

# COMMITTEE ON CAPITAL MARKETS REGULATION

December 15, 2010

The Honorable Christopher Dodd  
Chairman  
United States Senate Committee on  
Banking, Housing and Urban Affairs  
448 Russell Senate Office Building  
Washington, DC 20510

The Honorable Barney Frank  
Chairman  
United States House of Representatives  
Financial Services Committee  
2252 Rayburn House Office Building  
Washington, DC 20515

The Honorable Richard Shelby  
Ranking Member  
United States Senate Committee on  
Banking, Housing and Urban Affairs  
304 Russell Senate Office Building  
Washington, DC 20510

The Honorable Spencer Bachus  
Ranking Member  
United States House of Representatives  
Financial Services Committee  
2246 Rayburn House Office Building  
Washington, DC 20515

Re: The Pace of Rulemaking Under the Dodd-Frank Act

Dear Chairman Dodd, Ranking Member Shelby, Chairman Frank and Ranking Member Bachus:

We believe there is an urgent need for your Committees to hold oversight hearings on the implementation through rulemaking of the Dodd-Frank legislation. We believe that the current rulemaking process is sacrificing quality and fairness for apparent speed, risking lengthy court challenges and poor rules that will damage our financial system and hinder economic recovery. This is not to say the regulators should always apply the brakes. Where the problems are well understood and the solutions are clear, regulators should act quickly.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) has created a unique challenge for the businesses and individuals who will be affected by the unprecedented pace and quantity of major agency rulemakings. Dodd-Frank requires federal agencies to write at least 230 new rules,<sup>1</sup> and many more may be issued after that. These are no ordinary rulemakings—this is almost a complete rewrite of the rules governing the country's financial markets. The Securities and Exchange Commission (SEC), which in 2005 and 2006, before the financial crisis, issued on average fewer than ten new rules a year, must now issue approximately one hundred new rules, some sixty of which must be written by July 2011, one year after Dodd-Frank was enacted. The Commodity Futures Trading Commission (CFTC) issued eleven new rules total in the two years before the crisis; it must now issue nearly forty by July 2011.

<sup>1</sup> Sec. Industry & Fin. Mkts. Ass'n, *Regulatory Action Database*, <http://www.sifma.org/members/dodd-frank.aspx> (calculated based on rulemakings required by the SEC, FDIC, CFTC, FRB, and FSOC).

*Table 1: Average annual rate of rulemaking (rules per year)<sup>2</sup>*

Agency	Pre-Dodd-Frank (2005–2006)	Post-Dodd-Frank
SEC	9.5	59
CFTC	5.5	37
FDIC	8	6
Federal Reserve	4.5	17

The process the federal regulators are using to create these new rules is seriously flawed. Rather than using a prudent deliberative process, sweeping reforms are being quickly pushed forward without providing adequate time for meaningful fact-finding or dialogue.

This push for speed can be traced to the August pledge Secretary of the Treasury Geithner made in response to charges that regulatory uncertainty would hinder economic recovery.<sup>3</sup> Glenn Hubbard and Hal Scott published an op-ed in the *Wall Street Journal* shortly thereafter pointing out that Secretary Geithner’s pledge “ignores the basic legal requirement for deliberative and rational regulatory implementation”<sup>4</sup> but regulators seem to have missed the message. CFTC Chairman Gary Gensler has been the most aggressive and speediest rule maker, vigorously defending his agency’s rapid rulemaking schedule<sup>5</sup> and warning not to expect extensions of public comment periods on proposed rules.<sup>6</sup>

The Administrative Procedure Act (APA) requires an informed rulemaking process that is transparent and responsive to the public and affected parties. Indeed, the D.C. Circuit has noted that even if the Congress “vest[s] broad rulemaking authority in an agency...[and] charge[s] the agency with swiftly and effectively implementing a national policy,...the agency remains bound by the APA’s notice and comment requirements.”<sup>7</sup> Historically the SEC, the CFTC, the Federal Reserve System, and the Federal Deposit Insurance Corporation (FDIC) respected the rulemaking process. Although those agencies are not subject to rulemaking review by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management

<sup>2</sup> Includes only formal, notice-and-comment rulemaking. Does not include technical amendments or interim final rules.

<sup>3</sup> Timothy F. Geithner, *Rebuilding the American Financial System*, Address at New York University Stern School of Business (Aug. 2, 2010), transcript available at <http://www.treasury.gov/press-center/press-releases/Pages/tg808.aspx> (“First, we have an obligation of speed. We will move as quickly as possible to bring clarity to the new rules of finance. The rule writing process traditionally has moved at a frustrating, glacial pace. We must change that.” (internal paragraph break omitted)).

