Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework

Donna M. Nagy

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JUDICIAL RELIANCE ON REGULATORY INTERPRETATIONS IN SEC NO-ACTION LETTERS: CURRENT PROBLEMS AND A PROPOSED FRAMEWORK

Donna M. Nagy†

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INTRODUCTION

In 1967, during a panel discussion sponsored by the Section of Administrative Law of the American Bar Association, administrative law scholar Kenneth Culp Davis contended that "some of the most important law of the SEC is embodied in [a] big batch of no-action letters. This is law. The interpretations are law."\(^1\) Manuel Cohen, then Chairman of the Securities and Exchange Commission ("SEC" or "Commission"), objected vehemently to this characterization and retorted that the SEC's bevy of no-action letters "may be lore, I-o-r-e, but it is not law."\(^2\)

Today, more than thirty years later, the legal status and significance of SEC no-action letters still engender spirited debate. Much of the controversy stems from the fact that these letters are issued not by the SEC as such,\(^3\) but by members of the SEC staff,\(^4\) in response to particular inquiries by market participants or their counsel in the context of proposed transactions. At times, the staff's response merely conveys an enforcement position—whether the staff would recommend enforcement action to the full Commission if the transaction were undertaken in the manner described in the incoming letter. Other times, in addition to an enforcement position, the staff's response contains explicit interpretations of relevant statutory provisions or SEC rules and regulations\(^5\) as they relate to the proposed transaction. Under either scenario, the SEC has made clear that any regulatory interpretations expressed by the staff in a no-action letter

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2 Id. (remarks of Manuel Cohen).

3 The Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78a-78mm (1994 & Supp. II 1996), created the SEC as an independent regulatory agency composed of five Commissioners (no more than three of whom may be from the same political party) who are appointed by the President, with the advice and consent of the Senate, for a five year term. Id. § 78d. In addition to administering and enforcing the Exchange Act, the SEC has responsibility over five other federal statutes: the Securities Act of 1933 (the "Securities Act"), id. §§ 77a-77aa (1994 & Supp. II 1996); the Investment Company Act of 1940 (the "Investment Company Act"), id. §§ 80a-1 to 80a-64 (1994 & Supp. II 1996); the Investment Advisers Act of 1940 (the "Investment Advisers Act"), id. §§ 80b-1 to 80b-21 (1994 & Supp. II 1996); the Public Utility Holding Company Act of 1935, id. §§ 79a to 79z-6 (1994); and the Trust Indenture Act of 1939, id. §§ 77aaa-77bbbb (1994).

4 The SEC staff is composed of attorneys, accountants, financial analysts and examiners, economists, investigators, engineers, and other professionals. Under the Commissioner's direction, the staff ensures that publicly held companies, broker-dealers, investment companies and advisers, and other market participants comply with the federal securities laws. See OFFICE OF PUBLIC AFFAIRS, SEC, THE WORK OF THE SEC 5-6 (1994). Some commentators refer to actions by the SEC as actions by the full Commission, distinguishing SEC actions from actions on the part of its staff members. See, e.g., THOMAS LEE HAZEN, 1 TREATISE ON THE LAW OF SECURITIES REGULATION § 1.3 (3d ed. 1996).

5 For a discussion of the SEC's statutory authority to promulgate rules and regulations, see infra notes 29-32 and accompanying text.
“do not constitute an official expression of the Commission’s views,”6 nor do they constitute rulings binding on any party, including the Commission.7 Thus, even though they are publicly available,8 regulatory interpretations articulated through the vehicle of no-action letters are said to be informal and advisory, rather than official and definitive. In short, the SEC did not design the process to be formal agency action.

Notwithstanding their status as unofficial and informal pronouncements, SEC no-action letters have assumed a considerable degree of importance to market participants and their counsel in planning transactions and conducting business. As the SEC has recognized, many issuers, securities law practitioners, and other members of the public closely monitor such letters, and often view them as “the most comprehensive secondary source on the application of [the federal securities] laws.”9 Securities law commentators have made an even stronger case for the significance of no-action letters, contending that such letters are often “the sole body of precedent” on particular provisions,10 and that certain complex and technical areas of securities regulation have become “almost exclusively topics for staff interpretation . . . in the sense that there are few court cases and few authoritative interpretations by the Commission itself.”11 Thus, many

7 See Monthly Publication of List of Significant Letters Issued by the Division of Corporation Finance, Securities Act Release No. 5691, 41 Fed. Reg. 13,682 (1976) [hereinafter List Release] (“The Commission is not bound by these staff responses . . . . The staff’s responses to letters are not rulings of the Commission or its staff on questions of law or fact . . . . Further, such letters are not intended to affect the rights of private persons.”); see also infra notes 90-98 and accompanying text (discussing similar disclaimers placed upon no-action letters by the staff and Commission).
8 See infra Part I.C.1.a.
11 Robert J. Haft, Analysis of Key SEC No-Action Letters, at vii (1996). Professor Haft’s book, which is updated annually, summarizes, synthesizes, and distinguishes a wide variety of no-action letters and places them in context with related adjudicative decisions, SEC rules, and SEC releases. By devoting an entire volume to the analysis of no-action letters, Professor Haft displays an impressive willingness to elevate the important substance
securities law practitioners and their clients consider no-action letters a source of de facto law.\textsuperscript{12}

In addition to affecting the planning and structuring of securities transactions, the staff's regulatory interpretations articulated through the no-action letter vehicle also have significant repercussions when parties challenge securities transactions in court.\textsuperscript{13} Indeed, litigants in securities cases frequently urge courts to defer to regulatory interpretations in no-action letters,\textsuperscript{14} and courts frequently rely on no-ac-

\textsuperscript{12} See William J. Lockhart, SEC No-Action Letters: Informal Advice as a Discretionary Administrative Clearance, 37 LAW & CONTEMP. PROBS. 95, 122 (1972) ("The Commission-reviewed no-action positions and accompanying statements would seem, from counsel's perspective, to constitute 'law,' for they involve a final official disposition of a concrete claim not unlike the mass of case law on which lawyers commonly rely for guidance."); Lewis D. Lowenfels, SEC No-Action Letters: Conflicts with Existing Statutes, Cases, and Commission Releases, 59 VA. L. REV. 303, 303 (1973) [hereinafter Lowenfels, Conflicts] ("Recent years have seen an additional source of substantive law emerge through the publication of requests for 'no-action letters' and the SEC staff's responses to these requests."); Lewis D. Lowenfels, SEC No-Action Letters: Some Problems and Suggested Approaches, 71 COLUM. L. REV. 1256, 1257 (1971) [hereinafter Lowenfels, Problems] ("'[N]o-action' letters have acquired the force and authority of law in guiding and shaping private business transactions."); \textit{see also} Larry D. Barnett, MUTUAL FUNDS AND FEDERAL REGULATION 1-4 (1997) (contending that no-action letters are "an important source of law").

\textsuperscript{13} The SEC, the Department of Justice, or private parties may initiate litigation alleging violations of the federal securities laws based on explicit or implied statutory rights of action. \textit{See}, e.g., 15 U.S.C. § 77h-1 (1994) (authorizing the SEC to institute administrative proceedings for Securities Act violations); id. § 77t (authorizing the SEC to institute injunctive actions and suits for monetary penalties in federal district court for Securities Act violations); id. § 77x (providing criminal penalties for certain willful violations of the Securities Act); id. § 77i(a)(1) (providing express right of action against securities sellers who violate the registration provisions in Securities Act section 5); Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) ("[A] private right of action under [section] 10(b) ... and Rule 10b-5 has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure.") (footnote omitted).

\textsuperscript{14} Requests for judicial deference to regulatory interpretations in no-action letters have come from private litigants—both plaintiffs and defendants—as well as the SEC itself. See cases discussed \textit{infra} notes 276-314 and accompanying text.
tion letter authority in the course of resolving legal disputes.\textsuperscript{15} Securities law scholarship, however, has yet to focus on the judiciary’s treatment of no-action letters in securities litigation.\textsuperscript{16} Perhaps even more surprising than the lack of empirical study is the absence of normative analysis.\textsuperscript{17} And while administrative law scholars have devoted substantial attention to questions concerning judicial deference to regulatory interpretations articulated by agencies in informal formats,\textsuperscript{18} their general critiques of judicial practices have not explored the specific problem of judicial reliance on SEC no-action letters. This Article is designed to fill this significant gap between securities law and administrative law scholarship.\textsuperscript{19}

\textsuperscript{15} See infra notes 276-99 and accompanying text.


\textsuperscript{19} The absence of securities law commentary is particularly noteworthy because scholars in other disciplines driven by federal agency practices—such as taxation law, environmental law, and patent law—have already been exploring the doctrinal and normative issues concerning judicial treatment of regulatory interpretations embodied in formats less formal than agency rules and regulations. See, e.g., Paul L. Caron, \textit{Tax Myopia Meets Tax
Traditionally, and still typically, judicial descriptions of SEC no-action letters have run the gamut from "law," to "orders," to "rulings," to "informal opinions," to "prosecutorial decision[s]." This judicial failure to characterize no-action letters consistently is symptomatic of a more fundamental problem: many courts treat informal regulatory interpretations in no-action letters as interchangeable with formal and official regulatory interpretations that the full Commission has promulgated. Consequently, courts often defer automatically to the regulatory interpretations in no-action letters. In other words, many courts accept no-action letter authority as definitive interpretations of the federal securities statutes and SEC rules and regulations without independently analyzing the particular regulatory provisions in dispute. This Article contends that such automatic deference is unwarranted as a doctrinal matter. It also identifies important normative reasons why courts should subject no-action letters to meaningful scrutiny prior to relying on them as interpretive authority. Finally, this Article proposes a framework to assist courts in performing this critical function.

