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Playing Nicely: How Judges Can Improve Dodd-Frank and Foster Interagency Collaboration

ABSTRACT. Devised in the aftermath of the most severe financial crisis since the Great Depression, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) was enacted to reduce risk, increase transparency, and promote market integrity. Since Dodd-Frank was signed into law in 2010, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) have promulgated numerous rules to carry out these statutory mandates. This Note analyzes inconsistencies in the two Commissions' swaps regulations and argues that those inconsistencies have forced regulators and market participants to bear substantial costs and, more importantly, have thwarted the congressional goals underlying Dodd-Frank. To this day, neither the SEC nor the CFTC has offered an adequate justification for its decision not to harmonize swaps rules.

In this Note, I argue that the Commissions' failure to account for these costs constitutes an illegal exercise of authority. The crux of my argument is that the Commissions cannot perform meaningful cost-benefit analysis or fulfill the Administrative Procedure Act's (APA) reasoning requirements without considering the incremental costs generated by regulatory inconsistencies. I conclude that when the SEC and CFTC fail to justify the costs of regulatory divergences, both the APA and the cost-benefit requirements in the agencies' authorizing statutes can—and should—be read to require the Commissions to adjust their rules to account for the costs of inconsistent and duplicative swaps regulations.

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INTRODUCTION

In early April 2012, just two years after Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),¹ a sense of déjà vu paralyzed financial markets. On April 6, the press reported that J.P. Morgan had suffered significant losses because of trades executed in its London office.² A week later, CEO Jamie Dimon dismissed these reports as a mere “tempest in a teapot.”³ But the loss turned out to be more than that. One month later, J.P. Morgan disclosed that its losses had ballooned from \$415 million to \$2 billion.⁴ By the end of the year, transactions executed by a single J.P. Morgan trader named Bruno Iksill—more commonly known as the “London Whale”—led to a \$6.2 billion trading loss.⁵ In other words, barely two years after the most consequential financial regulatory reform in decades, a major financial institution took risky bets that once again roiled global credit markets. And— even more troubling— it did so right under the nose of its regulators.

A year-long Senate investigation followed. The investigation concluded that the American financial system would be less vulnerable to systemic shocks if federal regulators required more comprehensive financial reporting,⁶ used more accurate risk models,⁷ and finalized rules prohibiting banks from using

1. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2. See, e.g., Gregory Zuckerman & Katy Burne, “London Whale” Rattles Debt Market, WALL ST. J. (Apr. 6, 2012), <http://www.wsj.com/articles/SB10001424052702303299604577326031119412436> [<http://perma.cc/HEH5-LE2Y>]. See generally STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 113TH CONG., JPMORGAN CHASE WHALE TRADES: A CASE HISTORY OF DERIVATIVES RISKS AND ABUSES 3-13 (Comm. Print 2013) (providing an overview of the J.P. Morgan case).

3. STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *supra* note 2, at 10-11.

4. *Id.*

5. See *id.* at 35; Katy Burne, *Making Waves Against “Whale,”* WALL ST. J. (Apr. 10, 2012), <http://www.wsj.com/articles/SB10001424052702304587704577336130953863286> [<http://perma.cc/XSK8-U7EG>]; Christopher Matthews, *Too Big To Fail: 3 Lessons of the “London Whale” Debacle*, TIME (Mar. 20, 2013), <http://business.time.com/2013/03/20/what-have-we-learned-3-lessons-from-the-london-whale-trading-debacle> [<http://perma.cc/8FZY-7CJ9>].

6. STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *supra* note 2, at 16 (“Federal regulators should require banks to identify all internal investment portfolios containing derivatives over a specified notional size, and require periodic reports with detailed performance data for those portfolios. . . . Federal regulators should require banks to establish hedging policies and procedures that mandate detailed documentation when establishing a hedge, including identifying the assets being hedged, how the hedge lowers the risk associated with those assets, how and when the hedge will be tested for effectiveness, and how the hedge will be unwound and by whom.”).

7. *Id.* (“Federal regulators should strengthen credit derivative valuation procedures.”).

money held in federally insured deposit accounts to make speculative investments that did not benefit their customers.⁸

The usefulness of the Senate Report, however, was undermined by the fact that existing regulations rendered many of its recommendations superfluous. Dodd-Frank already required that data on swaps,⁹ the financial instruments traded by the London Whale,¹⁰ be reported on publicly accessible exchanges.¹¹ The Commodity Futures Trading Commission (CFTC), one of the agencies charged with monitoring swaps and detecting destabilizing financial positions, had finalized swap-reporting rules in March 2012. Those rules went into effect at the beginning of 2013.¹²

Nor did the Report mention that banks had already begun to report swap data in anticipation of the CFTC's rules. In the aftermath of the London Whale

8. *Id.* at 17 (“Federal financial regulators should immediately issue a final rule implementing the Merkley-Levin provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, also known as the Volcker Rule, to stop high risk proprietary trading activities and the build-up of high risk assets at federally insured banks and their affiliates.”). Note that it is unclear if the Volcker Rule would have prevented the London Whale trades. The line between proprietary trading, which would be barred under the Volcker Rule, and hedging, which would be permitted, is thin. In the London Whale case, the Senate Report assumes that the trades would be considered proprietary trading. J.P. Morgan, by contrast, claims that the bank was hedging, intending to reduce losses in a downturn. *Compare id.* at 14 (“Internal bank documents revealed that the [credit portfolio] was not managed as a hedge and, by March 2012, was not providing credit loss protection to the bank.”), *with id.* at 4 (“JPMorgan Chase told the Subcommittee that the [credit portfolio] was not intended to function as a proprietary trading desk, but as insurance or a ‘hedge’ against credit risks confronting the bank.”).
9. A “swap” is a contract that requires conditional payments between counterparties derived from changes in specified prices or events, generally related to financial markets, such as interest or currency exchange rates. “Swaps” can also include “credit” events, such as the default by a borrower on an unrelated “reference” security or loan. For example, parties can trade (or swap) the cash flows from one financial instrument, such as the interest payments on a corporate bond, for the cash flows from another financial instrument, such as the principal and variable rate payment on a mortgage-backed security. See *Product Descriptions and Frequently Asked Questions*, INT’L SWAPS & DERIVATIVES ASS’N, <http://www.isda.org/education/faqs.html> [<http://perma.cc/9QKM-DKLE>].
10. STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *supra* note 2, at 29; see also Eleazar David Meléndez, *How Did JPMorgan Lose Billions in One Trade? London ‘Whale’ Explained*, INT’L BUS. TIMES (May 5, 2012), <http://www.ibtimes.com/how-did-jpmorgan-lose-billions-one-trade-london-whale-explained-698018> [<http://perma.cc/6KRE-M7EM>].
11. Dodd-Frank, Pub. L. No. 111-203, §§ 721, 761, 124 Stat. 1376, 1658-72, 1754-59 (2010) (codified at 15 U.S.C. § 8302).
12. Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012) (codified at 17 C.F.R. pt. 43); Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012) (codified at 17 C.F.R. pt. 45).

incident, Michael Bodson, the chief executive of a company that collected swap data, acknowledged that data on the London Whale's trades had been reported to swap data repositories.¹³ The problem was that although CFTC rules specify *what* data must be reported, the rules do not explain *how* data repositories should report information.¹⁴ According to Bodson, regulators failed to detect the London Whale's position not because the data was unavailable, but because formatting incompatibilities rendered it unusable.¹⁵

Significantly, however, Title VII of Dodd-Frank does not grant regulatory authority over swaps solely to the CFTC, but divides oversight between the Securities and Exchange Commission (SEC) and the CFTC.¹⁶ Title VII grants the SEC the authority to regulate security-based swaps and the CFTC the authority to regulate all other swaps.¹⁷ In accordance with its own statutory mandate, the SEC issued its final rule on the reporting and public dissemination of security-based swap information over three years after the CFTC's rules went into effect.¹⁸ Dodd-Frank split oversight between the two agencies in order to avoid alienating members of Congress who served on the agricultural committees,¹⁹ who had made it clear that they would vote against any bill that removed the CFTC from their jurisdiction.²⁰

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13. Joe Rennison, *Policymakers Left with Problem in the Wake of London Whale: US Derivatives Regulator Admitted It Missed the Calamity*, FIN. TIMES (Oct. 13, 2015), <http://www.ft.com/content/7b15e4c2-638c-11e5-9846-de406ccb37f2> [<http://perma.cc/W4LT-4TRY>].
 14. See, e.g., Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2198-2210; see also *infra* Part I.
 15. See Rennison, *supra* note 13.
 16. See §§ 721, 761, 124 Stat. at 1658-72, 1754-59 (2010).
 17. See *id.* As discussed in Part I, there is no principled reason why either agency regulates the swaps under its jurisdiction. Although the word "security" in security-based swaps may give the impression that the SEC has special expertise in the swaps under its jurisdiction, this simply is not the case. All swaps are derivatives, and the only difference between swaps under the SEC's jurisdiction and swaps under the CFTC's jurisdiction is how many securities the swap is based on. In fact, the same small number of financial institutions are parties to the vast majority of swaps under both agencies' jurisdictions, and the swaps themselves, whether regulated by the SEC or the CFTC, work in exactly the same way—they are simply agreements to exchange (or swap) cash flows.
 18. Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 80 Fed. Reg. 14,564 (Mar. 19, 2015) (codified at 17 C.F.R. pt. 242).
 19. See Jim Puzzanghera, *CFTC's Farm Roots Complicate Reform Efforts*, L.A. TIMES (Sept. 8, 2009), <http://articles.latimes.com/2009/sep/08/business/fi-financial-reform8> [<http://perma.cc/5EPG-NESZ>].
 20. H.R. 2289, 114th Cong. (2015).

In abandoning regulatory consolidation, Title VII permitted the SEC and CFTC to create a fragmented reporting regime that has raised the costs of complying with Dodd-Frank while making it more difficult for regulators to supervise the swaps market. There is no question that the SEC and CFTC are each statutorily required to issue swaps regulations.²¹ Nonetheless, the effectiveness of the SEC's and CFTC's rules depends in large part on whether their rules are compatible.²² This Note analyzes recent D.C. Circuit cost-benefit cases in order to argue that the Administrative Procedure Act (APA) and the cost-benefit mandates in the agencies' organic statutes, both individually and in tandem, require that the SEC and CFTC either justify the costs of regulatory inconsistencies or harmonize their regulations. Thus, in addition to offering a possible solution to the SEC's and CFTC's unwillingness to promulgate consistent swaps rules, this Note offers a new, albeit limited, defense of cost-benefit analysis. Recently, a number of academics have criticized "judicially reviewed, quantified"²³ cost-benefit requirements as an exercise in futility and a judicially sanctioned attempt to quantify the unquantifiable.²⁴ By forcing agencies to harmonize their rules when they cannot offer a reasonable justification for an inconsistency, I show that cost-benefit requirements can discipline agency action in cases involving overlapping agency jurisdiction.

This Note proceeds in three parts. Part I provides a brief overview of Dodd-Frank and examines existing rules governing swap reporting and swap execution facilities (SEFs). This Part shows that the SEC's and CFTC's failure to collaborate has created unnecessary costs, made the American financial system less transparent, and introduced unjustified risk into the market. Part II analyzes the cost-benefit and APA requirements that govern SEC and CFTC rule-makings. I argue that the two agencies are legally required to consider how their swaps regulations interact. Although practitioners and scholars have argued that it is desirable for the two agencies to collaborate,²⁵ almost no one has

21. See 15 U.S.C. § 8302(a) (2012).

22. As discussed in detail in Part I, compatibility between the two agencies' rules will decrease the costs of complying with swaps rules and make Dodd-Frank more effective. Data incompatibilities have forced market participants to build two different reporting infrastructures and make it impossible for regulators to analyze the entire swaps market.

23. See, e.g., John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 889 (2015).

24. See, e.g., *id.* at 976, 979 (arguing that "the types of costs that are likely to be the largest ongoing costs were not quantified," and that cost-benefit analysis "can camouflage the effects of rulemaking, rather than discipline it"); Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. S351, S352 (2014).

25. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1137 (2012); see also Lyndsey Layton, *Unsafe Eggs Linked to U.S. Failure To Act*,

suggested that collaboration is legally required.²⁶ Part III describes my model of judicial review and considers how the SEC and CFTC might respond if this model were put into practice.²⁷ In addition, Part III examines cases in which other agencies have collaborated voluntarily and argues that the form of judicial oversight I endorse would grant the SEC and CFTC broad discretion to choose the most effective method of harmonizing their rules.

My argument applies not only to swaps, but also to other areas in which the APA and cost-benefit requirements could reduce some of the inefficiencies that occur when Congress requires agencies to administer regulatory initiatives jointly. New regulations are not written on a blank slate; they interact with a complicated and dynamic administrative apparatus. Agencies must therefore consider how their rules will interact and whether these interactions undermine the effectiveness of new rules.

I. THE EFFECTS OF INCONSISTENT SWAPS REGULATION

Congress enacted Dodd-Frank in the wake of the 2008 recession to reduce risk in U.S. financial markets. In this part, I explain how Title VII of Dodd-Frank seeks to accomplish this goal. I then identify two elements of Dodd-

WASH. POST (Dec. 11, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/10/AR2010121007194.html> [<http://perma.cc/A35M-GA7Q>] (“Fractured oversight remains a problem today. There are more than 15 federal agencies and 71 interagency agreements dealing with food safety. Experts in public health and government accountability say that fragmentation weakens oversight, wastes tax dollars through redundancy and creates dangerous gaps.”).

26. To my knowledge, only one case has implied that the SEC and CFTC may have a legal obligation to collaborate in certain situations. That case, *Investment Co. Institute v. SEC*, 720 F.3d 370 (D.C. Cir. 2013), considered whether the CFTC had adequately considered the SEC’s regulatory regime when adopting a new rule. The D.C. Circuit held that the agencies must consider how their rules will be affected by existing rules, and found that the CFTC had given adequate reasons for diverging from the SEC’s rule. Had the D.C. Circuit reached a different factual conclusion and found that the CFTC had not given adequate reasons, it might have established that the agencies have a legal obligation to collaborate when they cannot give good reasons for regulatory inconsistencies. See *infra* Part III for a more detailed discussion of *Investment Co. Institute*.
27. Specifically, Part III surveys a variety of both financial and non-financial regulatory actions that involve duplicative and overlapping jurisdictions. It turns out that there are many effective and efficient ways for the SEC and CFTC to harmonize their regulations. This argument is intended to clarify my view that judicial enforcement of cost-benefit and APA requirements actually empowers agencies to a greater degree than legislative or executive oversight by allowing agencies to exercise wide discretion in choosing how to collaborate. Other models, by contrast, generally involve an outside actor stepping in and forcing agencies to act in a certain way.

Frank—swap-reporting rules and SEF rules—in which inconsistencies between the SEC’s rules and the CFTC’s rules impose unnecessary costs without providing any identifiable benefit. I further argue that these conflicting rules ultimately compromise Dodd-Frank’s goal of controlling systemic risk.

A. The 2008 Recession and Title VII of Dodd-Frank

The Great Recession of 2008 is widely considered to be the worst economic crisis since the Great Depression.²⁸ Despite aggressive and unprecedented efforts by the Department of Treasury and the Federal Reserve, unemployment rose to ten percent—a thirty-year high²⁹—and housing prices fell thirty-three percent,³⁰ costing Americans \$16.4 trillion in household wealth.³¹

Although the causes of the financial crisis continue to be debated,³² it is clear that swaps—in particular, credit default swaps—played a critical role in allowing individual companies to accrue risk sufficient to cause the global economy to collapse.³³ Credit default swaps are akin to insurance on bonds.

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28. See *World Economic Outlook April 2009: Crisis and Recovery*, INT’L MONETARY FUND 9 (2009), <http://www.imf.org/external/pubs/ft/weo/2009/01/pdf/text.pdf> [<http://perma.cc/WX8V-Q9CF>] (“By any measure, this downturn represents by far the deepest global recession since the Great Depression.”).
29. *The Recession of 2007-2009*, U.S. BUREAU LAB. STAT. 2 (2012), http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf [<http://perma.cc/LLF5-6NAB>].
30. Jeffrey P. Cohen, Cletus C. Coughlin & David A. Lopez, *The Boom and Bust of U.S. Housing Prices from Various Perspectives*, ST. LOUIS FED. RES. BOARD REV. 341, 344 (2012), <http://research.stlouisfed.org/publications/review/12/09/341-368Cohen.pdf> [<http://perma.cc/MS6G-HQW9>].
31. Chris Isidore, *America’s Lost Trillions*, CNN: MONEY (June 9, 2011, 1:03 PM), http://money.cnn.com/2011/06/09/news/economy/household_wealth [<http://perma.cc/9PF7-YWW6>].
32. See, e.g., JOHN A. ALLISON, *THE FINANCIAL CRISIS AND THE FREE MARKET CURE: WHY PURE CAPITALISM IS THE WORLD ECONOMY’S ONLY HOPE* (2013) (arguing that over-regulation in the housing market created moral hazards that led to excessive risk-taking); JOHN CASSIDY, *HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES* (2009) (arguing that a market bubble caused the crisis); SIMON JOHNSON & JAMES KWAK, *13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN* (2010) (arguing that lax regulatory standards allowed banks to become too big and bankers to invent toxic financial products); MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010) (arguing that securitization created the housing bubble by allowing bankers to make loans to people who could not afford to repay them and then to shift the risk off of their balance sheets).
33. For a description of the evolution of the credit default swaps market, including their potential uses to shift credit risk, see Frank Partnoy & David A. Skeel, Jr., *The Promise and Perils of Credit Derivatives*, 75 U. CIN. L. REV. 1019 (2006–07), which discusses the benefits of, and the risks posed by, credit default swaps; Ron Hera, *Forget About Housing, the the*

When a bank buys a bond, say from General Electric (GE), the bank expects to receive a steady stream of payments from GE over the life of the bond. However, if GE were to go bankrupt, the bank would stop receiving those payments. To hedge against that possibility, the bank might buy a credit default swap from another company. The credit default swap would require the bank to pay a premium at regular intervals. In exchange, the company that sold the credit default swap would agree to pay a large sum if the entity that borrowed funds from the bank cannot afford to pay the interest on its bond. As long as GE can afford to pay its interest payments, the bank loses its premium payments. But if GE were to go bankrupt, then the bank would receive money from the party that sold the bank the credit default swap. In this way, credit default swaps allow companies to insure against the possibility that a counterparty will not be able to honor its obligations.