<sup>4</sup> Glenn Hubbard & Hal S. Scott, *Geithner’s Hollow ‘Speed’ Pledge to Business*, WALL ST. J., Aug. 5, 2010.

<sup>5</sup> Gary Gensler, Address at the Institute of International Bankers (Oct. 21, 2010), transcript available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-56.html> (“It is essential that we work expeditiously to address those weaknesses to protect the American public. Lastly, finishing rules within the statutory deadline will best bring regulatory certainty to the marketplace.”).

<sup>6</sup> See Gary Gensler, Address at the U.S. Chamber of Commerce (Sept. 21, 2010), transcript available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-51.html> (“[I]t is not likely that we will extend public comment periods.”); see also *Registration of Foreign Boards of Trade*, 75 Fed. Reg. 70,974 (Nov. 19, 2010) (“The Commission is not inclined to grant extensions of this comment period.”).

<sup>7</sup> *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006).

and Budget, which imposes a minimum 60-day period for public comments on proposed rules,<sup>8</sup> a random sample of those agencies' rulemakings during 2005 and 2006 revealed that during that time they allowed on average more than 60 days for public comment. Major rulemakings were open for comment for as many as 90 or 120 days. Further, rulemakings did not even begin until the proposing agency did its homework, extensively surveying existing practices and consulting with industry experts about the consequences of various possible courses of action. In contrast, in the first three months after the passage of Dodd-Frank, those same agencies and the new Financial Stability Oversight Council (FSOC) gave an average of just over 30 days for comment.<sup>9</sup> Although the average comment period for all Dodd-Frank rulemakings is now a bit over 40 days, it is still too short, particularly since the financial regulators issued nearly 40 proposed rules in November alone. We are not hopeful that the agencies will be flexible with these deadlines.

This focus on speed over participation undercuts the traditional deliberate rulemaking process that the public has come to expect. The customary practice of allowing all interested parties to have their say during the rulemaking process is more, not less, important when agencies are considering complex and critical policies like those in the Dodd-Frank Act. It is exceedingly rare for regulators to have occasion to promulgate so many rules about one topic. When that happens, the affected people, companies, and industry groups need extra time to process the fundamental changes that are coming out from the varied federal agencies; instead they are getting less time. Although it is difficult for even industry trade groups to participate at this pace, it is virtually impossible for individual firms and the public at large to meaningfully participate in the process.

Providing meaningful comments on proposed rules is made even more difficult by Dodd-Frank's requirements for joint rulemaking and coordination between agencies. Unfortunately, this coordination has been sorely lacking. In the field of securitization, for example, the Office of the Comptroller of the Currency, the Federal Reserve System, the FDIC, the SEC, the Secretary of Housing and Urban Development, and the Federal Housing Finance Agency are charged with *joint* rulemaking,<sup>10</sup> yet the SEC and the FDIC have each already released proposed or final rules, conflicting with each other, in advance of the joint process.<sup>11</sup> Similarly, the SEC and CFTC have proposed conflicting rules in other areas.<sup>12</sup>

Moreover, instead of regulating in order to solve a particular problem and pursue a coordinated policy objective, regulators have been proceeding rule by rule. By treating each rule somewhat independently, and in no particular order, the results may be haphazard. A rational rulemaking sequence would begin with defining important terms with substantive requirements to follow.

<sup>8</sup> See Exec. Order No. 12,866, § 6(a), 58 Fed. Reg. 51,735, (Oct. 4, 1993).

<sup>9</sup> Calculated using the number of days between publication in the Federal Register and deadline for comments.

<sup>10</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (hereinafter "Dodd-Frank"), § 941(b).

<sup>11</sup> See Asset-Backed Securities, 75 Fed. Reg. 23,328 (May 3, 2010) (SEC); Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection With a Securitization or Participation After September 30, 2010, 75 Fed. Reg. 60,287 (September 30, 2010) (FDIC).

<sup>12</sup> See 75 Fed. Reg. 65,882 (Oct. 26, 2010) (SEC); 75 Fed. Reg. 63,732 (Oct. 18, 2010) (CFTC).

