices, rather than the validity of a final rule. See, e.g., Lawson, supra note 9, at 388-403.

[17] E.g., Kerwin and Furlong, supra note 11, at 184 ("use of devices other than rules" has become widespread); see also part I.B., infra (discussing studies observing a decline in notice-and-comment rulemaking over the time span of the judicial opinions elaborating the statutory requirements).

rulemaking as to hinder federal agencies' ability to formulate policy efficiently or are a worthwhile cost of enhancing agencies' democratic legitimacy and accountability.[18]

Notice-and-comment rulemaking is referred to as "informal" rulemaking notwithstanding its increasing formalization by courts, as it still substantially contrasts with the rulemaking specified in other APA sections that establish a set of procedures that resemble a judicial trial, including taking oral evidence under oath at a hearing, maintaining a written record, and justifying findings solely on the basis of material presented at the hearing.[19] Rulemaking following the latter procedural requirements, referred to as "formal" rulemaking, must be undertaken when a statute requires its use; otherwise an agency can employ the informal procedure.[20] Despite the difference in procedural requirements, rules adopted by either method have the same legally binding effect on the public. Namely, they are final agency action, creating binding rights and obligations on private parties, with the follow-on legal consequence that a person aggrieved by such action has the right under the APA to seek judicial review.[21]

In addition to excluding rules required by Congress to be implemented through formal rulemaking, the APA exempts an agency from following notice-and-comment when it finds

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[18] For discussion of the "ossification thesis" see Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking, 75 Tex. L. Rev. 483 (1997) and for empirical evidence suggesting that the thesis is overstated, see Jason Webb Yackee and Susan Webb Yackee, Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"?, 20 J. Pub. Adm. Res. 261 (2009).

[19] 5 U.S.C. §§ 556-557.

[20] See 5 U.S.C. § 553(c) ("When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection).

[21] 5 U.S.C. § 702 ("Right of review": "a person ... aggrieved by agency action is entitled to judicial review"); id. § 704 ("Actions reviewable": "final agency action for which there is no other adequate remedy in a court are subject to judicial review").

"good cause" not to do so (defined as when the informal procedure would be "impracticable, unnecessary, or contrary to the public interest").[22] In such circumstances, an agency must provide an explanation, in the rule issued, of the rationale for its finding.[23] Rules in this category are adopted without notice and comment, but they are final action with equivalent legal consequences to rules issued under the notice-and-comment process.

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

Agency guidance does not formally impose obligations on private parties because it is

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[22] 5 U.S.C. § 553(b)(B).

[23] Id.

[24] 5 U.S.C. § 553(b)(A).

[25] See, e.g., William Funk, A Primer on Nonlegislative Rules, 53 Adm. L. Rev. 1321, 1322 (2001). Although one might be puzzled about the terminology that characterizes general policy statements or interpretations as "rules," the APA defines the term "rule" very broadly, as an "agency statement of general or particular applicability and future effect designed to ... interpret, or prescribe law or policy," 5 U.S.C. § 551 (4) (definition of "rule"); hence the explanation for why there would have been a need to expressly exclude such actions from notice-and-comment procedures.

expressly defined as intended to provide information about an agency's future position on specific issues (or, as in the case of an interpretive rule, to explain an agency's understanding of an existing rule, i.e., how it will view private parties' obligations). It is therefore not generally deemed by courts to be final agency action, which eliminates private parties' right to judicial review of the policy under the APA (unless it has been enforced against them for noncompliance).[26] Accordingly, this is a critical distinction for understanding an agency's regulatory strategy. If an agency adopts a policy through a legislative rule then private parties can challenge such action in court if they believe it to be legally objectionable without having to wait until they have incurred sanctions in an enforcement action.

It is at this point in the description of administrative law jurisprudence that doctrinal analysis becomes opaque. On occasion, courts have held a challenged guidance (nonlegislative) action to be final action, and thereupon invalidated the action because it was not adopted through a notice-and-comment process.[27] The judicial distinctions between nonlegislative and legislative

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[26] Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 Cornell L. Rev. 397, 411 (2007); Mark Seidenfeld, Substituting Substantive for Procedural Review of Guidance Documents, 90 Tex. L. Rev. 331, 343 (2011); see Abbe R. Gluck, Anne Joseph O'Connell and Rosa Po, Unorthodox Lawmaking, Unorthodox Rulemaking, 115 Colum. L. Rev. 1789, 1857, 1860 (2015) (The D.C. Circuit has been "shutting the courthouse door to challenges over policy statements [because] they lack the requisite finality under the APA and dismissing challenges to them as unreviewable," and it "recently appear[s] to have made it harder for agency guidance to satisfy the APA's finality guidance.")

[27] E.g., Croplife America v. E{A, 329 F.3d 876 (D.C. Cir. 2993) (directive announcing moratorium on use of third-party human test data in agency decisionmaking process over pesticide registration held final action); Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (nineteen-page, singled spaced guidance document. adding detailed monitoring requirements for emissions held final action under Supreme Court test for being "consummation" of decisionmaking over a long period of multiple versions and requiring states to take specific action that would affect the petitioning companies).

rules are, in these instances, rather murky at best, even for the cognoscenti.[28] When a challenge is successful, the nonlegislative action is characterized as having an effect equivalent to that of final agency action, under the courts' application of a two-part test requiring first, that the challenged action be the "consummation" of an agency's decsionmaking on the issue (i.e., "completed" and "not tentative") and second, that it have " legal consequences," or determines "rights and obligations."[29] Even while commentators describe courts' application of the doctrine as a muddle, they invariably conclude that the APA's finality requirement renders it exceedingly difficult for parties to obtain preenforcement judicial review of nonlegislative action, and some suggest that the trend has been to render it increasingly difficult to do so.[30]

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[28] E.g., Funk, supra note 25, at 1331. As the Lawson casebook concludes, "If, after all of this, you are having trouble distinguishing legislative rules from procedural rules from interpretative rules from general statements of policy, take heart that you are far from alone," and then quotes the D.C. Circuit Court of Appeals, "The inquiry [as to how to classify an agency action as a legislative rule, interpretive rule, or general statement of policy] turns out to be quite difficult and confused. ..." Lawson, supra note 9, at 447-48. The doctrinal uncertainty regarding category distinctions occurs at two levels, not only as between nonlegislative and legislative rules, but also as between types of nonlegislative rules. In particular, courts' characterization of whether an agency pronouncement is an interpretative rule or a policy statement is abstruse at best, or as one court has put it, the distinction is "enshrouded in considerable smog." General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc). Although it would seem plausible to assume that the type of nonlegislative rule should have no differential impact regarding legal consequences, it sometimes does. See John F. Manning and Matthew C. Stephenson, Legislation and Regulation Cases and Materials 843 (3d ed. 2017).(because inflexible (i.e., agency retains limited or no discretion) policy statements are characterized as legislative rules but inflexible interpretative rules are not (when rule interpreted is mandatory), agency's ability to characterize action as one or the other can affect litigation outcome).

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

[30] David L. Franklin, Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut, 120 Yale L. J. 276; 301, 310 (2010) ("tests applied in these cases could scarcely be called emphatic or predictable"; "doctrines such as standing, finality, ripeness and nonreviewablility ...

There are further differential legal consequences between legislative and nonlegislative rules. For instance, agencies' authorizing statutes often impose specific strictures regarding factors that an agency must consider when engaging in rulemaking.[31] A failure to consider those factors adequately can invalidate a legislative rule.[32] Those statutory considerations can be given short shrift in guidance pronouncements because an agency need not provide a reasoned explanation for the action and, as a general proposition, can avoid judicial review, given courts' propensity not to characterize guidance as final agency action. Moreover, because agency action in such circumstances does not provide a record of the decisional process, which would permit an evaluation of the quality of decisionmaking by a court that in principle occurs when an

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combine to make it very difficult to obtain judicial review of permissive... agency pronouncements"); Gwendolyn McKee, Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine, 60 Admin. L. Rev. 371, 374 (2008).("impossible to challenge agency action at any point prior to an enforcement action" under the current doctrinal standard); Seidenfeld, supra note 26, at 334, 376 (having earlier described the case law distinguishing legislative and nonlegislative rules as "confusing" and "inconsistent," later states "nonetheless, the dual inquiry that governs finality predisposes courts to determine that guidance documents are not final more often than is warranted"); Gluck et al. supra note 26, at 1857, 1860 (concluding from recent cases "D.C. Circuit has been shutting the courthouse door to challenges over policy statements...concluding that they lack the requisite finality under the APA").

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

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

aggrieved party challenges a notice-and-comment rulemaking, it renders it even more difficult for parties to challenge the policy substantively, were litigation permitted to proceed.[33]

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

Legal consequences' differing across regulatory actions is key for appreciating the arcane complexity of the legal architecture given courts' tendency to defer to an agency's choice of regulatory instrument.[35] This tendency permits an agency, through selection of the regulatory instrument, to determine when its policy decisions can more readily be subjected to judicial review. That choice does present an ostensible tradeoff, as the Supreme Court has held that the level of judicial scrutiny should vary with the form of action, such that greater deference is to be afforded to actions taken under more formal procedures, such as notice-and-comment

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[33] The import of the Supreme Court decision in U.S. v. Mead, 533 U.S. 218 (2001), indicating that a lower level of scrutiny would be applied to agency action adopted with more demanding procedures (i.e., rules issued in a notice-and-comment process as opposed to guidance documents) is uncertain, as courts have split on whether to defer to the most informal actions, Lawson, supra note 9, at 621, and the Supreme Court itself both before and after *Mead*, has applied the higher level of *Chevron* deference to nonlegislative rules, with empirical studies indicating that agencies win a majority of cases even when applying *Mead's* lower deference level. Franklin, supra note 30, at 320-21.

[34] Perez v. Mortgage Bankers Assn, 135 S. Ct. 1199, 1206 (2015) ('the D.C. Circuit correctly read [the statute] to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.")

[35] M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1419 (2004) (courts continue to refuse to review agency choices of policymaking tools).

rulemaking, compared to guidance pronouncements.[36] Such a tradeoff presumably would incentivize agencies to employ the notice-and-comment process to increase the probability that their policy judgments will be upheld.[37] But, contrarily, courts defer to agency interpretations of their own regulations (which are adopted through guidance not notice-and-comment rulemaking).[38] The doctrinal development of deference to agency interpretations of agency rules, without appreciation of the real-world ramifications of that intellectual move, makes a hash of the presumed tradeoff between regulatory instrument (formality) and judicial review (deference).[39]

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[36] E.g., U.S. v. Mead, 533 U.S. 218 (2001); Christensen v. Harris County, 529 U.S. 576 (2000); Magill, supra note 35, Magill contends that courts provide agencies with leeway on the choice of instrument precisely because they can impose different standards of review for those instruments, and in particular, employ greater deference to more deliberative, i.e., notice-and-comment, rulemaking. She contends that courts thereby constrain agency choice. However, to the extent that, due to the judicial doctrine regarding finality and firms' response to guidance, those other actions are not readily subject to judicial review, agency behavior will not be constrained by the doctrine that courts will apply less deference to regulatory actions adopted with less process. See text at notes 26 & 29, supra (discussing finality doctrine), and notes 40-41 & 90, infra (discussing firms' response to guidance).

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

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

[39] As Justice Scalia pithily put it:

> "By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.

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

> "if you are a regulated party, and the agency issues an interpretative rule or policy statement indicating its present view of the law, you will probably make serious efforts to comply with that rule even if it is not formally binding. At a minimum, the rule alerts you to the kind of conduct that the agency regards as worthy of prosecution; at a maximum, the rule may effectively dictate how the agency will conduct its prosecutorial adjudications. The *practical effect* of such rules on regulated parties may be hard to distinguish from the practical effect of legislative rules."[40]

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

The divergent legal consequence regarding finality for notice-and-comment rules as opposed to guidance is key for understanding the financial regulation context and the sway the

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Perez v. Mortgage Bankers Assn, 135 S. Ct. at 1211-12 2015) (Scalia, J., concurring).

[40] Lawson, supra note 9, at 422 (emphasis in original).

[41] See note 90, infra, for an elaboration of this point. Illustrations of this behavior in the context of CFPB guidance are provided in the Appendix.

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

As a consequence, by using guidance strategically instead of notice-and-comment rulemaking, particularly in the financial-entity regulatory context, an agency can obtain the benefit of a rule (regulated entities' compliance), without incurring the procedural costs that are legally supposed to accompany the imposition of obligations on private parties under requirements imposed on regulatory decisionmaking by Congress and courts in order to protect the public and regulated entities from arbitrary and capricious decisions. A critical issue, then, is an empirical one: to what extent can an agency shape its agenda to impose rule-like constraints on conduct while avoiding the procedural protections that are supposed to accompany such activity? This paper's research design seeks to provide an answer to that question, whether there are institutional constraints on agencies' choice of regulatory instrument, by identifying differences in the use of notice-and-comment rulemaking across agencies whose structures vary

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

with regard to the degree to which they are independent of legislative control.

B. Overview of the Literature on Agency Design

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

The focus of this paper is on two core mechanisms, analyzed in the agency design literature, which are of particular relevance with regard to the comparative analysis of the regulatory activity of the CFPB. First, political scientists emphasize the importance of agency independence, which is largely a function of location within the administrative state (i.e., within or outside of the cabinet bureaucracy), as well as leadership qualifications and terms, as a key issue in agency design.[44] In a comprehensive study of the politics of agency design, Lewis

[43] Congress's mechanisms of agency control can interact as substitutes as well as complements, such that, use of ex ante controls could be traded off against ex post control mechanisms. Gersen, supra note 8, at 358

[44] David E. Lewis, Presidents and the Politics of Agency Design (2003); Terry M. Moe, The Politics of Bureaucratic Structure, in John E. Chubb and Paul E. Peterson, eds., Can the Government Govern? (1989).

characterizes the motivation for independent commissions to be to create a mechanism to insulate agency decisions from the President.[45] From a legislature's perspective, an independent commission with partisan balance is a preferable structure, compared to an agency that is within the executive branch, for mitigating preference divergence and commitment problems.[46]

Correlatively, as Congress's principal concern with respect to preference divergence would relate to an agency whose decisionmaking is dominated by the President of the opposing political party, agencies created under divided government (i.e., the President and majorities in Congress are of different parties) are more likely to be situated outside of the executive branch (i.e., independent commissions).[47] Because agency independence also reduces a future

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[45] Lewis, supra note 44.

[46] There is empirical support for this proposition: Brian D. Feinstein and Daniel J. Hemel, Partisan Balance with Bite, 118 Colum. L. Rev. __ (forthcoming 2018) (finding cross-party appointments are ideologically closer to their own party than co-party appointees are to the President, and concluding that a partisan balance requirement constrains the President, ensuring divergent views are expressed in agency deliberation that facilitates congressional monitoring); Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation (2007) (unpublished manuscript) (examining forty years of votes of commissioners of Federal Communications Commission and finding "profound" effect of commissoner ideology on votes, "corroborating that partisan requirements genuinely constrain presidents," and that cross-party appointees appear to be more extreme than own-party appointees, "evidenc[ing] congressional influence in the selection and oversight" of the agency).

[47] Lewis, supra note 44 (finding positive correlation between creation of independent agencies and size of majority of opposition party in the House); see David Epstein and Sharyn O'Halloran, Delegated Powers 99, 135 (1999) (finding Congress accords less discretion to the executive branch a measure that includes creation of independent agencies as a constraint on discretion, under divided government, measured by both chambers' being controlled by party opposite of President). Corrigan and Revesz critique Lewis's study, contending that his statistically significant measure for divided government related to the size of the majority of the opposition party in the House, is not significant in their analysis, but they also find that independent agencies are more likely to be formed in the context of divided government for a measure related to the size of the majority of the opposition party in the Senate. Patrick Corrigan and Richard L. Revesz, The Genesis of Independent Agencies, 92 N.Y.U.L. Rev. 637 (2017). As they also similarly find a significant positive correlation between a measure of divided government and the creation of independent agencies, supporting the point in the text, Corrigan and Revesz's critique of Lewis's research is inapposite for the focus of this paper.

Congress's control, when coupled with specific policy directives in an agency's authorizing statute, the durability of the legislation is enhanced (i.e., such an arrangement minimizes potential "interference" by a future Congress or President with an agency's mission).[48]

Second, in a canonical contribution, McCubbins, Noll and Weingast advanced the thesis that administrative law plays a key function for congressional control of agencies.[49] They focus most specifically on the APA's notice-and-comment requirement, contending that it mitigates the the principal-agent problem of information asymmetry, in the following three ways: 1) most directly, it compels an agency to obtain and then provide relevant information regarding the rulemaking in public; 2) it empowers constituents both to influence policy and, when an agency does not adopt Congress's preferred policy, to seek the policy's reversal through litigation and/or by notifying Congress; and 3) upon receipt of such alerts, Congress can thereupon apply ex post oversight and sanctions, such as budgetary restrictions, that can be a powerful tool for affecting agency conduct. The setup of the APA, in short, is conceptualized as a mechanism to discipline agencies and mitigate preference divergence between an agency and Congress.

Reliance on administrative law as an instrument of agency control has a notable additional benefit, that Congress need not know details regarding which policy is desirable to be responsive to constituents, as the structure of the administrative process is expected to channel an agency to select outcomes favored by constituents whom Congress has statutorily

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[48] Citing work by Posner and Landes, Horn, supra note 8, at 18-19, suggests that the commitment problem is mitigated through specific directives to an agency coupled with enforcement delegated to courts, which are more independent of the legislature than agencies.

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

empowered.[50] Administrative procedures, can also mitigate the commitment problem, by having the effect of what McCubbins et al. colorfully term "stacking the deck," that is, favoring an enacting coalition in the administrative process, not only by the general enfranchisement of interested members of the public in the APA, but also by statutory mandates of specific participation rights and favorable evidentiary standards for an enacting coalition's members with regard to a particular agency's rulemaking. As McCubbins et al. put it, provisions supplementing the protections of the APA will "cause the political environment in which an agency operates to mirror the political forces that gave rise to the agency's legislative mandate long after the coalition behind the legislation has disbanded."[51]

McCubbins et al.'s conceptualization of the APA as a mechanism for mitigating the principal-agency problem of the administrative state is not, however, without its skeptics, particularly among administrative law scholars who question whether Congress exercises meaningful control over agencies through the APA as theorized. For instance, Robinson contends that Congress cannot successfully craft administrative structures and processes to favor specified constituents without agreement on substantive policy choices in the first place, while McCubbins et al.'s model presumes the enacting coaltion cannot specify policy outcomes – that is why it delegates to the agency.[52] The contention is that when policy is indeterminate ex ante (i.e., the coalition can secure legislation only by "finessing" policy choices), then processes

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[50] Id. at 244.

[51] Id. at 262.

[52] Glen O. Robinson, Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process, 75 Va. L. Rev. 483, 484-85 (1989); McCubbins et al., supra note 1, at 255 (enacting coalition specifies administrative procedures to ensure preferred constituents can influence decisions because the legislators "may not know what specific policy outcome they will want in the future.")

cannot be established that ensure which group's interest will control the regulatory policy output ex post.[53] In support of that claim, Robinson points both to the uniformity of procedures established by the APA when variation would seem more consistent with McCubbins et al.'s thesis as winning coalitions that create agencies vary dramatically, and to the independence of the judiciary that reviews regulation, applying standards that "are not congruent with enforcement of implicit political bargains," i.e., which cannot be assured to favor the position of the historical winning coalition when a rule is challenged.[54]

Equally, if not more telling in my judgment, regarding the importance of judicial review for McCubbins et al.'s thesis, as highlighted by Gersen, is courts' doctrinal standards that, as a general proposition, defer to agencies' choice of instrument. By overlooking the earlier analyzed judicial doctrines according agencies significant leeway to implement policy without following the safeguards of notice-and-comment rulemaking, Gersen suggests that McCubbins et al. overstate Congress's ability to control agencies, for judicial doctrine permits their subversion of Congress's administrative design.[55] But the divergent perspective of McCubbins et al. and their critics is ultimately a disagreement over an empirical claim regarding the relative effectiveness of agency design at producing accountable decisionmaking. Robinson would appear to concur in this assessment for he concludes his critique with the observation that the "theory fails for too much ambition and too little evidence," suggesting that were empirical evidence presented that corroborated the "structure and process" hypothesis of congressional control of agencies, while

[53] Robinson, supra note 52, at 485.

[54] Id. at .489, 491

[55] Gersen, supra note 8, at 344.

he might be uncomfortable with such a finding, he might be persuaded.[56] Not surprisingly, there is now an empirical literature that investigates this precise issue.

Much of the empirical literature directed at testing the significance of the two key features of agency design of interest – independence and administrative use of notice-and-comment rukemaking – consists of studies seeking to explain design choice in relation to political conditions (e.g., divided government) when agencies are created. The idea informing such a research agenda is that an agency's structure is specified at the time of its creation and rarely changes thereafter, given the stickiness of legislation. Lewis finds that new agencies are more likely to be independent (measured in terms of location – independent commission or within the executive branch – and fixed terms and restrictions on leadership, such as partisan balance or expertise requirements) when formed under divided government with large majorities in the House.[57] Corrigan and Revesz find, however, that new agencies are more likely to be independent (measured by a different set of organizational factors) when formed under divided government with large majorities in the Senate, and not the House.[58] Nevertheless, the import of the two studies is similar, as they suggest that the strength of a congressional majority facilitates adoption of an organizational structure by which Congress can exert greater control, compared to that of the President, over an agency.

Lewis further finds, as would be anticipated, that agencies created by executive order (57 percent of the data set) are more likely to be organized under presidential control (i.e., not

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[56] Robinson, supra note 52, at 498.

[57] Lewis, supra note 44.

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

independent) and dramatically so, compared to those created by statute, which are more likely to be independent commissions.[59] Both Lewis and Moe also provide, in support of the contention regarding Presidential preference for non-independent agencies, anecdotes of maneuvering over the structure of proposed new agencies, in which Presidents consistently seek executive control (by agency location within the executive branch) in contrast with congressional advocacy of independent commissions.[60]

While McCubbins et al. do not empirically test their hypothesis regarding the crucial function of the APA, they engage in casual empiricism regarding Congress's devising administrative processes that "stack the deck" in favor of specific constituents to maintain congressional control. They analyze statutes governing several agencies and identify how they advantage specific interest groups, by authorizing intervenor programs (in effect financing interest groups' participation in agency rulemaking), or by setting the burden of proof to benefit a particular group.[61] This need not be done solely in an initial agency-authorizing statute or amendments to it. Instead, a general statute applying to agencies across the board could also suffice.[62] McCubbins et al.'s explanation of the adoption of special administrative procedures

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[59] Lewis, supra note 44, at 126.

