WHO'S POLICING THE FINANCIAL COP ON THE BEAT? A CALL FOR JUDICIAL REVIEW OF THE CONSUMER FINANCIAL PROTECTION BUREAU'S NON-LEGISLATIVE RULES

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Abstract

This article addresses administrative power in the context of financial services. The Dodd-Frank Act created the Consumer Financial Protection Bureau (CFPB), an independent executive agency, to oversee this space. The CFPB issues interpretations and other guidance documents of consumer financial regulations it administers. This article discusses whether courts should defer to the CFPB's issuances in certain contexts. The claim in this article is that courts should not defer to the Bureau's interpretations and other regulatory guidance documents that seek to interpret regulations the CFPB administers. This article argues that the CFPB has been issuing "legislative," or "substantive" rules while avoiding the notice-and-comment process. This practice by the CFPB has been used to regulate fair lending in the context of automotive finance. Through a case study of Ally Financial, Inc., this article illustrates how the Bureau has enforced its interpretation of fair lending through adjudication of its own interpretations.

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I. Introduction

Should a judge defer to a government agency's interpretation of a regulation this agency administers? Should the answer to this question depend on whether the interpreted regulation involves the environment, automobile safety, or banking? If you say courts should defer, how do you determine what level of deference they should give? Here, too, does it matter what subject this regulation addresses?

Far from an academic exercise, these questions go to the heart of the administrative power. This power is especially pronounced in the area of financial services, where a newly created self-described "cop on the beat," namely, the Consumer Financial Protection Bureau (Bureau), runs the regulatory regime.[2] The Bureau is an independent executive agency[3] that derives its funding, similar to other bank regulators,[4] from outside the usual congressional

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[2] *See Welcome to the Consumer Financial Protection Bureau (CFPB)—Featuring Narration by Ron Howard*, YOUTUBE (Feb. 2, 2011), https://www.youtube.com/watch?v=1V0Ax9OIc84.

[3] Administrative law scholars distinguish between "independent" and "executive" agencies. *See* KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 5 (2d ed. 2014). Unlike executive agencies, independent agencies are "somewhat insulated from presidential control." *Id.* Moreover, executive agencies are usually led by a single director who can be removed from his position by the president's decision, whereas independent agencies are usually headed by a "group of individuals . . . whose membership is closely balanced between the two major political parties" who the president can usually remove only "for cause" and whose service terms are usually "fixed and staggered." *Id.* As a result of the differing structures, independent agencies tend to enjoy "more freedom than executive agencies to develop and to implement their own policies." *Id.* The Bureau is led by one director, who is nominated by the president and approved by the Senate to serve a five year term. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C § 5491(b)-(c) (2012). In this sense the Bureau is an executive agency. But the Bureau's director can only be removed for cause, i.e., "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3). In this sense the Bureau is an independent agency. Thus the Bureau is a hybrid and combines features of both forms.

[4] *See, e.g.*, *Budget and Strategic Planning*, NAT'L CREDIT UNION ADMINISTRATION, http://www.ncua.gov/About/Pages/budget-strategic-planning.aspx [https://perma.cc/4NS8-M5U6?type=source]; *Who is the FDIC?*, FED. DEPOSITORY INS. CORP. (2014), https://www.fdic.gov /about/learn/symbol/ [https://perma.cc/7QRR-XVY2]; *Who Owns a Federal*

appropriations process.[5] The Bureau issues interpretations and other guidance documents of the consumer financial regulations it administers.[6] So when this Bureau issues interpretations and guidance documents, should courts simply defer to the Bureau?

My claim is straightforward: courts should not defer to the Bureau's interpretations and other regulatory guidance documents that seek to interpret regulations this agency administers. Judicial deference—if given to the newly created Bureau—will not only stifle financial innovation, but more importantly undermine the legal certainty and rule of law in the important area of consumer financial protection law.[7] I will offer a case study of the Bureau's use of interpretative documents to effectuate changes in law in the area of auto lending, namely, the Bureau's use of bulletins.[8]

Though created with noble goals in mind—to protect consumers and ensure fair competition within various financial services and banking industries—the practice of relying on interpretative rules to effectuate regulatory changes can raise serious

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Reserve?, BOARD GOVERNORS FED. RESERVE BOARD, http://www.federalreserve.gov/faqs/about_14986.htm [http://perma.cc/CBF2-XVGH]; *About the OCC*, OFF. COMPTROLLER CURRENCY, http://www.occ.gov/about/what-we-do/mission/index-about.html [http://perma.cc/EW48-XU7G].

[5] *See* 12 U.S.C § 5491(b)-(c); CCH ATTORNEY-EDITOR STAFF, DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 490 (2010) (explaining the status of the Consumer Financial Protection Fund).

[6] Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 348 (2012) (summarizing the Bureau's rulemaking powers).

[7] As a side note, that Congress amended the Fair Credit Reporting Act to require courts to give deference to the agencies that can enforce that law "as if that agency were the only agency authorized" to enforce it does not answer the question whether such mandated deference is constitutionally permissible. *See* Fair Credit and Reporting Act, 15 U.S.C. § 1681(e)(2) (2012) ("Notwithstanding any power granted to any Federal agency under this title, the deference that a court affords to a Federal agency with respect to a determination made by such agency relating to the meaning or interpretation of any provision of this title that is subject to the jurisdiction of such agency shall be applied as if that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of this title.").

[8] *See infra* Part III.B (addressing the case against Ally Financial, Inc. and Ally Bank).

concerns, ranging from constitutional violations of separation of powers to undermining legal certainty and the rule of law. This article, believed to be the first of its kind on the Bureau's use of interpretative rules, seeks to explore both the larger practice of agencies' issuing interpretative rules and the specific consequences of the Bureau's use of them in the financial and banking sectors.

The Administrative Procedure Act does not require government agencies to follow notice-and-comment procedure when issuing interpretative rules (through advisory opinions and the like).[9] At oral argument in a recent Supreme Court case—*Perez v. Mortgage Bankers Association*[10]—Justice Elena Kagan expressed the concern of many when she asked the solicitor general whether "agencies more and more are using interpretative rules and . . . guidance documents to make law."[11] She inquired if by so doing the agencies are "essentially [doing] an end run around the notice and comment provisions."[12] It appears that the Bureau, willingly or unwillingly, may be making law in the way Justice Kagan feared.

Part I provides an overview of the Bureau, including its unique governing structure and powers. Part II then discusses the law governing the Bureau, addresses the difference between legislative and non-legislative rules, and examines why agencies are supposed to follow a notice-and-comment procedure when adopting legislative rules.

Part III of the article explains how the Bureau has chosen to regulate fair lending in the context of automotive finance. This part then examines, through a case study against Ally Financial, Inc., how the Bureau has then enforced its interpretation of fair lending, namely, through adjudication of its own interpretations.

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[9] Administrative Procedure Act, 5 U.S.C. § 553 (2012). Notice and-comment rule-making is "a lengthy process in which the public is given an opportunity to comment on a proposed version of the rule and the agency responds to the comments." Brian Wolfman & Bradley Girard, *Argument Preview: The Administrative Procedure Act, Notice-and-Comment Rule Making, and "Interpretive" Rules*, SCOTUSBLOG (Nov. 26, 2014, 10:13 AM), http://www.scotusblog.com/2014/11/argument-previewthe-administrative-procedure-act-notice-and-comment-rule-making-and-interpretive-rules/ [http://perma.cc/FB2K-UJCM].

[10] 135 S. Ct. 1199 (2015).

[11] *See* Transcript of Oral Argument at 13-14, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) (No. 13-1041).

[12] *Id.*

Part IV summarizes courts' approach to administrative agencies' practice of issuing interpretative rules.[13] This part then focuses on agencies' interpretation of *financial* regulations.

Part VI addresses arguments in favor of judicial deference to agencies' interpretative rules, while Part VII summarizes arguments against such special deference. Part VII concludes that judicial deference to financial regulators brings with it unsettling consequences, from potentially violating constitutionally enshrined principles of separate powers (and checks and balances) to undermining legal certainty, thus undermining the rule of law.

Finally, for these reasons the article concludes that courts should not grant deference to the Bureau's interpretation of its own regulations because doing so undermines the role of the judiciary (i.e., to interpret law). This conclusion draws support from a recently passed bipartisan bill in the House of Representatives, which seeks to preserve flexibility for the Bureau to interpret the regulations it administers while also ensuring legal certainty and predictability for the industries it supervises, as well as maintaining the constitutionally mandated separation of powers.[14]

II. Consumer Financial Protection Bureau

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) in response to the greatest financial crisis since the Great Depression of the 1930s.[15] The Dodd-Frank Act was designed to overhaul and

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[13] Readers may be surprised to learn that courts seem to give a kind of special deference to agencies' interpretation of financial regulations. *See infra* Part V.A (discussing deference to agencies' interpretation of financial regulations).

[14] *See* Reforming CFPB Indirect Auto Financing Guidance Act, H.R. 1737, 114th Cong. (2015).

[15] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.). The Federal Reserve Bank of Dallas has put the cost of the crisis up to $14 trillion (equating to up to $120,000 for every household). *See* Tyler Atkinson et al., *How Bad Was It? The Costs and Consequences of the 2007-09 Financial Crisis*, STAFF PAPERS, July 2013, at 2, https://dallasfed.org/assets/documents/research/staff/staff1301.pdf [https://perma.cc/8FGG-EBBN].

improve numerous aspects of the banking and financial system.[16] Noble in its intent, it has been described by one critic as "by far the most costly and restrictive [regulatory] legislation since the New Deal" and even blamed for "produc[ing] the slowest post-recession U.S. recovery in modern history."[17] The Bureau, an independent executive agency, housed within the Federal Reserve, is at the heart of these reforms.[18]

A. Goals and Objectives of the Bureau

[16] CCH ATTORNEY-EDITOR STAFF, *supra* note 4, at 60-65. For a description of what caused the financial crisis in the United States, see FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT (2011), http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [http://perma.cc/CGL5-HYHU]; PETER J. WALLISON, HIDDEN IN PLAIN SIGHT (2015); Peter J. Wallison, *Roadkill in the Fed's Race to Regulate Shadow Banking*, WALL ST. J., Apr. 20, 2015, at A13. For an exhaustive global view of what caused the financial crisis, see MARTIN WOLF, THE SHIFTS AND THE SHOCKS 2 (2014) (blaming, among others, the failure of the economics establishment "to understand how the economy worked, at the macroeconomic level, because it failed to appreciate the role of financial risks; and it failed to understand the role of financial risks partly because it failed to understand how the economy worked at the macroeconomic level"). For a somewhat livelier read on the various causes of the crisis, see MICHAEL LEWIS, THE BIG SHORT (2010); BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE (2010). For a focus on the regulatory response to the financial crisis, see VIRAL V. ACHARYA ET AL., REGULATING WALL STREET (2010); SUSAN BERSON & DAVID BERSON, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2012).

[17] WALLISON, *supra* note 14, at xii-xiii.

[18] 12 U.S.C. § 5491 (2012). The Bureau was originally conceived by then-Law Professor Elizabeth Warren of Harvard Law School, who currently serves as a Democrat Senator from Massachusetts. *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY (2007), http://www.democracy journal.org/5/6528.php?page=all [http://perma.cc/XVH9-XTUQ] (calling for a consumer financial product commission modeled off the United States Consumer Product Safety Commission to focus on consumer financial safety).