Limiting public participation not only injures the democratic character of the rulemaking process, but also opens the rules themselves to increased challenge in federal courts. The break-neck speed of implementation that we have seen so far is precisely the type of “arbitrary and capricious” practice that the APA forbids. The SEC and the CFTC are required by statute to perform detailed cost/benefit analysis.<sup>13</sup> The FSOC is required to consider costs and benefits in some of its studies regarding systemic risk,<sup>14</sup> and would also likely be subject to the APA when it promulgates rules.<sup>15</sup> Its rules may even be subject to OIRA review, with the strict cost-benefit requirements that review entails. Proper cost/benefit analysis takes not only proper data, but also time. The regulators presently have neither. There is a good chance many of these rules will be challenged and overturned, so that the speed of implementation, in the end, is really an illusion.

It is far better simply to slow down and return to the responsible practice of providing people with at least 60 days to digest proposed rules and to offer helpful and meaningful comments to the regulators. We are not blind to the constraints and pressures the regulators face. Congress has included deadlines for the implementation of Dodd-Frank that are overly ambitious and demanding. In the two years before the financial crisis, the SEC took an average of 524 days—almost a year and a half—to issue a final rule after proposing one. For the rules it has proposed so far, it has an average of only about 200 days before the Dodd-Frank Act requires final rules. Although the CFTC now has more time to finalize its rules than it typically takes (it has 238 days, compared to its 109-day historical average), it has never before been tasked with writing so many complex rules.

*Table 2: Average number of days between proposed rule and final rule*

<b>Agency</b>	<b>Pre-Dodd-Frank (2005–2006)</b>	<b>Post-Dodd-Frank<sup>16</sup></b>
SEC	524	208
CFTC	109	238
FDIC	154	292
Federal Reserve	596	278

Nevertheless, the agencies have both the duty and the ability to conduct the rulemaking process in a responsible, thorough manner. The Fifth Circuit Court of Appeals has noted that agencies do not always “regard the statutory deadline[s] as sacrosanct.”<sup>17</sup> Indeed, the Financial Crisis Inquiry Commission has already announced that it will not issue its report on the financial crisis to the President and Congress before the deadline Dodd-Frank imposed.<sup>18</sup> Rules are particularly late when, as here, agencies have to promulgate many rules in a short time period. For example, the SEC missed two deadlines when implementing rules required by the Sarbanes-

<sup>13</sup> See 15 U.S.C. §§ 78c(f), 78w(a)(2) (SEC); 7 U.S.C. § 19(a) (CFTC).

<sup>14</sup> See Dodd-Frank §§ 115(c)(1), 123(a)(1).

<sup>15</sup> See 5 U.S.C. § 553.

<sup>16</sup> Calculated using the number of days between the proposed rule and the statutory deadline.

<sup>17</sup> U.S. Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979); see also Jacob Gersen & Anne O’Connell, *Deadlines in Administrative Law*, 156 U. PENN. L. REV. 923, 954 (2008) (discussing missed deadlines).

<sup>18</sup> Compare Press Release, Fin. Crisis Inquiry Comm’n, Financial Crisis Inquiry Commission Announces New Date for Final Report (Nov. 17, 2010) (announcing report delayed until Jan. 2011), with Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21 § 5(h), 123 Stat. 1617, 1630 (report due Dec. 15, 2010).

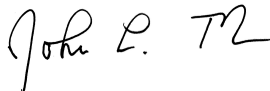
Oxley Act of 2002.<sup>19</sup> If the statutory deadlines are too short then the appropriate action is to request more time from Congress, not to push rules onto the public at a reckless pace.

Dodd-Frank is a massive piece of legislation requiring massive implementation. Yes, a long period of implementation creates uncertainty, with a possible drag on the economy. But a faster pace may be an illusion if key rules are challenged and overturned in the courts for lack of a fair process. More importantly, speed may kill our economy by producing bad rules that interfere with the proper functioning of the financial system for years to come. Reduction of uncertainty by the adoption of ill-considered rules is the wrong choice. We urge you to hold prompt hearings on the rulemaking process.

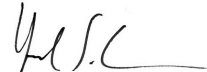
Respectfully submitted,



R. Glenn Hubbard  
Co-CHAIR



John L. Thornton  
Co-CHAIR



Hal S. Scott  
DIRECTOR

<sup>19</sup> See, e.g., Improper Influence on Conduct of Audits, 68 Fed. Reg. 31,820 (May 28, 2003) (issuing final rule two months after statutory deadline); Strengthening the Commission's Requirements Regarding Auditor Independence, 68 Fed. Reg. 6,006 (Feb. 5, 2003) (announcing final rule after statutory deadline had passed that would not become effective for over two months).