Part I focuses on the SEC's no-action letter process. It first places no-action letters in context with various other formats used by the SEC to announce regulatory interpretations. It then describes the SEC's practice of issuing no-action letters, and discusses the ways in which these letters have impacted the actions of securities law practitioners and their clients. These practical consequences have significant bear-

24 Board of Trade v. SEC, 883 F.2d 525, 530 (7th Cir. 1989).
ing on questions concerning the weight that courts should accord no-action letters in securities litigation.

Part II examines how courts have treated no-action letters and postulates how courts should treat such interpretive authority. It first discusses the principles of "automatic deference" that the Supreme Court developed to ensure that administrative agencies, rather than courts, have primary interpretive authority over ambiguous provisions in agency-administered statutes and rules.\(^{25}\) Part II then criticizes a number of judicial opinions for applying these principles to the informal and unofficial regulatory interpretations in no-action letters. It also criticizes those opinions that cite no-action letters as authority without specifying why—let alone how—they are relying on that authority. Part II concludes that courts must never rely on no-action letters as definitive interpretations of ambiguous provisions in the federal securities laws. This Part also emphasizes the benefits attained when courts subject the regulatory interpretations in no-action letters to independent and meaningful scrutiny.

The third and final Part proposes a framework that courts can use when presented with interpretive issues under the federal securities laws that the SEC seemingly has resolved in no-action letters. The proposed framework recognizes that while courts are never required to defer automatically to regulatory interpretations in no-action letters, courts should nonetheless treat no-action letters as informal and unofficial authority, and may rely on regulatory interpretations in the letters to the extent that they are persuasive. Part III's framework draws on factors for evaluating the persuasive force of an agency's regulatory interpretation suggested in *Skidmore v. Swift & Co.*\(^{26}\) In so doing, this Article concludes that, prior to relying on regulatory interpretations in SEC no-action letters, courts should consider a number of variables including: (1) whether the regulatory provision is, in fact, ambiguous; (2) the validity of the staff's reasoning in the letter; (3) whether the full Commission has reviewed and approved the no-action letter issued by the staff; (4) the letter's consistency with earlier and later interpretive pronouncements; (5) the extent to which the no-action letter draws on the staff's particular expertise; and, in certain instances, (6) the extent to which private parties may have relied on the no-action letter.


\(^{26}\) 323 U.S. 134 (1944). In *Skidmore*, the Supreme Court determined that a regulatory interpretation may constitute "persuasive authority" in a situation where a court is not legally bound to follow the interpretation. *Id.* at 139-40.
I
THE SEC'S NO-ACTION LETTER PROCESS

A. Formats Used by the SEC to Announce Regulatory Interpretations

Since its creation by Congress in 1934, the SEC has been the federal agency responsible for administering and enforcing federal statutes concerned with protecting investors in the U.S. securities markets. Particularly because the statutory language is both broad and ambiguous, the task of administering and enforcing this statutory scheme necessitates continual interpretive judgments. The SEC announces these regulatory interpretations in different contexts and in a variety of formats.

1. Formal and Official Interpretations

The SEC announces many of its important interpretations of the federal securities statutes through the exercise of congressionally delegated rulemaking powers. On some occasions, the SEC bases its rulemaking on statutory provisions that grant the agency specific authority to promulgate rules or regulations imposing requirements or defining the scope of lawful or unlawful conduct. On other occasions, the SEC premises its rulemaking on statutory provisions that grant the agency general authority to "make, amend, and rescind such rules and regulations as may be necessary to carry out [the stat-
utes]." The SEC often uses its general rulemaking powers to define statutory terms or to create "safe harbors" that provide objective criteria upon which market participants may rely to secure exemptions provided for in the statutory text. Before promulgating a rule pursuant to either type of authority, the SEC generally publishes the proposed rule in the Federal Register for notice and comment. When finalized, the rule is again published in the Federal Register and then codified in the Code of Federal Regulations ("C.F.R."). Rules and regulations promulgated pursuant to the SEC's statutory authority, whether specific or general, are aptly described as "SEC rules.

The SEC also received from Congress broad quasi-judicial powers. Through the process of adjudicating administrative proceed-

30 Securities Act § 19(a), 15 U.S.C. § 77s(a); accord Exchange Act § 29(a)(1), id. § 78w(a)(1). Congress has also granted the SEC the authority to define terms used in the Exchange Act. Id. § 78c(b).


32 The Administrative Procedure Act (the "APA") affords interested parties the right to participate in an agency's rulemaking process. See 5 U.S.C. §§ 551-559, 701-706. For rulemaking to be valid, the agency must (1) publish general notice of the proposed rule in the Federal Register, see id. § 553(b), and (2) give interested persons "an opportunity to participate in the rulemaking through submission of written data, views, or argument," id. § 553(b)-(c). These requirements are known as "the notice and comments requirements" of the APA. The APA also specifies that agencies must "incorporate in the rules adopted a concise general statement of their basis and purpose" and must publish a final rule in the Federal Register at least 30 days before it becomes effective. Id. Agency rules that may be classified as "interpretive rules" or "statements of policy" are exempt from these requirements. Id. § 553(d); see also infra notes 41-44 and accompanying text. Although the APA uses the term "interpretive rules," courts and commentators often use the terms "interpretative" and "interpretive" interchangeably. See, e.g., Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1534 (D.C. Cir. 1989). Consistent with the current practice of most courts and commentators, this Article uses the term "interpretive."

33 See, e.g., Securities Act § 8A, 15 U.S.C. § 77h-1 (granting authority to issue cease-and-desist orders, after notice and a hearing, for Securities Act violations); Exchange Act § 15(b)(4)(D), 15 U.S.C. § 78o(b)(4)(D) (granting authority to enter orders that censure, suspend, or revoke registration of broker-dealers, if the SEC finds, after notice and opportunity for a hearing, that a securities law violation has occurred); Exchange Act §§ 21B, 21C, 15 U.S.C. § 78u-2 to -3 (granting authority to issue cease-and-desist orders, after notice and a hearing, for Exchange Act violations and authority to impose monetary penalties against certain regulated individuals and entities); see also SEC Procedural Rule § 2(e), 17 C.F.R. § 201.102(e) (authorizing the institution of administrative disciplinary proceedings against individuals "practicing" before the SEC and who have engaged in "unethical or improper professional conduct"). In addition, although not an adjudicative proceeding as such, the SEC has authority under section 21(a) of the Exchange Act to publish reports concerning violations of the federal securities laws which it has investigated. See 15 U.S.C. § 78u(a). The SEC often uses section 21(a) reports to announce new, and typically novel, interpretations of regulatory provisions as they pertain to matters of public importance. See
ings against alleged securities law violators, the full Commission may announce new interpretations of statutory provisions and SEC rules. In SEC v. Chenery Corp., 332 U.S. 194 (1947), the Supreme Court recognized that announcing new regulatory interpretations in the course of a litigated proceeding would necessarily have a retroactive effect on the respondent. The Court nonetheless held that announcing new rules of law by means of adjudication was not per se an abuse of discretion. Id. at 203-04. The Court concluded that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." Id. at 203; see also Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1055 (D.C. Cir. 1979) (stating that "[t]raditionally, it is the agency, not the court, which determines whether to proceed by rulemaking, by individual adjudication, or by a combination of the two"). The SEC's preference for developing new regulatory interpretations through litigated proceedings instead of rulemaking—either directly through adjudicating administrative proceedings or indirectly through initiating civil enforcement actions in federal district court—has been subject to sharp criticism. See ROBERTA S. KARMEL, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA 96 (1982) (strongly disfavoring prosecutorial strategies for developing law, in part because "[o]ther regulated persons who will become subject to that regulatory policy do not have the opportunity to object or to comment upon the new interpretation or rule, as they would have in a rulemaking proceeding"); see also Richard W. Painter & Jennifer E. Duggan, Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation, 50 SMU L. Rev. 225, 276 (1996) (concluding that litigated proceedings against attorneys have failed to articulate intelligible standards regarding attorney conduct, and advocating the adoption of "a clear set of rules stating exactly what lawyers must do about client fraud").

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35 See, e.g., statutory provisions cited supra note 33.

36 5 U.S.C. § 554(a) (setting forth APA procedures applicable to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing").

37 All agencies charged with enforcing and administering a statute have "inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." Production Tool Corp. v. Employment & Training Adm'r, 688 F.2d 1161, 1166 (7th Cir. 1982) (citing General Electric Co. v. Gilbert, 429 U.S. 125 (1976)).

38 U.S. Const. art. II, § 1, cl. 1.
Interpretive statements that the SEC issues pursuant to this inherent authority fall within the APA's broad definition of "rule"; however, provided such statements can be classified as "interpretive rules" or "general statements of policy," they are exempt from the notice and comment procedures generally applicable to agency rulemaking. Typically, the SEC announces interpretive


40. The APA broadly defines a rule to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

41. Unlike either the text of the APA or its legislative history, the Attorney General's Manual on the APA provides definitional guidance as to what constitutes interpretive rules. U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act (1947) [hereinafter APA Manual]. The APA Manual defines interpretive rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." Id. at 30 n.3. The Supreme Court has observed that the APA Manual is "a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 546 (1978) (citations omitted).

42. The APA Manual defines general statements of policy, or "policy statements," as those "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." APA Manual, supra note 41, at 30 n.3. Thus, further action on the part of an agency is necessary before the policy described in the statement can have a legally binding effect on the public. See 1 Davis & Pierce, supra note 28, § 6.2.

