NOTES

DODD–FRANK'S FAILURE TO ADDRESS CFTC OVERSIGHT OF SELF-REGULATORY ORGANIZATION RULEMAKING

*Derek Fischer**

Since its formation, the Commodity Futures Trading Commission (CFTC) has taken a hands-off approach with respect to its oversight of the futures industry. It has relied on self-regulatory organizations (SROs)—namely, exchanges such as the Chicago Mercantile Exchange and associations such as the National Futures Association (NFA). The Dodd–Frank Act (Dodd–Frank), Congress's attempt to address unregulated derivatives and swaps trading, perceived as key contributors to the 2007–2008 financial crisis, created an expanded regulatory role for the CFTC while simultaneously increasing its reliance on old and new SROs. Yet Congress failed to grasp the expansion in resources the CFTC would require both to perform its new duties and to continue its traditional oversight of industry self-regulation. In particular, the CFTC lacks the statutory mandate and the resources to counter the risks associated with industry self-regulation in theory and in practice. This Note compares the divergent schemes of the Commodity Exchange Act and the Securities Exchange Act to show that the statutory impetus to review SRO rulemaking is much stronger with the SEC than with the CFTC. It then empirically assesses CFTC oversight of rulemaking by the National Futures Association to show that from 2003 to 2012 ninety-four percent of rule additions or amendments proposed by the NFA—which must be sent to the CFTC before taking effect—were adopted unmodified. This Note argues that the CFTC likely is not adequately scrutinizing rule proposals by the NFA—or, if it is doing so, it is doing so out of the public eye. It concludes that the CFTC should conduct a self-assessment and begin disclosing conversations with the SROs it oversees in order to determine how it can better monitor self-regulatory organizations.

INTRODUCTION

Congress enacted the Commodity Exchange Act (CEA) in 1936 in order to regulate transactions on commodity futures exchanges, prevent manipulation of the market, and deal with the issue of short selling.[1] Congress vested the authority to administer the requirements of the CEA

* J.D. Candidate 2015, Columbia Law School.

1. Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. §§ 1–27f (2012)).

in the Department of Agriculture until 1974,[2] when Congress established an independent agency, the Commodity Futures Trading Commission (CFTC), to "strengthen the regulation of futures trading, [and] to bring all agricultural and other commodities traded on exchanges under regulation."[3] Thus, since 1974, the CFTC, an independent agency "patterned closely after" the Securities and Exchange Commission (SEC),[4] has maintained authority over futures trading.[5]

Just as the Securities Exchange Act of 1934 ("Exchange Act") "prescribes a concurrent and cooperative structure of regulation by and among the SEC and several specialized 'self-regulatory organizations'"[6] (SROs), the CEA provides a "two-tier structure"[7] that allows for self-regulation in futures trading.[8] Indeed, due to the nature of the futures market[9] and to political and market pressure,[10] the CFTC's traditional

2. See, e.g., 7 U.S.C. § 6f(1) (1936) (requiring futures commission merchants and floor brokers to register with Secretary of Agriculture); see also John C. Coffee, Jr. & Hillary A. Sale, Securities Regulation 66 (12th ed. 2012) (noting Department of Agriculture oversaw futures trading prior to establishment of CFTC).

3. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (codified in scattered sections of 5 U.S.C. and 7 U.S.C.).

4. Coffee & Sale, supra note 2, at 66; see also Jim Bartos, United States Securities Law: A Practical Guide § 8.2.3, at 262 (3d ed. 2006) ("The CFTC resembles the SEC in its organization . . . [but with a] much smaller staff and a more specialized mandate than the SEC."). Compare 7 U.S.C. § 2(a)(2)(A) (2012) (naming CFTC as independent agency with five commissioners subject to nomination by President and advice and consent of Senate), with 15 U.S.C. § 78d(a) (2012) (naming SEC as independent agency with five commissioners subject to nomination by President and advice and consent of Senate).

5. Coffee & Sale, supra note 2, at 66. The CFTC has "exclusive jurisdiction . . . with respect to accounts, agreements . . . and transactions involving swaps or contracts of sale of a commodity for future delivery . . . traded or executed on a contract market . . . or a swap-execution facility . . . or any other board of trade, exchange, or market and transactions subject to regulation" by the CFTC as designated by the CEA. 7 U.S.C. § 2(a)(1)(A). Its jurisdiction does not limit or supersede the SEC's authority, except as provided by the CEA. Id.

6. Coffee & Sale, supra note 2, at 67; see Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp); see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010) (noting private SROs in securities industry "investigate and discipline their own members subject to" SEC oversight). The Exchange Act defines an SRO as "any national securities exchange, registered securities association, or registered clearing agency." 15 U.S.C. § 78c(a)(26). Stock exchanges must register subject to approval and requirements of the SEC, id. § 78f, as must registered securities associations, id. § 78o-3.

7. Coffee & Sale, supra note 2, at 67; see also Kristin N. Johnson, Governing Financial Markets: Regulating Conflicts, 88 Wash. L. Rev. 185, 202 (2013) [hereinafter Johnson, Governing Financial Markets] ("While there is no universally agreed upon definition, financial markets scholars use the term 'self-regulation' to describe a dual-tiered regulatory approach.").

8. See, e.g., 7 U.S.C. § 1a(40) (defining contract markets and other organizations as "registered entit[ies]"); id. § 6(a) (restricting futures trading in most cases to boards of trade registered with CFTC as contract markets).

9. See Coffee & Sale, supra note 2, at 67 (noting "fewer retail traders and individuals are active in the futures markets" as compared to stock markets SEC regulates).

approach to regulation of the futures industry has been more laissez faire —in comparison to the SEC's hands-on approach to securities-industry regulation—including a more lax approach with respect to self-regulation.[11] Even as "the scope of futures trading [expanded] beyond agricultural products and other commodities" to contracts tied to markets including treasury bonds and foreign currencies,[12] the CFTC's deferential approach toward the industry persisted through much of the first decade of the new millennium despite attempts to increase its power and regulatory authority.[13]

However, the 2007–2008 financial crisis signaled the need for more regulation in areas that had traditionally been left to the market.[14] The resulting legislation, Title VII of the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd–Frank" or the "Act"), known as the Wall Street Transparency and Accountability Act of 2010, led to a substantial increase of CFTC regulatory authority by giving the agency the ability to regulate over-the-counter (OTC) derivatives and swaps.[15] Thus, Dodd–Frank has increased the CFTC's authority over the marketplace while simultaneously increasing the number of entities it regulates.[16]

Title VII requires most derivatives to be traded through derivatives clearing organizations (DCOs)[17] and most swaps to be traded via swap execution facilities.[18] The statute tasks the CFTC with registering these

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10. See infra notes 114–116 and accompanying text (discussing pressure on CFTC to stay out of swaps-market regulation).

11. See Coffee & Sale, supra note 2, at 67 ("[The CFTC] defers more to self-regulation and makes less use of enforcement. It is also strongly committed to 'principles-based' regulation . . . .").

12. Id. at 66.

13. See, e.g., Scott McCleskey, When Free Markets Fail: Saving the Market When It Can't Save Itself 39 (2010) (highlighting 1998 CFTC concept release "proposing that over-the-counter derivatives, and particularly swaps, . . . be subject to transparency and other regulatory requirements"). See generally Simon Johnson & James Kwak, 13 Bankers: The Wall Street Takeover and the Next Financial Meltdown 7–9 (2011) (discussing then-CFTC Commissioner Brooksley Born's failed efforts to regulate derivatives).

14. See infra note 122 and accompanying text (explaining how excessive risk taking in derivatives contributed to financial crisis).

15. See Wall Street Transparency and Accountability Act of 2010, Pub. L. No. 111-203, tit. 7, 124 Stat. 1376, 1641–1802 (codified in scattered sections of 7 U.S.C. and 15 U.S.C.) (providing for regulation of OTC derivatives and swaps by CFTC); Dodd–Frank Act, CFTC, http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm (on file with the *Columbia Law Review*) (last visited Sept. 20, 2014) (summarizing CFTC's new areas of authorization codified in Dodd–Frank).

16. CCH Attorney-Editor Staff, Dodd–Frank Wall Street Reform and Consumer Protection Act: Law, Explanation and Analysis 254–55 (2010) (explaining after Dodd–Frank, derivatives clearing organizations "are subject to registration, reporting, and recordkeeping requirements" and noting "[s]wap execution facilities must be registered with the . . . CFTC for swaps").

17. 7 U.S.C. § 2(h) (2012).

18. 7 U.S.C. § 7b-3.

entities and monitoring their activities in the same way the CEA traditionally has tasked the CFTC with regulating futures exchanges and associations.[19] Yet the CFTC has neither the time nor the resources to perform these functions effectively,[20] including monitoring how SROs enact rules.[21] Market participants thus can exploit the already precarious agency problem associated with allowing the financial industry to self-regulate.[22]

This Note argues that despite the key place of self-regulation in the United States' financial regulatory regime and despite Dodd–Frank's expansion of the CFTC's role in overseeing the financial system, neither Congress nor the CFTC has addressed the CFTC's inability to oversee SRO rulemaking. Part I provides a background on futures regulation before and after Dodd–Frank, with a specific focus on the CFTC's relationship with SROs and its increased regulatory burden following the financial crisis.[23] Part II uses statutory analysis and a simple empirical study to demonstrate how the CFTC's mandate to oversee SRO rulemaking comes up short in light of the goals of Dodd–Frank, and it discusses the implications of this failure. Part III suggests potential solutions to this problem and concludes that, at a minimum, heightened transparency with respect to CFTC–SRO discussions is necessary.

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19. See infra Part I.A.1 (describing traditional regulatory tasks of CFTC).

20. See, e.g., David Dayen, Congress Is Starving the Agency That's Supposed to Prevent Another Meltdown, New Republic (Nov. 7, 2013), http://www.newrepublic.com/article/115511/cftc-funding-will-prevent-it-regulating-derivatives (on file with the *Columbia Law Review*) (reporting CFTC "has seen its operations squeezed by drastic underfunding, right at the time the Dodd–Frank financial reform law dropped a whole new set of responsibilities in its lap . . . [and that] the lack of resources has made [CFTC] rules almost irrelevant, since the CFTC simply cannot enforce them").

21. See 7 U.S.C. § 7a-2(c) (requiring CFTC to review rule changes by SROs).

22. See Saule T. Omarova, Wall Street as Community of Fate: Toward Financial Industry Self-Regulation, 159 U. Pa. L. Rev. 411, 419 (2011) [hereinafter Omarova, Community of Fate] (acknowledging ideal self-regulatory model would allow market participants to adopt and enforce self-governing rules while making them "more explicitly responsible for the economic and societal effects of such activities"); J.W. Verret, Dr. Jones and the Raiders of Lost Capital: Hedge Fund Regulation, Part II, A Self-Regulation Proposal, 32 Del. J. Corp. L. 799, 819 (2007) (noting "element of supplemental government oversight" should accompany self-regulation to harness latter's benefits, "eliminate cases of market failure[,] and establish[] a forum for firms to compete . . . in policing themselves"); see also Richard W. Painter, Convergence and Competition in Rules Governing Lawyers and Auditors, 29 J. Corp. L. 397, 410 (2004) (explaining agency costs can lead to poor evaluation of risk or failures to respond appropriately).

23. While the term "regulatory burden" is occasionally used for different purposes, for ease of exposition in this Note the phrase refers to the burdens a regulator faces when its objectives are measured against its resources.

I. GOVERNMENT REGULATORS AND SELF-REGULATORY ORGANIZATIONS BEFORE AND AFTER DODD–FRANK

Congress passed Dodd–Frank, in part, to respond to the excessive, unregulated risk taking in the financial industry that contributed to the financial crisis.[24] Although the correctness of this response is beyond the scope of this Note,[25] it is clear that Congress viewed the explosion of the unregulated OTC derivatives market as a problem that needed to be fixed.[26] Thus, Title VII drastically expands the types of transactions and entities the CFTC oversees in order to bring derivatives and swaps within the regulator's purview.[27]

Dodd–Frank does not fundamentally alter the way the CFTC regulates. The Act maintains the CFTC's classic two-tier structure, in which the CFTC oversees the SROs—such as exchanges and associations—that regulate the day-to-day activities of industry participants.[28] SROs perform critical functions such as facilitating transactions, setting capital requirements and other rules, and disciplining members that violate these rules.[29] Though allowing private actors to perform these functions has significant advantages,[30] the system implicates important transparency

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24. The introduction to the Act notes that it was passed "[t]o promote the financial stability of the United States by improving accountability and transparency . . . to end 'too big to fail', to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices." Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010); cf. Johnson & Kwak, supra note 13, at 10 (arguing failure to regulate derivatives contributed to "decade-long financial frenzy that ultimately created the worst financial crisis and deepest recession the world has endured since World War II").

25. Cf. John C. Coffee, Jr., The Political Economy of Dodd–Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated, 97 Cornell L. Rev. 1019, 1037 (2012) ("Reasonable persons can disagree about whether this corrective process went too far . . . or not far enough.").

26. See Mission & Responsibilities, CFTC, http://www.cftc.gov/About/MissionResponsibilities/index.htm [hereinafter CFTC, Mission & Responsibilities] (on file with the *Columbia Law Review*) (last visited Sept. 20, 2014) ("In the aftermath of the 2008 financial crisis—caused in part by the unregulated swaps market—President Obama and Congress charged the CFTC with reforming this market.").

27. See id. ("The agency now . . . has regulatory oversight of the over $400 trillion swaps market, which is about a dozen times the size of the futures market.").

28. See infra notes 138–141 and accompanying text (explaining how CFTC relies on private actors performing quasi-regulatory functions).

29. See, e.g., Market Regulation, CME Grp., http://www.cmegroup.com/market-regulation/ (on file with the *Columbia Law Review*) (last visited Sept. 20, 2014) (outlining self-regulatory responsibilities of designated contract markets, including protecting market integrity and issuing and enforcing antifraud and antimanipulation rules).

30. See Omarova, Community of Fate, supra note 22, at 416 (arguing financial industry self-regulation is crucial to any "workable long-term solution" to systemic problems "[g]iven the complexity and global nature of the modern financial market").

and accountability concerns.[31] It is therefore vital, within the context of the regulatory regime envisioned by U.S. legislators, that the CFTC have the legal and practical means to minimize the negative consequences of self-regulation.[32]

This Part discusses the evolution of the CFTC, with a specific focus on its relationship with SROs and its increased mandate and burdens since the adoption of Dodd–Frank. Part I.A addresses the CFTC and self-regulation. In particular, it identifies the types of SROs that the CFTC regulates, explains the reasons for the existence of financial SROs, and explores the arguments against self-regulation. Part I.B explains how deregulation with respect to the CFTC's ability to oversee derivatives trading and swaps was a contributing factor in the financial crisis. It then identifies how Dodd–Frank responds to that deregulation by substantially increasing the authority of—and the burdens on—the CFTC.

A. *The CFTC's Relationship with Self-Regulatory Organizations*

The CFTC has regulated commodity futures markets in the United States since 1974.[33] Despite its roots in agricultural-commodities trading, the futures industry has become increasingly complex since the CFTC's creation.[34] In the late 1980s, the CFTC began to permit trading on foreign futures and options in the United States.[35] Organized into four divisions,[36] the CFTC aims to encourage competitiveness and efficiency,

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31. U.S. Gov't Accountability Office, Private Fund Advisers 19–20 (2011), available at http://www.gao.gov/assets/330/320886.pdf (on file with the *Columbia Law Review*) (acknowledging problems with SROs include conflicts of interest, because self-regulators may favor interests of and be accountable to industry instead of investors, Congress, and public).

32. See Omarova, Community of Fate, supra note 22, at 483 ("[F]or an effective self-regulatory system to emerge and thrive, there must be a strong regulatory and supervisory framework in whose shadow such self-regulation operates."). This Note does not normatively assess the wisdom of Dodd–Frank. But as Dodd–Frank is the law that Congress elected to pass, it is important to analyze how that law can be enforced in the best interests of the U.S. economy. Cf. id. at 419 (highlighting need for "balance between financial institutions' freedom to engage in increasingly complex activities in the most economically efficient way and their duty to conduct their . . . business activities in accordance with the overarching public interest in preserving financial stability").

33. CFTC, Mission & Responsibilities, supra note 26.

34. Id.

35. See Frederic S. Mishkin, The Economics of Money, Banking, and Financial Markets 339 (alt. ed. 2007) (explaining "rapid growth of financial futures markets" and "resulting high profits" incentivized foreign exchanges to enter business); CFTC History in the 1980s, CFTC, http://www.cftc.gov/About/HistoryoftheCFTC/history_1980s (on file with the *Columbia Law Review*) (last visited Sept. 20, 2014) (noting 1987 adoption of rules regarding foreign futures and options and 1988 approval of offer and sale of foreign option contracts).

36. These divisions are the Division of Clearing and Risk, the Division of Enforcement, the Division of Market Oversight, and the Division of Swap Dealer and Intermediary Oversight. See CFTC Organization, CFTC, http://www.cftc.gov/About/

protect against fraud and market manipulation, and ensure market integrity.[37]

1. *Oversight of SROs.* — Critically, the CFTC supervises exchanges and other SROs. In an SRO, "a group of firms or individuals exerts control over its own membership and their [behavior]."[38] In the financial industry, self-regulation differs from pure private ordering in that government agencies impose formalities for the adoption or amendment of rules, policies, and procedures.[39] SROs in both the futures and securities industries include exchanges and associations.[40]

Though the Commodity Exchange Act does not specifically define futures-industry SROs,[41] it does define various types of industry organizations and entities that the CFTC regulates.[42] Furthermore, section 21 of the CEA provides for registration of futures associations,[43] which participate in self-regulation via rulemaking and enforcement in an effort to maintain integrity and increase investor confidence in the futures

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CFTCOrganization/index.htm (on file with the *Columbia Law Review*) (last visited Sept. 20, 2014) (describing roles of each division).

37. CFTC, Mission & Responsibilities, supra note 26; see also Mishkin, supra note 35, at 339 ("The CFTC oversees futures trading and the futures exchanges to ensure that prices . . . are not being manipulated, and it also registers and audits the brokers, traders, and exchanges . . . ."). The CFTC thus has "considerable powers of regulation and review." Bartos, supra note 4, at 262.

38. Robert Baldwin et al., Understanding Regulation: Theory, Strategy, and Practice 137 (2d ed. 2012). Self-regulation may be purely private, organized and operated "in pursuit of the private ends of its membership," or "it may act governmentally in so far as public policy tasks are delegated to private actors or institutions" and insofar as it is constrained by statutes, governmental oversight, or participation and accountability mechanisms. Id. at 137–38. SROs may play one or more roles, including rulemaking, monitoring, and enforcement. Id. at 138.

39. Onnig H. Dombalagian, Self and Self-Regulation: Resolving the SRO Identity Crisis, 1 Brook. J. Corp. Fin. & Com. L. 317, 318–19 (2007); see also Robert J. Shiller, Democratizing and Humanizing Finance, *in* Reforming U.S. Financial Markets: Reflections Before and Beyond Dodd–Frank 1, 8 (Benjamin M. Friedman ed., 2011) ("[SROs] represent private interests of an industry group and set rules for their proper behavior. The government delegates authority to SROs . . . ."); SEC, Third Report on the Implementation of Organizational Reform Recommendations 40 (2012), http://www.sec.gov/news/studies/2012/sec-organizational-reform-recommendations-101712.pdf [hereinafter SEC, Third Report] (on file with the *Columbia Law Review*) ("[T]he SEC's relationship with SROs has both supervisory and co-regulatory aspects . . . .").

40. See infra text accompanying notes 41–67 (describing various SROs in financial industry).

41. Compare 15 U.S.C. § 78c(a)(26) (2012) (defining SROs), with 7 U.S.C. § 1a (2012) (containing no such definition).

42. 7 U.S.C. § 1a. These include, for example, boards of trade ("any organized exchange or other trading facility"), id. § 1a(6), registered entities (including boards of trade, DCOs, and swap execution facilities), id. § 1a(40), and swap execution facilities ("trading system[s] or platform[s] in which multiple participants have the ability to execute or trade swaps"), id. § 1a(50).