At the end of 2007, the credit default swaps market was worth \$60 trillion.³⁴ Companies used credit default swaps to protect against nearly every possible contingency, from changes in bonds and stocks to fluctuations in interest rates and housing prices.³⁵ The portfolio of one credit default swap seller, AIG, covered bonds worth more than \$440 billion.³⁶ AIG did not have sufficient funds to honor all of its obligations. As a result, Moody's Investor Service, a credit rating agency, downgraded AIG's credit rating. Because of the terms of the credit default swap contracts, AIG had to post more collateral—which it did not have—to guarantee its ability to pay its credit default swap obligations. AIG's inability to make good on its credit default swap obligations thus meant that banks immediately lost their insurance on \$440 billion worth of bonds.³⁷ Overnight, the banks were worth billions less.³⁸ This, in turn, meant that banks had less money to lend, which meant that other banks had to borrow at

[sic] *Real Cause of the Crisis Was OTC Derivatives*, BUS. INSIDER: FINANCE (May 11, 2010, 2:50 PM), <http://www.businessinsider.com/bubble-derivatives-otc-2010-5> [<http://perma.cc/5UPL-4WJ2>].

34. Adam Davidson, *The Big Money: How AIG Fell Apart*, REUTERS (Sept. 19, 2008, 10:27 AM), <http://www.reuters.com/article/us-how-aig-fell-apart-idUSMAR85972720080919> [<http://perma.cc/6D9Q-9JSU>]. As a point of reference, global GDP that year was \$57.6 trillion. See *World GDP by Year*, MULTPL (2015), <http://www.mtpl.com/world-gdp/table/by-year> [<http://perma.cc/88ER-E5RQ>].

35. See Rene M. Stulz, *Credit Default Swaps and the Credit Crisis*, 24 J. ECON. PERSP. 73, 85-92 (2010).

36. See Davidson, *supra* note 34.

37. *Id.*

38. *Id.*

higher costs.³⁹ Some banks no longer had enough money available to cover their costs. Others could not afford to borrow under these new terms. Weak banks faced collapse, which threatened to cause the money supply to contract further. Absent a government intervention, the inability of AIG, a single firm, to make good on its credit default swap obligations exposed the entire global economy to substantial risk.⁴⁰ A similar story played out with Lehman Brothers, Bear Stearns, and Merrill Lynch, among others, though in the case of Lehman Brothers, the government allowed the company to fail.⁴¹

One of the reasons that individual companies such as AIG were able to assume such risky positions was because before Dodd-Frank, swaps were generally traded “over-the-counter” (OTC).⁴² In other words, deals were negotiated and executed privately between two parties.⁴³ As a result, there was no central repository of information and no way for regulators or counterparties to determine if an individual counterparty would be able to honor its swap obligations. Banks were unable to discover how badly other banks were affected, and so at the first sign of trouble, these financial institutions stopped lending to each other out of fear that their counterparties were overexposed.⁴⁴ As the CFTC has noted, OTC trading made the swaps market “less transparent than

39. *Id.*

40. Matthew Karnitschnig et al., *U.S. To Take Over AIG in \$85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J. (Sept. 16, 2008, 11:59 PM), <http://www.wsj.com/articles/SB122156561931242905> [<http://perma.cc/4LGH-Q53R>].

41. See Arrick Mollenkamp et al., *Lehman Files for Bankruptcy, Merrill Sold, AIG Seeks Cash*, WALL ST. J. (Sept. 16, 2008, 6:52 PM), <http://www.wsj.com/articles/SB122145492097035549> [<http://perma.cc/GLM8-9KZ6>].

42. See DODD-FRANK’S TITLE VII: OTC DERIVATIVES REFORM, ERNST & YOUNG 1 (2013), [http://www.ey.com/Publication/vwLUAssets/Key_questions_board_members_should_ask_about_Title_VII/\\$FILE/Americas_FAAS_Dodd_Frank_derivatives_reform.pdf](http://www.ey.com/Publication/vwLUAssets/Key_questions_board_members_should_ask_about_Title_VII/$FILE/Americas_FAAS_Dodd_Frank_derivatives_reform.pdf) [<http://perma.cc/H6DN-QTXE>].

43. *Id.*

44. See Jose Berrospide, *Liquidity Hoarding and the Financial Crisis: An Empirical Evaluation*, BANK FOR INT’L SETTLEMENTS 1 (2012), <http://www.bis.org/bcbs/events/bhbibe/berrospide.pdf> [<http://perma.cc/ZME4-F9PU>] (finding that, during the financial crisis, “banks held more liquid assets in anticipation of future expected losses from securities write-downs”); see also Asani Sarkar, *Liquidity Risk, Credit Risk, and the Federal Reserve’s Responses to the Crisis*, FED. RES. BANK N.Y. STAFF REP. 389 (Sept. 2009), http://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr389.pdf [<http://perma.cc/KTK3-XWLC>] (“The empirical evidence supports the Fed’s views on the primacy of balance sheet constraints in the earlier stages of the crisis and the increased prominence of counterparty credit risk as the crisis evolved in 2008.”).

exchange-traded futures and securities markets.”⁴⁵ The CFTC went on to describe “[t]his lack of transparency [as] a major contributor to the 2008 financial crisis because regulators and market participants lacked visibility to identify and assess the implications of swaps market exposures and counterparty relationships.”⁴⁶ The lack of swaps exchanges and reliable reporting systems thus enabled single companies, such as AIG, to take significant and sizable positions that left the global financial system at risk.⁴⁷

Congress passed Dodd-Frank in 2010 in direct response to the recession.⁴⁸ The statute’s goal was to prevent another crisis of such scale and to “promote the financial stability of the United States by improving accountability and transparency in the financial system.”⁴⁹ To that end, Title VII of Dodd-Frank established a new framework for the regulation of the swaps market by author-

45. Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,476, 33,476 (June 4, 2013) (codified at 17 C.F.R. pt. 37); see also *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, FIN. CRISIS INQUIRY COMMISSION 299, 352, 363-64, 386, 621 n.56 (2011), http://fcicstatic.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf [<http://perma.cc/H4A6-ZEFP>] (describing how OTCs’ lack of transparency contributed to the 2008 financial crisis and the general sense of panic that followed).

46. Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. at 33,476.

47. Scholars have compared the panic caused by AIG’s collapse to a bank run. See Gary Gorton, *Slapped in the Face by the Invisible Hand: Banking and the Panic of 2007*, FED. RES. BANK ATLANTA 2 (May 9, 2009), <http://www.frbatlanta.org/-/media/Documents/news/conferences/2009/financial-markets-conference/gorton.pdf> [<http://perma.cc/NM25-YQGU>] (“The U.S. had a banking panic starting in August 2007, one that continues today.”). Note that my analysis of the financial crisis is not meant to explain the full causes of the crisis, but rather to give a watered-down explanation of how swaps allowed individual firms to accrue risk sufficient to endanger the entire American economy. For a deeper analysis of the causes of the crisis, and in particular of how the swaps market interacted with the repurchase market to spread risk, see Gary Gorton & Andrew Metrick, *Securitized Banking and the Run on Repo*, MOODY’S (Nov. 13, 2009), http://www.moody.com/microsites/crc2010/papers/gorton_run_on_repo_nov.pdf [<http://perma.cc/KZH9-DXKD>].

48. *Implementation of the Dodd-Frank Act: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 112th Cong. (2011) (statement of Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys.), <http://www.federalreserve.gov/newsevents/testimony/bernanke20110217a.htm> [<http://perma.cc/MTC3-K2AE>] (“The Dodd-Frank Act addresses critical gaps and weaknesses in the U.S. regulatory framework, many of which were revealed by the recent financial crisis.”); Richard C. Longworth, *Geithner and Paulson: Reflections on Financial Crises*, CHI. COUNCIL ON GLOBAL AFF. (May 28, 2014), <http://www.thechicagocouncil.org/event/geithner-and-paulson-reflections-financial-crises> [<http://perma.cc/GD6L-BKC9>].

49. H.R. 4173, 111th Cong. (2010).

izing the SEC and CFTC to regulate OTC derivatives, including swaps.⁵⁰ Under Title VII, the SEC and CFTC must establish margin requirements,⁵¹ rules for clearing and trade execution,⁵² and real-time reporting.⁵³ These rules ensure that the vast majority of transactions are reported to regulators, that swaps are traded on a market rather than through bilateral transactions, and that one firm's inability to honor its obligations does not bankrupt the firm's counterparties.

Key to these reforms was creating pre- and post-trade transparency in swap deals. Reporting requirements attempt to provide post-trade transparency by ensuring that upon the completion of every swap, regulators and market participants can receive volume and pricing information.⁵⁴ Reporting require-

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50. The CFTC regulates “swaps,” and the SEC regulates “security-based swaps.” Both have authority over “mixed swaps.” Dodd-Frank, Pub. L. No. 111-203, §§ 721, 761, 124 Stat. 1376, 1658-72, 1754-59 (2010) (codified at 15 U.S.C. § 8302).
51. Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, 77 Fed. Reg. 70,214, 70,215 (Nov. 23, 2012) (codified at 17 C.F.R. pt. 240) (describing capital, margin, and segregation rules).
52. Clearing Agency Standards, 77 Fed. Reg. 66,220 (Nov. 2, 2012) (codified at 17 C.F.R. pt. 240) (adopting clearing agency standards); Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, 77 Fed. Reg. 41,602 (July 13, 2012) (codified at 17 C.F.R. pts. 240, 249) (adopting clearing procedures).
53. Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 76 Fed. Reg. 42,396 (July 18, 2011) (codified at 17 C.F.R. pt. 240) (providing standards for external business conduct); End-User Exception to Mandatory Clearing of Security-Based Swaps, 75 Fed. Reg. 79,992 (Dec. 21, 2010) (codified at 17 C.F.R. pt. 240) (detailing end-user exceptions); Trade Acknowledgment and Verification of Security-Based Swap Transactions, 76 Fed. Reg. 3859 (Jan. 21, 2011) (codified at 17 C.F.R. pt. 240) (providing trade acknowledgement rules); Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75,208 (Dec. 2, 2010) (codified at 17 C.F.R. pts. 240, 242) (detailing reporting rules); Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. 10,948 (proposed Feb. 28, 2011) (to be codified at 17 C.F.R. pts. 240, 242, 249) (adopting registration framework for execution facilities); Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. 77,306 (proposed Dec. 10, 2010) (to be codified at 17 C.F.R. pts. 240, 249), *corrected at* 75 Fed. Reg. 79,320 (proposed Dec. 20, 2010) (to be codified at 17 C.F.R. pts. 240, 249) *and* 76 Fed. Reg. 2287 (proposed Jan. 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249) (providing data repository rules); Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 76 Fed. Reg. 65,784 (Oct. 24, 2011) (codified at 17 C.F.R. pts. 240, 249) (detailing registration rules for dealers and major swap participants);.
54. *See* Registration of Swap Dealers and Major Swap Participants, 77 Fed. Reg. 2613, 2613 (Jan. 19, 2012) (codified at 17 C.F.R. pts. 1, 3, 23, 170) (identifying the goals of Dodd-Frank and summarizing how the regulation helps accomplish those goals).

ments seek to ensure that regulators and market participants can look at the swaps market and identify systemic risk early enough to prevent a financial crisis.⁵⁵ Title VII sought to create pre-trade transparency by establishing SEFs, or trading platforms roughly analogous to stock exchanges that allow swap participants to trade swaps on a competitive exchange.⁵⁶ The existence of competitive trading platforms makes information about swaps available to the market by making swap bids (offers to buy a swap if certain terms are met) and offers (offers to sell a swap if certain terms are met) available to interested parties. Thus, Dodd-Frank seeks to bring swaps out of the opaque world of bilateral backroom dealing by forcing parties in a swap deal to use transparent trading systems and platforms.⁵⁷

As a political compromise,⁵⁸ Title VII divided oversight of swaps between the SEC and the CFTC. It granted the SEC the authority to regulate security-

55. *Id.*

56. Dodd-Frank defines an SEF as “a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system.” 7 U.S.C. § 1a(50) (2012). SEFs operate either (a) under the regulatory oversight of the CFTC, pursuant to Section 5h of the Commodity Exchange Act, *see* 7 U.S.C. § 7b-3 (2012), or (b) under the regulatory oversight of the SEC, *see* Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. at 10,948.

57. *See* Registration of Swap Dealers and Major Swap Participants, 77 Fed. Reg. at 2613.

58. The CFTC was originally conceived of as an agricultural regulator of futures contracts. As a result, when the Commodity Exchange Act was enacted in 1936, the Department of Agriculture was given authority to oversee and enforce the Act. *See* Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936) (establishing the CFTC). The SEC, by contrast, was thought of as a securities regulator. *See* Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (establishing the SEC). By the late 1970s, however, the line between futures and securities began to blur. Futures markets began to list futures contracts whose underlying products had nothing to do with agriculture. Applying a broad definition of “commodity,” the CFTC’s jurisdiction grew to include transactions that shifted interest-rate exposure specific to a particular loan and transactions that shifted the risk of default on particular bonds (i.e., credit default swaps). As these markets evolved, the agencies and Congress debated who should regulate swaps transactions. A temporary détente was reached in 1982, when Chairmen John Shad of the SEC and Philip Johnson of the CFTC negotiated the “Shad-Johnson Accord,” which split jurisdiction between the two agencies along lines that had more to do with historical jurisdiction than the economic reality of the swaps products being regulated. *See generally* JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES, VOLUME III: FROM THE AGE OF DERIVATIVES INTO THE NEW MILLENNIUM (1970–2001) 97 (2002); John D. Benson, *Ending the Turf Wars: Support for a CFTC/SEC Consolidation*, 36 VILL. L. REV. 1175, 1179–80 (1991); Egon Guttman, *The Futures Trading Act of 1978: The Reaffirmation of CFTC-SEC Coordinated Jurisdiction over Security/Commodities*, 28 AM. U. L. REV. 1 (1978); Jerry W. Markham, *Federal Regulation of Margin in the Commodity Futures Industry—History and Theory*, 64 TEMP. L. REV. 59 (1991); U.S. GEN. ACCOUNTING OFFICE, GGD-00-89, CFTC AND SEC: ISSUES RELATED TO THE SHAD-JOHNSON JURISDICTIONAL AC-

based swaps and the CFTC the authority to regulate all other swaps.⁵⁹ Yet the Act did not define the terms “swap” and “security-based swap.” Instead, Dodd-Frank instructed the SEC and CFTC to issue a joint rulemaking defining those terms,⁶⁰ which the agencies did on August 13, 2012.⁶¹ By that time, however, the CFTC had already issued a number of swap-related regulations.⁶² As a result, market participants had to begin setting up compliance programs without knowing which financial instruments would eventually be subject to CFTC requirements.

As a general rule, the CFTC oversees the majority of swaps, including swaps based on interest or other monetary rates, and the SEC regulates swaps

CORD (2000); Simon Boughey, *Dodd-Frank Gives Nod to Regulatory Turf Wars*, FIN. NEWS (Feb. 14, 2011), <http://www.efinancialnews.com/story/2011-02-14/dodd-frank-regulatory-turf-wars> [<http://perma.cc/RPX5-G7E8>] (“The reason for this apparent illogicality is to be found in the pages of history, where one discovers a decades-long rivalry between the CFTC and SEC over the governance of derivative instruments.”).

