The Long Road Back: Business Roundtable and the Future of SEC Rulemaking

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I. INTRODUCTION

The Securities and Exchange Commission (SEC or Commission) has faced a number of challenges in the last few years. Judge Rakoff's decision in *Citigroup*,[1] the Madoff scandal,[2] and the *Business Roundtable* decision[3] are just a few of the developments that have dealt lasting damage to the SEC's reputation.[4] Critics have scrutinized the agency's decisionmaking on multiple fronts—from its enforcement policy to the quality of its rulemaking—and the SEC has largely come up short in the analysis.[5] The once-revered top cop[6] of the securities markets has taken a hit, and it is unclear whether it can recover.

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1. In *SEC v. Citigroup*, Judge Jed S. Rakoff refused to approve the settlement of an SEC enforcement action against Citigroup. SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011). In the context of his decision, Judge Rakoff raised a variety of questions and concerns about the SEC's enforcement policies and settlement practices. *See* Order Directing Hearing, SEC v. Citigroup Global Mkts., Inc., No. 11 Civ. 7387 (S.D.N.Y. Oct. 27, 2011), *available at* http://www.scribd.com/doc/70540706/Judge-Rakoff-s-order-in-S-E-C-v-Citigroup-Global-Markets (inviting the SEC to justify various of its policies). The case is currently on appeal to the Second Circuit, which issued a preliminary opinion suggesting that it is likely to overturn the lower court's decision. *See* SEC v. Citigroup Global Mkts., Inc., 673 F.3d 158 (2d Cir. 2012) (granting a stay of the lower court's order).

2. Bernie Madoff's thirteen-billion dollar Ponzi scheme was reportedly the largest in history. *See* Steven Pearlstein, *SEC's Gaping Blind Spots Kept Madoff's Misdeeds Out of Sight*, WASH. POST, July 1, 2009, at A13 (describing the SEC's failure to uncover a sixteen-year scheme despite numerous inquiries and warnings); Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639, 654–58 (2010) (identifying various explanations for the SEC's failure to investigate the Madoff case more effectively).

3. Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

4. *See, e.g.*, David S. Hilzenrath, *Madoff Case Haunts SEC as Panel Weighs Budget*, WASH. POST, Mar. 7, 2012, at A13 (reporting questions raised by a congressional panel about the SEC's budget request in light of its failure to detect Madoff's Ponzi scheme).

5. *See generally* Jill E. Fisch, *Top Cop or Regulatory Flop: The SEC at 75*, 95 VA. L. REV. 785 (2009) (describing criticisms of SEC regulatory and enforcement policies in the context of the 2008 financial crisis).

The *Business Roundtable* decision is of particular importance. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank)[7] tasked the SEC with an unprecedented number of required rulemakings.[8] Although the SEC has failed to complete many of these within the statutorily mandated time frames,[9] the Jumpstart Our Business Startups Act (JOBS Act),[10] signed by President Obama on April 5, 2012, requires additional SEC rulemaking in connection with its implementation.[11] Commentators have observed that these rulemakings must withstand the rigorous scrutiny to which the D.C. Circuit subjected the SEC's proxy access rule.[12] Indeed, the media reports that regulators are "paralyzed" by the threat of litigation.[13] The SEC has also announced

6. *See, e.g.*, Troy A. Paredes, Comm'r, Sec. & Exch. Comm'n, Remarks at the 2009 Southeastern Securities Conference (Mar. 19, 2009) (transcript available at http://www.sec.gov/news/speech/2009/spch031909tap.htm) (describing the SEC as "an agency with a tradition of excellence that dates back 75 years").

7. Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act), Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78n(a)(2) (Supp. IV 2010)).

8. *See, e.g.*, DAVIS POLK & WARDWELL LLP, SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, ENACTED INTO LAW ON JULY 21, 2010 (2010), *available at* http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf (describing the Dodd-Frank Act as containing 243 required rulemakings and sixty-seven studies, including ninety-five rulemakings and seventeen studies directed specifically at the SEC). Notably, the decision also threatens the rulemakings conducted by other agencies, some of which face more substantial statutory requirements than the SEC. *See, e.g.*, Sarah N. Lynch & Christopher Doering, *Analysis: Bruised Regulators Brace for Dodd-Frank Court Fights*, REUTERS (Aug. 4, 2011), http://www.reuters.com/article/2011/08/04/us-financial-regulation-courts-idUSTRE7730K220110804 (describing implications of the decision for CFTC rulemaking).

9. *See, e.g.*, Karen Kroll, *What's the Holdup With Dodd-Frank Rulemaking?*, COMPLIANCE WEEK, May 8, 2012 (reporting that, as of May 1, 2012, two-thirds of Dodd-Frank rulemaking deadlines had been missed).

10. Pub. L. No. 112-106, 126 Stat. 306 (2012).

11. *See, e.g.*, James Hamilton, *SEC Chair Tells House Panel that SEC Rulemaking Teams Working on Complex JOBS Act Implementing Regulations*, DODD-FRANK NEWS CENTER (Apr. 25, 2012, 4:55 PM), http://financialreform.wolterskluwerlb.com/2012/04/sec-chair-tells-house-panel-that-sec-rulemaking-teams-working-on-complex-jobs-act-implementing-regul.html (recounting that SEC Chairman Mary Schapiro told the House Financial Services Committee that "the rulemaking required for implementation of many new JOBS Act provisions will be complex"); J. Robert Brown Jr., *The SEC and the Non-Cost Benefit Analysis (Part 4)*, RACE TO THE BOTTOM (Apr. 26, 2012, 6:00 AM), http://www.theracetothebottom.org/home/the-sec-and-the-non-cost-benefit-analysis-analysis-part-4.html (describing some of the SEC rulemaking required by the JOBS Act).

12. *See* Brown, *supra* note 11 (noting that "Business Roundtable will require a lengthy and far more detailed cost benefit analysis").

13. Christopher Doering, *Financial Regulators "Paralyzed" by Threat of Wall Street Lawsuits*, HUFFINGTON POST (Mar. 8, 2012), http://www.huffingtonpost.com/2012/03/08/financial-regulators-paralyzed-threat-wall-street-lawsuits_n_1332294.html?ref=business.

a number of changes to its rulemaking practices in response to the *Business Roundtable* decision.[14]

Rule 14a-11, the SEC's proxy access rule, was clearly flawed, a point I detail extensively in other work.[15] It is unlikely, however, that these flaws resulted from the SEC's failure to conduct an adequate cost-benefit analysis, the basis on which the D.C. Circuit invalidated the rule. Similarly, it is unlikely that the SEC's changes to its rulemaking procedures, which focus largely on the role of economic analysis, address the true weaknesses in those procedures. Instead, this Article argues that the SEC's decisionmaking process is artificially constrained by structural requirements that limit the agency's effectiveness in formulating policy and reaching consensus. As a result, the rationales for its rules are inadequately articulated, and the rules are poorly designed.

As a first step, it is necessary to evaluate the *Business Roundtable* decision more carefully. This Article examines the decision and the context in which it was decided in Part II. In Part III, this Article discusses the statutory obligations imposed on SEC rulemaking that the court applied in the *Business Roundtable* case—the Administrative Procedure Act (APA)[16] and section 2(b) of the Securities Act of 1933.[17] Part IV explores two critical structural constraints on SEC rulemaking—the notice-and-comment procedure imposed by the APA, as well as the Government in the Sunshine Act (the Sunshine Act)[18]—and describes the practical effect that these constraints have on the rulemaking process in general and on Rule 14a-11 in particular. In Part V, this Article considers the effect of Dodd-Frank's legislative policy choices on judicial oversight of agency rulemaking.

Bad rules make bad law, and Rule 14a-11 was arguably a bad rule.[19] But the flaws in SEC rulemaking are quite different from those identified by the D.C. Circuit. At the same time, the *Business Roundtable* decision was itself flawed. In evaluating the SEC's decision to adopt a proxy access rule, the D.C. Circuit completely disregarded the congres-

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14. *See, e.g.*, Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n, Testimony Concerning Economic Analysis in SEC Rulemaking (Apr. 17, 2012) (transcript available at http://www.sec.gov/news/testimony/2012/ts041712mls.htm) (describing new staff guidance for conducting economic analysis in connection with proposed rulemaking).

15. *See generally* Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435 (2012).

16. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of Title 5).

17. 15 U.S.C. § 77b(b). Congress added the same language to § 3(f) of the Securities Exchange Act of 1934. *See id.* § 78c(f).

18. Pub. L. No. 94-409, 90 Stat. 1241 (1976).

19. *See generally* Fisch, *supra* note 15 (describing flaws in Rule 14a-11).

sional policy judgments reflected in Dodd-Frank. Congress played a critical role by explicitly authorizing the SEC to adopt a proxy access rule. By substituting its own policy judgment for that of Congress, the D.C. Circuit threatens not just the ability of administrative agencies to formulate regulatory policy, but also the ability of Congress to direct agency policymaking. Explicit congressional determinations regarding regulatory policy warrant greater judicial deference than the courts have given to them. At the same time, Congress may implicitly subject the agency's implementation of that policy to greater scrutiny as to whether the agency has been faithful to its legislative directive.

II. THE *BUSINESS ROUNDTABLE* DECISION

A. Background to the Decision: The Proxy Access Rule

The starting point of this Article is the D.C. Circuit's decision in *Business Roundtable*.[20] This case presented a challenge to the legitimacy of Rule 14a-11, the proxy access rule that the SEC adopted in 2010.[21] Notably, Congress explicitly authorized the SEC to adopt a proxy access rule in section 971 of Dodd-Frank.[22] Although the SEC had been considering some form of proxy access for seventy years[23] and had issued a notice of proposed rulemaking prior to the enactment of Dodd-Frank,[24] it did not act until after Congress formally authorized a proxy access rule.[25]

I have described the provisions of Rule 14a-11 in detail elsewhere.[26] To summarize, the rule would have required public companies

20. Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

21. Rule 14a-11 was reserved from the 2010 Code of Federal Regulations pending litigation over its validity in the D.C. Circuit. After the rule was invalidated in *Business Roundtable*, the 2011 Code of Federal Regulations omitted the rule entirely. The rule as adopted can be found at Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,677–93 (proposed Sept. 16, 2010).

22. Dodd–Frank Act, Pub. L. No. 111-203, § 971, 124 Stat. 1376, 1915 (2010) (codified as amended at 15 U.S.C. § 78n(a)(2) (Supp. IV 2010)).

23. *See* Fisch, *supra* note 15 (observing that the SEC first considered some form of the proxy access rule in 1942).

24. *See* Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024 (proposed June 18, 2009).

25. Among the obstacles to the SEC's prior adoption of a proxy access rule were concerns about whether the agency possessed the necessary statutory authority. *See, e.g.*, Letter from David Hirschmann, Senior Vice President, U.S. Chamber of Commerce, to Elizabeth M. Murphy, Chairman, Sec. & Exch. Comm'n 1 (Aug. 14, 2009), *available at* http://www.sec.gov/comments/s7-10-09/s71009-181.pdf (stating that the SEC's proposed proxy access rule was "beyond the Commission's authority"); Jill E. Fisch, Professor, Statement During SEC Roundtable Discussion on Proposed Security Holder Director Nomination Rules (Mar. 12, 2004) (prepared statement available at http://www.sec.gov/spotlight/dir-nominations/fisch031204.pdf) (citing legislative history of federal securities laws in response to concerns about the agency's statutory authority).