43. Id. § 21.

industry.[44] The futures-industry regulatory regime mirrors the securities-industry regulatory regime in that there are two key types of SROs that the respective independent regulators oversee: exchanges and associations.[45] These SROs are defined below.

a. *Exchanges.* — First, the CEA provides mechanisms by which boards of trade—exchanges on which futures transactions occur—are registered as designated contract markets by the CFTC.[46] Boards of trade designated by the CFTC include the Chicago Mercantile Exchange (CME), the Chicago Board of Trade (CBOT), the New York Mercantile Exchange (NYMEX), and its subsidiary, the Commodity Exchange (COMEX).[47] Aside from COMEX and NYMEX, these organizations were established independently[48] but are now consolidated under the umbrella of the CME Group.[49]

Subject to reasonable discretion with regard to its operation as an independent private entity, a board of trade must comply with the principles of the CEA and any rules or regulations promulgated by the CFTC to maintain its designation as a contract market.[50] Boards of trade make rules, monitor the actions of individuals and entities trading on their contract markets, enforce compliance with their rules, and discipline those that violate the rules.[51] Furthermore, boards of trade must work to prevent market manipulation and market disruption.[52] Aside from ensuring that boards of trade comply with the CEA and its self-promulgated rules and regulations, the CFTC has the authority to oversee rulemaking by boards of trade (and other registered entities, such as

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44. Cf. Who We Are, Nat'l Futures Ass'n, http://www.nfa.futures.org/NFA-about-nfa/index.HTML [hereinafter NFA, Who We Are] (on file with the *Columbia Law Review*) (last visited Sept. 5, 2014) (introducing National Futures Association as SRO meant to, inter alia, "safeguard market integrity").

45. See Bartos, supra note 4, at 262 (explaining CEA "creates a structure for regulating and supervising commodities exchanges" and noting "CFTC delegates some of its powers to the National Futures Association, a self regulatory organization approved by the CFTC, and the commodities exchanges"). Both the Securities Exchange Act and the Commodity Exchange Act identify types of SROs that are neither exchanges nor associations. See, e.g., 7 U.S.C. § 1a(15)(A) (including DCOs as registered entities); 15 U.S.C. § 78o-7 (requiring SEC to register and oversee credit-rating agencies).

46. 7 U.S.C. §§ 7, 7a-2, 7b.

47. See Membership at CME Group, CME Grp., http://www.cmegroup.com/company/membership/ [hereinafter Membership at CME Group] (on file with the *Columbia Law Review*) (last visited Sept. 19, 2014) (noting these exchanges are designated boards of trade).

48. See Jeremy Gogel, "Shifting Risk to the Dumbest Guy in the Room"—Derivatives Regulation After the Wall Street Reform and Consumer Protection Act, 11 J. Bus. & Sec. L. 1, 11 (2010) (tracing origins of these exchanges).

49. Membership at CME Group, supra note 47.

50. 7 U.S.C. § 7(d)(1).

51. See id. § 7(d)(2) (outlining various functions of board of trade).

52. See, e.g., id. § 7(d)(4) ("The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions . . . .").

DCOs). Though the CFTC owes a degree of deference to boards' rulemaking,[53] the CFTC must deny those rules it deems inconsistent with its regulations or the CEA.[54]

b. *Associations.* — The CFTC also has the authority to register futures associations and oversee them.[55] Registered futures associations must operate in the public interest and must comply with the provisions of the CEA and the regulations of the CFTC.[56] A registered futures association may promulgate rules requiring membership for entities undertaking certain activities[57] and must design their rules "to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . and to remove impediments to and perfect the mechanism of free and open futures trading."[58] Furthermore, it must design and implement disciplinary mechanisms and arbitration procedures to enforce these rules.[59]

Just as the Financial Industry Regulatory Authority (FINRA), supervised by the SEC,[60] oversees the securities industry by requiring registration of broker-dealers and subjecting members to its "rules, examinations, and enforcement authority,"[61] the National Futures Association (NFA) performs similar functions as the self-regulatory organization for the futures industry.[62] The NFA is governed by a board of member and nonmember directors (representing the industry and the public, respectively). "[A]nyone engaged with the public in futures transactions, including futures commission merchants, [and] retail foreign exchange dealers," is required to become a member.[63] The NFA, with a membership of 4,100 firms and 57,000 associates, thus promulgates and enforces rules and standards of professional conduct for all participants in the

53. See id. § 7a-2(c)(2), (c)(4)(A), (c)(5) (providing requirements for CFTC oversight of SRO rulemaking); see also Hester Peirce, Economic Analysis by Federal Financial Regulators, 9 J.L. Econ. & Pol'y 569, 608–09 (2013) (explaining CEA directs CFTC to approve SRO rule changes consistent with statutory requirements); cf. Coffee & Sale, supra note 2, at 67 (noting CFTC "defers more to self-regulation" than SEC).

54. 7 U.S.C. § 7a-2(c)(5); see also Johnson, Governing Financial Markets, supra note 7, at 202 (noting SEC and CFTC are authorized "to monitor SROs' rulemaking processes to ensure that SRO regulations are consistent with federal regulations and that SROs vigorously enforce these rules").

55. 7 U.S.C. § 21(a).

56. Id. § 21(b)(1).

57. Id. § 21(m).

58. Id. § 21(b)(7).

59. Id. § 21(b)(8)–(10).

60. See 15 U.S.C. § 78o-3 (2012) (outlining requirements for SEC oversight of registered securities associations).

61. Peirce, supra note 53, at 606–07.

62. See id. at 608 ("NFA is the counterpart to FINRA for the futures industry.").

63. Id.

futures industry.[64] The CFTC has the power to suspend the NFA's registration if its rules do not comply with the requirements of the CEA,[65] to review the disciplinary actions the NFA takes,[66] and to oversee NFA rulemaking.[67]

As is clear from the extent to which the CEA provides for interaction between the CFTC and registered entities, self-regulatory organizations are integral to an efficient U.S. futures industry and an effective futures regulatory regime.[68] However, too much deference to SROs can lead to the very harms the CEA was designed to prevent—for example, market manipulation[69]—because of the dangers associated with allowing those who must follow the rules to make and enforce said rules.[70] At a minimum then, a regime that effectively intermingles government regulation with self-regulation must balance the expertise and efficiency gained by self-regulation against the accountability and fairness issues created by delegation of regulatory roles to private actors.[71] The next two subsections will identify the reasons for and benefits of self-regulation in the financial industry and discuss the potential negative implications of self-regulation when left unchecked.

2. *Factors Contributing to the Existence of Self-Regulation in the Financial Industry.* — There are various reasons for the existence and persistence of self-regulatory organizations in the U.S. financial industry. Realistic accounts recognize the self-interested motives of the futures industry and the need for rational balancing by the government, while theoretical or normative accounts extol the benefits of regulation by those who know

64. NFA, Who We Are, supra note 44. Members of the NFA must comply with numerous rules and requirements in various registration categories. Compliance, Nat'l Futures Ass'n, http://www.nfa.futures.org/NFA-compliance/index.html (on file with the *Columbia Law Review*) (last visited Oct. 9, 2014).

65. 7 U.S.C. § 21(c) (2012).

66. Id. § 21(h).

67. Id. § 21(j)–(k) (requiring submission of rule changes or additions to CFTC by futures association and granting CFTC permission to modify or amend these futures association rules).

68. Cf., e.g., Shiller, supra note 39, at 8 ("SROs . . . are essential to a functioning democracy.").

69. See 7 U.S.C. § 5(b) (stating purpose of CEA is "to deter and prevent price manipulation or any other disruptions to market integrity").

70. See infra Part I.A.3 (discussing hazards associated with self-regulation).

71. See Baldwin et al., supra note 38, at 137–43 (identifying this tension); Onnig H. Dombalagian, Demythologizing the Stock Exchange: Reconciling Self-Regulation and the National Market System, 39 U. Rich. L. Rev. 1069, 1090 (2005) [hereinafter Dombalagian, Demythologizing the Stock Exchange] (noting self-regulation must balance dangers of permitting financial industry to completely self-regulate with government's inability to regulate directly on wide scale).

the markets best.[72] The following paragraphs will address these lines of reasoning.

Theoretical accounts of the benefits of self-regulation are primarily concerned with the potential for increased expertise and effectiveness.[73] For example, advocates of self-regulation argue that "financial services practitioners know much more about their sector than a civil servant or bureaucrat ever could[,] . . . [because] the ongoing proximity of links with the profession or membership . . . keeps expertise honed and information up to date."[74] Therefore, those most closely associated with the regulated entities will better understand the balance between a functioning market and protections against problems such as market manipulation.[75] This "special knowledge" should enable SROs to perceive what types of obligations regulated parties will deem reasonable and acceptable and to craft rules accordingly.[76] In turn, more acceptable demands from regulators—private or public—should "produce[] higher levels of voluntary compliance."[77] Finally, self-regulation can help centralize and focus the regulatory needs of an industry where government regulation is scattered.[78] Theoretically, this expertise and effectiveness should bring about a more efficient regulatory scheme.[79]

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72. Cf. Johnson, Governing Financial Markets, supra note 7, at 235 (noting ideal self-regulation is "elusive theoretical concept"). Johnson argues self-regulation rests on three theoretical assumptions: that SROs will be innovative and adaptive, that they will act in a manner consistent with federal and public interests, and that SRO decisionmakers will correctly prioritize regulatory norms. Id. at 202.

73. See, e.g., id. at 203 ("Deferring to SROs allows government regulators to benefit from [SRO leaders'] . . . sophisticated understanding of . . . financial instruments.").

74. Baldwin et al., supra note 38, at 139.

75. See Lanny A. Schwartz, Suggestions for Procedural Reform in Securities Market Regulation, 1 Brook. J. Corp. Fin. & Com. L. 409, 427–28 (2007) ("Formulating policy . . . necessarily involve[s] an assessment of the proper course in light of changing conditions . . . . [A]n expert body [has] the . . . ability to balance these factors . . . ."); Shiller, supra note 39, at 8 ("[T]here is a sense that rules that serve a certain purpose are better made by people who understand that purpose.").

76. Baldwin et al., supra note 38, at 139.

77. Id.; see also Bos. Consulting Grp., U.S. Securities and Exchange Commission: Organizational Study and Reform 25 (2011) [hereinafter BCG Report], http://www.sec.gov/news/studies/2011/967study.pdf (on file with the *Columbia Law Review*) (citing justification for SROs that "industry participants are seen as more likely to buy into regulation when it comes from within" and thus "voluntary self-regulation may be more amenable to market participants than government oversight").

78. Cf. Shiller, supra note 39, at 9–10 (explaining dispersion of mortgage regulation, with no central regulator, exacerbated problems associated with subprime boom).

79. See, e.g., Baldwin et al., supra note 38, at 140 (arguing "self-regulators, with their easy access to those under control, experience low costs in acquiring . . . information[,] . . . have low monitoring and enforcement costs[,] and . . . are able to adapt . . . to changes . . . in a flexible and smooth manner"); Coffee & Sale, supra note 2, at 631 (touting industry rulemaking as "flexible and detailed, more sensitive to market nuances, and more able to deal with ethical and moral issues that a governmental agency cannot as legitimately regulate").

From a rational perspective, it would be practically impossible for government regulators alone to adequately oversee the industry considering the scope of their mandate.[80] As SROs are self-funded, they acquire resources via various fees imposed on their members.[81] Self-regulation therefore internalizes direct costs of regulation to the industry rather than forcing taxpayers to bear the cost.[82] When the burden of regulation shifts to industry, the regulator saves valuable time, money, and other resources. Because "staff, technology, and operating capital define[] a regulator's capabilities," an increase in resources via delegation to an SRO can enable regulators to "hire better skilled and more experienced personnel, draft better and more comprehensive regulations, invest in more sophisticated information processing and surveillance systems," and in general regulate more effectively.[83] Thus, a two-tier structure of regulation as featured in acts like the CEA can exploit the dominant power and influence of SROs to advance the goals of the regulatory regime.[84]

Historical factors also account for the United States' financial regulators' reliance on SROs: Many CFTC-regulated exchanges predate the adoption of the CEA.[85] In a sense, it was merely more practical to adapt the post-Great Depression regulatory structure to existing organizations that already had self-enforcement and self-regulation mechanisms in place.[86] However, self-interest on the part of the financial industry may

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80. Cf. Eric J. Pan, Understanding Financial Regulation, 2012 Utah L. Rev. 1897, 1918 [hereinafter Pan, Understanding] ("The primary difference between public and private regulatory strategies is the immediate cost to the [government] regulator.").

81. See, e.g., Dombalagian, Demythologizing the Stock Exchange, supra note 71, at 1096 (noting various fees stock exchanges may collect).

82. See, e.g., Pan, Understanding, supra note 80, at 1922 ("Self-regulation is often considered less expensive . . . than direct regulation, as the financial industry pays for its own regulatory apparatus."); see also Dombalagian, Demythologizing the Stock Exchange, supra note 71, at 1096 ("Self-regulation allows regulators to bundle industry regulation with the other services and expenses in an exchange's income statement, thus '[s]paring the federal government much of the burden of securities regulation' while obscuring the actual cost to the private sector." (alteration in original) (quoting Regulation of Market Information Fees and Revenues, 64 Fed. Reg. 70,613, 70,624 (Dec. 17, 1999) (codified at 17 C.F.R. pt. 240 (2014)))).

83. Pan, Understanding, supra note 80, at 1932 (footnote omitted).

84. Dombalagian, Demythologizing the Stock Exchange, supra note 71, at 1092.

85. See Gogel, supra note 48, at 11 (noting establishment of CBOT in 1848, CME's predecessor in 1874, and Kansas City Board of Trade in 1856); see also Coffee & Sale, supra note 2, at 67 (noting "historical inevitability" of two-tier structure); cf. Johnson, Governing Financial Markets, supra note 7, at 199–200 ("For hundreds of years, financial market participants have organized exchanges and clearinghouses.").

86. See Dombalagian, Demythologizing the Stock Exchange, supra note 71, at 1075–76 (noting self-regulatory framework was originally developed in part to avoid impracticality of growing administrative state); Johnson, Governing Financial Markets, supra note 7, at 201 (explaining Depression-era laws embraced notion market participants could serve primary role in market governance considering exchanges and clearinghouses had already occupied central role in market regulation for over a century).

contribute to the persistence of the current structure: The industry may prefer self-regulation because, if administered effectively, it can stave off further intrusion by the government.[87] The self-interested motivations of SROs are addressed in the next subsection.

3. *Negative Consequences of Self-Regulation.* — SROs pose risks if there is no government regulator ready to step in if the system goes awry.[88] At a general level, delegation to self-regulators implicates a double agency problem: The interests of the SROs do not always line up with the interests of the government regulator and, by extension, the interests of the public.[89] An SRO may "be more strongly accountable to their members than to the public or those affected by their activities."[90] Others contend regulatory capture[91] will lead to domination of the regulatory process by industry, preventing market entry and reducing competition.[92] Unaccountable SROs may be able to circumvent external controls—for exam-

87. See, e.g., Dombalagian, Demythologizing the Stock Exchange, supra note 71, at 1073–74 (noting various exchanges historically promulgated governance standards to avoid intrusive government regulation); Anthony Ogus, Rethinking Self-Regulation, 15 Oxford J. Legal Stud. 97, 98 (1995) ("[P]rivate interests that are threatened by regulation may gain considerable benefits if they are allowed themselves to formulate and enforce the relevant controls.").

88. Justice William O. Douglas quipped that the SEC would defer to SROs for frontline enforcement but "would keep the shotgun . . . behind the door—loaded, well-oiled, cleaned, ready to use." Charles R. Geisst, Wall Street: A History 249 (1997) (quoting Justice Douglas) (internal quotation mark omitted).

89. Cf. Pan, Understanding, supra note 80, at 1903 ("The principal–agent problem creates moral hazard and the assumption of excess risk.").

90. Baldwin et al., supra note 38, at 143; see also Luis A. Aguilar, Comm'r, SEC, Public Statement: The Need for Robust SEC Oversight of SROs (May 8, 2013), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1365171515546 (on file with the *Columbia Law Review*) ("[I]nherent conflict[s] of interests involved in self-regulation [make] robust SEC oversight over SROs . . . indispensable."); BCG Report, supra note 77, at 25 ("[I]ndustry participants have a conflict of interest . . . that might prevent them from imposing regulatory strictures on themselves.").

91. Regulatory capture might be understood as the danger of "agencies deliver[ing] regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public." Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1, 5 (1998); see also Gerard Caprio, Jr., Regulatory Capture: Why It Occurs, How to Minimize It, 18 N.C. Banking Inst. 39, 45 (2013) ("[R]egulators might be enticed by the prospect of a much better paying job in the private banking sector in exchange for current light supervision." (citing George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971))); Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. Econ. & Org. (Special Issue) 167, 169 (1990) (explaining capture theory defines "actors in the regulatory process as having narrow, self-interested goals—principally job retention . . . or perhaps postofficeholding personal wealth," with "[t]hese personal goods . . . acquired or cemented by using regulatory power to help others achieve similarly narrow goals, often pecuniary").

92. See, e.g., SEC, Study on Enhancing Investment Adviser Examinations 33 (2011), http://www.sec.gov/news/studies/2011/914studyfinal.pdf (on file with the *Columbia Law Review*) (citing danger of "SRO 'capture' by the discrete industry group from which SRO staff are drawn and to which they may return after their service").

ple, by making and enforcing rules in a way that benefits members only—imposed by statutory and administrative regulation.[93] Because the default assumption is "that a private actor would pursue regulatory strategies that best satisfy its private interests or otherwise allow it to extract certain private benefits," there is an inherent risk in giving SROs unfettered discretion in exercising their substantial influence over the financial industry.[94] This risk grows when an SRO is funded by regulated firms,[95] especially when a self-regulator's financial prospects are directly tied to increased market activity.[96]

The general need for caution when delegating to and relying on SROs is especially appropriate in this case due to the specific risks associated with financial self-regulation.[97] In particular, the complexity of the industry,[98] the speed of market dynamics,[99] and the expertise of market participants relative to the government regulator[100] give the SRO a significant information advantage.[101] This information asymmetry[102]—aggra-

93. See Johnson, Governing Financial Markets, supra note 7, at 203 (doubting "regulated entities continuously introduce regulation that aligns market participants' behavior with the public's interest").

94. Pan, Understanding, supra note 80, at 1931; see also Johnson, Governing Financial Markets, supra note 7, at 206 (explaining SRO directors may prioritize "commercial interests . . . above regulatory norms").

95. See BCG Report, supra note 77, at 25 ("Critics of securities SROs . . . claim that exchanges fail to discipline profitable or otherwise powerful members out of fear that excessive regulation will push business to more lightly regulated competitors."); see also Dombalagian, Demythologizing the Stock Exchange, supra note 71, at 1097 (explaining conflicts of interests associated with SRO revenue streams); cf. NFA, Who We Are, supra note 44 (assuring public NFA is "financed exclusively from membership dues and assessment fees").

96. See Johnson, Governing Financial Markets, supra note 7, at 204 (arguing fact that exchanges and clearinghouses have shareholders demonstrates "conflict between SROs' commercial goals and . . . regulation"); cf. William L. Cary, Federalism and Corporate Law: Reflections upon Delaware, 83 Yale L.J. 663, 665–67 (1974) (presenting "race [to] the bottom" argument).

97. See Omarova, Community of Fate, supra note 22, at 483 ("In the financial services industry, it is particularly important that any self-regulatory scheme be firmly embedded within a sophisticated, comprehensive, and effective scheme of direct government regulation and supervision.").