[60] Id; Moe, supra note 44.

[61] McCubbins, et al., supra note 1, at 266-69.

[62] An example of such a strategy that McCubbins et al. provide is a 1969 statute requiring environmental impact statements for all agencies' proposed projects, contending that it promoted the influence of environmental groups, which had been otherwise not represented (hence resisted or ignored) in agencies' decisionmaking, as they had only recently become sufficiently organized to be politically significant. Id. at 265-65. They buttress the contention by reference to an estimate from another study that the environmental impact statute prolonged by a full year the time in which a license to construct a nuclear plant was approved, substantially increasing costs and thereby, as they put it, "served the ends of the environmentalists by effectively stopping nuclear power development in the United States." Id. at 265.

for specific agencies would not be subject to Robinson's critique regarding their analysis of the APA, but as they do not connect the descriptions to policy outcomes, the examples would not answer his objections.

In addition to studies analyzing the political conditions under which agencies are created, there is a strand in the literature that seeks to demonstrate influence by Congress (or the President) on agency policies. The bulk of those studies analyze the decisionmaking of a single or a few agencies, and more importantly, few seek to examine the control mechanisms of agency design that are the focus of this paper, agency independence in relation to administrative procedure, that is, the form in which regulatory action is undertaken.[63] The findings of this strand of research are briefly reviewed, however, as they underscore and contextualize this paper's exploration of the tools that Congress deploys through which it can assert influence, if not control, over agency decisionmaking.

Weingast and Moran examine the decisionmaking of the Federal Trade Commission ("FTC") in relation to the preferences (indicated by votes) of members of the congressional subcommittees that have jurisdiction over it.[64] They show that a dramatic alteration in FTC policy occurred when the composition of the Senate subcommittee changed markedly from 1976 to 1979, and that the FTC's selection of cases between 1964 and 1976 varied in conjunction with changing subcommittee chairmen. As legislators with more "consumer activist" preferences took over (departed), the agency shifted to bringing more (fewer) consumer-oriented cases (specifically, there was a statistically significant relation between Senators' ideological scores

[63] For a list of such studies, see Christopher R. Berry and Jacob E. Gersen, Agency Design and Distributive Politics, 126 Yale. L. J. 1002, 1006 n. 8 (2017).

[64] Barry R. Weingast and Mark J. Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. Pol. Econ. 765 (1983).

derived from voting records and the number of cases brought in specified categories), with the subcommittee chairman's effect estimated as twelve times more influential on case selection than other Senators.[65]

The research questions of two more recent studies, by Berry and Gersen and by O'Connell, are closer to this paper's focus, as they investigate the relation between agency independence and activity.[66] Berry and Gersen examine agencies' awarding of grants to

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[65] Id. at 790. Similarly, examining the number of enforcement actions brought by four agencies, without attempting to distinguish their structural characteristics, Hedge and Johnson find that the number declined after a Republican majority took over Congress in 1995 (the midterm election in President Clinton's first term), albeit the trend lasted only for two years. David Hedge and Renee J. Johnson, The Plot That Failed: The Republican Revolution and Congressional Control of the Bureaucracy. 12 J. Pub. Adm. Res. and Theory 351 (2002).

[66] Berry and Gersen, supra note 63; Anne Joseph O'Connell, Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State, 94 Va. L. Rev. 889 (2008). A third recent study examining a large sample of agencies (all agencies in existence from 1987-2004) by Feinstein is not directly on point because, rather than studying the connection between agency design and policy outcomes, it examines instead the relation between agency independence and monitoring activity by Congress (measured by the number of congressional hearings). Brian D. Feinstein, Designing Executive Agencies for Congressional Influence, 69 Adm. L. Rev. 259 (2017). The idea is that Congress will exercise greater oversight of agencies over which it has greater control compared to the President. Feinstein finds that agencies whose leaders are confirmed by the Senate are subject to greater oversight by the Senate, whereas agencies whose leaders have fixed terms or qualification requirements are subject to less oversight by either chamber, and statutory creation is insignificantly related to oversight. Given the mixed evidence regarding oversight, one of his conclusions is that independent agencies are more independent than the literature has assumed (on the view that an agency subject to oversight will be responsive to Congress's preferences). The connection between structure, oversight and responsiveness is made by reference to his earlier research. In his dissertation, Feinstein finds that agencies that have engaged in an "infraction" (which refers to a bureaucratic "problem" or critical assessment of an agency identified from government and media sources) that is the subject of a committee oversight hearing are 22 percent less likely to engage in another infraction within a year of the hearing compared to agencies that have engaged in an infraction but were not subjected to a hearing. Brian D. Feinstein, Oversight, Despite the Odds: Assessing Congressional Committee Hearings as a Means of Control over the Federal Bureaucracy. Harvard University Dissertation.(2009) As the dissertation's analysis does not distinguish agencies by their degree of independence, a relation between the findings of the two studies is intriguing, but in the absence of an analysis combining data sets, the studies independently do not demonstrate that agency structure (through a differential ability of Congress to exercise control) affects agency activity.

congressional districts from 1984-2007, contending that the allocation of funds is a constant decisional context that better permits a comparison of the impact of differences in agency structure on an agency's responsiveness to political actors than other forms of agency decisionmaking.[67] They find that there is a presidential effect: districts receive more funds when their representative is a member of the President's party, the less independent the agency (measured by the proportion of political appointees in the agency's upper echelons). However, for the most independent (i.e., highly insulated) agencies, a member of the President's party has no effect on district funding.[68] They also find congressional influence: there is a significantly positive effect on a district's funding when its representative is a member of the majority party and the agency has a higher number of Senate-approved appointees.[69]

Although the precise mechanism cannot be identified, Berry and Gersen suggest that principals (Congress and the President) are selecting what they term the "right type of appointee"

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[67] Berry and Gersen, supra note 63, at 1014.

[68] As the proportion of political appointees, their proxy for Presidential control, i.e., non-independence, increases by one standard deviation (22 percent), when a district moves into the President's party the funds received increase by nearly 7 percent. Id. at 1031. There was no effect on district funding by having a representative who was a member or chair of the committee with jurisdiction over an agency.

[69] The findings are not robust, however, to alternative independence variables. They mention testing variables that distinguish agencies by whether they were founded during divided government or the number of branches controlled by the Democratic party at founding, none of which evince the same relation of political responsiveness as the appointee variable. But they do not test variables identifying specific structural features of agencies. Berry and Gersen, supra note 63, at 1035. Agencies that are governed by boards or commissions are apparently found to provide more funding to districts of members of the majority party (but not the President's party), but the finding's significance is discounted because there are only four such agencies in the data set, and a commission structure is "virtually coterminous" with other independence variables, such as fixed terms and limits on the President's removal power (which are not separately investigated). Id.

whose "preferences [are] sympathetic to the principal."[70] Namely, agencies with more appointees subject to Senate confirmation would appear to be more responsive to the majority party in the Senate while agencies with fewer such appointees would appear to be more responsive to the party of the President, as they distribute more funds, respectively, to districts represented by members of the party of their appointer.[71] Berry and Gersen therefore conclude that agency design matters. However, because their findings are not robust across different measures of agency insulation, and in particular, more straightforward definitions of agency independence either have no significant correlation with grants or cannot be satisfactorily examined given the data set, such as an agency's distance from the executive branch or its leadership structure, the generalizability of the conclusion is open to question.[72]

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[70] Id. at 1038.

[71] Id.

[72] The methodology has limitations. For instance, Berry and Gersen use agency fixed effects to address the potential confounding effect of agency mission, as opposed to agency structure/political control, that some agencies' grants will disproportionately go to one party's districts, i.e., Department of Housing and Urban Development grants tend to go to urban areas, which are more likely to elect Democrats. However, while technically proper, use of a district fixed effect to address the difficulty that agency missions coincide with districts represented by particular parties, is less informative than including specific variables related to districts and agency missions, such as urbanization or demographic data. Besides providing more granular controls, separately including such variables can control for district changes over time, whereas fixed effects treat district characteristics as unchanging over time. This is an important distinction because, for the research design to work, characteristics of a district in terms of what level of grant is appropriate must not have changed when it elects an individual from a different party. Yet it would seem equally, if not more, plausible that a change in the political party of a district's representative is a function of changing district characteristics which could affect a grant, such as, a change in demographics. Such an effect is obscured by the use of a fixed effects approach. Finally there is a relation between agency structure and outcomes that would appear to open the findings to question: agencies that have fewer political appointees also tend to be entitlement agencies, e.g., Department of Veterans Affairs and Social Security Administration, where grants are given to designated individuals, Berry and Gersen, supra note 63, at 1025, which limits such agencies' ability to adjust grant levels as a district's representation changes. The concern is that such a phenomenon would bias the results to find less responsiveness in less politicized agencies when it is actually the grant formula, and not the proportion of political

The second study, by O'Connell, investigates both the number and form of reported (legislative) rulemakings by the 15 cabinet departments and 32 executive and independent agencies over 1983-2003, with a series of hypothesis tests directed at a subset of five independent commissions and five executive branch entities.[73] She examines three types of legislative rules: rules adopted by notice-and-comment, interim final rules and direct final rules. Interim rules are typically adopted under the APA "for cause" exemption to notice-and-comment rulemaking, and are effective immediately on publication, with comments, if solicited at all, to be received ex post. A direct final rule is a rule that is effective on publication but voided upon receipt of adverse comments thereafter, and thus expected to be used for noncontroversial, technical subjects.[74] While all three types of rules are "legislative" rules, the latter two lack the democratic legitimacy of notice-and-comment rules, as the reasoned deliberation that follows the collection of information from affected parties and facilitates congressional efforts to maintain control over an agency's decisions is absent.

Two of O'Connell's findings would appear to have pertinence for the empirical analysis of this study. First, she presents data suggesting that the proportion of notices of proposed rulemaking (regulatory filings that indicate an agency's plan to engage in a notice-and-comment

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appointees, that is affecting the outcome. Moreover, Berry and Gersen note that there are few independent commissions in the sample, which further suggests that Congress does not use such a structure when it is creating an agency with grant-giving authority, and as a consequence, that the findings may well not be relevant for such agencies.

[73] O'Connell, supra note 66.

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

rulemaking), compared to legislative rules finalized without obtaining comments (direct final rules and interim final rules), has declined over time, although she notes that an "overall" lower proportion of independent agencies' rulemaking took the form of direct and interim final rules compared to that of executive branch agencies.[75] Thus, when analyzing differences in agencies' use of specific regulatory instruments in this study, it will be necessary to control for a potential time trend. Otherwise, any finding of a difference across agencies could be mistakenly attributed to organizational structure when it was simply a temporal effect.

Second, O'Connell finds that independent agencies complete significantly more notice-and-comment rulemakings under Republican than Democratic Presidents compared to non-independent (executive branch) agencies, and that overall fewer rulemakings are completed under divided government.[76] While this is a relative and not an absolute finding regarding

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

[76] Id. at 956 n. 174 (analyzing completions over entire year). She also finds that initiation of rulemakings is significantly higher for independent agencies when there is a Republican President as well as Republican Congress. Id. at 945 (analyzing initiations in last quarter of a year). Paralleling O'Connell's finding regarding the impact of the political environment on rulemaking overall, Yackee and Yackee also find a significant decrease in the issuance of notice-and-comment rules during periods of divided government in their full sample, but when agencies are grouped into cabinet and non-cabinet (i.e., independent agencies and entities in the executive branch that are independent of cabinet departments, such as the Environmental Protection Agency), only the issuance of informal rulemaking by cabinet departments decreased significantly during divided government. Jason Webb Yackee and Susan Webb Yackee, Divided Government and U.S. Federal Rulemaking, 3 Regulation & Governance 128, 134, 138 (2009 (notice-and-comment rulemaking by forty agencies over 1985-2005). Because Yackee and Yackee's theoretical and analytical focus is not on the relation between agency structure and rulemaking, their article is not discussed in the text. Because the periods of divided government in this paper coincide with either a Republican President (1970s) or Republican Congress (post-Dodd-Frank), a divided government variable will capture either of the effects reported by

independent agency action, it suggests that attention should be paid, when examining the activity of agencies in this study, to the political environment, as the party of the President and of the majority in Congress switches over the two time spans under investigation in this paper. Although the shift should similarly affect all comparison agencies (SEC, CFTC, CPSC), which share the independent commission organization of the independent agencies in O'Connell's study, the CFPB, with a markedly different structure, might well behave otherwise.

Neither the Berry and Gersen nor the O'Connell studies go to the question on which this paper is focused. The agency decision that Berry and Gersen study – general spending decisions – does not permit examination of whether agency structure affects the form of decisionmaking, that is, whether a more insulated agency will behave so as to attenuate, rather than facilitate public and congressional monitoring of its decisions. Using grant decisions has the benefit, as Berry and Gersen observe, of facilitating cross-agency comparisons, but it also unfortunately restricts the question that can be answered regarding the impact of agency structure.

O'Connell, by contrast, is examining different forms of agency decisionmaking. But when the issue concerns the relation between agency structure and rulemaking, the more critical comparison, in my view, and hence the focus of this paper, is between the use of legislative and nonlegislative rules, given the earlier-discussed differential impact in real-world consequences.[77] Namely, while both interim and direct final rules are issued without engaging in notice and comment as are interpretative rules, being final action they have equal status as notice-and-comment rules regarding aggrieved parties' access to judicial review and in that review would presumably be subject to any considerations specifically required by Congress (i.e., meeting a

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O'Connell as well as those of Yackee and Yackee. See part III, infra.

[77] See text at notes 26 & 33, supra.

cost-benefit standard) or by the judiciary for satisfying an agency's informal rulemaking.[78] In short, the considerable advantage of the Unified Agenda, O'Connell's data source, is its comprehensive coverage of all federal agencies, but it comes at a cost, in this instance, of including only legislative rulemaking. As a consequence, O'Connell's data set does not permit an assessment of a key dichotomy in agency instrument choice which is the focus of this paper's inquiry, the implementation of policy through the use of legislative versus nonlegislative rulemaking.[79]

II. Research Design: Comparing Agency Independence across the CFPB, CPSC, CFTC and SEC

In contrast to the extant literature, this study's research design compares the use of

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

[79] A few studies have examined agencies' use of guidance rather than rulemaking, with differing conclusions concerning whether agencies behave strategically in making such choices, but because none of these studies seek to associate agency structure with policymaking choice, they are not discussed. See, e.g., James T. Hamilton and Christopher H. Schroeder, Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste, 57 Law and Contemp. Prob. 111 (1994) (policymaking choice of the Environmental Protection Agency depends on a variety of factors, such as, cost of obtaining agreement among interested parties on a policy or likelihood of judicial review, such that, guidance is used when negotiation cost or probability of judicial monitoring is high, which are deemed to indicate a strategic choice to evade congressional constraints); Connor N. Raso, Strategic or Sincere? Analyzing Agency use of Guidance Documents, 119 Yale L. J. 782 (2010) (policymaking choice is said not to be strategic, in a study with various samples consisting of four, ten or fifteen executive departments and one independent agency, due to the following findings: agencies do not use guidance significantly more in times of divided government than unified government; agencies do not increase guidance at the end of a president's second term; the number of significant guidance issued is far less than the number of significant rules; and the Bush administration revised only 12 percent of significant guidance documents issued by all previous administrations). In contrast to Raso, this paper cannot similarly identify significant guidance because only executive agencies during the George W. Bush administration were required to provide such characterizations of the guidance they, or their agencies previously, issued, under his Executive Order No. 13, 422, which was revoked by President Obama.

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

A. Criteria of Agency Independence

The most comprehensive effort at identifying agency independence, by Datla and Revesz, enumerates seven distinguishing characteristics.[80] By defining independence along a continuum of combinations of those features, they seek to combat what they perceive to be a mistaken binary approach in the legal literature to independence and, thereby, to introduce a more nuanced conception compared to the prevalent definition, which is, a multimember agency whose commissioners serve fixed terms with removal only for cause.[81] Datla and Revesz's seven indicia for assessing agency independence are:

(i) statutory removal protection;

(ii) fixed terms for agency leadership (referred to as "tenure specified");

(iii) multimember (versus single-headed) agency structure;

(iv) partisan balance requirements for multimember agencies;

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[80] Kirti Datla and Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 Cornell L. Rev. 769 (2013).

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

(v) authority to conduct litigation without having to go through the Department of Justice; (vi) authority to bypass centralized review by the executive branch agency, Office of Management and Budget ("OMB"), in submitting budget requests to Congress, and in clearing congressional testimony or proposed legislation; and

(vii) formal adjudication authority.[82]

Given that the partisan balance requirement is only applicable to a multimember leadership structure, this factor can, I think, be more usefully characterized as a subcategory of the multimember structure criterion, rather than an independent factor (as it comes into play conditional on there being a multimember structure).

In addition to providing a definition of independence that is both comprehensive and functional for my purpose of comparing agencies, Datla and Revesz's multifactor approach has a further benefit for this paper's research inquiry. By isolating which characteristics the four agencies in this study share, and more particularly, those the CFPB does not share with the other three agencies, the empirical inquiry can focus on specific factors of independence. Namely, to the extent that the analysis identifies a significant difference in choice of regulatory instrument between the CFPB and the other agencies, it can be inferred that the CFPB's missing characteristic(s) explain the observed difference. There is a wrinkle, however, in this approach: Datla and Revesz do not include as an indicia of independence a further important distinguishing feature among the agencies in this study's analysis concerning agency funding: whether an agency is subject to the congressional appropriations process.[83] Accordingly, the analysis will

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[82] Id. at 786-809.

[83] Datla and Revesz include a tangentially related item, (vi) in the list in the text, that agency budgeting bypasses executive review, which is true as a matter of course for agencies not subject to appropriations, but characterizes a broader set of agencies and thus better serves their purpose both as the number of administrative entities financed outside of the appropriations

not be able to strip out an effect of the CFPB's rather distinctive financing arrangement from that of the Datla and Revesz independence characteristics.

B. Selection of Comparable Agencies

To study the relation between agency independence and regulatory strategy, a set of cognate agencies, albeit with differing degrees of structural independence from the political branches, were identified. The CFPB was taken as the starting point for inquiry, given its anomalous degree of independence, and the ongoing controversy over its structure, years after its creation.

The identification of the initial agency selected to include in comparison to the CFPB, the CPSC, seeks to match agency mission and timing. The CPSC is an agency with an analogous mission to that of the CFPB: protecting consumers from products deemed harmful. In addition to having cognate missions of consumer protection, upon establishment both agencies assumed regulatory responsibility for numerous statutes that had been within the purview of a number of existing agencies and executive departments. But while the originator of the idea to create the CFPB had presented the CPSC as the model animating her proposal,[84] it has a conventional organizational structure that is subject to far greater congressional control than the agency design that Congress adopted for the CFPB. It therefore permits a well-matched institutional contrast to the CFPB.

An advantage of comparing the CFPB and CPSC is timing in the life cycle of an agency: an agency's activities in the initial years of its existence might well vary from those at a later

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process is small, and as their principal focus, in contrast to that of this paper, is on measuring agency independence from presidential, rather than congressional, control.

[84] Elizabeth Warren, Unsafe at Any Rate: If It's Good Enough for Microwaves, It's Good Enough for Mortgages: Why We Need a Consumer Financial Product Safety Commission. 5 (Summer) Democracy 8 (2007).

date, as it will have to make a host of judgments at the outset regarding its authorizing statutes, including whether to revise inherited rules and interpretations, as well as issues of first impression under those statutes, compared to an established regulator whose ongoing activity tends to be path dependent, informed by regulatory and interpretative precedents. However, given the forty-plus years between the two agencies' creation, norms of regulatory practice could have evolved, which would diminish the appropriateness of the comparison. Accordingly, in addition to examining the CPSC's activity in the startup phase, its activity over the identical interval (2011-16) as the initial five years of the CFPB's operation is also investigated.

To the extent that there is a significant difference in instrument choice between the CPSC and CFPB in their initial years, then the second comparison should isolate whether any divergence is due to evolving administrative law conventions rather than a difference in agency structure, by indicating whether the CPSC's usage is consistent over time.[85] Indeed, commentators contend that in the 1970s, notice-and-comment rulemaking was less well established than in subsequent years.[86] If that contention is accurate, then consistency in agency use across the two time spans would not simply diminish potential concern regarding comparability of agency practice over time but would also add confidence to the import of finding a greater use of informal rulemaking by an agency commencing activity in the 1970s compared to one launched in the 2010s. Because the view that notice-and-comment rulemaking

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

[86] Gluck et al., supra note 26, at 1792 n. 3 ("the Supreme Court's 1973 decision in United States v. Florida East Coast Railway Co. . . .which held that agencies need only use formal, trial-like proceedings in limited circumstances ... turned agencies to notice-and-comment rulemaking as their primary mode of action.")

was less-established in the 1970s would predict that the direction of use should be the opposite (i.e., lower in the 1970s), such a finding would bolster confidence in interpreting divergent practices across the two agencies as indicative of agency design affecting instrument choice. A finding of no difference in CPSC practice over the two intervals might also suggest that there is an inconsequential life-cycle effect, or that any such effect was washed out within the five years under review.

The CFPB and CPSC are agencies with comparable missions directed at a different type of product – financial versus physical – with a further potentially salient difference that might influence regulatory decisionmaking beyond any difference in organizational structure. Creating the CFPB, as earlier noted was a component of Dodd Frank, comprehensive legislation in which Congress placed new and considerable regulatory demands on numerous existing financial market regulators as well as a new entity, in response to the global financial crisis of 2008-09. Accordingly, in an effort to control for potential differences in regulatory climate as well as product, two additional agencies are included in the comparison, the SEC and CFTC. Those two agencies' jurisdictional scope encompasses financial products traded in retail markets and their stated regulatory mission to foster markets and adopt rules protecting market participants parallels that of the CFPB.[87] Equally, if not more important for comparative purposes, those

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

agencies were confronted with extensive regulatory demands through specified delegations in Dodd-Frank, as was the CFPB. But their organizational structure matches that of the CPSC, and hence they provide additional benchmarks for evaluating the CFPB's regulatory decisionmaking. Accordingly, their post-Dodd-Frank regulatory activity is compared to that of the CFPB.