26. *See generally* Fisch, *supra* note 15 (describing and criticizing the SEC's proxy access rule).

to include a limited number of director candidates nominated by large shareholders on the issuer's proxy statement. To qualify to nominate director candidates, a shareholder was required to have held at least three percent of the company's stock for three years or more.[27] Shareholders were not permitted to use Rule 14a-11 to seek control of an issuer.[28] Neither issuers nor states were permitted to create a mechanism by which an individual company could opt out of the required proxy access procedure.[29]

The Business Roundtable and the U.S. Chamber of Commerce, which had previously threatened to challenge an SEC rule mandating proxy access[30] and had successfully challenged other SEC rulemaking efforts,[31] filed their complaint just a month after the rule was adopted.[32] The petitioners argued, among other claims, that the SEC's adoption of Rule 14a-11 was arbitrary and capricious in violation of the APA and that the SEC failed to adequately assess the rule's effect on efficiency, competition, and capital formation.[33]

B. The Circuit Court Decision

The D.C. Circuit vacated Rule 14a-11, agreeing with the petitioners that the SEC had acted arbitrarily and capriciously.[34] In particular, the court observed that the SEC has "a unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation.'"[35] In concluding that the SEC had failed to meet this obligation, the court largely faulted the quality of the SEC's economic analysis.[36] The court identified several ways in which the SEC had, in the court's

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27. *Id.* at 463.

28. *Id.* at 475–76.

29. *Id.* at 490.

30. *See, e.g.*, John F. Hartigan et al., *Proposed Corporate Governance Changes Applicable to Public Companies*, MORGAN LEWIS (June 14, 2010), http://www.morganlewis.com/index.cfm/publicationID/0e1078ef-16be-40dc-8c84-bfba6c2e528c/fuseaction/publication.detail (describing the proxy access proposal as "perhaps the most controversial and potentially divisive aspect of the corporate governance reforms" and observing that the Chamber of Commerce had threatened litigation if the SEC adopted the proposal).

31. *See infra* Part II.C (describing other successful challenges to SEC rulemaking).

32. *See* Petition for Review, Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (No. 10-1305).

33. *Id.* at 2. The complaint also alleged that proxy access rules exceeded the SEC's authority and violated the petitioners' First and Fifth Amendment rights under the Constitution. *Id.* The D.C. Circuit did not reach these issues.

34. *Bus. Roundtable*, 647 F.3d at 1148.

35. *Id.*

36. *Id.* (explaining that the agency acted arbitrarily by failing "adequately to assess the economic effects of a new rule").

opinion, failed to estimate or quantify the potential costs of proxy access properly or failed to obtain sufficient empirical data to support its conclusions.[37] On issues for which commentators had presented the SEC with competing economic analysis, the court criticized the agency's failure to "make tough choices about which of the competing estimates is most plausible."[38]

The *Business Roundtable* decision was noteworthy for several reasons. First and foremost was the level of vitriol in the opinion. The court did not simply fault the SEC's rulemaking procedures; it characterized the SEC as acting "inconsistently and opportunistically"[39] and its reasons for acting as "unutterably mindless."[40] The court stated that the SEC's rejection of the petitioners' prediction of the potential costs of issuer opposition to shareholder nominees "had no basis beyond mere speculation."[41] The court described the SEC as "ducking serious evaluation of the costs that could be imposed [by special interests]."[42] Notwithstanding the fact that SEC rulemakings are conducted by scores of staff members and ultimately adopted by a commission whose composition changes over time, the opinion seemed to attribute a stable (and deficient) institutional character to both the SEC and its rulemakings, describing the agency as having "failed once again" to conduct an adequate cost-benefit analysis.[43]

These statements suggest that the court was not merely challenging the SEC's rulemaking process, but was questioning its good faith in analyzing the desirability of the rule. Although the court did not identify a basis for this concern, its language seemed to highlight the particular vulnerability of the agency's reputation and institutional competence.

The court did not defer to the SEC's rationale for its rulemaking, its evaluation of the quality of alternatives and data presented by industry

37. *See, e.g.*, *id.* at 1150 (stating that the SEC "did nothing to estimate and quantify the costs it expected companies to incur").

38. *Id.* (citation and internal quotation marks omitted). Commentators have argued that the court's empirical analysis was, itself, "cursory." *See, e.g.*, Grant M. Hayden & Matthew T. Bodie, *The Bizarre Law & Economics of* Business Roundtable v. SEC, 38 J. CORP. L. 1, 25, 30 (2012).

39. *Bus. Roundtable*, 647 F.3d at 1148.

40. *Id.* at 1156.

41. *Id.* at 1150.

42. *Id.* at 1152.

43. *Id.* at 1148. Notably, one of the cases cited by the court in characterizing the SEC as a repeat offender—specifically, the *Chamber of Commerce* case—was decided in 2004 by a Commission of which none of the five commissioners who considered Rule 14a-11 was a member. *See SEC Historical Summary of Chairmen and Commissioners*, SEC. & EXCH. COMM'N, http://www.sec.gov/about/sechistoricalsummary.htm (last updated Dec. 17, 2012) (describing periods of service of SEC commissioners and showing that none of the commissioners who considered Rule 14a-11 joined the Commission until 2006 or after).

participants, or its assessment of the methodology of studies included in the public-comment file.[44] At the same time that the court criticized the SEC for inappropriately discounting commentators' predictions about the costs of the rule, the court branded the agency as inconsistent for increasing the qualification requirements to use Rule 14a-11 from its original rule proposal—a change that would lower costs by reducing the number of shareholder nominations.[45] In short, the court's statements were less about the SEC's failure to assess costs and benefits than the SEC's erroneous assessment.

Ultimately, the court appeared to make an independent policy judgment that, notwithstanding the SEC's view, proxy access is a bad idea. At the same time, language in the opinion suggested the possibility that an SEC determination that differed from that of the court (or even from that of the petitioners) was, as a result, arbitrary.[46] This approach reflects a marked contrast to the Second Circuit's recent statement in the *Citigroup* case, which reflects the more traditional deference to agency policymaking.[47] As the *Citigroup* court observed, "[i]t is not . . . the proper function of federal courts to dictate policy to executive administrative agencies."[48] The D.C. Circuit's substitution of its policy judgment for that of the SEC both differs from this traditional deference and poses a threat to future agency rulemaking efforts.

C. The Business Roundtable *Opinion in Context*

The D.C. Circuit's criticism of Rule 14a-11 must be understood in context. *Business Roundtable* was not the first D.C. Circuit decision in recent history to invalidate an SEC rule. Indeed, in the *Business Roundtable* opinion, the court highlighted two other recent occasions on which it had invalidated SEC rulemaking: *American Equity*[49] and *Chamber of Commerce*.[50] In 2010, the D.C. Circuit in *American Equity* struck down an SEC rule providing that fixed, indexed annuities did not constitute annuity contracts within the meaning of the Securities Act and were,

44. *See, e.g.*, *Bus. Roundtable*, 647 F.3d at 1151 (criticizing the SEC for relying on "two relatively unpersuasive studies"). So long as the studies persuaded the SEC, the statutory origin of a requirement that they also persuade the reviewing court is illusive.

45. *Id.* at 1152–53.

46. *See, e.g.*, *id.* at 1150–51 (implying that SEC acted arbitrarily in concluding that Rule 14a-11 would improve board performance and in rejecting an empirical study purporting to reach the opposite conclusion).

47. SEC v. Citigroup Global Mkts., Inc., 673 F.3d 158 (2d Cir. 2012).

48. *Id.* at 163.

49. Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010).

50. Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005).

therefore, subject to federal securities regulation rather than merely state insurance law.[51]

Significantly, despite holding that the SEC's Rule 151A was entitled to *Chevron* deference,[52] the court invalidated the rule, concluding that the agency's section 2(b) analysis was "flawed."[53] Notably, the SEC had made specific findings, as required by section 2(b) of the Securities Act, with respect to the rule's effect on "efficiency, competition and capital formation."[54] Nonetheless, the D.C. Circuit disagreed with the SEC's conclusions. Specifically, the court faulted the SEC for insufficiently analyzing these factors under the preexisting state-law regulatory regime.[55] The court concluded that the SEC's failure to analyze these factors under "the existing state law regime renders arbitrary and capricious the SEC's judgment that applying federal securities law" would constitute an improvement.[56]

Business Roundtable also relied heavily on the court's prior decision in *Chamber of Commerce*.[57] In *Chamber of Commerce*, the court reviewed the SEC's adoption of mutual fund reforms requiring the boards to have an increased percentage of independent directors and an independent board chairman.[58] The court found that the rule changes were within the SEC's statutory authority to adopt and consistent with congressional intent. Nonetheless, the court concluded that the rule changes were invalid because the SEC had failed to sufficiently quantify the costs associated with their adoption;[59] this failure, it held, was inconsistent with the agency's obligations under the analogue to section 2(b) in the Investment Company Act.[60]

In contrast to the court in *Business Roundtable*, the *Chamber of Commerce* court stated that the SEC was not required to conduct an empirical study to determine the benefits of its new rules, noting that "depending upon the nature of the problem, an agency may be 'entitled to conduct . . . a general analysis based on informed conjecture.'"[61] None-

51. *Am. Equity Inv. Life Ins. Co.*, 613 F.3d at 167–68.

52. *Id.* at 175–76. Notably, the *Business Roundtable* decision does not discuss *Chevron* deference.

53. *Id.* at 177.

54. 15 U.S.C. § 77b(b).

55. *Am. Equity Inv. Life Ins. Co.*, 613 F.3d at 177–78.

56. *Id.* at 179.

57. Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005).

58. *See* Investment Company Governance, 17 C.F.R. pt. 270 (2004).

59. *Chamber of Commerce*, 412 F.3d at 144.

60. *See* 15 U.S.C. § 80a-2(c).

61. *Chamber of Commerce*, 412 F.3d at 142 (quoting Melcher v. FCC, 134 F.3d 1143, 1158 (D.C. Cir. 1998) (omission in original)).

theless, the court found that the SEC had failed to consider adequately the cost of its new requirements as well as a disclosure alternative to the requirement of an independent board chair.[62]

Other recent D.C. Circuit decisions evaluating the validity of SEC rules follow a similar pattern. In *Goldstein v. SEC*,[63] the court invalidated a rule requiring hedge fund registration (a requirement that Congress subsequently imposed by statute in Dodd-Frank).[64] The SEC adopted the rule in response to the rapid growth of the hedge fund industry, which, according to the SEC, posed several problems including the growing access of retail investors to hedge fund investments and the potential for fraud.[65] The court rejected the SEC's rule as an arbitrary departure from its prior regulatory policy. The court specifically discounted the agency's findings concerning developments in the industry and the growing economic significance of hedge funds to the capital markets.[66]

In *NetCoalition v. SEC*, the D.C. Circuit invalidated an SEC order approving a requested fee change by NYSE Arca, a self-regulatory organization registered with the SEC as a national securities exchange.[67] Specifically, Arca proposed to begin charging a fee for its proprietary "depth of book data."[68] Although the court conceded that the SEC acted within the scope of its authority and that its choice of approach in evaluating the proposed rule change was reasonable, the court nonetheless found that the agency had failed to disclose a "reasoned basis" for concluding that the proposed pricing was reasonable.[69]

Finally, in *Financial Planning Ass'n v. SEC*, the court invalidated an SEC rule that broadened the exemption for broker-dealers from regulation under the Investment Advisers Act (IAA) in order to permit broker-dealers to create alternative fee structures for customer accounts without being subject to regulation under the IAA.[70] *Financial Planning Ass'n* differs somewhat from the prior cases because the SEC was acting under a statute that explicitly authorized it to exempt persons from the

62. *Id.* at 143.

63. Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2005).

64. *See* Dodd–Frank Act, Pub. L. No. 111-203, § 403, 124 Stat. 1376, 1570–71 (2010).

65. *Goldstein*, 412 F.3d at 882.

66. *See id.* (noting that the dissenting commissioners "doubted it"). In addition, the court held that the SEC's interpretation of the term "client" was unreasonable because it created inconsistencies in the scope of regulation provided by the IAA. *Id.*

67. NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010). Under the Securities Act, national securities exchanges are required to file proposed rule and fee changes with the SEC for approval. The SEC subjects these proposals to its standard notice-and-comment procedure. *See id.* at 528.

68. *Id.* at 531.

69. *Id.* at 544.

70. 482 F.3d 481, 493 (D.C. Cir. 2007).

IAA.[71] The court held that this language did not apply because broker-dealers who did not receive special compensation were already named in one of the congressionally enumerated exemptions.[72]

This history of repeated invalidations of SEC rulemakings by the D.C. Circuit suggests some degree of distrust of the SEC's policymaking judgments. The extent to which this distrust may stem from the agency's involvement in various embarrassments and scandals is unclear. Since the 2008 financial crisis, the SEC has been the target of a series of attacks on its competence, credibility, and policymaking, and the number of agency missteps and problems has been shockingly high. I have written elsewhere, for example, of the extensive criticism directed at the SEC over its administration of the Consolidated Supervised Entities program, its failure to detect the massive fraud perpetrated by Bernie Madoff, alleged improprieties in the agency's investigation of possible insider trading at Pequot Capital Management, and several other issues.[73] In 2010, a former SEC lawyer was convicted of criminal conspiracy for his participation in a fraudulent "pump and dump" stock scheme.[74] In 2011, a high-profile study reported the extent of the revolving door that exists between SEC employment and the subsequent representation of private clients in dealings with the agency.[75] Even as the D.C. Circuit was announcing its *Business Roundtable* decision, the media was reporting on the SEC's widespread destruction of documents relating to its investigations.[76] At the same time, the SEC entered into a lease for 900,000 square feet of office space that it did not need and lacked the budget to pay for, a deci-

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71. The Investment Advisers Act provides that an investment adviser did not include "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order." 15 U.S.C. § 80b-2(a)(11)(H).

72. *See* 15 U.S.C. § 80b-2(a)(11)(C) (exempting "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor").

73. *See generally* Fisch, *supra* note 5.

74. Kara Scannell, *Jury Convicts Former SEC Lawyer*, WALL ST. J. (Jan. 28, 2010), http://online.wsj.com/article/SB10001424052748704194504575031941422210152.html.

75. David S. Hilzenrath, *SEC Staff's 'Revolving Door' Prompts Concerns About Agency's Independence*, WASH. POST (May 13, 2011), http://www.washingtonpost.com/business/economy/sec-staffs-revolving-door-prompts-concerns-about-agencys-independence/2011/05/12/AF9F0f1G_story.html. More recently, a former SEC lawyer settled criminal charges that he violated SEC ethics rules and continued to represent a client after being told by the SEC that he had a conflict of interest. *See* Andrew Harris, *Ex-SEC Enforcer Settles Stanford Ethics Dispute with U.S.*, BLOOMBERG BUSINESSWEEK (Jan. 18, 2012), http://www.business week.com/news/2012-01-18/ex-sec-enforcer-settles-stanford-ethics-dispute-with-u-s-.html.

76. Matt Taibbi, *Is the SEC Covering Up Wall Street Crimes?*, ROLLING STONE (Aug. 17, 2011), http://www.rollingstone.com/politics/news/is-the-sec-covering-up-wall-street-crimes-20110817.

sion that the Inspector General termed "a deeply flawed and unsound analysis."[77]

These problems likely carried particular weight at the D.C. Circuit, which, because of its location and specialized caseload, is particularly sensitive to the functioning of the regulatory agencies.[78] It would not be unreasonable to conclude that the rulemaking and policy judgments of an agency that cannot even exercise its leasing authority appropriately should be subjected to careful scrutiny. The D.C. Circuit's reluctance to uphold SEC rules against challenge, however, predates the series of recent scandals. Two of the best known decisions invalidating SEC rulemaking were the D.C. Circuit's prior *Business Roundtable* decision in 1990 overturning the SEC's one-share, one-vote rule[79] and its decision in *American Bankers Ass'n*[80] requiring banks that engaged in securities business to register as broker-dealers.[81] Although the court may have become more demanding in its recent scrutiny, its skepticism of SEC rulemaking is not a new development.

Of course, the SEC is not the only agency to have suffered the invalidation of its rules at the hand of the D.C. Circuit.[82] Nor is it the only agency to have its rules subjected to the intense "hard look" scrutiny that appears to shift from procedural oversight to substantive review.[83] On the other hand, the string of securities cases is notable because in no case did

77. OFFICE OF INSPECTOR GEN., SEC. & EXCH. COMM'N, REPORT ON INVESTIGATION: IMPROPER ACTIONS RELATING TO THE LEASING OF OFFICE SPACE 2 (2011), *available at* http://www.sec.gov/foia/docs/oig-553.pdf.

78. Commentators have suggested that this familiarity may lead to greater court skepticism of agency rulemaking decisions. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 795 (2008) (reporting that D.C. Circuit judges are "much less willing to validate the decisions of the EPA and the NLRB in arbitrariness cases than are judges in other circuits").

79. Bus. Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990).

80. Am. Bankers Ass'n v. SEC, 804 F.2d 739 (D.C. Cir. 1986).

81. The rule, which the SEC adopted after an administrative reinterpretation of the Glass-Steagall Act, responded to the new entry of banks into the brokerage market. This entry was facilitated by the subsequent repeal of Glass-Steagall in 1999. To the extent that, as some commentators argue, the repeal of Glass-Steagall was a contributing factor in the financial crisis because of its role in increasing the size and interdependence of the big banks, the SEC's attempt to regulate bank brokerage activities through Rule 3b-9 now appears perspicacious. *See, e.g.*, Peter L. Bernstein, *What's Free About Free Enterprise?*, N.Y. TIMES (Sept. 27, 2008), http://www.nytimes.com/2008/09/28/business/28view.html?pagewanted=2&_r=1 (describing the repeal of Glass-Steagall as "a key contributor to the calamities now gripping the banking system").

82. *See, e.g.*, EME Homer City Generation, L.P. v. EPA, No. 11-1302, 2012 U.S. App. LEXIS 17535 (D.C. Cir. Aug. 21, 2012) (invalidating EPA's transport rule).

83. *See* discussion *infra* Part III.A (describing hard look review).

the D.C. Circuit uphold a challenged SEC rule.[84] The result of the SEC's repeated inability to defend its rules against attack is an absence of decisions that validate a specific rulemaking process or that articulate the type of analysis that meets the judicial standard for cost-benefit analysis—the type of decisions that could serve as a roadmap for future agency action.

The absence of decisions of this type stands in contrast to the court's oversight of other agencies.[85] For example, Professors Thomas Miles and Cass Sunstein empirically studied published appellate decisions from 1996 to 2006 reviewing actions by the Environmental Protection Agency (EPA) and National Labor Relations Board (NLRB).[86] The authors found that the courts validated agency decisions at an overall rate of sixty-four percent.[87] Similarly, William Jordan's study of D.C. Circuit remands of agency rules between 1985 and 1995 found that, although the invalidations often resulted in temporary setbacks, the agencies involved successfully implemented their policies in approximately eighty percent of the cases in which the D.C. Circuit had originally remanded rules as arbitrary and capricious.[88] Although empirical data is limited on the manner in which courts apply hard look analysis, to the extent that the D.C. Circuit's approach to SEC rulemaking is exceptional, it may in part reflect an inherent judicial skepticism about the extent to which financial regulation truly involves complex scientific or technical analysis that is within the particular competence of the agency such that deference to the agency's judgment is warranted.[89]

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84. The Supreme Court upheld the SEC's promulgation of Rule 14e-3, an insider trading provision, in an appeal of the criminal prosecution of James O'Hagan. *See* United States v. O'Hagan, 521 U.S. 642 (1997). The opinion did not subject the rule to the type of analysis applied by the D.C. Circuit in the cases discussed in the text. *See id. But see id.* at 680 (Thomas, J., concurring in the judgment in part and dissenting in part); United States v. O'Hagan, 92 F.3d 612 (8th Cir. 1997), *reversed*, 521 U.S. 642. The Northern District of California upheld Rule 13b2-2 against a challenge in the criminal case of *United States v. Reyes*, but the opinion did not contain an analysis of the rulemaking process. United States v. Reyes, No. C 06-00556 CRB, 2007 U.S. Dist. LEXIS 41632 (N.D. Cal. May 30, 2007); *see also* Levy v. Sterling Holding Co. 544 F.3d 493 (3d Cir. 2008) (upholding SEC's amendments to rules under § 16 and the retroactive application of those rules to the case at bar).

85. *See, e.g.*, Coal. for Responsible Regulation, Inc., v. EPA, 684 F.3d 102 (D.C. Cir. 2012) (rejecting a challenge to EPA rules regulating the emission of greenhouse gases).

86. Miles & Sunstein, *supra* note 78.

87. *Id.* at 767; *see also* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?: An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825 (2006).

88. William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 440 (2000).

89. *Cf. Coal. for Responsible Regulation*, 684 F.3d at 117 (stating that the EPA had made "a 'scientific judgment' about the potential risks greenhouse gas emissions pose to public health or

D. The Response to Business Roundtable

Commentators interpreted *Business Roundtable* as a strong statement that the SEC needed to improve its cost-benefit analysis. As one law firm commentator observed, "[w]e were struck by just how meticulous the DC Circuit panel expected the SEC to be in assessing the 'economic effects' of its rules."[90] To examine further the quality of the SEC's economic analysis, the SEC Inspector General conducted two separate studies reviewing the SEC's rulemaking process with respect to particular Dodd-Frank rulemakings.[91] Similarly, the Government Accountability Office (GAO) conducted a study, required by Congress under Dodd-Frank, of the SEC's rulemaking process.[92] In response to the concerns noted in the *Business Roundtable* decision and these studies, the SEC adopted new staff guidance on economic analysis in its rulemaking.[93] In testimony before Congress, SEC Chairman Mary Schapiro described the new steps that the SEC staff was taking to improve the economic analysis in its rulemaking process.[94]

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welfare—not policy discussions"); *id.* at 120 ("[W]e give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." (internal quotation marks omitted)); Huls Am. Inc. v. Browner, 83 F.3d 445, 452 (D.C. Cir. 1996) (noting that the court owes an "extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise"); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 813–14 (1978) (holding that the FCC, in making "judgmental or predictive" factual determinations, did not need "complete factual support" because "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency").

90. Melinda Brunger et al., *DC Circuit Panel Vacates Proxy Access Rule*, ANDREWS KURTH (July 28, 2011), http://www.andrewskurth.com/pressroom-publications-815.html.