98. See Gary B. Gorton, Misunderstanding Financial Crises: Why We Don't See Them Coming 207 (2012) (noting how different markets aggregate and incorporate information differently).

99. Id. at 195 (contending speed and complexity at which market evolves means government likely will always be behind market "in terms of measuring . . . changes and in adopting new regulations").

100. See Henry T.C. Hu, Too Complex to Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm, 90 Tex. L. Rev. 1601, 1610 (2012) (acknowledging "complexities related to financial innovation" are creating problems for key regulatory paradigms).

101. See Omarova, Community of Fate, supra note 22, at 418 ("[T]he most fundamental challenges facing financial regulators and policymakers stem from the increasing complexity of financial products and activities . . . .").

vated by problems of capture unique to the industry[103]—enhances the risk that SROs can act contrary to public policy without detection.[104]

B. *Deregulation, the Financial Crisis, and Dodd–Frank's Expansion of CFTC Responsibilities*

Dodd–Frank has substantially increased the authority and mandate of the CFTC by increasing the types of activities and entities it regulates.[105] At the same time, heightened responsibility has strained limited resources, which may perversely increase the CFTC's reliance on SROs to administer various regulatory functions.[106] To understand why Dodd–Frank represents such a substantial leap in the delegation of responsibility to the CFTC, it is important to identify the CFTC's prior frustrated efforts to expand the scope of its authority in the midst of the deregulated environment preceding the financial crisis. Thus, Part I.B.1 reviews the decision not to regulate the OTC derivatives market and identifies certain factors contributing to the financial crisis. Part I.B.2 then connects these contributing factors to the provisions of Dodd–Frank that increased the authority and burdens of the CFTC.

1. *Deregulation and the Financial Crisis.* — As noted previously, futures trading became significantly more complex after the establishment of the CFTC.[107] Market participants created various types of derivatives, "agreement[s] between counterparties that create[] rights and obligations rela-

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102. See id. ("Private industry actors may be in the best position to identify and understand underlying trends in the increasingly complex financial markets and to gather and analyze . . . information . . . .").

103. See, e.g., Johnson & Kwak, supra note 13, at 5–6 (arguing precrisis deregulation and postcrisis bailouts were due in part to political establishment's captivity "to the idea that America needs big . . . banks"); infra note 259 (discussing revolving door and political and ideological alignment of Wall Street and government regulators).

104. See Gorton, supra note 98, at 194 (arguing government regulators were unaware of realities and complexities of market in run-up to financial crisis).

105. For example, Dodd–Frank vastly expands the CFTC's mandate by requiring mandatory clearing of swaps, subject to certain exemptions, and requiring the CFTC to "review on an ongoing basis each swap or group of swaps to determine whether the swap should be required to [be] cleared." CCH Attorney-Editor Staff, supra note 16, ¶ 3060, at 276 (citing Dodd–Frank Wall Street Reform and Consumer Protection (Dodd–Frank) Act § 723(a)(3), 7 U.S.C. § 2(h)(2)(A)–(C) (2012)). The Act also subjects DCOs to registration and governance requirements overseen by the CFTC. Id. ¶ 3070, at 281 (citing Dodd–Frank § 725(b)–(c), 7 U.S.C. § 7a-1).

106. See Daria S. Latysheva, Note, Taming the Hydra of Derivatives Regulation: Examining New Regulatory Approaches to OTC Derivatives in the United States and Europe, 20 Cardozo J. Int'l & Comp. L. 465, 496 (2012) ("[I]ndependent groups funded by the futures industry . . . may have to assume responsibility for overseeing the derivatives market.").

107. See supra notes 34–35 and accompanying text (discussing introduction of instruments not tied to commodities in futures markets).

tive to some underlying asset."[108] Although certain futures were traditionally traded on CFTC-regulated exchanges, market participants began trading forward contracts and swaps "over the counter," meaning that derivatives were exchanged directly between counterparties.[109] Market participants used swaps to mitigate risk,[110] but the lack of regulation of the OTC market by the CFTC, among other benefits,[111] made OTC trading increasingly attractive to the financial industry.[112]

Activity in the OTC markets increased,[113] but the CFTC left swaps unregulated for much of the 1980s and 1990s by exempting various types of swaps and other OTC transactions.[114] As the market grew, the CFTC reexamined its practice of exempting swaps.[115] But the profitability of these practices in a political environment favoring deregulation led Congress to effectively eliminate the possibility of federal regulation of

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108. Paul M. McBride, The Dodd–Frank Act and OTC Derivatives: The Impact of Mandatory Central Clearing on the Global OTC Derivatives Market, 44 Int'l Law. 1077, 1081 (2010). These underlying assets can be anything from agricultural products and natural resources to interest rates and foreign currencies. See id. (identifying various underlying assets).

109. See id. at 1081–86 (explaining types of derivatives and development of OTC market).

110. See, e.g., Henry T.C. Hu, Misunderstood Derivatives: The Causes of Informational Failure and the Promise of Regulatory Incrementalism, 102 Yale L.J. 1457, 1466–67 (1993) (explaining how swaps can mitigate risks in airline industry).

111. For example, the lack of a central exchange in OTC trading allows parties to take advantage of information asymmetries in a way that general exchange trading does not. See Gorton, supra note 98, at 207 (discussing difference between exchange and OTC trading).

112. In 2010, then-CFTC Chairman Gary Gensler identified various reasons for not regulating derivatives in the thirty-year period from their emergence in the 1980s to the enactment of Dodd–Frank in 2010; for example, some believed expertise and self-interest would effectively self-police sophisticated financial institutions and prevent them from taking excessive risk. Gary Gensler, Chairman, CFTC, Testimony Before the Financial Crisis Inquiry Commission (2010) [hereinafter Gensler Testimony], available at http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-48 (on file with the *Columbia Law Review*). For more on deregulation, see generally Doha M. Abdelhamid, International Regulatory Rivalry in Open Economies: The Impact of Deregulation on the US and UK Financial Markets 22–32 (2003) (explaining trend of removing regulations "in order to allow markets to work more freely").

113. See Johnson, Governing Financial Markets, supra note 7, at 212 ("[T]he expansive growth of OTC derivatives agreements occurred in an opaque, bilateral, shadow market.").

114. See Gensler Testimony, supra note 112 (noting CFTC practice of exempting OTC transactions in 1990s). Courts, Congress, and the Federal Reserve signaled to the CFTC to stay out of the market during this time. See Abdelhamid, supra note 2, at 94–95 (explaining pressure on CFTC to exempt swaps).

115. See Gensler Testimony, supra note 112 (explaining 1998 announcement of intention to reconsider approach).

OTC trading with the Commodity Futures Modernization Act of 2000 (CFMA).[116]

There are various reasons for why the CFTC historically has been more hands off with respect to the markets and market actors within its jurisdiction.[117] For one, the CFTC was often under the influence of politicians favoring less regulation.[118] Also, it began as a commodities regulator, which meant that as futures trading became more advanced and complex, the CFTC was not necessarily equipped to handle such changes.[119] Even though OTC trading substantially increased in the 1990s and the CFTC began exercising more control over OTC trading and swaps, "[d]eregulatory forces prevailed in the debate."[120] Justifications for deregulation included assumptions that overregulation would decrease profitability by causing traders to shift overseas, that the "sophisticated traders" of the marketplace did not need regulatory protections (or, alternatively, would be capable of self-discipline), and that the idiosyncratic aspects of OTC trades made them unsusceptible of uniform regulation.[121]

The resulting environment—comprising excessive risk taking in the OTC market and overleveraging with respect to derivatives—undoubt-

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116. Commodity Futures Modernization Act (CFMA) of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-365 (codified at 7 U.S.C. §§ 1, 27 (2006)), repealed by Wall Street Transparency and Accountability Act of 2010, Pub. L. No. 111-203, tit. 7, 124 Stat. 1376, 1641–1802 (codified in scattered sections of 7 U.S.C. and 15 U.S.C.). After the CFTC issued a May 1998 "Concept Release" proposing "significant changes in the regulation and oversight of the OTC derivatives market," the Clinton Administration recommended that the CFTC not regulate the OTC derivatives market; Congress swiftly followed with the CFMA. Arthur W.S. Duff & David Zaring, New Paradigms and Familiar Tools in the New Derivatives Regulation, 81 Geo. Wash. L. Rev. 677, 684–85 (2013) (citing CFTC, Over-the-Counter Derivatives (May 6, 1998), available at http://www.cftc.gov/opa/press98/opamntn.htm) (discussing historical factors contributing to passage of CFMA). As Duff and Zaring explain, "[w]ith the stroke of a pen, Congress excluded from CFTC oversight most off-exchange financial derivatives transactions" by a broad range of market actors. Id. at 685.

117. For an in-depth exploration of reasons for the CFTC's deregulatory approach and the regulatory history of derivatives, see generally Gensler Testimony, supra note 112.

118. Cf. Roberta Romano, The Political Dynamics of Derivative Securities Regulation, 14 Yale J. on Reg. 279, 320, 368 (1997) (discussing historical tendency of financial community to favor less political intervention in the economy and discussing how CFTC "supporters" favored deregulation).

119. See Gensler Testimony, supra note 112 (discussing "absence of a regulatory framework" for OTC trading and noting CFTC continuously exempted swaps and derivatives trading from regulation).

120. Brooksley Born, Foreword: Deregulation: A Major Cause of the Financial Crisis, 5 Harv. L. & Pol'y Rev. 231, 233 (2011).

121. See Gensler Testimony, supra note 112 (listing five justifications for past deregulatory approach). Indeed, those who supported the CFTC's approach of exempting swaps were not entirely unjustified—"[t]he markets for OTC derivatives exploded in the wake of the CFMA." Duff & Zaring, supra note 116, at 685 ("[T]he total notional value of OTC derivatives grew from approximately $88 trillion in 1999, just prior to the CFMA, to more than $670 trillion on the eve of the financial crisis in 2008.").

edly contributed to the systemic failure culminating in the financial crisis.[122] Defaults on money owed on derivatives contracts triggered failures throughout the system.[123] While it would be difficult to prove whether more regulation in the OTC market would have prevented a key cause of the crisis, deregulation contributed to an environment in which financial actors ignored warning signs and continued to leverage themselves while intensifying risk throughout the financial system.[124]

2. *Dodd–Frank Increases the Responsibilities and Strains the Resources of the CFTC.* — Title VII of Dodd–Frank[125] attempts to respond to the perceived systemic issues in the OTC market by vastly increasing the role of the CFTC in supervising swaps and OTC derivatives trading.[126] The Act reverses the CFMA's ban on regulating the OTC marketplace and in turn gives the CFTC broad authority over an area historically out of its reach.[127]

Dodd–Frank responds to the derivatives issue by requiring most swaps to be cleared through DCOs.[128] The CFTC must continuously

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122. See CCH Attorney-Editor Staff, supra note 16, ¶ 3005, at 250 ("It is widely acknowledged that OTC derivatives contracts, particularly credit default swaps, played a significant role in the recent financial crisis.").

123. See Johnson, Governing Financial Markets, supra note 7, at 214–15 (noting AIG's due to failure to assess exposure in credit-default-swap market "triggered a cascade of losses" and almost led to collapse); see also CCH Attorney-Editor Staff, supra note 16, ¶ 3005, at 251 (explaining "unexpected losses on . . . derivatives trades . . . could seriously impair the financial condition[s]" of counterparties); Randall S. Kroszner, Making Markets More Robust, *in* Reforming U.S. Financial Markets: Reflections Before and Beyond Dodd–Frank, supra note 39, at 41, 73–74 (discussing system-wide risk associated with "failure of one institution causing problems throughout the system due to cascading failures on derivatives contracts").

124. See Coffee, supra note 25, at 1048–49 (explaining "most major financial institutions relied, directly or indirectly, on credit default swaps issued or backstopped by AIG to hedge . . . exposure to financial risks" but AIG was unable to insure against real magnitude of exposure).

125. Wall Street Transparency and Accountability Act of 2010, Pub. L. No. 111-203, tit. 7, 124 Stat. 1376, 1641–1802 (codified in scattered sections of 7 U.S.C. and 15 U.S.C.).

126. See CCH Attorney-Editor Staff, supra note 16, ¶ 3005, at 248 (explaining that establishing comprehensive framework of oversight for OTC derivatives markets was seen as crucial to laying foundation for safer financial system); Coffee, supra note 25, at 1062 ("In response to the AIG episode, the Dodd–Frank Act sought to bring transparency to the OTC market by mandating the use of clearinghouses, exchange trading of OTC derivatives, and trade reporting.").

127. See Duff & Zaring, supra note 116, at 688, 690 (explaining Dodd–Frank subjected an essentially unregulated trading market to both market regulation and stability oversight).

128. See 7 U.S.C. § 2(h) (2012) (setting forth clearing requirement). Clearinghouses "manage (and mitigate) systemic risk by guaranteeing the credit worthiness of swap counterparties, and requiring counterparties to set aside adequate collateral . . . to prevent default." Michael Greenberger, Diversifying Clearinghouse Ownership in Order to Safeguard Free and Open Access to the Derivatives Clearing Market, 18 Fordham J. Corp. & Fin. L. 245, 248 (2013). There are arguments for and against clearing. Compare id. at 246 ("[I]mplementing objective governance standards . . . will enhance market stability,

review whether swaps should be cleared,[129] and the statute generally requires DCOs to register with the CFTC.[130] The CFTC must ensure that DCOs comply with the standard requirements for registered entities,[131] and Dodd–Frank specifically requires DCOs to comply with various core principles.[132] Additionally, Dodd–Frank ensures that swap execution facilities—facilities "for the trading or processing of swaps"—are registered with and monitored by the CFTC and SEC.[133]

Title VII augments the regulatory objectives of the CFTC, but scarce resources could strain the agency's ability to perform its new duties while maintaining its traditional role.[134] Thus, despite pressure to regulate in the wake of the financial crisis, "resource constraints [may] force regulators to seek more cost effective regulatory strategies, driving them to rely more on private strategies," including increased reliance on SROs.[135] In a 2011 report, CFTC Chairman Gary Gensler noted the CFTC was regulating a $40 trillion marketplace on a $169 million annual budget.[136] Thus, suggestions that the CFTC would pass off regulatory responsibilities to the NFA are not surprising.[137]

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efficiency, and competitiveness."), with Coffee, supra note 25, at 1063 (arguing clearinghouses do not eliminate but instead merely shift risk).

129. 7 U.S.C. § 2(h)(2).

130. Id. § 7a-1(a).

131. See id. § 7a-2 (imposing various requirements on entities, such as designated contract markets, registered with CFTC).

132. These principles include adequate capitalization, admission and eligibility standards, objectivity in the market, appropriate risk-management standards, and limitation of exposure. See id. § 7a-1(c).

133. Id. § 7b-3 (laying out requirements for registration and compliance of swap execution facilities); cf. Rosa M. Abrantes-Metz et al., Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses, 15 U. Pa. J. Bus. L. 357, 360–61 (2013) ("Swaps are simply too important and too relevant to slip through the cracks.").

134. See Coffee, supra note 25, at 1029, 1079 (worrying about prospect of "administrative softening, or even abandonment, of legislative enactments" because of reliance on regulatory agencies for implementation); see also Latysheva, supra note 106, at 494 (explaining SEC and CFTC need increased financial and human resources to fully accomplish goals of Dodd–Frank).

135. Pan, Understanding, supra note 80, at 1901.

136. Oversight of Dodd–Frank Implementation: A Progress Report by the Regulators at the Half-Year Mark: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs, 112th Cong. 63 (2011) (testimony of Gary Gensler, Chairman, Commodity Futures Trading Commission), available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=2271e4a1-a42e-4284-8fa4-696ba1e78c02 (on file with the *Columbia Law Review*).

137. See Peirce, supra note 53, at 601 (noting CFTC "has begun delegating additional functions" to NFA); Derivatives Rule Enforcement May Fall to Private Sector: CFTC, FINCAD Derivatives News (Jan. 14, 2011, 5:50 PM), http://derivative-news.fincad.com/derivatives-regulations/derivatives-rule-enforcement-may-fall-to-private-sector-cftc-1023/ (on file with the *Columbia Law Review*) (stating NFA would "bear the brunt" of policing entry into derivatives market without additional funding to CFTC); cf. William A. Birdthistle &

While Title VII greatly increases the scope of the CFTC's mandate and regulatory authority, it also maintains the classic structure of a two-tier regulatory regime. As before the crisis, the CFTC must rely in large part on private actors to perform quasi-regulatory functions ostensibly in the public interest.[138] By specifically requiring registration and CFTC oversight of DCOs[139] and swap execution facilities,[140] Dodd–Frank employs standard market-actor risk-mitigation tools in the CFTC's new areas of regulation.[141] While the financial crisis revealed the dangers of delegating quasi-regulatory functions to a market that failed to adequately police itself in the years leading up to the crisis,[142] the arrangement between public and private regulators reinforced by Dodd–Frank "arguably distorts private market incentives and risks in important ways that may be antithetical to [its own] safety and soundness goals."[143] Thus, the increase in private entities performing quasi-regulatory functions, combined with the effect of additional responsibilities on scarce government resources, reveals the importance of ensuring that the CFTC can adequately maintain the delicate balance between deferring to self-regulation and providing meaningful and effective oversight.[144]

II. THE CFTC'S INABILITY TO OVERSEE SRO RULEMAKING

Self-regulatory organizations are a key component of the regulatory regime contemplated by the CEA, but adequate oversight by the government regulator is essential to optimizing the benefits of SROs. As Title VII has increased the CFTC's responsibilities in overseeing futures industry SROs, it is crucial to consider whether the CFTC is in practice ensuring the balance contemplated by the current two-tier structure of U.S. financial regulation.

This Part uses SRO rulemaking as a lens through which to view the issue of government oversight of self-regulatory organizations.[145] Rule-

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M. Todd Henderson, Becoming a Fifth Branch, 99 Cornell L. Rev. 1, 5 (2013) (arguing in wake of financial scandals SROs are becoming more aligned with governmental organizations).

138. See Duff & Zaring, supra note 116, at 702–03 ("Even the various capital adequacy and margin requirements that will be promulgated for swap dealers, major market participants, and clearinghouses have a history of private sector analogs.").

139. 7 U.S.C. § 7a-1 (2012).

140. Id. § 7b-3.

141. Duff & Zaring, supra note 116, at 678.

142. See generally Gorton, supra note 98, at 186–94 (discussing unregulated, precrisis "shadow banking").

143. Duff & Zaring, supra note 116, at 705.

144. See id. at 703 (taking optimistic view Title VII leverages traditional strengths of CFTC "to enhance the existing incentive structures of private participants in the derivatives markets and further the safety and soundness regulatory agenda").

145. In this Note, rulemaking is defined as any activity that changes the language of an SRO's rulebook, including adding, amending, or repealing rules.

making is a crucial regulatory function as it defines the terms by which regulators undertake monitoring and enforcement.[146] When private actors make the rules, there exists the risk that rules will serve industry interests over the public interest and that members may contemplate means by which they can exploit these rules.[147] Dodd–Frank reflects Congress's commitment to a two-tier regime, yet the Act and practical realities have left the CFTC unable to effectively monitor rulemaking by SROs.[148]

This Part proceeds as follows. It demonstrates the disparity between the attention Congress has paid to SEC oversight of SROs and the attention it has paid to CFTC oversight of SROs. It compares in Part II.A.1 the more rigorous procedures securities SROs face to change rules as compared to futures SROs. It then examines in Part II.A.2 the issues that the independent studies of the SEC, compelled by Dodd–Frank, highlighted. This examination demonstrates that the CFTC faces similar issues that currently are not being addressed. Part II.B conducts an empirical analysis of the NFA's rule submissions to the CFTC. The near-universal approval of unmodified NFA rule submissions suggests it is probable that the amount of meaningful oversight of SROs by the CFTC has not increased since the financial crisis despite the fact that Dodd–Frank requires the CFTC to rely more extensively on these organizations. Part II.C analyzes the implications of these results.