The CFTC provides a further comparative benefit, for it was created in the 1970s, shortly after the establishment of the CPSC. It thereby serves a dual function, as both a life cycle and political environment comparator with the CFPB. In addition, analyzing the CFTC's activity in both time periods tests the consistency of its choice of instrument as a new agency undertaking its initial statutory implementation and an established agency confronted with the extensive demands of Dodd-Frank, circumstances simultaneously experienced by the CFPB.[88]

An additional advantage of comparing the four agencies for the statistical analysis is that they all exercise considerable control over regulated entities, either by product gatekeeping (CPSC and CFPB) or ongoing supervisory relationships with regulated entities (CFBP, CFTC and SEC).[89] These are regulatory contexts in which guidance can function as a rule for regulated

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

[89] The Office of Comptroller of the Currency also regulates entities regulated by the CFPB, with similar supervisory relationships, and had responsibility for some consumer financial product protection legislation that Dodd-Frank transferred to the CFPB. But it was excluded from the research design because as an executive branch agency, it is subject to the President's direct sphere of control, rendering it structurally accountable to one of the political branches. Hence, it is not comparable to the four agencies under study, as it operates under a different incentive system regarding regulatory choices.

entities, as the earlier quoted Lawson casebook observed, because such entities will perceive an existential threat from noncompliance as they are at risk of being put out of business by an enforcement action banning a core product or imposing punitive damages and fatal reputational harm.[90] Hence, there need not be concern in interpreting divergent relative use of guidance and notice-and-comment rulemaking across the four agencies as due to guidance having a differential impact on the behavior of regulated entities, as those entities would be equally motivated to comply rather than challenge policies implemented through guidance by all of the agencies.

C. Comparison of Agency Independence Characteristics

The agencies under study all share four of Datla and Revesz's criteria, diverging on (i) statutory removal restrictions, (ii) multimember structure, and (iii) the partisan balance requirement. Only the CFPB lacks a multimember structure and, correlatively, a partisan

[90] E.g., Raso, supra note 79, at 803 (agencies obtain more voluntary compliance from guidance when they have "gatekeeping power" over private parties, such as the U.S. Food & Drug Administration, as that power provides "strong incentives" to regulated entities to cooperate). Moreover, financial institutions can be subject to existential threats from cross-agency regulatory action, which exacerbates a perceived need to comply rather than challenge nonlegislative action: namely, non-compliance with CFPB guidance could result in retaliation from a financial institution's prudential banking supervisor, and not solely the CFPB. This possibility is not speculative: a telling example involves the CFPB's actions regarding Ally Bank. The CFPB director serves on the Federal Deposit Insurance Corporation Board ("FDIC") and the Financial Stability Oversight Council, which is comprised of the heads of all of the financial regulatory agencies, and both institutions have important decisional authority over regulated firms. Ally Bank settled, rather than challenged, a questionable enforcement action by the CFPB that was based on a problematic guidance document, due to the threat of adverse retaliatory action by its other supervisory agencies. At the time of the CFPB action, Ally needed permission from the Federal Reserve ("Fed") to remain a financial holding company in order to retain lines of business that were essential for its survival. It was also under review by the FDIC for how well it was complying with the Community Reinvestment Act. CFPB lawyers met with Fed and FDIC officials and thereafter informed Ally that the company would be assured favorable treatment by the Fed and FDIC were the CFPB action "prompt[ly] and robust[ly]. resolved." Paul Sperry, Obama Bullied Bank to Pay Racial Settlement Without Proof: Report, N.Y. Post, Feb. 7, 2016. The guidance at issue, which concerns the indirect financing of automobile dealer loans, is discussed in the Appendix.

balance requirement. There are statutory removal restrictions in the authorizing statutes of the CFPB and CPSC,[91] whereas the statutes creating the SEC and CFTC, albeit fixing the commissioners' terms of office, do not contain removal protection provisions. However, there would appear not to be a practical difference created by the omitted language, as courts and commentators consider SEC (and other independent agency) commissioners to have removal protection despite the statutory lacuna.[92] Apart from the independence characteristics identified by Datla and Revesz, there are a few additional, agency-specific structural differences regarding the agencies' insulation from political accountability to be identified for their potential impact on the empirical analysis. Of these further differences analyzed below, the most consequential has

[91] Although the definition of what constitutes "cause" differs across the statutes, Datla and Revesz consider variations in statutory formulations to be "of limited practical effect," because "no recent President has attempted to remove the head of an independent agency for cause" and there has not been any judicial interpretation of the terms of statutory removal clauses. Datla and Revesz, supra note 80, at 788. Without defining the term, in Bowsher v. Synar the Supreme Court described "good cause" defined in a statute as "inefficiency, neglect of duty or malfeasance," as permitting removal for any "actual or perceived transgression of the [principal's] will," 478 U.S. 714, 729 (1986), and in Morrison v. Olson it suggested that "good cause" permitted removal of an officer "[not] competently performing his or her statutory responsibilities, " 487 U.S. 654, 692 (1988), which are very broad statements that are consistent with Datla and Revesz's view that variation in statutory language is of little or no import.

[92] E.g., Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010) (U.S. Supreme Court deciding case with understanding that SEC commissioners can be removed only for cause); Datla and Revesz, supra note 80, at 789, 833 (citing both securities law scholar and former SEC Chairman, William Cary's view of constraint on President from removing a commissioner despite lack of statutory limitation, and federal appellate court decision implying for-cause removal protection for SEC commissioners). Moreover, no President would appear to have behaved differently toward commissioners of agencies with statutory protection and those without it. The explanation Datla and Revesz advance for such behavior is caution against having to litigate removal, in conjunction with political costs that would accompany any removal. Id. at 787, 789. Vermeule describes a constraint on other actors to treat such commissioners as having removal protection, as a "convention," an "unwritten political norm," regarding agency independence. Adrian Vermeule, Conventions of Agency Independence, 113 Colum. L. Rev. 1162, 1165-66 (2013). The implication of both explanations is the same: there is no meaningful difference regarding removal protection for commissioners of multimember agencies located outside of the executive branch whether operating under statutes that are explicit or silent on the subject.

already been mentioned, that the CFPB is not subject to the appropriations process.

1. CFPB

The CFPB was established by Dodd-Frank in 2010, consolidating in one agency functions that had previously been allocated across seven federal agencies. It was given a comparatively anomalous autonomous structure for a U.S. administrative agency.[93] It is organized analogously to a cabinet department in that it has a single director, but, in contrast to cabinet department secretaries, who serve at the President's pleasure, the CFPB director has statutory removal protection.[94] The agency is further independent of the executive by location, as it was placed within the Federal Reserve ("Fed") System. Despite its location, Fed Board

[93] A number of commentators have highlighted the CFPB's anomalous structure. E.g., Jacob E. Gersen, Administrative Law Goes to Wall Street: The New Administrative Process, 65 Admin. L. Rev. (2013); Roberta Romano, Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation, 43 Hofstra L. Rev. 25 (2014); Todd Zywicki. The Consumer Financial Protection Bureau: Savior or Menace?, 81 Geo. Wash. L.Rev. 856 (2013).

[94] 12 U.S.C. §5491(a)-(b)(1), 5492(c)(2)-(3). The CFPB's single-director structure affords a further degree of political independence, not focused upon by Datla and Revesz, regarding continued operation upon a leadership vacancy for an unlimited duration. The CFPB director may continue in office after expiration of his term until a successor has been appointed and qualified, and if the director's position is vacant, then the deputy director, who is appointed by the director, is designated to serve as acting director. 12 U.S.C. § 5491 (b)(5)(B). By contrast, the length of time in which a commissioner can retain his or her seat upon a term expiration is limited (one year for CPSC commissioners, and until the expiration of the next Congress or approximately two years, for CFTC and SEC commissioners) and a vacant commissioner seat cannot be filled temporarily by the agency with an acting commissioner. Rather, replacing a member of an independent commission requires nomination by the president and confirmation by Congress (or unilateral presidential action through a recess appointment). Thus filling a vacancy at the top of a multimember commission requires consent by the political branches. However, commissions can continue to operate with skeletal leadership, given the absence of a statutory quorum requirement for the CFTC and SEC, and a sliding scale quorum requirement for the CPSC, albeit its ability to function is time-limited, to six months when down to a one-person quorum. 15 U.S.C. § 2053(d). See Anne Joseph O'Connell, Trump's Staffing Record in the First 100 Days Was Slow, But Not Catastrophic, Brookings Report (2017), available at: https://www.brookings.edu/research/trumps-staffing-record-in-the-first-100-days-was-slow-but-not-catastrophic/ (Federal Vacancy Act, which permits acting officials, does not apply to independent agencies).

governors may neither intervene in the CFPB's affairs, review or delay implementation of its rules, nor consolidate the bureau, its functions or responsibilities with any other office or division of the Fed.[95]

An equally, if not more important, feature than leadership structure, that is unique to the CFPB across the agencies under study, is its funding arrangement: it is independent of both Congress and the President, for it is not subject to the annual appropriations process. The director sets his own budget, which is funded by the Fed (capped at twelve percent of the Fed's total operating expense).[96] There are other administrative agencies that are not subject to the appropriations process, but they tend to be prudential regulators of financial institutions and have multimember leadership structures, such as the Fed and the FDIC, and far narrower, technical missions.[97] Both of these differences from the CFPB's structure – multimember leadership and narrow, technical mission – are critical for appreciating how those agencies' setup

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[95] 12 U.S.C. § 5492(b)(2).

[96] 12 U.S.C. §§ 5497(a) &(c)(2012).

[97] See Datla and Revesz, supra note 80, at 793 (table 3, listing agencies with multimember structures); U.S. General Accounting Office, GAO-02-864, SEC Operations: Implications of Alternative Funding Structures 11-12 (2002) (listing agencies with truly independent funding). The OCC is not a multimember organization, but in contrast to the CFPB, the Comptroller serves at the pleasure of the President with no restrictions on removal and, like the Fed and FDIC, it has a more technical mission than the CFPB, being a prudential regulator. The CFPB's financing arrangement was explained in the Senate report accompanying the bill that became Dodd-Frank as necessary to avoid the political pressure in the appropriations process that was said to have limited the effectiveness of the Office of Federal Housing Enterprise Oversight ("OFHEO"), which regulated the government entities guaranteeing mortgages. Sen. Report 111-176, 111th Cong., 2nd Sess. 163 (Apr. 30, 2010). The comparison is nonsensical and is a rationalization of a decision made for other purposes. Such a task was not allocated to the CFPB and so whatever pressure OFHEO experienced would not be relevant to the CFPB's activities. In addition, OFHEO's successor agency, the Federal Housing Finance Agency, created in 2008 with a single-director, independently-financed structure, in contrast to the CFPB, has a far more circumscribed mission as a prudential regulator, as did OFHEO, paralleling other independently funded financial agencies.

can maintain political accountability despite Congress's ceding budgetary authority, in contrast to that of the CFPB.

First, in contrast to the CFPB's single-director structure, multimember agencies, as earlier mentioned, tend to be more responsive to Congressional objectives, and, not surprisingly, are a prevalent structure for agencies exempt from the appropriations process.[98] Second, such agencies tend to have a narrow technical mission – prudential regulation and the setting of monetary policy– which circumscribes the scope of agency authority and is thereby thought to mitigate accountability issues and thus potential abuse otherwise generated by independence from the appropriations process.[99] The CFPB's expansive grant of authority to "ensur[e] that all consumers have access to markets for consumer financial products and services" that are "fair, transparent and competitive," is the precise opposite of a narrow, technical mission.[100]

There is, moreover, a widely-acknowledged distinction between the mission of the Fed and that of the CFPB as relates to the need for independence. The core rationale for the independence of a central bank from political accountability is considered to be a problem of time-inconsistency: elected officials, having a short term horizon, would press for a reduction in

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[98] Lewis, supra note 44, at 60, 126 (agencies created in divided government are more likely to be independent commissions when there is a large majority in Congress); Corrigan and Revesz, supra note 46 (similar finding); see also David Epstein and Sharyn O'Halloran, supra note 47, at 97, 135 (Congress delegates less to executive branch in condition of divided government, where one component in delegation index is location of agency, e.g., whether the agency is an independent commission, independent agency, in the cabinet or executive branch, etc.); part I.B, supra (summarizing studies on agency responsiveness to Congress). In addition, as noted earlier, multimember structure can facilitate constituent and congressional monitoring, by information about decisionmaking provided in commissioner dissents, and thereby better align agency and congressional policy preferences. See text at note 6, supra.

[99] Note, Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection, 125 Harv. L. Rev. 1822, 1823-24 (2012).

[100] 12 U.S.C. § 5511(a).

interest rates, but such a policy would lead to an undesirable long term outcome of increased inflation and accompanying poor economic performance.[101] An independent central bank is believed to be able to withstand such pressure and focus on the performance of the economy in the long-run. That critical and widely-accepted rationale for central bank independence is simply inapposite to the CFPB, as there is no such divergence between time horizon and social welfare in legislators' policy preference in the consumer protection context.[102]

Although the CFPB director must file semi-annual reports with Congress, there is minimal sanctioning that Congress can bring to bear to influence the agency to alter policies that it finds objectionable, given its lack of budgetary control, which is a critical disciplining technique because of the difficulty of altering the legislative status quo.[103] Congress, for example, extensively – and successfully – uses limitation riders in appropriations bills, which range from forbidding issuance of specific regulations to curtailing everyday decisions regarding statutory implementation, along with other "extralegal" techniques, such as accompanying

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[101] E.g., Helge Berger, Jakob de Haan and Sylvester C.W. Eijffinger, Central Bank Independence: An Update of Theory and Evidence 15 J. Econ. Surveys 3 (2001).

[102] Bruce Ackerman suggests a need for creating agencies completely independent of the political branches in order to protect "especially fundamental governmental values," which need "special constitutional protection," a thesis supported by comparative evidence of the existence of such entities across nations, providing two examples, election commissions, which serve to monitor the integrity of elections, and central banks. Bruce Ackerman, Good-bye Montesquieu at 129-30, in Susan Rose-Ackerman and Peter L. Lindseth, eds., Comparative Administrative Law (2010). The CFPB does not satisfy Ackerman's criteria, as it cannot be related to any such fundamental value that require special constitutional protection, nor is its mission unique, as there are numerous extant agencies with similar missions to protect consumers that have no special insulation, in both the United States and other nations.

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

nonstatutory directives regarding spending, to constrain agencies' actions.[104]

Appropriations riders are a particularly effective means for a legislative majority to exercise control because they have a privileged legislative status (i.e., they are subject to special floor rules preventing minority holdup).[105] Nonstatutory budgetary directives, which are included in committee reports on appropriation bills or made at hearings, are also a mechanism of congressional control because those committees have effective sanctions by which to obtain compliance, ranging from cutting funding and adding punitive provisos (i.e., objectionable restrictions from the agency's perspective on the use of funds) in subsequent appropriations legislation to using detailed line items rather than lump-sum appropriations.[106] Accordingly, the CFPB's exemption from the appropriations process, in conjunction with its single-person leadership structure and broad regulatory mandate, render it strikingly, and anomalously, insulated from political accountability among independent regulatory agencies.

2. CPSC

The CPSC was established in 1972 with expansive authority over all consumer products, and enforcement responsibility for a multitude of preexisting product safety statutes, as well as a

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[104] E.g., Jason A. MacDonald, Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions, 104 Am. Pol. Sci. Rev. 766 (2010); Michael W. Kirst, Government Without Passing Laws (1969). For example, approximately 300 limitation riders were written into appropriations bills in the House of Representatives per year from 1993 to 2002, affecting agency decisions from forbidding issuance of regulations to curtailing everyday decisions regarding statutory implementation. MacDonald, supra, at 767-69.

[105] Id at 767.

[106] Kirst, supra note 104, at 73-79. Kirst further maintains that committees more commonly use nonstatutory directives than statutory limits to constrain agency action, not only because they are efficient but also because they retain control in the appropriations committees, rather than the legislative committees with jurisdiction over an agency, and the appropriations committees can exercise oversight over whether the agency has complied with their instructions. Id. at 155.

more comprehensive new statute creating it, similar to the authorizing statute of the CFPB.[107] Of all of the agencies in the study, it is the only one with all seven of the Datla and Revesz criteria.

The CPSC's authorizing statute contained a novel regulatory procedure: a public participation process for setting safety standards that provided what were considered to be unprecedented legal rights (i.e., rights going beyond those enumerated in the APA) to the public to petition the agency to create standards, as well as to participate in the early stages of standard development through an "offeror" process requiring the agency to solicit and use individuals outside of the agency to develop initial drafts of a standard.[108] But as fewer safety standards were implemented in the agency's early years than had been anticipated, the regulatory experiment was abandoned for hindering the adoption of standards, and the novel public participation features were repealed in 1981, leaving the agency's standard-setting subject solely

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[107] It would appear to have the most extensive jurisdiction of all agencies in the study, as it has jurisdiction over one million producers and sellers of an estimated ten thousand products. Teresa M. Schwartz, The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade, 51 Geo. Wash. L. Rev. 32, 43 (1982). As earlier noted, the only distinction between the CPSC and the SEC and CFTC concerns the removal power: The chair of the CPSC serves a fixed term, and along with the CPSC commissioners can be removed by the President only for "neglect of duty or malfeasance in office but for no other cause,15 U.S.C. § 2053 (a), in contrast to the chairs of the SEC and CFTC, who explicitly serve at the pleasure of the President, with no statutory language regarding removal for SEC and CFTC commissioners. While CPSC commissioners might appear to have greater insulation than the CFPB director because "inefficiency" is not included as a reason for removal in the CPSC's defining statute, Datla and Revesz persuasively maintain that variation in statutory removal language has no practical effect. Datla and Revesz, supra note 80, at 788.

[108] 15 U.S.C. §§ 2056(d) & 2059(e) (repealed 1981). After the offeror provided a draft, the agency was then to finalize the standard in a conventional notice-and-comment procedure, along with holding a hearing at which oral testimony could be received. As Schwartz, supra note 107, at 45-46 describes, the CPSC was authorized to hold public hearings and conduct investigations in response to petitions and required to act on a petition within 120 days, plus to "promptly commence" proceedings to ban a product or develop a safety standard upon granting a petition. If it denied a petition, a petitioner had the right to go to court and the court was to consider the denial de novo, although the judicial review provision's applicability was delayed for three years to permit the new Commission to establish priorities.

to the APA.[109] As the statistical analysis uses relative, rather than absolute, counts of categories of agency action, it controls for distortions in the comparison created by a potentially lower level of overall activity due to impediments to policy implementation created by the failed public participation experiment.

3. CFTC

The CFTC was created as an independent commission in 1974, assuming jurisdiction over derivative products previously regulated by a bureau within the Department of Agriculture.[110] Similar to the CPSC, the agency's regulatory authority was altered over the two time intervals in which activity is examined. Under its original statute, the CFTC had to approve all proposed futures contracts and commodity exchange rules, and a few years after its establishment, Congress further required the agency to employ a notice-and-comment process, paralleling APA informal rulemaking, to approve all commodity exchange rules that it deemed "economically significant."[111] These requirements were repealed in 2000.[112]

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

[110] The creation of an independent agency was opposed by farm interests and Republican House members, who preferred to retain the agency within the cabinet. The Republican minority lost on a party line vote, at a time of divided government, an outcome consistent with the earlier discussed political science literature indicating that independent agencies tend to be created in such a political environment to strengthen congressional vis a vis presidential control. See Roberta Romano, The Political Dynamics of Derivative Securities Regulation, 14 Yale J. on Reg. 279, 342-43 (1997). Although the CPSC was also created in a period of divided government, its independent regulatory structure had been the recommendation of a national commission established by congressional resolution in 1967. Schwartz, supra note 107, at 36.

[111] 7 U.S.C. § 7a (12), as amended by Pub. L. 95-405, § 12, 92 Stat. 870, 871, 95th Cong., 2d sess. (1978).

[112] Commodity Futures Modernization Act of 2000, § 110, Pub. L. 106-554, 114 Stat. 2763A-384, 106th Cong., 2d sess. (2000) (Appendix E). As discussed in part III, the statistical analysis is run both with and without the actions approving exchange rules and futures contracts that were adopted under the requirements that were subsequently repealed, to retain consistency

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

Because funds are appropriated annually to non-sunsetting agencies such as the SEC and CPSC, one could plausibly contend that there is scant distinction between the politics of appropriations versus reauthorization. But while budget reductions or periodic threats thereof can be expected in the scheme of things, a move to zero appropriation for those agencies, which would be the budgetary analogue to non-reauthorization, has never been contemplated by Congress. Nevertheless, equally true, given its forty-plus years of operation, the possibility of eliminating the CFTC seems as improbable as a zero appropriation for the SEC or CPSC.[113]

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in the comparisons..

[113] The CFTC's reauthorization has often been subjected to delay, with the agency given temporary extensions while legislators negotiate revisions to its authorizing statute or have more pressing matters on the agenda, but abolishing the agency would appear never to have been seriously considered. Romano, supra note 110. In a few reauthorizations, the SEC and its congressional supporters sought to transfer authority over financial futures away from the CFTC to the SEC, which would have been a substantial diminution of the agency's authority as the markets for financial products swamp agricultural ones, but the efforts were repeatedly rebuffed. E.g., id. at 354-70. Subsequently, the 2000 reauthorization provided shared jurisdiction over some security-based derivatives, see Commodity Futures Modernization Act, supra note 110, Title II, and several provisions in Dodd-Frank require joint rulemaking by the agencies, see, e.g.,

Congressional deliberations on its reauthorization have, in fact, focused on expansions or contractions of its authority, rather than its existence.[114] But anticipation of upcoming reviews would, in all likelihood, provide the CFTC with an incentive to be more responsive to Congress than the other agencies.

Accordingly, if Congress prefers rulemaking employing notice and comment, as implied by the McCubbins et al. framework, for providing it with greater leverage over an agency compared to other forms of policymaking, then sunsetting should incentivize the CFTC to use that congressionally-favored regulatory instrument more frequently than other agencies, particularly as reauthorization approaches. Although the paper's data set does not consist of a time series of sufficient length to investigate that intriguing timing issue, if being subject to sunset has a significantly greater impact on an agency's independence than being subject to annual appropriations, then we should observe a difference in behavior between the CFTC and the other agencies. If, however, there is no substantial difference regarding an agency's independence between being subject to reauthorization or annual appropriations, then the CFTC would be expected to behave no differently from the SEC and CPSC. Put another way, if no difference in choice of instrument is observed across these agencies, then we could infer that sunsetting does not have a distinctive impact on agency decisionmaking.

4. SEC

The SEC, a New Deal agency created in 1934, has no discernible idiosyncratic features regarding independence that deviate from the Datla and Revesz indicia, in contrast to the CFPB and CFTC, and as earlier mentioned, lacks only one, statutory removal protection (as is also true

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Dodd-Frank, supra note 2, § 406 (codified at 15 U.S.C. 89b-11(e)).