91. The report on the first study, which examined six specified rulemakings, was released on June 13, 2011. *See* OFFICE OF INSPECTOR GEN., SEC. & EXCH. COMM'N, REPORT OF REVIEW OF ECONOMIC ANALYSES PERFORMED BY THE SECURITIES AND EXCHANGE COMMISSION IN CONNECTION WITH DODD-FRANK RULEMAKINGS (2011), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_13_11.pdf [hereinafter OIG REPORT I]. Although the report identified a few possible areas of improvement, it concluded that the rulemaking procedures had complied with the spirit of the cost-benefit analysis set out in the executive orders and that the agency had identified and reviewed possible alternatives to the proposed rules. *Id.* at 41. The second study was released in January 2012. *See* OFFICE OF INSPECTOR GEN., SEC. & EXCH. COMM'N, FOLLOW-UP REVIEW OF COST-BENEFIT ANALYSES IN SELECTED SEC DODD-FRANK ACT RULEMAKINGS (2012), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2012/Rpt%20499_FollowUpReviewofD-F_CostBenefitAnalyses_508.pdf [hereinafter OIG REPORT II].

92. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-151, DODD-FRANK ACT REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION (2011), *available at* http://www.gao.gov/new.items/d12151.pdf.

93. Memorandum from the Div. of Risk, Strategy & Fin. Innovation and the Office of Gen. Counsel to the Staff of the Rulewriting Divs. & Offices (Mar. 16, 2012), *available at* http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

94. *See* Schapiro, *supra* note 14. The steps included greater involvement of economists in the rulemaking process; more specific explanations of the justifications for the rule; greater differentiation between the economic impacts resulting from the congressional mandate and those resulting

These steps may not be sufficient to satisfy all policymakers. In June 2011, Representative Scott Garrett introduced H.R. 2308, the SEC Regulatory Accountability Act.[95] Among other things, H.R. 2308 proposes to establish explicit requirements for cost-benefit analyses for Commission rules and orders.[96] The bill would also require the SEC to review its regulations at least once every five years to determine whether any are "outmoded, ineffective, insufficient, or excessively burdensome."[97] In addition, the bill would require the SEC to state, for all major rules, the purposes and intended consequences of the rules, and to identify metrics to measure, after adoption, whether the rule has accomplished the stated purposes.

Although the foregoing criticisms suggest that the SEC's use of cost-benefit analysis is distinctively deficient, studies suggest that the expectations of the *Business Roundtable* court and some commentators are outside the norm employed by agencies generally and, more problematically, are unrealistic. A 2011 report to the Senate from the Committee on Capital Markets Regulation of the U.S. Chamber of Commerce examines several federal agencies' rulemakings under Dodd-Frank.[98] For example, the Committee observed that, of 192 proposed and adopted Dodd-Frank rules, over a quarter had no cost-benefit analysis at all; over a third had entirely nonquantitative cost-benefit analysis; and of the fifty rules containing quantitative analysis, the majority were limited to administrative and similar costs and therefore failed to account for the rules' expected broader economic impact.[99]

Similarly, the Office of Management and Budget's 2011 Report to Congress on the Benefits and Costs of Federal Regulations stated that, of the sixty-six major rules promulgated by executive agencies in 2010, the

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from the exercise of agency discretion; more extensive discussion and quantification of costs and benefits; "more integrated analysis of economic issues (including efficiency, competition, and capital formation)"; explicit encouragement for commenters to provide quantitative information, and discussion of the information provided; and greater discussion of alternatives that the SEC had rejected. *Id.*

95. SEC Regulatory Accountability Act of 2011, H.R. 2308, 112th Cong. (2011). A similar bill was introduced to the Senate in April 2012. SEC Regulatory Accountability Act, S. 2373, 112th Cong. (2011).

96. H.R. 2308 § 2(e)(1)(b) ("Before promulgating a regulation under the securities laws . . . the Commission shall . . . propose or adopt a regulation or order only on a reasoned determination that the benefits of the intended regulation or order justify the costs of the intended regulation or order.").

97. *Id.* § 2(e)(4).

98. Letter from Comm. on Capital Mkts. Regulation to Congress (Mar. 7, 2012), *available at* http://capmktsreg.org/pdfs/2012.03.07_CBA_letter.pdf.

99. Media Advisory, Comm. on Capital Mkts. Regulation, CCMR Warns That Inadequate Cost-Benefit Analysis Opens Dodd-Frank Rulemaking to Challenge and Delay (Mar. 7, 2012), *available at* http://capmktsreg.org/pdfs/2012.03.07_CBA_letter.pdf.

issuing agencies quantified and monetized both costs and benefits for only eighteen.[100] Of the seventeen major rules promulgated by independent agencies in 2010, the issuing agencies subjected none to an analysis of both anticipated costs and benefits.[101]

The utility and practicality of cost-benefit analysis has, of course, been widely debated, and an extensive discussion of this debate is beyond the scope of this Article.[102] It is clear, however, that the increased emphasis on cost-benefit analysis has slowed the SEC's progress on adopting the new regulations required by Dodd-Frank and the JOBS Act.[103] Since *Business Roundtable*, the pace of SEC rulemaking has slowed by about half, largely due to the agency's effort to analyze costs and benefits more comprehensively.[104] The concern is that, absent adequate cost-benefit analysis, the agency's rules face a continued risk of invalidation by the D.C. Circuit. The next Part considers, in more detail, the legal bases for such invalidation.

III. STATUTORY LIMITS ON SEC RULEMAKING

The *Business Roundtable* decision is based on the federal courts' obligation to ensure that agency rulemaking is consistent with the constraints imposed by Congress. SEC rulemaking must conform to the requirements of the APA and the more specific requirements of section 2(b) of the Securities Act. These constraints, as well as the impact from judicial interpretations of such constraints, are addressed in this Part.

A. The Administrative Procedure Act

The APA sets out the ground rules for judicial review of agency rulemaking.[105] The APA instructs a reviewing court to invalidate agency action that is "in excess of statutory jurisdiction, authority, or limitations,

100. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

101. *Id.* at 4.

102. *See, e.g.*, William H. Rodgers, Jr., *Benefits, Costs, and Risks: Oversight of Health & Environmental Decisionmaking*, 4 HARV. ENVTL. L. REV. 191, 193–201 (1980) (identifying difficulties in applying cost-benefit analysis to environmental regulation).

103. *See* Edward Wyatt, *At House Hearing, Schapiro Says Cost Analyses Are Slowing S.E.C.'s Work*, N.Y. TIMES DEALBOOK (Apr. 25, 2012, 3:35 PM), http://dealbook.nytimes.com/2012/04/25/at-house-hearing-schapiro-says-cost-analyses-are-slowing-s-e-c-s-work/.

104. Steven Sloan, *Schapiro Says SEC Will Change Cost Calculation of Regulation*, BLOOMBERG (Apr. 17, 2012, 7:58 AM), http://www.bloomberg.com/news/2012-04-17/schapiro-says-sec-will-change-cost-calculation-of-regulation-1-.html.

105. 5 U.S.C. § 500 (2006).

or short of statutory right."[106] In addition, the reviewing court is required to strike down actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[107]

In applying the APA, courts determine whether an agency has acted within the scope of its statutory authority using a deferential standard of review commonly known as "*Chevron* deference."[108] Although *Chevron* is often described as having "revolutionized the jurisprudence of agency deference,"[109] courts apply *Chevron* deference surprisingly infrequently.[110] Modern courts closely review the factual record and reasons justifying the agency's policy choices.[111] Commentators have termed this closer scrutiny "hard look" review.[112] The U.S. Supreme Court set out the dominant formulation of the rationality requirement in the *State Farm* case:

> An agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[113]

As the Court explained, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[114]

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106. *Id.* § 706(2)(C).

107. *Id.* § 706(2)(A).

108. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The *Chevron* Court explained, "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844.

109. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1093 (2008).

110. *See id.* at 1090 ("[F]rom the time it was handed down until the end of the 2005 term, *Chevron* was applied in only 8.3% of Supreme Court cases evaluating agency statutory interpretations.").

111. *See, e.g.*, Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1451 (2005) ("[I]n the 1970s and 1980s, the 'hard look' doctrine evolved, requiring agencies to provide rational explanations for their decisions, justify departures from past practices, allow participation by a wide range of interested constituencies, and consider reasonable alternatives.").

112. *See, e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 525 (1985) (describing the emergence, in the 1970s, of "a new, more rigorous scope of review under the arbitrary and capricious standard—a scope of review known as the 'hard look'").

113. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

114. *Id.* (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

In squaring hard look review with the principles underlying *Chevron* deference,[115] the Supreme Court justified *State Farm*'s process-based emphasis in terms of permitting judicial oversight under the APA. Courts may have greater competence in overseeing the process by which an agency formulates its decision than in evaluating the policies underlying that decision.[116] The D.C. Circuit has stated that reviewing the procedures by which agencies adopt legislative rules falls within the court's "area of competence" and "contribute[s] to the rationality and fairness of agency decision making without detracting unduly from its effectiveness."[117] Hard look review has also been defended as preserving the lawfulness of agency action, ensuring that the agency develop a factual record upon which to deploy its technical expertise, ensuring public participatory values in policy formulation, and protecting the agency's determination from politically charged interest-group domination.[118]

Nonetheless, hard look review has generated substantial controversy. Much of the controversy stems from the fact that, as in the *Business Roundtable* decision, hard look review appears to have morphed from process-based review into substantive review,[119] with the court overturning agency decisions on the basis of its own policy preferences.[120] Courts, of course, deny that they are making independent policy judgments,[121] but as in *Business Roundtable*, this denial is often implausible.

115. For a more extensive discussion of *Chevron* deference and its scope, see Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

116. *See generally* Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599 (2002) (identifying three distinctive justifications for the hard look doctrine among three D.C. Circuit court judges).

117. Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1049 (D.C. Cir. 1979); *see* Envtl. Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) ("When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process . . . .").

118. *See, e.g.*, Sinden, *supra* note 111 (defending cost-benefit analysis as a tool for combating political influence over agency rulemaking).

119. *But see* FCC v. Fox TV Stations, Inc., 556 U.S. 502 (2009) (overturning a lower court's decision to apply an overly high standard in reviewing rationality of agency rulemaking).

120. *See, e.g.*, Miles & Sunstein, *supra* note 78, at 806–07 ("The best conclusion is that in its operation, arbitrariness review is significantly affected by the ideological dispositions of federal judges in a way that produces serious errors in light of the aspirations of *State Farm* itself."). Courts may be skeptical of agency policy judgments for many reasons ranging from the politicization of agency rulemaking to concerns over agency capture. *See, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1039–44, 1059–67 (1997) ("[M]any federal judges became convinced that agencies were prone to capture and related defects and—more importantly—that they were in a position to do something about it."). The extent to which these concerns justify more intrusive judicial oversight is beyond the scope of this essay.

121. *See, e.g.*, Coal. for Responsible Regulation, Inc., v. EPA, 684 F.3d 102, 122 (D.C. Cir. 2012) ("As with other reviews of administrative proceedings, we do not determine the convincing force of evidence, nor the conclusion it should support . . . .").