A. *The Disparity Between Statutory Commands for the CFTC and the SEC to Monitor SRO Rulemaking*

Congress has shown that oversight of financial-industry SROs is an important component of the United States' financial regulatory regime. Yet a comparison of the relevant provisions of the CEA and the Exchange Act demonstrates that the CFTC's mandate to oversee SRO rulemaking is substantially more lenient than the SEC's mandate to do the same. Furthermore, by requiring outside review and analysis of the SEC's relationship with SROs, including review and analysis of SEC oversight of SRO rulemaking, Congress demonstrated its desire for the SEC to con-

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146. See Baldwin et al., supra note 38, at 138 (contemplating role of self-regulators to involve promulgation of rules to be enforced); cf. U.S. Gov't Accountability Office, GAO-12-625, Securities Regulation: Opportunities Exist to Improve SEC's Oversight of the Financial Industry Regulatory Authority 4 (2012) [hereinafter GAO, FINRA Study] ("[A] principal oversight mechanism for SEC is its authority to review and . . . approve SRO proposed rules and proposed changes to existing rules . . . .").

147. Cf. supra notes 74–77 and accompanying text (explaining SROs' ability to craft rules more acceptable to industry, especially considering SROs are populated with industry personnel).

148. This Note does not assess whether Dodd–Frank addressed the correct problems, let alone found the best solutions, associated with the financial crisis. Instead, assuming arguendo Dodd–Frank is an effective form of regulation (because it is the law in place), this Note identifies an omission in the law and seeks to address it.

sider how the structure and functioning of the regulatory regime could be improved. Yet Congress's failure to do the same for the CFTC, at precisely the time when it was expanding the scope of the CFTC's responsibilities with respect to SROs, left an important issue not just unresolved, but unconsidered.

1. *Comparison of Statutory Schemes.* — The CEA requires the CFTC to supervise any "new rule or rule amendment" that a "registered entity may" choose to adopt by requiring registered entities to provide to the CFTC a "written certification that the . . . new rule[] or rule amendment complies" with the statute.[149] Similarly, registered futures associations must "file with the Commission . . . copies of any changes in or additions to the rules of the association."[150] Thus, all SRO rule amendments must go through the CFTC. Yet the Act contemplates minimal scrutiny of these rules. With respect to registered entities,

> [t]he new rule or rule amendment . . . *shall* become effective . . . 10 business days after the date on which the Commission receives the certification [that the proposed rule complies with the CEA] . . . unless the Commission notifies the registered entity within such time that it is staying the certification because there exist novel or complex issues that require additional time to analyze, an inadequate explanation by the submitting registered entity, or a potential inconsistency with [the CEA or CFTC regulations].[151]

Furthermore, registered entities "may request that the Commission grant prior approval to any . . . new rule[] or rule amendment,"[152] which the CFTC "*shall* approve . . . unless the Commission finds that the new rule, or rule amendment, is inconsistent with [the CEA] (including [CFTC] regulations)."[153] The process by which registered futures associations' rule additions and amendments are filed with the CFTC and become effective are substantially the same,[154] though the maximum time period allowed for CFTC review of registered futures associations' rule submis-

149. 7 U.S.C. § 7a-2(c)(1) (2012). Registered entities include boards of trade designated as contract markets, DCOs, swap execution facilities, and swap data repositories. Id. § 1a(40).

150. Id. § 21(j).

151. Id. § 7a-2(c)(2) (emphasis added). If the CFTC stays certification, it has ninety days to review the rule filing, id. § 7a-2(c)(3)(A), after which time the rule will become effective, id. § 7a-2(c)(3)(B), unless the CFTC "notifies the registered entity during such period that it objects to the proposed certification on the grounds that it is inconsistent with" the CEA or CFTC regulations adopted pursuant to the CEA, id. § 7a-2(c)(3)(B)(ii). During this time the CFTC must provide a thirty-day public-comment period. Id. § 7a-2(c)(3)(C).

152. Id. § 7a-2(c)(4)(A).

153. Id. § 7a-2(c)(5)(A) (emphasis added).

154. In part, the relevant provision reads: "The Commission *shall* approve such rules if such rules are determined by the Commission to be consistent with the requirements of this section and not otherwise in violation of this chapter or the regulations issued pursuant to this chapter." Id. § 21(j) (emphasis added).

sions is longer than for registered entities.[155] The CFTC can abrogate futures-association rules and request alterations or supplemental rules, but cannot do so for registered entities.[156]

Read alone, it appears that the CEA contemplates a balance whereby the CFTC acts as a backstop to ensure that SROs do not violate the CEA or CFTC regulations,[157] but is not so heavily involved in the rulemaking process that the efficiency and expertise gains of self-regulation are lost.[158] However, parallel provisions in the Exchange Act reveal that the SEC has a more comprehensive mandate with respect to overseeing SRO rule changes in the securities industry without compromising SRO independence. Like the CEA, the Exchange Act requires each SRO to file copies of any "proposed rule change."[159] Unlike the CEA, which permits SRO rule amendments to become effective unless the CFTC takes action within ten days, the Exchange Act mandates SEC rule review.[160] Thus, the default in the Exchange Act is that "[n]o proposed rule change shall take effect *unless* approved by the [SEC] or otherwise permitted in accordance with" statutory provisions.[161] The SEC must approve an SRO's proposed rule change if it finds the change consistent with the Exchange Act and SEC regulations, but it must reject a rule change if it does not make such a finding.[162] The agency must wait a minimum of thirty days from the original filing before approving a rule.[163] Finally, under certain circumstances, a proposed rule change may become effective immediately upon filing.[164]

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155. See id. (providing time limits of up to "one year . . . or within such longer period as the registered futures association may agree to" for CFTC to conclude disapproval proceeding).

156. Id. § 21(k).

157. Cf. Geisst, supra note 88, at 249 (acknowledging Justice Douglas's proposition that SEC would keep a "shotgun . . . behind the door" in case exchanges went astray of statutory requirements via self-regulation).

158. See supra notes 73–79 and accompanying text (discussing potential benefits of self-regulation).

159. 15 U.S.C. § 78s(b)(1) (2012). These include "any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization." Id.

160. See id. ("The Commission shall, as soon as practicable after the date of the filing of any proposed rule change, publish notice . . . [and] give interested persons an opportunity to [comment] . . . ."); see also SEC, Third Report, supra note 39, at 41 (explaining filing requirement allows for SEC and public review).

161. 15 U.S.C. § 78s(b)(1) (emphasis added). The SEC has forty-five days to either "approve or disapprove the proposed rule change," id. § 78s(b)(2)(A)(i)(I), or "institute proceedings to determine whether the proposed rule change should be disapproved," id. § 78s(b)(2)(A)(i)(II). The SEC may extend the time period for up to forty-five additional days if the SRO consents or the SEC provides notice of reasons for a determination that a longer period is appropriate. Id. § 78s(b)(2)(A)(ii).

162. Id. § 78s(b)(2)(C)(i)–(ii).

163. Id. § 78s(b)(2)(C)(iii). The statute allows certain "good cause" exceptions. Id.

164. The Exchange Act allows SROs to file rules for immediate effectiveness in certain situations that are inconsequential from a regulatory perspective. Id. § 78s(b)(3)(A)

The statutory scheme reveals that in many ways the manner in which the CFTC oversees SRO rulemaking is the inverse of the manner in which the SEC oversees SRO rulemaking. While the default for futures SROs is that rules become effective unless the CFTC affirmatively intervenes, the default for securities SROs is that the SEC will review every proposed rule change filed except those that the SRO designates as being so insubstantial as to become immediately effective without review.[165] Proposed rule changes submitted to the CFTC become effective within ten days; meanwhile, the SEC may not approve a proposed rule change until at least thirty days after the original filing.[166] Moreover, the standard for approval and disapproval for each government agency is subtly but meaningfully different: The CFTC must approve any proposed rule or rule amendment *unless* it finds that rule to be *inconsistent* with the CEA or CFTC regulations; the SEC can *only* approve a proposed rule change if it affirmatively finds that rule *consistent* with the Exchange Act or SEC regulations.[167] In sum, Congress requires the SEC to take steps to carefully consider any rule change proposed by an SRO and has built in safeguards to ensure that careful consideration has in fact occurred, but Congress leaves the decision to the CFTC whether to intervene and carefully review a rule change an SRO has proposed.[168]

That Congress leaves the decision of whether to take action to the CFTC is especially problematic considering the agency's post-Dodd–Frank responsibilities.[169] In fact, the National Futures Association has already begun to undertake functions previously performed by the

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(allowing rule to take immediate effect if "constituting a stated policy," "establishing or charging a . . . fee," or "concerned solely with the administration of the [SRO]").

165. See supra note 164 (explaining circumstances under which SRO can file a proposed rule change for immediate effectiveness). For an explanation of the SEC's efforts to increase the number of proposals filed for immediate effectiveness, see SEC, Third Report, supra note 39, at 41–42.

166. Compare supra text accompanying note 151 (describing CFTC timeline), with supra text accompanying note 163 (describing SEC timeline).

167. If the statute requires the CFTC to take action to disapprove a rule, but the SEC to take action to approve a rule, it logically follows that rules overseen by the CFTC are more likely to become effective.

168. The SEC's rule-oversight regime is far from perfect. See infra Part II.A.2 (discussing independent reviews of SEC–SRO relationships). But the fact that Congress has created a more rigorous regime for SEC–SRO rulemaking oversight than for CFTC–SRO rulemaking oversight may signal to the CFTC that oversight of SRO rule changes is not a priority. Though the CFTC may intervene to more carefully review a rule, the onus is on the CFTC to decide whether to act.

169. See Matthew Philips, The CFTC Is Drowning in Market Data, Bloomberg Businessweek (Oct. 31, 2013), http://www.businessweek.com/articles/2013-10-31/the-cftc-is-drowning-in-swaps-futures-trading-data (on file with the *Columbia Law Review*) (noting "flood of data" for CFTC to analyze due to regulation of swap execution facilities); supra notes 134–137 and accompanying text (explaining CTFC's new burdens may force it to rely increasingly on SROs to help monitor the industry).

CFTC.[170] That the CFTC is experiencing a resource crunch[171] that is unlikely to end in the near future[172] only exacerbates the problem. Thus, when the CFTC is forced to conduct regulatory triage in order to determine how to best allocate its scarce resources, it is unrealistic to expect the CFTC to devote those resources to an activity (meaningfully reviewing SRO rulemaking) that is statutorily discretionary in most circumstances.[173]

2. *Independent Assessments of SEC–SRO Oversight Mandated by Dodd–Frank.* — Aside from the statutory differences, Congress has demonstrated its inattention to how the CFTC oversees SROs in other ways. In particular, Dodd–Frank requires two independent assessments of the SEC's relationships with the SROs it regulates.[174] The comptroller general, located in the Government Accountability Office (GAO), must

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170. See NFA's Functions Explained: NFA in Brief, Nat'l Futures Ass'n, http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=1001&Section=1 (on file with the *Columbia Law Review*) (last visited Oct. 8, 2014) (noting "NFA performs registration functions under the Commodity Exchange Act—functions previously performed by the CFTC"—and CFTC "has also authorized NFA to process CFTC registration applications by screening applications, and where appropriate, granting or denying registration applications in all categories").

171. See D.M. Levine, JPMorgan Hearing: Market Regulators Warn They're Broke, Outgunned by Wall Street, Huffington Post (May 22, 2012, 1:55 PM), http://www.huffingtonpost.com/2012/05/22/jpmorgan-hearing_n_1536596.html (on file with the *Columbia Law Review*) ("[Former CFTC] Chairman Gary Gensler told lawmakers that the demands on [the] agenc[y] to expand oversight are growing, but that [its] pocketbooks are not."); see also Philips, supra note 169 (noting CFTC is "[w]oefully understaffed [and] underfunded," CFTC has only forty more employees than it did twenty years ago, its budget is less than twenty percent of SEC's, and Gensler's recognition of resource problems); Steven Lofchie, CFTC Chairman Gensler Speaks Before International Group of Treasury Associations and U.S. Chamber of Commerce, Ctr. for Fin. Stability (Sept. 30, 2013), http://centerforfinancialstability.org/wp/?p=3060 (on file with the *Columbia Law Review*) (reporting Gensler's view that "CFTC is an underfunded and understaffed agency, and should be allocated proper funding in order to continue monitoring the swaps market").

172. See Pan, Understanding, supra note 80, at 1937 (predicting decline in regulatory funding as financial markets recover).

173. See John S. Applegate, Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control, 9 Yale J. on Reg. 277, 323 (1992) (arguing priority setting and allocation of scarce resources requires regulatory triage); Colloquium, Proceedings of the Sixth Annual Robert C. Byrd Conference on the Administrative Process, 10 Admin. L.J. Am. U. 251, 262–64 (1996) (statement of David C. Vladeck, Director, Public Citizen Litigation Group) (explaining agencies facing budget constraints must perform "regulatory triage," by "implement[ing] the rules mandated by Congress" first, with discretionary rules potentially "squeezed aside"); see also Cornelius M. Kerwin, Rulemaking: How Government Agencies Write Law and Make Policy 154–55 (3d ed. 2003) ("[A]gencies facing the twin pressures of tight resources and even tighter schedules . . . invest their people power in rational ways.").

174. See 15 U.S.C. § 78d-9 (2012) (requiring Comptroller General to submit periodic reports to Congress including evaluation of SEC's oversight of securities associations); Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 967(a)(2)(F)–(G), 124 Stat. 1376, 1913 (2010) (requiring independent consultant to study, inter alia, SEC's oversight and reliance on SROs).

submit to Congress "a report that includes an evaluation of the oversight by the [SEC] of national securities associations"[175] ("GAO study"), of which FINRA is currently the only one.[176] In specifying what the GAO study should include, Congress refers to FINRA rules in two of the eleven provisions: The GAO must analyze "the impact of any conflicts of interest on the regulatory enforcement or rulemaking by" FINRA[177] and must evaluate oversight by the SEC with respect to "the ongoing effectiveness of the rules of [FINRA]."[178]

Second, section 967 of Dodd–Frank requires the SEC to hire an independent consultant to comprehensively review "the SEC's relationship with and reliance on self-regulatory organizations and other entities relevant to the regulation of securities and the protection of securities investors that are under the SEC's oversight."[179] The selected consultant, Boston Consulting Group (BCG), studied "whether the SEC's oversight and reliance on self-regulatory organizations promotes efficient and effective governance for the securities markets"[180] and "whether adjusting the SEC's reliance on self-regulatory organizations is necessary to promote more efficient and effective governance for the securities markets."[181] While the statute does not specifically require review of the SEC's procedures for overseeing SRO rulemaking, BCG's final report specifically addresses the procedures by which the SEC reviews SRO rule filings.[182] And, not only has "an independent consultant of high caliber"[183] analyzed these procedures, but the SEC, as mandated by Dodd–Frank,[184] has also considered and responded to BCG's suggestions.[185]

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175. 15 U.S.C. § 78d-9(a). The first report was due in July 2012, and subsequent reports are due every three years after that. Id.

176. See GAO, FINRA Study, supra note 146, at 2 (noting Dodd–Frank provision "solely applies to FINRA").

177. 15 U.S.C. § 78d-9(a)(1).

178. Id. § 78d-9(a)(9).

179. Dodd–Frank § 967(a)(1).

180. Id. § 967(a)(2)(F).

181. Id. § 967(a)(2)(G).

182. See BCG Report, supra note 77, at 65–67 (analyzing and suggesting improvements for SEC oversight of SRO rulemaking).

183. Dodd–Frank § 967(a)(1).

184. See id. § 967(c) (requiring SEC to periodically report to Congress "SEC's implementation of the regulatory and administrative recommendations contained in the consultant's report").

185. For example, the SEC acknowledged the continued assessment of "how to enhance the post-Dodd–Frank SRO rule change review process in a manner that allows it to progress efficiently, while assuring adequate review of each proposal." SEC, Fourth Report on the Implementation of SEC Organizational Reform Recommendations 28 (2013), http://www.sec.gov/news/studies/2013/sec-organizational-reform-recommendations-043013.pdf [hereinafter SEC, Fourth Report] (on file with the *Columbia Law Review*). Progress included "plann[ed] enhancements to the electronic form filing system for SRO rule changes, including ways to capture and reflect in the system more information on filings," and circulation of "a written dashboard of noteworthy SRO rule changes." Id. at

Considering how much of the post-Dodd–Frank regulatory regime requires the CFTC to rely on SROs,[186] it bears asking whether Congress should have mandated similar reviews of the CFTC's relationship with SROs. Congress has *required* the SEC to continuously consider how to improve the efficiency of rulemaking oversight while maintaining meaningful review; meanwhile, the understaffed and underfunded CFTC has neither been required by law to have such reviews conducted nor had the impetus to conduct a review itself. In light of the CFTC's more lenient standard for reviewing SRO rules in the Commodity Exchange Act,[187] the fact that both reports highlight potential issues with the SEC's contemporary rule-review regime[188] only reinforces the argument that Congress has paid inadequate attention to how the CFTC oversees SROs. But this point is moot if the CFTC has in practice meaningfully reviewed proposed rule additions and changes by SROs.

B. *Empirical Study: Near-Universal Approval of CFTC Rule Submissions*

This section presents the results of an empirical survey of proposed rule changes and additions submitted to the CFTC by the National Futures Association from 2003 to 2012 and examines whether or not the NFA ultimately adopted these changes. This survey shows that, despite the CFTC's increased role in regulating the futures industry after Dodd–Frank, its performance of a particular regulatory function—review of SROs' proposed rule changes—has not significantly changed from its performance in the deregulated environment that preceded the financial crisis.[189] The study does not aim to present the relatively lax statutory structure discussed in Part II.A.1 as the "cause" of this lack of change.[190] It is instead limited in scope, only reviewing rule submissions

28–29; see also SEC, Third Report, supra note 39, at 42 (identifying areas of focus for improving rule-filing process).

186. See supra notes 138–144 and accompanying text (explaining implications of increased CFTC reliance on SROs after Dodd–Frank).

187. See supra Part II.A.1 (comparing CFTC–SRO rule-review structure with SEC–SRO rule-review structure and determining SEC's requires more comprehensive review).

188. See, e.g., GAO, FINRA Study, supra note 146, at 15 (recommending SEC "encourage FINRA to conduct retrospective reviews of its rules" as FINRA does not currently do so); BCG Report, supra note 77, at 65 (remarking some SEC rule reviewers "could benefit from a deeper understanding of how the markets and market participants operate"). But see id. at 65–67 (suggesting, in light of strained resources, SEC should consider ways to make rule-proposal review more efficient and suggesting legislative changes making SEC–SRO rule review more lax to "reduce the volume of filings submitted").

189. Compare supra Part I.B.1 (reviewing deregulation before financial crisis), with supra Part I.B.2 (explaining increased role of CFTC since enactment of Dodd–Frank).

190. Considering the GAO's study of 432 SEC releases regarding FINRA-proposed rule changes from 2009 to 2011 revealed "only one occurrence of a disapproved release available on SEC's website", GAO, FINRA Study, supra note 146, app. at 30, a pure cause-and-effect argument based on the statutory disparity would not pass muster. Yet comments by both BCG and the GAO on the SEC's current statutory structure have indicated an at least implicit belief that, despite there being room for improvement, the SEC does in fact

by one SRO, the NFA, found in documents available to the public. This should not be taken to indicate a comprehensive conclusion, but the trend revealed by this study suggests that the CFTC has remained consistently deferential despite increasing reliance on SROs. One way the CFTC can remain a vigilant overseer of SRO practices is by ensuring SROs' rules are in the public's interest and not just in the interests of their members. The data, however, provide one indicator that the CFTC is not performing this function.