[114] See Romano, supra note 110 (discussing CFTC reauthorizations from 1970s through 1990s).

of the CFTC). Its organization as an independent regulatory commission might seem to be inconsistent with the political science literature's expectations, given that at the time it was established, the government was unified, and not divided, but also contrary to the literature's perspective on presidential preference, the Roosevelt Administration did not propose that an executive agency enforce the securities laws.[115] Of course, the finding that independent agencies are more likely to be established when there are large majorities under divided government does not imply that such agencies are never formed under unified government.

The timing of the SEC's authorizing statute provides a possible explanation of the somewhat puzzling absence of removal protection: it was enacted after a Supreme Court decision holding that limitations on the President's removal power were unconstitutional, but prior to a subsequent decision upholding for cause limits on the removal of independent agency commissioners.[116] The SEC has, however, from early on been characterized as indistinguishable

[115] The 1933 Act, the first federal law regulating securities transactions, gave regulatory power to an existing independent agency, the Federal Trade Commission ("FTC"), and while the 1934 Act, as proposed by the House and supported by the Roosevelt Administration, retained enforcement power in the FTC, the Senate proposed its placement in a new independent agency. In a compromise in conference, the House gave up FTC enforcement in exchange for the Senate's receding on provisions regarding margin limits. Joel Seligman, The Transformation of Wall Street (3d ed). 70, 96-99 (2003). President Roosevelt apparently did not consider enforcement by an executive agency, as he rejected an initial formulation (of what became the 1933 Act) that would have placed enforcement in the Post Office, and reassigned others to draft new legislation, which, as mentioned, placed that function in the FTC. Id. at 51-52. Seligman quite plausibly explains the creation of the SEC to be an "accident," and suggests that the Senate (and the stock exchange) proposed the new agency out of fear of excessively rigorous enforcement by the FTC, which was led by fervent New Dealers. Id. at 97.

[116] Note, The SEC Is Not an Independent Agency, 126 Harv. L. Rev. 781, 783, 785 (2013) (SEC created after Myers v. U.S., which "appeared to hold that Congress could not limit the President's removal power" but before Humprhey's Executor v. U.S., which held that it could, and so "unsurprising that [the statute] had nothing to say about removal").

from independent agencies with removal protections,[117] and, as earlier noted, the commissioners are widely perceived to have removal protection by courts and commentators.

5. Summing Up the Comparative Assessment

The CFPB's distinctive lack of a multimember structure, when compared to the other agencies under study, from among the Datla and Revesz criteria of independence makes possible identification of an impact on agency policymaking of a specific structural characteristic of independence in the empirical analysis. However, given the agency's other distinctive feature of being independent of the appropriations process, which is not one of Datla and Revesz's indicia of independence, the empirical analysis will not be able to isolate whether a difference in behavior between the CFPB and the other agencies is due to the divergence in leadership structure or funding, or some combination of the two. In addition, if a more granular degree of independence than that identified by reference to the Datla and Revesz criteria affects an agency's choice of policy tools, then we would expect, on a continuum of political insulation given the differences between the CFTC, CPSC and SEC, a significant and progressive increase in the use of less politically accountable nonlegislative rules moving from the CFTC (which must be reauthorized) to the SEC and CPSC and then to the CFPB (the most autonomous agency).

If, however, being subject to periodic reauthorization does not impact administrators' behavior differently from those who are subject to appropriations, then the location on the continuum of activity for the CFTC would approximate that of the SEC. By contrast, if multimember leadership structure is more critical than other independence features, then we

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

would expect to find no discernible distinction in behavior among the three bipartisan commissions, the CPSC, SEC and CFTC, but a striking differentiation between those agencies and the CFPB. That outcome would also hold if the sole factor affecting agency accountability was whether or not it was subject to congressional appropriations.

III. Analysis of Agency Rulemaking

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

A. Data set Construction and Summary Statistics

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

Enforcement actions are excluded from the analysis, although agencies do, on occasion, undertake substantive policy initiatives through such activity, due to measurement and tractability issues. For instance, according to a study of SEC reporting of enforcement actions, year-to-year data is not reliable: the practice of joining defendants in one action or bringing

separate actions based on one investigation is inconsistently applied over time and across regional offices, and there is double- or triple-counting (follow-on administrative actions imposing industry bars or registration revocations are counted as well as the underlying federal court or administrative adjudication of liability).[118] Quite apart from accuracy of counts, it would further not be practicable to review the thousands of enforcement actions that were brought by agencies within the sample periods in order to differentiate which ones should be included for possibly supplanting notice-and-comment rulemaking by constituting new policy initiatives versus excluded as garden variety cases.[119]

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

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[118] Urska Velikonja, Reporting Agency Performance: Behind the SEC's Enforcement Statistics, 101 Cornell L. Rev. 901, 934-35 (2016)

[119] To convey a sense of what would be a prohibitive undertaking, consider that in the past three years, a leading securities law service published a list of the top 10 SEC enforcement actions (from among the over 800 brought each year), and at most only one or two of the thirty could be characterized as involving a new policy initiative that could more appropriately have been issued through rulemaking. The lists are in: Marc D. Powers, Andrew W. Reich and Jonathan A. Forman, Top 10 SEC Enforcement Highlights of 2016, Fed. Sec. L. Rep. No. 2759 (Jan.19,2017); Marc D. Powers, Andrew W. Reich and David M. McMillan, Top 10 SEC Enforcement Highlights of 2015, .Fed. Sec. L .Rep. No. 2710 (Jan. 21, 2016); Marc D. Powers, Andrew W. Reich and Yulia M. Fradkin, 2014 Top 10 SEC Enforcement Highlights, Fed. Sec. L. Rep. No.2663 (Feb. 5, 2015). Of course, this characterization is only suggestive as other practitioners would, no doubt, generate alternative lists which might contain more (or less) rule-like enforcement actions.

infeasibility of evaluating all of the possible enforcement actions prevents ascertaining the prevalence of such a pattern for the agencies under investigation.

Documents for all identified regulatory activity were reviewed and classified as rules or guidance following the description appearing in the Federal Register or agency website (i.e., the agency's own characterization).[120] Table 1 provides an overview of all identified activity by agency, and as explained below, Table 2 tallies the subset of activity from Table 1 that is used in the empirical analysis. Rules are divided into two broad categories, those adopted in a notice-and-comment procedure ("notice-and-comment") and those that were not, i.e., rules and other final action, such as orders, effective upon publication without prior notice and solicitation of comments.[121]

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

[121] CFTC approvals of exchange rules that, as earlier noted, were required to employ a notice-and-comment process, are separately tallied in the tables and not included in the tally of notice-and-comment rules, but are counted as notice-and-comment rules in the statistical analysis. Proposed rules are not included in the data set for two reasons. First, exclusion avoids

Non-notice-and-comment rules include both interim final rules and direct final rules, which are the rules, along with notice-and-comment promulgations, investigated by O'Connell in her study. The tables separately indicate the number of actions in those two subgroups for comparative purposes with O'Connell's analysis, but they are also included in the tables' tally of "non-notice-and-comment" rules.[122] Only the CPSC issued any direct final rules. The infrequent use of such an instrument is consistent with O'Connell's finding that independent agencies were not the "greatest users" of direct final rulemaking.[123]

The non-notice-and-comment rule category includes a diverse set of final agency actions that are neither interim nor direct final rules. The categories with the greatest number are CPSC orders approving third-party-devised safety standards and revising third-party testing accreditations, and CFTC approvals of futures contracts. Given the large number of those actions on the CPSC and CFTC regulatory dockets, they are separately itemized in the tables, but as with interim and direct final rules, they also are included in the tables' tally of non-notice-and-comment rulemakings.[124]

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what would otherwise result in double counting notice-and-comment rules, once when proposed and comments are solicited and again when the rule is finalized. Second, as some proposed rules are never adopted, it would be misleading to include such proposals as they never had legal consequences.

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

[123] O'Connell, supra note 66, at 933.

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

Agency guidance can be issued in many formats. The tables tally guidance documents using an agency's own classification.[125] While the tables provide granularity with respect to the type of guidance document, little value-added information is gained by differentiation.[126] As indicated in the tables, agencies sometimes solicit comments on guidance documents at the time of issuance, typically explicitly noting that comments are not required under the APA (as they also do when soliciting comments on what they determine to be APA-exempt legislative rules). As with interim rules in which comments are sought ex post, the guidance documents are rarely thereafter revised.

APA's notice-and-comment procedure.

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

[126] The agencies' variously named guidance documents are combined into one guidance category in several subsequent tables and figures. Regardless of designation, the legal effect is the same: as discussed earlier, they are exempt from APA notice-and-comment requirements and, as a general proposition, not subject to pre-enforcement judicial review. Quite apart from the equivalence in legal consequences across guidance subcategories, a further rationale for aggregation is that the nomenclature across agencies can be idiosyncratic (i.e., only the SEC issued guidance documents denoted "concept releases"), and thereby renders a more granular comparison problematic.

As indicated by comparing Tables 1 and 2, a sizeable proportion – one third (237 of 717) – of rules not subject to notice-and-comment consist of nonsubstantive regulatory activity, such as technical corrections for spelling, punctuation or cross-reference mistakes in previously published rules, extensions of effective dates, and rules related to an agency's internal organization or procedures, which, as earlier detailed, fall within the APA's notice-and-comment exemptions.[127] The tabulations in Table 2 eliminate these inconsequential, housekeeping rules as they have no significant substantive policy content, along with guidance pronouncements deemed trivial (i.e., those merely summarizing an existing rule and neither interpreting a rule nor announcing a new policy initiative).[128] As with exempt rules, an appreciable proportion of guidance fits in this category (43 percent or 172 of 399). A further reason for excluding inconsequential activity is that some agencies have a higher frequency of issuing nonsubstantive rules, such as technical corrections, than others, and if such activity were to be included, it would

[127] 5 U.S.C. § 553(a) (2) (notice-and-comment section not applicable to matters relating to "agency management or personnel"). Rules that extend effective dates may well significantly impact regulated entities, but they are excluded because they do not contain new policy initiatives and inclusion could bias downward an agency's use of notice-and-comment, as extensions are exempt rules that typically extend rules that were adopted by notice-and-comment. In addition, many extensions, if included, would result in doublecounting policy initiatives. For example, eleven of fifteen rule extensions adopted by the SEC, which issued the most extensions, were continuances of extensions of four rules.

[128] Appendix Table A1 maps the construction of Table 2 from Table 1. As indicated in that table, the largest categories of nonsubstantive rules consist of technical corrections (97) and amendments (47 rules). The most frequent technical amendment is a rule adjusting a statutory asset size exemption threshold in accordance with changes in inflation. Two notice-and-comment rules are excluded from Table 2 because they fit the definition of nonsubstantive applied to determine which non-notice-and-comment rules to exclude: one, adopted by the CFTC in its initial years of operation, related solely to internal agency practice; the other, adopted by the CFPB, was a technical amendment delaying a rule's effective date. An action is included in Table 2 if there is any ambiguity about whether to classify it as inconsequential.

skew the calculation of agencies' relative use of notice-and-comment rulemaking.[129]

As Table 2 indicates, there are 707 agency actions, of which 480 (68 percent) are rules and 227 (32 percent) are guidance, which constitute the data used in the statistical analysis.[130] Of the regulatory activity reported in the table, 295 are rules adopted by notice-and-comment proceedings, which is a substantial majority of aggregate rulemaking (approximately 62 percent), albeit less than half (approximately 42 percent) of total regulatory activity.

Figures 1 and 2 present graphically the use of regulatory instrument by agency, showing, respectively, the number and percentage of activity, by agency, divided into three categories: notice-and-comment rules; all other rules (i.e., notice-and-comment-exempt rules, including interim and direct final rules, and other non-notice-and-comment rule-like categories of final agency action); and guidance (i.e., all nonlegislative action). As visual inspection suggests, the proportion of notice-and-comment rulemaking varies markedly across the agencies, ranging from 25 percent (CFPB) to 58 percent (SEC and CPSC). These data also underscore the continued pertinence of O'Connell's observation that agencies "still engage in a significant volume of

[129] Moreover, some nonsubstantive rules are agency-specific, and their inclusion would distort a comparative analysis. For instance, the SEC publishes as rules, updates to its Edgar file manual (which contains instructions for firms' submission of required informational filings electronically); there is no analogue in the other agencies' regulations, and as indicated in Table A1, these 21 non-notice-and-comment rules comprise 16 percent of total SEC rulemakings. Similarly, as agency practice regarding guidance varies, excluding inconsequential guidance reduces the potential for distortion in analyzing the relative use of notice and comment that would occur were no adjustment made. All agencies, for example, are required by federal law to publish guides for small firms that explain how to comply with regulations, which is guidance that fits my definition of inconsequential, but only the SEC website enabled consistent identification of such guides, which at 24 in number, constitute 21 percent of SEC guidance documents. Accordingly, these inconsequential though numerous SEC small firm guides are excluded from the analysis.

[130] If the CFTC's 39 exchange rule and futures contract approvals are excluded from the analysis, given their origination in the private sector, in contrast to actions undertaken on the agency's initiative, then the proportion of rules and guidance are minimally impacted, at, respectively, 66 percent and 34 percent.

notice-and-comment rulemaking."[131]

The far greater use of notice-and-comment proceedings compared to interim rulemaking by agencies in this study (with the CFPB being the notable outlier) is consonant with O'Connell's further finding that only a small proportion of independent agencies' rulemaking consists of interim final rules.[132] Only the CFPB, at 34 percent of total rules, comes even within the range of the proportion of interim rules issued by the most frequent users of such a regulatory instrument reported by O'Connell (a range of 34.2 to 49.4 percent), and then it is at the lower end of that range.[133] Somewhat more than half (15 of 25) of the CFPB's use of interim final rules was to implement the transfer of regulatory authority from predecessor agencies (i.e., those agencies' existing rules were adopted as interim final rules by the CFPB, with little substantive change). Although the CPSC did not identify the mechanism by which it transferred predecessors' regulations as interim final rules, both agencies' rationales for those rules' being exempt from notice-and-comment requirements were the same: the transferred regulations did not add any new requirements and were therefore "unnecessary" under the APA's "good cause" exemption.[134]

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[131] O'Connell, supra note 66, at 936. These data bolster the contention of Yackee and Yackee, supra note 18, that the "ossification" objection to notice-and-comment rulemaking is overstated.

[132] Id. at 935.

[133] Id. at 934 (proportion of interim rules as a percentage of agency rulemaking of the five most frequent users of interim rules).

[134] E.g., Consumer Product Safety Comm'n, Subchapter D- Flammable Fabrics Act Regulations, Part 1607-Procedures for the Development of Flammability Standards, Part 1609-National Advisory Committee for the Flammable Fabrics Act, Revision and Transfer of Regulations, 39 Fed. Reg. 40,758, 40,759 (1974); Consumer Financial Protection Bureau, 12 CFT Part 1026, Truth in Lending (Regulation Z); Interim Final Rule, 76 Fed. Reg. 78,766, 79,770 (2011). The CFPB provided additional rationales, such as the transferred rules' having originally been adopted by notice and comment. Id.

Table 3 shows the breakdown of agency activity by year, including the activity agencies undertook in response to Dodd-Frank.[135] It indicates that agency activity varies over time and that, for agencies subject to Dodd-Frank (the CFPB, CFTC and SEC), the bulk of their notice-and-comment proceedings were concentrated on implementing that statute's requirements. Indeed, many of their non-notice-and-comment rulemaking and guidance pronouncements also were issued under provisions of the statute. As a proportion of total regulatory action over the period, 75 percent of CFPB activity, 75 percent of that of the CFTC and 56 percent of that of the SEC referenced a provision in Dodd-Frank as the statutory basis for the action. These data underscore the extensive regulatory demands generated by Dodd-Frank.

Figure 3 plots regulatory activity in three categories (notice-and-comment rule; non-notice-and-comment rule, and guidance) over time for each agency, for the four agencies in aggregate in 2011-16, for the three agencies in aggregate in years of initial operations, and only notice-and-comment rulemaking for all agencies over all time intervals. There is no apparent consistent downward trend in agencies' notice-and-comment activity, in contrast to a decline reported by O'Connell from the 1990s to early 2000s.[136]

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

[136] In an article focused solely on rulemaking during party transitions that extends the data set of her earlier work, O'Connell confirms the earlier study's finding of less frequent rulemaking activity in the initial year of a new administration, and suggests as the explanation, the considerable time required for a new administration to staff an agency, due to delays experienced in the nomination and confirmation process. Anne Joseph O'Connell, Agency Rulemaking and Political Transitions, 105 Nw. U. L. Rev. 471, 495-97 (2011). The activity of the agencies under study does not comport with her findings. As indicated in Figure 3, there is a spurt in rulemaking by the CPSC in the first year of the Carter presidency, whereas the CFTC's rulemaking, more consistent with O'Connell's data, does not begin to increase substantially until the administration's second year. The sizeable increase in CFTC activity in 1979 (the Carter administration's third year) is largely due to a 1978 amendment to the CFTC's authorizing statute which, as previously noted, required the agency to employ notice and comment for

During the post-Dodd-Frank years, the political environment shifted from unified government, as Democrats controlled both chambers of Congress along with the presidency in 2011-2012 (years 1-2 in table 3), to partially divided government (i.e., control of the House of Representatives switched to Republicans) in 2013-14 (years 3-4), and then to fully divided government in the final two years, when Republicans controlled the Senate as well as the House. The political environment in which the initial regulatory activity of the CPSC and CFTC occurred is nearly a mirror image. Congress remained under Democratic control throughout the interval, while it began with fully divided government (a Republican president) in 1973-76, but shifted to unified government in the later years (1977-80), when Democrats won the White House. O'Connell found an increase in rulemaking by independent agencies in the context of Republican-controlled Congresses. The agencies in this study, as indicated in Figure 3, do not evince such an effect. To the contrary, visual inspection suggests that there is no pattern of regulatory activity in relation to changes in the political environment (i.e., undivided versus divided government).

B. Statistical Analysis

Crosstabulations were computed to assess, as a first cut, whether there is a significant difference in agencies' use of notice-and-comment rules. As indicated in Table 4, all permutations comparing agencies that include the CFPB indicate that notice-and-comment activity is significantly different from that which would randomly be expected, whether the

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approval of economically significant exchange rules (which account for 15 of the 26 notice-and-comment rules that year). There was also a larger number of proposed futures contracts (8) in 1979 than in other years. As both types of action originate in activity by the private-sector (commodity exchanges), this increase in agency action compared to the earlier years of the Carter administration would not, therefore, seem to be explained as a function of staffing difficulties at the beginning of a new administration.

CFPB is compared to (i) all agencies, including the CFTC and CPSC in both the post-Dodd-Frank period and their initial years of operation; (ii) all agencies, in the post Dodd-Frank time interval; (iii) only the agencies subject to Dodd-Frank in the post-Dodd-Frank period (i.e., SEC and CFTC); (iv) only the CFTC and CPSC in their years of initial operations; and the first three comparisons but grouping all the non-CFPB agencies together. Chi-square tests that compare observed to expected frequencies of events (here, notice-and-comment rulemaking) reject the hypothesis that the proportions are identical for all agencies.

But when the CFPB is removed from the crosstabulation, there is no significant difference in use of notice-and-comment from what we would expect to occur randomly (all chi-square tests are insignificant, indicating that the null hypothesis of no difference in activity cannot be rejected). Accordingly, simple univariate tests indicate that the CFPB uses notice-and-comment rulemaking significantly less frequently than the other agencies under study.[137] Of course, these tests do not control for timing and political environment, which affected agency policymaking in O'Connell's study, and for which a multivariate analysis is required. But they do suggest that nuanced differences in agency structure among the CFTC, SEC and CPSC are not plausible factors that affect an agency's choice of rulemaking instrument, compared to the overarching distinctive structural difference between those agencies and the CFPB (i.e., not

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

being subject to the appropriations process or having a multimember leadership structure with a bipartisan balance). Given a consistent finding that there is no significant difference in the other agencies' notice-and-comment rulemaking as a group, and intra-agency over time, their activity is aggregated in the multivariate analysis that follows.

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

Table 5 presents results of maximum likelihood logit regressions of the probability that a regulatory activity follows a notice-and-comment proceeding.[138] The explanatory variables include a CFPB indicator variable that equals 1 if the adopting agency is the CFPB, and 0 otherwise; an indicator variable for whether an agency referenced a provision of Dodd-Frank as the statutory basis for the action; the year of adoption (coded as 1-6, to be able to include all agency observations in one regression but maintain the life-cycle comparison, given different years when the activity was undertaken); and an indicator variable for whether an activity was adopted when there was fully divided government (years 5 and 6 in the post-Dodd-Frank interval and years 1-2 and 1-4, respectively, for the CFTC and CPSC in their years of initial operation).

The model is run for all agencies in both time intervals (model 1), and then just for agency activity taking place in 2011-16 (i.e., excluding observations from the initial years of operation of the CFTC and CPSC), to eliminate noise in the estimation of the year and political

[138] The maximum likelihood logit regression estimates the function: $Pr(y=1) = F(ß_0 + ß_n X_n)$, where $F(.) = e^2 /(1 + e^2)$ is the cumulative logistic distribution. All statistical analyses were conducted in Stata.

variables arising from including regulatory activity undertaken in a different environment (model 2).[139] Finally, a model is run excluding all CPSC activity and that of the CFTC in its initial years, thereby including only activity of the three agencies subject to Dodd-Frank rulemaking requirements in the post-Dodd-Frank interval (CFPB, CFTC and SEC) (model 3). This latter model eliminates the possibility of a misleading inference regarding the impact of Dodd-Frank that could be affected by the presence of a number of observations on which it could have no influence (i.e., on the regulatory activity of the CPSC or of the CFTC in its initial years). Finally, given potential collinearity between the year and divided government variables, the model is estimated including each of those variables separately.[140]

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[139] Because orders are considered adjudications and not rules, Manning and Stephenson, supra note 28, at 707, the regressions in the table were also run excluding orders. There is no change in significance, sign or magnitude of the results from those reported in the tables when orders are excluded from the analysis. In addition, a substantial proportion (close to one-third) of rules adopted by the CFTC in its initial years of operation were responses to private party activity (approval of futures contracts and exchange rules), and, as earlier noted, the agency's required approval of those matters was eliminated a decade before the post-Dodd-Frank period. Accordingly, the models in Table 5 in which the CFTC's activity in its years of initial operation are included were also estimated dropping observations for actions approving futures contracts and exchange rules. In neither of those reestimated regressions was the sign or significance of any of the independent variables different from those reported in the table, and the coefficient magnitudes were similar. For the four regulatory actions adopted in December but not published in the Federal Register until the following January, see note 133 supra, the reported regressions classify those observations in the earlier year of agency approval, but all results are unchanged when the regressions are reestimated using the Federal Register publication year instead for those observations. Finally, fifteen CFPB guidance documents were lists defining depositary institutions subject to the agency's jurisdiction and eight guidance documents were lists identifying rural counties that are exempt from various mortgage rules. Although these lists have important consequences for the entities included, the documents could be considered insignificant, as they do not consist of new initiatives. Accordingly, all models in Table 5 were estimated excluding these guidance actions (both separately for the two lists as well as jointly) and in no instance were any results different from those reported in the table.