The D.C. Circuit appears to have extended hard look analysis in *Business Roundtable* and its predecessor cases by adding a specific requirement concerning cost-benefit analysis. In *Business Roundtable*, the court stated that the SEC is required to "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation."[122] The source of this additional obligation is unclear.[123]

The only authorities cited by the court for the requirement are the court's prior decisions in *Chamber of Commerce*[124] and *Public Citizen*.[125] Presumably, because *Public Citizen* dealt with rulemaking by the Federal Motor Carrier Safety Administration and not the SEC, the applicability of that decision to the *Business Roundtable* context implies that the required cost-benefit analysis is a component of the APA and not an agency-specific statute.[126] But, although *Chamber of Commerce* describes this obligation as "statutory,"[127] neither of the prior decisions refers to any specific statute that requires an agency to determine the economic consequences of a proposed rule.[128]

One might, of course, argue that adopting a regulation without evaluating its costs and benefits is inherently irrational,[129] but the authority of a reviewing court to invalidate an agency rule on the basis of an inadequate cost-benefit analysis is not obvious. Indeed, a plausible argument can be made that the absence of such a requirement is the rea-

122. Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

123. That cost-benefit analysis is not an inherent requirement for all agency rulemaking is highlighted by the D.C. Circuit's recent decision in *Coalition for Responsible Regulation*, in which the court specifically held that cost-benefit analysis was not required because it had nothing to do with the question before the EPA. 684 F.3d at 118; *see also* Schapiro, *supra* note 14 ("No statute expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities . . . .").

124. Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005).

125. Pub. Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 1209 (D.C. Cir. 2004).

126. Notably, *Public Citizen* involved rulemaking pursuant to a specific statute in which Congress directed the Federal Motor Carrier Safety Administration (FMSCA) to consider specific factors that have no relevance outside the case-specific context. *Id.* The holding in that case was based on the FMCSA's failure to consider one of those statutorily mandated factors; the subsequent discussion of cost-benefit analysis to which the *Chamber of Commerce* court refers was dicta. *See id.* at 1217 ("[W]e will not render final decision on petitioners' other objections to the rule, as the failure of the agency to consider the statutorily mandated factor is dispositive . . . .").

127. *Chamber of Commerce*, 412 F.3d at 143.

128. *See id.* (describing the SEC's "statutory obligation to determine as best it can the economic implications of the rule it has proposed").

129. Indeed, SEC chairmen have repeatedly stated that there is an expectation that the SEC would conduct cost-benefit analysis. *See* OIG REPORT I, *supra* note 91, at 4. On the other hand, one recent empirical study found that the quality of an agency's cost-benefit analysis is not correlated with the net benefits of the rule. *See generally* Stuart Shapiro & John F. Morrall III, *The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience*, 6 REG. & GOVERNANCE 189 (2012).

son that the President imposed such an obligation on executive branch (but not independent) agencies through Executive Orders 12866 and 13563.[130] Congress has also included an obligation to conduct cost-benefit analysis in specific statutes, [131] but it has not incorporated a universal requirement of cost-benefit analysis into the APA.[132] The Supreme Court has explicitly stated that, in the absence of specific statutory language, an obligation to conduct a formal cost-benefit analysis is not inferred.[133]

In addition, empirical analysis of proposed rulemaking has obvious limitations. It is difficult to predict the effect that a new rule will have, particularly with respect to financial-market regulation. Regulated entities may perceive the rule as changing existing norms and engage in substantial compliance or seek to avoid the rule through regulatory arbitrage. In addition, empirical analysis frequently requires regulators to extrapolate from transactions that are not comparable to those contemplated under the proposal.[134] Thus, the reliability of empirical evidence, even when carefully compiled, is questionable.

B. Section 2(b) Review

Congress has supplemented the rationality requirements of the APA with more particularized criteria to which SEC rulemaking must adhere. Although Congress originally authorized the SEC in the Securities and

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130. Regulatory Planning and Review, Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993); Improving Regulation and Regulatory Review, Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

131. Congress has also, where appropriate, required agencies to follow specific rulemaking procedures in addition to those mandated by the APA, but when doing so, Congress generally uses precise language setting out its mandate. *See, e.g.*, Schiller v. Tower Semiconductor, Ltd., 449 F.3d 286, 300 n.14 (2d Cir. 2006) (citing, as an example, rulemaking procedures mandated for the EPA by the Clean Air Act).

132. The Supreme Court has recognized that Congress has the authority to forbid agencies from conducting cost-benefit analysis. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 217–18 (2009). As Justice Breyer observed in his separate opinion, Congress might have legitimate reasons for seeking to reduce an agency's reliance on cost-benefit analysis, including concerns that "[t]he preparation of formal cost-benefit analyses can take too much time, thereby delaying regulation . . . [and possibly causing the agency to] emphasize easily quantifiable factors over more qualitative factors." *Id.* at 232 (Breyer, J., concurring in part and dissenting in part).

133. *See, e.g.*, *Entergy Corp.*, 556 U.S. at 238–39 ("Indeed, this Court has recognized that when Congress has intended that an agency engage in cost benefit analysis, it has clearly indicated such intent on the face of the statute." (citation and internal quotation marks omitted)); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510 (1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.").

134. *See, e.g.*, Hayden & Bodie, *supra* note 38, at 25–27 (observing that empirical studies upon which the SEC and commentators relied involved proxy contests that were not directly comparable to those that would have occurred under Rule 14a-11).

Exchange Act of 1934 to promulgate rules "as necessary or appropriate in the public interest or for the protection of investors,"[135] in the National Securities Markets Improvements Act of 1996, Congress added the requirement that the SEC consider the degree to which its rules would promote "efficiency, competition, and capital formation."[136] Commentators have debated the extent to which this amendment was designed to sacrifice investor protection in favor of facilitating capital formation or increasing U.S. market competitiveness.[137] Notwithstanding this debate, it is clear that the introduction of particularized statutory criteria authorized the courts to exercise increased judicial oversight.[138]

The nature of this increased oversight is, however, unclear. In a careful and insightful new article, Jim Cox and Benjamin Baucom review the legislative history of this provision and conclude that there is scant evidence Congress intended to change the standard for judicial review significantly or to impose substantial new burdens on SEC rulemaking.[139] In particular, section 2(b) does not direct the SEC to conduct a cost-benefit analysis.[140]

It is further worth noting, as Cox and Baucom do, that the language in section 2(b) merely directs the SEC to consider specific factors; Congress did not tell the SEC how to balance these factors against each other, specify a dominant factor, or mandate a net positive outcome.[141] In-

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135. *See, e.g.*, Securities Exchange Act of 1934, Pub. L. No. 73-404, ch. 401, § 14(a), 48 Stat. 881, 895 (codified as amended at 15 U.S.C. §§ 78a-pp).

136. Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3434 (1996) (adding section 2(b), which provides, "Whenever pursuant to this subchapter [15 U.S.C. §§ 77a–77aa] the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"); *see* 15 U.S.C. § 77b(b).

137. *See, e.g.*, Duke K. Bristow et al., *Venture Capital Formation and Access: Lingering Impediments of the Investment Company Act of 1940*, 2004 COLUM. BUS. L. REV. 77, 104 (2004) (expressing skepticism about the extent to which amendments to the National Securities Markets Improvement Act (NSMIA) are likely to facilitate capital formation); Kevin A. Jones, *The National Securities Markets Improvement Act of 1996: A New Model for Efficient Capital Formation*, 53 ARK. L. REV. 153, 155 (2000) (praising the NSMIA's value for capital formation by preempting inconsistent state regulation).

138. *See, e.g.*, David W. Schnare, *Environmental Rationality and Judicial Review: When Benefits Justify Costs Under the Safe Drinking Water Act Amendments of 1996*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 65, 98 (1998) (explaining how 1996 Amendments to the Clean Water Act, which mandate a specific process for the EPA's cost-benefit analysis, establish a higher standard of review than the APA's hard look).

139. James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the DC Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811 (2012).

140. *See, e.g.*, Schiller v. Tower Semiconductor, Ltd., 449 F.3d 286, 300 (2d Cir. 2006).

141. Cox & Baucom, *supra* note 139, at 1818–20.

deed, many financial regulations are likely to produce conflicting results when analyzed in accordance with these factors. For example, increasing investor protection frequently imposes costs on capital formation, as illustrated most compellingly by the Sarbanes-Oxley Act.[142] Conversely, reducing the disclosure requirements for emerging growth companies sacrifices investor protection as illustrated by the JOBS Act.[143] Thus, the SEC's consideration of the four statutory factors is unlikely to be outcome determinative.

How, then, should a court assess the SEC's analysis under section 2(b)? The Supreme Court's language in *State Farm* is instructive.[144] Because section 2(b) identifies specific factors for the SEC's consideration, the SEC's rulemaking should describe the manner in which it has considered those factors—efficiency, competition, and capital formation.[145] Congress's direction should be understood as a refinement of the SEC's rulemaking process, not an invitation to the court to second-guess the SEC's evaluation or prioritization of these factors.

The above-described statutory constraints result in a distinct antiregulatory bias. Specifically, as described in Part II.C of this Article, the SEC faces a very high hurdle in justifying new regulations.[146] In contrast, the SEC's failure to act is largely unreviewable. Although courts have occasionally upheld challenges to agency inaction in the face of a specific statutory rulemaking obligation, as a general rule, agencies have broad discretion to refrain from adopting regulations.[147] Although the existing deregulatory bias may or may not be normatively desirable, its effect is significant in the context of congressionally directed rulemaking

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142. *See, e.g.*, Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 3 (2002) (criticizing the costs imposed by the Sarbanes-Oxley Act).

143. JOBS Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

144. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

145. *See also* Cox & Baucom, *supra* note 139, at 1831 (exploring the SEC's analysis of the section 2(b) factors in promulgating Rule 151A).

146. *See* Doering, *supra* note 13.

147. *See, e.g.*, Natural Res. Def. Council v. FDA, No. 11 Civ. 3562 (THK), 2012 U.S. Dist. LEXIS 77384 (S.D.N.Y. June 1, 2012) (finding that the FDA was arbitrary and capricious in failing to act on the findings of its own task force in 1972 and failing to act on two citizen petitions filed in 1999 and 2005 on penicillin and other drugs that are added to animal feed in low-dose or "subtherapeutic" levels to prevent animal disease). *See generally* Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979) (discussing the scope of judicial review for an agency's failure to adopt a proposed rule); Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1190 (2009) (discussing judicial review of an agency decision to withdraw proposed rulemaking).

initiatives such as those mandated by Dodd-Frank. This Article will return to that issue in Part V.

IV. ADDITIONAL STRUCTURAL CONSTRAINTS ON SEC RULEMAKING

In addition to the substantive constraints previously discussed, the SEC is subject to structural requirements concerning its rulemaking procedures. Two of these requirements are of particular importance in the context of Rule 14a-11: the notice-and-comment requirements of the APA and the open-meeting requirement of the Sunshine Act. This Part considers these additional constraints, which are often overlooked in the analysis of SEC rulemaking but which play a critical role in the effectiveness, or ineffectiveness, of the rulemaking process. Notably, the constraints described in this Part are not unique to the SEC but apply to a variety of executive and independent agencies. This Part focuses specifically on their application to SEC rulemaking.

A. The Notice-and-Comment Procedure

The APA requires administrative agencies to follow specific procedures when they engage in rulemaking.[148] In particular, section 553 of the APA requires most agency rulemaking to comply with the notice-and-comment procedure.[149] Agencies using this procedure must publish a general notice of proposed rulemaking in the *Federal Register*, including "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[150] The agency must then provide at least thirty days for interested parties to submit their data, views, or arguments for agency consideration.[151] The agency then considers the comments it receives and adopts a final rule, which must be published in the *Federal Register* before it is effective.[152]

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148. Technically, notice-and-comment rulemaking is informal agency rulemaking. Formal rulemaking requires a hearing and is akin to a trial. *See* 5 U.S.C. §§ 556–557.