The main statutory goals of the Bureau are to guarantee that consumers have fair access to financial markets and that these markets are "fair, transparent, and competitive."[19]

The Bureau exercises its powers (1) to guarantee that consumers have access to the information about financial products and services; (2) to protect consumers from discrimination and unfair practices; (3) to review "outdated, unnecessary, or unduly burdensome regulations;" (4) to enforce the federal consumer financial protection laws consistently; and (5) to ensure that the consumer financial products and services markets function "transparently and efficiently to facilitate access and innovation."[20]

To accomplish these objectives, the Bureau can engage in education activities, address consumer complaints, and monitor consumer financial markets.[21] In addition, the Bureau supervises "consumer financial product and service providers that are not supervised by the prudential regulators," [22] including taking

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[19] 12 U.S.C. § 5511(a). As Martin Wolf has observed, "the era of financial liberalization [is] over. The question [is] only how far backwards policymakers [will] go." WOLF, *supra* note 13, at 28.

[20] 12 U.S.C. § 5511(b). The Bureau has the power to bring lawsuits in its own name, using its own attorneys, against anyone (including individuals) who is violating a federal consumer financial law or regulation. It can seek civil penalties, injunctions, and any other available relief in such suits, and compromise with court approval. § 5564. With the consent of the Attorney General, the Bureau can even represent itself before the Supreme Court. § 5564(e). All of that said, the Bureau must notify the Attorney General of (1) any suits it files and (2) any suit to which the Bureau is a party that does not involve the sale of consumer financial products and services. § 5564(d). The Bureau and the Attorney General are to coordinate their litigation activities. § 5564(d)(2)(B). The general statute of limitations for the Bureau three years of the date when it discovers the violation, unless otherwise provided by applicable federal consumer financial law. § 5564(g). If the Bureau finds evidence that anyone has violated a federal criminal law, then it is required to forward that evidence to the Attorney General for appropriate action. § 5566(d)(2)(B).

[21] 12 U.S.C. § 5551(c).

[22] CCH ATTORNEY-EDITOR STAFF, *supra* note 4, at 491. Among those supervised entities are "persons who originate, broker or service residential mortgages or who provide mortgage loan modification or foreclosure relief services; are 'larger participants' . . . in a market for any other consumer financial product or service; have been found by the Bureau to be involved in conduct that poses risks to consumers; make private education loans; or

appropriate enforcement action. The Bureau adopts regulations and issues orders and guidance to implement the federal consumer protection laws[23] and performs activities ancillary to those listed above.[24]

The Dodd-Frank Act transferred to the Bureau the rulemaking authority under federal consumer financial laws previously vested in seven other federal agencies: the Federal Reserve Board; the Federal Deposit Insurance Corporation; the National Credit Union Administration; the Office of the Comptroller of the Currency; the Office of Thrift Supervision; the Department of Housing and Urban Development,[25] and the Federal Trade Commission (FTC).[26]

B. Unique Structure and Powers of the Bureau

As noted above, the Bureau implements consumer protection laws by adopting regulations, issuing orders, and providing guidance to regulated industries.[27] Where the rulemaking authorities of the

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make payday loans." *Id.* at 494. Furthermore, the Bureau has "supervisory authority over the largest banks, thrifts and credit unions." *Id.* at 495; *see also* 12 U.S.C. § 5515. In connection with these entities "the Bureau . . . coordinate[s] its supervisory activities with the supervisory activities conducted by prudential regulators and the State bank regulatory authorities." § 5515(b)(2). Prudential regulators focus on ensuring the safety and soundness of those institutions. § 5325. The Bureau is responsible only for ensuring consumer compliance. § 5511(c)(4).

[23] 12 U.S.C. § 5512.

[24] 12 U.S.C. § 5511(c); *see also* DAVID H. CARPENTER, CONG. RESEARCH SERV., R42572, THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 12 (2014), https://www.fas.org/sgp/crs/misc/R42572.pdf [https://perma.cc/RLE3-4W7Z] (discussing the powers of the Bureau).

[25] *See* 12 U.S.C. § 5581(a)(2); Streamlining Inherited Regulations, 76 Fed. Reg. 75,825 (Dec. 5, 2011) ("Accordingly, the Bureau assumed responsibility over the various regulations that these agencies had issued under this rulemaking authority."); CCH ATTORNEY-EDITOR STAFF, *supra* note 4, at 520.

[26] Congress only transferred the FTC's (limited) rulemaking authority to the Bureau. *See* CARPENTER, *supra* note 22, at 25. The FTC retained its enforcement authority, which in many cases is shared with the Bureau. *Id*. at 4.

[27] CCH ATTORNEY-EDITOR STAFF, *supra* note 4, at 492.

Bureau and another agency overlap, the Bureau "shall have the exclusive authority to prescribe rules subject to those provisions of the law."[28]

The Dodd-Frank Act requires courts to defer to the Bureau's interpretations of the consumer financial laws.[29] It provides that "the deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law."[30] Courts have already upheld the constitutionality of deference to the Bureau's rulemaking on the grounds that "Congress's intent to grant the [Bureau] exclusive authority to interpret the federal consumer financial laws is clear, and it is entirely consistent with Article III for courts to defer to [the Bureau's] interpretations in the manner contemplated by [the Supreme Court's precedents]."[31]

Two final observations about the Bureau are in order. First, funding for the Bureau was specifically designed to fall outside the usual congressional appropriations process.[32] Congress designed the Bureau's operations to be funded principally by transfers made by

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[28] § 5512(b)(4)(A).

[29] *See* 12 U.S.C. § 5581(b)(5)(E) ("No provision of this title shall be construed as altering, limiting, expanding or otherwise affecting the deference that a court otherwise affords to the . . . Bureau in making determinations regarding the meaning or interpretation of any provision of a Federal consumer financial law . . . .").

[30] § 5512(b)(4)(B).

[31] Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc., 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014) (holding that the Dodd-Frank Act's delegation of authority to the Bureau did not violate the constitutional prohibition of delegation of legislative power); *see also* Consumer Fin. Prot. Bureau v. ITT Educ. Serv., Inc., No. 1:14-cv-00292-SEB, 2015 WL 1013508, at *9 (S.D. Ind. Mar. 6, 2015), *appeal filed*, No. 15-1761 (7th Cir. 2015) (explaining that the limited powers of the executive branch concerning removal of the Bureau's officers do not make the Bureau's unconstitutional).

[32] *See* 12 U.S.C. § 5497(a)(1) ("[T]he Board of Governors shall transfer to the Bureau . . . the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law.").

the Board of Governors of the Federal Reserve System from the combined earnings of the Federal Reserve System, up to the limits set forth in the Dodd-Frank Act.[33] "Transfers from [the Fed] . . . are capped at $618.7 million for [fiscal year] 2015. For [fiscal year] 2016, the transfer cap is estimated to be $631.7 million."[34]

Second, unlike many other agencies and commissions that are headed by three to five commissioners (e.g., Securities and Exchange Commission, Federal Communications Commission), the Bureau is headed by a sole director.[35]

For these two reasons (and others), some critics of the Bureau, especially on Capitol Hill, view the agency as wielding too much power: "The [Bureau] is perhaps the single most powerful and least accountable federal agency in all of Washington," said Chairman of the Financial Services Committee, Jeb Hensarling (R-Texas).[36] "When it comes to the credit cards, auto loans and mortgages of hardworking taxpayers, the [Bureau] has unbridled discretionary power, not only to make them less available and more expensive but to absolutely take them away."[37]

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[33] *See* § 5497(a)-(b) (stating that the funds transferred to the Bureau come "from the combined earnings of the Federal Reserve System"). In practice, "[t]he Director of the [Bureau] requests transfers from the Federal Reserve System in amounts that he or she [in his or her discretion] has determined are reasonably necessary to carry out the Bureau's mission without exceeding the limits in the Dodd-Frank Act." CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 11 (2015), http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf [http://perma.cc/U2B3-Y3YM].

[34] CONSUMER FIN. PROT. BUREAU, *supra* note 31, at 11.

[35] WERHAN, *supra* note 2, at 5; CCH ATTORNEY-EDITOR STAFF, *supra* note 4, at 484-85.

[36] *See, e.g.*, Jeb Hensarling, Chairman, Fin. Servs. Comm., Chairman's Hersaling's Opening Statement at Hearing on CFPB (Jan. 28, 2014), http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=367901 [https://perma.cc/V5F3-PKVP?type=source].

[37] *Id*. For an example of a bipartisan expression of dissatisfaction with the Bureau's structure, see Kyrsten Sinema & Randy Neugebauer, *Depolitizing Elizabeth Warren's Pet Project*, WALL ST. J., Oct. 15, 2015, at A13 (recognizing the importance of consumer protection but calling for a commission with "bipartisan leadership" to lead the Bureau). Ms. Sinema is a Democratic Member of the House of Representatives; Mr. Neugebauer is a Republican Member of the House.

Congress has drafted several bills that would replace the Bureau's director with a commission, as well as subject the Bureau's funding to the more traditional process of congressional appropriations oversight.[38] As of the time of printing of this article, none of these bills has become law.

III. The Law Governing the Bureau: The Administrative Procedure Act

Having looked at how the Bureau governs others, this part examines how the Bureau itself is governed. It explains how legislative rules (regulations) issued by an agency differ from non-legislative rules and why agencies such as the Bureau are supposed to follow a notice-and-comment procedure when adopting legislative rules (but also why they might avoid doing so, too).

A. Legislative Rules and Non-Legislative Rules

Agencies exercise their law-making powers by rulemaking and adjudicating.[39] Agencies have exercised these powers long

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[38] *See, e.g.*, H.R. 1266, 114th Cong. § 2 (2015) (replacing a sole director with a five-person commission, serving five-year staggering terms, to be appointed by the President and confirmed by the Senate). For a sampling of media reaction to this bill, see Joseph Lawler, *Republican Bill Aims to Limit Consumer Bureau's Power*, WASH. EXAMINER (Mar. 6, 2015), http://www.washingtonexaminer.com/republican-bill-aims-to-limit-consumer-bureaus-power/article/2561141 [http://perma.cc/JSC4-GGC2] (providing commentary on the Republicans' aims to limit the power of the Bureau, and what their goals are in the bill). For a sampling of opposition to this bill, see Letter from Americans for Fin. Reform to Cong. 2 (Mar. 12, 2015), http://ourfinancialsecurity.org/wp-content/uploads/2015/03/AFR-House-letter-CFPB-structure-3.12.15.pdf [http://perma.cc/AEA3-2LQF] (arguing, *inter alia*, that multi-member commissions "often fall into a pattern of gridlock" and that this change in governing structure "would reduce the Bureau's effectiveness in standing up for the public interest"). Other reform bill suggests replacing the Bureau's director with a multi-person commission but subject the Bureau's appropriations to the congressional process. S. 205, 113th Cong. (2013).