[140] The two variables are highly correlated (significant at less than .01), ranging from .13 for all observations (model 1) to .78 for observations only of agencies subject to Dodd-Frank in the post-Dodd-Frank period (model 3). The results are, however, unaffected - in significance and coefficient magnitude – if both variables are included in all three models reported in Table 5. Regressions were also estimated defining the divided government indicator variable to include

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

Notice-and-comment rulemaking is also significantly positively related with an action's being associated with a provision in Dodd-Frank. But Dodd-Frank activity would not appear to be the cause of the differential regulatory activity between the CFPB and the other agencies: in a model (unreported) that omits all activity referencing Dodd-Frank, the dummy variable for the CFPB is still significantly negative at less than one percent (whether the other regressor is year or divided government, either of which remains insignificant). Dodd-Frank requirements are therefore not driving the results. Accordingly, the analysis is consistent with the hypothesis that agency design matters. More specifically, it is consistent with the particular hypothesis motivating this paper's inquiry, that the more insulated an agency is from political accountability (the CFPB), the less likely it will employ notice-and-comment rulemaking to implement its mission.[141]

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years in which there was "partial" divided government (i.e., years 3-4 in the post-Dodd-Frank interval when Republicans controlled the House). The redefined divided government variable remains insignificant in models 2 and 3 (.85 and .98, respectively), although it is marginally significant in model 1, at 8 percent. I have no explanation for such a finding, which is puzzling as the change in variable definition affects only post-Dodd-Frank actions, but as it is still insignificant using conventional significance levels, I do not consider it to be of import.

[141] Because there was no bureau director until January 2012, when President Obama made a recess appointment, and Dodd-Frank limited the agency's ability to regulate nonbanks in the absence of the initial appointment of a director, the three regression models in Table 5 were

Table 6 transforms the regressor coefficients of the best-performing model in Table 5 (i.e., the model with the highest percentage of correct classifications and best goodness-of-fit, which is model 3, estimated only on actions by agencies subject to Dodd-Frank, the CFPB, CFTC and SEC in the post-Dodd-Frank interval) into odds ratios. These ratios indicate how much more likely an action will be a notice-and-comment rule when it has the characteristic of the specific independent variable, holding all other variables constant. The transformation into odds ratios therefore provides interpretive content to the statistical significance of the variables that is easier to appreciate. As the ratios reported in Table 6 indicate, a regulatory action is 22 percent less likely to be a notice-and-comment rule if the agency is the CFPB, and seven times more likely to be such a rule if the subject matter relates to Dodd-Frank. The odds ratio computation provides a compelling and striking, as well as more readily comprehensible, indication of how atypical the CFPB's mode of decisionmaking is.

An alternative, seemingly plausible interpretation of the findings could relate to agency expertise, that is, an agency could be less likely to employ notice-and-comment rulemaking when it is resource-rich, on the view that an agency lacking sufficient resources to obtain

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reestimated omitting the 2011 observations (in parallel omitting 1975 observations for the CFTC and 1973 observations for the CPSC in model 1), to eliminate the possibility that the CFPB's lower likelihood of using notice-and-comment rulemaking is due to reticence to act in the absence of a director. But as reported in Appendix Table A2, that is not an explanation for the observed significant difference: the sign and significance of all of the independent variables are unchanged when the earlier months' activity is omitted. Regressions (unreported) were also estimated omitting observations through July 15, 2013 (and analogous observations through July 15 for the CFTC in 1976 and CPSC in 1974 in model 1), which is the day before the bureau director's appointment was confirmed by the Senate, in case a potential question concerning the constitutionality of the recess appointment restrained the CFPB from engaging in informal rulemaking prior to his confirmation. Again, all findings of significance and insignificance are unaffected. While constitutionality might not have been an agency concern in 2012 and therefore not affected its decisionmaking, in fact, the recess appointment was found to be unconstitutional. See. National Labor Bd. v. Noel Canning, 134 S.Ct. 2550 (2014) (invalidating on constitutional grounds three other recess appointments made on the same day).

information on its own regarding appropriate policy would find public input provided by notice-and-comment essential. This intriguing hypothesis is not, however, supported by the data on available agency resources: the CFPB is not the most resource-rich agency of the four agencies under study.[142] The CFPB's 2016 budget (i.e., the amount of funds it requested to be transferred from the Fed) was $565 million, in contrast to the SEC's appropriated budget for that year of $1.6 billion, although the CFPB's resources were substantially greater than those of the CFTC and CPSC, whose appropriated budgets for 2016 were $250 million and $125 million, respectively. If available resources are calculated on a staff per capita basis, by the ratio of agency budget to employees, an arguably more accurate comparative metric of administrative capacity, then the CFPB is no richer than either the CFTC or the SEC, with roughly similar ratios of $355,000, $350,000 and $381,000, respectively, with only the CPSC's ratio being substantially lower at $221,000. Agency organization would, therefore, appear to be a more plausible explanation of the results than expertise, as proxied by availability of resources.

There is no association between year and adoption of notice-and-comment rules (i.e., the year indicator variable is insignificant). A number of robustness checks were run that varied the method for identifying a time trend: using actual years rather than the values 1-6 for the year variable, in case conflating different years in which agencies' initial operations occurred creates noise; and including dummy variables for each year (with year 1 being the omitted year) offering a more granular test of a time trend. The findings of insignificance for the variable(s) indicating time were, however unaffected, confirming that there is no temporal trend in notice-and-

[142] Budget and staff figures were obtained from agency reports and congressional appropriations bills for fiscal year 2016.

comment rulemaking.[143]

There is also no association between the political environment (divided versus unified government) and notice-and-comment rulemaking, as the divided government indicator variable is insignificant in all of the multivariate analyses, a finding at odds with O'Connell's finding that the political environment impacts independent agency decisionmaking.[144] To probe the robustness of this divergent finding, three alternative models were estimated.

First, as the independent agencies whose behavior O'Connell found altered were all structured as independent regulatory commissions, the three models of Table 5 were reestimated to include an interaction term between the CFPB dummy and divided government variables (unreported). The rationale for including this variable is that due to its greater political insulation, the CFPB might not be expected to react to changes in the political environment in a similar way to the agencies that O'Connell found affected. The interaction term was, however, insignificant in all three regressions. Second, a model was estimated excluding the CFPB

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[143] Only one year dummy was significant in only one model (year 5 in the model including all agencies in all time periods (i.e., all 707 observations), Moreover, tests in all three models of whether the coefficients were the same for all of the year dummies were all insignificant, that is, the hypothesis that notice-and-comment activity was not significantly different across time could not be rejected.

[144] A earlier discussed, the divided government variable is equivalent to a dummy variable for a Republican Congress or Republican president, and thus is equivalent to the political environment that O'Connell and Yackee and Yackee found impacted informal rulemaking. See note 75, supra. To check whether the insignificant variables, year and divided government, might still contribute explanatory power, a nested logit likelihood-ratio test was undertaken to compare a full model including the agency, Dodd Frank, year and divided government variables to a model excluding the year and divided government variables, on the observation sets of all three models in Table 5. The difference in the log likelihoods of the two regressions multiplied by minus two has a chi-squared distribution with two degrees of freedom. The resulting test statistic was insignificant in all estimations (chi-squared statistic of 0.88, probability of.6449 for model 3 observations; chi-squared statistic of 0.52, probability of .7709.for model 2 observations; and chi-squared statistic of 4.7, probability of .0956, for model 1 observations).

observations, so that only agencies structured akin to those in O'Connell's study are included, and again, the divided government variable was insignificant.[145] Third, because O'Connell's data set does not contain guidance, the three models were reestimated using only the regulatory activity that she investigates: notice-and-comment, interim and final direct rules. Still, the divided government variable was insignificant, while notice-and-comment rulemaking was significantly negatively associated with the CFPB, and in the two models including CPSC observations, still significantly positively associated with Dodd-Frank.[146]

Finally, there is a question whether Dodd-Frank's imposition of numerous deadlines on regulatory mandates could explain the CFPB's less frequent recourse to notice-and-comment rulemaking rather than its more insulated structure. Gersen and O'Connell, for instance, find that there is a statistically significant higher percentage of interim final rules among rules with deadlines than without (12 percent compared to 8 percent), although they do not report equivalent information regarding notice-and-comment rules.[147] An inference from their analysis would be that deadlines should encourage an agency to favor rulemaking that avoids the notice-

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[145] This model, of course, does not include the CFPB dummy variable and includes only the political environment and Dodd-Frank dummy regressors. A further model (unreported) was run on the divided government variable using solely CPSC and CFTC actions in their initial years of operation, as those activities occurred in a political environment (a Republican president rather than Congress) different from that of the post-Dodd-Frank period. In that regression, the divided government variable was significantly negative, indicating less, rather than more, notice-and-comment rulemaking by independent agencies under a Republican president, a finding that is the precise opposite of O'Connell's.

[146] The models were also reestimated solely using all legislative rules, given the greater number of types of such rules (e.g., orders) included in this paper's data set. Again, the divided government variable is insignificant, agency dummy variable is significantly negative and Dodd-Frank dummy variable is significantly positive in all three models..

[147] Jacob E. Gersen and Anne Joseph O'Connell, Deadlines in Administrative Law, 156 U. Pa. L. Rev.923, 943 (2008).They examine rulemaking from 1987-2003, in which the bulk of the data set consists of rules issued by executive branch agencies.

and-comment process, as that would facilitate more rapid implementation of mandated policy within a deadline. As the CFPB was not the only agency subject to Dodd-Frank deadline requirements, there is a comparative benchmark against which to assess whether pressure to meet deadlines, and not structural independence, explains its anomalous behavior.

Attempting to meet Dodd-Frank deadlines does not explain the CFPB's anomalous behavior regarding use of notice-and-comment rulemaking. Dodd-Frank imposed markedly fewer rulemaking deadlines on the CFPB than on either the CFTC or SEC, with statutory directives imposing mandated rulemaking with deadlines of 16, 41 and 69, respectively.[148] Table 7 tallies agencies' rulemaking activity associated with Dodd-Frank deadlines. Not only does it indicate that agencies with greater notice-and-comment activity had more statutory deadlines to meet, but also, it indicates that the vast majority of statutory directives requiring deadlines were met with notice-and-comment rulemaking, a result inconsistent with Gersen and O'Connell's finding.

As a test whether the CFPB dealt with the statutory burden differently from other agencies, model 3 was reestimated to include an interaction term between the Dodd-Frank and CFPB indicator variables to capture any such divergence. The interaction term was, however, insignificant in both versions of the model (year or divided government) reported in Table 5, while the effect of the separate indicator variables for the CFPB and Dodd-Frank were unchanged – significantly negative and positive, respectively, at less than one percent.

As Table 7 indicates, agencies adopted multiple rules under Dodd-Frank provisions with a deadline, and some rules related to multiple deadline provisions. Model 3 of Table 5 (the model with only actions by agencies affected by Dodd-Frank) was reestimated with a deadline

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

indicator variable equaling 1 for any rule that was identified as implementing a provision in Dodd-Frank that imposed a deadline on the required rulemaking, and then with a "first" deadline indicator variable equaling 1 only for the first rule issued under such a provision. In their respective regressions, both deadline variables were significantly positively related to notice-and-comment rulemaking (at less than one percent), while the significance of the other variables in the reported regressions without deadline variables was not affected.

To investigate further whether the CFPB was differentially affected by deadlines, interaction variables between each of the deadline variables and the CFPB dummy were constructed. The interacted variable using the first adopted rule under a deadline was insignificant, while that using all rules adopted under a deadline was significantly positive, indicating that, if anything, the CFPB was more likely to use notice and comment for rules that could at all be related to a deadline. Accordingly, the hypothesis that the CFPB's significantly lower probability of using notice-and-comment rulemaking compared to other agencies is a function of the urgency of meeting statutory deadlines can be rejected.

IV. Implications for the CFPB's Structure and for Agency Design

The key empirical finding – that the agency structured to be the most independent from political accountability engaged significantly less frequently in notice-and-comment rulemaking than three other cognate, albeit less politically insulated, agencies – indicates that agency structure would appear to affect the choice of regulatory instrument. Agency structure can thereby facilitate avoidance of congressional objectives regarding its legislated preferred option in regulatory decisionmaking: notice-and-comment rulemaking. Of course, this is not to say that for any specific policy there is a wide variety of considerations that influence an agency's choice

of regulatory instrument.[149] The contention, informed by the statistical analysis, is that the institutional effect will be in the aggregate, that is, an agency will be more apt to engage in unconstrained policy formulation, without recourse to use notice-and-comment, the more independent it is of political control because it can suffer minimal adverse consequence from engaging in that behavior. After all, notice-and-comment rulemaking is cumbersome and time-consuming from an agency's perspective, and a leadership that is confident in its policy judgments and unfettered from political discipline, can quite simply avoid it.

Short-circuiting notice-and-comment rulemaking has, in turn, a negative feedback loop of diminishing Congress's capacity to engage in agency oversight, given that one of the notice-and-comment process's functions, as posited by McCubbins et al., is to provide a mechanism for Congress to obtain information regarding policy initiatives and thereby to facilitate its exercise of control over policy. As a consequence, such behavior reduces the democratic legitimacy and accountability of the administrative state - both directly (by elimination of the public's formal participatory role) and indirectly (by limiting the ability of Congress to exercise oversight and thereby control). This section discusses the implications of this key finding, initially for the ongoing controversy over the CFPB's structure, and then more broadly, albeit more briefly, for reform proposals addressing regulatory strategy and the literature on agency design.

A. Organization of the CFPB

A rationale often invoked for rejecting legislative proposals to restructure the CFPB along more conventional lines, that the agency is doing just fine because it "has produced a relatively small number of major new rules through a deliberate process,"[150] is factually in error.

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[149] E.g., E. Donald. Elliot, Re-Inventing Rulemaking, 41 Duke L.J. 1490 (1992).

[150] Ingo Walter, Rebalancing Consumer Protection in the Trump Era, in Matthew P. Richardson, et al., eds., Regulating Wall Street: CHOICE Act vs. Dodd-Frank 161 (2017)

The mistake in such an assessment is that it misperceives the legal landscape. As the statistical analysis demonstrates and case studies in the Appendix illustrate, the CFPB has employed much more frequently guidance and exempt rules, instruments far from the deliberation that is either explicitly or implicitly being lauded. Only 25 percent of the CFPB's significant regulatory activity was effected by a notice-and-comment rule (compared to 58 percent by the SEC, 50 percent by the CFTC and 43 percent in its years of initial operations, 58 percent by the CPSC and 48 percent in its years of initial operation. Another metric evidencing the CFPB's anomalous behavior is that a regulatory action was 22 percent less likely to be undertaken by notice-and-comment rulemaking if the agency was the CFPB rather than the other agencies. In a nutshell, the data indicate that the quality of the CFPB's decisionmaking, and hence the appropriateness of its current organization, cannot be properly assessed by referencing only its notice-and-comment rulemaking because that is simply not the sole, or even major, arena in which the agency's regulatory initiatives are taking place, as further underscored by the case studies in the Appendix.

In light of the party line vote on the Dodd-Frank legislation in which the CFPB was established, its anomalous independent structure has been an ongoing point of contention, with bills regularly introduced by Republicans to reorganize the agency more conventionally and thereby subject it to greater political accountability.[151] The continuing effort by opponents of the

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(quoting approvingly Harvard economist John Campbell).

[151] For a summary of eleven bills introduced in the 113th Congress (the penultimate session under the Obama administration), proposing a restructuring of the CFPB offered under divided government, see Andrew J. Buczek and Haydn J. Richards, Jr., House Financial Services Subcommittee Holds Legislative Hearing on CFPB Proposals, CONSUMER FIN. SERVS. L. BLOG (May 27, 2014), http://www.cfs-lawblog.com/House-Subcommittee-Hearing-CFPB-Proposals. In the newly formed 115th Congress commenced in January 2017, four bills were introduced to restructure, or eliminate the agency in the session's first two months. See S. __ 115 Cong., 1st Sess. (Feb. 15, 2017) (CFPB Accountability Act of 2017 (subjecting CFPB to regular

CFPB to restructure the agency fits a pattern in U.S. political history: agency terminations, not simply restructurings, upon changes in administration have been common enough occurrences.[152]

The statistical analysis further suggests that Republican efforts to restructure the agency along conventional independent commission lines are not simply an exercise in symbolic politics, as some might perhaps intuit. Rather, such a reorganization would in due course render the CFPB more attentive to congressional preferences, as such agencies are more likely to engage in notice-and-comment rulemaking, which, as earlier noted, facilitates congressional oversight. Namely, the bulk of the Republican bills would have transformed the agency into a multimember, bipartisan-balanced commission.

However, in June 2017, the Republican House took a different tack as they passed a bill that would reorganize the CFPB more along the lines of an executive branch agency, by retaining the single-director structure but eliminating the position's statutory removal protection

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appropriations process); S.370, 115th Cong., 1st Sess (Feb. 14, 2017) (eliminating CFPB by repealing statute creating it); H.R. ___, 115th Cong. 1st Sess. (Feb. 14, 2017) (same); S __, 115th Cong., 1st Sess. (2017) (Feb. 14, 2017) (in effect subjecting CFPB to appropriations process by deleting provisions regarding funding from the Fed and requiring all funds obtained by the CFPB from penalties to be transferred into the government's general revenue fund); S. 105, 115th Cong., 1st Sess. (Jan. 11, 2017) (reorganizing agency into bipartisan commission).

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

and subjecting the agency to appropriations.[153] It is more than a coincidence that the change occurred when a Republican had assumed the presidency. The notable shift in Republican approach is consistent with the political science literature's matching agency design and political environment, as it contends that agencies created during spells of divided government are more likely to be independent commissions, while those created in periods of unified government are more likely to be located within the executive branch. Whatever the substantive merit of this decision when compared to opting for a commission structure from the perspective of exercising congressional control, it would make the agency accountable to an elected officeholder in contrast to the status quo.

If the CFPB had a more conventional structure of a multimember commission subject to the appropriations process, then given the empirical findings of how such agencies behave, Congress would have available more effective tools for gathering information regarding the desirability of CFPB policy initiatives. For instance, as regulatory action could be expected to follow a notice-and-comment process more frequently, Congress would not have to undertake time-consuming investigations, in which internal documents have to be pried from an agency, well after an initiative's implementation, in order to gain an understanding of a policy's formulation, as was the case for the CFPB's initiative on automobile dealer loans discussed in the Appendix. Moreover, even an intensive congressional investigation under the current organizational setup might not provide much information in the future, as CFPB staff, now appreciative of the fact that an adversarial Congress will seek to obtain and then publicly release embarrassing internal memoranda, would most likely, in response, avoid putting candid assessments in writing regarding the legality of engaging in rulemaking rather than guidance, for

[153] Financial CHOICE Act of 2017, H.R. 10, sections 711 & 712, 115th Cong., http://clerk.house.gov/evs/2017/roll299.xml (passed June 8, 2017).

instance, so as not to leave a problematic paper or electronic trail.

In addition, the greater likelihood of use of notice-and-comment rulemaking were the agency to have a more conventional structure, as indicated by the empirical analysis, would, in turn, facilitate oversight by both Congress as well as courts, by creating a public record documenting the quality of decisionmaking. A single director acts with minimal constraints on choice of regulatory instrument because the individual does not have to seek to develop a consensus with colleagues of different viewpoints on a desirable policy initiative. As there has only been one director of the CFPB, the statistical analysis finding the agency was significantly less likely to use notice-and-comment rulemaking compared to the other agencies is, of course, a function of that individual's preference. But that does not diminish the implications of the findings. It suffices to say that there could not as readily have been a "Richard Cordray" (i.e., one individual's) effect were the CFPB a more conventionally structured agency.

By contrast, in multimember commissions, effort is frequently made to reach a consensus because that adds value to a policy initiative: a unanimous or near unanimous rule plausibly has a greater probability of being upheld by a court. Court decisions may be more likely to uphold an agency rule that is adopted by consensus because dissents accompanying a nonunanimous rule can communicate information regarding the quality of the decisional process that can buttress a litigant's challenge to a rule.[154]

Furthermore, when policy initiatives are adopted by a broad consensus, Congress may be more inclined to provide an agency with greater latitude to exercise its judgment. Bipartisan

[154] E.g., Chamber of Commerce v. SEC, 412 F. 3d 133, 144 (D.C. Cir. 2005) (referring to commissioners' dissents in one of its reasons for striking down an SEC rule). For a discussion of the importance of a multimember commission to reach a compromise and the damaging effect of dissents on judicial review of a rule, see Bruce Kraus and Connor Raso, Rational Boundaries for SEC Cost-Benefit Analysis, 30 Yale J. Reg. 2 (2013).

agreement over policy could, for instance, lead Congress to feel less need to engage in intrusive monitoring (i.e., holding confrontational oversight hearings). Such an outcome, in turn, would benefit the agency, as hearings are time-consuming and can have the effect of distracting an agency in the performance of its mission. Congress might also be less likely to adopt appropriations riders limiting agency action, as agency consensus over specific policies could reduce congressional concern that a policy is misdirected. These signals are absent when policy is formulated by a single decisionmaker.

When a multimember commission engages in notice-and-comment rulemaking the agency should, in addition, be able to craft a more durable policy than a single director. The information generated from a broad range of constituents, indicating what features of a proposed rule might be problematic from their perspective and how those issues could satisfactorily be addressed, would be filtered through commissioners' multiple viewpoints and not just that of a single individual whose perspective and experience are inherently more limited. As a consequence of the partisan balance requirements for commissions, it is far more probable that a well-recognized benefit of group decisionmaking, reduction in errors of judgment from the evaluation and combination of divergent views, will come into play than the equally well-recognized potential cost, the aggravation of errors from a "group think" dynamic where diversity of viewpoints and independent thought is absent.[155] As earlier noted, partisan balance requirements are consequential, resulting in appointment of commissioners with inherently diverse viewpoints.[156]

In sum, the notice-and-comment process provides an agency with valuable information

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[155] E.g., James Surowiecki, The Wisdom of Crowds (2004) (comprehensive discussion of the literature on group decisionmaking).