149. *Id.* § 553. Agencies can avoid the notice-and-comment requirements by issuing informal guidance or interpretive rules. *See, e.g.*, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007) (explaining how agencies use these mechanisms to bypass the notice-and-comment procedure).

150. 5 U.S.C. § 553(b)(1)–(3).

151. *See id.* § 553(c)–(d).

152. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1321 (1992) (describing requirements for the promulgation of legislative rules).

Courts have elaborated on these requirements. An agency must, for example, provide fair notice of both its originally intended rule and its final rule—substantial changes between the two may be held to have deprived the public of its opportunity to comment.[153] Agencies must disclose the data upon which they have relied and justify their decision in terms of the administrative record.[154] Finally, agencies must consider reasonable alternatives, including alternatives suggested by commenters.[155]

The SEC's notice-and-comment procedures have evolved over time. Although written comments are open to the public, for many years these comments were only available at the SEC library or through a request for photocopies. Today, comments may be submitted electronically and are available on the SEC website.[156] Importantly, however, the process only provides the public with access to the substance of comments that are communicated in writing.

The notice-and-comment process is not the exclusive mechanism interested parties use to communicate their views to SEC officials. A substantial number of these communications take place through private meetings between SEC officials and interested parties. Although the SEC discloses the existence of these meetings and the identities of the participants in the comment file, the meetings are not open to the public, and the substance of the discussions is not publicly available.[157]

In an effort to provide the public with the opportunity to give input on regulatory proposals at an earlier stage—an effort motivated by the rulemaking directives in Dodd-Frank—the SEC created a new public-comment page in 2010.[158] The new page enables interested parties to

153. *See* Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1103–05 (4th Cir. 1985).

154. Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997).

155. *See, e.g.*, Laclede Gas Co. v. FERC, 873 F.2d 1494, 1498 (D.C. Cir. 1989) ("[W]here a party raises facially reasonable alternatives . . . the agency must *either* consider those alternatives or give some reason . . . for declining to do so.").

156. Comments may be submitted with an online form, by e-mail, through Regulations.gov, or in writing. The SEC posts all comments on its website—paper comments are scanned and posted in a PDF format. *See How to Submit Comments on SEC Rulemaking*, SEC. & EXCH. COMM'N http://www.sec.gov/rules/submitcomments.htm (last modified Jan. 1, 2009).

157. *See also* Keith Paul Bishop, *Ex Parte Communications and SEC Rulemaking*, CAL. CORP. & SEC. LAW (June 19, 2012), http://calcorporatelaw.com/2012/06/ex-parte-communications-and-sec-rulemaking/ (describing and criticizing the SEC's use of private meetings and its failure to disclose more information about them).

158. SEC. & EXCH. COMM'N, PUBLIC COMMENT PAGE FOR SEC INITIATIVES UNDER DODD-FRANK ACT, http://www.sec.gov/spotlight/regreformcomments.shtml (last visited Oct. 16, 2012).

provide comments even prior to the SEC's formal rulemaking proposals.[159]

At the same time, the SEC announced that it would follow "newly-established best practices when holding meetings with interested parties in order to ensure full transparency to the public."[160] Despite these best practices, the memoranda of meetings included in the public-comment file continue to disclose only the identities of the parties involved and the general topic under discussion unless the participants voluntarily provide additional written information.[161] The memoranda do not include a description of the position taken by the parties, arguments or other information provided to the Commission and its staff, or any other substantive information.

B. Government in the Sunshine Act

Although commentators have examined and criticized the notice-and-comment procedure in some detail, the other structural constraint—the Government in the Sunshine Act[162]—has received less attention. The Sunshine Act was passed in 1976 as part of the open-records reforms adopted in response to the Watergate era.[163] The Act requires that meetings of multi-member government agencies be open to the public with at least seven days advance public notice.[164] The Act defines a meeting as the "deliberation" of at least a quorum of individual agency members regarding agency business.[165] As applied to the SEC, this definition

159. *See* Press Release, Sec. & Exch. Comm'n, SEC Chairman Schapiro Announces Open Process for Regulatory Reform Rulemaking (July 27, 2010), *available at* http://www.sec.gov/news/press/2010/2010-135.htm.

160. *Id.*

161. These meetings continue to occur frequently. For example, the SEC's Dodd-Frank website disclosed eighty-four meetings prior to June 15, 2012, concerning the topic of definitions including swap and security-based swap under Title VII of Dodd-Frank. *See Comments on Concept Release: Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC. & EXCH. COMM'N, http://www.sec.gov/comments/s7-16-10/s71610.shtml#meetings (last visited Oct. 16, 2012).

162. 5 U.S.C. § 552b.

163. *See* Daniel P. Finney, *Watergate Scandal Changed the Political Landscape Forever*, USA TODAY (June 16, 2012), http://www.usatoday.com/news/nation/story/2012-06-16/watergate-scandal-changed-political-landscape/55639974/1. Other reforms adopted in response to Watergate were the Ethics in Government and Presidential Records Acts.

164. The Sunshine Act lists ten exemptions that largely parallel the exemptions under the Freedom of Information Act. Special Comm., Admin. Conference of the U.S., *Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 421 (1997). Importantly, unlike the Freedom of Information Act, the Sunshine Act does not contain an exemption for predecisional meetings. *Id.*

165. 5 U.S.C. § 552b. The House Judiciary Committee noted, in hearings held the year after the adoption of the Sunshine Act, that the vague definition of "meeting" had the potential effect of

means that no more than two SEC commissioners can meet privately to discuss or deliberate agency business.[166]

The purpose of the Act is to render agency policymaking transparent by subjecting it to public view.[167] In effect, however, the Act precludes private policy deliberations among agency heads and undermines the collaborative and bipartisan structure of the SEC.[168] By requiring that discussions take place in public, the Act subjects them to media scrutiny, interest-group attention, and political pressure.[169] These pressures make it more difficult for commissioners to modify their positions and engage in compromise. They also have the counterintuitive effect of reducing the transparency of the agency's true decisionmaking.[170] As a result, public meetings have become, in effect, formal procedures in which commissioners articulate their previously developed positions on the stated agenda items rather than engage in meaningful discussions.[171]

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undermining the ability of agencies to engage in their regular operations. *See Government in the Sunshine Act Implementation: Hearing Before the House Subcomm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary*, 95th Cong. 6–7 (1977) [hereinafter *Hearing*] (statement of Richard Berg, Exec. Sec'y, Admin. Conference of the U.S.) (noting the difficulty of drawing a line identifying preliminary discussions that would not be subject to the Act).

166. During periods in which there are vacancies on the Commission, a quorum consists of two commissioners, and the Sunshine Act prohibits any private meetings or discussions between the commissioners. The SEC frequently operates with one or more vacant seats. *See, e.g.*, *Commissioner Paul Atkins Stepping Down From SEC*, NAT'L J., May 5, 2008 (describing both Democratic seats on the Commission as vacant); Lynn Stevens Hume, *Loss of Roberts May Put SEC in Legal Bind, Lawyers Say*, BOND BUYER, May 25, 1995 (reporting that a third commissioner's departure would leave the SEC with just two sitting commissioners).

167. *See, e.g.*, Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 190 (1997) (explaining the rationale for the Sunshine Act). The Act allows the public to attend and observe these meetings but does not provide the public with an affirmative power to participate. *Id.*

168. *See id.* at 210–17 (explaining tension between participation and deliberation).

169. *See, e.g.*, *Hearing*, *supra* note 165, at 10 (statement of Richard Berg, Exec. Sec'y, Admin. Conference of the U.S.) (noting that observers are likely to take advantage of comments made during public meetings to challenge or delay the rulemaking process because "[t]he temptation to the practicing bar of getting in last licks on the strength of what has occurred in the commission meeting is well-nigh irresistible").

170. *See also* Rossi, *supra* note 167, at 228–29 (explaining how public observation impairs collegiality of agency decisionmaking).

171. *See* Randolph May, *Reforming the Sunshine Act*, 49 ADMIN. L. REV. 415, 416 (1997) ("Rather than actual, collective deliberation in public, agency members often use the open meeting merely to announce and explain their positions."); Marcia Coyle, *Agencies Ask for Less Sunshine*, NAT'L L.J., Sept. 25, 1995, at A12 (quoting SEC Commissioner Steven Wallman as stating that open meetings are "short, scripted and perfunctory events involving no deliberation among agency officials").

How then, does the SEC engage in policymaking? The SEC responded to the adoption of the Sunshine Act in three ways.[172] First, individual commissioners delegated policy discussions to members of their staffs, who were not subject to the mandates of the Act. Although staff members could privately discuss agency policy, they lacked the authority to modify the substantive positions of the commissioners whose views they represented. This in turn reduced the prospect of compromise. Second, the SEC began to make more frequent use of notation voting, in which a matter was presented to commissioners for seriatim action without face-to-face discussion.[173] Third, and perhaps most problematically, the Act encouraged commissioners to air disagreements in the form of public criticism of, or dissent from, agency decisions.[174]

The Sunshine Act had the effect of concentrating the Commission's power in the chairman's office.[175] By shifting the decisionmaking mechanism from that of a collegial group process to an individual decisionmaker, the Act arguably undercut the rationale for the Commission's structure. First, this shift dissipated the effect of having an agency headed by multiple members.[176] A variety of studies have noted the differences between individual and collective decisionmaking,[177] and the absence of an opportunity for group deliberation creates a fundamental change in the character of SEC decisions. Second, by removing a vehicle

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172. *See* Kathy Bradley, Note, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM. L.J. 473 (1997) (explaining agency policymaking responses to the adoption of the Sunshine Act).

173. *See* Special Comm., *supra* note 164, at 424 (describing increased use of notation voting by agencies subject to the Sunshine Act); *Hearing*, *supra* note 165, at 78 (statement of Harvey Pitt, Gen. Counsel, Sec. & Exch. Comm'n) (describing notation voting).

174. *See* A.A. Sommer, Jr., *A Commissioner's Anger*, *in* INSIGHTS 4, 4 (1991) (criticizing Commissioner Fleischman's public statements about the Commission and observing that, because of the Sunshine Act, Commissioner Fleischman lacked an appropriate forum for airing those concerns privately).

175. *See, e.g.*, RICHARD K. BERG ET AL., AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 222 (2d ed. 2005) ("There is clear evidence to support the view that [the Sunshine Act has] . . . served to enhance the influence of agency chairmen and staff.").

176. *See* Special Comm., *supra* note 164, at 424 ("[T]he principal reason that Congress has established multi-member agencies in the first place is because Congress has made the judgment that, for the matters subject to the agency's jurisdiction, there is a benefit from a collegial decisionmaking process that brings to bear on the ultimate decisions the diverse viewpoints of agency members who have differing philosophies, experiences, and expertise."). It is worth noting that state corporate law has expressed a similar judgment in providing that corporations are to be managed under the direction of boards of directors that exercise collective rather than individual authority. *See, e.g.*, Fogel v. U.S. Energy Sys., Inc., No. 3271-CC, 2007 WL 4438978 (Del. Ch. Dec. 13, 2007) (determining that an action of individual directors outside the context of a formal board meeting did not constitute an action on behalf of the corporation).

177. *See* Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 12–19 (2002) (summarizing empirical studies of group decisionmaking).

for collective deliberation, the Act reduced the value of the requirement of a bipartisan commission by limiting the ability of minority commissioners to influence regulatory outcomes.