[39] WERHAN, *supra* note 2, at 5 ("[A]gencies can act with the force of law . . . through 'rulemaking,' a process that resembles legislative lawmaking, or they can issue an 'order' through 'adjudication,' a process that in its most formal version resembles a judicial trial."); *see also* William T. Mayton, *The*

before Congress enacted the Administrative Procedure Act (APA) in 1946.[40]

The first method, that is, issuing a rule through "rulemaking" is much more common; this is how regulations are made.[41] Regulations are known as "substantive rules" or "legislative rules" because they have the same legally binding effect as congressional legislation (e.g., statutes).[42] This article uses the term "legislative rule."

Non-legislative rules are sometimes referred to as guidance documents; they come in two primary forms: (1) policy statements[43] and (2) interpretative rules. Regardless of form, non-legislative rules (guidance documents) serve two primary functions. First, they enhance legal certainty by improving consistent application of laws and regulations.[44] Second, they increase "administrative transparency

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Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking, 1980 DUKE L.J. 103, 106-07 (1980) (explaining that rulemaking procedures provide "system of rules of prospective operation," while adjudication requires "backward-looking, 'accusatorial' proceedings").

[40] WERHAN, *supra* note 2, at 235;

[41] MAEVE P. CAREY, CONG. RESEARCH SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 1 (2013), https://www.fas.org/sgp/crs/misc/RL32240.pdf [https://perma.cc/222E-TLWG] ("Federal agencies usually issue more than 3,000 final rules each year on topics ranging from the timing of bridge openings to the permissible levels of arsenic and other contaminants in drinking water."); *see also* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010) ("[T]he Administrative Procedure Act . . . requires such rules to undergo the expensive and time-consuming process known as notice-and- comment rulemaking before being promulgated.").

[42] *See* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) (indicating that a legislative rule, like a statute, has "the force and effect of law"); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 (1979) (explaining that rules issued through the notice-and-comment process are "legislative-type rules" because they have "the force and effect of law").

[43] WERHAN, *supra* note 2, at 277 (explaining that the policy statements category includes, *inter alia*, guidance statements, memoranda, and bulletins).

[44] *Id.* at 276 ("They promote administrative consistency by instructing agency personal on how to apply broad or ambiguous laws.").

by notifying interested members of the public of administrative policies and legal interpretations before the agency acts on them."[45]

As important as non-legislative rules are for advising industry and the public, they are *not* law; they do not bind the public, agencies, or courts.[46] Because these documents have no inherent legal effect (except for whatever deference a court gives them), the issuing agency is not required to comply with notice-and-comment procedure.[47] The Administrative Procedure Act requires only that agencies publish guidance documents in the *Federal Register* when seeking to take action against affected members of the public on the basis of such documents.[48] Although it is often impossible to distinguish between interpretative rules and other guidance documents, as a practical matter, the difference is irrelevant for our discussion. What *does* matter is being able to distinguish either an interpretative rule or guidance document (either one is a non-legislative rule) from a legislative rule.

The agreed upon test is whether the rule creates a binding legal norm or binding legal effect.[49] If it does create a binding legal effect, it is a legislative rule subject to the notice-and-comment procedure.

The public can seek guidance of an agency's interpretation of the law through its interpretative rules.[50] An agency, however,

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[45] *Id.* at 276-77.

[46] *Id.* at 276 ("Guidance documents . . . lack the force of law.").

[47] *Id.* ("Because guidance documents lack legal effect, section 553(b)(A) of the Administrative Procedure Act exempts them from notice-and-comment requirements.").

[48] Administrative Procedure Act § 3, 5 U.S.C. § 552(a)(1)(D) (2012).

[49] Unlike a general statement of policy and an interpretative rule, a legislative rule "creates a binding legal norm." WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW 168 (4th ed. 2012).

[50] *See* Kevin M. McDonald, *Are Agency Advisory Opinions Worth Anything More Than the Government Paper They're Printed On?*, 37 TEX. TECH L. REV. 99, 108 (2004) ("Agencies issue interpretive rules to provide guidance to the public and, most importantly, their regulated industries on how they view the law."). As the Supreme Court has recently observed, the Administrative Procedure Act does not define interpretative rule "and its precise meaning is the source of much scholarly and judicial debate." Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015); *see also* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 929 (2004). This article follows the majority opinion in *Perez*, clarifying that "it suffices

may not use interpretative rules to bind the public by making law, because it is the province of the courts to decide whether the law means what the agency says it means.[51]

B. Notice-and-Comment Procedure is Required for Legislative Rules

The difference between legislative and non-legislative rules is crucial, because the APA requires agencies to follow a notice-and-comment procedure in cases of the former while exempting cases of the latter from such procedures.[52]

In brief, the notice-and-comment procedure consists of three steps. First, an agency must issue a "[general] notice of proposed rule making," usually through publication in the *Federal Register*.[53] Second, if "notice [is] required," then the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[54] "[The] agency must consider and respond to significant comments received during the period for public comment."[55] Furthermore, the agency must clarify in its final rule the rule's "basis and purpose."[56]

As Professor Keith Werhan has identified in his leading hornbook on administrative law, the purpose behind the notice-and-comment procedure is to improve the quality of rulemaking in at least three ways.[57]

First, requiring agencies to propose a rule in the *Federal Register* exposes their proposals to "diverse public comment,"[58]

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to say that [interpretative rules] are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez*, 135 S. Ct. at 1204 (citing Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

[51] 5 U.S.C. § 706 ("[T]the reviewing court shall . . . interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

[52] *See* 5 U.S.C. § 553(b).

[53] *Id.*

[54] § 553(c).

[55] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015).

[56] *Id.* (quoting 5 U.S.C. § 553(c)).

[57] *See* WERHAN, *supra* note 2, at 246.

[58] *Id.* (citing Int'l Union, United Mine Workers of America v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005)).

which should foster "rational" and "informed" rulemaking.[59] Second, public notice "furthers the values of fairness and democratic participation by providing interested members of the public an opportunity to shape the formulation of rules that govern their conduct."[60] Third, public notice (with input from affected parties) contributes to a more effective judicial review by inviting both proponents and opponents of the agency's rulemaking to submit evidence supporting their various positions for the administrative record.[61]

C. Non-Legislative Rules Allow Agencies to Interpret Regulations and Provide Advice to Industry

Unlike legislative rules, non-legislative rules (such as guidance documents or interpretative rules developed by agencies "lack the force of law."[62] In other words, non-legislative rules do not create or alter substantive legal rights held by members of the public. "[T]he critical feature of [non-legislative] rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'"[63]

Agencies do not have to follow a notice-and-comment procedure to issue non-legislative rules because such rules lack

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[59] *Id.* (citing Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1031 (D.C. Cir. 1978) ("The denial of an opportunity for comment on these facts further undermines our usual assumption that notice and comment rulemaking . . . will achieve rational results."); *see also* Chocolate Mfr. Ass'n v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985) ("The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking.").

[60] WERHAN, *supra* note 3, at 246 (citing Prometheus Radio Project v. Fed. Commc'n Comm'n, 652 F.3d 431, 449 (3d Cir. 2011); *Int'l Union*, 407 F.3d at 1259.

[61] *Id.*

[62] WERHAN, *supra* note 2, at 273 ("Interpretive rules and policy statements are often called 'guidance documents' or 'nonlegislative rules' because they lack the force of law.").

[63] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)) (defining an interpretive rule).

binding power.[64] "Like interpretative rules, guidance documents are often difficult to distinguish from legislative rules."[65] If an agency issues a non-legislative rule (e.g., interpretative rule; guidance document; or other statement of policy) and does not comply with a notice-and-comment procedure, usually "the challengers [of such statements] argue that the pronouncement is in fact a legislative rule and is therefore procedurally invalid for failure to undergo notice and comment."[66]

Quite often agencies issue such statements to address their enforcement policy. [67] The Bureau used its March 2013 Bulletin "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act" (Indirect Auto Lending Bulletin) precisely this way.[68] In this bulletin, the Bureau intended to provide guidance "about compliance with the fair lending requirements of the Equal Credit Opportunity Act"[69] as well as to clarify that it "applies to all indirect auto lenders within the jurisdiction of the [Bureau]."[70]

In determining whether a guidance document (or interpretative rule) falls within a category of legislative rule, courts consider whether the document creates a binding legal norm.[71]

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[64] FUNK & SEAMON, *supra* note 47, at164-65 ("General statements of policy, like interpretive rules, are rules, but rules that do not have binding legal power and consequently do not require notice-and-comment procedures."); *see also* Franklin, *supra* note 39, at 278 ("Nonlegislative rules, . . . are not meant to have binding legal effect, and are exempted from notice and comment by the APA as either 'interpretative rules' or 'general statements of policy.'").

[65] FUNK & SEAMON, *supra* note 47, at 165.

[66] Franklin, *supra* note 39, at 278.

[67] FUNK & SEAMON, *supra* note 47, at 165 ("[T]here are two situations in which [agencies] are most likely to use general statements of policy . . . one is to indicate when the agency will take investigative or enforcement action.").

[68] *See generally* CONSUMER FIN. PROT. BUREAU, BULL. NO. 2013-02, INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT (2013), http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf [http://perma.cc/3CSW-MQA3] [hereinafter INDIRECT AUTO LENDING BULLETIN].

[69] *Id.* at 1.

[70] *Id.*

[71] FUNK & SEAMON, *supra* note 47, at 165 (explaining general statements of policy are not binding legal norms because they require notice-and-

Courts also take into account the agency's intention concerning the prospective use of the document; if the agency intends to adjudicate (enforce) based on the document, then the document is in essence a legislative rule.[72] In the case of the Indirect Auto Lending Bulletin, the Bureau's position was unequivocal and final: it planned on enforcement of the Equal Credit Opportunity Act based on a disparate impact theory.[73]

Using non-legislative rules allows agencies to avoid the often lengthy and cumbersome notice-and-comment procedure.[74] The Supreme Court has, however, emphasized that this benefit comes at the cost of having no "force and effect of law . . . [nor being] accorded that weight in the adjudicatory process."[75] Although guidance documents do not have the force and effect of law, "there is absolutely no question that they count for something."[76]

The Bureau recognizes that guidance documents are not legally binding. In particular, visitors to the Bureau's website are informed that they "can contact [the Bureau's] Office of Regulations to receive informal guidance from a staff attorney about the Bureau's regulations . . . . *Any such informal guidance would not constitute an official interpretation or legal advice*."[77] Although the italicized portion is emphasized to show its limitation (i.e., it only applies to contacts made to the Bureau), one might also understand the statement more broadly as applying to any kind of informal guidance provided by the Bureau.

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comment procedures to become legislative rules); *see also* Franklin, *supra* note 39, at 288 ("As for distinguishing general statements of policy from legislative rules, courts tend to examine whether the rule is binding, either on the public or on the agency.").

[72] FUNK & SEAMON, *supra* note 47, at 165.

[73] *See* INDIRECT AUTO LENDING BULLETIN, *supra* note 66, at 3.

[74] Perez v. Mortg. Bankers Ass'n, 125 S. Ct. 1199, 1204 (2015) ("The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules.").

[75] *Id.* (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

[76] *See* WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 202 (2002).

[77] *Guidance Documents*, CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov/guidance/ [http://perma.cc/SY8X-BNQC] (emphasis added).