[156] See note 46, supra.

from diverse perspectives with practical experience related to issues under consideration, improving the quality of decisionmaking as well as increasing a policy's acceptance by the public. An agency is forewarned of the concerns of those who would be affected by a rule and can thereby adapt its decision to maximize legitimacy and thereby ensure effective implementation and enforcement.[157] An administrative design that encourages the use of such an open and transparent process would, in my judgment, be especially desirable in politically contentious times by reassuring all citizens that policies will be well thought out and carefully crafted after having received input from multiple perspectives. Of course, not all regulatory actions require an elaborate process, and in times of exigencies, a more rapid response is called for, which is the function of interim rules. But in the context of significant policy initiatives, following a notice-and-comment procedure should be the norm as it will produce decisions of higher quality and with greater democratic legitimacy compared to other regulatory instruments, quite apart from whether the decision turned out to be the appropriate one ex post.

A seeming puzzle follows from what has been said up to now regarding agency design: why would legislators ever voluntarily limit their ability to influence an agency's policymaking? Did Congress just get what it was seeking in the CFPB's anomalous regulatory decisionmaking? After all, one Congress chose to establish the anomalous structure. But Congress's intent, or more important, expectation regarding the impact of its administrative design for the CFPB is unfortunately, at best, obscure.

For instance, the organization of the CFPB swung back and forth throughout the legislative process from an individual director to multimember structure, suggesting legislators' uncertainty and disagreement regarding the appropriate design and its rationale. The original

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[157] Kerwin and Furlong, supra note 11, at 168-69.

House bill created an agency led by a single director with an oversight board consisting of the leaders of other agencies, but was modified in committee to a commission structure. This structure was further modified on the floor to begin with a single director but to convert into a five-member commission with partisan balance within two years of the transfer of regulatory authority from existing agencies to the new one.[158] But the Senate bill that replaced the House bill and was approved in conference, reverted back to a single director format. Although there was some discussion of agency structure in a House committee hearing and on the floor during deliberations on Dodd-Frank, the official legislative history (i.e., House, Senate and Conference committee reports) does not make any reference to a rationale for the final agreed-upon structure. The Senate report did reference the rationale for the agency's anomalous funding, as a need to respond to what it considered the cause of ineffectiveness of OFHEO, which regulated the government entities granting mortgages: "repeated Congressional pressure" in the appropriations process.[159] But as earlier noted, the analogy between the OFHEO and CFPB is inapt, given the considerably different scope of their regulatory missions.[160]

Democratic members of Congress have subsequently advanced two rationales for the CFPB's setup in a brief filed in response to litigation over the constitutionality of the agency's structure. They assert that they chose a single director over a multimember commission for

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[158] H.R. 4173, 111 Cong., 2nd Sess. §§ 4101-03 (Dec. 2, 2009); Brief Amici Curiae of Current and Former Members of Congress in Support of Respondent, PHH Corp. v. CFPB 18-19 (Mar.. 31, 2017) (hereinafter "Brief"). The change was explained as a compromise between the original bill and the House Energy and Commerce committee's amendment to a commission structure when considering the bill. Id.

[159] Sen. Report 111-176, supra note 97, at 163.

[160] See note 97, supra.

"speed and decisiveness" of regulatory action and to avoid regulatory capture.[161] The latter contention can be dismissed as baseless: there is no evidence that a multimember agency is more prone to capture than a single individual-led agency. Quite to the contrary, the opposite contention is far more intuitively plausible: it is easier to capture one individual than a multimember entity, where interest groups must not only coopt more individuals to succeed, but also individuals of sharply differing ideological persuasions. This characterization is informed by more than a simple appeal to intuition: partisan balance requirements, as earlier noted, have been found to have a significant impact, resulting in appointment of commissioners with highly diverse viewpoints, and do not function as window dressing for presidents to appoint members of the opposition party whose positions are closest to those of their own party.[162]

The other rationale in the Democrats' brief in support of the CFPB's constitutionality, speed in implementation, is a plausible explanation.[163] The Democratic party leadership, no doubt, made a calculation that a single director could more quickly implement its preferred policy agenda and rectify what it perceived to be a source of failure contributing to the global financial crisis, during the agency's formative years. The agency design would ensure that the determination of initial policies would be formulated solely by an individual who shared that agenda. But while the choice of organization is, of course, intentional, the consequence of the choice regarding the instruments by which the agency's policies are implemented was, in all likelihood, altogether not anticipated.

To put this another way, there is no reason to assume that Democrats either anticipated,

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[161] Brief, supra note 158, at 19, 13.

[162] Ho, supra note 46; Feinstein and Hemel, supra note 46.

[163] Brief, supra note 158, at 16, 20.

no less intended, that the agency's anomalous structure would result in its conducting a large proportion of its regulatory initiatives as guidance rather than through conventional notice-and-comment rulemaking. Not surprisingly, there is, for instance, nothing in the legislative record expressing even an inkling regarding how such an agency would implement its policy initiatives, which could have provided the only pertinent wisps from which to glean intent with regard to the counterfactual. Just as many commentators with financial expertise even today misperceive the legal landscape and impact of the CFPB's structure when lauding its rules, elected officials did not fully appreciate the consequences of the organizational decisions that they made.

Namely, a key objective in establishing a single-director agency was, no doubt, as the Democratic majority thought, to implement rapidly their policy objectives, which would then be fixed in place with a long reach beyond the initial director's five-year term and that of any distant potential Republican replacement. Indeed, achieving that objective was so paramount that the Democratic majority was willing to tie its hands by forfeiting the ability to exercise control over the agency through the appropriations process. But correlatively, by the CFPB's having resorted so infrequently to notice-and-comment rulemaking, the election cycle has rendered its initiatives less durable, thereby potentially undermining accomplishment of the Democratic majority's objective (that their appointee's policies would be independent of the election cycle), because guidance can be reversed upon a change in agency leadership with relative ease, in contrast to policies implemented through notice and comment, which can be reversed solely by going through that more demanding process once again, with judicial scrutiny of the new rationale.[164]

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[164] See note 34, supra; Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insur. Co., 463 U.S. 29 (1983) (rejecting agency's rescission of safety standard for inadequately explaining the decision). The unanticipated frustration of the Democratic party's objective to cement its policies for the long haul undoubtedly explains the bizarre behavior of the

It is, in fact, telling that the greater speed of agency action that the Democrats asserted in their brief to be the rationale for the agency's design, is not related to reducing time consumed in the use of the regulatory instrument. Rather, it is associated solely with the number of decisionmakers, that is, the ability of one individual to act quickly, because the individual need act solely to implement her own decision, and thus avoids the ever-possible "gridlock" generated by the need to reach a consensus, or at least a majority decision, from among a group of bipartisan commissioners.[165]

An apt analogue of how readily policies can be reversed when decisions rest with one individual can be observed in the pattern of rescission of executive orders, actions that can be characterized as the presidential analogue to agency guidance. Upon assumption of office, presidents routinely reverse with a pen many of their predecessor's executive orders, not only those concerning policies where the parties' positions dramatically diverge but also subjects on which there is, in fact, bipartisan consensus.[166]

CFPB employee, supported by Democratic legislators, litigating over the position of bureau director despite the president's authority, attested to by the agency's own general counsel, to appoint a director under the federal legislation regarding vacancies, as well as upheld by the federal court. See Court Decision Delayed in Consumer Financial Protection Bureau Leadership Battle, USA Today, Nov. 27, 2017, available at:https://www.usatoday.com/story/money/2017/11/27/consumer-financial-protection-bureau-leadership-struggle-heads-court/896949001/ and Siding with Trump, Judge Rules Mick Mulvaney to Remain Interim CFPB Head, USA Today, Nov. 28, 2017 https://www.usatoday.com/story/news/politics/2017/11/28/judge-rules-mick-mulvaney-remain-interim-headin-leadership-fight-consumer-financial-protection-burea/902173001/ .

[165] Brief, supra note 158, at 16.

[166] E.g., Robert W. Hahn and Cass R. Sunstein, A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis, 150 U.Pa. L. Rev. 1489, 1505- 07 (2002) (history of executive orders, revised by each president, related to executive branch review of agency rules using cost-benefit standard);. Sources: Obama may use executive order reverse abortion policy, CNN Politics (summarizing series of presidents reversing predecessors' executive orders related to abortion policies), available at: http://politicalticker.blogs.cnn.com/2009/01/19/sources-obama-may-use-executive-order-reverse

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

In addition, individuals with political ambition could find the position of a sole director of a government agency an attractive vehicle for furthering their political career. The interest of such individuals could well be at odds with that of the enacting legislators, despite sharing their overall objectives for the agency, for political reputations could be advanced by taking quick and highly visible action through guidance and enforcement actions, of the kind detailed in the appendix, which voting constituents might find appealing, at the cost of policy durability.[167] The

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[167] The behavior of the agency's initial director, who resigned before the expiration of his term in order to seek a high state political office, is consistent with this conjecture.

enacting legislative majority, which no doubt sought to implement durable policy which would advance its regulatory agenda through its choice of agency structure, surely did not foresee such a possible outcome.

In short, whatever the Democratic party leadership may have specifically thought it was achieving when designing the CFPB, the incentive to avoid notice-and-comment rulemaking provided by the anomalous structure is best characterized as the kind of unintended consequence that can especially occur when legislating in response to a crisis.[168] In a legislative context when time is considered to be of the essence for devising policy solutions, mistakes are inevitably made as it is impossible to think through fully all of the implications of a policy decision.

Although reorganization of the CFPB along conventional regulatory commission lines would seem to be an effective approach for encouraging it to engage more frequently in notice-and-comment rulemaking, given the empirical findings, it is possible that such an objective could be advanced without agency restructuring. Congress could, for instance, require the agency to use notice-and-comment for all significant policy initiatives, or initiatives related to specific topics, even if denominated by the agency as "guidance."[169] While eliminating an agency's choice of instrument for all significant policymaking would be a dramatic departure from the contemporary discretionary approach of the courts and APA, it is not beyond the realm of the imaginable with respect to the politics informing the CFPB, at least as regards specific areas of activity. A bipartisan bill passed the House of Representatives in 2015 that would have revoked the CFPB's guidance on automobile dealer loan financing, discussed in the Appendix,

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[168] See Romano, supra note 93.

[169] Cf. Robert A. Anthony, Interpretive Rules, Policy Statements, Guidance, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?, 41 Duke L. J. 1311 (1992) (proposing that all significant policymaking must be implemented through notice-and-comment rulemaking).

and would have required any subsequent guidance on the topic to follow a notice-and-comment procedure.[170]

However, a solution to the CFPB's less frequent use of notice-and-comment rulemaking for policy initiatives that would require the agency to employ that process for significant matters would present a formidable enforcement challenge. Existing statutory definitions related to requirements for "significant" rulemaking, for example, supplement quantitative measures with qualitative ones,[171] as a safeguard against a significant rule's slipping through requirements because of a shading of estimated costs so as to fall below a definitional threshold. The need to identify whether an initiative was "significant," would, in all probability, then, generate considerable litigation. Accordingly, in my judgment, restructuring the CFPB along conventional lines rather than retaining its structure but restricting the agency's use of guidance, is a cleaner solution. It would avoid a need for definitional finessing regarding the CFPB's choice of instrument yet at the same time, by enabling greater prophylactic control by Congress through the conventional instruments it possesses related to hearings and appropriations, it would constrain the agency's exercise of discretion over that choice.

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[170] See. John Irwin, U.S. House Passes Bill Revoking CFPB Auto Lending Guidance, Automotive News (Nov. 18, 2015), available at: http://www.autonews.com/article/20151118/FINANCE_AND_INSURANCE/151119809/u.s.-house-passes-bill-revoking-cfpb-auto-lending-guidance. President Obama indicated that he would veto the legislation and it did not move forward in the Senate.

[171] There is a quantitative standard of $100 million in the definition both of an "economically significant" rule, which is used to identify the executive agency rules subject to OIRA review, and of a "major rule," as used in the Congressional Review Act, to identify which rules are subject to its provisions, that permit Congress, with the approval of the president, to prevent a rule's promulgation within a prescribed time from issuance. OIRA Regulations and the Rulemaking Process, available at: frame.https://www.reginfo.gov/public/jsp/Utilities/faq.jsp; (OIRA definition of "significant"); 5 U.S.C. § 804 (2)(A) (Congressional Review Act definition of "major"). There are additional definitions both for "significant" and for "major" besides the quantitative standard. See OIRA Regulations and Rulemaking Process, supra; 5 U.S.C. § 804 (2)(B) & (C).

B. Regulatory Reform Proposals and the Agency Design Literature

The literature critiquing agencies' use of guidance to formulate policy rather than following a notice-and-comment process has generated a veritable cottage industry of reform proposals directed at altering agencies' incentives to employ guidance compared to notice-and-comment or at eliminating the choice entirely. A noncomprehensive list, to convey a sense of the range of the proposals, includes: requiring all significant policies to be adopted through notice-and-comment rulemaking; requiring agencies to provide an explanation for their choice of an alternative instrument to notice and comment, which decision would be reviewable by a court; providing citizens with the right to petition agencies to repeal or amend guidance, with the agency's response reviewable by a court; and requiring substantive judicial review of all nonlegislative rules upon issuance.[172]

Most of the proposals rely on an expanded scope of judicial review to deter use of guidance in place of notice-and-comment rulemaking, and all of the proposals share a perspective that is at odds with this paper's findings: The proposals contemplate operating across the board, in a one-size-fits-all type of approach, whereas this paper's data suggests that more apt solutions would be more flexibly focused to adapt to differences in agency design. Such an approach, by identifying objective institutional criteria with which to benchmark an

[172] Anthony, supra note 169 (proposal that all significant policies must be adopted through notice-and-comment, with exception for agency interpretations that do not add "any substantive terms"); Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev.461, 544 (2003) (proposal of preference for notice-and-comment for implementing broad statutory requirements and interpreting ambiguous statutes unless agency offers an explanation for their choice of an alternative, to which a reviewing court should defer if reasonable); Mendelson, supra note 26, 438-39 (proposal to require notice of guidance issuance and right for citizen to petition the agency to revise or repeal the guidance, with judicial review of agency response), Seidenfeld, supra note 26. (proposal to subject all nonlegislative rules to substantive judicial review upon issuance).

agency's regulatory performance, would provide a measure of greater predictability in courts' decisionmaking in a doctrinal area that is universally thought to be an intellectual morass.

For instance, to be most consistent with the empirical finding, reform proposals should focus on advocating a higher level of judicial scrutiny the more insulated an agency is from political accountability, such as the CFPB, with its combination of single-director leadership with removal protection and independence from the appropriations process, compared to an agency subject to greater congressional control, i.e., one with a more conventional organizational structure. In addition, because agencies that are not subject to the appropriations process but have focused, narrow technical missions do not present similar accountability issues as raised by an agency with a broad jurisdictional scope such as the CFPB,[173] applying stricter judicial review to their regulatory activity due to their funding independence would be less apt. Finally, in the multimember commission context, courts should be attentive to a lack of consensus, and the substance of dissents, assessed against a benchmark whether the commissioners as a practice sought and obtained a policy consensus (on the view that in an agency whose commissioners were continually at war, dissent might be a less informative signal of a poorly-formulated policy).

Implications can also be drawn from the statistical analyses for the literature on agency design. First, the findings support Gersen's critique of McCubbins et al.'s thesis, that by overlooking judicial deference to agency choice of instrument, they overestimate the degree to which administrative structure and process can function as a control mechanism, for the mechanism is effective only if agencies follow the notice-and-comment process. The CFPB has been able to operate largely beyond Congress's purview, and is thus a poster child for an agency

[173] As earlier noted, the narrow jurisdiction mitigates the principal-agent problem. See text and accompanying note 99, supra.

of the sort that McCubbins et al. implicitly dispute exists. However, the agency could also be said to be the exception that proves the rule, as the far greater frequency of use of notice-and-comment rulemaking by the three other agencies is consonant with their operating implicitly under the shadow of a meaningful degree of congressional oversight and control.

Second, the data support Datla and Revesz's contention that removal protection is not useful as a defining characteristic of agency independence. Agencies operating with the sole difference among the Datla and Revesz independence criteria being the presence of statutory removal protection – the CPSC, CFTC and SEC – did not significantly differ in the frequency of their following the regulatory procedure most politically accountable to Congress. Were statutory removal protection itself (as opposed to in conjunction with other characteristics) a consequential factor with regard to an agency's perception of its independence, then we would expect to have observed a divergence in the use of regulatory instruments between the CPSC and the other two agencies.

Conclusion

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

instrument, as the most independent agency in this study, the CFPB, uses significantly less frequently the most publicly accountable regulatory instrument of notice-and-comment rulemaking.

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

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

There is, at least, one "meta" policy implication from this study regarding promoting more democratically accountable agencies: if Congress wishes independent agencies with broad jurisdictional authority to follow notice-and-comment rulemaking, then when designing such an

agency, Congress should rely on its long- and well-established agency structure, a multimember commission, with partisan balance and subject to the appropriations process, in preference to a structure akin to that of the CFPB. The more conventional commission structure provides Congress with tools to exercise oversight and hence control over a potentially wayward agency. Reorganizing the CFPB along conventional independent agency lines would therefore be a salutary step toward bringing the agency back within the conventional understanding of democratic accountability informing the APA, by increasing the incentive to engage in the more transparent and participatory mode of regulatory decisionmaking provided by notice-and-comment.

Restructuring the agency as an executive branch agency, as would take place under legislation recently enacted by the House, would, no doubt, also address the democracy deficit under which the CFPB presently functions, by increasing responsiveness to the president rather than the legislative branch, the focus of this study. But whether or not the Senate - or the D.C. circuit in the ongoing litigation over the constitutionality of the CFPB's structure – endorses the House's approach, there would be considerable value-added from further empirical investigation of the relation between agency structure and agency decisionmaking. While this paper analyzes a broader set of regulatory activities than prior literature, the sample of agencies is, nevertheless, small and executive branch agencies were excluded to focus on the impact on agency behavior of comparative independence from congressional control. It therefore provides but a starting point and encouragement for further inquiry into the relation between agency independence and accountability of agency decisionmaking to democratic governance.

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

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

1. Automobile Dealer Loans

One of the most notable examples of the CFPB's use of guidance where rulemaking would conventionally be called for involves the regulation of automobile dealer loans. This CFPB activity has been the subject of congressional investigations and internal documents revealed a deliberately strategic, and what could reasonably be said to be lawless, use of guidance as a regulatory strategy.[174]

The CFPB staff believed that automobile dealers charged higher interest rates to women and minorities (African-Americans and Hispanic Americans) than to white men. But they possessed no actual sales data to support this belief, as the race and ethnicity of car buyers are not recorded. The agency therefore employed a statistical analysis using proxies for race and

[174] House Fin. Serv. Comm. Republican Staff Report, Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending, 114th Cong., 1st Sess. (Nov. 24, 2015) (hereafter House Staff Report).

ethnicity, such as surnames and zip codes, to estimate discriminatory dealer practices.[175] Dodd-Frank, however, expressly prohibited the agency from regulating automobile dealers.[176] Accordingly, in order to circumvent Congress's prohibition, the agency resorted to regulation of "indirect auto lenders" by issuing a fair lending guidance bulletin to banks --which are subject to its authority -- that indicated that the CFPB would enforce anti-discrimination laws against banks that purchased auto loans from auto dealers who discriminated.[177] As there was no evidence of intentional discrimination, the agency stated in the bulletin that a disparate impact would be sufficient to find a violation.[178]

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[175] Kim B. Perez, The CFPB "Indirectly".Regulates Lending Through Auto-Dealers, 18 N.C. BANK. INST. 399, 418 (2014) (showing that the CFPB guidance bulletin relied on mathematical proxies for race and ethnicity, using Social Security Administration and Census Bureau data to estimate the probability someone is of a racial or ethnic minority based on their surname and geographic location, and then used the proxies to determine where consumers might experience discrimination based on interest rates that proxy-determined minorities received); Your Car Dealer Must Be a Racist, Wall St. J., Nov. 15, 2013, at A14. The external consultant hired by the agency to assist in the analysis was said to be a firm associated with the plaintiff's bar and thus not a disinterested party with respect to the methodology employed. See Ronald L. Rubin, The Rogue Regulator, Weekly Standard (Feb. 15, 2016), available at: http://www.weeklystandard.com/the-rogue-regulator/article/2000932 Not surprisingly, the methodology employed produced much higher estimates of the number of minorities receiving discriminatory loans than statistical methods used by other experts, and indeed was known by the agency to, in fact, grossly overstate the numbers. See id; House Staff Report, supra note 174.

[176] 12 U.S.C. § 5519 (2012). The statute contains exceptions to the exclusion of auto dealers from the CFPB's regulatory authority, but none of the exceptions apply to auto loans that a dealer provides through a bank or that are securitized, the subject of the guidance.

[177] CFPB Bulletin 2013-02, "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act" (March 21, 2013). As the bulletin stated, it applied to "all indirect auto lenders within the jurisdiction of the Consumer Financial Protection Bureau (CFPB), including both depository institutions and nonbank institutions."

[178] Id.; CFPB to Hold Auto Lenders Accountable for Illegal Discriminatory Markup, Consumer Fin. Prot. Bur. (Mar. 21, 2013), available at: http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-to-hold-auto-lenders-accountable-for-illegal-discriminatory-markup/..

The guidance further suggested that banks could avoid an enforcement action if they imposed controls on, and monitored, dealer markups and then took "prompt corrective action" against noncompliant dealers, or, better yet, if they charged flat fees to eliminate dealer discretion in the setting of interest rates. The latter approach was the industry practice regarding dealer compensation (lenders shared profits with dealers as a function of the dealer's markup of a loan's interest rate).[179] Banks quite rationally responded to the guidance, which was provided in the shadow of an implicit supervisory threat of adverse regulatory action if they did not comply, by informing dealers that if they did not comply, they would impose flat fees (which was the CFPB's desired objective).[180]

The guidance bulletin contained a number of troubling legal interpretations. For instance, the discrimination standard that the CFPB applied in the bulletin was a disparate impact rather than disparate treatment (i.e., intent) standard, despite Supreme Court jurisprudence at the time requiring intent.[181] Equally, if not more, problematic is the CFPB's interpretation in the bulletin of who is a "creditor" under the fair lending law. Although the agency contended that it was not reinterpreting or making new "law,"which eliminated the need for following rulemaking procedures, the interpretation was quite novel, as neither auto dealers' markups nor indirect

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[179] CFPB Bulletin 2013-02, supra note 177, at 4-5.

[180] Your Car Dealer Must Be a Racist, supra note 175; Perez, supra note 175. The agency brought enforcement actions against four banks under the Bulletin. Id. at 399 & n. 5.