43. See supra note 32 (discussing APA notice and comment requirements). Interpretive rules and policy statements are often described collectively as nonlegislative rules to distinguish them from legislative rules (also known as substantive rules) which are "issued by an agency pursuant to statutory authority and which implement the statute," and, therefore, must adhere to APA notice and comment requirements. APA Manual, supra note 41, at 30 n.3; see also 1 Davis & Pierce, supra note 28, § 6.3 (distinguishing generally between interpretive rules and legislative rules). While relatively easy to state, courts have had notorious difficulty applying the legal distinction between interpretive rules and policy statements, on the one hand, and legislative rules, on the other. The D.C. Circuit, which decides a large percentage of cases alleging APA violations, has on different occasions described this distinction as "fuzzy," "hazy," "tenuous," "blurred," "baffling," and "enshrouded in considerable smog." American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (stating that "the spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum"); Community Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (quoting authorities describing the distinction between legislative rules and general policy statements as "tenuous," "blurred," "baffling," and "enshrouded in considerable smog"); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 909 (5th Cir. 1983) (noting the D.C. Circuit's description of the "fuzzy perimeters" of interpretative rule exemption). Yet Professor Charles Koch argues that "[t]he distinction is not 'fuzzy' but clear: a legislative rule must be promulgated pursuant to a legislative grant of authority. The distinction is troublesome not because it is unclear, but because it is not always easy to determine." Charles H. Koch, Jr., Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy, 64 Geo. L.J. 1047, 1049 n.11 (1976); see also Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog, 8 Admin. L.J. Am. U. 1, 2 (1994) (stating that unless a rule has been promulgated by the use of the rulemaking procedures required for making rules with the force of law (e.g., prior notice and comment), an agency's rule can never be described as a "legislative rule").
rules or statements of policy in the form of "SEC releases" that are published in the *Federal Register* and often listed in the *C.F.R.*

Together, SEC rules, SEC orders, and SEC releases comprise what can be characterized as the official and formal side of the SEC's spectrum of interpretive authority. Publication in the *Federal Register*, codification or at least reference in the *C.F.R.*, issuance of a final decision on the record after a hearing, and authorization by the full Commission constitute some defining characteristics of these formal and official formats.

2. Informal and Unofficial Interpretations

Notwithstanding the SEC's efforts to clarify provisions in the federal securities laws through rulemaking, adjudication, and the issuance of SEC releases, securities law practitioners constantly struggle to apply statutory provisions and SEC rules to specific securities transac-

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From time to time, the SEC also uses an SEC release to publish the views of particular Divisions on various questions regarding provisions in statutes or SEC rules. See, e.g., Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act Release No. 1092, 52 Fed. Reg. 38,400 (Oct. 16, 1987) (conveying the Division of Investment Management's views clarifying, among other things, the "business" element of the definition of investment adviser); Interpretive Release on Regulation D, Securities Act Release No. 6455, 48 Fed. Reg. 10,045 (Mar. 10, 1983) (stating the Division of Corporation Finance's views on various interpretive questions regarding Regulation D). The full Commission, however, expressly authorizes the issuance of these releases and does not appear to draw substantive differences between Commission views expressed in releases and authorized staff views that are expressed in releases. See Rowe, *Highlights*, supra note 17, at 75-76. For example, both types of releases are published in the *Federal Register*, and the *C.F.R.*'s listing of interpretive releases does not distinguish between Commission releases and Commission-authorized staff releases.
tions contemplated by their clients. The Commission has long recognized and appreciated this struggle. Consequently, from its earliest days, the Commission has encouraged its staff to provide advice and guidance to those seeking assistance.45

Several factors account for the SEC's willingness to assist the public in this manner. First, the intricate and complex federal securities statutes, together with the more than 1400 SEC rules codified in the C.F.R.,46 often exacerbate public confusion. Additional formal rulemaking projects, therefore, do not always provide an antidote. Second, the varied and complicated nature of business transactions often makes "one-size-fits-all" securities law interpretations difficult to apply. In contrast, the staff can tailor its informal advice and guidance to specific transactions. Moreover, the SEC recognizes that effective capital formation and the success of the securities markets depend on public confidence in issuers, financial institutions, and market professionals. By reviewing proposed transactions, staff officials can suggest modifications that may alleviate the need for future enforcement actions and the negative publicity often generated therefrom.47 Finally, securities law practitioners (many of whom are former SEC staff members themselves)48 frequently work as business planners and, as such,
are uniquely positioned to apply interpretive guidance to a client’s business transaction from its inception.\textsuperscript{49}

SEC staff members utilize a panoply of techniques to dispense this informal advice to the public. For example, regulatory interpretations may be provided in face-to-face meetings or telephone conversations between SEC staff members and securities law practitioners;\textsuperscript{50} in staff letters commenting on filed material;\textsuperscript{51} through speeches and presentations at professional conferences; in congressional testimony; and, most importantly for the purposes of this Article, in no-action letters that respond to requests for advice on the appropriateness of contemplated transactions.\textsuperscript{52}

\textsuperscript{49} As one commentator advises, “congruence with the Commission’s policies and interpretations is often the best way efficiently to accomplish a client’s transaction.” LARRY D. SODERQUIST, SECURITIES REGULATION 13 (3d ed. 1994); see also Beaumont v. American Can Co., 621 F. Supp. 484, 492-93 (S.D.N.Y. 1985) (stating that “as a practical matter the custom of soliciting the SEC’s guidance in the form of exemptions or ‘no-action’ positions with respect to transactions which fall into gray areas of the securities statutes or regulations provides indispensable information to those seeking to structure advantageous, and sometimes creative, deals while staying within the bounds of the law”), aff’d, 797 F.2d 79 (2d Cir. 1986).


\textsuperscript{51} See 17 C.F.R. § 202.3 (setting forth the “letter of comment” or “deficiency letter” process for certain filings under the Securities Act or Exchange Act).

\textsuperscript{52} See infra Part I.B. (discussing the SEC’s practice of issuing no-action letters). Furthermore, the SEC is constantly generating new vehicles for dispensing informal advice to the public. For instance, in November 1996, the SEC announced that the Corporation Finance Division was preparing a number of “staff legal bulletins” to assist the public with a variety of interpretive issues. See Securities Regulation Briefs, Corporation Finance Division Staff, 28 Sec. Reg. & L. Rep. (BNA) 1376 (Nov. 8, 1996). The Corporation Finance Division has produced five such bulletins thus far, and they are publicly available on the SEC’s
While encouraging its staff to provide advice to the public in all of these formats, the SEC has taken steps to maintain a distinction between the formal and official regulatory interpretations that it provides as an agency and the informal and unofficial ones provided by its staff. The SEC's procedural rules, for example, describe the availability of "informal administrative interpretations" and specifically provide that "opinions expressed by members of the staff do not constitute an official expression of the Commission's views."

To some, the SEC's distinction between Commission views and staff views may seem exceedingly formalistic. After all, actions by the full Commission comprise only a fraction of the agency's day-to-day activities. But the full Commission's ability to separate its actions from those of its staff makes the agency more accommodating to the needs of securities law practitioners and their clients. Conversely, if staff officials' interpretive statements bound the agency, the Commission might significantly curtail its traditional support of staff advisory practices, or perhaps eliminate such practices entirely.

B. The SEC's Practice of Issuing No-Action Letters

The SEC first issued SEC "opinions of counsel," the precursor to today's no-action letters, as early as 1936, in response to specific requests from members of the public seeking advice regarding the applicability of the federal securities laws to particular transactions. The SEC rarely made views set forth in these opinions of counsel public, and expressly stated that they were "staff views" that did not constitute Commission rulings. Moreover, from time to time, particularly when a question of law or fact was very close, the staff's response would not express a legal opinion. Rather, the staff member would

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53 See supra notes 50-52, infra notes 92-98 and accompanying text (providing additional discussion on unofficial nature of staff opinions).
54 17 C.F.R. § 202.2.
55 Id. § 202.1(d).
56 See generally MICHAEL ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES §§ 1.01-1.07 (1973) (discussing advice-giving practices of federal government agencies including the SEC).
57 Lemke, supra note 10, at 1021.
58 Id.
59 See 1 LOSS & SELIGMAN, supra note 10, at 533-34 n.29.
merely indicate a position on the likelihood of enforcement action. According to Professors Loss and Seligman, by the early 1960s, the SEC largely replaced opinions of counsel with no-action letters.60

1. What Are No-Action Letters?

Today, the staff’s written responses to requests for advice from members of the public generally take one of three forms: a “pure” no-action letter, an interpretive letter, or a no-action letter issued pursuant to Rule 14a-861—an SEC rule providing shareholders of a public company with the right to have their proposals included in the company’s annual proxy materials.

a. “Pure” No-Action Letters and Interpretive Letters

According to the SEC, “[a] no-action letter is one in which an authorized staff official indicates that the staff will not recommend any enforcement action to the Commission if the proposed transaction described in the incoming correspondence is consummated.”62 “Pure” no-action letters typically conclude with a statement that the “response only represents the staff’s position on enforcement action and does not purport to express any legal conclusion on the questions presented.”63 Ironically, even when the staff does not grant the requested “no-action” relief, its disfavorable written response is still termed a “no-action letter.”64 Moreover, negative responses to no-action requests generally contain some type of statutory or regulatory analysis as to why the staff cannot respond positively to the requestor’s inquiry.65 Thus, pure no-action letters most often communicate favorable enforcement positions.