Unfortunately, agencies, including the Bureau, may not always follow what they publish on their websites. As we will see below, shortly after issuing the Indirect Auto Lending Bulletin, the Bureau commenced an enforcement action that relied in part on a legal theory announced in that bulletin.[78] Thus, the "informal guidance" document (non-legislative) was subsequently used as a justification for an enforcement action. This practice of publishing bulletins that officially do not have the effect of law, but nonetheless are otherwise relied upon in enforcement proceedings, contributes to a perception that agencies intentionally bypass the notice-and-comment requirements required for rulemaking through backdoor measures, that is, by issuing guidance documents.[79]

Further supporting this perception is a report from the House Committee on Government Reform, which noted that guidance documents (and other non-legislative rules, such as interpretative rules) may allow agencies to circumvent procedures that "protect citizens from arbitrary decisions and enable citizens to participate effectively in the process."[80] Echoing this concern, numerous D.C. Circuit decisions have attacked agencies' use of guidance.[81] Finally,

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[78] *See* Ally Fin., Inc., CFPB No. 2013-CFPB-0010, (Dec. 20, 2013), http://files.consumerfinance.gov/f/201312_cfpb_consent-order_0010.pdf [http://perma.cc/88NN-5RVX] (hereinafter Consent Order).

[79] *See* Franklin, *supra* note 39, at 278 (explaining that many remarked that the cumbersome notice-and-comment procedure "has driven agencies increasingly to avail themselves of the [available] exemptions").

[80] H.R. Rep. No. 106-1009, at 1 (2000).

[81] Perhaps the best expression of this concern is found in the oft-cited *Appalachian Power Co. v. Envtl. Prot.*, 208 F. 3d 1015, 1019 (D.C. Cir. 2000):

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

academics have voiced their disapproval of agencies' abuse of guidance documents.[82] As a result, it is not surprising that the Bureau's enforcement actions based on its Indirect Auto Lending Bulletin have raised similar concerns.[83]

IV. The Bureau's Non-Legislative Rules and Enforcement

This part focuses on the Bureau's practices in the field of the automotive finance. With the example of a case study of Ally Financial, Inc.,[84] it examines how the Bureau enforces its non-legislative rules.

A. Indirect Auto Lending Bulletin

Perhaps the most important and, without question, the most controversial guidance document released to date by the Bureau in the automotive finance field is the Indirect Auto Lending Bulletin.[85] In this bulletin the Bureau clarified its policy with respect to the fair lending requirements under Regulation B it administers[86] (recall that general statements of policy are non-legislative documents).[87]

In the area of automotive finance a typical indirect credit sale transaction involves three participants. The auto dealer, who functions as the original creditor, participates by "extending credit by

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[82] *See, e.g.*, Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like–Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312 (1992) (explaining that the answer to the questions in the title of the article is generally no); *see also* FOX, *supra* note 73, at 204 ("[W]ithout a bright line test for distinguishing between [legislative and non-legislative rules], an agency can slip substantive consequences into an interpretation [or bulletin] and still enjoy the benefit of a fully retroactive effect.").

[83] *See infra* IV.B (discussing the case of Ally Financial, Inc.).

[84] *See generally* Consent Order, *supra* note 76.

[85] INDIRECT AUTO LENDING BULLETIN, *supra* note 66.

[86] *Id.* at 1; *see also* Regulation B, 12 C.F.R. §§ 202.1 (2015) (aiming to achieve "the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age").

[87] *See supra* Part III.C (explaining the notion of non-legislative documents).

the act of exchanging a car for a contract containing the buyer's promise to pay for the car over time."[88]

The dealer then assigns this installment sales contract to a third-party, an indirect auto lender, such as an automotive captive finance company or, alternatively, a competing bank.[89] Although dealers could keep the credit contract and collect payments directly from the buyer (and thus retain the full finance charge, not just "participation" through the reserve (or markup)), most dealers follow the three-way model because they need the immediate liquidity and do not want to hold and service the contract. [90]

The Indirect Auto Lending Bulletin addresses the policies of "indirect auto lenders"[91] "permit[ing] dealers to increase consumer

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[88] Thomas B. Hudson, *Pinnochio and the Senator*, AUTO DEALER TODAY (June 2015), http://www.autodealermonthly.com/channel/compliance/article/story/2015/06/pinocchio-and-the-senator.aspx [http://perma.cc/W6YC-H3VN].

[89] *See id.*

[90] *See id.*; *Understanding Vehicle Finance*, FED. TRADE COMMISSION (Jan. 2014), https://www.consumer.ftc.gov/articles/0056-understanding-vehicle-financing [https://perma.cc/DQ5A-FDM7] (discussing dealership financing and indirect lending). The practice of paying dealers for assisting in the financing of automobiles has been traced back to 1925, when General Motors Acceptance Corporation (GMAC) first began adding to the finance charge an amount to be collected from the purchaser and paid to the dealer. *See* Fourth Amended Class Action Complaint at 4, Coleman v. Gen. Motors Acceptance Corp., 196 F.R.D. 315 (M.D. Tenn. 2000), *vacated*, 296 F.3d 443 (6th Cir. 2002) (No. 3-98-0211) (naming this practice "finance charge markups," "dealer rebating," or "dealer reserve" which "revolutionized the automobile financing business").

[91] Indirect auto lenders do not loan money to consumers, and therefore are not "creditors" within the meaning of the Truth in Lending Act, 15 U.S.C. § 1602(g) (2012), "but instead purchase credit sales contracts from auto dealers, who are the 'creditors' that extend credit to auto buyers." Kevin McDonald & Kenneth J. Rojc, *Automotive Finance: Shifting Into Regulatory Overdrive,* 69 BUS. LAW. 599, 600 (2014). The Bureau describes indirect auto lending as follows:

> In indirect auto financing, the dealer usually collects basic information regarding the applicant and uses an automated system to forward that information to several prospective indirect auto lenders. After evaluating the applicant, indirect auto lenders may choose not to become involved in the transaction or they may choose to provide the dealer

interest rates and . . . compensate[ing] dealers with a share of the increased interest revenues."[92] The Bureau claims these policies create risk of price disparities "on the basis of race, national origin, and, potentially, other prohibited bases,[93] and therefore could violate the Equal Credit Opportunity Act (ECOA).[94] Because indirect auto lenders will likely be considered "creditors" or "assignees" under the ECOA, such "lenders may be liable under the legal doctrines of both disparate treatment and disparate impact."[95]

The Bureau emphasized that offering rate participation programs may be sufficient by itself to trigger liability if the lender participates in credit decisions and such programs result in disparities on a prohibited basis.[96]

> with a risk-based "buy rate" that establishes a minimum interest rate at which the lender is willing to purchase the retail installment sales contract executed by the consumer for the purchase of the automobile.

INDIRECT AUTO LENDING BULLETIN, *supra* note 66, at 1.

[92] INDIRECT AUTO LENDING BULLETIN, *supra* note 66, at 1.

[93] *Id.* at 2. "The Bureau's focus in the context of auto finance appears to be on discrimination against African-Americans, Hispanics and women, which is prohibited by the Equal Credit Opportunity Act, although discrimination on any prohibited basis may trigger the Bureau's scrutiny." McDonald & Rojc, *supra* note 89, at 599 n.3 (citing 15 U.S.C. § 1691(a)); *see also* Patrice Ficklin, *Preventing Illegal Discrimination in Auto Lending*, CONSUMER FIN. PROTECTION BUREAU (Nov. 4, 2013), http://www.consumerfinance.gov/blog/preventing-illegal-discrimination-in-auto-lending/ [http://perma.cc/97AL-FP95].

[94] Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (2012) (prohibiting creditors from discriminating against loan applicants in credit transactions on the basis of characteristics such as race or national origin).

[95] INDIRECT AUTO LENDING BULLETIN, *supra* note 66, at 2-3. *See generally* Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words That Actually Are There*, 61 BUS. LAW. 829 (2006) (addressing the ECOA credit discrimination); Kevin M. McDonald & Rojc, *supra* note 89, at 600; Kevin M. McDonald & Kenneth J. Rojc, *Automotive Finance Regulation: Warning Lights Flashing*, 70 BUS. LAW. 617, 618-621 (2015) ("By shopping for the highest flat fee offered by different indirect lender on a contract-by-contract basis, dealers might disparately impact one protected class of consumers over another class, which may violate the fair lending laws.").

[96] INDIRECT AUTO LENDING BULLETIN, *supra* note 66, at 3.

The Bureau cautioned that despite Regulation B, which limits the liability to assignees who have actual knowledge of credit discrimination by the original creditor,[97] lack of actual knowledge of discrimination by auto dealers is not a defense for the indirect auto lenders because this provision "does not limit a creditor's liability for its own violations—including, for example, disparities on a prohibited basis that result from the creditor's own markup and compensation policies."[98]

Having identified the fair lending risks inherent in rate participation programs, the Indirect Auto Lending Bulletin then described procedures and policies that indirect auto lenders should adopt to comply with the Bureau's interpretation of the ECOA and Regulation B.[99] The Bureau offered two possible risk mitigation approaches: indirect auto lenders can (1) control and closely monitor dealer markup programs or (2) eliminate dealers' discretion altogether by adopting a flat fee per transaction program.[100]

It is important to note that the Bureau did not intend to make rate participation programs illegal *per se*. Rather, the Indirect Auto Lending Bulletin clarified that the indirect auto lenders should address the disparities prohibited by the ECOA.[101]

Unlike mortgage lending, where lenders are required by federal law to collect and report information on borrowers' race, ethnicity, and gender,[102] such information is typically not collected in

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[97] Regulation B, 12 C.F.R. § 202.2 (2015) (clarifying that a person is not a creditor for purposes of liability under Regulation B "unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction").

[98] INDIRECT AUTO LENDING BULLETIN, *supra* note 66, at 3. "The disparities triggering liability could arise either within a particular dealer's transactions or across different dealers within the lender's portfolio."

[99] *Id.* at 4.

[100] *Id.* Notably, the Bureau does not require creditors or lender to disclose to consumers that dealer reserve is negotiable. In 1977, the Federal Reserve Board considered and specifically decided *against* requiring such a disclosure. *See* Interpretation on Disclosure of Amount of Dealer Participation, 42 Fed. Reg. 19,124, 19,124 (Apr. 12, 1977).

[101] INDIRECT AUTO LENDING BULLETIN, *supra* note 66, at 4-5. On additional fair lending guidance for auto finance, see McDonald & Rojc, *supra* note 89, at 600-01.

[102] Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-2810 (2012); Regulation C, 12 C.F.R. pt. 1003 (2015).

connection with auto sales and financing.[103] As a substitute for such information, the Bureau estimates an auto buyer's race by using geocodes to determine census tracts containing a majority of minorities.[104] Surnames are used as a proxy for Hispanic ethnicity and first names are used as proxy for female gender.[105]

B. Bureau's Enforcement Actions on the Basis of the Indirect Auto Lending Bulletin

Within just a few months of issuing the Indirect Lending Bulletin, the Bureau began enforcing its own interpretation of the regulation it administers (Regulation B).

On December 20, 2013, Ally Financial, Inc., and Ally Bank (collectively, "Ally") settled a fair lending complaint filed by the Bureau and the Department of Justice (DOJ).[106]

At issue were Ally's practices in its capacity as an indirect

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[103] Ficklin, *supra* note 91 (highlighting differences in information collection and reporting requirements between mortgage lenders and auto lenders).