[181] Id. at 424. As Perez notes, the statutes under which the Supreme Court has upheld a disparate impact are those that contain the word "affect," language not contained in the lending statute. Id. at 423.She further notes that the federal government's litigation strategy was generally to avoid taking disparate impact cases before the Supreme Court, such that when the Court granted certiorari on a disparate impact challenge, the government settled the case to avoid a possible adverse decision. Id. at 424.

lenders had previously been understood to fall within the statutory definition.[182]

More important than the guidance's apparent reliance on problematic legal interpretations, internal documents indicated that the CFPB staff had discussed adopting a rule to end dealer discretion regarding interest rates. They rejected doing so, however, because they believed that they did not have the legal authority to write such a rule, and that a rule would therefore be subject to political repercussion or court challenge by automobile dealers.[183]

A further reported concern of the CFPB staff was that the more transparent rulemaking process would require it to "disclose its proxy method used to determine a disparate impact," exposing it to public comment and critique.[184] As the staff was, no doubt, aware, federal courts

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

[183] As the staff put it, "There are several concerns with a rulemaking approach. First, the legal authority for all of the potential rulemakings is unclear, given our lack of authority over dealers. . . Second, the bureau would face considerable pressure from external groups if it sought to regulate or ban the practice of markup iteslf.. The rule could be perceived as an attempt to circumvent our lack of regulatory authority over auto dealers, and that presents both legal and political risks that our rule could be overturned by a court or Congress." CFPB Briefing Memorandum for the Director, Auto Finance Discrimination Initiative Update Meeting 5 (April 4, 2013), available at: http://financialservices.house.gov/hearingslegislation/staff-reports.htm (hereafter CFPB Memo)

[184] Rachel Witkowski, The Inside Story of the CFPB's Battle Over Auto Lending, The American Banker (Sept. 24, 2015) (quoting CFPB staff internal memo), available at: http://www.americanbanker.com/news/law-regulation/the-inside-story-of-the-cfpbs-battle-over-auto-lending-1076940-1.html?zkPrintable=true. The agency's internal documents acknowledged that its methodology overestimated the number of minorities by 20 percent, while a private sector report found a 41 percent overestimation, as the methodology estimated that 11 percent of an applicant pool was African-American when the actual share was 7.8 percent. House Staff Report, supra note 174, at 29. Another report indicated that only half of the individuals identified by the agency's methodology as African-Americans were actually African-Americans. Id. at 30. The director of the bureau was informed of the misestimation, and that a public document issued by the agency understated the error rate, and still permitted use of the flawed methodology to impose liability in enforcement actions against banks, computing penalties based on incorrect numbers.

require the disclosure of the data on which a proposed rule relies under their interpretation of what constitutes a "meaningful opportunity to participate in" rulemaking as required by the APA.[185] In short, a notice-and-comment process would have revealed, as internal documents subsequently indicated, that the statistical method used was "prone to significant error" and that known factors affecting interest rates not related to race were not controlled for in the analysis, which when included, produced dramatically different results.[186] While a notice-and-comment rulemaking might therefore have produced a quite different substantive rule compared to the policy contained in the guidance document, had the output of such a process replicated the guidance on the same data revealed in the House investigation, a successful court challenge would surely have followed.[187]

Finally, the crux of the agency's objection was dealer's use of interest rate markups. But

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[185] Manning and Stephenson, supra note 28, at 738.

[186] House Staff Report, supra note 174, at 3. As internal memoranda put it" We have reason to believe that our proxy [methodology] is less accurate in identifying the race/ethnicity of particular individuals than some proprietary proxy methods that use nonpublic data..." and that there would be "serious risk" that a "methods announcement [would] provid[e] fodder to defendants to show how our methods are inferior to other proprietary proxies,' and "[i]f we choose not to publish, we will be more likely to consult an outside expert for litigation purposes and our internal methodological deliberations will not be discoverable." Id. at 27. Moreover, the bureau director authorized enforcement actions despite having been informed that when the staff had reestimated its models including standard controls (such as an individual credit scores), disparities in interest rates fell by half, information which was to be withheld in settlement negotiations. Id. at 39.

[187] Besides the difficulty of justifying the policy given the flawed data analysis, it seems probable that the cost-benefit criteria would not have been easily satisfied as the dealer compensation policy promoted by the guidance may well increase lending costs. As Perez notes, if dealer discretion on rates is maintained, then banks must engage in costly monitoring, imposing costs that will increase the rate of interest banks require, and if instead discretion is replaced with flat fees, then dealers will lose the flexibility of trading interest rates off against purchase price, with the upshot that they will be less likely to offer lower purchase prices. Perez, supra note 175, at 426-27.

the staff provided an additional, telling reason not to pursue a rule to prohibit the practice: there was "little principled basis on which to distinguish [automobile dealers'] markup from other, similar practices that are ubiquitous in retail transactions."[188]

The CFPB staff outlined the legal difficulties that would arise in a notice-and-comment rulemaking to the bureau director and could plot out an alternative strategy without apprehension that the flawed data and analysis flowing from it, would be publicly revealed, thereby impeding the agency's ability to proceed. Such a strategy would, in all likelihood, not have been successful had the CFPB been a multimember entity. For had the existing guidance been put forward, given the diversity of perspective a partisan balance requirement creates in the membership of a commission, a commissioner would surely have publicly objected, revealing the problematic legal and statistical analysis supporting the action, and regulated entities would have been provided ammunition to challenge any action the agency might have brought against them for non-compliance. While banks might still have settled such action, they would either have settled for far lower sums, or have been better positioned to litigate successfully with reduced apprehension of being subject to a supervisor's retaliation, given a commission's divided opinion and the attendant publicity that would flow from a dissent.

The glimpse into the agency's internal deliberation, afforded by Congress's investigation (and in a few media reports prior to the congressional activity), highlights the conflict between agency independence and accountability, suggesting that the extensive political insulation of the CFPB facilitates its use of guidance strategically to evade the standards imposed by Congress. The balance between these competing concerns has not been properly struck as neither the public revelation of the agency's internal machinations nor Congress's investigation had any impact on

[188] CFPB Memo, supra note 183, at 4.

the CFPB's subsequent behavior. The guidance still remains in full force and effect. It is highly likely that if, for instance, the CFPB were subject to the appropriations process, that would not be a long-term resolution, as Congress would be able to discipline the agency by adopting an appropriations rider prohibiting use of funds to enforce the policy.[189]

2. Credit Card Add-ons

The CFPB's use of guidance to regulate credit card add-ons provides an additional illustration of how the agency's policymaking sidesteps congressional instructions regarding its rulemaking considerations. The CFPB staff believed that credit card add-ons, such as payment for lost wallet protection, have little or no value and should not be sold.[190] Rather than engage in notice-and-comment rulemaking to determine whether that was, in fact, the situation, the agency published guidance, a list of "expectations" regarding what it would look for in evaluating the products banks offered, and then brought three enforcement actions against credit-card providers for improper marketing in light of those expectations.[191]

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[189] Such action would be likely to occur because, as earlier noted, in November 2015, a bipartisan bill passed the House that would have revoked the indirect auto financing guidance and required the agency to use a notice-and-comment procedure for any future regulation of the subject. See note 170, supra.. The stalling of the bill in 2017 would not recur – or at least not recur for the same reasons –in the current Congress: President Trump would not be likely to veto such legislation, and were the substance of the 2015 legislation included in an appropriations bill, then as earlier noted, a minority in the Senate would not be able to block enactment.

[190]Although the agency's objections to the products were stated in terms of the use of "deceptive" or "high-pressure" marketing tactics, Consumer Fin. Prot. Bur., What Are Credit Card "Add-on Products" (Mar. 1, 2013), http://www.consumerfinance.gov/askcfpb/1541/what-are-credit-card-add-products.html, the detailed procedures it identified for banks' marketing of such products to not be considered deceptive were so burdensome that it is plain that the agency's goal was to eliminate the products entirely, an objective that was achieved.

[191] Consumer Fin. Prot. Bur., Marketing of Credit Card Add-on Products (2012), available at: http://www.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf

In response to those agency actions, the three largest banks, followed by other institutions (none of whom were the subject of the enforcement actions), "voluntarily" cancelled the products.[192] Withdrawal of the products, was, no doubt, the agency's objective from the outset. Yet such action would appear to contravene the CFPB's statutory directive, which, as earlier noted, instructs the agency to consider the "potential benefits and costs to consumers and covered persons [financial institutions], including the potential reduction of access by consumers to consumer financial products or services resulting from such rule."[193] Drafting a set of "expectations" with which it was virtually impossible to comply enabled the agency to avoid having to consider and justify the potential reduction in consumer access to the product, as Congress directed in Dodd-Frank, which could have been challenging to do in a notice-and-comment rulemaking.

3. Mortgage Marketing Services Agreements

A final illustration of the CFPB's choice of regulatory instrument as a mechanism to evade Congress's rulemaking constraints involves its regulatory approach to marketing services agreements in real estate transactions. The Real Estate Settlement and Procedures Act ("RESPA"), one of the statutes whose enforcement was transferred to the CFPB in Dodd-Frank, prohibits giving or accepting a fee or kickback for referrals of real estate settlement services

[192] See Karen Weise, The Consumer Finance Watchdog Is Having an Impact, Bloomberg Businessweek. (Jan. 10, 2013), http://www.businessweek.com/printer/articles/90258-the-consumer-finance-watchdog-is-having-an-impact. The three banks subject to the enforcement actions – one of which was for failure to supervise a third-party vendor and not for any failures in its own marketing – were required to pay in aggregate $101.5 million and $435 million in refunds to customers. Id.

[193] 12 U.S.C. § 5512(b)(2)(A)(i) (2012).

involving a federally-related mortgage loan.[194] But fees paid by lenders to real estate entities for marketing services actually rendered, such as advertising or promotional services, at fair market value, are legitimate payments and not prohibited by the statute.[195] Marketing services agreements are ubiquitous in real estate transactions, having been used for decades. The CFPB staff, however, apparently perceives all such arrangements as disguised payments for referrals (i.e., illegal notwithstanding the statute), and as providing no benefits to consumers but, rather, as harming them by limiting competition.

In October 2015, following a "warning" issued with respect to the legality of marketing services agreement a few months earlier in July, the CFPB issued a compliance bulletin regarding the agreements in relation to RESPA, indicating its "grave concerns" over their use, emphasizing the "legal risks" that they present to mortgage industry participants and that it would "continue actively scrutinizing" use of such agreements.[196] The Mortgage Bankers Association ("MBA") characterized the guidance as directed at eliminating marketing services agreements, legal or not, from the marketplace, describing the bulletin to its members as follows:

> "Coming as it does after enforcement and other actions by the CFPB on marketing services agreements, MBA believes that the CFPB's bulletin is short on actual guidance, and can only be interpreted as a series of warnings to lenders against MSAs."[197]

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[194] 12 U.S.C. § 2607 (a).

[195] 12 U.S.C. § 2607 (c).

[196] CFPB Compliance Bulletin 2015-05, RESPA Compliance and Marketing Services Agreement 5 (Oct. 8, 2015); Trey Garrison, CFPB Doubles Down against Marketing Services Agreements, HousingWire (Oct. 8, 2015), available at: http://www.housingwire.com/articles/35303-cfpb-doubles-down-against-marketing-services-agreements

[197] Ben Lane, MBA Issues Warning: CFPB Is Coming for Marketing Services Agreements, HousingWire (oct. 14, 2015), available at: http://www.housingwire.com/articles/35343-mba-issues-warning-cfpb-is-coming-for-marketing-

The MBA further noted that the bulletin "diverged from previous interpretations" of RESPA, and "notably" lacked "any guidance on how to properly construct a mortgage servicing agreement."[198]

The agency could not be clearer in conveying its view that lenders – entities subject to its jurisdiction – should not enter into marketing services agreements. In fact, two large mortgage lenders, Wells Fargo and Prospect Mortgage, had already processed the not so veiled threat upon issuance of the "warning" and exited all such agreements because of "regulatory uncertainty" generated by the CFPB's actions, including its reinterpretation of RESPA.[199] Upon the bulletin's release, Bank of America immediately followed suit and announced it was discontinuing use of the arrangements as well.[200]

The agency's approach to these contractual arrangements parallels its approach toward

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services-agreements

[198] Id. The CFPB had been reinterpreting the statute in enforcement actions brought before the guidance was itself issued, and validity of the reinterpretation, as well as its retroactive application to contracts written under the prior interpretation, were issues raised in litigation in which a federal appellate court held the agency's structure to be unconstitutional, as well as invalidating the new interpretation of the rule, PHH Corp. v. Consumer Financial Protection Bureau, No. 15-1177 (D.C. Cir. Dec. 11, 2016), but the decision has been vacated under circuit procedures as the full court granted the agency's petition for en banc review of the decision, the focus being on the constitutional question, Order No. 15-1177, D.C. Cir. (Feb. 17, 2017) (granting petition for en banc reconsideration); Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Colombia Circuit, as amended through Jan. 26, 2017, p. 58 ("When rehearing *en banc* is granted, the Clerk enters an order granting the rehearing *en banc* and vacating the judgment by the original panel, either in whole or in part, as circumstances warrant.")

[199] Trey Garrison, CFPB to Mortgage Industry: Get Out of MSAs, HousingWire (Jul. 30, 2015, available at: http://www.housingwire.com/articles/34641-cfpb-to-mortgage-industry-get-out-of-msas They left the market in response to the agency's July "warning."

[200] Ben Lane, CFPB, Regulatory Concerns Drive Bank of American Out of MSAs, HousingWire (Oct. 14, 2015), available at: http://www.housingwire.com/articles/35351-cfpb-regulatory-concerns-drive-bank-of-america-out-of-msas

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

Table 1. Agency Policymaking Activities Overview

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

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

(first action taken by the then newly-established CFTC) through May 1980, matching the number of months in which the CFPB's initial activity is tracked. Activity tallied excludes enforcement actions, decisions on petitions, issuance of advisory opinions, no-action letters and guidance directed to consumers. 'n.a." indicates a type of activity that is not applicable to an agency. A number in parentheses indicates the number of actions in the non-notice-and-comment rule or guidance category that were effective on publication with solicited comments to follow the effective (i.e., publication) date, except for futures contracts, for which the CFTC solicited comments before it determined to approve a proposed contract, the action tallied being notices of proposed contracts and not final approvals (which were not included in the Federal Register). Fifteen CFPB interim rules are transfers of regulation from other agencies; and four CPSC_initial notice-and-comment exempt rules are transfers of regulation from other agencies. The CPSC direct final rule count includes one rule that was withdrawn due to receipt of adverse comments.

Table 2. Significant Agency Policymaking Activities Overview

Rulemaking Format	CFPB	SEC	CPSC	CPSC_ initial	CFTC	CFTC_ initial	Total
All Activity	156 (64)	89 (65)	57 (42)	120 (83)	140 (74)	145 (86)	707 (414)
All Rulemaking	72	59	51	94	80	124	480
Notice-and-comment	39	52	33	58	70	43	295
Statutory required notice-and-comment exchange rule	n.a.	n.a.	n.a.	n.a.	n.a.	18	18
Non-notice-and-comment	33 (25)	7 (4)	18 (6)	36 (14)	10 (3)	63 (23)	167 (75)
Interim	25 (25)	4 (4)	0	11 (10)	2 (2)	2 (2)	44 (43)
Direct final rule	0	0	7	0	0	0	7
Accreditation revision	n.a.	n.a.	6 (6)	n.a.	n.a.	n.a.	6 (6)
Order	0	0	0	0	6	2	8
Futures contract	n.a.	n.a.	n.a.	n.a.	n.a.	21 (21)	21 (21)
All Guidance	84	30 (9)	6 (3)	26 (11)	60 (1)	21 (2)	227 (26)
Guidance	67	18 (1)	3 (1)	0	31	2 (1)	121 (3)
Policy statement	7	3 (2)	2 (1)	19 (10)	1	8 (1)	40 (14)
Interpretive rule	3	4 (1)	1 (1)	7 (1)	2 (1)	9	26 (4)
Concept release	n.a.	5 (5)	n.a.	n.a.	n.a.	n.a.	5 (5)
Release of reports	n.a.	n.a.	n.a.	n.a.	n.a.	0	0
Industry letter/ letter to Congress	7	0	0	0	26	2	35

Notes: This table tallies the form of regulatory activity, eliminating nonsubstantive activity, undertaken by four federal agencies, the Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission (CPSC) and Commodity Futures Trading Commission (CFTC). Agency activity in the first three and fifth columns is tracked from April 2011 (first action by the newly established CFPB) through May 2016; the fourth column, CPSC_initial, tracks activity from June 1973 (first action by then newly established CPSC) through July 1978, matching the number of months in which the CFPB's initial activity was tracked, and the sixth column, CFTC_initial, tracks activity from April 1975 (first action taken by the then newly-established CFTC) through May 1980, matching the number of months in which the CFPB's initial activity is tracked.. Activity tallied excludes enforcement actions, petitions, advisory opinions, no-action letters and consumer guidance, rules that are not substantive in content, such as, technical corrections, technical amendments, extensions of effective or compliance dates, and rules related to internal organization or procedure. Detail on the excluded material is provided in Appendix Table A1. "n.a." " indicates a type of activity that is not

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

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

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

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

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

Table 4. Notice-and-comment Rulemaking Crosstabulations.

Crosstabulation	Chi-squared	Probability	Sample
N & C rule and Agency	397.9488 (5) *	0.0	All agencies, both times (707)
N & C rule and Agency	32.0079 (2) *	0.0	CFPB, CFTC, SEC (385)
N & C rule and Agency	7.7146 (4)	0.103	SEC, CFTC and CPSC both times (551)
N & C rule and Agency	1.9489 (2)	0.377	CFTC, SEC, CPSC (286)
N & C rule and Agency	1.5522 (1)	0.213	CFTC and SEC (229)
N & C rule and Agency	1.8039 (1)	0.179	CFTC (both times) (285)
N & C rule and Agency	1.4143 (1)	0.234	CPSC (both times) (177)
N & C rule and Agency	17.6946 (2)	0.0	CFPB, CFTC and CPSC initial period (421)
N & C rule and Year	2.8402 (5)	0.725	All agencies, both times (707)
N & C rule and Year	11.6284 (5)	0.040	CFPB, CFTC, SEC (385)
N & C and Year	19.5519 (5) *	0.002	CFPB (156)
N & C and Year	24.7601 (5) *	0.0	CFTC (140)
N & C and Year	16.6498 (5)	0.005	CFTC initial period (145)
N & C and Year	6.4786 (5)	0.262	CFTC both times (285)
N & C and Year	7.0724 (5)	0.215	SEC (89)
N & C and Year	4.9716 (5)	0.419	CPSC (57)
N & C and Year	5.2647 (5)	0.384	CPSC initial period (120)
N & C and Year	6.4034 (5)	0.269	CPSC both times (177)
N & C and Year	19.2982 (5) *	0.002	CFPB, CFTC and CPSC initial period (421)

Notes: This table presents contingency table chi-squared tests crosstabulating an indicator variable for notice-and -comment rules against either agency or year. The agencies are Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission (CPSC) and Commodity Futures Trading Commission (CFTC) tracked over approximately six years. The time period is April 2011 (first action by the newly established CFPB) through May 2016; activity by the CPSC and CFTC is also tracked from June 1973 and April 1975, respectively (first action by the agencies when established) through July 1978 and May 1980, respectively; when only this period is used for these agencies' observations, it is referred to as "initial period." When "both times" appears in the table, all CPSC and CFTC observations are included in the crosstabulation. Numbers in parentheses in column 2 are the chi-square degrees of freedom; numbers in parentheses in column 4 are the number of observations in the crosstabulation. The reported probabilities are not adjusted for multiple comparisons. * indicates a chi-squared value that is significant when applying a Bonferroni adjustment, i.e., for nineteen comparisons,, to retain a global confidence interval of 95 percent (.05 significance), the probability is adjusted to .0026, which, interpolating from chi-squared distribution tables reporting probability values of .002 and .005, is a chi-squared value of 18.4526.

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

	Model (1) All agencies	Model (1) All agencies	Model (2) All agencies 2011-16	Model (2) All agencies 2011-16	Model (3) Dodd-Frank agencies 2011-16	Model (3) Dodd-Frank agencies 2011-16
CFPB	-1.6993 (.2370) **	-1.6747 (.2356) **	-1.6230 (.2404) **	-1.6299 (.2400) **	-1.5108 (.2476) **	-1.5206 (.2475) **
Dodd-Frank	1.1879 (.1945) **	1.0529 (.1922) **	1.2956 (.2323) **	1.3054 (.2338) **	1.9286 (.3024) **	1.9631 (.3050) **
Year	.0761 (.0513)	.	-.0368 (.0697)		-.0321 (.0807)	
Divided government		-.2921 (.1831)		-.0625 (.2647)		.0419 (.3057)
Constant	-.5908 (.2101) **	-.2127 (.1197)	-.4159 (.2848)	-.5165 (.1914) **	-1.1095 (.3802) **	-1.2353 (.2820) **
Likelihood ratio chi-squared statistic	72.01 **	72.36 **	72.45 **	72.23 **	85.23 **	85.09 **
Pseudo R-squared statistic	.0742	.0745	.1195	.1192	.1629	.1626
Correctly classified	63.37%	63.37%	68.33%	68.33%	72.21%	72.21%
Pearson chi-squared (goodness of fit) statistic	42.75 **	3.45	39.54 **	1.92	44.22 **	0.77
nob	707	707	442	442	385	385

Notes: This table presents the results of logistic regressions of agency activity, where the dependent variable equals 1 if the activity is a notice-and-comment rule, 0 for all other rules and guidance activity. Agencies are Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission (CPSC) and Commodity Futures Trading Commission (CFTC). Activity is tracked from April 2011 (first action by the newly established CFPB) through May 2016; activity by the CFTC and CPSC is also tracked from April 1975 and June 1973, respectively (first action by the then newly established CFTC and CPSC) through May 1980 and July 1978, respectively. Model 1 uses observations of all agencies over both time periods; model 2 uses observations for only 2011-2016, excluding observations of the activity of the CFTC and CPSC in 1975-80 and 1973-78, respectively; model 3 uses observations only for agencies subject to Dodd-Frank (CFPB, CFTC and SEC), excluding all activity of the CPSC and CFTC activity in 1975-80. CFPB is an indicator variable that equals 1 if the agency is the CFPB, 0 otherwise; Dodd-Frank is an indicator variable that equals 1 if the activity was undertaken under a provision in Dodd-Frank; year is an indicator variable (1-6) for the six years of agency activity; divided government is an indicator variable for when the party of the President differs from the majority party in the Senate and House (i.e., years 5-6 for activity tracked over 2011-16, years 1-4 for CPSC activity tracked over 1973-78) and years 1-2 for CFTC activity tracked over 1975-80). Numbers in parentheses are standard errors; Likelihood ratio chi-squared statistic tests the null hypothesis that all coefficients except that of the constant term are zero; Pearson chi-squared (goodness of fit) statistic tests observed against expected outcomes; ** significant at < .01; * significant at .05.