59. See *supra* note 16. Overlapping regulations might be defended for maintaining historic agency expertise. In other contexts, historical expertise may offer compelling reasons for agencies not to coordinate, but this is not the case with the regulation of swaps. While the SEC oversees certain types of swaps and the CFTC oversees other types of swaps, there is no principled reason why either agency should regulate the swaps under its jurisdiction. Originally, the CFTC was conceived of as a futures regulator that would protect farmers from being taken advantage of by savvy Chicago futures traders. See *supra* note 58. The vast majority of swaps today, however, have nothing to do with farming. There is no meaningful difference in terms of who trades swaps under one agency’s jurisdiction and how those swaps are structured.
60. Dodd-Frank, Pub. L. No. 111-203, 124 Stat. 1376, 1644 (2010).
61. See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208, 48,349-54 (Aug. 13, 2012) (codified at 17 C.F.R. pts. 1, 230, 240-41) (defining those terms and formally allocating rulemaking authority between the SEC and the CFTC). It is worth noting that the CFTC is responsible for regulating a much larger percentage of swaps than the SEC. The gross market value of credit default swaps subject to SEC jurisdiction is about \$278 billion. The gross market value of credit default swaps subject to CFTC jurisdiction is just under \$6 trillion. See *OTC, Credit Default Swaps, by Type Position*, BANK FOR INT’L SETTLEMENTS (May 4, 2016), http://www.bis.org/statistics/d10_1.pdf [<http://perma.cc/JW8C-Z4HS>].
62. For example, the CFTC issued clearing and reporting rules at the end of 2010, nearly eighteen months before defining the term “swap.” See End-User Exception to Mandatory Clearing of Security-Based Swaps, 75 Fed. Reg. 79,992 (Dec. 21, 2010) (codified at 17 C.F.R. pt. 240) (detailing end-user exceptions); Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 Fed. Reg. 77,306 (proposed Dec. 10, 2010) (to be codified at 17 C.F.R. pts. 240, 249), *corrected at* 75 Fed. Reg. 79,320 (proposed Dec. 20, 2010) (to be codified at 17 C.F.R. pts. 240, 249) and 76 Fed. Reg. 2287 (proposed Jan. 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249) (detailing data repository rules).

based on a single security, loan, or narrow-based security index⁶³—that is, a security index that has nine or fewer underlying securities.⁶⁴ Thus, if a party wants to purchase a swap based on eight securities, it would be subject to SEC rules, and if the party traded a swap based on ten securities, it would be subject to CFTC rules.⁶⁵

To be sure, Dodd-Frank attempted to reduce the costs of dual agency oversight of swaps by directing the SEC and CFTC to “adopt rules to ensure that such transactions and accounts are subject to comparable requirements to the extent practicable.”⁶⁶ Yet as the rest of this Section shows, the SEC and CFTC have been reluctant to follow this mandate, and the incompatibility of their swaps rules has dramatically increased the costs of derivatives regulations and thwarted regulatory attempts—and Congress’s original goals—to make the swaps market safer and more transparent.

B. Inconsistencies in Rules Governing Swap Reporting

In December 2011, the CFTC approved its final rule on swap data record-keeping and reporting requirements.⁶⁷ The CFTC then issued additional final rules governing swap reporting in March 2012, and swap dealers began reporting data for index-based and interest-rate swaps shortly thereafter.⁶⁸ Over three years later, in February 2015, the SEC issued its own final rule on the reporting and public dissemination of security-based swap information.⁶⁹ Shortly thereafter, in August 2015, the CFTC issued a notice of proposed rulemaking to re-

63. See 124 Stat. at 1644; see also Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Record-keeping, 77 Fed. Reg. at 48,208.

64. 7 U.S.C. § 1a(35) (2012) (defining a security-based swap as an index that has nine or fewer component securities).

65. Although this description applies as a general matter, I should note that there are also three alternative means for qualifying as a narrow-based security index. See 7 U.S.C. § 1a(35); see also 17 C.F.R. § 240.3a68-1b (2016).

66. 15 U.S.C. § 78o(c)(3)(C) (2012).

67. Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012) (codified at 14 C.F.R. pt. 45); Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012) (codified at 17 C.F.R. pt. 43).

68. Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. at 2136; Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. at 1186.

69. Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 80 Fed. Reg. 14,564 (Mar. 19, 2015) (codified at 17 C.F.R. pt. 242).

wise parts of its swaps rules.⁷⁰ The Commission finalized these revisions ten months later.⁷¹ While similar in many respects, the two rules reflect important differences in terms of what must be reported and who must report the information.

Swap transactions generally consist of the “initial transaction” between the two parties and two “clearing transactions” between the clearing agency and the two parties. In most cases, the CFTC and the SEC require that all three be reported, but their requirements differ in certain cases. Under CFTC rules, if the initial transaction is accepted for clearing prior to being reported, the derivatives-clearing organization (rather than one of the parties to the swap) is required to report the initial transaction.⁷² Under SEC rules, one of the parties to the initial transaction, rather than the clearing agency, is required to report the initial security-based swap.⁷³

This inconsistency imposes substantial costs on the regulated community. To comply with the CFTC’s rules, financial institutions had to build reporting infrastructures in 2012 without knowing whether that infrastructure would be compatible with the SEC’s rules for security-based swaps. Then, three years later, these institutions had to build new reporting infrastructures or update their existing infrastructures in order to allow them to input separate reporting requirements.⁷⁴

For swaps not traded on a market, both the SEC and CFTC rules reflect an understanding that more sophisticated parties will be better able to understand reporting requirements, build infrastructure, and bear the cost of reporting. For those swaps, the CFTC’s reporting rules place the reporting onus first on any swap-dealer counterparty, then on any major swap-participant counterparty and then, only if neither of those are involved in a swap, on an entity that is

70. Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, 80 Fed. Reg. 52,544 (proposed Aug. 31, 2015) (to be codified at 17 C.F.R. pt. 45).

71. Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, 81 Fed. Reg. 41,736 (June 27, 2016) (codified at 17 C.F.R. pt. 45).

72. *Id.*

73. Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 81 Fed. Reg. 53,546, 53,613 (Aug. 12, 2016) (codified at 17 C.F.R. pt. 242).

74. See Annette L. Nazareth & Gabriel D. Rosenberg, *The New Regulation of Swaps: A Lost Opportunity*, 55 COMP. ECON. STUD. 535, 545 (2013) (arguing that “the task [of building compliance programs with Title VII of Dodd-Frank] has been made all but impossible by the radically different timeline on which the CFTC and SEC are proposing and adopting their rules and the fact that, particularly on the CFTC’s side, the swaps rule proposals have been adopted in an illogical order”).

not a swap dealer or major swap participant.⁷⁵ The SEC's rule generally follows the same reporting order with one crucial difference—if only one party to the swap is defined as a U.S. person (i.e., incorporated in the United States), that person is responsible for reporting.⁷⁶

As Annette Nazareth and Gabriel Rosenberg have pointed out, what emerges is a bifurcated reporting regime with puzzling results.⁷⁷ Consider two variants of a standard swap deal. First, imagine that an American corporation enters into an index credit default swap with a London-based swap dealer. Because the transaction involves an index credit default swap, it is subject to CFTC rules.⁷⁸ The swap dealer is responsible for the immediate reporting of the transaction, and the American corporation is responsible for updating the initial report for the duration of the swap.⁷⁹ Now imagine that the American company and the London-based swap dealer enter into a credit default swap on a single asset instead of an index. In this case, the transaction would be governed by SEC rules, so an American corporation would be responsible for reporting the transaction.⁸⁰ Data repositories are repeat players in the swaps market and are therefore likely to understand their reporting obligations. Individual corporations, by contrast, may trade swaps infrequently. It is therefore likely that they will lack reporting infrastructure and may not even know that they have a duty to report. Forcing individual companies—especially small companies that lack experience in financial markets—to report swap information already imposes a fairly substantial burden on swap participants. This inefficiency is aggravated by the fact that companies must comply with two different regimes. Every American company that wants to trade swaps must therefore understand not only that they are occasionally responsible for reporting the initial swap transaction, but also that this requirement differs depending on which set of rules governs a swap. The agencies could have avoided this inefficiency by agreeing on a single, consistent reporting framework. Indeed, neither agency has provided a sufficient explanation for its decision to enact

75. Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182, 1197, 1236 (Jan. 9, 2012) (codified at 17 C.F.R. pt. 43).

76. See Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30,968, 31,065, 31,066 (proposed May 23, 2013) (to be codified at 17 C.F.R. pts. 240, 242, 249).

77. See Nazareth & Rosenberg, *supra* note 74, at 541.

78. See Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. at 1182.

79. See *id.* at 1197.

80. Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 81 Fed. Reg. 53,546, 53,613 (Aug. 12, 2016) (codified at 17 C.F.R. pt. 242).

regulations that diverge from the other regulator's rules in costly but seemingly insignificant ways.⁸¹

Additional costs arise from distinct requirements about what data must be reported. While the CFTC's rules include detailed tables of required data elements for various types of swaps,⁸² the SEC initially set out only the basic elements of reportable information in its final rule on swap reporting, leaving the data repositories that store SEC-traded swaps responsible for sorting out the details for each product type.⁸³ Nor does the SEC ask for underlying valuation data.⁸⁴ In contrast, the CFTC requires that the derivatives-clearing organization report daily valuation data.⁸⁵ And, if the reporting counterparty for the initial transaction is a swap dealer or major swap participant, then the counterparty is also responsible for reporting daily valuation data.⁸⁶ Both the SEC and CFTC reporting regimes use coded identifiers (IDs) to identify a person, product, or transaction.⁸⁷ However, the SEC requires more granular information on the parties executing the transaction, including IDs related to the broker, trader, trading desk, counterparty, product, and transaction.⁸⁸ By contrast, the CFTC requires only that swap participants report the legal-entity identifiers of the parties to a swap, as well as the unique product and unique swap identifiers.⁸⁹

The SEC and CFTC also disagree about the definition of block trades, which are large trades with the potential to move the market.⁹⁰ The CFTC, but

81. For a discussion of the agencies' justifications for these divergences, see *infra* Section I.D.

82. See Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. at 1249-62.

83. See Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30,968, 31,071 (proposed May 23, 2013) (to be codified at 17 C.F.R. pts. 240, 242, 249).

84. See *id.* at 31,093.

85. Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. at 1197. The CFTC amended this requirement on June 27, 2016 to clarify that the requirement that the reporting party provide valuation data "appl[ies] to all swaps," not just to "cleared swaps." Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, 81 Fed. Reg. 41,736, 41,746 (June 27, 2016) (codified at 17 C.F.R. pt. 45).

86. *Id.*

87. See Cross-Border Security-Based Swap Activities, 78 Fed. Reg. at 31,214; Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. at 1212.

88. Cross-Border Security-Based Swap Activities, 78 Fed. Reg. at 31,211-13.

89. Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. at 1184.

90. See generally *Frequently Asked Questions About Block Trade Reporting Requirements*, MORRISON & FOERSTER (2016), <http://media.mofo.com/files/uploads/Images/FAQs-Block-Trade-Reporting-Requirements.pdf> [<http://perma.cc/4VCD-8VZD>].

not the SEC, has set minimum amounts for block trades.⁹¹ In contrast, the SEC's proposed rule would delegate to swap data repositories the authority to establish policies and procedures for calculating which trades constitute block trades.⁹² The SEC defended this decision for preserving flexibility.⁹³ However, it did not mention the fact that inconsistent rules about block trades will force market participants, data repositories, and clearinghouses to set up two different programs to report and execute the largest and most significant block trades.

The table below shows important differences between SEC and CFTC requirements for reporting swap information to swap data repositories:⁹⁴

TABLE 1.
REPORTING REQUIREMENTS FOR SWAP DATA REPOSITORIES (SDRs)

Note: DCO: derivatives clearing organization, SBS: security-based swap, SBSB: security-based swap dealer, SDR: swap data repository, SIP: securities information processor, UIC: unique identification code

Reporting Party	CFTC Rules	SEC Rules
	One-sided reporting: reporting counterparty reports to an SDR based on a reporting hierarchy (inconsistencies likely result because of differences in "swap dealer" and SBSB registrations).	reporting side

91. The CFTC defines block size as the greater of (a) the ninety-fifth percentile of transaction size in that category of swap instrument in the past calendar year (distribution test) and (b) the largest of five times the mean, median, and mode of transaction sizes for that category swap instrument over the past calendar year (social size multiple test). See Procedures To Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 78 Fed. Reg. 32,865, 32,868 (May 31, 2013) (codified at 17 C.F.R. pt. 43).

92. Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75,208, 75,228 (proposed Dec. 2, 2010) (to be codified at 17 C.F.R. pts. 240, 242).

93. *Id.*

94. Adapted from Memorandum from Gibson Dunn to Our Clients and Friends, U.S. SEC Implements Dodd-Frank Act Title VII: Reporting and Public Dissemination Rules for Security-Based Swaps 12-16 (Apr. 8, 2015), <http://www.gibsondunn.com/publications/documents/SEC-Implements-Dodd-Frank-Title-VII--Reporting-and-Public-%20Dissemination-Rules--Security-Based-Swaps.pdf> [<http://perma.cc/8MYV-223Y>].

PLAYING NICELY

Reporting Timing	“As soon as technologically practicable” from the time of execution, with backstops based on asset class, counterparty, and implementation timing; reporting counterparties cannot hold the reports.	Twenty-four-hour window (or longer if next day is not a business day) from the time of execution for all trades, subject to revision by the Commission upon additional market studies; reporting sides can hold the reports.
Entity to Which Data is Reported	SDRs registered with the CFTC.	SDRs registered with the SEC and registered as SIPs.
Use of Identifiers	Requires legal entity identifiers for parties to the swap, a unique product identifier, and a unique swap identifier.	Requires UICs for parties to the SBS, asset managers, platforms, brokers, trading desks, individual traders, branches, products, and transactions.
Data Fields To Be Reported	Provides specific data fields that must be reported to an SDR; also provides that the SDR may ask for additional information and specify the format.	Does not specify particular data elements for each product type; requires SDRs to establish and publish policies and procedures setting the reportable data elements and formats for SBS information.
Cleared Transactions	If the DCO accepts a swap for clearing, requires the DCO to report the initial swap to the SDR; requires resulting swaps with the DCO to be reported by the DCO to the SDR; requires the reporting of daily valuation data for cleared swaps by the DCO and by the swap dealer/major swap participant.	Requires the counterparty (i.e., reporting side) to the initial SBS to report to the SDR; does not require resulting SBS with the clearing agency to be reported to the SDR at this time; does not require reporting of valuation data for cleared SBSs.
Life-Cycle Events	Permits reporting of continuation data for swaps using snapshot or state data.	Permits only snapshot reporting for continuation data.
Data To Be Publicly Disseminated	All data fields in Appendix A to Part 43 of the CFTC’s regulations; notional amounts to be publicly disseminated are capped; certain information is masked when disseminated.	All data fields reported to an SDR, except those defined in Rule 902(c).
Block Trades	Specific rules and sizes for block trades in all asset classes set forth in CFTC regulation 43.6 and Appendix F to Part 43.	Treats block trades like all other SBS transactions; subject to revision by the SEC upon additional market studies.

Embargo Rule

Data cannot be shared until reportable swap data is “sent” to the SDR.

Data cannot be shared until reportable SBS data is “sent” to the SDR; exception for post-trade affiliates of counterparties.

Market participants repeatedly expressed concerns about the costs of complying with inconsistent swaps rules during both agencies’ rulemaking processes. For example, in a comment letter on the SEC’s proposed rule on data repositories, the Depository Trust & Clearing Corporation (DTCC), one of the four swap-reporting organizations currently registered with the CFTC,⁹⁵ urged the SEC and the CFTC to “harmonize the regimes that oversee [swap data repositories].”⁹⁶ DTCC emphasized that “harmonization is a more important priority than the exact nature of the consistent standard, as SDRs can adjust to meet a single standard but not multiple, inconsistent standards.”⁹⁷ Gibson Dunn echoed DTCC’s complaint, arguing that “[w]here regulatory requirements diverge, market participants must develop practical and sound reporting policies and procedures for each respective reporting regime.”⁹⁸

95. See *Swap Data Repository Organizations*, CFTC, [http://sirt.cftc.gov/sirt/sirt.aspx?Topic=Data Repositories](http://sirt.cftc.gov/sirt/sirt.aspx?Topic=Data%20Repositories) [<http://perma.cc/WWJ5-KR6Z>].

96. Letter from Larry E. Thompson, Gen. Counsel, Depository Tr. & Clearing Corp., to Elizabeth M. Murphy, Sec’y, SEC 4 (Jan. 24, 2011) (on file with author).

97. *Id.* at 3. DTCC was equally forceful in a comment letter on the SEC’s Regulation SBSR: “Given the significant number of registered entities (execution platforms, clearinghouses, SDRs, dealers, and major swap participants) that will face dual oversight, unnecessary distinctions in the registration and regulation of these entities risk jeopardizing regulatory compliance, add confusion to Dodd-Frank Act implementation, and ultimately impose unnecessary costs.” Letter from Larry E. Thompson, Gen. Counsel, Depository Tr. & Clearing Corp., to Elizabeth M. Murphy, Sec’y, SEC (Aug. 21, 2013) (on file with author). The Securities Industry and Financial Markets Association (SIFMA) echoed the DTCC’s claims: “[T]he Commission can greatly improve the quality of the swap data being reported by establishing uniform standards for swap [U]niform reporting standards would allow the Commission and other global financial regulators to easily compare data across multiple SDRs to develop a clear picture of the swap markets.” Letter from Timothy W. Cameron, Managing Dir., Sec. Indus. & Fin. Mkts. Ass’n, to Melissa D. Jurgens, Sec’y, CFTC, Comments Regarding Review of Swap Data Recordkeeping and Reporting Requirements (RIN 3038-AE12) (May 27, 2014), <http://www.sifma.org/comment-letters/2014/sifma-amg-submits-comments-to-the-cftc-regarding-swap-data-recordkeeping-and-reporting-rules> [<http://perma.cc/XH8Z-9X69>].