[104] Patrice Ficklin, Fair Lending Director, Consumer Fin. Prot. Bureau, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act, Presentation at Webinar Indirect Auto Lending—Fair Lending Considerations (Aug. 6, 2013), http://www.visualwebcaster.com/FederalReserveBankSF/94628/event.html.

[105] *Id.* Furthermore, the Bureau encouraged auto finance companies to use "reasonable proxy methods that are suitable to their nature, size, and complexity in monitoring fair lending risk" rather than wait for any official proxy methodology to be released. Letter from Richard Cordray, Director, CFPB, to Rep. Spencer Bachus (Aug. 2, 2013), http://www.infobytesblog.com/wp-content/uploads/2013/08/CFPB-Response-to-6-20-13-Republican-Letter-8-2-13.pdf [http://perma.cc/4BZV-4ZYD].

[106] Consent Order, *supra* note 76 (a consent order concerning the investigation of Ally); *see also* United States v. Ally Fin., Inc., No. 13-cv-15180 (E. D. Mich. Dec. 23, 2013), http://www.justice.gov/crt/about/hce/documents/allyco.pdf [http://perma.cc/33L3-32NF];
Press Release, Consumer Fin. Prot. Bureau, CFPB and DOJ Order Ally to Pay $80 Million to Consumers Harmed by Discriminatory Auto Lending (Dec. 20, 2013), http://www.consumerfinance.gov/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing/ [http://perma.cc/4K6N-7H9J] (explaining that Ally's actions addressed in the consent order exemplify fair lending risks described in the Indirect Auto Lending Bulletin).

auto lender.[107] On the basis of the Bureau's fair lending examination that began in September 2012,[108] the Bureau and the DOJ found that Ally published a "buy rate" to dealers reflecting the minimum interest rate at which Ally would purchase a retail installment sales contract and allowed dealers to "mark up" the buy rate to a higher rate in the retail installment contracts they entered into with auto buyers.[109] Ally did not monitor if its discretionary polices addressed to auto dealers resulted in discrimination.[110]

Because the installment sales contracts did not contain information on the race or national origin of the buyers, the Bureau and the DOJ assigned race and national origin probabilities to the applicants in order to evaluate any differences in dealer markup.[111] The statistical method they used for assigning these probabilities is known as Bayesian Improved Surname Geocoding (BISG).[112] BISG assigns race and national origin probabilities through a proxy methodology that combines geography-based probabilities (i.e., zip code), with name-based probabilities (i.e., last names), to form a more reliable overall probability.[113]

The government's BISG proxy analysis estimated that, from April 1, 2011 through December 31, 2013, (1) about 100,000 African-American consumers were charged approximately twenty-nine basis points more in dealer markup than similarly situated white

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[107] *See* Consent Order, *supra* note 76, at 4.

[108] The Bureau examined Ally's indirect auto lending program for compliance with the Equal Credit Opportunity Act. *See* Press Release, Consumer Fin. Prot. Bureau, *supra* note 104.

[109] Consent Order, *supra* note 76, at 4-5.

[110] *Id.* at 7-8.

[111] *Id.* at 5-6 (discussing geography-based and name-based probabilities to estimate "disparities in dealer markup on the basis of race or national origin").

[112] *Id.* at 6.

[113] *Id.* BISG was originally developed in 2009 by researchers at the RAND Corporation who were looking to develop a more reliable method to predict race and national origin in the health care insurance industry, although it is not without shortcomings. *See* Marc N. Elliot et al., *Using the Census Bureau's Surname List to Improve Estimates of Race/Ethnicity and Associated Disparities*, 9 HEALTH SERV. & OUTCOMES RES. METHODOLOGY 69, 70 (2009) (concluding that "[d]espite their improvement in accuracy, indirect methods such as BISG cannot replace the information gained from self-reported data").

consumers, resulting in an average overpayment of $300 interest over the life of the contract; (2) about 125,000 Hispanic consumers where charged approximately twenty basis points more in dealer markup than similarly situated white consumers, resulting in an average overpayment of over $200 interest over the life of the contract; and (3) about 10,000 Asian/Pacific Islander consumers were charged approximately twenty-two basis points more than similarly situated white consumers, resulting in average overpayments exceeding $200 in interest over the life of the contract.[114]

Ally agreed to pay $80 million in damages to reimburse the affected consumers and a civil penalty of $18 million.[115]

To prevent future discrimination, the consent order requires Ally to establish a compliance program that will do the following: monitor and coordinate Ally's compliance with the order; educate dealers on fair lending laws and obligations; provide prompt corrective action against dealers where dealer disparities are found within Ally's portfolio; and analyze Ally's portfolio for any pricing disparities.[116] Unless Ally's compliance program effectively removes the disparities, Ally will pay a remuneration to the affected consumers every year until the expiration of the order in three years.[117]

In line with the two options for fair lending compliance which the Bureau described in its 2013 Auto Indirect Lending Bulletin,[118] Ally was given the option to move away from a discretionary but monitored dealer markup-system to a non-discretionary form of dealer compensation by paying a flat fee to the dealer for each installment sales contract Ally purchases, which would eliminate Ally's obligation to monitor the fair lending risk of ongoing discretionary dealer markups.[119]

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[114] Consent Order, *supra* note 76, at 6-7.
[115] *Id.* at 15, 20.
[116] *Id.* at 8-10.
[117] *Id*. at 10.
[118] *See* INDIRECT AUTO LENDING BULLETIN, *supra* note 66, at 4-5 (highlighting the steps for fair lending compliance); *see also* McDonald & Rojc, *supra* note 89, at 600.
[119] Consent Order, *supra* note 76, at 11-12. For a rather scathing critique of the basis upon which the Bureau conducted this action against Ally, see *Washington's Latest Bank Heist*, WALL ST. J., Apr. 7, 2015, at A12. *See also Do Two Half-Victims Make a Whole Case?*, WALL ST. J., Apr. 14,

Ally subsequently chose to retain its existing business model of providing dealer markups with the additional monitoring and controls required in the consent order.[120] Ally's CEO was quoted as saying that Ally would not "be the Trojan horse for driving industry change" away from compensating dealers through "markup" to a compensation structure based on flat fees.[121] Although the industry as a whole has not embraced the flat-fee model, one notable exception, BMO Harris Bank, announced that it had moved from a discretionary dealer reserve to a flat-fee model to compensate dealerships for their expenses in handling sales financing.[122] The Bureau's Director Cordray applauded BMO's announcement as a "proactive step to protect consumers from discrimination."[123]

2015, at A14 (highlighting that victims of the Ally's violation did not obtain any compensation because there were no victims).

[120] Consent Order, supra note 76, at 11-12.

[121] *See* Jim Henry, *Ally Won't Be A "Trojan Horse,"* AUTOMOTIVE NEWS (Feb. 3, 2014), http://www.autonews.com/article/20140203/FINANCE_AND_INSURANCE/302039931/ally-wont-be-a-trojan-horse [http://perma.cc/H3KM-H9YJ] (quoting Ally CEO Michael Carpenter at the National Automobile Dealers Association convention). For the additional considerations that motivated Ally to settle with the Bureau and the DOJ, see *id.*

[122] *See* Jim Henry, *Bank Turns to Flat Fee*, AUTOMOTIVE NEWS (May 5, 2014, 12:01 AM), http://www.autonews.com/article/20140505/FINANCE_AND_INSURANCE/305059946/bank-turns-to-flat-fee [https://perma.cc/26N3-Q6JL].

[123] *See* Press Release, Consumer Fin. Prot. Bureau, Statement of CFPB Director Richard Cordray on BMO Harris Auto Lending Policy (Apr. 30, 2014), http://www.consumerfinance.gov/newsroom/statement-of-cfpb-director-richard-cordray-on-bmo-harris-auto-lending-policy [https://perma.cc/WJ7C-YWLZ?type=source]. While it is unclear whether other finance sources will also switch to flat fees, auto dealers oppose the switch. *See* Jim Henry, *NADA's Take on "The Fallacy of Flats,"* AUTOMOTIVE NEWS (May 29, 2014, 3:32 PM), http://www.autonews.com/article/20140528/BLOG13/305299996/nadas-take-on-the-fallacy-of-flats [https://perma.cc/T4ZJ-7ZFB] (pointing out that adopting a flat-fee system may introduce fair lending risk onto a dealership's individual portfolio). *But see* Jamie LaReau, *Some Dealers Prep for Flat Fees*, AUTOMOTIVE NEWS (Apr. 13, 2015, 12:01 AM), http://www.autonews.com/article/20150413/FINANCE_AND_INSURANCE/304139983/some-dealers-prep-for-flat-fees [https://perma.cc/PR7Q-JETC] (observing that some dealers have begun relying less on dealer reserve as a source of profit and instead

V. Judicial Review of Agencies' Non-Legislative Rules

Having seen how the Bureau interprets one of its key regulations (Regulation B), namely, through a non-legislative rule (i.e., the Indirect Auto Lending Bulletin), and perhaps more importantly, how the Bureau enforces that non-legislative rule in adjudications (e.g., through enforcement actions such as those against Ally), it is worth asking the question—what would a court make of the Bureau's Indirect Auto Lending Bulletin if Ally had challenged this bulletin instead of settling?

This part starts with a brief overview of how courts review agencies' own interpretations of statutes and regulations. It then narrows down to how courts review agencies' non-legislative rules, focusing on interpretative rules.[124] Finally, this part looks at how courts would likely treat the Indirect Auto Lending Bulletin, namely, as a non-legislative rule. Whether a court's analysis declares this non-legislative rule an "interpretative rule" or some other form of non-legislative rule (e.g., policy statement) does not have a material impact on the analysis. Courts would likely have upheld the Bureau's Indirect Auto Lending Bulletin under any category of non-legislative rule since they generally defer to agencies' interpretations of regulations agencies administer, which is what the Indirect Auto Lending Bulletin does with regard to Regulation B. Whether this deference is logically sound is the subject of Parts V and VI.

A. Interpretations of Statutes and Regulations

Despite the requirements of the APA, the Supreme Court has held that agencies can interpret the statutes and regulations, creating over time what Justice Scalia recently labeled "an elaborate law of deference."[125]

Although this issue is not directly relevant to this article, because it focuses on agencies'—specifically, the Bureau's—

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focused efforts more on selling ancillary products, such as extended service contracts).

[124] It is possible the Bureau would have argued for deference on the basis that the Bulletin was a guidance document in the form of an interpretative rule.

[125] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring).

interpretations of their own regulations, it is worth mentioning first how courts review agencies' interpretations of *statutes*. When reviewing an agency's interpretation of a statute, courts apply what is known as the *Chevron* two-step test.[126] Under step one, the court determines—using traditional tools of statutory interpretation—whether the statutory meaning of the issue at hand is clear (and thus, not ambiguous).[127] If the statute is clear, the reviewing court decides if the agency's interpretation is consistent with the clear meaning of the statute.[128]

If the statute is ambiguous or silent on the issue, then step two of *Chevron* applies.[129] A statute is ambiguous if it is "susceptible to more precise definition and open to varying constructions."[130] Step two of *Chevron* requires courts to defer to the agency's interpretation of the statute so long as that interpretation is "reasonable" or "permissible."[131] To determine whether the agency's interpretation is permissible, courts evaluate if it is logically coherent or if it is

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[126] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). The impact of *Chevron* has been the subject of numerous articles. *See, e.g.*, Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002) (explaining that *Chevron* addressed the most important issue in modern administrative law—the allocation of power between courts and agencies). Perhaps most importantly, *Chevron* stripped courts of their traditional powers by making the agencies "the authoritative interpreter[s] (within the limits of reason) of [ambiguous] statutes." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005). Cass Sunstein has therefore described *Chevron* as a "counter-*Marbury* for the administrative state . . . ." Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2119 (1990).