Table 6. Log-Odds Ratios of Coefficients (Notice-and-comment)

Variable	Log-odds ratio	Log-odds ratio
CFPB	.2208	.2186
Dodd-Frank	6.8798	7.1210
Year	.9684	
Divided government		1.0428
Constant	.3297	.2908

Notes: This table converts the coefficients of the Model 3 logistic regressions in Table 5 into log-odds ratios. The dependent variable equals 1 if agency activity is a notice-and-comment rule, and 0 for all other rules and guidance activity. CFPB is an indicator variable that equals 1 if the agency is the CFPB, 0 otherwise; Dodd-Frank is an indicator variable that equals 1 if the activity was undertaken under a provision in Dodd-Frank; year is an indicator variable (1-6) for the six years of agency activity; divided government is an indicator variable for when the party of the President differs from the majority party in the Senate and House The included agencies are Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), and Commodity Futures Trading Commission (CFTC). The six years start in April 2011 (first action by the newly established CFPB) and end in May 2016; 2015-16 (years 5-6) are the years in which there was divided government.

Table 7. Dodd-Frank Mandated Rulemakings with Deadlines

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

Notes: The data source for identification of Dodd-Frank provisions requiring rules subject to

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

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

Rulemaking Format	CFPB	SEC	CPSC	CPSC_ initial	CFTC	CFTC_ initial	Total
All Rulemaking	108	130	58	143	113	165	717
Technical corrections	10	7	3	37	22	18	97
Technical amendments	24	11	0	9	1	2	47
Effective date extensions	1	15	4	3	2	2	27
Internal organization and procedures	0	13	0	0	6	18	37
Edgar manual updates	n.a.	21	n.a.	n.a.	n.a.	n.a.	21
Other	1	4	n.a.	n.a	2	1	8
Significant rulemaking	72	59	51	94	80	124	480
All Guidance	124	114	9	27	92	33	399
Staff summary and discussion of rules, internal procedures, corrections, general letters and FAQs	40	60	0	0	32	3	135
Other	0	0	0	1	0	5	6
Small entity compliance guide	n.a.	24	n.a.	n.a.	n.a	n.a.	24
Record system guidance	n.a.	n.a.	3	n.a.	n.a.	4	7
Significant Guidance	84	30	6	26	60	21	227

Notes: This table presents information on the nonsubstantive regulatory activity undertaken by four federal agencies, the Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission and Commodity Futures Trading Commission (CFTC). Agency activity in the first three and fifth columns is tracked from April 2011 (first action by the newly established CFPB) through May 2016; the fourth column, CPSC_initial, tracks activity from June 1973 (first action by then newly established CPSC) through July 1978, matching the number of months in which the CFPB's initial activity was tracked and the sixth column, CFTC_initial, tracks activity from April 1975 (first action taken by the then newly-established CFTC) through May 1980, matching the number of months in which the CFPB's initial activity is tracked.. The tallies show the action by regulatory type that are excluded from Table 1 to construct Table 2 (significant agency activity). "n.a." indicates a type of activity that is not applicable to an agency. Technical corrections consist of corrections in spelling, punctuation, citations and cross-references. An example of a technical amendment is a rule adjusting asset size exemption thresholds (e.g., 21 CFPB rules); a few technical amendments are technical corrections to rule amendments. Two notice-and-comment rules are eliminated from Table 1, one CFTC rule in its initial years of operation and one CFPB rule, because they pertained to nonsubstantive matters, respectively, internal procedure and extension of an effective date. The rule in the "other" category for the CFPB was an interim rule addressing how states were to provide notice a to the CFPB warning it of actions or proceedings they were taking, and was characterized as insignificant because it had no bearing

on private parties/regulated entities; the two rules in the "other" category for the CFTC consist of a rule identifying an entity designated to provide swap dealer id numbers and a rule eliminating references to entities eliminated under Dodd-Frank, and the "other" category rule for CFTC_initial concerns document privacy; the four rules in the "other" category for the SEC consist of a rule noticing a temporary rule's expiration, a rule noticing the effective date of a rule that had been held in abeyance due to litigation, an interim final temporary rule that maintained the status quo to delay the effectiveness of a change made by Dodd-Frank until a notice-and-comment rule could be adopted, and an order indicating an inflation adjustment required by Dodd-Frank entered simuiltaneous with a notice of a notice-and-comment rule-making for how to calculate future inflation adjustments [could count the "other" rules as technical?]. The guidance in the "other" category for the CPSC concerns postponement of the effective date of a policy and procedures statement concerning substantial product hazards, and for the CFTC concerns advisory committee creation and release of reports; record system guidance includes annual privacy reports..

Table A2. Logistic Regressions of the Probability of Notice-and-Comment Rulemaking Post-Appointment of CFPB Director

	Model (1) All agencies	Model (1) All agencies	Model (2) All agencies 2012-16	Model (2) All agencies 2012-16	Model (3) Dodd-Frank agencies	Model (3) Dodd-Frank agencies
CFPB	-1.3183 (.2437) **	-1.3066 (.2432) **	-1.2080 (.2508) **	-1.2158 (.2508) **	-1.0459 (.2612) **	-1.0579 (.2612) **
Dodd-Frank	.9669 (.2101) **	.8906 (.2036) **	1.1840 (.2563) **	1.2198 (.2557) **	1.8545 (.3319) **	1.9153 (.3327) **
Year	.0406 (.0676)	.	-.0757 (.0924)		-.0676 (.1048)	
Divided government		-.2447 (.1959)		-.0751 (.2701)		.0278 (.3091)
Constant	-.4349 (.2958)	-.1889 (.1263)	-.3244 (.4063)	-.5881 (.2219) **	-1.0923 (.5035) *	-1.3715 (.3185) **
Likelihood ratio chi-square	39.86**	41.07 **	44.06 **	43.46 **	56.85 **	56.44 **
Pseudo R-square	.0495	.0510	.0907	.0894	.1337	.1327
Correctly classified	60.34%	60.34%	65.35%	65.35%	68.79%	68.79%
Pearson $\chi 2$ Goodness of fit	24.57	6.65	21.26	4.57	25.38	2.51
nob	585	585	355	355	314	314

Notes: This table presents the results of logistic regressions of agency activity, where the dependent variable equals 1 if the activity is a notice-and-comment rule, and 0 for all other rules and guidance activity. Agencies are Consumer Financial Protection Bureau (CFPB), U.S. Securities and Exchange Commission (SEC), Consumer Product Safety Commission (CPSC) and Commodity Futures Trading Commission (CFTC). Activity is tracked from January 2012 (when President Obama filled the position of CFPB director by a recess appointment) through May 2016; activity by the CPSC and CFTC is also tracked from January 1974 and January 1976, respectively, (to parallel the starting period used for the CFPB) through July 1978 and May 1980, respectively. Model 1 uses observations of all agencies over both time periods; model 2 uses observations for only 2012-2016, excluding observations of the activity of the CPSC in 1974-78; model 3 uses observations only for agencies subject to Dodd-Frank (CFPB, CFTC and SEC), excluding all activity of the CPSC and of the CFTC in 1976-80. CFPB is an indicator variable that equals 1 if the agency is the CFPB, 0 otherwise; Dodd-Frank is an indicator variable that equals 1 if the activity was undertaken under a provision in Dodd-Frank; year is an indicator variable (2-6) for the five years of agency activity; divided government is an indicator variable for when the party of the President differs from the majority party in the Senate and House (i.e., years 2015-16 for activity tracked over 2011-16, years 1974-76 for CPSC activity tracked over 1974-78, and year 1976 for CFTC activity tracked over 1976-80). Numbers in parentheses are standard errors; Likelihood ratio chi-square tests the null hypothesis that all coefficients except that of the constant term are zero; Pearson $\chi 2$ goodness of fit tests the observed against expected outcomes; ** significant at < .01; * significant at .05.

Figure 1. Form of Agency Policymaking

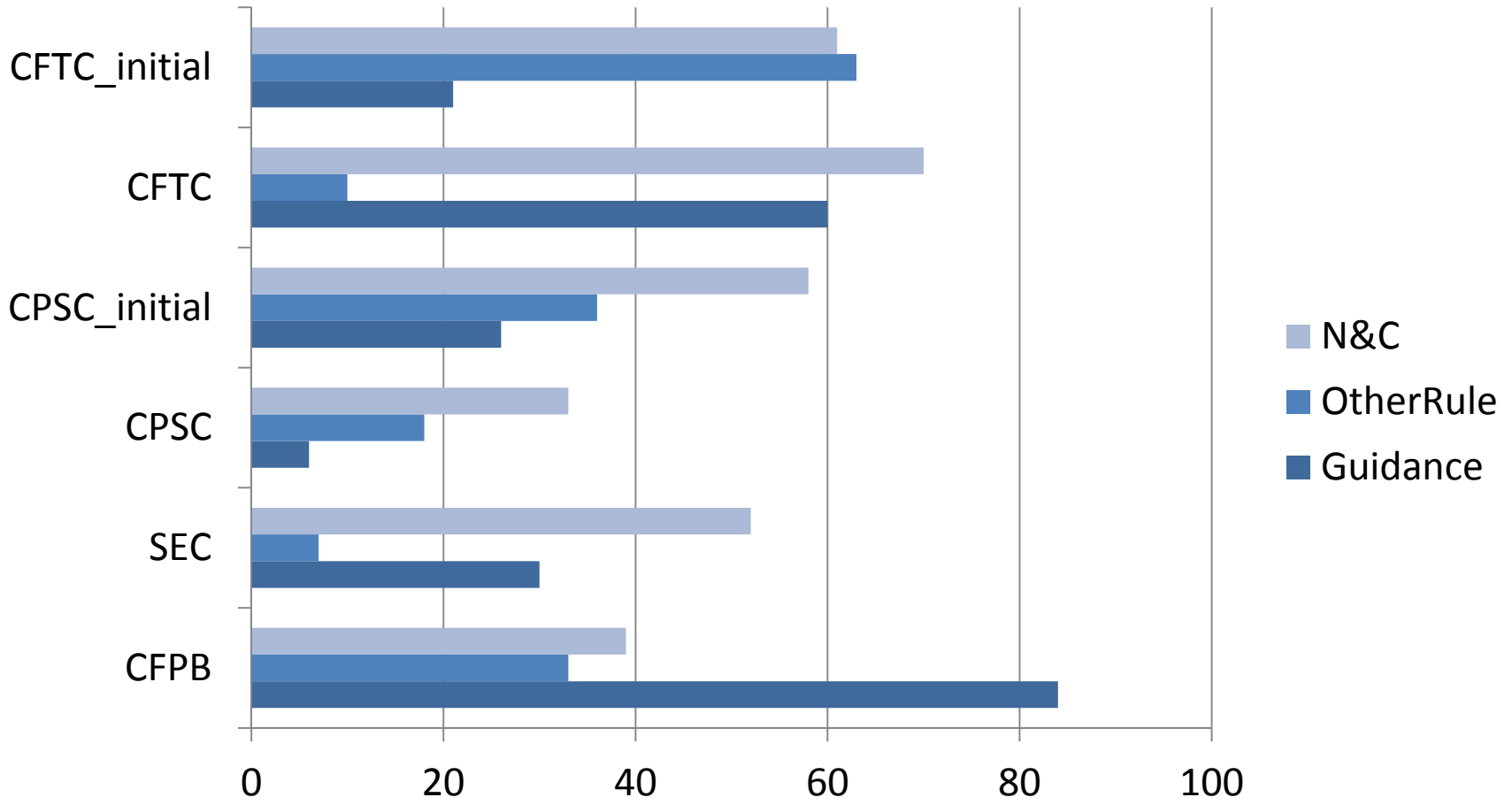


Figure 2. Percentage N&C of Significant Policymaking Activity by Agency

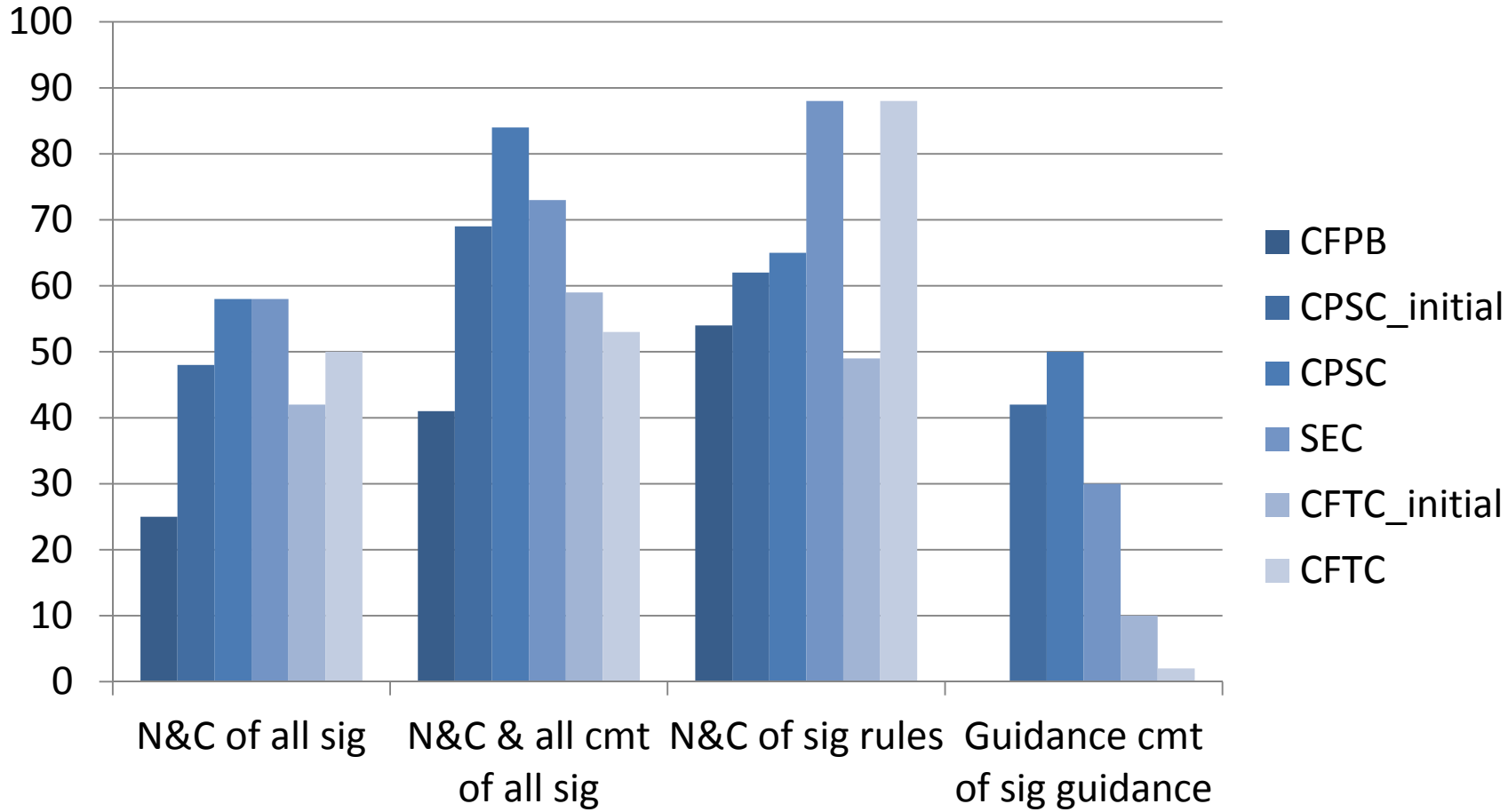
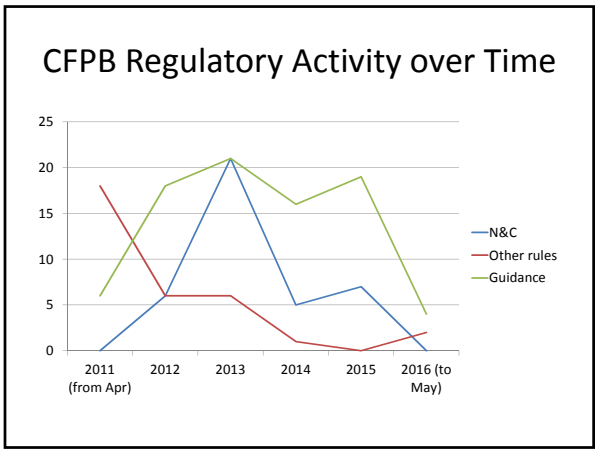
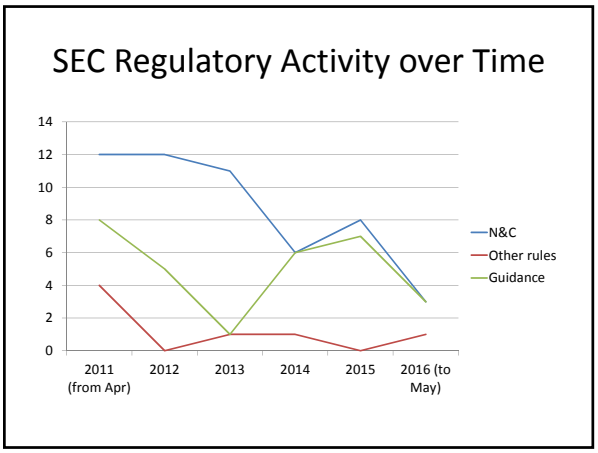
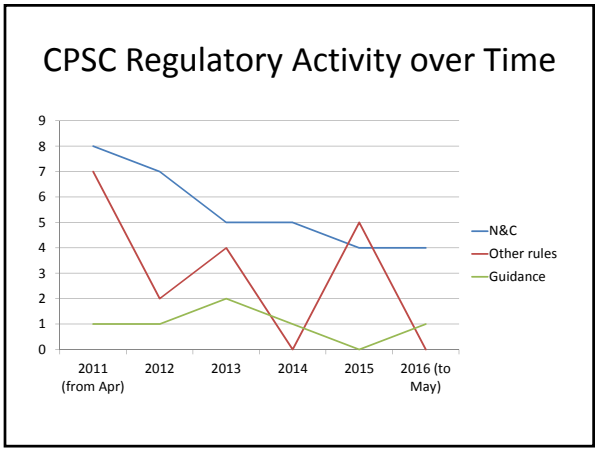
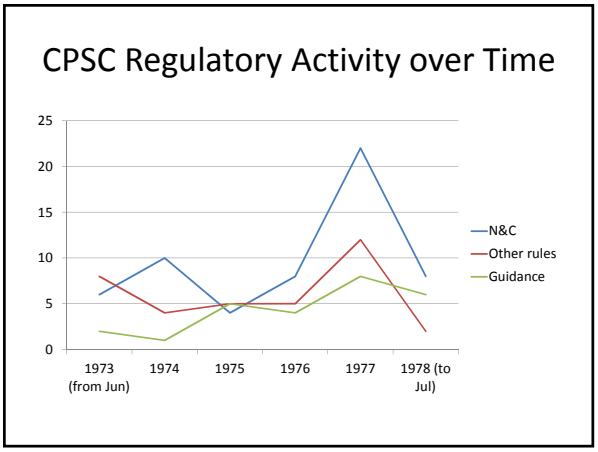


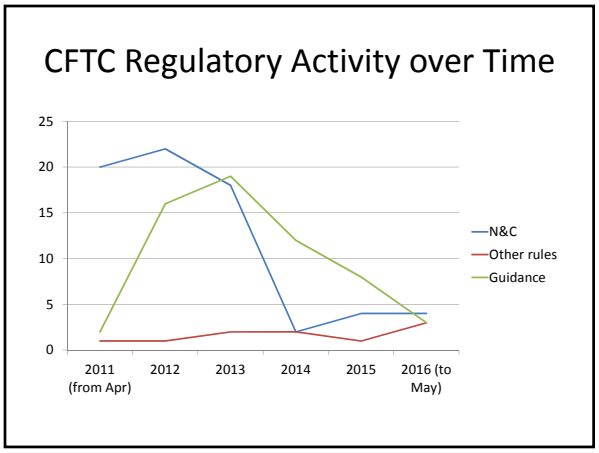
Figure 3. Agency Activity over Time

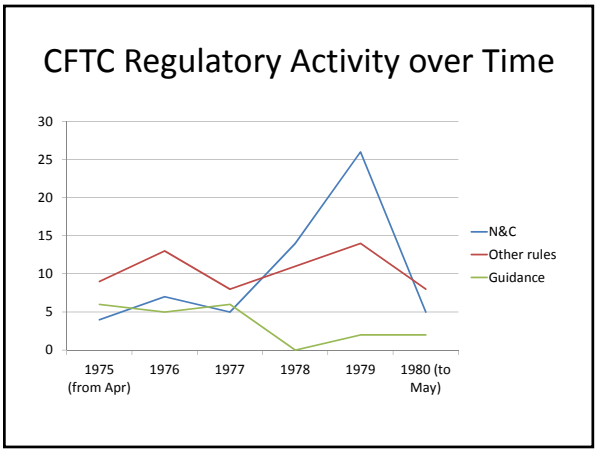




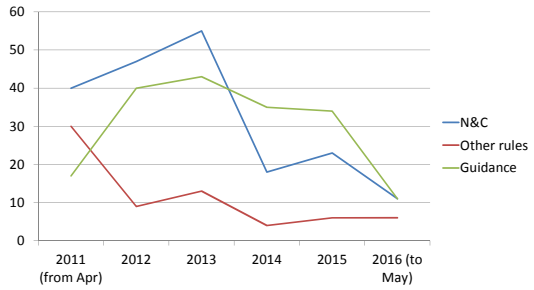




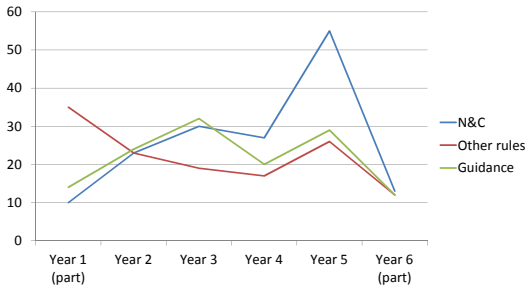




Four Agencies' Regulatory Activity over Time



Three Agencies' Initial Regulatory Activity over Time



Agencies' Notice & Comment Rulemaking over Time