The Act also changed the manner in which commissioners received information. In particular, because of its mandates, the Act prioritized the commissioners' access to information from interest groups and other stakeholders at the expense of information exchanges among the commissioners themselves. Because commissioners bring a range of experiences and expertise to the agency, this shift sacrificed the sharing of that collective knowledge among the group of commissioners.

In 1995, the chair of the Administrative Conference of the United States (ACUS) was asked to review the Sunshine Act in light of these concerns.[178] The chair established a special committee, held a series of public meetings, and concluded that there was substantial credible evidence that the Act was having a negative effect on collective decisionmaking by multi-member agencies.[179] The committee concluded that Congress should establish a pilot program to enable agencies to engage in preliminary policymaking and deliberations outside of the public-meeting context.[180] Shortly after the committee made its recommendations, however, Congress terminated the funding of the ACUS,[181] and the committee's recommendations were abandoned.[182]

C. The Effect of These Constraints

Although both the notice-and-comment process and the Sunshine Act have been defended in terms of transparency and democratic values, they sacrifice consensus building as well as decisionmaking efficiency, and they allow for the increased influence of political forces and interest groups.[183] These sacrifices are of particular concern in the context of SEC rulemaking. Financial regulation involves high stakes and repeat industry players who have extensive control over critical information and

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178. Special Comm., *supra* note 164, at 421.

179. *See id*.

180. *Id.*; *see also* May, *supra* note 171 (defending the special committee's recommendation for a pilot program). Mr. May served as the chairman of the special committee. *Id.* at 415 n.a.; *see also* William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171 (2009) (advocating an exception for predecisional debate).

181. *See* May, *supra* note 171, at 415 n.1 (citing H.R. Res. 2099, 104th Cong. (1995) (enacted)).

182. Alan B. Morrison, *Farewell Fond ACUS, We Loved You Well*, 30 ARIZ. ST. L.J. 169, 169 (1998).

183. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and The Fourth Branch*, 84 COLUM. L. REV. 573, 595 (1984) (noting that "candor and the flexibility necessary for collaboration or compromise are more likely to flourish in the shade").

ample financial resources, which they can use to influence the rulemaking process.[184] The SEC's rulemaking structure enables these interest groups to engage in a high level of participation. More importantly, it allows industry groups to control the administrative record by submitting extensive comments and studies to which the SEC is then obligated to respond. As one legal advisor put it, "the D.C. Circuit's decision underscores the importance of including in one's comments expert and empirical analyses to contradict (or at least challenge) any unfounded assumptions, dubious principles, or debatable academic research on which an agency's own analysis might be based."[185]

Cost-benefit analysis exacerbates this problem. Because regulated entities generally bear the costs of new regulation, the rulemaking process creates incentives for them to highlight and overestimate those costs. The SEC does not receive comparable assistance in evaluating the benefits of its new regulations, which typically inure to the benefit of dispersed and less politically effective investors, consumers, or capital markets. Accordingly, industry groups dominate both the public and private mechanisms for provision of information and influence.[186] They are represented disproportionately in the comment letters and private meetings, and they provide the overwhelming majority of comments that include data, statistics, or alternatives to the proposed rulemakings.[187]

Several studies have documented the dominance of industry groups in financial rulemaking. Kim Krawiec, for example, found that banks and bank representatives have dominated Dodd-Frank rulemaking.[188] In addition to filing lengthy submissions with supporting data and specially commissioned studies, banks accounted for ninety-three percent of the

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184. *See Recent Case: Administrative Law—Judicial Review of Agency Rulemaking—District of Columbia Circuit Vacates Securities and Exchange Commission's "Hedge Fund Rule"—* Goldstein v. SEC, *451 F.3d 873 (D.C. Cir. 2006)*, 120 HARV. L. REV. 1394, 1397 (2007) (observing that this rulemaking context may be "unique to the financial sector, in which systemic risk is high and regulated parties face strong incentives—and have substantial power—to avoid regulation").

185. Heath P. Tarbert, *Challenging Federal Agency Rulemakings*, METROPOLITAN CORP. COUNS. (Dec. 19, 2011), http://www.metrocorpcounsel.com/articles/17129/challenging-federal-agency-rulemakings.

186. *See generally* Matt Grossman, *Interest Group Influence on US Policy Change: An Assessment Based on Policy History*, 1 INTEREST GROUPS & ADVOC. 171 (2012), http://www.palgrave-journals.com/iga/journal/v1/n2/full/iga20129a.html (documenting interest-group influence across a range of policy areas).

187. *See, e.g.*, CARY COGLIANESE, CHALLENGING THE RULES: LITIGATION AND BARGAINING IN THE ADMINISTRATIVE PROCESS 73 tbl.2-2 (1994); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006).

188. Kimberly D. Krawiec, Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform 37 (Mar. 25, 2012) (working paper), *available at* http://ssrn.com/abstract=1925431.

private meetings with agency officials—meetings that are not open to the public and are only summarily reported in the public-comment file without disclosure of the meeting content.[189]

In another recent study, Wendy Wagner, Katherine Barnes, and Lisa Peters find similar domination by regulated firms in the context of EPA rulemaking.[190] Their study documents the fact that "[r]egulated firms submitted the vast majority of the detailed comments that had the potential to influence agency decision makers and to which agencies had to respond in order to satisfy reviewing courts."[191] Wagner and her colleagues also show that industry comments are more influential in affecting the final version of adopted rules.[192]

In addition to the loss of consensus-building and decisionmaking efficiency, the Sunshine Act also increases the impact of political forces by requiring a public meeting forum. Through this public forum, industry groups and the media can draw attention to any political (rather than just legal) vulnerabilities in the commissioners' positions. Political forces are of concern in SEC rulemaking because of the substantial political influence of the financial sector—an influence no doubt assisted by the substantial political contributions made by financial firms.[193] One recent empirical study found that political influence is likely to have a negative effect on the quality of rulemaking.[194] Stuart Shapiro and John Morrall compare politically controversial rules to less salient ones and find that less politically controversial rules have higher net benefits.[195] In the case of the SEC, it appears that political pressure has led the SEC to postpone or scale back a number of controversial rule proposals.[196]

One can see the effect of these constraints on the emergence of Rule 14a-11. The proxy access rule was stalled for years in response to

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189. *Id.* at 7.

190. *See generally* Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99 (2011).

191. Richard J. Pierce, Jr., *Judicially Enforced Notice-and-Comment Rulemaking Systematically Biases Results in Favor of Regulated Firms*, PENN L. REGBLOG (Jan. 24, 2012), http://www.law.upenn.edu/blogs/regblog/2012/01/judicially-enforced-notice-and-comment-rulemaking-systematically-biases-results-in-favor-of-regulate.html (describing study's findings).

192. Wagner et al., *supra* note 190, at 128–29. Other studies have found similar results. *See generally* Krawiec, *supra* note 188.

193. *See, e.g.*, *Securities & Investment*, OPENSECRETS, http://www.opensecrets.org/industries/indus.php?ind=F07 (last visited Oct. 16, 2012) (summarizing political contributions by brokerage and investment banking firms).

194. *See generally* Shapiro & Morrall, *supra* note 129.

195. *Id.*

196. *See* Jesse Westbrook, *Why the SEC Keeps Backpedaling*, BLOOMBERG BUSINESSWEEK (Dec. 30, 2009), http://www.businessweek.com/magazine/content/10_02/b4162024089183.htm (detailing SEC backpedaling in response to lobbying by regulated entities).

forceful business group opposition.[197] The SEC repeatedly revised its proposed rule, which, in every version, included complex qualification requirements or triggering conditions developed in response to concerns articulated by industry groups about excessive costs or the potential for abuse.[198] In response to interest-group lobbying and political pressure,[199] the SEC structured its rule to exclude precisely the types of shareholders most likely to use it—public pension funds and hedge funds.[200] I have written elsewhere on the deficiencies of the final rule, but throughout the rulemaking process, the SEC did not propose or adopt a rule designed to provide a meaningful level of proxy access, despite its claim that the rule was designed to simulate personal attendance at a shareholder meeting.[201]

Most problematically, the SEC releases failed to make an affirmative case justifying either proxy access as a general matter or its specific choices in promulgating the rule. In terms of the policy choice, nowhere in its releases did the SEC make the affirmative claim that shareholder nominations will improve corporate performance, corporate compliance, or board functioning. The SEC offered no theory as to what types of shareholders would seek to nominate directors or the purposes of these nominations. Nowhere did the SEC discuss the effect that shareholder-nominated directors were likely to have on board functioning.[202]

With respect to implementation, the rule was similarly deficient. The SEC did not set out the basis for adopting the three-year and three-percent holding requirements. Although the SEC recognized that less

197. *See, e.g.*, *id.* (describing how the SEC's adoption of the rule was delayed in response to a threatened lawsuit by the U.S. Chamber of Commerce); *see also* Fisch, *supra* note 15 (describing the history of the proxy access rule).

198. *See, e.g.*, Comment Letter from Abe Friedman, Managing Dir., Barclays Global Investors, to Elizabeth Murphy, Sec'y, Sec. & Exch. Comm'n 2 (Aug. 14, 2009), *available at* http://www.sec.gov/comments/s7-10-09/s71009-172.pdf (defending the requirement of triggering events to prevent abuse of proxy "abuse by investors with short-term goals or take-over interests").

199. *See* Kenneth L. Altman & James F. Burke, *Proxy Access*: *A Study of 500+ Letters Submitted to the SEC on "Facilitating Shareholder Director Nominations*,*"* ALTMAN GROUP (Nov. 30, 2009), *available at* http://www.altmangroup.com/pdf/ProxyAccessAltmanGroupRpt.pdf (summarizing positions taken in comment letters on proxy access).

200. Fisch, *supra* note 15, at 463.

201. *Id.*; *see also* Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L. REV. 1347, 1381–82 (2011) (arguing that there was substantial doubt that those investors who would have qualified to use the proxy access rule would use the rule).

202. The SEC did cite one study on hybrid boards: CHRIS CERNICH ET AL., IRRC INST. FOR CORP. RESP., EFFECTIVENESS OF HYBRID BOARDS (2009), *available at* http://www.irrcinstitute.org/pdf/IRRC_05_09_EffectiveHybridBoards.pdf; *see also* Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024, 29,074 n.349 (proposed June 18, 2009). The SEC's conclusion, based on this study, was that the rule "may result in improved company performance, arising from improvements in board performance." Facilitating Shareholder Director Nominations, 74 Fed. Reg. at 29,073.

than a third of publicly traded companies have even a single shareholder who meets these requirements, the SEC releases did not defend its line drawing.[203] Nor did it explain how, in light of these statistics, the rule was likely to have an impact. As Commissioner Casey observed in her dissent from the SEC's decision to adopt the rule, the result was simply not a "meaningful" threshold.[204]

Finally, as with other recent rulemakings, in the SEC's adoption of Rule 14a-11, the SEC neither identified a problem that required redress nor explained how Rule 14a-11 was designed to resolve a problem. Although the D.C. Circuit's insistence on formal cost-benefit analysis was incorrect, the SEC did not articulate a policy rationale for adopting a federal rule mandating proxy access and dictating a single set of circumstances under which that proxy access could occur. In short, under the APA standard, the SEC's actions appeared completely arbitrary, though not for any of the reasons articulated by the D.C. Circuit.