The NFA is a relevant organization for study for multiple reasons. First, it performs a variety of regulatory functions,[191] meaning its rulebook covers a range of relevant regulatory areas.[192] Second, because the CFTC has delegated significant regulatory responsibilities to the NFA,[193] it is vital that the CFTC ensures the NFA is adequately performing these functions rather than taking advantage of its increased role to benefit its members at the expense of the public.[194] Third, because the NFA mirrors FINRA in structure and function, this study can model the GAO's analysis.[195] While the NFA does not facilitate or oversee the market on a transaction-to-transaction basis, these other features make it ripe for study.[196]

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meaningfully oversee the SRO rulemaking process to some extent. See, e.g., id. at 5 & n.10 (noting after Dodd–Frank, "SEC can now directly disapprove proposed rule changes that are subject to SEC approval if it does not find that they are consistent with the Exchange Act," something it could not do prior to the Act); BCG Report, supra note 77, at 66 ("For each filing, [SEC staff] needs to ensure the proposed rule is thoroughly described and analyzed in order to enable meaningful public comment.").

191. See supra text accompanying notes 62–64 (describing role and regulatory responsibilities of NFA).

192. NFA Manual/Rules, Nat'l Futures Ass'n, http://www.nfa.futures.org/nfamanual/NFAManualTOC.aspx [hereinafter NFA Manual] (on file with the *Columbia Law Review*) (last visited Sept. 20, 2014) (listing rule categories such as compliance, arbitration, and financial requirements).

193. See 17 C.F.R. § 3.2(a) (2014) (delegating registration functions of CFTC to NFA); supra notes 137, 170 (discussing these delegations).

194. Cf. BCG Report, supra note 77, at 65 (noting because exchanges have begun outsourcing regulatory responsibilities to FINRA, "it has become increasingly important that the SEC be able to measure the effectiveness of SRO regulatory operations, over time and relative to each other").

195. See GAO, FINRA Study, supra note 146, at 12 ("From 2009 through 2011, SEC issued more than 400 releases regarding FINRA proposed rule changes. We reviewed a sample of 19 of these releases . . . ."); supra notes 60–62 and accompanying text (explaining how NFA resembles FINRA).

196. In some respects, the CME Group, an exchange, might be a more relevant organization to review considering its similarity to clearinghouses and swap execution facilities, the two organizations that will receive the most attention post-Dodd–Frank. However, CME's various mergers and acquisitions create practical difficulties with respect to a study of its rule submissions with the CFTC over a ten-year period. See CME Grp., CME Group Overview 2 (2013), available at http://www.cmegroup.com/company/files/cme-group-overview.pdf (on file with the *Columbia Law Review*) (noting mergers and acquisitions). Furthermore, it is important to acknowledge that, while the NFA is primarily a regulatory

Table 1 below presents the results of the empirical survey, determined by reviewing and analyzing the section 21(j) submissions to the CFTC,[197] all publicly available on the NFA's website.[198] The table shows that, since 2003, the NFA's proposed rule additions or amendments have been adopted consistently at a rate of nearly one hundred percent. Notably, the average rate of adoption by the NFA of any rule submitted to the CFTC was almost exactly the same from 2003 to 2007 (ninety-four percent) as it was from 2008 to 2012 (ninety-three percent). And the only two times rule submissions were withdrawn outright in the ten-year period resulted from the NFA's voluntary decisions—with one withdrawal prompted by consultation with association members, and the other submitted by the NFA without explanation—and not because of explicit rejection by the CFTC.[199] Consistent with the analysis outlined in Part II.A.1, the results suggest either nonparticipation or at least nonmeaningful participation by the CFTC in the NFA rulemaking process both before the financial crisis and after the first proposals for Dodd–Frank.[200]

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organization, the other major SROs under the jurisdiction of the CFTC—the exchanges—primarily *facilitate* transactions and perform regulatory functions aimed at that goal. In that sense, the CFTC's oversight of the NFA may function differently than its oversight of the CME Group.

197. 7 U.S.C. § 21(j) (2012) (requiring futures associations to submit all proposed rule amendments or additions to CFTC). For a detailed description of methodology and results, see infra Appendix.

198. CFTC Rule Submissions, Nat'l Futures Ass'n, http://www.nfa.futures.org/NFA-regulation/regulationRuleSubList.asp [hereinafter NFA, CFTC Rule Submissions] (on file with the *Columbia Law Review*) (last updated Sept. 20, 2014).

199. Letter from Thomas W. Sexton, Senior Vice President & Gen. Counsel, Nat'l Futures Ass'n, to Sauntia Warfield, Assistant Sec'y, CFTC, Regarding Use of Technology to Monitor FCM Segregation Compliance—Proposed Amendments to NFA Financial Requirements Section 4, at 3–4 (Nov. 27, 2012) [hereinafter Sexton, Nov. 27, 2012, Letter], available at http://www.nfa.futures.org/news/PDF/CFTC/FR_Sec4_UseOfTechnologyToMonitorFCM_SegregationCompliance_111512.pdf (on file with the *Columbia Law Review*) (noting discussion with FCM vendors led NFA to withdraw proposed rule requiring monitoring "through direct, view only online access to customer segregated and secured amount bank accounts"); Letter from Thomas W. Sexton, Senior Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David Stawick, Office of the Secretariat, CFTC, Regarding Definition of Forex Dealer Member: Proposed Amendments to NFA Bylaw 306, NFA Financial Requirements Section 11(a), and the Interpretive Notice Regarding Forex Transactions 1 (Nov. 19, 2010) [hereinafter Sexton, Nov. 19, 2010, Letter], available at http://www.nfa.futures.org/news/PDF/CFTC/Withdrawal_Bylaw306_FR11a_c082208.pdf (on file with the *Columbia Law Review*) (withdrawing earlier rule submission).

200. See supra notes 169–173 and accompanying text (arguing structure of CEA will keep oversight of SRO rulemaking low on CFTC's priority list considering added burdens of Dodd–Frank).

TABLE 1: MINIMAL EFFECT OF CFTC OVERSIGHT ON NFA RULEMAKING

Year	Total Rules Submitted	Adopted Unchanged	Adopted Modified	Rejected or Withdrawn
2003	9	100.0%	0.0%	0.0%
2004	13	92.3%	7.7%	0.0%
2005	11	81.8%	18.2%	0.0%
2006	23	100.0%	0.0%	0.0%
2007	25	96.0%	4.0%	0.0%
2008	14	92.9%	0.0%	7.1%
2009	16	87.5%	12.5%	0.0%
2010	17	94.1%	5.9%	0.0%
2011	11	100.0%	0.0%	0.0%
2012	20	90.0%	5.0%	5.0%

C. *Implications of the Empirical Study*

This subpart analyzes the results of the survey presented in Part II.B. First, this subpart addresses how the results implicate some of the key concerns addressed in Part I regarding self-regulatory organizations and the post-Dodd–Frank responsibilities of the CFTC. In particular, Part II.C.1 argues the evidence supports the hypothesis that Congress has left in the two-tier system a significant gap, which is open to exploitation by SROs. Second, Part II.C.2 addresses an important unknown in the empirical study—the fact that there may be significant nonpublic discourse between SROs and the CFTC—and argues that such a possibility is problematic as well.

1. *Opportunities for Deregulatory Rulemaking.* — The failure to meaningfully oversee SRO rulemaking could significantly undermine the CFTC's role as an SRO monitor.[201] The statutory scheme can only be successful in the way Congress contemplated if regulation by the CFTC buttresses the risk imposed by private organizations. The lack of such a backstop jeopardizes the balance envisioned by the United States' two-tier system of financial regulation.

Though the word "rule" has a regulatory connotation, the numbers suggest SROs have an opportunity to erode this balance by using rulemaking for deregulatory aims. Not only do SROs, often led by actors

201. See supra notes 138–144 and accompanying text (explaining how Title VII of Dodd–Frank maintains traditional reliance on private self-regulators).

imposing agency costs,[202] have the opportunity to make weak *new* rules,[203] but they also have the opportunity to exploit the lack of oversight to substantially weaken *preexisting* rules.[204] When the balance tips in favor of SROs' guiding policy, the probable costs associated with this shift may outweigh the expertise and efficiency benefits associated with SROs.[205] And if the failure to oversee rulemaking is not limited to the NFA but extends to those SROs that oversee market transactions and whose financial benefit is tied directly to the number of market transactions that take place,[206] market participants have even more of an opportunity to use this leeway to their unfair advantage.[207] By extension, because the CEA requires oversight of rulemaking not just by exchanges and futures associations but also by swap execution facilities and DCOs, the findings

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202. See, e.g., 7 U.S.C. § 7a-1(c)(2)(Q) (requiring DCO governing boards to include market participants); see also Letter from Angela Canterbury, Dir. of Pub. Policy, & Michael Smallberg, Investigator, Project on Gov't Oversight, to Debbie Stabenow, Chairwoman, Senate Comm. on Agric., Nutrition & Forestry, et al. 2 (July 23, 2012) [hereinafter POGO Letter], available at http://www.pogoarchives.org/m/fo/nfa-letter-20120723.pdf (on file with the *Columbia Law Review*) ("NFA's board is filled with industry representatives."). The LIBOR scandal provides an example of the dangers of financial institutions setting industry standards without supervision. See Gary Gensler, Chairman, CFTC, Oral Remarks Before European Parliament, Economic and Monetary Affairs Committee, Brussels, Belgium 2–3 (Sept. 24, 2012), http://www.cftc.gov/ucm/groups/public/@newsroom/documents/speechandtestimony/opagensler-121.pdf (on file with the *Columbia Law Review*) (explaining LIBOR benchmark was "vulnerable to misconduct" because banks made LIBOR submissions "essentially without oversight," yet had inherent conflicts of interest); see also Abrantes-Metz et al., supra note 133, at 360 (claiming manipulation of LIBOR "may have generated billions of dollars of illicit profits").

203. By the standards of current U.S. policy, against which they are ostensibly measured.

204. For example, of the ten years studied, the two years that had the highest amount of rulemaking activity occurred at the peak of the precrisis deregulatory regime. This fact creates some cause for speculation about whether these were proregulatory rules or deregulatory rules. See supra Table 1; cf. Gorton, supra note 98, at 182 (citing summer 2007 as beginning of financial crisis).

205. Various provisions of the CEA recognize the possibility that SROs can be utilized for purposes inconsistent with regulatory goals. See, e.g., 7 U.S.C. § 7a-1(c)(2)(P) (requiring DCOs to make rules mitigating against conflicts of interest); id. § 7b-3(f)(3) ("The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation."); see also POGO Letter, supra note 202, at 1 (urging Senate to "reconsider the government's reliance" on NFA, arguing "[g]roups such as NFA are inherently conflicted because they are funded by the firms they oversee" and are "less accountable" than government agencies).

206. See supra notes 95–96 and accompanying text (explaining dangers associated with self-funded SROs).

207. See Saule T. Omarova, License to Deal: Mandatory Approval of Complex Financial Products, 90 Wash. U. L. Rev. 63, 135 (2012) [hereinafter Omarova, License to Deal] ("The recent crisis demonstrated that unregulated financial innovation can impose an unacceptably high price on society . . . ."); see also Nate Silver, The Signal and the Noise: Why So Many Predictions Fail—But Some Don't 23–26 (2012) (explaining rating agencies that failed to accurately predict risk associated with certain transactions may have done so because they were paid per transaction).

above implicate the concern that market participants could take advantage of the lack of meaningful oversight of SRO rulemaking to circumvent the very tools Dodd–Frank created to address key contributors to the financial crisis.[208] If the data do in fact represent a larger phenomenon, financial institutions may even realize an opportunity to conduct regulatory arbitrage and divert their capital from SEC-regulated markets to CFTC-regulated markets, where the rules are laxer.[209]

Finally, one might argue that the NFA (or similar agencies) essentially prescreens rules, such that they only adopt rules that they know comply with CFTC regulations or the CEA. Thus, the high level of statutory deference given to SRO rules[210] and the results of the empirical study[211] are not so troubling—Congress and the CFTC have delegated certain regulatory responsibilities to SROs, thereby showing their faith that the SROs will comply with applicable law.[212] Perhaps, in the face of the inherent epistemic uncertainty associated with the prospective effect of a new rule,[213] whether promulgated by a government agency or an SRO, the CFTC *should* defer to an organization that the CFTC has certi-

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208. One anecdotal example of how financial institutions may be "flexing [their] financial muscle and capitalizing on loosened federal regulations to sway a variety of commodities markets" involves the allegations that Goldman Sachs has been warehousing aluminum for unduly long waiting periods in an effort to keep prices high. David Kocieniewski, A Shuffle of Aluminum, but to Banks, Pure Gold, N.Y. Times (July 20, 2013), http://www.nytimes.com/2013/07/21/business/a-shuffle-of-aluminum-but-to-banks-pure-gold.html (on file with the *Columbia Law Review*).

209. See Frank Partnoy, Financial Derivatives and the Costs of Regulatory Arbitrage, 22 J. Corp. L. 211, 227 (1997) ("Regulatory arbitrage consists of those financial transactions designed specifically to reduce costs or capture profit opportunities created by differential regulations or laws."); see also Lucy McKinstry, Note, Regulating a Global Market: The Extraterritorial Challenge of Dodd–Frank's Margin Requirements for Uncleared OTC Derivatives & a Mutual Recognition Solution, 51 Colum. J. Transnat'l L. 776, 817 (2013) ("[D]omestic coordination between the CFTC and SEC [is] . . . necessary . . . to forestall regulatory arbitrage and contain the systemic risks of uncleared derivatives."); cf. Gensler Testimony, supra note 112 (noting concern financial institutions will transact under another regime when they perceive regulation under one regime to be too burdensome). Taking the argument to its extreme, a significant diversion of capital to futures markets would increase market activity, further straining the CFTC at the precise time when it is struggling to reconcile increased responsibility with scarce resources. See supra note 27 (noting immense size of market CFTC now regulates).

210. See supra Part II.A.1 (discussing statutory rule-review regime).

211. See supra Table 1 (revealing almost all rule changes proposed by NFA are adopted unchanged).

212. See Baldwin et al., supra note 38, at 141–42 (remarking "special difficult[ies]" associated with self-regulatory regimes lacking "democratic legitimacy" are "less severe in self-regulatory regimes that are directed towards objectives that are set down in statutes"); cf. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (requiring deference to reasonable agency interpretation of statute when there is "express delegation of authority" by Congress).

213. See GAO, FINRA Study, supra note 146, at 14 (urging SEC to retrospectively review FINRA rules).

fied as capable of regulatory responsibilities.[214] However, delegation of regulatory responsibilities to an arguably self-interested private actor is plainly distinguishable from delegation of regulatory responsibilities to another branch of government—while government agencies ultimately are accountable to the public, SROs are not.[215] Furthermore, it is not altogether clear, despite historical reliance on SROs, that recent delegations show the CFTC's faith in the NFA—as opposed to simple desperation.[216] These considerations demonstrate that even if the NFA has prescreened in the past it would be imprudent for the CFTC to presume the NFA will continue to only enact compliant rules in the future.

2. *The Probability and Meaning of Behind-the-Scenes Discourse.* — The data in the survey only account for the information the NFA makes public: the rule submissions to the CFTC and the announcements of when rule amendments and additions will (or have) become effective. Yet it is unlikely that this public information constitutes the extent of communications between the SRO and the government agency.[217] Furthermore, time lag between the submission of some rule proposals to the CFTC and the announced effective date might indicate the CFTC is devoting meaningful time and resources to scrutinizing proposed rule changes.[218] But the statutory procedures for rule review,[219] combined with the increased

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214. See 7 U.S.C. § 21(b) (2012) (setting registration standards for futures associations).

215. Baldwin and his coauthors note that even when an SRO has some democratic legitimacy, "special problems of capture arise" as "legitimate objectives or rules will tend to be subverted to private purposes where their pursuit and application is given over to a private body that is accountable to its private members and is ineffective control of relevant information." Baldwin et al., supra note 38, at 141–42. The authors note that SROs tend "to act anti-competitively on access requirements and prices, so that members' interests rather than those of the public are served." Id. at 142. Indeed, "[o]ne of the principal functions of NFA is to establish . . . minimum financial requirements" for its members. NFA's Regulatory Operations, Nat'l Futures Ass'n, http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=1003&Section=1 (on file with the *Columbia Law Review*) (last visited Oct. 5, 2014).

216. See supra note 137 and accompanying text (discussing recent delegations to NFA due to strained resources).

217. Cf. BCG Report, supra note 77, at 66 (noting "[securities] SRO rules are often developed in partnership with" SEC staff).

218. See, e.g., Notice I-12-06, Nat'l Futures Ass'n (Apr. 18, 2012), http://www.nfa.futures.org/%5C/news/newsNotice.asp?ArticleID=4018 (on file with the *Columbia Law Review*) (announcing CFTC approval of proposed NFA Interpretive Notice submitted to CFTC for prior approval six months earlier). For the original submission, see Letter from Thomas W. Sexton, Senior Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David A. Stawick, Sec'y, CFTC, Regarding Allocation of Bunched Retail Forex Orders for Multiple Accounts—Proposed Adoption of the Interpretive Notice to NFA Compliance Rule 2-10 (Sept. 2, 2011), available at http://www.nfa.futures.org/news/PDF/CFTC/IntNotc_CR2-10_BunchedRetailForexOrders_MultipleAccts_0811.pdf (on file with the *Columbia Law Review*).

219. See 7 U.S.C. §§ 7a-2(c), 21(j) (placing burden on CFTC to find problem with SRO rules).

strain on the CFTC,[220] militate against the likelihood of ongoing dialogue between the CFTC and SROs regarding rulemaking.

Moreover, the possibility of significant behind-the-scenes CFTC–SRO discourse with respect to every proposed new rule implicates other concerns. When the dialogue occurs out of the public eye,[221] there is no way to determine whether oversight is actually meaningful or if the summary public approval of rule proposals that the study suggests reflects summary private approval as well.[222] It might be fair to argue that some conversations are best kept private, either to avoid publicity for potentially unpopular but necessary decisions,[223] or to keep industry secrets secret.[224] But the full title of Title VII[225] and purpose of Dodd–Frank[226] strongly suggest Congress intended to shift away from such opacity. Furthermore, if there are extensive private communications, the ninety-four percent adoption rate of proposed rule additions and amendments raises con-

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220. See supra notes 20, 171–172 and accompanying text (explaining CFTC is underfunded).

221. Note that while the rule proposals are published on the NFA's website, there is no formal "notice and comment" period like there would be for federal administrative rulemaking. In fact, the NFA does not always even announce when a rule has gone into effect. See infra Appendix (explaining how rule changes were verified).

222. See Harry First & Spencer Weber Waller, Antitrust's Democracy Deficit, 81 Fordham L. Rev. 2543, 2544–45 (2013) (lamenting regulatory deficiency due to "policymaking by unaccountable and nontransparent technocratic institutions far removed from democratic . . . control"); Jodi L. Short, The Political Turn in American Administrative Law: Power, Rationality, and Reasons, 61 Duke L.J. 1811, 1844 (2012) (addressing "suspicion that agencies are not only opaque but that they are also obfuscating the real reasons for their actions"); see also Bruce Kraus & Connor Raso, Rational Boundaries for SEC Cost-Benefit Analysis, 30 Yale J. on Reg. 289, 339 (2013) (noting congressional goal of open agency decisionmaking with "full [public] understanding of the [agency's] reasoning"); cf. Exec. Order No. 13,579, § 1(a), 3 C.F.R. 256, 256 (2012), reprinted in 5 U.S.C. app. § 601 (2012) ("Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking.").

223. See Letter from Michael K. Powell, Chairman, FCC, & Michael J. Copps, Comm'r, FCC, to Ted Stevens, Chairman, Senate Comm. on Commerce, Sci. & Transp. 1–2 (Feb. 2, 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256655A1.pdf (on file with the *Columbia Law Review*) (discussing issues with legislation regarding open agency communications).

224. Cf. 5 U.S.C. § 552(7)(b)(4) (exempting "trade secrets and commercial or financial information" from Freedom of Information Act requirements).