[127] *Chevron U.S.A., Inc.*, 467 U.S. at 842-43; *see* AM. BAR ASS'N, SECTION OF ADMIN. LAW AND REGULATORY PRACTICE, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 34 (2d ed. 2004) (explaining that interpreting the meaning of a statute, most judges will draw upon "the text of the statute, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history").

[128] *Chevron U.S.A., Inc.*, 467 U.S. at 843; *see also* N.L.R.B. v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987).

[129] *Chevron U.S.A., Inc.*, 467 U.S. at 843.

[130] Gonzales v. Oregon, 546 U.S. 243, 258 (2006); WERHAN, *supra* note 2, at 374.

[131] *See Chevron U.S.A., Inc.*, 467 U.S. at 843-44.

arbitrary and capricious.[132] If the statutory interpretation is permissible, it possesses the "power to control."[133]

Courts accord deference to more than just agencies' construction of statutes: the Supreme Court has held the scope of judicial deference includes allowing agencies to authoritatively resolve ambiguities in *regulations*, too.[134]

Pursuant to what is known as the *Auer* standard of deference, a court must accept an agency's interpretation of its own regulation unless such interpretation is "plainly erroneous or inconsistent with the regulation."[135] The Supreme Court has applied this greater standard of deference to agencies' interpretations resulting from "the agency's fair and considered judgment[,]" instead of requiring the agency to comply with any formal process in issuing the interpretation.[136]

The consequence of the judiciary giving "controlling weight" to agencies' interpretations (i.e., the executive branch) is significant. As Justice Scalia noted in his concurring opinion in *Perez v. Mortgage Bankers Association*,

> By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretative rules' exemption from

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[132] *See* AM. BAR ASS'N, *supra* note 125, at 34-35.

[133] Courts sometimes give some deference to an agency interpretation of statutes where the *Chevron* principles do not apply. *Id*. at 36. In these cases, the agency's view can have "power to persuade," as opposed to "power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also* FOX, *supra* note 73, at 202 (explaining that under *Skidmore* courts should accord some deference to the bulletins).

[134] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) (emphasis added) (clarifying that agencies may authoritatively resolve ambiguities in regulations).

[135] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); *see also* Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 516 (2011) (observing that the tests of *Seminole Rock* and *Auer* are identical).

[136] *See* AM. BAR ASS'N, *supra* note 125, at 37-38 ("The Supreme Court has applied *Auer* deference to agency interpretations, as in litigation briefs, that are not the outgrowth of any formal process within the agency as long as it appears that the interpretation reflects the agency's fair and considered judgment.").

> notice-and comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretative rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretative rules that command deference do have the force of law.[137]

An empirical study conducted in 2008 by William Eskridge and Lauren Bauer supports Justice Scalia's points.[138] This study examined the Supreme Court's decisions reviewing agencies' interpretations of agency rules and found that the Supreme Court upholds 91% of such agencies' actions when applying the *Auer* doctrine.[139] More recently, Richard Pierce and Joshua Weiss found that district and circuit courts upheld agencies' interpretations when applying the *Auer* doctrine in 76.26% of the 219 cases studied, with no significant difference between the rate at which district courts upheld agency interpretations (75.93%) and the rate at which circuit courts upheld them (76.58%).[140]

The results are consistent with an empirical study done in 2010 by David Zaring that found courts upheld agency actions in about 70% of the cases regardless what doctrine the court applied.[141] The studies did not show a correlation between the party affiliation of the judges or agencies' leadership and the deference either.[142] Comparing the seemingly high rate of deference accorded by the Supreme Court to agencies with the rate of district and circuit courts, Pierce and Weiss observed that the Supreme Court "appears to be alone in the extreme deference it accords agency interpretations of rules."[143]

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[137] *Perez*, 135 S. Ct. at 1211-12 (Scalia, J., concurring).
[138] William N. Eskridge, Jr. & Lauren E. Bauer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamden, 96 GEO. L.J. 1083, 1142 tbl.15 (2008).
[139] *See id.*
[140] *See* Pierce & Weiss, *supra* note 133, at 519.
[141] *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 169 (2010).
[142] Pierce & Weiss, *supra* note 133, at 520.
[143] *Id.*

B. Special Deference to Financial Regulations

The *Auer* deference to agencies' interpretations of their own regulations has received especially strong support in the area of consumer financial protection.

The seminal case on point, *Ford Motor Credit Co. et al. v. Milhollin*,[144] had to decide whether the Truth-in-Lending Act (TILA)[145] and its implementing regulation (Regulation Z)[146] required lenders (in this case Ford Motor Credit) to disclose "the existence of an acceleration clause always . . . on the face of a credit agreement."[147]

An acceleration clause gives the creditor a right to accelerate payment of the entire debt upon the buyer's default.[148] Although Ford Motor Credit disclosed the acceleration clause in the body of the sales contract, at issue was whether the clause should have been disclosed on the front page of the contract.[149] Neither TILA nor

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[144] 444 U.S. 555 (1980).

[145] 15 U.S.C. § 1601 (2012) ("The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit . . . so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."). For an excellent understanding of the theory behind and history of TILA, see THOMAS A. DURKIN & GREGORY ELLIEHAUSEN, TRUTH IN LENDING xvii, 6-8, 13-14, 82-83, 171-74 (2011) (explaining the evolution of the TILA and disclosures in the regulatory scheme as a response to consumer financial illiteracy, merchant fraud, and inadequate regulation of consumer credit).

[146] 12 C.F.R. pt. 226 (2015) (implementing the TILA); *see also* Panetta v. Milford Chrysler Sales Inc., No. 14-05680, 2015 WL 1296736, at *3 (E.D. Pa. Mar. 23, 2015) (addressing disclosure requirements under the TILA and Regulation Z).

[147] *Milhollin*, 444 U.S. at 557.

[148] *Id.* at 558 (explaining acceleration clause). These clauses are common in retail installment sales contracts, commonly found in the auto-lending context where monthly payments apply toward payment of the entire amount financed.

[149] *Id.*

Regulation Z provided any answer.[150] The Federal Reserve Board, which had authority over Regulation Z, had "consistently construed the statute and regulations as imposing no such uniform requirement."[151]

In a 9-0 decision, the Supreme Court concluded that a "high degree of deference" should be given to the Federal Reserve Board and its staff "in determining what resolution of that issue is implied by truth-in-lending enactments."[152] Overruling the Ninth Circuit, the Supreme Court initially instructed that "caution must temper judicial creativity in the face of legislative or regulatory silence," and that courts should be "[attentive] to the views of the administrative entity appointed to apply and enforce a statue."[153] Going a step further, the Supreme Court held that "deference is *especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z*," and that "[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the act or Regulation should be *dispositive*."[154]

The Supreme Court offered three reasons for this "dispositive deference."[155] First, the Supreme Court followed precedent. Citing *Seminole Rock*[156] and its progeny, it noted the "traditional acquiescence"[157] and "considerable respect"[158] afforded

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[150] *Id.* at 560 ("[W]e conclude that the issue of acceleration disclosure is not governed by clear expression in the statute or regulation, and that it is appropriate to defer to the Federal Reserve Board and staff in determining what resolution of that issue is implied by the truth-in-lending enactments.").

[151] *Id.* at 557, 563.

[152] *Id.* at 557, 560.

[153] *Id.* at 565 (emphasizing that because legislative silence is often Congress's conscious decision to allow an industry-specific regulator to fill statutory gaps, courts must be careful not to overstep their bounds and impose upon that regulator constraints not envisioned by Congress).

[154] *Id*. (emphasis added).

[155] *Id.* at 566-69 (highlighting as factors supporting heightened deference to the Federal Reserve Board's interpretation of acceleration provision disclosure under TILA and Regulation Z: jurisprudential considerations, congressional intent, and practical necessity).

[156] 325 U.S. 410 (1945).

[157] *Id.* (citing Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 315 (1933)).

to the statutory (and regulatory) interpretations of the officers and agency officials tasked with enforcing those statutes and regulations.[159]This appeal to precedent and tradition is, according to the Supreme Court, "particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in 'setting [the statutory] machinery in motion.'"[160] In sum, TILA is "best construed by those who gave it substance in promulgating regulations thereunder."[161]

Second, the Supreme Court considered congressional intent. In 1974 and 1976, TILA was amended to provide creditors with a defense shield from liability based on compliance with an act's interpretation by the Federal Reserve Board.[162] These two amendments to TILA signaled to the Court "an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative."[163]

In light of this congressional decision, the Supreme Court urged restraint from interpreting the TILA and deferred to the Federal Reserve Board "so long as the latter's lawmaking is not irrational."[164] The Court did not ask whether this congressional delegation of judicial interpretation from the judiciary to an executive agency was itself unconstitutional.

Lastly, in addition to precedent and congressional intent, the Supreme Court reasoned that deference to the Federal Reserve was "compelled by necessity" because the Court simply was not equipped to interpret the statute (or its regulation) for itself.[165] The Supreme Court emphasized that "a court that tries to chart a true course to [TILA's] purpose embarks upon a voyage without a compass when it

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[158] *Id.* at 566 (citing Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945)).
[159] *Id.* ("The Court has often repeated the general proposition that considerable respect is due 'the interpretation given [a] statute by the officers or agency charged with its administration.'") (alteration in original) (quoting Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978)).
[160] *Id.* at 566 (alteration in original) (quoting Norwegian Nitrogen Prod. Co., 288 U.S. at 315).
[161] *Id.*
[162] *Id.* at 567.
[163] *Id.* at 567-68.
[164] *Id.* at 568.
[165] *Id.* at 568.

disregards agency views."[166] Without providing any meaningful reason why a court cannot interpret a consumer financial statute such as TILA, it basically genuflected: "[A]dministrative agencies are simply better suited than courts to engage [in the proper interpretative process]."[167]

So what does this case mean for the Bureau?

As noted above, the Dodd-Frank Act transferred the authority to enforce consumer financial laws previously held by the Federal Reserve Board (and other agencies) to the Bureau.[168] Thus, the Bureau also inherited law applicable to those agencies.[169] The inherited law includes applicable case law such as *Ford Credit*, which applied *Auer* and *Seminole Rock* deference with even greater vigor to consumer financial laws such as TILA and its implementing Regulation Z. Applying this line of precedents to the Bureau's Indirect Auto Lending Bulletin would likely yield the same type of deference, too. After all, both, TILA and ECOA, are consumer financial laws being interpreted by the agency (i.e., the Bulletin interpreting a regulation, namely, Regulation B).

To summarize, courts currently defer greatly to agency interpretations of their own regulations, especially when those regulations relate to consumer financial protection, such as those regulations administered by the Bureau (e.g., Regulation Z (implementing TILA); Regulation B (implementing ECOA)). Whether this deference is logically sound is the subject of the next two parts of this article.