The SEC contrasts a pure no-action letter with an “interpretive letter” wherein “the staff provides an interpretation of a specific statute, rule or regulation in the context of an actual fact situation.”66 In general, the SEC does not label interpretive letters as such. Rather, if the staff fails to disclaim the letter’s expression of a legal conclusion the letter is deemed interpretive. In other words, because the staff has

60 See id.
63 Lenke, supra note 10, at 1032; see Rowe, Reliance, supra note 16, at 706, 766 (discussing pure no-action letters).
64 See generally HAFT, supra note 11 (outlining and analyzing both favorable and unfavorable no-action letters).
65 See Lenke, supra note 10, at 1095 (“Unlike a favorable response, the staff is more apt to explain the basis for [an] adverse response, particularly if it is based on a disagreement regarding an interpretation of the law.”).
66 Procedures Utilized Release, supra note 62, at 320-21 n.2.
not included a sentence that describes the letter as solely the staff's position on enforcement action, the letter may be characterized as interpretive.67

Most securities law scholars and practitioners agree that the SEC's distinction between no-action and interpretive letters is frequently blurred.68 Indeed, many, if not most, letters advising a no-action position do so based on a staff member's interpretation of the law, regardless of whether she explicitly communicates that interpretation within the body of the letter.69 Accordingly, when a staff member explicitly bases a no-action position on a particular interpretation of the law, the so-called interpretive letter fits into a subset of the broader category of no-action letters.70 For these reasons, the general term "no-action letter" encompasses both pure no-action and interpretive letters. Similarly, the term "regulatory interpretations" fairly describes both explicit interpretations in no-action letters as well as those interpretations implied from particular enforcement positions articulated in some pure no-action letters.71

b. No-Action Letters Relating to Shareholder Proposals Under Rule 14a-8

Because they are often cited by parties in litigation,72 no-action letters containing interpretations of SEC Rule 14a-873 merit brief, separate attention. Rule 14a-8 provides shareholders of a public company with a general right to have their proposals included in the company's proxy materials for its annual shareholder meeting,74 but specifies that the company may omit a shareholder proposal on any of

67 See Lemke, supra note 10, at 1032.
68 See Rowe, Highlights, supra note 17, at 75 (stating that "in some instances, these distinctions may be blurred and, for some purposes, may not be relevant"); see also Lemke, supra note 10, at 1022 (stating that "it is often difficult to categorize a response definitively as either no-action or interpretive").
69 See Lemke, supra note 10, at 1022; see also 3 HAROLD S. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 1.13, at 1-93 (1997) (stating that "no-action letters in many instances have an underlying interpretative rationalization").
70 See Lemke, supra note 10, at 1032; Rowe, Highlights, supra note 17, at 75.
71 But see infra notes 410-11 and accompanying text (advising courts to accord greater scrutiny when relying on regulatory interpretations in pure no-action letters).
72 See, e.g., infra notes 194-200, 276-83, 304-12 and accompanying text (discussing the so-called "Cracker Barrel" controversy and other cases involving requests by public companies for judicial deference to no-action letters containing regulatory interpretations of SEC Rule 14a-8).
74 Rule 14a-8(a) provides that "[i]f any security holder of a registrant notifies the registrant of his intention to present a proposal for action at a forthcoming meeting of the registrant's security holders, the registrant shall set forth the proposal in its proxy statement and identify it in its form of the proxy." Id. § 240.14a-8(a).
The rule also specifies that a company planning to exclude a proposal from its proxy materials must file the following with the SEC: the proposal, any supporting statements by the shareholder, a statement of the reasons why the company considers the omission proper, and, where the reasons for omission are based on matters of law, a supporting opinion of counsel. Although Rule 14a-8 merely prescribes notification and filing requirements, virtually all companies that decide to omit a shareholder proposal seek a no-action letter in support of their decision. Consequently, in responding to no-action requests, staff members necessarily must draw interpretive conclusions regarding whether the shareholder proposals are properly excludable.

Although no-action letter requests and responses involving other SEC rules or statutory provisions may practically affect the legal rights of third parties, no-action letters issued in connection with Rule 14a-8 are somewhat special because the rule itself contemplates the presence and involvement of a clearly identifiable third party—the shareholder-proponent. Hence, in addition to a company's no-action letter request and its opinion of counsel, the staff also receives submissions from the shareholder-proponent's counsel or the individual shareholder. The process therefore takes on many characteristics of an adjudication—the SEC staff reviews "briefs" submitted by both constituencies and chooses the position with which it most agrees.

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75 Id. § 240.14a-8(c)(1)-(13); see, e.g., id. § 240.14a-8(c)(1) (stating that a proposal may be excluded if it is not a proper subject for action under the laws of registrant's domicile); id. § 240.14a-8(c)(2) (stating that a proposal may be excluded if its implementation would require registrant to violate any state or U.S. law, or any law of any foreign jurisdiction to which the registrant is subject); id. § 240.14a-8(c)(7) (stating that a proposal may be excluded if it "deals with a matter relating to the conduct of the ordinary business operations of the registrant").

76 Id. § 240.14a-8(d)(1)-(4).

77 See Jonathan E. Gottlieb, Regulation of Shareholder Proposals—Recent Developments and Some Suggestions for Reform, Insigrrs, Dec. 1993, at 25; see also Schwartz & Weiss, supra note 11, at 648-49 (discussing no-action letters in the context of Rule 14a-8).

78 See infra note 352 and accompanying text.

79 17 C.F.R. § 240.14a-8(d)(3)-(4) (stating that registrant must furnish shareholder proponent with the reasons for omission and a copy of the supporting opinion of counsel); id. § 240.14a-8(e) (specifying that if the shareholder believes that the statement in opposition contains materially false and misleading information, the shareholder may bring this matter to the Commission's attention via a letter setting forth the reasons for this view).

80 See Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release No. 12,599, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,635, at 86,602, 86,605 (July 7, 1976) [hereinafter Shareholder Proposals Release] (noting that the staff will consider arguments by the proponent as to "why it is believed that the intended omission of a shareholder proposal would be violative of the proxy rules").

Shareholders who fail to convince the staff to issue a disfavored no-action letter may pursue their legal arguments in court by alleging, in an action against the company, a Rule 14a-8 violation. The shareholders' strong interest in having their proposals included in proxy materials, particularly those raising important social and political issues, coupled with the possibility of recouping attorney fees under the "common benefit rule," virtually guarantees that some cases will end up in a federal district court. The federal judge must then decide what weight to accord the no-action letter that the SEC staff issued to the company.


The SEC has developed a set of fairly rigid procedures applicable to individuals and entities seeking no-action letters. Generally, such requests are directed to the chief counsel of the SEC division responsible for administering the statute or SEC rules under which the request...
arises. Consequently, three SEC divisions handle the bulk of requests—Corporation Finance, Market Regulation, and Investment Management. Staff attorneys working for the division's chief counsel typically prepare a draft of the response which, depending on the significance and level of complexity of the regulatory issue involved, one or more higher ranking officials review prior to transmission. The SEC's procedural rules expressly provide that "any statement by the . . . chief counsel . . . of a division can be relied upon as representing the views of that division." Moreover, for the purposes of this provision, a statement that an attorney on the chief counsel's staff signs is regarded as a statement by the chief counsel.

In the context of no-action letters, the SEC's pronouncement that statements by certain high ranking officials "can be relied upon" as the position of the corresponding division certainly begs the critical question of what it means for an individual or entity to be able to rely on such a statement. However, in a number of SEC releases, the SEC has set forth examples of what permissible reliance does not mean.

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87 See Lemke, supra note 10, at 1024. In addition to reciting specific facts relating to the transaction at issue, the SEC has made clear that the requestor "should indicate why he thinks a problem exists, his own opinion in the matter and the basis for such an opinion." No-Action and Interpretive Letters Release, supra note 86, at 840. This dictate prompted the following advice from a securities law practitioner:

In explaining [the basis of the problem] there should be a discussion of relevant precedent, including any applicable case law or administrative positions and particularly any no-action letters relevant to the issues involved . . . . In addition, applicable contrary precedent should be discussed and distinguished, if possible, and a request that is unprecedented should be noted as such. The staff may return a request unanswered if the requestor's opinion is unsubstantiated.

Lemke, supra note 10, at 1027 (footnotes omitted).

88 See id. at 1022.

89 See id. at 1029. In 1980, following the model that other SEC divisions employed, Corporation Finance adopted an "abbreviated response" format for most of the no-action letters it issues. Procedures Utilized Release, supra note 62, at 321. Pursuant to this format, most no-action letters authored by the staff do not restate the facts and legal issues presented by the requestor. Rather, the Division "simply sets forth its position on the issues raised . . . on a separate page attached" to the requestor's letter. Id. Consequently, as Professor Haft has noted, "the staff usually does not, except in a conclusory fashion, state the rationale for its ruling in a specific case." Haft, supra note 11, at viii; see also Lemke, supra note 10, at 1031 ("[T]he staff's response usually consists of no more than two or three paragraphs setting forth the position of the division."). The SEC staff has also enumerated particular areas and situations where it will not express any position or comment. For example, it will not respond to questions regarding the availability of either Securities Act section 4(2) exemptions for private offerings or interstate offering exemptions under Securities Act section 3(a)(11). See Procedures Utilized Release, supra note 62, at 322-23 (discussing these and other identified areas of "no-comment").

90 17 C.F.R. § 202.1(d) (1997). The full provision specifies that "any statement by the director, associate director, assistant director, chief accountant, chief counsel, or chief financial analyst of a division can be relied upon as representing the views of that division." Id.

91 See Lemke, supra note 10, at 1024 & n.21.
For instance, it does not mean that no-action letters bind the full Commission to a particular interpretive view because the Commission takes the position that "it is not bound by these staff responses."92 The phrase "can be relied upon" also does not mean that the Commission promises to refrain from instituting an enforcement action against the recipient of a no-action letter because "the Commission reserves the right to act contrary to staff advice."93 It also does not mean that parties can rely on no-action letters in subsequent transactions because "no-action and interpretative responses by the staff are subject to reconsideration."94 Likewise, permissible reliance does not mean that similarly situated third parties can rely on no-action letters95 because the SEC places a theoretical "addressee-only" limitation on its advice in most letters.96 Finally, possession of a no-action letter does not insulate the recipient from suit by a private party because no-action letters are "not rulings of the Commission or its staff on questions of law or fact and are not dispositive of the legal issues raised as to the applicability of the federal securities laws to a given transaction."97 Furthermore, "such letters are not intended to affect the rights of private parties."98

92 List Release, supra note 7, at 13,682.
93 Small Entities Release, supra note 50, at 15,606.
95 See Shareholder Proposals Release, supra note 80, at 86,605 (stating that "[b]ecause the staff's advice on contested proposals is informal and nonjudicial in nature, it does not have precedential value with respect to identical or similar proposals submitted to other issuers in the future"). But see Procedures Utilized Release, supra note 62, at 324 (stating that "issuers . . . and their counsel should review past statements issued by the Division [of Corporation Finance] in connection with the same or similar proposals submitted to other issuers in the future") (footnote omitted).
96 Unless otherwise specified, any legal conclusions are limited solely to the specific facts and circumstances described in the incoming letter. See Small Entities Release, supra note 50, at 15,606 ("In general, only the party or parties requesting a no-action or interpretive position may rely on a no-action or interpretive letter, and they may rely on the position with regard only to the specific facts addressed in the letter."). But see infra notes 157-58 and accompanying text (discussing instances where divisions specifically approve of reliance by third parties and instances where no-action letters are issued in response to requests by associations or industry groups on behalf of their membership).
97 List Release, supra note 7, at 13,682.
98 Id.; see also Non-Public Offering Exemption, Securities Act Release No. 4552, 27 Fed. Reg. 11,316 (Nov. 6, 1962) (advising the public that, when presented with identical facts, federal courts may nonetheless apply alternative tests and draw different conclusions regarding the availability of Securities Act section 4(1)'s transactional exemption); supra note 82 (quoting SEC statements regarding rights of shareholder proponents to institute
Thus, by a process of elimination, one may conclude that the SEC intends reliance on views of the division to simply mean that the recipient can consider the letter a promise that the division staff will not bring that particular transaction to the Commission’s attention for enforcement action. Such a promise, however, probably would not constitute a basis for legal estoppel. Yet recipients highly value no-action letters, undoubtedly because the Commission appears to have never proceeded against the recipient of a no-action letter who acted in good faith on the letter’s advice.