98. Memorandum from Gibson Dunn to Our Clients and Friends, *supra* note 94, at 17. Gibson Dunn specified that “differences between the asset classes under the SEC’s jurisdiction compared to the CFTC’s jurisdiction will require SDRs to specify the differences in the data elements in their policies and procedures.” *Id.* at 6. Cleary Gottlieb also noted that efforts to harmonize regulations have failed, and that inconsistent data requirements impose substan-

Others have expressed concern that regulatory inconsistencies will prevent market participants from using swap data. The Securities Industry and Financial Markets Association (SIFMA), an interest group that represents the securities industry,⁹⁹ asked that market participants be able to “review [swap data-repository] reported trade information for trades executed on behalf of clients, or otherwise process such information in an automated fashion”; that “client trade information [be] made available to asset managers in an easily accessible, easy to read format”; and that “consistent specifications and reporting fields [be] utilized to harmonize reporting requirements across jurisdictions and to ensure the interoperability of such information.”¹⁰⁰ SIFMA worried that regulatory inconsistencies would make it impossible for buyers to analyze the market and monitor the exposure of their counterparties. In the case of swaps not traded on exchanges, inconsistencies between SEC and CFTC rules would therefore prevent buyers from assessing the competitiveness of the products they purchase. Though SIFMA discussed the operational difficulties of inconsistent regulations, its concerns point to a potentially more pernicious cost than those associated with mere compliance. Not only will buyers’ inability to analyze the swaps market increase the cost of engaging in transactions, but it will also prevent swap counterparties, who are the first line of defense against systemically risky positions, from detecting those build-ups.

Data incompatibility also threatens to undermine regulators’ ability to detect destabilizing swap build-ups. As even regulators themselves have admitted, inconsistent swaps rules make it more difficult to supervise the swaps market. The astronomical losses caused by the London Whale, discussed above, show that this concern is not merely hypothetical. In a speech about the challenges that the CFTC faced in analyzing data promulgated solely under its rules, CFTC Commissioner Scott O’Malia drew attention to the London Whale incident and offered a frank assessment of the obstacles posed by inconsistent swap reporting. Noting that “[t]he goal of data reporting is to provide the

tial additional costs: “In some cases, the SEC has sought to harmonize its approach with that of the CFTC. Despite these efforts, however, enough differences exist between the Final CFTC Reporting Rules and the Final SEC Reporting Rules that firms will likely need to make significant modifications to their existing reporting systems to comply with the Final SEC Reporting Rules.” Memorandum from Cleary Gottlieb, SEC Adopts Rules Regarding Reporting and Dissemination of Security-Based Swap Information and Proposes Further Amendments to the Reporting Rules 11 (Apr. 20, 2015), <http://www.clearygottlieb.com/~media/cgsh/files/publication-pdfs/sec-adopts-rules-regarding-reporting-and-dissemination-of-security-based-swap.pdf> [<http://perma.cc/5LW7-WB83>].

99. *About SIFMA*, SEC. INDUSTRY & FIN. MKTS. ASSOCIATION, <http://www.sifma.org/about> [<http://perma.cc/U7W3-7Y45>].

100. Letter from Timothy W. Cameron to Melissa D. Jurgens, *supra* note 97.

Commission with the ability to look into the market and identify large swap positions that could have a destabilizing effect on our markets,” the Commissioner reported that “the Commission’s progress in understanding and utilizing the data in its current form and with its current technology is not going well.”¹⁰¹ Commissioner O’Malia pointed out that formatting incompatibilities rendered the reams of swap information submitted to the CFTC effectively useless. According to Commissioner O’Malia, because the CFTC did not specify in what format reporting parties should submit data, the Commission had been unable to track and analyze developments in the swaps market.¹⁰² Commissioner O’Malia also noted that members of the CFTC’s staff had acknowledged that they “currently cannot find the London Whale in the current data file,”¹⁰³ and he went on to testify that destabilizing swap positions will only be visible to the SEC and the CFTC if the Commissions “work to harmonize rules sets as far as possible, particularly in clearing, trading and reporting.”¹⁰⁴

Recall that a primary objective of Dodd-Frank was to increase transparency in the swaps market.¹⁰⁵ In furtherance of this goal, reporting requirements were intended to help agencies identify swap positions that could endanger the global economy.¹⁰⁶ The trading losses incurred by the London Whale, however, illustrate how reporting incompatibilities have already prevented regulators from identifying when parties have taken systemically important and risky swaps positions. But even if the CFTC fixes its own internal reporting problems, differences between its reporting requirements and those issued by the SEC will present regulators with additional challenges. In addition to imposing perplexing and unjustified costs on market participants, these inconsistencies will continue to impede detection of systemically important swap positions.

101. Scott D. O’Malia, Comm’r, CFTC, Keynote Address at SIFMA Compliance and Legal Society Annual Seminar: CFTC’s Implementation of Dodd Frank—Grading Agency Transparency (Mar. 19, 2013), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-22> [<http://perma.cc/6UNU-JED7>].

102. *See id.*

103. *Id.*

104. *Dodd-Frank Turns Five: Assessing the Progress of Global Derivatives Reforms: Hearing Before the H. Comm. on Agric.*, 114th Cong. 15 (2015) (statement of Scott D. O’Malia, CEO, Int’l Swaps & Derivatives Ass’n), http://agriculture.house.gov/uploadedfiles/7.29.15_dodd_frank.pdf [<http://perma.cc/6VAL-282W>].

105. *See supra* notes 49, 56 and accompanying text.

106. *See supra* notes 53, 56 and accompanying text.

C. Inconsistencies in Rules Governing SEFs

Like swap-reporting rules, inconsistent regulations governing SEFs raise the costs of complying with Dodd-Frank while reducing transparency in the market. An SEF is a regulated “trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility.”¹⁰⁷ For swaps traded on an exchange, Dodd-Frank charges the SEC with regulating security-based swaps and the CFTC with regulating most other swaps.¹⁰⁸ As soon as the CFTC finalized its SEF rules in 2013, market participants began building SEFs to conform with the agency’s rules.¹⁰⁹ In contrast, the SEC issued its proposed rules in 2011, but it has yet to finalize them.¹¹⁰

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107. Dodd-Frank, Pub. L. No. 111-203, § 721(a), 124 Stat. 1376, 1670 (2010) (codified as amended at 7 U.S.C. § 1a(50) (2012)). Section 733 of Dodd-Frank amended the Commodity Exchange Act to move swap trading and execution to SEFs and designated contract markets (DCMs). *See id.* § 733, 124 Stat. at 1712 (codified as amended at 7 U.S.C. § 7b-3 (2012)). Section 723(a)(3) of Dodd-Frank added a trade execution requirement, which requires that swap transactions subject to the clearing requirement under section 2(h)(1) of the Commodity Exchange Act be executed on an SEF or a DCM, unless no SEF or DCM “makes the swap available to trade” or the clearing exception under section 2(h)(7) of the Commodity Exchange Act applies. *See id.* § 723(a)(3), 124 Stat. at 1675-81 (codified as amended at 7 U.S.C. § 2(h)(1)-(8) (2012)).
108. *See id.* § 721, 124 Stat. at 1666-69 (codified as amended at 7 U.S.C. § 1a(47) (2012)) (noting CFTC’s jurisdiction); *id.* § 763(a), 124 Stat. at 1762 (codified at 15 U.S.C. § 78c-3 (2012)) (noting SEC’s jurisdiction). Dodd-Frank also amended the Securities and Exchange Act to provide that “[n]o person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange” *See id.*, 124 Stat. at 1770 (codified at 15 U.S.C. § 78c-4(a)(1) (2012)). This section exempts security-based swaps from the clearing requirement where one of the counterparties to the SB Swap: “(A) is not a financial entity; (B) is using security-based swaps to hedge or mitigate commercial risk; and (C) notifies the [SEC], in the manner set forth by the [SEC], how it generally meets its financial obligations associated with entering into non-cleared security-based swaps.” *See id.*, 124 Stat. at 1679 (codified at 15 U.S.C. §§ 78c-3(g)(1)(A)-(C) (2012)); *see also* End-User Exception to Mandatory Clearing of Security-Based Swaps, 75 Fed. Reg. 79,992 (Dec. 21, 2011) (codified at 17 C.F.R. pt. 240).
109. According to CFTC Chairman Tim Massad, the SEFs established under the CFTC’s regime are off to a running start: “Currently, we have nearly two dozen SEFsSEF trading accounted for about half of the total average daily volume of interest rate derivatives in 2014. And according to data by Clarus Financial Technology, over the first three quarters of 2015, 73 percent of credit default swaps were executed on-SEF—as were 69 percent of all interest rate swaps.” Timothy Massad, Chairman, CFTC, Keynote Remarks Before the Swap Execution Facility Conference (Oct. 26, 2015), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-32> [<http://perma.cc/47EK-B2D7>].
110. Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. 10,948 (proposed Feb. 28, 2011) (to be codified at 17 C.F.R. pts. 240, 242, 249).

The critical distinction between the CFTC's SEF rules and the SEC's proposed rules is whether the agency or the SEF should determine if a certain type of transaction must be traded on an SEF.¹¹¹ Both agencies agree that swaps that are "made available for trading" must be traded on an SEF and that other swaps can continue trading through bilateral transactions rather than on an exchange.¹¹² However, the SEC has proposed that the agency should determine which products are made available for trading,¹¹³ while under existing CFTC rules, the SEFs themselves determine which products are made available for trading, subject to CFTC approval.¹¹⁴

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111. Compare *id.* at 10,969 ("[A] SB swap would be considered to be 'made available to trade' on an exchange or a SB SEF pursuant to Section 3C(h) of the Exchange Act should be made pursuant to objective measures established by the Commission, rather than by one or a group of SB SEFs."), with *Methods of Execution for Required and Permitted Transactions*, 17 C.F.R. § 37.9 (2016) (noting that this determination is made by the SEFs themselves).
112. Section 723(a)(3) of Dodd-Frank requires that transactions involving swaps subject to the clearing requirement under section 2(h)(1) of the Commodity Exchange Act occur on an exchange, except where no DCM or SEF makes the swap "available to trade" or the swap transaction is subject to the clearing exception under section 2(h)(7) of the Commodity Exchange Act. Dodd-Frank, Pub. L. No. 111-203, § 723(a), 124 Stat. 1376, 1681 (2010) (codified as amended at 7 U.S.C. § 2(h)(8) (2012)). Section 763(a) of Dodd-Frank requires that transactions involving security-based swaps subject to the clearing requirement of subsection (a)(1) of section 3C of the Securities Exchange Act be executed on an exchange unless no exchange or SB SEF makes the SB swap available to trade. *See id.* § 723(a), 124 Stat. at 1767 (codified as amended at 15 U.S.C. § 78c-3(h)(2) (2012)).
113. *See* Registration and Regulation of Security-Based Swap Execution Facilities, 76 Fed. Reg. at 10,969 ("The Commission does not, however, have sufficient data at this time to propose the objective standards pursuant to which a determination whether a SB swap is 'made available to trade' would be made We solicit comment in this release, however, on how the Commission should craft an objective standard for whether a SB swap is 'made available to trade.'").
114. The finalized CFTC rules offer SEFs two ways of designating a new product "available to trade." The first way, referred to as the "approval" process, allows an SEF to request the CFTC's approval of a new rule prior to its implementation. *See* 17 C.F.R. § 40.5 (2016). The CFTC has forty-five days to review the proposed rule, but it may extend its review for another forty-five days where novel or complex issues are present. *See id.* § 40.5(a)(9)(b). The second process, referred to as the "self-certification" process, allows SEFs to submit new rules to the CFTC under self-certification procedures. *See id.* § 40.6. The CFTC has ten business days to review the rule before it is deemed certified and can be made effective. *See id.* § 40.6(a)(3). However, the CFTC may stay certification for ninety days, during which time it must provide a thirty-day public comment period. *See id.* § 40.5(c). In order to determine that a swap is made available to trade, an SEF must find that the swap meets one or more of the criteria listed in the rules, which include: "[w]hether there are ready and willing buyers and sellers"; "[t]he frequency or size of transactions"; "[t]he trading volume"; "[t]he number and types of market participants"; "[t]he bid/ask spread"; and "[t]he usual number of resting firm or indicative bids and offers." *Id.* § 37.10(b).

Buyers have expressed concern that allowing SEFs to determine when swaps are available for trading will incentivize manipulative behavior. For example, the Managed Funds Association, a group that represents the interests of the hedge fund industry,¹¹⁵ asked the CFTC “to make the ‘available for trading’ determination” itself.¹¹⁶ The Managed Funds Association worries that the discretion given to SEFs “will create considerable uncertainty among market participants.”¹¹⁷ It is concerned that individual SEFs will identify a product that is not traded on other SEFs and quickly establish “an overnight monopoly” over that product.¹¹⁸ This would reduce competition and favor larger, wealthier SEFs. It would also force buyers who would like access to all types of swap products to connect to all SEFs. Otherwise, buyers risk being crowded out of a market because they are not connected to a SEF that trades a desirable product. The CFTC SEF regime might therefore incentivize SEFs to determine opportunistically that a product has been made available for trading in order to establish a monopoly for that product. Because this opportunism is not available in the SEC’s regime, SEFs operating under the CFTC’s rules are less likely to choose to trade security-based swaps.

SEFs therefore need to decide whether to develop systems flexible enough to meet both the CFTC’s and SEC’s requirements or whether to focus exclusively on one asset class. If CFTC-specific and SEC-specific SEFs develop, market participants will need to become members of and build technological connections to both. Twenty-five SEFs currently operate under the CFTC rules,¹¹⁹ which apply to seventy-three percent of credit default swaps and to sixty-nine percent of all interest rate swaps.¹²⁰ Because the CFTC market is so large, SEFs

The SEC proposes that the “made available for trade” determination be made by using the following objective criteria: (1) “the aggregate amount of trading in the SB swap on exchanges and SB SEFs and in the [over-the-counter] market,” or (2) the “overall volume” in the SB Swap. See *Registration and Regulation of Security-Based Swap Execution Facilities*, 76 Fed. Reg. at 10,970.

115. See *About MFA*, MANAGED FUNDS ASS’N, <http://www.managedfunds.org/about-mfa> [<http://perma.cc/KC9N-583H>].

116. Letter from Stuart J. Kaswell, Exec. Vice President & Managing Dir., Gen. Counsel, Managed Funds Ass’n, to David A. Stawick, Sec’y, CFTC 3 (Mar. 8, 2011), http://www.managedfunds.org/wp-content/uploads/2011/06/3.8.11-CFTC.Swap_Execution.Facilities.Rules_Final_MFA_Letter.pdf [<http://perma.cc/Y4J3-AC88>].

117. *Id.*

118. *Id.*

119. See *Trading Organizations—Swap Execution Facilities*, CFTC, <http://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=SwapExecutionFacilities> [<http://perma.cc/EA9Z-QNP5>] (documenting that twenty-eight organizations sought registration, three of which have since withdrawn).

120. See Massad, *supra* note 109.

may lack the incentive to create a separate infrastructure for the SEC's SEF regime. And if SEFs do choose to specialize in one regulator's rules and create separate SEFs for SEC or CFTC rules, then swap traders would have to pay for additional SEF connections if they want to access all products. Thus, unless the SEC changes the trade determination in its final rules, the agencies' failure to harmonize their SEF rules will lead to the same outcome as in the reporting context: inefficiencies without benefits.

D. Failure To Consider the Costs of Inconsistent Swaps Regulations

While the SEC and CFTC are certainly aware of the benefits of harmonizing their swaps regulations,¹²¹ the agencies have offered only cursory analyses of the costs of inconsistent swaps regulations. The SEC's analysis of SEFs is a powerful example. The Commission's cost-benefit analysis fills just two columns in its forty-six-page notice in the Federal Register and does not once mention the CFTC's regulations.¹²² The CFTC proposal is no different. As MarketAxess, a company interested in trading both SEC- and CFTC-governed swaps, pointed out, the CFTC's proposal "does not analyze the cost of organizing and operating a SEF," nor does it "consider the burden of its proposal or review[] the regulatory costs of possible alternative regulatory approaches to its proposal."¹²³

This failure to consider harmonizing swaps regulations is not unique.¹²⁴ The Commissions rarely mention how existing swaps rules might affect their

121. They have, for example, issued a joint report in which they acknowledge that "[i]mproving coordination and cooperation between the SEC and CFTC is essential to achieving the Administration's directive on harmonization going forward." *A Joint Report of the SEC and the CFTC on Harmonization of Regulation*, SEC & CFTC 10 (2009), <http://www.sec.gov/news/press/2009/cftcjointreport101609.pdf> [<http://perma.cc/VP67-Q5EA>]. The joint report contains several recommendations about how the SEC and the CFTC could "better coordinate their operations, information-sharing, and regulations." *Id.*; see also *id.* at 14-15 (describing shared training, staffing, and technology programs for the SEC and CFTC). It specifically recommends "[a]n appropriate forum for discussion and communication between the SEC and the CFTC to identify emerging regulatory risks and assess and quantify their implications for investors and other market participants, and provide recommendations for solutions would serve the agencies' harmonization initiative." *Id.* at 10.

122. See Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33,476 (June 4, 2013) (codified at 17 C.F.R. pt. 37).

123. Letter from Richard M. McVey, Chairman & Chief Exec. Officer, MarketAxess Holdings Inc., to David A. Stawick, Sec'y, CFTC 13 (Mar. 8, 2011), <http://www.marketaxess.com/pdfs/31489RichardMcVey.pdf> [<http://perma.cc/55AM-L7CF>].