VI. Arguments Supporting Judicial Deference

Having looked at the current state of judicial deference to agency rulemaking, this part takes a *prescriptive* approach by setting out the main arguments *for* such judicial deference. Within these arguments are embedded the responses to these arguments, which Part VII addresses in greater detail.

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[166] *Id.*
[167] *Id.* at 569.
[168] *See supra* Part II.A (discussing the powers of the Bureau).
[169] *Id.*

A. Complexity of Regulations Requires Agency Expertise

One of the most common explanations of judicial deference is that an agency possesses special expertise in administering its "complex and highly technical regulatory program."[170] Moreover, some argue that courts should defer to an agency "because the agency understands better than a court which interpretation will allow the agency to further its statutorily assigned mission."[171]

Clearly, a special and technical expertise explains why agencies, not courts, write *regulations*, but does such expertise extend judicial deference to agencies' interpretations of those regulations?[172] Interpretation of regulations aims at ascertaining their meaning; this is an adjudicatory function and is therefore a task for judges, not regulators.[173]

Put differently, the purpose of interpretation is to determine the fair meaning of the rule, to say "what the law is."[174] Regulatory interpretation is not about making policy, but rather "to determine what policy has been made and promulgated by the agency, to which the public owes obedience."[175]

The "special expertise" is a sufficient justification for agency's power to make regulations, but it is a logical *non sequitur* to conclude that agencies should perform adjudicatory interpretation of those regulations.[176] That is the province of the courts, as *Marbury* held back in 1803.[177]

As Justice Thomas observed when noting this logical flaw in inquiry, "[t]he proper question faced by courts in interpreting a

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[170] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).
[171] *See* Pierce & Weiss, *supra* note 133, at 517.
[172] *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part) (arguing that there are no compelling reasons for the *Auer* deference).
[173] *Id.*
[174] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing judicial review under Article III of the Constitution).
[175] *Decker*, 133 S. Ct. at 1340.
[176] *Id.*; *see also* Quinn M. Sorenson, Decker v. NEDC: *A New Dispute Over Judicial Deference to an Agency's Interpretation of its own Regulation*, 44 TRENDS, no. 6, 2013, at 9, 12 (suggesting that separate opinions in *Decker* might open the door for challenges to the *Auer* doctrine).
[177] *Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

regulation is not what the best policy choice might be, but what the regulation means."[178]

Because agency regulations have the force of law,[179] and courts are tasked with interpreting the law, courts—not agencies—should interpret "regulations . . . like any other law."[180] That laws may be technical in nature is a red herring.[181] Technicality and complexity of laws certainly does not logically lead to a conclusion that judges cannot therefore interpret them.[182] Besides, how does one even determine what is sufficiently "technical" to require interpretation by an issuing agency rather than a court?[183]

B. Agencies Understand Background and Intent of Regulations

Another reason for judicial deference to an agency's interpretation of its own regulation is that the agency, as the drafter of the regulation, has special insight into the intent of the regulation.[184] The assumption behind this reason is that "[b]ecause the [agency] promulgates th[e] standards, the [agency] is in a better

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[178] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1222 (2015) (Thomas, J., concurring).

[179] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979) ("[S]ubstantive agency regulations have the 'force and effect of law.'").

[180] *Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring).

[181] *See* NIGEL WARBURTON, THINKING FROM A TO Z 124 (3d. ed. 2007) (defining "red herring" as "[a] form of irrelevance which leads the unwary off on a false trail. A red herring is literally a dried fish which when dragged across a fox's trail leads the hounds off on the wrong scent.").

[182] *See e.g.*, Barber v. Gonzalez, 347 U.S. 637, 640-43 (1954) (interpreting technicalities of the immigration laws).

[183] *See, e.g.*, Kevin O. Leske, *Splits in the* Rock. *The Conflicting Interpretations of the* Seminole Rock *Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 828-32 (2014) (analyzing different approaches to the question of whether an agency issuing the interpretation has specialized technical expertise in the matter).

[184] *See, e.g.*, Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers").

position . . . to reconstruct the purpose of the regulations in question."[185]

Upon closer inspection, however, this reason is rather "weak"[186] and suffers from several flaws. First, the Supreme Court has given deference to an agency even when (1) that agency was not the original drafter of the regulation in question[187] and (2) the agency interpretations were inconsistent with interpretations adopted closer in time to the promulgation of the interpreted regulations.[188] Second, and most important, this reason assumes—falsely—that an agency's intent, and not the text, of its regulation should govern the interpretation. As in statutory interpretation, regulatory interpretation should be governed by the text of the regulation.[189] And "[w]hether governing rules are made by the national legislature or an administrative agency, [the Court is] bound *by what they say*, not by the unexpressed intention of those who made them."[190] "For the same reasons that [courts] should not accord controlling weight to post-enactment expressions of intent by individual Members of Congress, [they] should not accord controlling weight to expressions of intent by administrators of agencies."[191]

Finally, as Professors Pierce and Weiss have observed, because many interpretations come out long after the underlying

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[185] *Id.* at 152.

[186] *See* Pierce & Weiss, *supra* note 133, at 516.

[187] *See* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696-98 (1991) (applying *Seminole Rock* deference to one agency's interpretation of another agency's regulations because Congress had delegated authority to both to administer the program).

[188] *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170-171 (2007).

[189] *See* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means."). For an excellent overview of statutory and regulatory interpretation, see WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT (3d ed. 2014) (identifying as argument categories text, intent, precedent, tradition, and policy); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW (2012) (outlining interpretive methods as applied to constitutional, statutory, and contractual materials).

[190] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part).

[191] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1224 (2015) (Thomas, J., concurring).

regulations being interpreted were even published, it is doubtful that the agency's authors of the interpretation played any role in the decision that led to the issuance of the underlying rule in the first place.[192] In light of this reality, deferring to agencies' interpretations of regulations on the basis of special insight of agency personnel who were not at the drafting table seems rather tenuous.

C. Congressional Intent Supports Deference

A third reason for deferring to agencies' interpretations of their own regulations "is that Congress has delegated to agencies the authority to interpret their own regulations."[193] The reasoning runs as follows: "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, . . . the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[194]

The problem with this reason is that Congress does not have the authority to delegate the power of interpreting laws to the executive branch. The Supreme Court has made clear that "the structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an office under its control what it does not possess."[195] "Similarly, the Constitution does not empower Congress to issue a judicially binding interpretation of the Constitution or its laws. Lacking the power itself, it cannot delegate that power to an agency." [196] In a nutshell, this is Constitutional Law 101: Separation of Powers. Congress makes the laws.[197] The executive enforces the law.[198] "[*T*]*he power to create legally binding interpretations of the law rests with the Judiciary*."[199]

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[192] Pierce & Weiss, *supra* note 133, at 516.
[193] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring).
[194] Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 151 (1991).
[195] Bowsher v. Synar, 478 U.S. 714, 726 (1986).
[196] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring)
[197] U.S. CONST. art. I, § 1.
[198] *Id.* art. II, § 2.
[199] *Perez,* 135 S. Ct. at 1224 (Thomas, J., concurring) (emphasis added) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 179-80 (1803)); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 222 (1995) (finding the "essential balance" of the Constitution in that the Legislature is

D. Too Much Judicial Oversight Threatens Agency Independence

Proponents of deference offer at least one more argument in support of their position, albeit a weaker and certainly more antiquated one. They posit that "too much oversight by the courts of administrative matters would imperil the 'independence and esteem' of judges."[200] This argument suggests that questions of public administration, such as those addressed in regulations, "lie close to the public impatience,"[201] such that having judges resolve open questions regarding them would "expose [judges] to the fire of public criticism."[202]

Upon closer examination, this argument rests on the flawed notion that judges should not decide matters that expose them to public criticism. So, perhaps they should not decide same-sex marriage, abortion, or free speech matters? For that matter, are not almost all legal matters decided by the Supreme Court ones that "lie close to the public impatience?" Moreover, whether these matters lie close or far from the "public impatience" does not really matter, because the constitutional allocation of powers *requires* the judicial branch "to apply the law to cases and controversies that come before it."[203] Besides, any justice who has survived Senate confirmation hearings has the constitution needed to weather any public criticism that might come his or her way.

"possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' but the power of 'the interpretation of the laws' [is] 'the power and peculiar province of the courts.'").

[200] *See Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring) (quoting CHARLES EVANS HUGHES, *Speech before the Elmira Chamber of Commerce, April 18, 1907*, *in* ADDRESSES OF CHARLES EVANS HUGHES 1906-1916 185 (2d ed. 1916)).

[201] *See Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring) (quoting HUGHES, *supra* note 197, at 186).

[202] HUGHES, *supra* note 197, at 187.

[203] *Perez*, 135 S. Ct. at 1225 (Thomas, J., concurring).

VII. Arguments against Judicial Deference to Agency Interpretation of Regulations

A. Requirements of the Administrative Procedure Act

The APA is clear that courts should resolve ambiguities in regulations. In particular, section 706 of the act states that "the reviewing court shall . . . interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[204] Thus, allowing agencies to "determine the meaning" of the regulations they administer violates the plain text of the APA.

Although an agency can, and in many cases should, advise the public by explaining its interpretation of a regulation (either through an interpretative rule or other form of guidance), that agency may not use its interpretation "to bind the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means."[205]

B. Lack of Support in Tradition and History

Despite the clear language of the APA, the Supreme Court has developed a rather complicated method of nevertheless deferring to agencies' interpretations of both statutes and regulations.[206] *Chevron* allowed for deference to agencies' interpretations of statutes[207] and *Auer* (following *Seminole Rock*) allowed for deference to interpretation of regulations.[208] By deferring to agencies, the Supreme Court has "allowed agencies to make binding rules unhampered by the notice-and-comment procedures."[209]

Nonetheless, although *Chevron* "did not comport with the APA, [it] at least was in conformity with the long history of judicial review of executive action," where agencies interpreted ambiguities

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[204] 5 U.S.C. § 706 (2012).
[205] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring).
[206] *See* Leske, *supra* note 180, at 793-96 (addressing the development and the theoretical underpinnings of the *Auer* deference).
[207] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
[208] Auer v. Robbins, 519 U.S. 452, 461 (1997).
[209] *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring).

in statutory language.[210] Although there was tradition and history before *Chevron* that allowed the executive to resolve *statutory* ambiguities, no such tradition and history exists for allowing the executive to resolve *regulatory* ambiguities.[211]

C. Constitutional Concerns

Deferring to agency interpretations of regulations raises at least two additional constitutional concerns, which are touched on briefly below. In short, transferring judicial power to the Executive Branch strips away from the Judicial Branch its judicial obligation to provide the constitutional "check" on the political branches.[212]

1. Deference Transfers Power from Judiciary to Executive

Article III of the U.S. Constitution makes clear that "when a party properly brings a case or controversy to [a] . . . court, that court is called upon to exercise the 'judicial Power of the United States.'"[213] The Framers understood that although the other branches of Government have the authority and obligation to interpret the law, too, they did not have such authority in a judicial proceeding, where "only the judicial interpretation by the court would be considered authoritative."[214]

The primary reason for this understanding was the judges were presumed to exercise *independent* judgment.[215]

In other words, whereas "the Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law . . . the Judiciary, insulated from both internal and external sources of bias, is duty bound to exercise

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[210] *Id.*
[211] *Id.*
[212] For an excellent disquisition on these two concerns, see *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1213-25 (2015) (Thomas, J., concurring).
[213] *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring) (citing U.S. CONST. art. III, § 1).
[214] *Id.* at 1217.
[215] *Id.*

independent judgment in applying the law."[216] That is exactly why judges, not agency administrators, should interpret agency regulations. Put another way, because agency regulations have the force and effect of law,[217] interpreting those regulations calls for the exercise of independent judgment, which is the hallmark of the *judiciary*, not the executive or legislative branches.