Commentators have observed that, when a no-action letter request involves a novel or highly complex issue or area of interpretation, the staff typically consults with the Commission prior to issuing a response. Indeed, the SEC’s procedural rules specifically provide for such consultation. However, this provision is qualified, as the rules also make it clear that any consultation lies solely in the discretion of the Commission.

In its discretion, the Commission may also act on requests from the public for Commission review of staff positions articulated in no-action letters. Members of the division that issued the challenged private actions under Rule 14a-8 regardless of staff or Commission views expressed in no-action letters).

99 See, e.g., SEC v. Culpepper, 270 F.2d 241, 248 (2d Cir. 1959) (“It has often been said that ‘the Commission may not waive the requirements of an act of Congress nor may the doctrine of estoppel be invoked against the Commission.’” (emphasis added) (quoting SEC v. Morgan, Lewis & Bockius, 209 F.2d 44, 49 (3d Cir. 1953)); Frank C. Newman, Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law, 53 COLUM. L. REV. 374 (1953) (discussing estoppel arguments in claims of reliance on agency advice).

100 See 10 Loss & SELIGMAN, supra note 10, at 4543-44 & n.197 (noting that “it is no secret that the Commission will normally take no action when a person has acted in good faith on the basis of a staff letter” and citing sources contending that the Commission has never proceeded against a recipient of a no-action letter relying in good faith on that letter).

101 See, e.g., LOUIS LOSS, 3 SECURITIES REGULATION 1895 (1961) (opining that “it is no secret that Commission officials do not express opinions on close questions of construction, particularly when they are major or novel, without some clearance with the Commission”); Lemke, supra note 10, at 1029.

102 See 17 C.F.R. § 202.1(d) (1997). This section provides that: [I]n certain instances an informal statement of the views of the Commission may be obtained. The staff, upon request or on its motion, will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion.

Id.

103 See id.

104 See id.; see also Lemke, supra note 10, at 1026 (describing the Commission’s requirements for reviewing staff no-action letters). Requests for review by the full Commission
no-action letter are generally responsible for presenting the matter to the Commission. This presentation often takes the form of a staff recommendation that the Commission decline to review the matter. More often than not, the Commission accepts this recommendation.

On some occasions the Commission reviews the staff's no-action letter and issues a brief statement expressing agreement or disagreement with the staff's position. However, even when the Commission exercises its discretion to review the staff's no-action position, the Commission characterizes any statement it issues as "informal." Thus, the Commission appears to draw a distinction between the views expressed in SEC releases and those expressed in "informal statements" regarding no-action letters issued by the staff. One manifestation of this distinction is that, unlike SEC releases, Commission statements approving or reversing staff no-action letters are neither published in the Federal Register nor referenced in the C.F.R. Rather, such informal statements are generally made at Commission meetings, and the Secretary of the Commission notifies the requestor of the Commission's action.

4. Direct Judicial Review of Regulatory Interpretations in No-Action Letters

Each federal securities statute contains a provision permitting "[a] person aggrieved by an order of the Commission" to seek direct judicial review at the federal appellate level. The APA supplements
this statutory provision by specifying that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."\textsuperscript{111} The availability of either type of judicial review for SEC no-action letters is a disputed issue.

As a threshold matter, the availability of judicial review depends on whether the Commission reviewed and approved the particular no-action letter. In cases where the Commission has refused to review a no-action letter issued by the staff, direct judicial review under either the federal securities statutes' review provisions or the APA is generally foreclosed because there is no final agency action to review.\textsuperscript{112}

In contrast, when the Commission reviews and affirms a staff no-action letter, there is at least an arguable claim of final agency action. For example, in 1970, the D.C. Circuit asserted jurisdiction over a regulatory interpretation in a Commission-approved no-action letter.\textsuperscript{113} However, the weight of recent authority seems to forestall direct review at the federal appellate level on the grounds that even Commission-approved no-action letters are not "final orders" within the meaning of the federal securities statutes.\textsuperscript{114}

Section 706 of the APA permits a federal district court to reverse final agency action that is, among other things, "arbitrary" or "capricious."\textsuperscript{115} Therefore, under the APA, district courts may review regulatory interpretations in no-action letters that have been reviewed and approved by the Commission. One must read this section, however,

\begin{itemize}
  \item \textsuperscript{111} 5 U.S.C. § 702.
  \item \textsuperscript{112}  See Kixmiller v. SEC, 492 F.2d 641, 643-44 (D.C. Cir. 1974) (holding that court has no jurisdiction under Exchange Act section 25(a) to review staff position in no-action letter where Commission has refused either to examine the staff's view or to express a view of its own); Potomac I, supra note 104, at 96,327 (citing Kixmiller and noting that there would be no jurisdiction under the APA to review a staff no-action letter that had not been reviewed and affirmed by the Commission). But see Vickery, supra note 81, at 356 (arguing that "[d]irect judicial review should be available where the head of an agency refuses to review informal staff action and the practical detriment imposed on the plaintiff outweighs the costs to the agency").
  \item \textsuperscript{113} Medical Comm. for Human Rights v. SEC, 482 F.2d 659 (D.C. Cir. 1970) (holding that Commission-approved no-action letter was an SEC order under Exchange Act section 25(a) and was ripe for review because it constituted the agency's "final word" on its interpretation of SEC Rule 14a-8's exception for ordinary business activities), vacated as moot, 404 U.S. 403 (1972).
  \item \textsuperscript{114} Amalgamated Clothing & Textile Workers Union v. SEC, 15 F.3d 254 (2d Cir. 1994) (holding that because no-action letters lack binding "legal effect," the Commission-approved no-action letter containing an interpretation of Rule 14a-8 was not a "final order" within the meaning of Exchange Act section 25(a)); see also Bd. of Trade v. SEC, 883 F.2d 525 (7th Cir. 1989) (noting that the Commission-approved no-action letter was tentative, not final, as would be necessary for the court to assert jurisdiction under Exchange Act section 25(a), but disclaiming jurisdiction because, even if it were a final order within the meaning of section 25(a), the no-action letter was a "refusal to prosecute" which, under the APA, is committed to agency discretion by law) (citing 5 U.S.C. § 702(1)).
  \item \textsuperscript{115} 5 U.S.C. § 706(2)(A); see Potomac I, supra note 104, at 96,327 (reviewing SEC no-action letter pursuant to APA section 706).
\end{itemize}
against the backdrop of section 704, which limits judicial review to instances where "there is no other adequate remedy in a court." 116 Litigants seeking direct judicial review of Commission-approved regulatory interpretations in no-action letters therefore must overcome two hurdles to be heard in federal district court. First, they must demonstrate that the regulatory interpretation constitutes final agency action that is "ripe" for review. 117 Second, they must demonstrate the absence of an alternative legal remedy. 118

Thus, whether an individual or entity seeks review at the federal appellate level through the federal securities laws, or at the district court level through the APA, they are unlikely to succeed in challenging a regulatory interpretation in a no-action letter in a direct action against the SEC. Rather, market participants and public investors who disagree with regulatory interpretations in no-action letters are generally forced to challenge such interpretations indirectly—either in the course of enforcement actions initiated by the SEC or in private litigation. The individual or entity opposing the regulatory interpretation in the no-action letter therefore places tremendous faith in the judiciary that independent review will be accorded. Yet, practical—rather than legal—reasons often forestall opportunities for such indirect judicial review.

C. The Practical Impact of SEC No-Action Letters on the Regulatory Process

If the SEC's no-action letter process functioned in practice the way it was designed to in theory, its public impact would be largely limited to the particular individuals and entities who seek and receive the informal regulatory advice regarding a specific transaction. Yet

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117 In Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), the Supreme Court articulated standards for determining whether an agency's regulatory interpretation was "ripe" for pre-enforcement judicial review. Id. at 148. In Potomac I, the court applied these ripeness standards to a regulatory interpretation in a Commission-approved no-action letter and concluded that the balance of interests favored prompt adjudication. Potomac I, supra note 104, at 96,328. However, in a subsequent proceeding, the court found that the statutory interpretation conveyed in the no-action letter was not arbitrary or capricious. See Potomac Fed. Corp. v. SEC, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,815, at 96,720 (D.D.C. 1974) [hereinafter Potomac I].
118 In New York City Employees' Retirement System v. SEC, 45 F.3d 7 (2d Cir. 1995), the U.S. Court of Appeals for the Second Circuit categorized a regulatory interpretation in a no-action letter that had been reviewed and approved by the Commission as an "interpretive rule" within the meaning of section 553 of the APA. Id. at 13. The challenged no-action letter contained a regulatory interpretation that purportedly interpreted Rule 14a-8 to permit the exclusion of a shareholder proposal. Id. at 10. The court rejected the shareholder's claim for review of the rule under APA section 706 because it found that the plaintiff shareholders had an effective alternative legal remedy to suing the SEC—it could sue the company under a private right of action for the company's violation of Rule 14a-8. Id. at 14.
few would dispute that the no-action letter process in existence today substantially affects the behavior of all market participants, rather than merely the particular no-action letter recipients. Indeed, by announcing regulatory interpretations through the vehicle of no-action letters, the SEC has both encouraged favored conduct and discouraged, and in some cases eliminated entirely, disfavored actions and practices. In other words, the SEC has been able to use its no-action letter process as an effective policymaking tool.  