225. Wall Street Transparency and Accountability Act of 2010, Pub. L. No. 111-203, tit. 7, 124 Stat. 1376, 1641–1802 (codified in scattered sections of 7 U.S.C. and 15 U.S.C.).

226. See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010) (stating Act was passed "[t]o promote the financial stability of the United States by improving accountability and transparency . . . to end 'too big to fail', to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices").

cerns about regulatory capture,[227] a phenomenon particularly pervasive in banking and finance.[228]

Ultimately, the survey's results suggest the best-case scenario is that there are extensive nonpublic interactions between the CFTC and the NFA such that the CFTC has ensured that each rule proposal, made public as a formality, has complied with public policy. But considering the worst-case scenario allowed by the data—summary adoption without meaningful review of every proposed NFA rule—the results are indeed troubling. Either way, when there is no disclosure of activities or communications before the submission of a rule proposal to the CFTC, or between submission and announced approval, it is difficult to efficiently determine whether the defined goals of the CEA and Dodd–Frank are being accomplished.

III. REASSESSMENT AND DISCLOSURE AS FIRST STEPS TO IMPROVING CFTC OVERSIGHT OF SRO RULEMAKING

One reason that the two-tier model of financial regulation has persisted in the United States is the mutually beneficial nature of the regime. By voluntarily submitting to federal oversight, market participants have the opportunity to optimally regulate themselves;[229] meanwhile, the federal government strives to achieve the expertise gains of industry self-regulation while passing off costs to the industry.[230] Thus, this Note does not nebulously advocate for *more* regulation; rather, it

227. See Michael A. Livermore & Richard L. Revesz, Regulatory Review, Capture, and Agency Inaction, 101 Geo. L.J. 1337, 1340 (2013) ("Capture describes situations where organized interest groups successfully act to vindicate their goals through government policy at the expense of the public interest."); Saule T. Omarova, Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation, 37 J. Corp. L. 621, 630 (2012) [hereinafter, Omarova, Bankers] (noting "misalignment of incentives of government actors who pursue narrow private interests that may conflict with the public interest they purport to serve"). But see Lawrence G. Baxter, "Capture" in Financial Regulation: Can We Channel It Toward the Common Good?, 21 Cornell J.L. & Pub. Pol'y 175, 176–79 (2011) (critiquing capture theory).

228. See Omarova, Bankers, supra note 227, at 630 ("[N]ot only do the supervisors and regulators come to rely on the industry's superior technical expertise, especially with respect to the increasingly complex financial products and services, but they also build strong professional and personal relationships with the managers of the regulated institutions."). For an argument that Wall Street's political and ideological hold on financial regulators influenced the response to the financial crisis, see Johnson & Kwak, supra note 13, at 1–12, 153–80.

229. See Johnson, Governing Financial Markets, supra note 7, at 201–02 (explaining development of two-tier system).

230. See id. at 203 ("Deferring to SROs allows government regulators to benefit from SRO boards of directors and governing committees' sophisticated understanding of conventional and exotic financial instruments."). But see POGO Letter, supra note 202 (arguing CFTC should take sole responsibility for regulating rather than delegating to NFA because of the high costs, which CFTC currently is not positioned to bear, associated with monitoring NFA).

claims that more attentive scrutiny of SRO rulemaking is necessary to maintain stability in the futures industry. Considering the political infeasibility of even more CFTC responsibilities after its already substantial increase in authority[231] and given the current legislative climate in general,[232] this Note seeks other solutions to the problem aside from appropriating money to the CFTC to overcome its resource crunch.[233] This Part explains how simple attention to the current rule-oversight regime via self-assessment and heightened disclosure policies could address the problem. Part III.A explores how the CFTC might make its oversight of SRO rulemaking more robust, and Part III.B addresses how disclosure rules could enable the public to monitor this activity.

A. *Rethinking CFTC–SRO Oversight*

To address the issues highlighted in this Note, the CFTC must conduct a self-assessment to determine how, in the context of limited resources, it can improve rule oversight in order to limit SRO enactment of suboptimal rules. A starting point considering the analysis in Part II.A.1 might be to shift the burden from the CFTC to the SROs with regard to any proposed rule change or rule addition. Requiring the SRO to demonstrate that a new rule is consistent with government regulations, instead of requiring the CFTC to determine the new rule is inconsistent with federal policy, would imitate the SEC's current rule-oversight regime[234] and make it more difficult for self-interested SRO directors to

231. See Robert B. Ahdieh, Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s), 88 N.Y.U. L. Rev. 1983, 1985 (2013) ("Dodd–Frank . . . was fiercely fought and passed without a single vote to spare. Ensuing efforts of . . . regulators to undertake the . . . rulemakings mandated by the legislation have faced comparable resistance." (footnote omitted)); Michael Greenberger, Overwhelming a Financial Regulatory Black Hole with Legislative Sunlight: Dodd–Frank's Attack on Systemic Economic Destabilization Caused by an Unregulated Multi-Trillion Dollar Derivatives Market, 6 J. Bus. & Tech. L. 127, 139–42 (2011) (summarizing push to deregulate swaps in order to keep capital in U.S. markets). But see Jonathan Martin, Coalition of Liberals Strikes Back at Criticism from Centrist Democrats, N.Y. Times (Dec. 5, 2013), http://www.nytimes.com/2013/12/06/us/politics/coalition-of-liberals-strikes-back-at-criticism-from-centrist-democrats.html (on file with the *Columbia Law Review*) (reporting on populist wing of Democrats pushing for tougher regulations on Wall Street banks). See generally Arthur E. Wilmarth, Jr., Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street, 81 U. Cin. L. Rev. 1283 (2013) (presenting theories as to why Wall Street has been able to impede federal regulators' efforts to implement Dodd–Frank).

232. See supra note 20 (discussing congressional efforts to block funding for financial regulation).

233. See supra notes 20, 171–172 and accompanying text (discussing CFTC's regulatory burdens).

234. See supra Part II.A.1 (analyzing disparity between how SEC and CFTC verify rule changes).

wield their position against the public interest.[235] Uniformity also reduces the possibility of regulatory arbitrage,[236] enhances predictability, and promotes cooperation between the two regulators.[237] Finally, while requiring the CFTC to actively review more rule proposals may be burdensome, the burden of this policy change would be reduced by requiring the SRO to justify why its new rule is consistent with U.S. policy and the public interest.[238]

Despite the above benefits, it is unproductive to promote uniformity for uniformity's sake. Whether for historical or strategic purposes, Congress has chosen a multiagency system of financial regulation, and substantial benefits may accrue from having multiple overlapping agencies operate in different ways.[239] Legislators may have had a justifiable reason for the different systems of rule oversight.[240] Moreover, the SEC is currently not an exemplar of administrative effectiveness.[241] Most impor-

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235. See Hilary J. Allen, A New Philosophy for Financial Stability Regulation, 45 Loy. U. Chi. L.J. 173, 179, 198 (2013) (arguing shift of "regulatory burden of proof" to regulated entities would force industry to internalize costs and limit capture).

236. See Eric J. Pan, Structural Reform of Financial Regulation, 19 Transnat'l L. & Contemp. Probs. 796, 855 (2011) (noting Dutch "concluded that reducing the number of regulatory agencies would reduce the opportunity for regulatory arbitrage, where firms could take advantage of inconsistencies between the approaches and standards of competing regulators").

237. See Edward F. Greene & Joshua L. Boehm, The Limits of "Name-and-Shame" in International Financial Regulation, 97 Cornell L. Rev. 1083, 1122–23 (2012) (noting inconsistencies between SEC and CFTC regulation proposals despite Dodd–Frank's "explicit direction to the agencies to harmonize their approach"); cf. Colleen M. Baker, Regulating the Invisible: The Case of Over-the-Counter Derivatives, 85 Notre Dame L. Rev. 1287, 1291 (2010) (advocating cooperation between SEC and CFTC); Frank D'Souza et al., Illuminating the Need for Regulation in Dark Markets: Proposed Regulation of the OTC Derivatives Market, 12 U. Pa. J. Bus. L. 473, 511–12 (2010) (proposing one body with jurisdiction over both futures and securities to avoid confusion and delay).

238. See Allen, supra note 235, at 200 (arguing shift of regulatory burden would "direct[] all agency members to be 'contrarians' . . . with the perception that financial institution activities . . . are presumptively problematic . . . and therefore in need of regulation unless the financial institution can demonstrate otherwise").

239. See, e.g., Verret, supra note 22, at 824 (touting benefits of regulatory competition). But see Reza Dibadj, Reactionary Reform and Fundamental Error, 39 W. St. U. L. Rev. 281, 283 (2012) (mentioning "irony of Dodd–Frank creating more organizations . . . where there are already too many regulatory gaps" for firms to exploit).

240. Omarova, License to Deal, supra note 207, at 106 & n.236 (explaining dynamics between CFTC and SROs "are inherently more cooperative than adversarial" and reflect cultural differences between SEC and CFTC).

241. See Jonathan Macey, Opinion Analysis: That Which Does Not Kill the SEC May Make the Agency Stronger, SCOTUSblog (Feb. 28, 2013, 12:04 PM), http://www.scotusblog.com/2013/02/opinion-analysis-that-which-does-not-kill-the-sec-may-make-the-agency-stronger/ (on file with the *Columbia Law Review*) (speculating SEC "is operating under some masochistic urge to embarrass itself"); David Weidner, 3 Reasons Why the Volcker Rule Can't Fix Wall Street, MarketWatch (Dec. 9, 2013, 5:13 PM), http://www.marketwatch.com/story/3-reasons-why-the-volcker-rule-cant-fix-wall-street-2013-12-09 (on file with the *Columbia Law Review*) (citing "lack of regulatory gumption").

tantly, the GAO study provides evidence that the SEC approach may be no more effective than the CFTC approach.[242]

In light of the above considerations, the CFTC should tailor its reassessment of rule-oversight strategies to its unique circumstances. This may be a daunting task considering its substantial regulatory burdens, but even if the CFTC does not mimic the SEC's policies, the former can still follow the SEC's framework for self-assessment and self-improvement. For example, the SEC has been working to implement the solutions proposed by BCG and the GAO,[243] and the CFTC could adapt some of these solutions to its purposes.[244] One key regulatory strategy would be retrospective review of NFA and other SRO rules in order to ensure that complex and initially unclear rules are achieving regulatory goals.[245] The CFTC could achieve the benefits of cost internalization by requiring SROs to conduct retrospective review of their own rules and file the results with the CFTC, with penalties for fraud or nondisclosure.[246] This would be less cost- and labor-intensive than having CFTC employees heavily scrutinize the impact of rules after they have gone into effect, and retrospective review could ensure that new rules have not created unnecessary risk or overwhelmingly favored one type of market actor. The CFTC could also adopt the SEC's practice of internally circulating "noteworthy SRO rule changes" to remain "inform[ed] and engag[ed] . . . on

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242. See GAO, FINRA Study, supra note 146, app. at 30 (remarking, in review of 432 SEC releases regarding FINRA proposed rule changes, "[t]here was only one occurrence of a disapproved release [publicly] available"). But see BCG Report, supra note 77, at 66 (noting SEC's "approach to rule reviews is naturally risk-averse to ensure that every proposed rule is written in a manner that conforms to . . . requirements, and that no potentially negative market implications are overlooked").

243. See, e.g., SEC, Fourth Report, supra note 185, at 27–29 (responding to BCG proposals regarding oversight of SROs); see also GAO, FINRA Study, supra note 146, at 13 (noting SEC staff has begun strengthening review of FINRA proposed rule changes based on BCG recommendations).

244. For example, BCG urged the SEC to hire more skilled professionals to understand increasingly complex rules. BCG Report, supra note 77, at 64–65. BCG also stressed improving the efficiency of rulemaking oversight given the SEC's "limited staff bandwidth, higher volumes of rule filings, and statutory requirements." Id. at 66. However, BCG's suggestion of "amend[ing] the Exchange Act to give the SEC the authority to allow SROs to self-certify certain types of rules that they write" and revising the Act so that the SEC "is only required to review SRO rule filings of a high-risk type or significance" drifts toward the current CFTC regime and cuts against the issues addressed in this Note. Id. at 67.

245. See GAO, FINRA Study, supra note 146, at 14 (urging SEC to retrospectively review FINRA rules).

246. See id. at 14–15 ("By not conducting retrospective reviews of its rules, FINRA may be missing an opportunity to assess whether its rules are achieving their intended purpose."); cf. Exec. Order No. 13,579, §§ 1(c), 2, 3 C.F.R. 256, 257 (2012), reprinted in 5 U.S.C. app. § 601 (2012) (encouraging independent agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned").

important proposals."[247] This ensures more eyes, with different regulatory perspectives, consider each proposal. The SEC has also held an SRO Outreach Conference with a panel on SRO rule filings.[248] While such a conference may implicate capture concerns,[249] the CFTC and private organizations could use one to develop best practices for rulemaking.[250]

Ultimately, these suggestions will not universally eliminate the concerns associated with delegating significant regulatory and rulemaking responsibilities to an SRO, nor will they ensure meaningful review of every new rule. But, overall, they aim to increase the level of scrutiny of each rule and show the SROs that these proposals will not be rubber stamped, all while ensuring the CFTC does not face significantly costly burdens in the undertaking.

B. *Minimum-Disclosure Requirements to Monitor the Issue*

As explored in Part II.C.2, it is quite plausible that communications occur between the CFTC and the SROs it regulates with respect to the SROs' development and submission of rule amendments and additions. However, when these conversations are private, it is difficult to determine whether the CFTC is providing a meaningful check on new rules implemented by futures SROs. A policy requiring disclosure of these conversations, combined with the CFTC's practice of publishing rule proposals in the Federal Register for public comment,[251] would enable the public to verify that the CFTC is abiding by its mandate.[252] Disclosure would allow interested parties to monitor the CFTC's rule-review process in a significantly more detailed manner than the empirical survey in Part II.B without burdening the CFTC.[253] Though requiring publicized communications would slow down the process,[254] a more deliberate process forces

247. SEC, Fourth Report, supra note 185, at 29.

248. Id. at 28.

249. See Wilmarth, supra note 231, at 1417 ("[E]xtensive professional and social contacts encourage regulators to align themselves with the outlook of industry officials . . . .").

250. Aguilar, supra note 90 (arguing "closer working relationship between SROs and the SEC" can help Commission "re-evaluate how it can best provide appropriate oversight over SROs").

251. Cf. 15 U.S.C. § 78s (b)(1) (2012) (requiring CFTC to publish all SRO filings of proposed rule changes and give interested parties opportunity to comment).

252. See Simon Johnson, An Occupy Wall Street Offshoot Has Its Day, N.Y. Times: Economix (Jan. 16, 2014, 12:01 AM), http://economix.blogs.nytimes.com/2014/01/16/occupy-the-s-e-c-has-its-day/ (on file with the *Columbia Law Review*) (endorsing existence of group "watching carefully from the outside" to check both private actors and government regulators).

253. For a discussion stressing the importance of data collection and publication by regulators for study by academics and independent watchdogs, see Gorton, supra note 98, at 208–11.

254. Contra BCG Report, supra note 77, at 65–67 (seeking more efficient ways for SEC to oversee SRO rulemaking).

careful consideration of any new rule.[255] Of course, because disclosure requirements can unintentionally impede agency decisionmaking or force even more secretive communications, any such requirements must minimize interference with standard CFTC–SRO interactions.[256] A simple report of CFTC–SRO communications after a rule has gone into effect may suffice.

Disclosure requirements can also counter the effects of regulatory capture. For one, the CFTC can weigh public comments against the SRO's assertion that the proposed rule change aligns with regulatory goals.[257] Given that "most substantive decisions in the area of systemic risk regulation are made behind closed doors, by industry insiders and agency technocrats,"[258] disclosure requirements can help the public examine the close relationships between private and public regulators.[259] Interested parties provide "checks on regulatory capture and [may] diffuse the industry's power to control the regulatory agenda by putting both financial regulators and financial institutions under constant and intense public scrutiny."[260] The public would know which actors to hold accountable if an SRO rule allows for market manipulation or market

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255. See Cass Sunstein, Smarter Regulation: Remarks from Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, 63 Admin. L. Rev. (Special Edition) 7, 8 (2011) ("[I]f carefully designed, disclosure policies can promote informed choices . . . .").

256. See Kraus & Raso, supra note 222, at 340 & n.254 (lamenting "unintended consequence" of open-meeting requirements of Government in Sunshine Act, which "has left [SEC] Commissioners to communicate as best they can through one-on-one meetings, seriatim written consents, . . . and other awkward workarounds"); see also Jill E. Fisch, The Long Road Back: *Business Roundtable* and the Future of SEC Rulemaking, 36 Seattle U. L. Rev. 695, 719 (2013) (arguing transparency requirements of Sunshine Act "preclude[] private policy deliberations among agency heads and undermine[] the collaborative and bipartisan structure of the SEC"). However, with respect to oversight of SRO rulemaking, "media scrutiny, interest-group attention, and political pressure," id., are not necessarily consequences to be avoided, but consequences that may be welcomed.

257. See Dominique Custos, The Rulemaking Power of Independent Regulatory Agencies, 54 Am. J. Comp. L. (Special Issue) 615, 638 (2006) (explaining industry working closely with agency in formulating rules "brings the public interest down to the level of private interests," creating "context of confusion of status of the respective participants and represented interests at stake").

258. Omarova, Bankers, supra note 227, at 623.

259. See Baxter, supra note 227, at 199–200 (noting urgent problem of "connection between regulators and industry" and arguing "ex-ante review by an independent . . . institution" may be the solution (emphasis omitted)); Wilmarth, supra note 231, at 1407–14 (explaining how "revolving door" between Wall Street and Washington created political coalition bent on restraining Gensler's "vigorous reform efforts" by restricting budget and obstructing rulemaking); cf. Omarova, Bankers, supra note 227, at 650 (explaining how monitors ensure "regulatory agencies act in accordance with their stated objectives").

260. Omarova, Bankers, supra note 227, at 624. Omarova envisions a statutorily created "Public Interest Council" with the authority to "request regulatory agencies to report on their activities or to take action in identified areas, to participate in regulatory rule-making, and to petition Congress to take action with respect to specific issues of public concern." Id. at 623–24.

harm—or it could prevent such problematic rules from being enacted in the first place.[261]

Financial regulation is uniquely vulnerable to public scrutiny, because the "right" course of action is often difficult to explain to the general population.[262] That is in part why agencies such as the SEC and CFTC are independent and their leaders are somewhat insulated from removal.[263] Thus, disclosure rules will always raise concerns about encumbered regulators unable to make complex and politically unpopular decisions.[264] But even if it may occasionally be necessary for financial regulation to occur in the dark, concealed decisionmaking should be reserved for the most extreme circumstances.[265] Therefore, to the extent that hidden negotiations between the CFTC and SROs with respect to rulemaking exist, they should be the exception rather than the rule.

CONCLUSION

This Note demonstrates that in expanding the role of the CFTC via Title VII of Dodd–Frank, Congress ignored a key concern: the ability of the CFTC to meaningfully oversee SRO rulemaking in the futures industry. A statutory analysis and empirical survey reveal the likelihood that the CFTC is struggling to maintain the balance between public regulation and self-regulation by ensuring that SRO rules comply with U.S. policy. The CFTC must rethink how it oversees SRO rulemaking and develop best practices for accomplishing the task. Until it does this, requiring the CFTC to disclose its private communications with the SROs it regulates would help the public ensure that the CFTC is adequately performing its duties.

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261. See id. at 624 (stressing importance of "shin[ing] disinfecting sunlight on the workings of the financial services industry and its official overseers before the disaster strikes").

262. See Johnson & Kwak, supra note 13, at 162 (noting Treasury and Federal Reserve chose not to bail out Lehman Brothers in part because of political will against that option).

263. See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151–53 (2010) (discussing benefits of insulating independent agencies from plenary executive control).