The *Auer* deference, however, shuts out the judiciary from ascertaining the meaning of a regulation, i.e., determining whether a regulation properly covers the conduct of regulated parties.[218] Giving "controlling weight" to an agency's interpretation of its own regulations amounts to an unconstitutional transfer of the independent interpretative powers from the judiciary to the executive agency.[219] But the agency "lacks the structural [constitutional] protections for exercising the independent judgment" found in the judiciary (e.g., life tenure, salary protections, etc.).[220] "Because the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns."[221]

2. Deference Erodes Judicial Obligation to "Check" on Other Branches

Another constitutional problem with the *Auer* deference is that allowing agencies to interpret their own regulations "undermines the judicial 'check' on the political branches."[222]

Courts, and for that matter Congress, should not allow agencies to interpret their own (agency) regulations because "that would violate a fundamental separation of powers—that the power to write a law and the power to interpret it cannot rest in the same

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[216] *Id.* at 1219.
[217] United States v. Mead Corp., 533 U.S. 218, 231-32 (2001) (stating that the general rulemaking power conferred on agencies authorizes some regulation with the force of law).
[218] *Perez*, 135 S. Ct. at 1219 (Thomas, J., concurring).
[219] *Id.*
[220] *Id.* at 1220. Ironically, the Bureau's structure, described above in Part II.B, comes closer to the judiciary than many might expect. For example, the director of the Bureau cannot be removed by the president except for cause. And the Bureau enjoys significant financial independence.
[221] *Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring).
[222] *Id.*

hands."[223] As Montesquieu observed: "When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[224]

Allowing an agency to interpret its own regulations may incentivize the agency to write regulations ambiguously and broadly so it can retain the "flexibility" allowing it to later "clarify" with retroactive effect.[225] Justice Scalia has indicated that authorities as far back as Blackstone warned about the dangers of "[c]ombining the power to prescribe with the power to interpret" and "condemned the practice of resolving doubts about 'the construction of the . . . laws' by 'stat[ing] the case to the emperor in writing, and tak[ing] his opinion upon it.'"[226]

Another way of summarizing the above concerns is that the Judicial Branch has one main check on the excesses of the political branches, which is "the enforcement of the rule of law through the exercise of judicial power."[227] That judicial power consists of interpreting law, including administrative regulations. The Framers expected Article III judges to apply law as a "check" on the excesses of the executive and legislative branches.[228]

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[223] *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part).

[224] *See* MONTESQUIEU, SPIRIT OF THE LAWS 151-52 (O. Priest ed., T. Nuget trans., 1949).

[225] *See Decker*, 133 S. Ct. at 1341 ("[W]hen an agency interprets its *own* rules—that is something else. Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect.").

[226] *See id.* (quoting W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 58 (1765)).

[227] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1220 (2015) (Thomas, J., concurring).

[228] *Id.* ("If [the Government of the United States] make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. . . . They would declare it void." (quoting 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA IN 1787 553 (J. Elliot ed., 1836)).

If judges are supposed to safeguard the Constitution by declaring laws void that violate the Constitution, then judges cannot "opt out" of exercising this check without themselves violating the Constitution.[229] "When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check."[230] This abandonment permits the accumulation of governmental power (in another Branch) that the Framers warned against.[231]

This "accumulation of governmental powers" allows the Bureau to change the meaning of its regulations at its discretion and without any advance notice to the public or regulated businesses.

D. Legislators Avoid Responsibility

Yet another argument deferring to an agency's interpretation is that doing so undermines representative democracy "because it allows elected representatives in Congress to avoid public accountability by passing 'important policy choices' to unelected agency administrators."[232] "That legislators often find it convenient to escape accountability . . . is precisely the reason *for* a nondelegation doctrine."[233]

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[229] *Id.* at 1221 ("[T]he judiciary is called upon to exercise its independent judgment and apply the law.").

[230] *Id.*

[231] THE FEDERALIST No. 47, at 327 (James Madison) (Jacob Cooke ed., 1961) (stating that when judicial and legislative powers are combined, "there can be no liberty").

[232] WERHAN, *supra* note 2, at 66-67 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 132-33 (1980)).

[233] WERHAN, *supra* note 2, at 67 (quoting ELY, *supra* note 229, at 133). In January 2014, the U.S. District Court for the Central District of California held that the Bureau's structure was constitutional. Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc., 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014). In that case, the court rejected all of Morgan Drexen's arguments concerning the Bureau's unconstitutionality. *Id.* In particular, Morgan Drexen argued that the Bureau was unconstitutional because certain of its structural features violated separation of powers principles. *Id.* The features cited by Morgan Drexen were (1) the President's authority to only remove the Bureau's Director for cause; (2) a single Director; (3) the Bureau's funding through earnings rather than regular congressional appropriations, (4) the Bureau's authority to prohibit abusive acts or practices; and (5) the level of deference the Dodd-Frank requires courts to give the Bureau

Related to this criticism is an argument concerning the loss of individual liberty that accompanies delegation of authority to agencies. Some scholars argue that "[a]llowing such delegations makes it easy for Congress to enact statutes; entrusts lawmaking power to institutions—the presidency and administrative agencies—that are not designed to handle that power safely . . . ."[234]

At the very least, delegation can result in too much power concentrated in the executive—and its agencies—powers to (1) make and enforce laws (through legislative rules or regulations), and (2) under *Auer*—to interpret these legislative rules or regulations through non-legislative rules (such as the Indirect Auto Lending Bulletin); these three powers (make, enforce, and interpret law) were all powers that the Framers took great care to separate.[235]

E. Deference Undermines Legal Certainty

Finally, some commentators argue that because an agency's jurisdiction is national and a federal court's jurisdiction is regional, courts should defer to agency interpretations of agency regulation to "further . . . the goal of maximizing national uniformity in implementing national statutes."[236] But the problem here is that agencies will just become incentivized to write ambiguous and vague

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interpretations. *Id.* at 1086. The court found that none of these features rendered the Bureau unconstitutional. *Id.*at 1089.

[234] *See* WERHAN, *supra* note 2, at 67.

[235] *See id.* (citing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 107-18 (1993); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 809 (1999) ("[N]ondelegation doctrine is consistent with the Constitution's intended structure and that it serves important constitutional ends."); Nadine Strossen, *Delegation as a Danger to Liberty*, 20 CARDOZO L. REV. 861, 862-63 (1999) ("Delegation of this constitutionally defined lawmaking power to regulatory agencies undercuts its important protection of liberty in four ways. . . .").

[236] Pierce & Weiss, *supra* note 133, at 517. Pierce and Weiss note that Peter Strauss supported a strong version of judicial deference to administrative rulemaking for this particular reason. *Id.* (citing Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Actions*, 87 COLUM. L. REV. 1093, 1117 (1987)).

regulations that they later interpret as they see fit, knowing that courts will simply defer to their interpretations.[237]

VIII. Conclusion

Thus far in its short history, the Bureau has promulgated relatively few legislative rules (regulations) governing automotive finance. Instead, the Bureau has generally preferred to make law, and to interpret key provisions of the Dodd-Frank Act, through non-legislative rules (e.g., bulletins)[238] and through enforcement actions (adjudication).[239] Many of these enforcement actions have been conducted on the basis of legal theories announced in these non-legislative rules. For example, the Bureau has relied upon an unsettled legal theory—disparate impact—in the context of the ECOA enforcement actions against auto lenders. This theory was first announced in the Indirect Auto Lending Bulletin (a non-legislative rule) to *adjudicate* against Ally (culminating in a $98 million consent order).[240]

So long as the Supreme Court continues to defer (under either a "power to control" or "power to persuade" standard) to agencies' interpretations of regulations these agencies administer by giving the agencies' views "controlling weight" in judicial cases, especially when those cases involve consumer financial law, there is no reason to think the Bureau will change course.

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[237] *See also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 686-90 (1996) (arguing that courts should not defer to agency interpretations of agency rules and should instead apply the *Skidmore* test).

[238] INDIRECT AUTO LENDING BULLETIN, *supra* note 66.

[239] *See generally* Consent Order, *supra* note 76.

[240] *Id.*; *see also* Benjamin P. Saul & Thomas M. Hefferon, *CFPB and DOJ Enter Into First Joint Fair Lending Consent Order with Indirect Auto Finance Company*, GOODWIN PROCTER LLP (Dec. 23, 2013), http://www.goodwinprocter.com/Publications/Newsletters/Client-Alert/2013/1223_CFPB-and-DOJ-Enter-Into-First-Joint-Fair-Lending-Consent-Order.aspx?article=1 [https://perma.cc/NW9B-N6KT] (observing that the Bureau applied theories developed in the Indirect Auto Lending Bulletin in the investigation of Ally). The disparate-impact theory remains unsettled because the Supreme Court has never ruled whether a claim of discrimination under the ECOA can be based on such theory.

Yet frustration with the Bureau's use of non-legislative rules that has the effect of avoiding the APA's rulemaking and notice-and-comment procedures continues to grow among members of Congress from both political parties concerned with preserving the separation of powers while recognizing the need for a strong consumer financial agency.

Most pertinent to the issue of automotive finance is a recent bill passed by the House of Representatives on a bipartisan super-majority of 332-96.[241] If enacted, the proposed law will accomplish three things: it will (1) deprive the Bureau's Indirect Auto Lending Bulletin of legal force; (2) specify that the Bureau must "provide for a public notice and comment period" before issuing the guidance rules "primarily related to indirect auto financing[,]" and consult with the agencies that share jurisdiction over the indirect auto financing market (i.e., Federal Reserve; FTC; and DOJ); and (3) require the Bureau to make "all studies, data, methodologies, analyses, and other information relied on by the Bureau in preparing [guidance primarily related to indirect auto financing] publicly available" (exempting certain disclosures required to be redacted under the Freedom of Information Act).[242] These are not radical reforms; they are commonsense methods of governance that should guide our administrative state. As this article has demonstrated, too much power vested in any one agency runs the risk of violating the carefully crafted separation of powers structure that permeates our Constitution. If the Supreme Court will not protect this structure by granting deference to the agencies, then it will be up to Congress to do so.

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[241] *See* Reforming CFPB Indirect Auto Financing Guidance Act, H.R. 1737, 114th Cong. (2015). Two hundred forty-four Republicans and eighty-eight Democrats voted for passage. As of the time of printing, it is unclear whether the Senate will take up this bill. President Obama has vowed to veto it. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY 1 (2015), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr1737h_20151116.pdf [https://perma.cc/FB3T-NKPH].

[242] H.R. 1737 §§ 2, 3; *see also* Joe Overby & Nick Zulovich, *Efforts to Combat CFPB Ramp Up*, AUTO REMARKETING, May 1-14, 2015, at 16.