This Section analyzes how no-action letters have come to play this important role in the regulatory process. It first explains how changes in the public availability of no-action letters, coupled with the SEC’s retreat from its theoretical “addressee-only” position, have facilitated the SEC’s ability to shape general conduct through the issuance of these letters. It then identifies reasons why the SEC uses no-action letters to announce generally applicable regulatory interpretations and examines why securities law practitioners and their clients often regard these interpretations as law. This Section concludes by discussing many of the consequences that result from SEC policymaking through the no-action letter process.

Analyzing the practical implications of the SEC’s no-action letter process serves three corresponding purposes. First, it helps explain why so many courts have been willing to accord great deference to regulatory interpretations in no-action letters despite the SEC’s characterization of these letters as “unofficial” and “informal.” Second, it demonstrates why clarification of the legal status of no-action letters is so important. Finally, this analysis highlights the judiciary’s critical role in ensuring that the SEC’s no-action letter process does not diminish the legal rights of either the regulated community or the investing public. Indeed, as Professor Donald Langevoort has recognized in a broader context, “understanding the process of policy formulation at an administrative agency says a good deal about the deference we ought to give to agencies in such matters as statutory interpretation.”

119 For a general discussion of why the process of interpreting statutes and rules often requires that an agency make policy choices, see infra notes 222-31 and accompanying text.
120 See supra notes 95-96 and accompanying text.
121 See supra notes 53-56, 92-98 and accompanying text.
122 Donald C. Langevoort, The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formulation, 47 Wash. & Lee L. Rev. 527, 539 (1990). Professor Langevoort’s essay examines the SEC as a bureaucratic institution and offers insightful explanations for what he perceives as the agency’s risk aversion, its biases against the adoption of bright-line rules, and its tendency to adopt rhetorical conventions which become increasingly influential in shaping the SEC’s future behavior. Id. at 530-93. Of particular importance for purposes of this Article is Professor Langevoort’s caution that, due to the great force of SEC institutional rhetoric, the SEC’s regulatory interpretations “may well
1. The SEC's Use of the No-Action Letter Process as a Policymaking Tool

a. Changes Regarding the Public Availability of No-Action Letters

In the early years of the SEC's no-action letter process, the regulatory interpretations announced therein were generally available only to the particular requestors. Beyond that, as one commentator has recalled, "knowledge of the letters' very existence was a professional advantage limited (outside the ranks of the staff) to a few cognoscenti." This public unavailability of no-action letters significantly curtailed the SEC's ability to shape general conduct through no-action letters.

In 1968, the SEC invited public comment on the advisability of making no-action letters public, even though the agency took the position that such disclosure was not required under the Freedom of Information Act ("FOIA"). Two years later, the SEC reported that "[t]he overwhelming majority of commentators favored public disclosure of the matters treated in no-action and interpretative letters."
In response to this majority sentiment, the SEC announced that beginning December 1, 1970, requests for no-action letters, interpretive letters, and staff's responses would be available for public inspection and copying thirty days after the staff has given or sent its response to the requestor. The SEC further amended its rules in 1988 to provide for expedited publication of no-action and interpretive letters except in cases where it has granted confidential treatment.

Modern technology has also played a substantial role in ensuring widespread public availability of the thousands of no-action letters that the SEC issues each year. Today, practitioners may retrieve most no-action letters through the legal databases of Lexis and Westlaw, as well as through CCH and BNA loose-leaf services. Thus, interested persons can now access and research regulatory interpretations in no-action letters in a manner similar to the formal and official SEC pronouncements embodied in SEC rules, orders, and releases.

b. The SEC's Retreat from a Theoretical "Addressee-Only" Position

While certainly a prerequisite, public availability of no-action letters alone cannot explain how the SEC has come to use these letters as a general policymaking tool. Even publicly available letters would have little utility if the advice contained therein were applicable only to the specific facts and circumstances described by the individual request's Staff, Securities Act Release No. 5073, [1969-1970 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,828, at 83,979 (July 14, 1970). Securities law practitioners and commentators were not unanimous about the advisability of public disclosure. Professor Louis Loss, for instance, cautioned the SEC against permitting public access to all no-action letters. Louis Loss, Summary Remarks, 30 Bus. Law. 163, 164-65 (1975) (special issue). Moreover, shortly after the public availability decision was made, he expressed the rather animated view that:

If there is anything worse than not having precedent, it is being drowned in it. We all know that ninety percent of these letters are sheer, unadulterated, repetitious garbage. That was predictable. It is a fact. One can't possibly read even the letters that are occasionally digested in CCH or elsewhere. Perhaps one could read the headnotes. If you try to read everything that is going on in this field and those letters, those letters are very definitely the straw that breaks the camel's back.

Id. Professor Loss also suggested that the SEC "ought to come to grips with this and take the lawyer off the hook of a possible malpractice suit by ... inaugurating the practice of publishing perhaps fifty or a hundred of these letters per year—the ones that are meaningful and that could possibly be digested." Id. at 165.

126 Public Availability Release, supra note 94, at 80,051.

127 Expedited Publication Release, supra note 86, at 89,383. Pursuant to the SEC's Procedural Rules, individual requestors may seek "confidential treatment" of their requests and the staff's response thereto for a reasonable period of time, not exceeding 120 days. 17 C.F.R. § 200.81(b) (1997). However, the SEC has noted that the burden is on the requestor to establish the need for confidential treatment and that it would not grant confidential treatment unless a requestor clearly demonstrated such need. Public Availability Release, supra note 94, at 80,051. The SEC has further advised counsel and market participants that "requests for confidential treatment should be limited to the minimum period necessary under the circumstances. Only in exceptional situations, such as mergers or acquisition programs, will the full 90-day period be allowed." Id.
questor. Thus, the increased public availability of no-action letters must be viewed in conjunction with the SEC’s willingness, over the years, to depart from the theoretical “addressee-only” limitation placed upon these letters.\textsuperscript{128}

Significant empirical evidence suggests that both the Commission and its staff fully expect most regulatory interpretations in no-action letters to extend beyond the specific factual contexts in which they were issued. For example, in 1975, the SEC began to include in the \textit{SEC News Digest} a list of “significant” no-action letters.\textsuperscript{129} Publication of such a list would serve little purpose if these letters did not indicate, however informally, staff views that are generally applicable to similarly situated third parties.\textsuperscript{130} Additionally, most SEC divisions have identified certain regulatory issues that prior no-action letters have resolved, and they have announced their intention not to respond to no-action requests in those areas unless the request raises novel or unique issues.\textsuperscript{131} This practice makes sense only if the prior letters contain regulatory interpretations that are generally applicable to others in similar situations.\textsuperscript{132} Furthermore, SEC officials participate in numerous programs and symposia that are designed, in part, to publicize their most recent no-action positions and interpretations.\textsuperscript{133} They also prepare annual outlines and memoranda summarizing, for the public’s benefit, the year’s most important no-action letters.\textsuperscript{134} Yet, if regulatory interpretations in no-action letters were not generally applicable to similarly situated persons, staff efforts to educate the public about recent no-action letters would be meaningless. Finally, the Commission frequently references no-action letters in SEC orders and releases, a practice that also indicates the general applicability of no-action letters.\textsuperscript{135}

\begin{footnotes}
\footnote{128}{See supra notes 95-96 and accompanying text.}
\footnote{129}{List Release, supra note 7, at 13,682.}
\footnote{130}{See Rowe, \textit{Paper Tigers}, supra note 16, at 22. Rowe specifically notes that [t]he only rational explanation for giving special prominence to no-action positions is that they are intended to be relied upon and that those affected conform their conduct appropriately. Reference to these letters . . . cannot be intended only to provide guidance to those wishing to submit their own requests for no-action letters. Such a position would . . . lead to a waste of resources and inefficiencies . . . .\textit{Id.} at 23 (citation omitted).}
\footnote{131}{See Lemke, supra note 10, at 1084; Rowe, \textit{Paper Tigers}, supra note 16, at 22.}
\footnote{132}{See Rowe, \textit{Paper Tigers}, supra note 16, at 22 (contending that a strict addressee-only position “would be inconsistent with SEC public statements and letters such as those of the ‘don’t bother us anymore’ type”).}
\footnote{133}{See Separate Statement of Commissioner Fleischman, supra note 123, at 81,393.}
\footnote{134}{See, e.g., Division of Corporation Finance, \textit{Significant No-Action and Interpretive Letters, 1 The SEC Speaks in 1996}, at 196 (1996).}
\footnote{135}{See Separate Statement of Commissioner Fleischman, supra note 123, at 81,393; \textit{see also} Small Entities Release, supra note 50, at 15,606 (noting that “when proposing or adopting rules and rule amendments the Commission may cite with approval letters issued by}}
Former Commissioner Fleischman once colorfully characterized the SEC's vacillation between a theoretical "addressee-only" position and its practical "general applicability" position as a "kind of institutional schizophrenia." In addition to some of the examples mentioned, he also pointed out that:

In rulemaking proceedings, in prosecutorial briefs, in its Annual Reports to Congress, in its amicus program, in settlement orders, and in its adjudicated opinions, the Commission has cited to no-action letters[,] . . . in each case implicitly accepting those letters as statements of the relevant Division's view of a generally applicable position and in no case limiting the cited letters to their addressees (in fact, only occasionally even reciting the underlying facts for explanatory purposes).