124. See Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 75 Fed. Reg. 80,638, 80,656-57 (proposed Dec. 22, 2010) (to be codified at 17

cost-benefit analyses, and even when they do, their analyses either assert that they have harmonized where possible, or simply raise the possibility that inconsistent regulations are a problem. The agencies do not analyze inconsistencies or otherwise consider harmonizing their rules. For example, in footnote 356 of the CFTC's proposed rule on margin requirements for uncleared swaps, the agency acknowledges that regulatory arbitrage—the possibility that market participants will modify their products in order to avoid the CFTC's margin requirements—might render its proposed regulation less effective.¹²⁵ The CFTC further notes that if its margin requirements differ substantially from those of the other regulators, “operational inefficiencies” may prevent traders from “utilizing congruent operational and compliance infrastructure.”¹²⁶ In plain English, the agency is acknowledging that companies may have to set up separate compliance regimes for each agency's rules even though those rules regulate the same type of financial product. But after admitting that the actions of other financial regulators will affect whether its own regulations will require companies to set up more than one compliance program, the CFTC dismisses the dangers of regulatory arbitrage by asserting that it has “consulted and coordinated with” the appropriate regulators “in order to harmonize [their] respective margin rules to the greatest extent possible.”¹²⁷ However, the CFTC then admits that “[t]he baseline against which the costs and benefits associated with this rule will be compared is the status quo, [that is], the uncleared swaps markets as they exist today.”¹²⁸ Therefore, although the CFTC concedes that rules promulgated by other agencies will determine whether its own rules are effective, the agency analyzes the costs and benefits of its rules against a backdrop of the unregulated, pre-Dodd-Frank swapmarket.

Similarly, in response to comments requesting that the CFTC harmonize pricing and reporting requirements with the SEC's rules, the CFTC acknowledged the “concerns expressed,” but countered that “industry solutions . . . will mitigate” those costs.¹²⁹ Yet nowhere in the CFTC's eight-page cost-benefit analysis does the CFTC explain why the benefits of its rule justify the costs to market participants of implementing two different reporting systems. Nor did

C.F.R. pts. 23, 155); Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76,140, 76,167-68 (proposed Dec. 7, 2010) (to be codified at 17 C.F.R. pt. 43).

125. Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 636, 682 n.356 (Jan. 6, 2016) (codified at 17 C.F.R. pts. 23, 140).

126. *Id.* at 682.

127. *Id.* (footnote omitted).

128. *Id.*

129. Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182, 1223 (Jan. 9, 2012) (codified at 17 C.F.R. pt. 43).

the CFTC justify its decision to force market participants to devise creative compliance programs capable of accommodating two reporting regimes when the alternative—consistent regulations—would have allowed market participants to develop a single reporting program.¹³⁰ The CFTC’s cost-benefit analysis in its rules for block trades follow a similar pattern. The CFTC acknowledged that several commenters urged the Commission to “harmoniz[e] with the SEC’s approach” to designating block trades,¹³¹ and a number of other commenters asked the two agencies to “coordinate . . . in setting minimum block levels.”¹³² Yet after acknowledging these comments, the CFTC’s cost-benefit analysis did not walk through the benefits of coordinating with the SEC or the costs of inconsistencies.¹³³

Like the CFTC’s rules, the SEC’s final reporting rules failed to justify inconsistencies with the CFTC’s rules. Although the SEC admitted that it “has taken into consideration comments received supporting harmonization of the CFTC’s rules for swap data repositories with the SDR Rules,” the Commission responded to these comments by saying that it “believes that the final SDR Rules are largely consistent with the rules adopted by the CFTC.”¹³⁴ In another rule-making, the SEC again conceded that “it would be beneficial to harmonize, to the extent practicable, the information required to be reported under Regulation SBSR and under the CFTC’s swap-reporting rules.”¹³⁵ Nevertheless, the SEC countered that “the flexibility” of its reporting rule “will facilitate harmonization of reporting protocols and elements between the SEC and CFTC reporting regime.”¹³⁶ Notably, the SEC issued this cost-benefit analysis over three years after the London Whale incident. Nevertheless, the SEC did not mention that granting data repositories flexibility had prevented regulators from detect-

130. *Id.* at 1232-40.

131. Procedures To Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 78 Fed. Reg. 32,866, 32,897 (May 31, 2013) (codified at 17 C.F.R. pt. 43).

132. *Id.*

133. *Id.* at 32,915-27.

134. Security-Based Swap Data Repository Registration, Duties, and Core Principles, 80 Fed. Reg. 14,438, 14,442 (Mar. 19, 2015) (codified at 17 C.F.R. pts. 232, 240, 249). I should note that the SEC did justify one divergence with the CFTC’s rule—that swap data repositories comply with generally accepted accounting principles. *See id.* at 14,585. However, the SEC did not give any other reasons for this belief, despite the fact that considerable differences persist.

135. Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 80 Fed. Reg. 14,564, 14,570 (Mar. 19, 2015) (codified at 17 C.F.R. pt. 242).

136. *Id.*

ing a systemically significant swap build-up. Nor did it explain how it would detect potentially destabilizing swap positions given the likelihood that reporting inconsistencies would render swap data unusable.¹³⁷

Granted, the SEC and the CFTC have publicly acknowledged that regulatory inconsistencies render their regulations more expensive,¹³⁸ and they have independently recognized that they are required to consider the potential costs and benefits whenever they regulate. For instance, the SEC has released a “standard template”¹³⁹ to explain how it would measure costs and benefits when promulgating rules under Dodd-Frank.¹⁴⁰ The CFTC has also recently indicated that it plans to take its cost-benefit mandate more seriously, entering into a memorandum of understanding with the Office of Information and Regulatory Affairs (OIRA) to obtain “technical assistance . . . during the implementation of [Dodd-Frank], particularly with respect to the consideration of the costs and benefits of proposed and final rules.”¹⁴¹ The SEC and CFTC have also distributed internal guidance explaining how they should comply with cost-benefit requirements. In March 2012, the SEC cited “[r]ecent court decisions, reports of the U.S. Government Accountability Office . . . and the SEC’s Office of Inspector General . . . and Congressional inquiries” that had “raised questions about . . . the Commission’s economic analysis in its rulemaking.”¹⁴² The SEC guidance noted that, “as SEC chairmen ha[d] informed Congress since at least the early 1980s – and as rulemaking releases since that time reflect – the [SEC] considers potential costs and benefits as a matter of good

137. *See id.*

138. *See* sources cited *supra* note 121.

139. Memorandum from Dan M. Berkovitz, Gen. Counsel, CFTC & Jim Moser, Acting Chief Economist, CFTC, to Rulemaking Teams, CFTC (Sept. 29, 2010), reprinted in Office of the Inspector Gen., *An Investigation Regarding Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act*, CFTC at Ex. 1 (Apr. 15, 2011), http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/oig_investigation_041511.pdf [<http://perma.cc/Z2QH-FDFR>].

140. Div. of Risk, Strategy & Fin. Innovation & Office of the Gen. Counsel, *Current Guidance on Economic Analysis in SEC Rulemaking*, SEC (Mar. 16, 2012) [hereinafter *2012 Guidance*], http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf [<http://perma.cc/J3JH-6ULR>].

141. Office of Info. & Regulatory Affairs & CFTC, *Memorandum of Understanding*, WHITE HOUSE 1 (May 9, 2012), http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/oira_cftc_mou_2012.pdf [<http://perma.cc/XEK4-MGYK>].

142. *2012 Guidance*, *supra* note 140, at 1. The guidance directed the rulemaking staff to “quantify those expected benefits and costs to the extent possible.” *Id.* at 9.

regulatory practice whenever it adopts rules.”¹⁴³ The SEC guidance directed rulemaking staff to work with economists to analyze which costs and benefits a rule might create, to quantify those that could be quantified, and to explain why others could not feasibly be quantified.¹⁴⁴

And yet these attempts to improve cost-benefit analysis have not persuaded the agencies to coordinate their swaps rules, nor have they persuaded politicians and economists that the agencies have begun to take their cost-benefit obligations seriously. For example, the CFTC’s approach to considering costs and benefits under the standard template has come under heavy criticism, not just from market participants complaining about particular rulemakings, but also from economists,¹⁴⁵ members of Congress,¹⁴⁶ and CFTC commissioners. CFTC Commissioner Jill Sommers admitted, “The proposals we have issued thus far contain cursory, boilerplate cost-benefit analysis sections in which we have not attempted to quantify the costs because we are not required to do so under the Commodity Exchange Act [W]e should most certainly attempt to determine whether the costs outweigh the benefits.”¹⁴⁷ The Inspector General of the CFTC has even issued a report finding that the CFTC had adopted a “one size fits all” approach and had not given sufficient regard to “addressing idiosyncratic cost and benefit issues that were shaping each rule, and [were] often addressed in the preamble.”¹⁴⁸

In sum, while the costs that duplicative regulations impose on industry participants are serious, they are not the most significant problem with the current

143. *Id.* at 3.

144. *Id.* at 12.

145. Jacqueline McCabe, *The Need for Improved Cost-Benefit Analysis of Dodd-Frank Rulemaking*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 12, 2012), <http://corpgov.law.harvard.edu/2012/05/12/the-need-for-improved-cost-benefit-analysis-of-dodd-frank-rulemaking> [<http://perma.cc/X7U2-NW78>] (finding that of 192 rules issued under Dodd-Frank, 142 had no quantified cost-benefit analysis, and 57 contained no cost-benefit analysis at all).

146. *Wall Street Reform: Oversight of Financial Stability and Consumer and Investor Protections: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 113th Cong. 21 (2013) (statement of Sen. Mike Crapo) (urging the heads of the major financial agencies to commit to “act on GAO’s recommendation to incorporate OMB’s guidance on [CBA] into your proposed and final rules [and] interpretive guidance”).

147. Jill E. Sommers, Comm’r, CFTC, Remarks Before the Institute of International Bankers, Annual Washington Conference (Mar. 7, 2011), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opasommers-13> [<http://perma.cc/CM94-VFUJ>].

148. Office of the Inspector Gen., *A Review of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act*, CFTC 27 (June 3, 2011), http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf [<http://perma.cc/6V9B-H75G>].

regime. As the London Whale incident shows, the inconsistent regulations promulgated by the SEC and CFTC have made important data about the market exposure of industry participants more opaque and less accessible to regulators. The inconsistent regulations promulgated under Dodd-Frank have thus undermined the law's goal of reducing systemic risk. Although the SEC and CFTC have occasionally acknowledged the costs of these inconsistencies, to date, they have not justified these costs in their rulemakings.

II. REGULATORY HARMONIZATION THROUGH COST-BENEFIT MANDATES AND THE APA

Fortunately, cost-benefit mandates and the APA, both individually and in tandem, require the SEC and CFTC to consider the effects that their rules will have on market fragmentation and liquidity. The SEC and CFTC are statutorily required to justify their rules and respond to proposals that they harmonize their swaps regulations.¹⁴⁹ If the SEC and CFTC cannot provide a reasoned response to comments requesting that they harmonize swaps rules, then they must adjust their rules until they can offer a justification. Granted, neither cost-benefit mandates nor the APA have yet been used to encourage agencies to coordinate.¹⁵⁰ But, as this Part shows, judicial review of interagency coordination follows logically from the current doctrine. This Part argues that judicial review of the agencies' unwillingness to coordinate would not only force the Commissions to offer public justifications for their refusal to harmonize swaps regulations, but that the exercise of offering reasons for regulatory divergences would itself induce the agencies to work together.

A. APA Requirements

Under the APA, an agency's failure to consider alternative regulations should be considered an illegal exercise of authority.¹⁵¹ Section 553 of the APA

149. See *infra* Section II.B.

150. To date, no one has challenged the swap-reporting rules on the ground that the agencies' failure to harmonize violates the APA and their cost-benefit mandates. One case *did* challenge a recent CFTC rule for failure to harmonize with the SEC regime, but that challenge failed because the CFTC had given a fairly robust explanation of its decision to enact different regulations and had issued a notice of proposed rulemaking to harmonize its rule. See *Inv. Co. Inst. v. CFTC*, 720 F.3d 370 (D.C. Cir. 2013).

151. I offer a simplified story of the development of the APA. As others have shown, courts did not always engage in searching review of administrative actions. See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 525 (1985) (discussing the birth and the

requires agencies to describe proposed rules in a general notice of proposed rulemaking,¹⁵² to give third parties the opportunity to comment on proposed rules,¹⁵³ and to respond to relevant comments in a “concise general statement of their basis and purpose.”¹⁵⁴

These requirements were famously articulated in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance*.¹⁵⁵ In *State Farm*, the Supreme Court held that the National Highway and Traffic Safety Administration (NHTSA) acted arbitrarily and capriciously in revoking Standard 208, which required automakers to include passive restraints in all new cars.¹⁵⁶ While the agency had explained why car companies should not be required to install one kind of passive restraint—ignition interlocks—it gave no consideration to an alternative restraint mechanism that it had already proposed: mandating the use of airbags. According to the majority, because the agency “entirely failed to consider” this “important aspect of the problem,” its action was considered arbitrary and capricious under the APA.¹⁵⁷

Indeed, a long line of administrative law cases has established that section 553 requires agencies to respond to comments when implementing new rules.¹⁵⁸ Failure to do so renders agency action arbitrary and capricious, and therefore invalid. As the D.C. Circuit explained in *Home Box Office, Inc. v. FCC*, an agency “has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.”¹⁵⁹

The Supreme Court explained how courts should evaluate agency justifications for major administrative actions in *Citizens To Preserve Overton Park, Inc. v. Volpe*. According to the majority, courts should “consider whether the decision was based on a consideration of the relevant factors and whether there has

development of the hard look doctrine); Kathryn A. Watts, *Proposing a Place for Politics in Hard Look Review*, 119 YALE L.J. 2, 14-29 (2009).

152. 5 U.S.C. § 553(b)(3) (2012).

153. *Id.* § 553(c).

154. *Id.*

155. 463 U.S. 29 (1983).

156. *Id.* at 43.

157. *Id.*

158. See, e.g., *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1470 (7th Cir. 1985); *Ala. Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (noting that “the opportunity to comment is meaningless unless the agency responds to significant points raised by the public”).

159. 567 F.2d at 36.

been a clear error of judgment.”¹⁶⁰ The court went on to clarify that, “[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.”¹⁶¹ In other words, the courts police agency justifications but are prohibited from “substitut[ing their] judgment for that of the agency.”¹⁶² A court that finds an APA violation can remand the rule back to the agency for reconsideration.¹⁶³

The SEC’s and CFTC’s inconsistent regulation of swaps would fail this standard of APA review. As discussed in Part I, regulatory inconsistencies create burdensome costs for market participants and render the rules less effective at reducing systemic risk. Moreover, the industry has already laid the groundwork for APA review through its comments, which repeatedly urge the agencies to harmonize their swaps regulations.¹⁶⁴ If the rules were challenged under the APA, a court should find that the rules were not “based on a consideration of the relevant factors.”¹⁶⁵

Critically, as with any other rulemaking challenge under the APA, a court should remand the rule back to the respective agencies, who would then have the opportunity to resubmit the rules based on additional fact finding.¹⁶⁶ Thus, the reviewing court would not order the agencies to collaborate or otherwise oversee agency efforts to harmonize their rules. Instead, it would merely ensure that the SEC and CFTC have provided reasons for promulgating inconsistent swaps rules. If the reasons passed the APA’s standard of arbitrary and capricious review, the rules would withstand judicial scrutiny. If not, the SEC and CFTC would have to go back to the drawing board or harmonize their regulations. In other words, the court would be constrained to remanding – not invalidating – rules that are insufficiently justified.

^{160.} *Citizens To Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (internal citations omitted).

^{161.} *Id.*

^{162.} *Id.*

^{163.} *See, e.g., Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“When the BIA has not spoken on ‘a matter that statutes place primarily in agency hands,’ our ordinary rule is to remand to ‘giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise.’” (quoting *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam))); *see also* 3 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 18.1 (5th ed. 2010) (“In most cases, successful prosecution of a [petition for] review . . . yields . . . a judicial decision setting aside the agency action and remanding the proceeding for further agency action not inconsistent with the decision of the reviewing court.”).

^{164.} *See* discussion *supra* Section I.B.

^{165.} *Overton Park*, 401 U.S. at 416.

^{166.} *See* PIERCE, *supra* note 163, § 18.1.

B. Cost-Benefit Mandates

Like the APA, cost-benefit requirements in the CFTC's and SEC's organic statutes require the agencies to consider alternative regulatory approaches and to justify their proposed rules against these alternatives. There are three principle differences between cost-benefit analysis and the APA. First, cost-benefit analysis—but not the APA—explicitly requires agencies to consider the economic consequences of a rule as an additional factor when justifying the rule. Cost-benefit mandates therefore force agencies to go through not only the procedural requirement of considering relevant facts, but also the substantive requirement of showing that the benefits of an action outweigh the costs. Although courts still defer to agencies' substantive judgments about the net benefits of a rule, cost-benefit mandates open up room for judges to ensure that agencies give reasoned justifications of the societal usefulness of new rules.¹⁶⁷ Second, cost-benefit mandates ask agencies to consider less costly alternatives even if no one raised those alternatives during notice and comment.¹⁶⁸ Third, an agency must perform cost-benefit analysis only when a specific substantive statute requires that the agency conduct such an analysis. It is therefore not required of every administrative agency.

The authorizing statutes of both the SEC¹⁶⁹ and the CFTC¹⁷⁰ require the agencies to engage in cost-benefit analysis when promulgating new rules. The

167. In *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), for example, the court found that although the SEC's interpretation of a statute was reasonable under *Chevron*, it was necessarily arbitrary and capricious because the agency's analysis of the rule's benefits was unsound. The court therefore assumed that the cost-benefit mandate makes an agency's substantive judgments about the merits of a proposed action an appropriate subject of judicial review. This is also the approach followed in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), and *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005).