264. Cf. Lauren Tara LaCapra, Goldman, AIG and the Government Renew Their Friendship, Reuters: Unstructured Fin. (Apr. 15, 2013), http://blogs.reuters.com/unstructuredfinance/2013/04/15/goldman-aig-and-the-government-renew-their-friendship/ (on file with the *Columbia Law Review*) (citing public backlash against government-run AIG following disclosure it had paid back Goldman Sachs in full).

265. For a popular account arguing that the government used obfuscation in the midst of the financial crisis to "sell" a Wall Street bailout to the public, see Matt Taibbi, Secrets and Lies of the Bailout, Rolling Stone (Jan. 4, 2013, 4:25 PM), http://www.rollingstone.com/politics/news/secret-and-lies-of-the-bailout-20130104 (on file with the *Columbia Law Review*).

APPENDIX

A. *Methodology: Data Collection*

The empirical study featured in Part II.B presents a review of every publicly available proposed rule adoption or change submitted to the CFTC by the NFA for the years 2003 through 2012.[266] As required by the CEA, the NFA submits all rule amendments or additions to the CFTC.[267] Each rule submission is available on the NFA's website.[268] Because the NFA is to the CFTC what FINRA is to the SEC, this empirical study aims in part to mimic the study conducted by the GAO in its 2012 assessment of the SEC's FINRA oversight.[269] Because the implementation of Dodd–Frank is a work in progress, the analysis examines whether the CFTC's scrutiny changed from the years leading up to the financial crisis (from 2003 to 2007) to the years since (from 2008 to 2012).[270]

For each year, I assembled a list of all submission letters to the CFTC. Even though submission letters often contained proposed amendments to more than one rule in the NFA Manual, each letter counted as one "rule submitted." This is because when multiple changes were proposed in one letter, they were for the same category of regulation (e.g., registration rules). Furthermore, multiple proposals were often submitted on the same day, signaling that they were grouped or separated in certain ways for thematic reasons. Finally, when the NFA announced that a proposal had been approved by the CFTC, it did so by submission letter instead of by individually proposed amendments or additions. In the unique circumstance where announcements of rule proposals going into effect were separated because proposed amendments were modified and became effective at different times, one letter counted as two submissions.[271]

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266. Cf. GAO, FINRA Study, supra note 146, app. at 29 ("To understand the steps SEC takes to review and approve or disapprove FINRA's proposed rule changes, [the GAO] analyzed a random sample of SEC releases regarding FINRA's proposed rule changes issued in 2009, 2010, and 2011.").

267. 7 U.S.C. § 21(j) (2012).

268. For a complete list, see NFA, CFTC Rule Submissions, supra note 198.

269. See GAO, FINRA Study, supra note 146, app. at 29 (noting goal of describing "how SEC has overseen FINRA's proposed rule changes"). Like the GAO study, this Note both analyzes statutory provisions governing rule review and presents empirical results regarding rule review. See id. (noting review and analysis of "relevant federal statutes governing SEC's review of SRO rule filings" and "sample of SEC releases regarding FINRA's proposed rule changes").

270. Cf. id. ("We selected the years 2009 through 2011 because these were the most recent years that contained a full year of releases and included a full year of releases before and after the enactment of the Dodd–Frank Act."). The year 2013 was not included in this study because not all proposals in 2013 had been definitively acted upon by the time the study was completed.

271. See infra notes 301–302 for an explanation of this decision.

The CEA allows the NFA to make any rule amendment or addition effective ten days after receipt by the CFTC (the "ten-day" provision), but it also permits the NFA to request the CFTC's prior approval on any rule change or rule amendment.[272] The data-collection method sorted each rule (whether filed under the "ten day" provision or submitted to the CFTC for prior approval) into one of three outcomes: adopted unchanged, adopted modified, or rejected or withdrawn. In the results depicted in Table 1, I grouped all rules submitted together, with the ultimate goal of gaining an initial impression of whether (and, if so, how often) the CFTC was intervening in the NFA's modification of its rules.[273] However, in initial data collection, I recorded whether the NFA submitted more amendments under the "ten-day" provision or requested prior approval for the CFTC. For the most part, it has been split fairly evenly, except for in 2008 and 2009, when the majority of rules were filed under the "ten-day" provision. A subsequent study might analyze which types of rule changes the NFA and other SROs submit under each option. Table A.1 presents a year-to-year comparison of how many rule amendments or additions the NFA submitted under the "ten-day" provision versus how many amendments or additions for which the NFA requested prior approval.

TABLE A.1: RESULTS OF RULES SUBMITTED PER YEAR, SEPARATED BY TYPE OF SUBMISSION

	"Ten-Day" Provision		Prior Approval Requested			
Year	Adopted Unchanged	Adopted Modified	Adopted Unchanged	Adopted Modified	Withdrawn	Total
2003	5	0	4	0	0	9
2004	5	0	7	1	0	13
2005	5	0	4	2	0	11
2006	9	0	14	0	0	23
2007	12	0	12	1	0	25
2008	6	0	7	0	1	14
2009	12	0	2	2	0	16
2010	13	1	3	0	0	17
2011	6	0	5	0	0	11
2012	13	0	5	1	1	20
Total	86	1	63	7	2	159

272. 7 U.S.C. § 21(j).

273. This is slightly different from the FINRA study, in which the GAO "examined SEC releases approving proposed rule changes, granting accelerated approval of proposed rule changes, notifying the public of immediately effective proposed rule changes, and disapproving proposed rule changes . . . to understand how SEC reviews FINRA proposed rule changes and arrives at its decisions." GAO, FINRA Study, supra note 146, app. at 29–30.

B. *Methodology: Data Verification*

The next step was determining the outcome of each proposed amendment or addition. Though each submission letter to which the NFA website letter linked contained an endnote indicating when that rule became effective—implying that the rule had been approved, or at least not rejected, by the CFTC—I used more definitive means of verification whenever possible.[274] In particular, there were three more reliable means to verify the outcome of each proposed rule change. I compared each rule submission to a related NFA news release,[275] a subsequent rule submission, the updated NFA Manual,[276] or updated information attached to the rule submission itself[277] to determine whether that proposed rule adoption or amendment was adopted unchanged,[278] adopted in modified form,[279] or ultimately rejected by the CFTC or withdrawn by the NFA.[280]

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274. The information contained in these endnotes was generally vague. Compare Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David A. Stawick, Office of the Secretariat, CFTC, Regarding Proposed Amendments to NFA's Bylaw 301, Financial Requirements Section 5 and Registration Rules, at 17 n.* (Jan. 20, 2012) [hereinafter Sexton, Jan. 20, 2012, Letter], available at http://www.nfa.futures.org/news/PDF/CFTC/Bylaw301_F_R_Sec5_R_R_re_Swaps_0511.pdf (on file with the *Columbia Law Review*) (noting in endnote that proposed amendments "*became* effective July 18, 2012" (emphasis added)), with Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David A. Stawick, Office of the Secretariat, CFTC, Regarding Increase to FCM Assessment Fee—Proposed Amendments to NFA Bylaw 1301(b), at 4 n.* (Nov. 22, 2010), available at http://www.nfa.futures.org/news/PDF/CFTC/Bylaw1301b_FCMAssessmentFee112210.pdf (on file with the *Columbia Law Review*) (announcing date on which proposed rule "*will become* effective" (emphasis added)). Furthermore, the submissions with no "endnote" did not contain any information on the fate of that proposal.

275. The list of news releases can be found at News Releases, Nat'l Futures Ass'n, http://www.nfa.futures.org/NFA-regulation/regulationNewsRelList.asp (on file with the *Columbia Law Review*) (last visited Sept. 20, 2014).

276. NFA Manual, supra note 192.

277. See, e.g., Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David A. Stawick, Office of the Secretariat, CFTC, Regarding Acceptable Collateral for Forex Security Deposits—Proposed Amendments to NFA Financial Requirements Section 12 (Feb. 29, 2008), available at http://www.nfa.futures.org/NFA-regulation/regulationRuleSubLetter.asp?ArticleID=2095 (on file with the *Columbia Law Review*) (noting via endnote that rule became effective May 14, 2008). Almost every rule submission had an endnote, presumably added later, noting the effective date of the amendment; the few submissions without an endnote were presumed to have been modified, withdrawn, or rejected. However, the ultimate fate of each rule submission was verified via press release, later rule submission, or comparison to the NFA Manual whenever possible.

278. See, e.g., Notice I-08-14, Nat'l Futures Ass'n (Mar. 19, 2008), http://www.nfa.futures.org/NFA-regulation/regulationNotice.asp?ArticleID=2113 (on file with the *Columbia Law Review*) (noting approval of rule amendment by CFTC and effective date of amendment).

279. For example, on January 25, 2008, the NFA announced that the CFTC approved a proposed rule amendment that had been submitted on November 29, 2007. Notice I-08-

First, the NFA often announced via notices to members when proposed rule changes would go into effect.[281] Even when those announcements did not link directly to the original submission letter, they would contain enough information—such as the date of the original submission and the title of the rule being amended—to match a submission to a press release. Sometimes, these announcements would explicitly refer to CFTC approval of a submission;[282] other announcements would simply note the effective date of a rule amendment.[283]

A second way to verify the outcome of a proposal was to check it against a later submission containing a proposed amendment to the same rule. If a proposal had been adopted, the later submission would reflect those changes by showing the contemporaneous language of the rule being modified. Similarly, later proposals would announce if they were withdrawing or modifying an earlier submission that had not been approved.

Finally, the submission could be compared to the NFA Manual to determine whether the language in the proposed addition or amendment matched with the language in the Manual.[284] Because only the

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03, Nat'l Futures Ass'n (Jan. 25, 2008), http://www.nfa.futures.org/NFA-regulation/regulationNotice.asp?ArticleID=2059 (on file with the *Columbia Law Review*). The submission from November 29, 2007, to the CFTC indicates that the amendment was originally submitted to the CFTC on August 17, 2007, and that the November 29 submission constituted a withdrawal of the August 17 proposal and updated resubmission of an amendment to the same rule. Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David Stawick, Office of the Secretariat, CFTC, Regarding National Futures Association: Resubmission of Disclosure of Forex Dealer Members' Conflicts of Interest—Proposed Amendments to the Interpretive Notice Regarding Forex Transactions (Nov. 29, 2007) [hereinafter Sexton, Nov. 29, 2007, Letter], available at http://www.nfa.futures.org/news/newsRuleSubLetter.asp?ArticleID=2009 (on file with the *Columbia Law Review*). Thus, this was counted as one rule proposal adopted modified, rather than as two separate rule proposals.

280. See, e.g., Sexton, Nov. 27, 2012, Letter, supra note 199, at 3–4 (noting discussion with FCM vendors led NFA to withdraw proposed rule requiring monitoring "through direct, view only online access to customer segregated and secured amount bank accounts"). For the original proposal, see Letter from Thomas W. Sexton, Senior Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David A. Stawick, Office of the Secretariat, CFTC, Regarding National Futures Association: Protection of Customer Funds—Proposed Amendments to NFA Financial Requirements Section 4 To Provide On-Line View-Only Access to FCM Customer Segregated/Secured Amount Bank Account Information 1–5 (Aug. 21, 2012) [hereinafter Sexton, Aug. 21, 2012, Letter], available at http://www.nfa.futures.org/news/PDF/CFTC/FR_Sec_4_OnLineAccessToFCMCustomerBankInfo_082012.pdf (on file with the *Columbia Law Review*).

281. These announcements can be found on the NFA's website. Notices to Members, Nat'l Futures Ass'n, http://www.nfa.futures.org/NFA-regulation/regulationNoticeList.asp (on file with the *Columbia Law Review*) (last visited Sept. 21, 2014).

282. E.g., Notice I-09-18, Nat'l Futures Ass'n (Sept. 24, 2009), http://www.nfa.futures.org/NFA-regulation/regulationNotice.asp?ArticleID=2362 (on file with the *Columbia Law Review*).

283. E.g., Notice I-12-24, Nat'l Futures Ass'n (Oct. 3, 2012), http://www.nfa.futures.org/NFA-regulation/regulationNotice.asp?ArticleID=4119 (on file with the *Columbia Law Review*).

284. See NFA Manual, supra note 192.

current Manual is available and some rules have been amended multiple times, comparisons to later submissions were often more accurate. If the three methods of verification proved inconclusive, and the submission letter contained an endnote announcing the effective date of a rule change, I counted the submitted rule as adopted unchanged.

C. *Data Review and Decisionmaking*

The decisions made in data assembly—for example, how to classify a submission or how to verify its outcome—were naturally somewhat subjective. For this reason, Table A.2 gives an overview of the decisionmaking process in data collection and assembly. The table presents each rule submission by date, along with the type of submission and how I verified the outcome of each rule. The fourth column has in parentheses either the title of the Notice to Members, the date of the later proposed rule to which I compared the submission, or the rule name and number, depending on how the outcome was verified. The footnotes help explain the decisionmaking process for those submissions that required a classification decision.

TABLE A.2: VERIFICATION AND DECISIONMAKING

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
11/27/12	10-Day Provision	Adopted Unchanged	Notice to Members (I-13-05)
11/20/12	10-Day Provision	Adopted Unchanged	NFA Manual (Registration Rule 401(e)(3))
11/20/12	10-Day Provision	Adopted Unchanged	NFA Manual (Interpretive Notice 9049)
11/20/12	10-Day Provision	Adopted Unchanged	NFA Manual (Interpretive Notice 9067)
11/20/12	10-Day Provision	Adopted Unchanged	Notice to Members (I-13-14)
11/20/12	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-13-10)
11/20/12	Prior Approval Requested	Adopted Unchanged	NFA Manual (Bylaw 1301(f))
11/20/12	10-Day Provision	Adopted Unchanged	NFA Manual (Bylaw 1301(b)(i))
11/5/12	Amendments to Articles of Incorporation [voted on by members][285]	Adopted Unchanged	NFA Manual (Articles of Incorporation)

285. As these amendments were submitted to the CFTC "[p]ursuant to Section 17(j) of the Commodity Exchange Act," which corresponds to 7 U.S.C. § 21(j) (2012), without reference to the "ten-day" provision, this submission was counted as a "prior approval

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
8/27/12	10-Day Provision	Adopted Unchanged	NFA Manual (Interpretive Notice 9045)
8/22/12	10-Day Provision	Adopted Unchanged	Notice to Members (I-12-24)
8/21/12	Prior Approval Requested	Withdrawn	Later Submission (11/27/12)[286]
8/21/12	10-Day Provision	Adopted Unchanged	NFA Manual (Compliance Rule 2-10(a))
6/26/12	N/A — Modification of 1/20/12 Submission[287]		
6/5/12	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-13-12)
6/1/12	10-Day Provision	Adopted Unchanged	Notice to Members (I-12-15)
5/30/12	10-Day Provision	Adopted Unchanged	Notice to Members (I-12-27); NFA Manual (Financial Requirements Section 13)
5/29/12	10-Day Provision	Adopted Unchanged	NFA Manual (Bylaw 1301(e)(ii))
5/29/12	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-12-14)
3/8/12	10-Day Provision	Adopted Unchanged	Notice to Members (I-12-16)
1/20/12	Prior Approval Requested	Adopted Modified	NFA Manual (Various Provisions);[288] Later Submission (6/26/12)

requested" data point. Letter from Thomas W. Sexton, Senior Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David A. Stawick, Office of the Secretariat, CFTC, Regarding Integration of Swap Dealers and Major Swap Participants into NFA's Membership and Governance Structure 1 (Nov. 5, 2012), available at http://www.nfa.futures.org/news/PDF/CFTC/Governance%20Changes%2020120919.pdf (on file with the *Columbia Law Review*).

286. The submission from November 27, 2012, explains how discussions with third-party vendors to be regulated by the rule proposed in August led the NFA to change its thinking on certain rules regarding the use of technology to monitor compliance. The letter does not mention the August submission by name but alludes to the proposed provisions. Sexton, Nov. 27, 2012, Letter, supra note 199, at 3–4. Furthermore, the August 21 submission does not have an endnote denoting the amendment's effective date. Sexton, Aug. 21, 2012, Letter, supra note 280. The subsequent Notice to Members confirms that the language of the November 27, 2012, amendments was added, while the language of the August 21, 2012, amendments was not. Notice I-13-05, Nat'l Futures Ass'n (Jan. 30, 2013), http://www.nfa.futures.org/NFA-regulation/regulationNotice.asp?ArticleID=4182 (on file with the *Columbia Law Review*).

287. A submission letter to the CFTC that modified a previous proposal did not count as a new rule submitted. But if the letter did not announce it was modifying a previous proposal, two submissions amending the same NFA rule counted as separate submissions. See supra note 286 (explaining one such instance).

288. For a complete list of rules changed, see Sexton, Jan. 20, 2012, Letter, supra note 274, at 1.

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
10/13/11	10-Day Provision	Adopted Unchanged	Notice to Members (I-11-22)
9/22/11	10-Day Provision	Adopted Unchanged	Notices to Members (I-11-16, I-11-17)
9/15/11	10-Day Provision	Adopted Unchanged	Notice to Members (I-11-16)
9/2/11	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-12-06)
9/2/11	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-11-21)
9/2/11	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-12-03)
9/2/11	10-Day Provision	Adopted Unchanged	NFA Manual (Financial Requirements Section 6)
3/3/11	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-11-12)
3/3/11	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-11-14)
2/24/11	10-Day Provision	Adopted Unchanged	Notice to Members (I-11-07)
2/24/11	10-Day Provision	Adopted Unchanged	Notice to Members (I-11-08)
12/6/10	10-Day Provision	Adopted Unchanged	Notice to Members (I-11-03)
11/22/10	10-Day Provision	Adopted Modified	Later Submission (9/2/11)
11/22/10	10-Day Provision	Adopted Unchanged	NFA Manual (Bylaw 1301(b)); Later Submission (11/20/12)
10/6/10	10-Day Provision	Adopted Unchanged	Notice to Members (I-10-26)
9/28/10	10-Day Provision	Adopted Unchanged	NFA Manual (Various Rules); Later Submissions (3/3/11, 9/2/11, 11/20/12, 8/21/13)
9/14/10	10-Day Provision	Adopted Unchanged	Notice to Members (I-10-20)
9/10/10	10-Day Provision	Adopted Unchanged	NFA Manual (Registration Rules 206, 504); Later Submission (1/20/12)
9/7/10	10-Day Provision	Adopted Unchanged	NFA Manual (Bylaw 301; Various Registration Rules; Interpretive Notice 9002); Later Submissions (3/3/11, 1/20/12, 8/22/12)
9/7/10	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-10-30)
8/30/10	10-Day Provision	Adopted Unchanged	Later Submission (8/21/12)

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
8/30/10	10-Day Provision	Adopted Unchanged	Notice to Members (I-10-19)
7/8/10	10-Day Provision	Adopted Unchanged	Notice to Members (I-10-18)
6/1/10	10-Day Provision	Adopted Unchanged	NFA Manual (Financial Requirements Section 2)
5/25/10	10-Day Provision	Adopted Unchanged	Notice to Members (I-10-13)
3/8/10	Prior Approval Requested	Adopted Unchanged	NFA Manual (Compliance Rule 2-30; Interpretive Notice 9004)
2/22/10	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-10-14)
2/22/10	10-Day Provision	Adopted Unchanged	Notice to Members (I-10-11)
12/11/09	Prior Approval Requested	Adopted Modified	Submission Letter;[289] NFA Manual (Interpretive Notice 9049)
12/8/09	10-Day Provision	Adopted Unchanged	NFA Manual (Compliance Rule 2-29(h); Interpretive Notice 9063)
12/3/09	10-Day Provision	Adopted Unchanged	NFA Manual (Financial Requirements Section 15)
12/3/09	10-Day Provision	Adopted Unchanged	NFA Manual (Interpretive Notice 9053); Later Submission (9/2/11)
11/4/09	10-Day Provision	Adopted Unchanged	NFA Manual (Articles of Incorporation Article VII); Later Submissions (11/5/12, 8/29/13)
8/26/09	N/A — Modification of 5/27/09 Submission		
8/26/09	10-Day Provision	Adopted Unchanged	Later Submission (11/29/13); NFA Manual (Registration Rule 501)

289. Even though the submission letter for this rule announces the NFA would be invoking the "ten-day" provision, it also acknowledges that the CFTC and SEC requested modification of the amended language as originally approved by the NFA's Board of Directors. Letter from Thomas W. Sexton, Senior Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David A. Stawick, Office of the Secretariat, CFTC, Regarding Proposed Amendments to the Interpretive Notice Regarding SFP Proficiency Training 1 (Dec. 11, 2009), available at http://www.nfa.futures.org/news/PDF/CFTC/IntNotc_SFPProficiency Training121009.pdf (on file with the *Columbia Law Review*). The Board, immediately after approving the rule, "authorized NFA's Executive Committee to make any necessary changes to the proposal that might be requested by the CFTC or the [SEC]." Id. This is the rare instance of evidence of both government involvement in the process *and* disclosure of prepublication interactions between the NFA and CFTC.