In that same public statement, former Commissioner Fleischman strongly encouraged the SEC to "utter a new mantra, bespeaking a proper perception." Thus far, however, the SEC has not explicitly adopted this mantra.

c. Regulatory Advantages Attached to the No-Action Letter Format

Although the SEC initially resisted the public's call for access to no-action letters and may have intended to maintain a strict "addressee-only" position, the agency soon recognized the regulatory advantages of announcing generally applicable regulatory interpretations in no-action letters. For instance, unlike SEC rules, which the SEC may issue only following a notice and comment period, the SEC can immediately issue no-action letters, without justifying its policies before a well-informed and often skeptical public.

Moreover, as Professor Langevoort has observed, policymaking

the staff in the area"). The SEC has also argued in litigation that a no-action letter issued to a similarly situated third party evidenced that the defendant had prior notice, for purposes of constitutional due process, of the SEC's interpretation of a particular regulatory provision. See General Bond & Share Co. v. SEC, 39 F.3d 1451, 1455 (10th Cir. 1994). Although the court did not rule on this issue, the SEC's suggestion that publication of an interpretive view in a no-action letter constitutes constitutionally adequate notice to an unrelated third party is diametrically opposed to any contention that an "addressee-only" limitation applies to no-action letters.

Separate Statement of Commissioner Fleischman, supra note 123, at 81,392-93.

Id. at 81,393 (footnotes omitted).

Id. at 81,394.

See supra note 32 (discussing the APA's notice and comment requirements for legislative rules).

For example, Professor J. Robert Brown, Jr. maintains that many of the substantive standards and obligations imposed by the SEC on U.S. investment adviser advertising stem not from SEC rules but from informal no-action letters. Brown, supra note 11, at 279-89. He contends that if SEC rules had embodied these ostensible requirements, they "would have required notice and comment at both adoption and amendment. By relying on no-action letters, however, the staff could simply abandon earlier positions through updated pronouncements with little fanfare or procedural safeguards for the public." Id. at 279.
through these informal mediums "limits the opportunity for post hoc criticism based on the perception that, as a result of the particular line that it drew, the agency failed to prevent, if not encouraged, some activity that turned out to be socially harmful."\textsuperscript{141}

The availability of the no-action letter process also provides the SEC with an escape hatch from the fuzzy standards often set out in SEC releases or announced through litigated proceedings. This, in turn, alleviates some of the pressure placed on the SEC by market participants calling for additional safe harbor rules.\textsuperscript{142} In other words, the SEC can use no-action letters to focus on and delineate specific—and sometimes minute and mundane—criteria for complying with the law.\textsuperscript{143} Although commentators disagree as to whether this aspect of the process constitutes a positive attribute,\textsuperscript{144} this approach clearly preserves maximum flexibility in the shaping of future policy.\textsuperscript{145} Such flexibility, in turn, encourages innovative ideas during the period before the staff and Commission have fully crystallized

\begin{itemize}
\item \textsuperscript{141} See Langevoort, \textit{supra} note 122, at 531.
\item \textsuperscript{142} See \textit{supra} notes 43-44. The SEC acknowledged as much in its often cited 1971 Release on gun-jumping. \textit{See Guidelines for Registration Release, supra note 44, at 80,579.} The Release explicitly noted that “[i]t ha[...]d been suggested that the Commission promulgate an all inclusive list of permissible and prohibited activities in this area.” \textit{Id.} at 80,580. Yet the Release focused instead on broader guidelines for issuers, reasoning that bright-line rules were “not feasible for the reason that determinations [of legality] are based upon the particular facts of each case.” \textit{Id.} The Release “then recogniz[ed] that questions may arise from time to time” regarding “whether an item of information or publicity could be deemed to constitute an offer . . . in violation of Section 5.” \textit{Id.} It emphasized, however, that “the staff will be available for consultation concerning such questions.” \textit{Id.} Thus, in the area of gunjumping, the SEC seems to have used the promise of no-action letters to quell issuers’ demands for additional safe harbor rules.
\item \textsuperscript{143} To be sure, in many areas of securities regulation the development of such criteria through the no-action letter process has occurred at a glacial pace. \textit{See HAFT, supra} note 11, § 7.02 (noting that Rule 144 has been interpreted by the staff “in great detail over the course of more than twenty years in over 5,000 no-action letters”); \textit{id.} § 1.02 (discussing the definition of “investment contract” in Securities Act section 2(1) and emphasizing the hyper-technical nature of many of the inquiries posed by counsel in no-action letter requests).
\item \textsuperscript{144} Compare \textit{id.} §7.02 (contending that the lack of litigation is “perhaps the best measure of the tremendous success” of SEC Rule 144 and attributing this in part to the Rule’s interpretation in great detail by the staff “in great detail over the course of more than twenty years in over 5,000 no-action letters”); \textit{id.} § 1.02 (discussing the definition of “investment contract” in Securities Act section 2(1) and emphasizing the hyper-technical nature of many of the inquiries posed by counsel in no-action letter requests).
\item \textsuperscript{145} See Langevoort, \textit{supra} note 122, at 531. For example, Professor Therese Maynard maintains that, in the late 1980s, the SEC relied primarily on the no-action letter process to define the regulatory treatment of the proprietary trading systems (PTSs) that were beginning to emerge as a competitive, low-cost alternative to traditional exchanges. Maynard, \textit{supra} note 11, at 876-82. She contends that this no-action letter approach “afford[ed] the SEC administrative flexibility.” \textit{Id.} at 877.
their interpretive views. Policymaking through the no-action letter process also permits the SEC to modify or retract previously issued letters in response to feedback from the regulated community. Finally, because direct judicial review of SEC no-action letters is, as a practical matter, generally foreclosed, policymaking through the issuance of no-action letters effectively shields these regulatory interpretations from judicial oversight.

Thus, a number of practical reasons explains the SEC's decision to make announcements in an informal and unofficial format. And provided regulatory interpretations in no-action letters command the same public respect as formal and official pronouncements, the SEC has little to lose.

2. Public Reaction to Regulatory Interpretations Announced in No-Action Letters

Although securities law practitioners and their clients are well aware of the SEC's position that no-action letters constitute only informal and unofficial authority, many nonetheless treat the regulatory interpretations in no-action letters on par with SEC rules, orders, and releases. That is, securities law practitioners and their clients gener-

146 Professor Maynard further contends that while the SEC's decisions to issue favorable no-action letters to PTSs seemed to assume that these systems were not exchanges, it could also have been "that the SEC had not resolved this central question and deliberately decided to be vague, pending future analysis." Id. In subsequent commentary, Professor Maynard provided the following insight into the SEC's motivations for initially adopting a favorable no-action approach to transactions involving PTSs: The SEC used the no-action letter process to set PTSs policy primarily because "the SEC was fearful: fearful of committing a regulatory misstep that would drive further development of PTSs offshore to a more hospitable climate; fearful as well of taking any definitive regulatory action that would undermine the effective functioning of the established markets for secondary trading in the U.S." Therese H. Maynard, Another Perspective on the SEC's Market 2000 Study, INSIGHTS, July 1993, at 2, 30.

147 Although no-action letters are generally issued without opportunity for public comment, the SEC staff often considers feedback from the regulated community in determining whether to modify or retract previously stated no-action letter positions. See Stanley Keller, Current Issues in Private Placements: Private/Public Offerings, in PRIVATE PLACEMENTS 1996, at 9, 11 (1996) (noting that "[a] dialog between the staff and the private bar has resolved some of the issues [relating to private placements] and clarified others, while some issues remain outstanding"); Diane E. Ambler, Participant Directed Defined Contribution Plans and Reliance on the Private Investment Company Exception, INSIGHTS, Apr. 1996, at 12, 13 (noting that in response to sharp industry criticism of the staff's PanAgora no-action letter that restrictively interpreted section 3(c)(1) of the Investment Company Act "the SEC staff delayed the effective date of the PanAgora letter . . . and requested industry submissions to clarify the circumstances in which PanAgora would apply").

148 See Barbara Franklin, SEC's Informal Advice, N.Y. L.J., July 22, 1993, at 5 (quoting Former SEC General Counsel Ralph Ferrara that "the Commission, like all administrative agencies, likes to create nonreviewable actions"); see also 1 DAvis & PIERCE, supra note 28, § 6.2 (contending that agencies may announce rules in informal formats to avoid "the kind of 'searching and careful' judicial review courts typically apply to legislative rules").
ally regard the regulatory interpretations in no-action letters as a source of law.\textsuperscript{149} Several factors contribute to this practice.

First, the regulatory interpretations in no-action letters are often the only available guidance regarding the meaning of particularly complicated provisions of securities statutes or the SEC rules promulgated thereunder.\textsuperscript{150} Thus, as Professor Robert Haft contends, certain areas of the federal securities laws "have become almost exclusively topics for staff interpretation . . . in the sense that there are few court cases and few authoritative interpretations by the Commission itself."\textsuperscript{151} This dearth of authority gives rise to the following paradox: the public generally regards no-action letters as a source of law in part because the SEC frequently eschews official rulemaking in favor of announcing important regulatory interpretations through the vehicle of no-action letters. But if no-action letters did not command such significant public respect, the SEC undoubtedly would hesitate to announce important regulatory interpretations in that format, and it would instead promulgate a greater number of SEC rules or releases.