168. Note, however, that interested parties have repeatedly mentioned the costs imposed by inconsistent regulations during the comment period of derivatives rules. See *supra* Section I.B.

169. See Registration of Swap Dealers and Major Swap Participants, 77 Fed. Reg. 2613 (Jan. 19, 2012) (codified at 17 C.F.R. pts. 1, 3, 23, 170) ("The goal of this legislation was to reduce risk, increase transparency, and promote market integrity within the financial system . . .").

170. The CFTC's cost-benefit mandate has a similar origin. In 2000, Congress amended the CFTC's organic statute to require the CFTC to consider the economic consequences of new rules. The Commodity Exchange Act, however, is more precise in imposing a cost-benefit mandate. The Commodity Exchange Act states that the CFTC "shall consider the costs and benefits of the action of the Commission," and it expressly specifies that the CFTC must consider certain costs and benefits, including a rule's effects on "efficiency, competitiveness, and financial integrity of futures markets." 7 U.S.C. § 19(a) (2012). As with the SEC, courts have interpreted the CFTC's organic statute to require that the CFTC consider the costs of

Commissions must therefore show that a proposed rule outweighs possible alternatives, regardless of whether a third party has suggested the alternative in a comment. In interpreting the agencies' cost-benefit mandates, courts have emphasized that the agencies must justify their regulations not in relation to a hypothetical state in which other agencies do not exist, but in relation to the existing regulatory landscape. Thus, the SEC's and CFTC's failure to respond to comments requesting regulatory harmonization constitutes an arbitrary exercise of each agency's regulatory authority in a way that independently violates each agency's statutory cost-benefit mandate.

The D.C. Circuit has elaborated the SEC's cost-benefit requirements in a series of cases beginning in the early 2000s. *Chamber of Commerce v. SEC*¹⁷¹ was the first case to interpret section 80a of the Investment Company Act, which instructs the Commission to consider the effect of a new rule on efficiency.¹⁷² In *Chamber of Commerce*, the D.C. Circuit remanded an SEC rule requiring mutual funds' boards of directors to have independent chairmen and to have at least seventy-five percent of their directors be "independent" of management.¹⁷³ The D.C. Circuit held that the rule failed to comply with the SEC's cost-benefit requirement for two reasons. First, the SEC did not quantify the costs of requiring seventy-five percent independent directors.¹⁷⁴ The court held that the SEC should have attempted to quantify this cost even though the Commission did not know whether boards would respond to the rule by increasing the number

proposed regulations. *See Inv. Co. Inst. v. CFTC*, 891 F. Supp. 2d 162, 215 (D.D.C. 2012) ("While the CFTC did not calculate the costs of the Final Rule down to the dollar-and-cent, it reasonably considered the costs and benefits of the Final Rule, and decided that the benefits outweigh the costs."). And the CFTC has acknowledged that it must carefully consider costs when adopting new rules. In September 2010, the CFTC's General Counsel and Acting Chief Economist distributed a memorandum noting that, while the CFTC's authorizing statute does not require it to quantify all costs, it does require the CFTC to consider costs and benefits. The memorandum also noted that recent court decisions had shown that courts will perform searching review to ensure that the Commission has taken this requirement seriously. *See Memorandum from Dan M. Berkovitz & Jim Moser to Rulemaking Teams, supra* note 139.

171. 412 F.3d at 140-42.

172. 15 U.S.C. § 80a-2(c) (2012). This amendment was made in the National Securities Markets Improvement Act, *see* Pub. L. No. 104-290, § 106(c), 110 Stat. 3416, 3425 (1996), which added identical requirements to the other major federal securities laws—the Securities Act of 1933, *see id.* § 106(a), 110 Stat. at 3424 (codified at 15 U.S.C. § 77b(b) (2012)), and the Securities Exchange Act of 1934, *see id.* § 106(b), 110 Stat. at 3424-25 (codified at 15 U.S.C. § 78c(f) (2012)).

173. *Chamber of Commerce*, 412 F.3d at 136.

174. *Id.* at 143-44.

of directors on boards or by replacing incumbent directors.¹⁷⁵ Second, the SEC failed to justify the requirement that these boards have an independent chair.¹⁷⁶ The SEC recognized that newly independent chairs might hire staff, but it declined to quantify those costs because it stated that it could not predict how many chairs would hire staff, or how many staff members each chair would hire. Again, the court found this excuse unavailing.¹⁷⁷

According to the majority, these deficiencies constituted not only a violation of the SEC's specific cost-benefit mandate, but also a violation of the APA. The court held that the SEC violated the APA by failing to consider a proposal raised in comment letters that suggested that mutual funds be required to disclose publicly whether they had independent chairs.¹⁷⁸ The court noted that the SEC justified its decision not to consider this alternative on the ground that the SEC had no obligation to consider every alternative raised, that it did consider other alternatives, and that Congress in the Investment Company Act¹⁷⁹ itself had not relied on disclosure alone to police conflicts of interest in funds.¹⁸⁰ To this, the court responded, "[T]hat the Congress required more than disclosure with respect to some matters governed by the [Investment Company Act] does not mean it deemed disclosure insufficient with respect to all such matters."¹⁸¹

Furthermore, because the SEC did not consider whether an alternative regulatory regime would be equally effective and less costly, the Commission "fail[ed] adequately to consider the costs that mutual funds would incur in order to comply with the conditions."¹⁸² *Chamber of Commerce* therefore interpreted the Securities Exchange Act's requirement that the SEC "consider" a rule's effects on "efficiency"¹⁸³ to imply a robust cost-benefit mandate. Pursuant to this mandate, the SEC must consider not only whether the net benefits are economically justified compared to the status quo, but also whether the costs are justified when compared to less expensive alternatives.

175. The court said that the SEC could have determined "the range within which a fund's cost of compliance [would] fall." *Id.* at 143.

176. *Id.*

177. *Id.* at 144.

178. *Id.*

179. 15 U.S.C. §§ 80a-1 to 80a-64 (2012).

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

181. *Id.*

182. *Id.* at 136.

183. For the relevant provisions of the Securities Exchange Act, see 15 U.S.C. §§ 77b(b), 78c(f), 80a-2(c), 80b-2 (2012).

Since *Chamber of Commerce*, the D.C. Circuit has invalidated a number of financial regulatory actions for failing to satisfy the APA and the agencies' cost-benefit mandates.¹⁸⁴ Concerns about the adequacy of financial regulators' cost-benefit analyses intensified after the D.C. Circuit's opinion in *Business Roundtable v. SEC*,¹⁸⁵ which overturned the SEC's "proxy access" rule. The proxy access rule made it easier for shareholders to nominate outside candidates to become directors of publicly traded companies.¹⁸⁶ Calling the SEC's statutory mandate to perform cost-benefit analysis a "unique obligation," the court held that the agency's "failure to 'appraise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation' ma[de] promulgation of the rule arbitrary and capricious and not in accordance with law."¹⁸⁷ As in *Chamber of Commerce*, the SEC's failure to consider certain costs triggered violations of both the APA and of the Commission's cost-benefit

184. For instance, the D.C. Circuit invalidated a rule requiring hedge fund advisors to register under the Investment Advisors Act, see *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006), a rule exempting broker-dealers from registration requirements under the Investment Advisors Act, see *Fin. Planning Ass'n v. SEC*, 482 F.3d 481 (D.C. Cir. 2007), an order affirming expulsion of a member of the National Association of Securities Dealers, see *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059 (D.C. Cir. 2007), and a rule subjecting a new class of market-linked annuities to securities regulations governed by the SEC, see *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2009). Since *Chamber of Commerce*, only one decision has upheld an SEC regulation—*National Ass'n of Manufacturers v. SEC*. See 748 F.3d 359 (D.C. Cir. 2014), *overruled by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014), and *adhered to on reh'g*, 800 F.3d 518 (D.C. Cir. 2015).

The D.C. Circuit and D.C. District Court have made clear that CFTC rules are subject to the same judicial scrutiny as SEC rules, but they have generally dismissed challenges to CFTC rules on technical and procedural grounds. The court recently held that a CFTC regulation satisfied the APA and met its cost-benefit mandates in *Investment Co. Institute v. CFTC*, 720 F.3d 370 (D.C. Cir. 2013). A challenge to the CFTC's rulemaking establishing standards for calculating margin requirements for cleared swaps was dismissed for lack of standing. *Bloomberg L.P. v. CFTC*, 949 F. Supp. 2d 91 (D.D.C. 2013). The challenge to the CFTC's cross-border guidance in *Securities Industry & Financial Markets Ass'n v. CFTC*, 67 F. Supp. 3d 373 (D.D.C. 2014), was also decided on the technical ground that the provision in question constituted guidance and so was not subject to notice and comment. In another case, the plaintiffs challenged the Commission's approval of a rule of the Chicago Mercantile Exchange that requires the reporting of cleared swaps to the Chicago Mercantile Exchange's swap data repository and the self-certification of a similar rule by ICE Clear Credit, another derivative clearing organization. See *DTCC Data Repository (U.S.) LLC v. CFTC*, 25 F. Supp. 3d 9 (D.D.C. 2014). The court held that the self-certification of the ICE rule was not a reviewable final agency action, but denied the motion with respect to two of the plaintiffs' claims regarding CFTC's approval of the Chicago Mercantile Exchange's rule. *Id.*

185. 647 F.3d 1144 (D.C. Cir. 2011).

186. *Id.* at 1147.

187. *Id.* at 1148 (citing *Chamber of Commerce*, 412 F.3d at 144).

mandate. In language that is relevant to the regulation of swaps, the court observed that “the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.”¹⁸⁸

Though not discussed as frequently as *Chamber of Commerce* or *Business Roundtable*, the case most germane to the financial regulators’ swaps regulations is a 2010 opinion decided by the D.C. Circuit. The case, *American Equity Investment Life Insurance Co. v. SEC*,¹⁸⁹ explicitly held that the SEC could not determine whether an annuities regulation would be effective without first considering how the rule would interact with existing state annuities laws.¹⁹⁰ Specifically, the question in *American Equity* was whether an SEC regulation was warranted given the fact that state law already provided a “baseline level of price transparency and information disclosure.”¹⁹¹ According to the court, the SEC’s failure to show that its rule would improve the existing state law regime constituted a violation of its cost-benefit mandate. The court further held that the SEC’s failure triggered an APA violation as well: “The SEC’s failure to analyze the efficiency of the existing state law regime renders arbitrary and capricious the SEC’s judgment that applying federal securities law would increase efficiency.”¹⁹² *American Equity* therefore established that the existing regulatory landscape can be a relevant fact in APA and cost-benefit analysis.

American Equity was unique in the recent line of D.C. Circuit cases overturning SEC rules for inadequate cost-benefit analysis.¹⁹³ While most of these

188. *Id.* at 1148-49.

189. 613 F.3d at 178-79.

190. An annuity is a financial product in which an individual agrees to pay funds to a financial institution, which, at a later point in time, will make periodic payments to the individual. See *Annuities*, SEC, <http://www.sec.gov/answers/annuity.htm> [<http://perma.cc/US5P-WJN4>].

191. 613 F.3d at 178.

192. *Id.* at 179.

193. The SEC’s cost-benefit requirement comes from a 1996 bill in which Congress amended the SEC’s organic statutes to require the Commission to consider whether proposed regulatory actions would “promote efficiency, competition, and capital formation.” National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424 (codified as amended at 15 U.S.C. § 77b(b) (2012)) (“Whenever pursuant to this subchapter 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 also *id.* at 3425 (codified as amended at 15 U.S.C.

cost-benefit cases criticize the Commission for insufficiently justifying the costs and benefits of its own proposed rules,¹⁹⁴ *American Equity* criticized the SEC for failing to consider whether another regulatory regime rendered an SEC rule redundant. As the court explained, “The SEC could not accurately assess any potential increase or decrease in competition . . . because it did not assess the baseline level of price transparency and information disclosure under state law.”¹⁹⁵

American Equity is remarkable for at least three reasons. First, it is one of very few cases to acknowledge that in certain situations, the effectiveness of a regulation depends on how that regulation interacts with the regulatory apparatus as a whole.¹⁹⁶ Second, it suggests a role for the judiciary—namely, as the regulatory harmonizer of last resort—that a number of scholars have criticized on the ground that judges are ill-equipped to supervise administrative agencies.¹⁹⁷ And third, the court viewed this supervisory function as a logical and unremarkable extension of the court’s duty to ensure that agencies offer publicly accessible reasons to justify new rules.

§ 78c(f) (2012)) (same language). The SEC’s cost-benefit mandate comes from the D.C. Circuit’s interpretation of these statutes. *See, e.g.,* *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) (striking down proxy access rule because the SEC “inconsistently and opportunistically framed the costs and benefits of the rule”); *Am. Equity*, 613 F.3d at 167-68 (striking down an SEC fixed indexed annuities rule because “the SEC failed to properly consider the effect of the rule upon efficiency, competition, and capital formation”); *Chamber of Commerce v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005) (requiring the SEC to conduct cost-benefit analysis based on the statutory requirement that the SEC consider “efficiency” as one of a number of factors in rulemaking).

194. *See Bus. Roundtable*, 647 F.3d at 1144; *Chamber of Commerce*, 412 F.3d at 136.

195. *Am. Equity*, 613 F.3d at 178.

196. Of course, courts have previously looked at the existing regulatory environment to determine the validity of a proposed rule. For example, the Supreme Court famously invalidated an FDA rule classifying tobacco as a drug on the ground that related statutes and regulations suggested that the FDA lacked jurisdiction to regulate tobacco products. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Similarly, the Supreme Court has cited the states’ historical role in regulating the medical profession as evidence that the Attorney General did not have authority to prohibit doctors from prescribing regulated drugs that might be used in physician-assisted suicide. *See Gonzales v. Oregon*, 546 U.S. 243 (2006). But these cases did not determine how regulations interacted in situations of overlapping and duplicative jurisdiction, but rather determined whether an agency had authority to regulate a certain activity at all.

197. *See, e.g.,* Cass Sunstein, *Against Positive Rights*, in *WESTERN RIGHTS? POSTCOMMUNIST APPLICATION* 229 (András Sajó ed., 1996) (“Courts lack the tools of a bureaucracy. They cannot create government programs.”); Freeman & Rossi, *supra* note 25, at 1137 (“Although courts could in theory incentivize interagency coordination with greater deference, we argue that this shift is neither likely to occur under current doctrine nor warranted, and that the main drivers of coordination should be the legislative and executive branches.”).

The underlying facts of *American Equity* ensured that it would not prompt regulatory harmonization. This is because the question in that case was whether the SEC rule was warranted in the first place. The SEC sought to regulate an activity that was already subject to robust disclosure requirements under state law. Appellants sought to show that the SEC rule should be invalidated. Swaps are different. As Part I explained, the SEC and the CFTC oversee different kinds of swaps, and there is no question that the agencies are each statutorily required to issue regulations governing the swaps under their jurisdiction.¹⁹⁸ The question is therefore not whether one of the agencies has jurisdiction over swaps, but whether the SEC and CFTC considered how their rules would interact. As the next Part shows, applying the logic of *American Equity* to the SEC's and CFTC's swaps rules would create a strong incentive for the agencies to collaborate and reduce regulatory inconsistencies.

Three years after *American Equity*, the D.C. Circuit decided *Investment Co. Institute v. CFTC*,¹⁹⁹ which also considered remanding a financial regulation for failure to consider how the rule would interact with another financial regulator's rule. *Investment Co. Institute* considered the legality of a CFTC rule requiring certain companies that had previously been exempt from CFTC registration requirements to register with the CFTC. Appellants argued that the rule should be invalidated because the CFTC "ignored existing SEC regulations that could provide the necessary information about investment companies' activities in derivatives markets" and therefore failed to consider whether "existing regulations made its proposed regulation unnecessary."²⁰⁰ As in *American Equity*, the question was whether the agency had given adequate consideration to the existing regulatory apparatus. In this case, however, the court found that the CFTC had complied with the APA and its cost-benefit mandate. The court distinguished the case from *Business Roundtable* and *American Equity* on the grounds that the CFTC had consulted with the SEC and "surveyed the existing regulatory landscape and . . . found that its registration and reporting requirements could fill gaps in current regulations."²⁰¹ The court also drew attention to the fact that the CFTC planned to reduce inconsistencies between its rule and the SEC's rule, explaining that the CFTC had "issued a notice of proposed rulemaking for a harmonization, the entire purpose of which was to synchronize SEC and CFTC regulations, further distinguishing this case [*Investment*

198. Dodd-Frank, Pub. L. No. 111-203, §§ 721, 761, 124 Stat. 1376, 1658-72, 1754-59 (2010) (codified at 15 U.S.C. § 8302).

199. 720 F.3d 370 (D.C. Cir. 2013).

200. *Id.* at 373.

201. *Id.* at 374.

Co. Institute] from *American Equity* and *Business Roundtable*.”²⁰² Thus, the CFTC satisfied its cost-benefit requirement because it considered how its rule would interact with SEC rules, and because it planned to make further efforts to harmonize its rules and reduce the costs of regulatory inconsistencies.