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
8/26/09	10-Day Provision	Adopted Unchanged	Notice to Members (I-09-15); NFA Manual (Rules of Arbitration; Member Arbitration Rules)
8/25/09	10-Day Provision	Adopted Unchanged	NFA Manual (Compliance Rule 2-43(a))
8/25/09	10-Day Provision	Adopted Unchanged	Notice to Members (I-10-10)
8/25/09	10-Day Provision	Adopted Unchanged	Later Submission (9/2/11)
6/9/09	10-Day Provision	Adopted Unchanged	NFA Manual (Bylaw 301(a)(iii))
5/27/09	Prior Approval Requested	Adopted Modified	Later Submission (8/26/09);[290] Notice to Members (I-09-17)
5/7/09	10-Day Provision	Adopted Unchanged	NFA Manual (Articles of Incorporation Article VIII); Later Submission (11/5/12)
2/23/09	10-Day Provision	Adopted Unchanged	NFA Manual (Registration Rule 504(b)(3))
2/23/09	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-09-18)
2/23/09	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-09-18)
12/9/08	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-09-07)
12/9/08	Prior Approval Requested	Adopted Unchanged	Notices to Members (I-09-10, I-09-12)
12/3/08	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-09-07)
12/2/08	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-09-07)
11/26/08	10-Day Provision	Adopted Unchanged	Later Submission (9/28/10)
10/8/08	10-Day Provision	Adopted Unchanged	NFA Manual (Financial Requirements Section 2)
9/5/08	10-Day Provision	Adopted Unchanged	NFA Manual (Interpretive Notice 9021)

290. Letter from Thomas W. Sexton, Senior Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David A. Stawick, Office of the Secretariat, CFTC, Regarding Prohibition of Loans by Pools to Commodity Pool Operators and Related Parties 1, 3–4 (Aug. 26, 2009), available at http://www.nfa.futures.org/news/PDF/CFTC/CR2-45_IntNotc_Pool_Loans_to_CPOs_082009.pdf (on file with the *Columbia Law Review*) (noting withdrawal of May 27, 2009, proposed Compliance Rule 2-45 and resubmission of amendment). A note on the list of all 2009 submissions also confirms the May 27, 2009, submission was resubmitted August 26, 2009. CFTC Rule Submissions (2009), Nat'l Futures Ass'n, http://www.nfa.futures.org/NFA-regulation/regulationRuleSubList.asp?Year=2009 (on file with the *Columbia Law Review*) (last updated Dec. 28, 2009).

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
8/28/08	Prior Approval Requested	Withdrawn	Letter to CFTC[291]
8/22/08	Prior Approval Requested	Adopted Unchanged	Notices to Members (I-08-20, I-08-27); Later Submission (2/23/09)
5/20/08	10-Day Provision	Adopted Unchanged	NFA Manual (Financial Requirements Section 4)
3/17/08	10-Day Provision	Adopted Unchanged	NFA Manual (Interpretive Notice 9045)
2/29/08	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-08-26)
2/29/08	10-Day Provision	Adopted Unchanged	Notice to Members (I-08-14)
2/29/08	Prior Approval Requested	Adopted Unchanged	Later Submission (2/23/09)
12/5/07	N/A — Technical Changes to Reflect NASD Name Change[292]		
12/5/07	Prior Approval Requested	Adopted Unchanged	NFA Manual (Interpretive Notice 9045)
11/30/07	N/A — Submission of Rule Modified by SEC[293]		
11/29/07	10-Day Provision	Adopted Unchanged	NFA Manual (Compliance Rule 3-3; Registration Rule 502; Interpretive Notices 9018, 9022)
11/29/07	10-Day Provision	Adopted Unchanged	NFA Manual (Compliance Rule 3-7)
11/29/07	N/A — Modification of 8/17/07 Submission[294]		
11/29/07	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-08-15)
11/20/07	10-Day Provision	Adopted Unchanged	Notice to Members (I-07-45)

291. Sexton, Nov. 19, 2010, Letter, supra note 199, at 1.

292. This is another involuntary change required by outside circumstances—the fact that the National Association of Securities Dealers was becoming FINRA. Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David Stawick, Office of the Secretariat, CFTC, Regarding Technical Changes to Reflect NASD Name Change (Dec. 5, 2007), http://www.nfa.futures.org/news/newsRuleSubLetter.asp?ArticleID=2035 (on file with the *Columbia Law Review*).

293. Even though this proposed amendment was submitted to the CFTC, the impetus for the language change was a request by the SEC. Explanation of Proposed Amendments, Nat'l Futures Ass'n, http://www.nfa.futures.org/news/newsProposedRule.asp?ArticleID=2018 (on file with the *Columbia Law Review*) (last visited Sept. 21, 2014). This submission and the original one were disregarded because this Note looks only at CFTC involvement in the NFA's rulemaking process.

294. Sexton, Nov. 29, 2007, Letter, supra note 279.

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
9/27/07	10-Day Provision	Adopted Unchanged	NFA Manual (Articles of Incorporation Article VII; Bylaws 406, 503); Later Submission (11/4/09)
8/17/07	Prior Approval Requested	Adopted Modified	Notice to Members (I-08-03); Later Submission (11/29/07)
8/17/07	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-39)
8/17/07	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-41)
8/17/07	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-40)
8/17/07	10-Day Provision	Adopted Unchanged	Notice to Members (I-07-36)
8/17/07	10-Day Provision	Adopted Unchanged	Notice to Members (I-07-37)
8/17/07	N/A — Modified by SEC[295]		Later Submission (11/30/07)
5/22/07	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-29)
5/22/07	10-Day Provision	Adopted Unchanged	NFA Manual (Registration Rules 203, 204)
5/22/07	10-Day Provision	Adopted Unchanged	NFA Manual (Registration Rules 203, 214)
5/22/07	Prior Approval Requested	Adopted Unchanged	NFA Manual (Compliance Rules 2-36, 2-39; Interpretive Notice 9053)
5/22/07	10-Day Provision	Adopted Unchanged	NFA Manual (NFA Compliance Rule 3-3; Registration Rule 502)
5/22/07	10-Day Provision	Adopted Unchanged	NFA Manual (Various Rules)[296]
5/22/07	10-Day Provision	Adopted Unchanged	Notice to Members (I-07-27)
2/27/07	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-32)

295. This data point was removed from the study because the proposal was later modified by the SEC. See supra note 293 (noting SEC modification). For the original proposal, see Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to David Stawick, Office of the Secretariat, CFTC, Regarding Misuse of Trade Secrets and Proprietary Information (Aug. 17, 2007), http://www.nfa.futures.org/NFA-regulation/regulationRuleSubLetter.asp?ArticleID=1927 (on file with the *Columbia Law Review*).

296. For the complete list, see Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to Eileen A. Donovan, Office of the Secretariat, CFTC, Regarding Technical Amendments to NFA's Forex Requirements (May 22, 2007), http://www.nfa.futures.org/NFA-regulation/regulationRuleSubLetter.asp?ArticleID=1848 (on file with the *Columbia Law Review*).

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
2/26/07	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-17)
2/26/07	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-18)
2/23/07	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-24)
2/23/07	10-Day Provision	Adopted Unchanged	Later Submission (5/22/07)
2/23/07	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-23)
11/30/06	10-Day Provision	Adopted Unchanged	NFA Manual (Interpretive Notice 9046)
11/21/06	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-05)
11/21/06	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-16)
11/21/06	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-15)
11/21/06	10-Day Provision	Adopted Unchanged	Later Submission (12/11/09)
11/21/06	Prior Approval Requested	Adopted Unchanged	Later Submission (8/17/07)
11/21/06	10-Day Provision	Adopted Unchanged	NFA Manual (Bylaw 1301(a))
11/21/06	10-Day Provision	Adopted Unchanged	Later Submission (10/8/08)
11/13/06	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-07-14)
11/6/06	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-06-20)
8/17/06	10-Day Provision	Adopted Unchanged	Notice to Members (I-06-19)
8/17/06	Prior Approval Requested	Adopted Unchanged	NFA Manual (Interpretive Notice 9057)
7/5/06	N/A — Resubmission of 2/27/06 Proposal[297]		
5/22/06	Prior Approval Requested	Adopted Unchanged	NFA Manual (Code of Arbitration; Member Arbitration Rule Section 10(g))

297. The text of this submission letter makes clear that the language of the amendment proposed on February 27, 2006, was not changed, but the language of the explanation of the rule to the CFTC was changed. Thus this letter did not count as a rule submission, but the February 27, 2006, submission counted as adopted unchanged. Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to Lawrence B. Patent, Deputy Dir., Div. of Clearing and Intermediary Oversight, CFTC, Regarding Proposed Amendments to NFA's Interpretive Notice Regarding Forex Transactions with Forex Dealer Members (July 5, 2006), http://www.nfa.futures.org/news/newsRuleSubLetter.asp?ArticleID=1614 (on file with the *Columbia Law Review*).

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
5/22/06	Prior Approval Requested	Adopted Unchanged	Later Submission (5/22/07)
5/22/06	Prior Approval Requested	Adopted Unchanged	Later Submission (8/17/07)
5/22/06	10-Day Provision	Adopted Unchanged	NFA Manual (Compliance Rules 4-1, 4-2)
5/22/06	10-Day Provision	Adopted Unchanged	Later Submission (11/13/06)
2/27/06	10-Day Provision	Adopted Unchanged	Later Submission (2/27/07)
2/27/06	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-06-13); Later Submission (7/5/06); NFA Manual (Financial Requirements Section 13)
2/27/06	10-Day Provision	Adopted Unchanged	Later Submission (11/13/06)
2/27/06	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-06-09)
2/27/06	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-06-10)
1/26/06	N/A — Resubmission of 3/7/05 Proposal[298]		
1/26/06	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-06-09)
12/6/05	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-06-02)
11/29/05	10-Day Provision	Adopted Unchanged	Later Submission (12/5/05)
11/29/05	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-06-08)
11/29/05	N/A — Resubmission of 3/7/05 Proposal		
11/18/05	10-Day Provision	Adopted Unchanged	NFA Manual (Registration Rule 401)
9/19/05	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-06-01)
9/16/05	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-06-09)
8/22/05	N/A — Resubmission of 3/7/05 Proposal		

298. Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to Jean A. Webb, Secretariat, CFTC, Regarding Resubmission of Proposed Amendments to Financial Requirements Section 1 (to Impose a Capital Requirement on FCMs with Retail Forex Affiliates) and the Interpretive Notice Regarding Forex Transactions with Forex Dealer Members (Jan. 26, 2006) [hereinafter Sexton, Jan. 26, 2006, Letter], http://www.nfa.futures.org/news/newsRuleSubLetter.asp?ArticleID=1529 (on file with the *Columbia Law Review*).

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
6/8/05	N/A — Modification of 12/8/04 Submission[299]		
6/3/05	10-Day Provision	Adopted Unchanged	NFA Manual (Interpretive Notice 9053); Later Submission (11/13/06)
6/3/05	10-Day Provision	Adopted Unchanged	Later Submission (5/22/07)
3/7/05	Prior Approval Requested	Adopted Modified	Notice to Members (I-06-09);[300] Later Submissions (11/29/05, 1/26/06)
3/7/05[301]	Prior Approval Requested	Adopted Modified	Notice to Members (I-05-13);[302] Later Submission (8/22/05)[303]

299. Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to Jean A. Webb, Secretariat, CFTC, Regarding Resubmission of Proposed Amendments and Interpretive Notice to NFA Compliance Rule 2-6, Conducting Commodity Futures Business with an Expelled or Suspended Member or Associate (June 8, 2005), available at http://www.nfa.futures.org/news/newsRuleSubLetter.asp?ArticleID=1448 (on file with the *Columbia Law Review*).

300. A notice to members dated April 25, 2006, announced the CFTC approval of the amendments to Financial Requirements Sections 1 and 11 originally submitted on March 7, 2005. Notice I-06-09, Nat'l Futures Ass'n (Apr. 25, 2006), http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=1572 (on file with the *Columbia Law Review*). These amendments were modified and resubmitted on November 29, 2005. Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to Jean A. Webb, Secretariat, CFTC, Regarding Resubmission of Proposed Amendments to Financial Requirements Section 1 (to Impose a Capital Requirement on FCMs With Retail Forex Affiliates) and the Interpretive Notice Regarding Forex Transactions with Forex Dealer Members (Nov. 29, 2005), available at http://www.nfa.futures.org/news/newsRuleSubLetter.asp?ArticleID=1496 (on file with the *Columbia Law Review*) (acknowledging modification and resubmission of certain rules from March 7, 2005, letter). Finally, they were later remodified and resubmitted on January 26, 2006. Sexton, Jan. 26, 2006, Letter, supra note 298 (acknowledging modification and resubmission of November 29, 2005, modification and resubmission of March 7, 2005, submission).

301. The two March 7, 2005, submissions were in one letter. Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to Jean A. Webb, Secretariat, CFTC, Regarding Proposed Adoption of Compliance Rule 2-39 and Proposed Amendments to Compliance Rule 2-36, Financial Requirements Sections 1, 11, and 12 and the Interpretive Notice Regarding Forex Transactions with Forex Dealer Members (Mar. 7, 2005), http://www.nfa.futures.org/news/newsRuleSubLetter.asp?ArticleID=1430 (on file with the *Columbia Law Review*). However, this counted as two rule submissions because the submissions led to modifications of different rules at different points. See infra notes 303–302 (citing these submissions).

302. Notice I-05-13, Nat'l Futures Ass'n (Sept. 26, 2005), available at http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=1474 (on file with the *Columbia Law Review*) (announcing CFTC approval and effective date of some but not all amendments originally submitted March 7, 2005).

303. Letter from Thomas W. Sexton, Vice President and Gen. Counsel, Nat'l Futures Ass'n, to Jean A. Webb, Secretariat, CFTC, Regarding Proposed Adoption of Compliance Rule 2-39 and Proposed Amendments to Compliance Rule 2-36, Financial Requirements Sections 1, 11, and 12 and the Interpretive Notice Regarding Forex Transactions with Forex Dealer Members (Aug. 22, 2005), http://www.nfa.futures.org/NFA-regulation/

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
3/1/05	10-Day Provision	Adopted Unchanged	Later Submission (5/22/06)
12/8/04	Prior Approval Requested	Adopted Modified	NFA Manual (Compliance Rule 2-6; Interpretive Notice 9056); Later Submission (6/8/05)
12/7/04	10-Day Provision	Adopted Unchanged	NFA Manual (Bylaws 301, 701; Registration Rules 402, 501, 503, 504); Later Submission (8/26/09)
9/9/04	Prior Approval Requested	Adopted Unchanged	NFA Manual (Interpretive Notice 9055)
9/7/04	Prior Approval Requested	Adopted Unchanged	NFA Manual (Interpretive Notices 9053, 9021)
9/3/04	10-Day Provision	Adopted Unchanged	NFA Manual (Bylaw 1508)
8/31/04	Prior Approval Requested	Adopted Unchanged	NFA Manual (Bylaw 1301); Later Submission (11/20/12)
8/31/04	N/A — Resubmission of Proposal Outside Scope of Study[304]		
8/26/04	10-Day Provision	Adopted Unchanged	NFA Manual (8/26/04)
6/1/04	Prior Approval Requested	Adopted Unchanged	NFA Manual (Financial Requirements Section 5)
5/26/04	10-Day Provision	Adopted Unchanged	NFA Manual (Bylaw 1301(b)(i), (b)(ii), (d))
5/25/04	Prior Approval Requested	Adopted Unchanged	NFA Manual (Bylaw 1402)
5/24/04	10-Day Provision	Adopted Unchanged	NFA Manual (Interpretive Notice 9053); Later Submissions (3/7/05, 9/16/05, 11/13/06, 11/21/06, 8/22/08)
3/10/04	Prior Approval Requested	Adopted Unchanged	NFA Manual (Compliance Rule 2-34)
2/27/04	Prior Approval Requested	Adopted Unchanged	NFA Manual (Registration Rules 504, 509)

regulationRuleSubLetter.asp?ArticleID=1456 (on file with the *Columbia Law Review*) (announcing modification of amendments to Interpretive Notice regarding Forex Transactions with Forex Dealer Members).

304. Because this submission to the CFTC was a withdrawal and modification of an NFA submission to the CFTC from 2001, this could not be considered part of the study. Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to Jean A. Webb, Secretariat, CFTC, Regarding Proposed Amendments to Bylaws 301, 701, 702, 704 and 707, Compliance Rule 3-17 and Registration Rule 501 Relating to Non-Member Involvement in NFA's Disciplinary and Membership Committee Actions (Aug. 31, 2004), available at http://www.nfa.futures.org/NFA-regulation/regulationRuleSubLetter.asp?ArticleID=1331 (on file with the *Columbia Law Review*).

Date of Submission	Type of Submission	Outcome	How Outcome Was Verified
1/2/04	N/A — Resubmission of Pre-2003 Submissions[305]		
12/12/03	N/A — Not a Rule Amendment[306]		
12/4/03	10-Day Provision	Adopted Unchanged	NFA Manual (Various Registration and Arbitration Aules)
8/27/03	10-Day Provision	Adopted Unchanged	NFA Manual (Bylaws 301(i), 1301(b); Interpretive Notice 9029)
6/2/03	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-03-14)
5/27/03	Prior Approval Requested	Adopted Unchanged	Later Submission (1/20/12)
4/21/03	10-Day Provision	Adopted Unchanged	Later Submission (11/20/12)
3/4/03	10-Day Provision	Adopted Unchanged	Later Submissions (12/7/04, 5/22/07)
3/4/03	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-03-05)
3/4/03	Prior Approval Requested	Adopted Unchanged	Notice to Members (I-03-05)
3/4/03	10-Day Provision	Adopted Unchanged	Later Submission (9/7/04)

305. Because this submission to the CFTC was a withdrawal and modification of an NFA submission to the CFTC from before 2003, this could not be considered part of the study. Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to Jean A. Webb, Secretariat, CFTC, Regarding Resubmission of Proposed Adoption of NFA Compliance Rule 2-34 and Its Interpretive Notice Concerning Performance and Reporting Disclosures (Jan. 2, 2004), available at http://www.nfa.futures.org/NFA-regulation/regulationRuleSubLetter.asp?ArticleID=1214 (on file with the *Columbia Law Review*).

306. Even though this proposal was submitted to the CFTC under the CEA rule-review procedures, this was a proposal to postpone updating certain examinations the NFA administers; it was not a change to the NFA's rulebook. Letter from Thomas W. Sexton, Vice President & Gen. Counsel, Nat'l Futures Ass'n, to Jean A. Webb, Secretariat, CFTC, Regarding Proficiency Requirements for Security Futures Products (Dec. 12, 2003), available at http://www.nfa.futures.org/NFA-regulation/regulationRuleSubLetter.asp?ArticleID=1207 (on file with the *Columbia Law Review*). Therefore, it was removed from the study.