The final version of Rule 14a-11 suffered greatly from the absence of meaningful deliberation among the commissioners. Although Chairman Schapiro initially championed the rule, her support for proxy access appeared to have decreased substantially by the time it was adopted.[205] Commissioner Paredes raised a number of concerns in his dissent from the Commission's decision—most importantly the value of enabling companies to adopt individually tailored proxy access provisions through private ordering.[206] Despite the potential for private ordering to address the qualification requirements and line drawing with which the SEC clearly struggled, the commissioners were unable to engage in the type of meaningful discussion that could have produced a private-ordering backstop or alternative that might have won Commissioner Paredes's support. Similarly, as noted above, Commissioner Casey criticized the arbitrariness of the rule's line drawing.[207] Frank deliberations might have enabled the Commission to produce numbers that both generated consensus and had some rational basis. Perhaps most troubling was the fact that, as with

203. Fisch, *supra* note 15, at 460–65.

204. Kathleen L. Casey, Comm'r, Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt Amendments Regarding Facilitating Shareholder Director Nominations (Aug. 25, 2010) (transcript available at http://www.sec.gov/news/speech/2010/spch082510klc.htm).

205. *See* Fisch, *supra* note 15, at 477 (questioning whether the SEC had lost confidence in the concept of proxy access).

206. *See* Troy Paredes, Comm'r, Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt the Final Rule Regarding Facilitating Shareholder Director Nominations (Aug. 25, 2010) (transcript available at http://www.sec.gov/news/speech/2010/spch082510tap.htm). I have taken a similar position. *See* Fisch, *supra* note 15.

207. Casey, *supra* note 204.

a number of prior rulemakings, the commissioners' disagreements were aired in the form of public dissents rather than ironed out through private deliberation and compromise.

V. RETHINKING JUDICIAL OVERSIGHT

The preceding Part explains how the procedural requirements for rulemaking, to which the SEC is subject, have the potential to disrupt the quality of the resulting rules. More problematically, the negative effects of transparency appear to have a chilling effect on the SEC's ability to make collective policy choices, its willingness to identify its policy choices clearly, and its ability to defend the rationale for those choices. Potential solutions to these problems, as noted earlier, include revising the notice-and-comment procedures, limiting the application of the Sunshine Act to preliminary deliberations by SEC commissioners, or both.

Another option is to shift the locus of the policy determination away from the SEC. If the D.C. Circuit's concerns, for example, are rooted in a distrust of the agency's capacity for sound policy choices, or if political or interest-group influence is compromising the agency's independence, an alternative would be for Congress to reclaim a greater role in designating regulatory policy.

Whether the SEC or Congress is better suited to formulate financial regulatory policy raises a variety of questions about comparative institutional competence.[208] These questions are properly the subject of another article. It is unnecessary here, however, to address the normative question of whether Congress should exercise greater control over SEC rulemaking because Congress has done so, both in Dodd-Frank and the JOBS Act. This Part then considers how explicit congressional rulemaking directives should affect the judicial oversight of the resulting SEC rules.

What is perhaps most troubling about the *Business Roundtable* decision is the court's failure even to acknowledge that Congress explicitly authorized the SEC to adopt a proxy access rule as part of Dodd-Frank. Notably, departing from Congress's traditional approach to SEC rulemaking, in which Congress simply delegates general rulemaking authority "as necessary in the public interest or for the protection of investors,"[209] Dodd-Frank includes several alternative statutory approaches.

208. For a careful approach to analyzing comparative institutional competence, see NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1997).

209. *See supra* note 135.

The first approach is congressionally mandated rulemaking. In several provisions in Dodd-Frank, and many more in the JOBS Act, Congress determined for itself the nature of its desired regulatory changes and directed the agency to adopt certain rules, specifying in some cases a fair amount of detail over the manner in which the rules should operate. An example of congressionally mandated rulemaking is "say on pay," in which Congress not merely authorized but in fact compelled the SEC to adopt rules mandating advisory shareholder votes on executive compensation.[210] Congressional rulemaking directives should shift the nature of judicial oversight because Congress has resolved for itself the question of whether say on pay is good policy rather than leaving it to the SEC's judgment.

What role, then, should judicial review play? Suppose, for example, that after conducting its notice-and-comment review, the SEC had determined that the costs of say on pay outweighed the benefits.[211] Presumably, the SEC would nonetheless have been obligated, under the statute, to adopt the rule. Accordingly, it seems that the court could not reject the policy judgment upon which that rule was based. The case can be made that specific statutory directives trump the general limitations on agency lawmaking imposed by the APA. An alternative and perhaps better reading is that agency rulemaking in response to a statutory directive is, by definition, not arbitrary.

Could a court nonetheless determine that the agency's implementation of congressional policy was flawed? Presumably, a rule that utterly failed to implement the mandated policy or that directly contradicted the statutory requirements would be invalid. But implementation decisions inherently involve line-drawing choices that lend a certain degree of arbitrariness to agency decisionmaking, as evidenced by Rule 14a-11. Line drawing that is inconsistent with the statutory goals or utterly lacks a rationale may render a rule invalid. If, however, a court requires an agency to defend its line-drawing choices with empirical data, it risks undermining Congress's regulatory objectives or, worse, placing responsibility for the structure of the regulation in the hands of industry players who control the data and can commission studies designed to support their policy preferences.

210. Dodd-Frank Act, Pub. L. 111-203, § 951, 124 Stat. 1376, 1899 (2010). Congress's mandate went on to specify required details of the rules such as the frequency of the vote, its advisory nature, and its lack of effect on directors' fiduciary obligations.

211. I have suggested this possibility in other work. *See* Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay out of Corporate Governance*, 37 DEL. J. CORP. L. 731 (forthcoming 2013).

Does the same analysis apply to proxy access? Not necessarily. In the case of proxy access, Congress took a different approach—authorizing but not mandating SEC rulemaking.[212] Should the specific rulemaking authorization lead a court to determine that Congress has resolved the policy issue for itself, or does the agency, in regulating pursuant to the directive, need to justify its policy choice?

The question in the specific context of the proxy access rule is more complicated. In adopting Dodd-Frank, Congress explicitly considered statutorily mandating proxy access but ultimately decided against it.[213] The implications of this legislative history are unclear. Does it mean that Congress supported some type of proxy access but chose to leave the details to the SEC's discretion? Or does the history suggest that Congress was unsure about the policy question of whether proxy access was desirable?

Either way, this history warrants consideration in determining whether Congress had already resolved these policy questions and, if it had, identifying the role that this resolution should have on the extent and significance of the agency's subsequent cost-benefit analysis. The *Business Roundtable* case highlights the importance of considering congressional policy choices in determining the appropriate scope of judicial oversight of agency rulemaking, and the *Business Roundtable* court utterly failed in that obligation. At a minimum, the court should have determined whether Congress had already made the decision that a proxy access rule was good policy. If it had, requiring the SEC to justify the rulemaking usurps the role, not of the SEC, but of Congress.

Why then, one might ask, did the SEC fail to appeal the case to the U.S. Supreme Court?[214] One additional factor must be considered. If

212. *See* Dodd-Frank Act, § 971, 124 Stat. at 1915. A third option is for Congress to require study of a particular issue, which would suggest that both it and the agency involved require additional information to decide the policy question involved as well as the appropriate extent of any statutory delegation. Fiduciary duties of brokers and the scope of extraterritorial private rights of action for securities fraud are two examples in which Congress required such studies in Dodd-Frank. *See id.* § 913 (requiring SEC to conduct a study of the "effectiveness of existing legal or regulatory standards of care" for brokers); *id.* § 929Y (requiring SEC to study extraterritoriality).

213. On June 16, 2010, Senator Dodd, one of the bill's cosponsors, introduced a proposal that would have incorporated proxy access, with a five-percent ownership threshold, into the statute, rather than leaving a proxy access provision subject to discretionary SEC rulemaking. *See* Jonathan B. Cohn et al., On Enhancing Shareholder Control: A (Dodd-) Frank Assessment of Proxy Access 9 (July 14, 2011) (working paper), *available at* http://ssrn.com/abstract=1742506. The proposal was subsequently dropped. *Id.*

214. *See* Ben Protess, *S.E.C. Won't Fight Ruling Striking Down Proxy Access*, N.Y. TIMES DEALBOOK (Sept. 6, 2011), http://dealbook.nytimes.com/2011/09/06/s-e-c-wont-fight-ruling-striking-down-proxy-access (reporting that the SEC would not appeal the decision to the Supreme Court).

Dodd-Frank reflects a congressional determination on the desirability of proxy access, it should be understood as changing the nature of the SEC's discretionary authority.

In the case of general delegations of rulemaking authority to an agency, the agency has virtually no affirmative obligation to regulate.[215] In the case of congressional mandates, however, Congress has presumably reduced the agency's discretion, rendering a failure to act, or at least a failure to act in accordance with the mandate, subject to challenge. If Congress tells the agency to regulate, it is required to do so, and arguably the APA then authorizes the court to determine whether the agency rulemaking is faithful to the policy choices reflected in the statutory mandate. At a minimum, the court should have the power to invalidate rulemakings on the basis that they are ineffective in meeting the congressionally identified objectives. Even where Congress merely authorizes but does not require rulemaking, a rule that fails to meet the implicit policy objective behind the authorization is arguably irrational.

This presents the most difficult challenge for the SEC with respect to Rule 14a-11. As I have noted above and argued in more detail elsewhere, Rule 14a-11 offered little in terms of meaningful proxy access.[216] To the extent that Congress's authorization of a proxy access rule in Dodd-Frank reflected the decision that a federal proxy access rule was good regulatory policy, a rule that failed to provide effective access was inconsistent with that congressional judgment. To the extent that the SEC purported to articulate its own independent justification for the rule, or for the line drawing it contained, the rule fell short on the very grounds that the SEC offered in its defense—enhancing shareholders' preexisting state-law election rights by replicating their presence at a shareholders meeting.

VI. CONCLUSION

Increasingly, intensive judicial scrutiny of agency rulemaking, and the economic analysis in support of that rulemaking in particular, create substantial challenges for the SEC. The SEC's task is complicated by a variety of statutory and structural constraints that frustrate the Commission's ability to engage in collective decisionmaking. Although the D.C. Circuit has framed its criticisms of SEC rulemaking in terms of flawed economic analysis, the problem is more fundamental. A combination of structural factors limits the ability of SEC commissioners to make regu-

215. *See supra* note 147 and accompanying text.
216. *See* Fisch, *supra* note 15; Rock & Kahan, *supra* note 201.

latory choices through collective deliberation and political compromise. These limitations resulted in a proxy access rule that lacked both a meaningful justification for its adoption and, seemingly, the support of the Commission itself, rendering the rule highly vulnerable. More problematically, Rule 14a-11 is not unique, and judicial invalidation of SEC rulemaking has become commonplace.

The promulgation of poorly reasoned rules in which adopting agencies lack confidence is not easily corrected through the adoption of more elaborate procedures for economic analysis. A stronger response to these concerns would be to reconsider the dominance of transparency over other values in the regulatory process. The proposals to amend the Sunshine Act and provide greater space for private agency deliberations would be a valuable first step. A perhaps more politically feasible approach is for Congress to exert greater control over regulatory policy choices. Although this approach would subject regulatory policymaking to increased political pressure, reducing agency discretion over financial-market regulation may be desirable and could potentially increase congressional accountability for capital-market regulation. This choice would effect a significant change from the modern administrative state. If courts cannot and do not trust agencies to make regulatory policy, however, they should defer to Congress's decision to make those policy choices for itself.