Investment Co. Institute considered another question that is relevant for SEC and CFTC swaps regulations. Specifically, the court determined that a regulator must consider how its rule will interact with the existing regulatory apparatus—not how the rule would affect a hypothetical regulatory regime that might develop after another regulator acts at a later date. In *Investment Co. Institute*, appellants argued that the CFTC could not measure the costs and benefits of the rule because the CFTC had decided to perform a “multi-step rule-making with some regulations becoming final only after harmonization with SEC regulations.”²⁰³ According to appellants, the CFTC’s failure to delay implementation until it had coordinated with the SEC introduced an unjustifiable level of uncertainty and allowed the CFTC to “count[] benefits that may not materialize . . . while ignoring costs that may result from that rule.”²⁰⁴ Appellants therefore urged the CFTC to adopt its rules only after harmonizing its rule with the SEC’s rule. The D.C. Circuit disagreed. According to the court, the CFTC had “no obligation to consider hypothetical costs that may never arise.”²⁰⁵ The implication of the court’s opinion is that the court will not force agencies to modify the timing and substance of a new rule based on the likelihood that future rules will determine the efficacy of the currently proposed rule. Instead, courts should ensure that agencies have considered the existing regulatory landscape.

Investment Co. Institute therefore seems to favor the first mover when agencies regulate in shared administrative spaces. In the case of swaps, the CFTC may benefit from having enacted a number of swap-reporting rules before the SEC. While the CFTC need not consider costs and benefits that may or may not materialize, the SEC, by virtue of enacting swaps rules after the CFTC, must consider the regulatory apparatus that has emerged as a result of the CFTC’s swaps rules. As a result, *Investment Co. Institute* suggests that the SEC must either make its rules consistent with the CFTC’s rules or explain why it has chosen to take a different path. The CFTC has since amended its reporting rules, but since the CFTC issued these amendments after the SEC promulgated

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 375.

its reporting rules,²⁰⁶ the CFTC would have to consider how these modifications affect the SEC's rules.

As this Part has shown, both the APA and the specific statutory cost-benefit mandates of the SEC and CFTC make clear that these agencies are legally required to consider the broader regulatory environment into which a proposed rule will enter. Regardless of whether an agency must engage in cost-benefit analysis, the agency's failure to consider alternative regulations proposed during notice and comment triggers an APA violation that justifies judicial remand of the rule. If an agency is also governed by a cost-benefit mandate, reviewing courts can engage in a more searching review of the agency's justification of the social utility of the rule, regardless of whether a specific regulatory alternative has been raised in comments.

III. HOW JUDICIAL REVIEW CAN FOSTER INTERAGENCY COLLABORATION

The previous Section explained that the APA and the SEC's and CFTC's cost-benefit mandates require the agencies to consider how a new rule will interact with the existing regulatory apparatus. This Part explains how judicial enforcement of that standard would incentivize interagency collaboration. Critically, courts would not order agencies to act in a certain way, or even to collaborate. Instead, they would simply enforce well-established principles of administrative law that were articulated in iconic cases like *State Farm* and *Overton Park*.

This Part also clarifies how judicial review might work in tandem with executive and legislative attempts to facilitate agency collaboration. I argue that judicial review need not come at the expense of legislative or executive attempts to induce regulatory harmonization. Rather, judicial review would impose a baseline reason-giving requirement that would apply regardless of whether the executive or the legislature also sought to require collaboration. This Section shows that, in certain cases, judicial review may even prove more desirable than executive or legislative intervention. While executive or legislative interventions involve potentially burdensome intrusions from outside parties, judicial review would empower agencies by granting them broad discretion to decide how best to mediate the costs of inconsistencies.

206. Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps (Final Rule), 81 Fed. Reg. 41,736 (June 27, 2016) (codified at 17 C.F.R. pt. 45).

A. Interagency Collaboration

As Part II discussed, established doctrine permits courts to determine whether an agency has given adequate consideration to the ways a rule will interact with the existing regulatory apparatus. The analysis in this Part shows that applying that principle to swaps would encourage the SEC and CFTC to reduce inconsistencies and collaborate when necessary.

The basic point is that by forcing the SEC and CFTC to engage in a more searching analysis of the costs of inconsistent swaps rules, courts would create a powerful incentive for the agencies to harmonize their regulations. Frederick Schauer has shown that the act of giving reasons can discipline the institutions that give those reasons. According to Schauer, “when institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies.”²⁰⁷ On this view, the act of giving reasons can itself discipline agency action by limiting the scope of available discretion. A cynic may criticize agency decisions for being rash or self-interested, but so long as agencies give publicly accessible reasons, administrative choices cannot be justified solely on self-serving grounds. Schauer further notes that “[a] reason-giving mandate will also drive out illegitimate reasons when they are the only plausible explanation for particular outcomes.”²⁰⁸

One can understand recent cost-benefit cases as seeking to realize this ideal of reasoned administration. The D.C. Circuit’s case law leaves little doubt about the SEC’s and CFTC’s cost-benefit mandates: agencies must consider whether alternative regulations would better achieve a statute’s objectives at a lower cost. The law is emphatic, and there is no reason to think that a proposal asking the agencies to consider how their rules interact is any different from the *American Equity* requirement that the SEC consider how its rule fits into the state-governed insurance regulatory regime.²⁰⁹

207. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657-58 (2013); see also Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY 97, 100 (Jon Elster ed., 1998) (“The mere fact that an assembly of individuals defines its task as that of deliberation rather than mere force-based bargaining exercises a powerful influence on the proposals and arguments that can be made.”); *id.* at 104 (“Because there are powerful norms against naked appeals to interest or prejudice, speakers have to justify their proposals by the public interest.”).

208. Schauer, *supra* note 207, at 657-58.

209. *Id.*

I should note that this case law is far from uncontroversial. *Business Roundtable* was criticized for imposing an unrealistic burden on regulatory agencies.²¹⁰ Academic commentary focused on the court's willingness to force the SEC to do the impossible and provide an accurate quantitative assessment of the rule's costs.²¹¹ Specifically, scholars criticized Judge Ginsburg's admonition that the SEC's cost-benefit assessments "had no basis beyond mere speculation" because the agency failed "to estimate and quantify the costs it expected companies to incur"²¹²

However, one need not adopt Judge Ginsburg's claim that cost-benefit analysis requires that agencies quantify costs to conclude that the SEC's and CFTC's failure to account for each other's swaps regulations has jeopardized the lawfulness of their rules. In fact, the SEC and CFTC swaps regulations would fail even a relaxed version of *Business Roundtable*. Part II showed that current law requires agencies to give reasons for costly inconsistencies. To satisfy this requirement, the agencies are obligated to consider the rules' effects on the current regulatory regime, including their marginal benefits and costs in light of existing regulations. They have failed to do this. Thus, if someone challenged their swaps rules, it is in a court's legal power to remand the agencies' swaps rules for reconsideration. If the Commissions cannot give a plausible explanation for an inconsistency, they would have to harmonize their rules. As a result, the act of requiring reasons would itself prompt greater interagency collaboration.

210. Coates, *supra* note 23, at 917-20; James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1813, 1824 (2012) ("[T]he level of review invoked by the D.C. Circuit in *Business Roundtable* and its earlier decisions is dramatically inconsistent with the standard enacted by Congress [T]he Review Standard [that is, the requirement that the SEC consider the effect of a rule upon efficiency, competition, and capital formation] does not explicitly require the SEC to specify the costs of any proposed rule, to engage in rigorous analysis, or even to engage in cost-benefit analysis [I]t seems unlikely that the Review Standard was truly designed to establish more than a thoughtful analysis of the proposed rule's potential effects."); Gordon, *supra* note 24, at 370-71; *see also* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 316 (2013) ("The court appears to have applied a new burden of proof—the opposite of deference" (citations omitted)). A report from Better Markets asserted that the D.C. Circuit in *Business Roundtable* used cost-benefit analysis to "repeatedly substitute[] its own judgment for that of the agency." *Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC*, BETTER MKTS. 50 (July 30, 2012), <http://www.bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf> [<http://perma.cc/82CT-FSP8>].

211. *See* sources cited *supra* note 210.

212. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1150 (D.C. Cir. 2011).

This approach is precisely the standard Judge Ginsburg applied in *Business Roundtable*. The debate about whether it is appropriate to force agencies to quantify their cost-benefit analyses elides a more general point, which is that the D.C. Circuit struck down the SEC's proxy rules because the agency had failed to "weigh the rule[s'] costs and benefits," particularly as they related to the existing regulatory environment. And "[w]ithout th[at] crucial datum, the Commission ha[d] no way of knowing whether" its swaps rules would have a "net benefit."²¹³

Similarly, in the case of swaps, the SEC and CFTC have failed to account for a "crucial datum," which is whether their rules will be effective given the regulatory environment created by Dodd-Frank. Without that piece of information, the agencies have no way of knowing if their rules will be effective. Thus, when considering an obviously inconsistent regulation, the SEC and CFTC must provide some justification for the inconsistencies. As discussed in Part I, neither agency has done so in more than a cursory manner, even when confronted with relevant comments from the industry.²¹⁴ The agencies have neither "explain[ed] why those costs could not be quantified," nor have they "respond[ed] to substantial problems raised by commenters."²¹⁵ In light of *State Farm*, *Business Roundtable*, and *American Equity*, these deficiencies likely violate the APA and the agencies' statutory cost-benefit mandates. If the agencies continue to be unable to justify unilateral action, they have failed to justify the incremental costs of regulatory inconsistencies and must adopt the proposed alternative and harmonize their rules.

B. Why Judges?

Scholars have generally argued that the executive and the legislative branches are better suited than the judiciary to foster interagency collaboration. Rather than claim that courts do not have the legal authority to force agencies to work together, scholars who adopt this position argue that courts are poorly equipped to induce interagency collaboration. In a recent article describing the difficulties of overlapping swap jurisdiction, Jody Freeman and Jim Rossi argue that Congress and the President are best able to promote interagency collaboration: "Although courts could in theory incentivize interagency coordination with greater deference . . . this shift is neither likely to occur under current doc-

²¹³. *Id.* at 1153 (citation omitted).

²¹⁴. See discussion *supra* Part I.

²¹⁵. *Bus. Roundtable*, 647 F.3d at 1149.

trine nor warranted . . . the main drivers of coordination should be the legislative and executive branches.”²¹⁶

Freeman and Rossi thus regard the President and Congress, but not the courts, as possessing powerful tools that can be used to motivate agencies to coordinate. They suggest that the Financial Stability Oversight Committee (FSOC) and, to a lesser extent, OIRA, are best equipped to regulate financial transactions.²¹⁷ After all, FSOC was established in part to facilitate coordination among the financial regulators,²¹⁸ and section 112 of Dodd-Frank directs FSOC to monitor and respond to emerging risks to the stability of the U.S. financial system, including risks arising from the swaps market. To this end, Dodd-Frank instructs the Committee to “facilitate information sharing and coordination among the member [and other] agencies”; “identify” potentially perilous “gaps in regulation”; “identify systemically important financial market utilities and payment, clearing, and settlement activities”; recommend that member financial regulators impose certain “standards and safeguards”; and provide a forum for examining changes in markets and regulation and undertaking member dispute resolution.²¹⁹ Similarly, Executive Order 12,866 provides that significant regulatory actions must be submitted to OIRA for review.²²⁰

But Freeman and Rossi overlook the fact that, as a practical matter, executive and legislative efforts to foster interagency collaboration may be poor substitutes for judicial review because such efforts have often produced disappointing results. To date, FSOC has not participated in the swaps rulemaking process.²²¹ In fact, in November 2011, the GAO found that the agency had played only a limited role in providing coordination among its members, which

216. Freeman & Rossi, *supra* note 25, at 1137.

217. See, e.g., Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation* 27 (N.Y. Univ. Pub. Law & Legal Theory Working Papers, Paper No. 554, 2016), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1556&context=nyu_plltwp [<http://perma.cc/HG7R-YYUZ>] (defending the view that FSOC and OIRA should use cost-benefit analysis to discipline agencies and serve a coordinating role).

218. Dodd-Frank, Pub. L. No. 111-203, § 112(1)(e), 124 Stat. 1367, 1395 (2010).

219. 12 U.S.C. § 5322 (2012).

220. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

221. See *Davis Polk Regulatory Tracker*, DAVIS POLK, <http://www.regulatorytracker.com/regtracker> [<http://perma.cc/YH8T-QDQE>]. All of the swaps rules have been promulgated by the SEC or the CFTC, and the vast majority of these rules do not even mention FSOC. See *supra* notes 51-53 and accompanying text.

include the SEC and CFTC.²²² The report also noted that the coordination tools that FSOC had developed were of “limited usefulness”²²³ and recommended that FSOC “establish formal coordination policies.”²²⁴ Although FSOC broadly agreed with the report’s conclusions,²²⁵ a GAO report from September 2012 found that the agency had failed to enact meaningful reforms.²²⁶ The report reiterated that FSOC should create “formal collaboration and coordination policies.”²²⁷ Despite these continued admonitions, swaps rules remain bifurcated. In September 2014, the GAO reiterated that FSOC has “not adopt[ed] practices to coordinate rulemaking across member agencies”²²⁸

Nor has OIRA fared any better. OIRA has made the CFTC’s cost-benefit analyses longer, but it has not prompted the CFTC to consider how its regulations will interact with the SEC’s rules. This failure may be because the SEC has not worked as closely with OIRA, or it may result from OIRA’s lack of expertise in financial regulation. As Freeman and Rossi point out, “[I]t is not clear that OIRA, as currently constituted, is optimally positioned to sponsor coordination efforts that depend heavily on matters of legal interpretation or on substantive policy considerations beyond economic efficiency.”²²⁹ This concern likely applies to OIRA’s expertise with respect to the swaps market. And while the agreement between OIRA and the CFTC has generated more robust cost-benefit analyses, it has not prompted the CFTC to coordinate with the SEC or to consider the effects of inconsistent regulations.

Thus, not only are judges empowered to enforce coordination, but in many cases, they are also the most viable option for increasing agency collaboration. Further, as a doctrinal matter, if neither OIRA nor FSOC succeeds in forcing

222. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-151, DODD-FRANK ACT REGULATION: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION 26 (2011), <http://www.gao.gov/assets/590/586210.pdf> [<http://perma.cc/DR4K-92GT>].

223. *Id.* at 27.

224. *Id.* at 39.

225. Letter from Amias Gerety, Deputy Assistant Sec’y, Office of Fin. Stability Oversight Council, to A. Nicole Clowers, Dir., Fin. Mkts. & Cmty. Inv., U.S. Gov’t Accountability Office (Oct. 28, 2010), *reprinted in* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 222, at 105-06.

226. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-866, FINANCIAL STABILITY: NEW COUNCIL AND RESEARCH OFFICE SHOULD STRENGTHEN THE ACCOUNTABILITY AND TRANSPARENCY OF THEIR DECISIONS (2012), <http://www.gao.gov/assets/650/648064.pdf> [<http://perma.cc/QP3A-M62H>].

227. *Id.* at 55.

228. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-873T, FINANCIAL STABILITY OVERSIGHT COUNCIL: STATUS OF EFFORTS TO IMPROVE TRANSPARENCY, ACCOUNTABILITY, AND COLLABORATION (2014), <http://www.gao.gov/assets/670/665851.pdf> [<http://perma.cc/5NGZ-B8XK>].

229. See Freeman & Rossi, *supra* note 25, at 1200.

the agencies to abide by their APA and cost-benefit requirements, then the courts can and should intervene.²³⁰

Nor would judicial oversight prevent, or even hinder, other government bodies from helping agencies coordinate their rules. If FSOC or OIRA can succeed in fostering collaboration between the SEC and CFTC, they would thereby succeed in helping the financial regulators satisfy their APA and cost-benefit mandates. But insofar as FSOC and OIRA do not effectively prompt interagency coordination, the judiciary has a role to play in enforcing the reason-giving requirement. To reiterate, judges would not order agencies to adopt a certain rule or regulatory approach—they would simply ensure that agencies provide public justifications for promulgating inconsistent regulations.

Freeman and Rossi also incorrectly assume that the courts should not play a role in resolving disputes between different regulators. In fact, Rossi and Freeman conceive of judicial review as a possible obstacle for agency coordination because insufficient deference might stymie executive efforts to get regulators to work together.²³¹ As I argued in the previous Section, this vision of the judiciary misrepresents judges' role in administrative law. Under my proposal, the courts would not tell agencies how to act. Rather, they would use cost-benefit requirements and the APA to enforce the reason-giving requirement in seminal cases like *Overton Park*²³² and *State Farm*.²³³ Note that this form of judicial action would empower agencies by allowing them to decide for themselves how to work together. Whereas legislative or executive supervision involves an authority telling agencies how to act, the judicial scrutiny required by cost-benefit analysis and the APA would preserve agencies' discretion to decide the most effective way to collaborate.

Forcing agencies to consider the effects of regulatory divergences also preserves some of the beneficial effects of overlapping regulatory oversight. Martin Landau has argued that it is often desirable for multiple regulators to oversee the same products.²³⁴ Landau defends overlapping regulations because they create a bias toward overprotection. Because multiple regulators often oversee the same financial instrument, duplicative regulations can check bad behavior

230. See *supra* Part II.

231. Freeman & Rossi, *supra* note 25, at 1137.

232. 401 U.S. 402 (1971).

233. 463 U.S. 29 (1983).

234. See Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346 (1969) (defending redundancy in public administration); see also Eric Biber, *Too Many Things To Do: How To Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 5-6 (2009) (arguing that multiple-goal agencies can be monitored by competing agencies in the context of public land management).

by establishing backstops that protect against regulatory failures.²³⁵ The type of judicial review I envision is fully compatible with justifiable regulatory divergences. In requiring agencies to justify inconsistent regulations, I do not argue that agencies could never enact divergent regulations. But when regulated parties criticize a regulatory divergence, the agency must provide a reasoned justification for the difference. And of course, the judiciary would not be permitted to consolidate multiple agencies or otherwise force formal collaboration. The proposal here is far narrower. It would not compromise the benefits of having multiple perspectives when those benefits are justifiable.

Judicial review of regulatory divergences is also compatible with the views of scholars who defend regulatory fragmentation in certain cases for promoting administrative experimentation. According to some scholars, redundant oversight is desirable because it allows agencies to test different regulatory approaches and encourages agencies to function like laboratories, devising original solutions to difficult administrative challenges.²³⁶ For example, Neal Katyal has argued that the overlapping antitrust authority of the Federal Trade Commission and the Department of Justice can be justified on these grounds.²³⁷ Similarly, judicial review need not preclude financial regulators from crafting creative solutions to regulating the swaps market. Agencies are required to justify regulatory differences and to defend new approaches with sound logic. Whereas consolidating or eliminating agency functions might deter interagency “competition” and prevent agencies from becoming “laboratories” for creative policy solutions,²³⁸ coordinating agency action through judicial review could preserve agency independence while channeling competition in productive ways. It may even prompt agencies to offer public reasons for decisions that use novel approaches.

Perhaps the most challenging critique is that my prescriptive view could contribute to rulemaking “ossification.” Ossification refers to the fact that searching judicial review has occasionally prevented agencies from engaging in meaningful policymaking. Jerry Mashaw and David Harfst, for example, have shown that the judiciary’s willingness to remand rules promulgated by NHTSA pushed the agency away from rulemaking and into “case-by-case adjudication,

²³⁵. Note that although this critique applies to many agencies that oversee a product, this critique does not apply directly to swaps. As I explain in Part I, the SEC regulates certain types of swaps, and the CFTC regulates other kinds of swaps. Thus, the SEC would never establish additional checks on CFTC-regulated swaps.

²³⁶. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2325 (2006).

²³⁷. *Id.*

²³⁸. See *id.*

which requires little, if any, technological sophistication and which has no known effects on vehicle safety.”²³⁹ According to Mashaw and Harfst, judicial scrutiny that required NHTSA to justify safety rules with reasons led the agency to abandon rulemaking in favor of a less effective alternative—recalling automobiles after cars were found hazardous.

It is conceivable that my proposal would give courts further ammunition to invalidate agency actions. However, scholars have generally responded to the problems of agency ossification not by recommending the elimination of the reason-giving requirement, but by suggesting modifications to accommodate the realities of agency policymaking. Justice Elena Kagan and Professor Kathryn Watts, for example, have argued that permitting agencies to appeal to certain political reasons would de-ossify rulemaking by giving agencies additional ways to justify new rules.²⁴⁰ Others have supported relaxing the technical requirements of rulemaking without getting rid of the reason-giving requirement.²⁴¹ Moreover, the alternative to a reason-giving requirement is administrative rulemaking without judicial review. This is because, unless agencies provide reasons, courts will have no basis upon which to police agency discretion. Thus, critics who fear ossification generally advocate not abolishing the APA’s reason-giving requirements, but rather adapting the reason-giving requirement by weakening or otherwise modifying the standard of judicial review so that courts can supervise administrative action without undermining administrative efficiency.²⁴²

239. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 147-71 (1990).

240. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2382-83 (2001) (arguing that permitting politics to play a role in hard look review would help to respond to the ossification charge often levied against hard look review because “courts would have an additional reason to defer to administrative decisions in which the President has played a role,” and hence courts would reverse agency decisions less often); Watts, *supra* note 151.

241. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1401 (1992) (attributing the “Herculean effort of assembling the record and drafting a preamble” to heightened judicial scrutiny of rulemaking); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1997) (suggesting that the stringent judicial gloss on the APA has “transform[ed] the simple, efficient notice-and-comment process into an extraordinarily lengthy, complicated, and expensive process,” discouraging agency use of rulemaking).

242. Note that there may still be congressional and presidential oversight, but such oversight is often opaque. In a 2014 report on cost-benefit analysis, the GAO found that in seventy-two percent of cases, OIRA gave no explanation for designating a rule as significant. See *Federal Rulemaking: Opportunities Remain for OMB To Improve the Transparency of Rulemaking Processes: Testimony Before the H. Subcomm. on Gov’t Operations of the Comm. on Oversight & Gov’t Reform*, 114th Cong. 2 (2016) (statement of Michelle Sanger, Dir. of Strategic Issues, GAO), <http://www.gao.gov/assets/680/675810.pdf> [<http://perma.cc/8MAV-8MZ2>].

Of course, this model of judicial review is not a panacea. One possible problem is that the SEC and CFTC could manipulate their cost-benefit analyses to promote their own agendas.²⁴³ But judicial review is unlikely to aggravate the general problem of agency inconsistencies or false justifications. Instead, it promises at worst a partial solution. At present, the SEC and CFTC have barely considered the costs of inconsistent swaps regulations. This lack of oversight has left the agencies free to pursue their own agendas. Justifying inconsistencies would at least make them consider the costs of those inconsistencies. If the agencies thought that such justifications were unjustifiably costly, they might choose to avoid the headache of defending their inconsistencies and promulgate consistent regulations. And since the alternative could be a world with few corrective options and no oversight, the possibility of an imperfect solution is preferable to no solution at all.

C. Models for SEC and CFTC Swap Harmonization

The previous Section showed that judges would not substitute their judgment for that of the regulators, but would instead allow the agencies to choose for themselves how to collaborate most effectively. This Section describes how regulators in other arenas have found creative ways to work together to reduce the burdens of overlapping and duplicative regulations. If the SEC or CFTC determined that divergent swaps regulations were unjustifiable, the agencies could follow any one of several regulatory harmonization models.

One approach that the SEC and CFTC could choose is “substituted compliance,”²⁴⁴ which they have done in the past when issuing commodities regulations. Substituted compliance occurs when compliance with one agency’s rules constitutes compliance with the other’s.²⁴⁵ For example, in 2013, the CFTC explained that commodity pool operators that had registered with the SEC would not have to register with the CFTC because the two agencies’ regimes were designed “to achieve substantially similar goals.”²⁴⁶ The CFTC emphasized that it approved this “substituted compliance” approach because it felt “that general

^{243.} Cf. Robert Haveman, *The Chicago O’Hare Expansion: A Case Study of Administrative Manipulation of Benefit-Cost Principles*, 23 RES. L. & ECON. 183, 184-86 (2007) (describing the FAA’s use of cost-benefit analysis to justify its preexisting agenda).

^{244.} See Harmonization of Compliance Obligations for Registered Investment Companies Required To Register as Commodity Pool Operators, 78 Fed. Reg. 52,308, 52,308-10 (Aug. 22, 2013) (codified at 17 C.F.R. pt. 4) (allowing certain commodities companies already registered with the SEC to use their SEC registration to satisfy the CFTC’s requirements).

^{245.} *Id.*

^{246.} *Id.*

reliance upon the SEC's compliance regime . . . should provide market participants and the general public with meaningful disclosure."²⁴⁷ The CFTC thus adopted the very approach that MarketAxess suggested in order to harmonize SEF registration requirements.²⁴⁸ The CFTC has also used this method to harmonize its swap clearing rules with international regulators. For example, in February 2016, the CFTC recognized that the European regulators' rules were functionally equivalent to its own and declared that market participants could satisfy Title VII's clearing requirements by using international clearing corporations.²⁴⁹

Agencies can engage in substituted compliance formally through rulemaking, or informally through Memoranda of Understanding (MOUs). A prominent example of this form of collaboration is the "horizontal merger" guidelines that the DOJ and FTC released in 2010. The guidelines explain how the two agencies will evaluate the competitive impact of mergers under federal antitrust law.²⁵⁰ The guidelines were the result of a proactive effort to avoid incompatible antitrust enforcement actions. Freeman and Rossi praised the guidelines for transparently "signal[ing] the agencies' current thinking regarding enforcement policy and alert[ing] the regulated community to what types of mergers will attract the most scrutiny."²⁵¹

Under substituted compliance, the SEC, which has typically issued new swaps regulations after the CFTC, could permit companies to comply with only the CFTC's registration rules. The SEC could also modify its rules governing the establishment and maintenance of SEFs to allow compliance with CFTC rules to satisfy SEC SEF regulations. The SEC would simply state that participants that trade security-based swaps on SEFs effectively comply with its regulations if the participants follow the CFTC's rules.

Agencies have also enacted rules jointly,²⁵² as the SEC and CFTC did when defining the terms "swap" and "security-based swap."²⁵³ Agencies have even

247. *Id.* at 52,310.

248. *See supra* Section I.B.

249. Ed Beeson, *CFTC, Europe Hatch Accord on Clearing Rules*, LAW360 (Feb. 10, 2016, 9:41 AM), <http://www.law360.com/securities/articles/757561> [<http://perma.cc/FZ4U-5BZU>].

250. *Horizontal Merger Guidelines*, U.S. DEP'T JUST. & U.S. FED. TRADE COMMISSION (Aug. 19, 2010), <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [<http://perma.cc/GCU5-B46B>].

251. Freeman & Rossi, *supra* note 25, at 1165.

252. The financial industry has seen the most joint rules. *See, e.g.*, Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51,429, 51,429 (Aug. 20, 2010) (codified at 17 C.F.R. pts. 1, 240); Community Reinvestment Act Regulations, 74 Fed. Reg. 31,209, 31,209 (proposed June 30, 2009) (to be codified at 12

authorized a single agency to write a rule that they all agree to enforce.²⁵⁴ Such approaches would clearly reduce the problem of inconsistent swaps regulations. If the SEC and CFTC issued rules together, or if one agency agreed that it would adopt the other agency's rules, then regulated parties would be required to follow only one set of swaps rules.

"[D]efault position requirements"²⁵⁵ and "concurrence requirements"²⁵⁶ are two other options. Default position requirements occur when "Congress . . . mak[es] adherence to the interested agency's suggestions the default position from which the action agency may deviate only by showing that adherence to such suggestions would interfere with the action agency's legal duties."²⁵⁷ Concurrence requirements occur when Congress authorizes one agency to set a baseline regulatory standard from which another agency must not deviate; they essentially constrain the scope of the latter agency's decisions in certain domains.²⁵⁸

C.F.R. pts. 25, 228, 345, 563e) (issuing a notice of proposed rulemaking for the joint revision of rules by the Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, and Office of Thrift Supervision to implement the Community Reinvestment Act); Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,405 (Nov. 18, 2008) (codified at 12 C.F.R. pt. 233, 31 C.F.R. pt. 132) (promulgating joint rules of the FRB and the Department of the Treasury to implement the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-67 (2012)); Risk-Based Capital Standards; Recourse and Direct Credit Substitutes, 62 Fed. Reg. 59,944, 59,944 (Nov. 5, 1997) (codified at 12 C.F.R. pts. 3, 208, 225, 305, 325, 567). The regulated community in the financial sector has tended to support joint rulemaking because of its potential to increase uniformity. *See, e.g.*, Letter from Floyd E. Stoner, Exec. Editor, Am. Bankers Ass'n, to Barney Frank, Chairman, House Comm. on Fin. Servs., and Spencer Bachus, Ranking Member, House Comm. on Fin. Servs. (Sept. 18, 2007), [http://www.aba.com/archive/Letters_Congress_Archive/Letters%20to%20Congress%20Archive/FHA-ABA LetterSenate091807.pdf](http://www.aba.com/archive/Letters_Congress_Archive/Letters%20to%20Congress%20Archive/FHA-ABA%20LetterSenate091807.pdf) [<http://perma.cc/FZ95-64S5>] ("Joint rulemaking is important to ensure uniformity of regulation for all insured depository institutions.").

253. *See* sources cited *supra* note 61.

254. This is precisely what the Pipeline and Hazardous Materials Safety Administration, the Federal Aviation Administration, and the Federal Motor Carrier Safety Administration do. These agencies have authorized Pipeline and Hazardous Materials Safety Administration to promulgate rules on behalf of all three agencies.

255. For a fuller discussion of these requirements, see Freeman & Rossi, *supra* note 25, at 1159.

256. *Id.* at 1160.

257. *Id.* at 1159.

258. For example, the Nuclear Waste Policy Act, 42 U.S.C. §§ 10,101-270 (2012), grants authority to the EPA to promulgate environmental standards regulating releases of radioactive materials in nuclear waste repositories and requires that the Nuclear Regulatory Commission's repository-licensing decisions "not be inconsistent" with those standards. *Id.* § 10,141(a), (b)(1)(C).

Note that *Investment Co. Institute*, which held that the CFTC did not have to consider the possibility that a future rule might undermine the effectiveness of its own rule, suggests that the first regulator may create an implicit default position requirement by declaring that an agency need not consider how future rules might affect its own rule. Because the CFTC promulgated its reporting rules and its SEF rules before the SEC did, it need not explain why its rule diverged from the SEC's. A corollary of my argument is therefore that when one agency enacts a rule before the other agency, as the CFTC has done in promulgating swaps rules, that agency creates a default position from which the second agency can diverge only if it gives a reasoned justification for doing so. Of course, the SEC would not be required to adopt and enforce the same regulation as the CFTC – as agencies subject to congressionally mandated default position requirements must. The SEC would, however, have to show that its divergences from the CFTC's rules are justified, and the APA and cost-benefit requirements would effectively circumscribe the possible regulations the SEC can adopt.²⁵⁹

As these examples demonstrate, agencies can harmonize regulations in various ways. And although many of these approaches result from congressional or executive mandates, they model how the SEC and CFTC could satisfy APA and cost-benefit requirements after judicial review. As the preceding analysis of swaps regulations has shown, the alternative may not only be undesirable, but also illegal.

CONCLUSION

In his State of the Union Address in 2011, President Barack Obama publicly acknowledged the problem of overlapping regulation:

There are 12 different agencies that deal with exports. There are at least five different agencies that deal with housing policy. Then there's my favorite example: the Interior Department is in charge of salmon while they're in fresh water, but the Commerce Department handles them

²⁵⁹. One may argue that pressure to be the first to regulate creates an undesirable pressure to regulate quickly and therefore poorly. My response to this argument is that haste may not in this case make waste. The regulators would still be subject to judicial scrutiny, and so they could not pass arbitrary regulations. Further, agencies would still be subject to traditional non-judicial checks and balances that hold them accountable. Agency heads still have to appear before Congress and subject new rules to OIRA review. Thus, the pressure to regulate first may push agencies to regulate more efficiently, and because a number of checks exist to make sure agencies think through new regulations, this pressure may not make regulations sloppier.

when they're in saltwater. I hear it gets even more complicated once they're smoked.²⁶⁰

In the current regulatory climate, swaps and salmon suffer a common fate. As the Comptroller General of the United States has stated, “Virtually all of the results that the federal government strives to achieve require the concerted and coordinated efforts of two or more agencies.”²⁶¹ Three twenty-first century events—the U.S. government’s failure to prevent the terrorist attacks on September 11, 2001, the Bush Administration’s response to the devastation caused by Hurricane Katrina in 2005, and the Obama Administration’s response to the BP oil spill in the Gulf of Mexico in 2010—have drawn attention to the pressing need for greater coordination among our administrative agencies.²⁶² Scholars have also criticized agencies’ failure to coordinate as causing broader policy failures such as energy shortages.²⁶³ Although some have been pessimistic about courts’ abilities to encourage cooperation that would minimize the costs of regulatory inconsistencies, these academics have failed to account for the fact that the ordinary tools of judicial review can be used to force agencies to consider the ways that their actions interact. But courts can—and should—play an important role in fostering interagency coordination when the other branches fail.

260. President Barack H. Obama, Remarks by the President in State of Union Address (Jan. 25, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address> [<http://perma.cc/A47Z-ST27>].

261. *Managing for Results: Using GPRA To Help Congressional Decisionmaking and Strengthen Oversight: Testimony Before the Subcomm. on Rules and Org. of the H., Comm. on Rules*, 106th Cong. 19 (2000) (statement of David M. Walker, U.S. Comptroller Gen.), <http://www.gao.gov/assets/110/108330.pdf> [<http://perma.cc/8QFS-5EFU>].

262. See, e.g., Michael N. Widener, *Bridging the Gulf: Using Mediated, Consensus-Based Regulation To Reconcile Competing Public Policy Agendas in Disaster Mitigation*, 74 ALB. L. REV. 587, 598–99 (2011); *The 9/11 Commission Report*, NAT’L COMMISSION ON TERRORIST ATTACKS UPON UNITED STATES 400–03 (2004), <http://www.911commission.gov/report/911Report.pdf> [<http://perma.cc/3HY8-Q858>]; Frances Fragos Townsend et al., *The Federal Response to Hurricane Katrina: Lessons Learned*, DEP’T HOMELAND SECURITY & COUNTERTERRORISM 52–55 (2006), <http://library.stmarytx.edu/acadlib/edocs/katrinawh.pdf> [<http://perma.cc/UV52-UZW4>].

263. See Peter Huber, *Electricity and the Environment: In Search of Regulatory Authority*, 100 HARV. L. REV. 1002, 1002–03 (1987).