In addition to their frequent status as the only available guidance, the public often treats regulatory interpretations in no-action letters as authoritative because, while the full Commission is not legally bound to adhere to these letters, the SEC's actions demonstrate that it is bound honorably. That is, on the occasions—however seldom—when the Commission's views diverge from those of its staff, the Commission generally communicates such disagreements to the public by announcing that the public may no longer rely on the previously expressed staff views.\textsuperscript{152} Therefore, many securities law practitioners are

\begin{footnotes}
\textsuperscript{149} See supra text accompanying notes 6-12.
\textsuperscript{150} See Lemke, supra note 10, at 1019 (emphasizing that "on a significant number of the more complex aspects of the federal securities laws, no-action letters are the sole body of precedent").
\textsuperscript{151} Haft, supra note 11, at vii. Professor Haft offers two explanations for why certain areas have become the "special 'turf' of the staff." First, "because the Commission has delegated these subjects, usually involving expertise and 'hands-on' experience, to the staff persons involved," and second, "because private parties have been reluctant to litigate these issues in light of the unusually high liability contexts in which they arise and the need for relatively quick decisions." Id. Professor Haft also identifies a number of areas as the staff's turf. See, e.g., id. § 3.05 (noting that Regulation D "has become a special preserve for SEC staff interpretation."); id. § 7.02 (explaining that SEC Rule 144 "has been clarified almost exclusively by the staff of the SEC"); id. § 11.01 (noting that the grounds for the exclusion of shareholder proposals under Rule 14a-8 are quite ambiguous, and that "it is the staff, through its many letters each year, that has given the Rule its substantive scope and meaning").
\textsuperscript{152} See 3 Bloomental, supra note 69, at § 1.13 n.5 (noting that the Commission's concern over staff advice in a particular no-action letter prompted it to publish a subsequent letter more than a year later, which advised the public—notably not just the company recipient—that the staff had been instructed not to issue further no-action letters with respect to that type of transaction, and that reliance should not be placed on the prior
not deterred by the Commission’s statement that it “reserves the right to act contrary to the staff,” because they view this statement as an option that the SEC will never exercise.

Moreover, although the SEC’s theoretical addressee-only position may still caution some attorneys against relying on third party no-action letters to their client’s advantage, many consider even third party no-action letters as reliable authority. Practitioners often consider as particularly reliable those no-action letters that the staff has identified as “significant,” or that staff officials or Commissioners have referenced in speeches, articles, or SEC releases. The staff’s frequent willingness to grant blanket “permission” for similarly situ-
ated market participants to rely on a third party letter,\textsuperscript{158} and to issue no-action letters to professional associations or industry groups requesting no-action advice on behalf of their membership, has somewhat mooted concerns about the reappearance of the addressee-only position.\textsuperscript{159}

Finally, when no-action letters identify certain conduct as impermissible or outline ostensible regulatory requirements, securities law practitioners generally advise their clients to treat these unbinding interpretations as the law.\textsuperscript{160} They provide this advice because these letters reflect the standards and obligations that the staff will apply in the course of regulatory reviews and compliance examinations.\textsuperscript{161} Furthermore, the regulatory interpretations in no-action letters will likely constitute the interpretations that the full Commission will use not only to determine whether to institute enforcement actions, but also to adjudicate actions in the course of litigated proceedings.\textsuperscript{162} Thus, the time, money, and negative publicity associated with defending against an SEC enforcement action, possibly through an appeal to a

\textsuperscript{158} Small Entities Release, \textit{supra} note 50, at 15,606 n.20 (noting that, in certain instances, the staff of the Divisions of Corporation Finance and Market Regulation may approve reliance by third parties, and that the “Division of Investment Management generally permits third parties to rely on no-action or interpretive letters to the extent that the third party's facts and circumstances are substantially similar to those described in the underlying request”).

\textsuperscript{159} The SEC frequently issues “generic” no-action letters to professional associations and industry groups such as the American Bar Association (“ABA”), the Securities Industry Association (“SIA”), and the Investment Company Institute (“ICI”), with the understanding that both the enforcement positions and any explicit regulatory interpretations in its responses will be relied upon by the entire membership of the group. See \textit{Rowe, Paper Tigers, supra}, note 16, at 21. My own research reveals that during the fifteen year period between 1971-1996, the SEC issued at least fifteen no-action letters to the ABA, thirty-five no-action letters to the SIA, and seventy-five no-action letters to the ICI. Search of LEXIS, Fedsec Library, Noact File, (July 8, 1996).

\textsuperscript{160} See \textit{Lowenfels, Conflicts, supra} note 12, at 319-21; \textit{Lowenfels, Problems, supra} note 12, at 1257; see also Edward H. Fleischman, . . . \textit{Appropriate in the Public Interest}, Address to the Committee on Federal Regulation of Securities of the Section of Business Law of the ABA, Aug. 12, 1991 (“[L]et me put it to you short and clear: you can—nay, you \textit{must}—take into consideration in advising your clients any staff no-action or interpretive position (written or oral) that rejects a proffered argument or position reasonably close to your own, and you can reason from it to your \textit{disadvantage} (that is, respond to its implications).”), \textit{quoted in Rowe, Highlights, supra} note 17, at 86.

\textsuperscript{161} See \textit{Brown, supra} note 11, at 287 (contending that “[n]o-action letters have represented the vehicle of choice for articulating broad interpretations [of the Investment Adviser’s Act], while periodic inspections of investment advisors and their advertisements represent the primary mechanism for ensuring compliance”) (emphasis added).

\textsuperscript{162} As one commentator recently noted, “the burden of overcoming an adverse ‘no action’ letter issued to another person in substantially similar circumstances is great, and in an SEC administrative proceeding nearly insurmountable.” \textit{Rowe, Reliance, supra} note 16, at 677.
federal appellate court, often dictate that compliance with staff inter-
pretations will be the least costly alternative.163

3. Consequences Resulting from Policymaking Through the No-Action
Letter Process

The SEC can often command the same respect from the regu-
lated community regardless of whether it proceeds officially, through
the issuance of SEC rules, orders, or releases, or unofficially, through
the no-action letter process. Therefore, it is not surprising that the
SEC often chooses the flexible and expedient no-action letter process
to convey to the public generally applicable regulatory interpreta-
tions, particularly those that embody controversial or otherwise diffi-
cult policy choices. On such occasions, the SEC's no-action letter
process enables the SEC to have it both ways: the SEC can enjoy the
enforcement benefits of promulgated rules and standards, but can
also easily depart from those norms without promulgating new SEC
rules or even formally explaining in an SEC release its change in posi-
tion.164 Yet a host of problems emerges when the SEC uses the no-
action letter process as a policymaking tool.

First, announcing regulatory interpretations in no-action letters,
rather than in SEC rules or releases, produces a dearth of authorita-
tive pronouncements on which the public and, by extension, courts,
can rely for guidance. Market participants are particularly disadvan-
taged by the SEC's reluctance to issue safe harbor rules that set out
criteria specifying when compliance with statutory provisions will be
presumed.165 Safe harbor rules are tremendously popular with mar-
ket participants because the federal securities statutes insulate from
liability any person who in good faith conforms with an SEC rule, even

163 For comprehensive studies demonstrating that the SEC is by no means alone
among government agencies in using informal formats to bind the public practically, even
when these formats cannot bind the public legally, see Anthony, supra note 43; Robert A.
Anthony, Interpretive Rules, Policy Statements, Manuals, and the Like—Should Federal
Agencies Use Them to Bind the Public? 41 DUKE L.J. 1311 (1992) [hereinafter Anthony, Interpre-
tive Rules, Policy Statements]; Robert A. Anthony, "Well, You Want the Permit, Don't You?"
Agency Efforts to Make Nonlegislative Documents Bind the Public, 44 ADMIN. L. REV. 31 (1992)
[hereinafter Anthony, You Want the Permit?].
164 See Anthony, Interpretive Rules, Policy Statements, supra note 163, at 1319 (emphasizing
that "[i]t is easier for [an] agency to deviate from or change positions taken in policy
statements, memoranda and the like than it is to deviate from or change those adopted
through legislative processes"); Separate Statement of Commissioner Fleischman, supra
note 123, at 81,394 (acknowledging the Commission's appreciation of the administrative
ease that the no-action process begins). But see supra note 143 and accompanying text
(recognizing that most no-action letters involve mundane and technical issues and there-
fore affect regulatory change "at a glacial pace").
165 See Langevoort, supra note 122, at 530-31 (criticizing the SEC for "its disinclination
to adopt or endorse bright-line rules, notwithstanding the obvious value of such an ap-
proach in promoting planning and reducing the incidence of litigation").
if a court subsequently determines that the rule is invalid. But as the Second Circuit recently made clear, good faith reliance on a regulatory interpretation in a no-action letter does not fall within the meaning of these statutory provisions.

Second, the use of no-action letters to announce generally applicable regulatory interpretations is often a highly inefficient method of policymaking. As Professor Thomas Hazen has pointed out, the process is “time-consuming and cumbersome.” Moreover, the ad hoc development of rules in the context of particular transactions often generates a barrage of follow-up requests from similarly situated third parties seeking clarification of the position’s or interpretation’s general applicability, or requesting a modification in the context of slightly different facts. Clients and the SEC could certainly put their resources to better use.

Third, announcing new and important regulatory interpretations through no-action letters fails to capitalize on the benefits of public participation. Notifying the public about proposed regulatory

166 See, e.g., Securities Act § 19(a), 15 U.S.C. § 77s(a) (1994) (providing that no Securities Act provision “imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, or regulation of the [SEC]” even if the rule or regulation is subsequently determined by a court to be invalid); Exchange Act § 23(a), 15 U.S.C. § 78w(a)(1) (1994) (specifying that no Exchange Act provision imposing any liability shall apply “to any act done or omitted in good faith in conformity with any rule, regulation, or order of the [SEC],” even if such rule, regulation, or order is subsequently determined by a court to be invalid).

167 See Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 54 F.3d 69, 72 (2d Cir. 1995) (an SEC no-action letter does not constitute a “rule, regulation, or order of the SEC” within the meaning of Exchange Act section 23(a)); see also 10 Loss & SELIGMAN, supra note 10, at 454-45 (maintaining that “the immunity provisions do not apply to mere interpretations”). But see Rowe, Reliance, supra note 16, at 749-60 (arguing that, in many cases, courts may be willing to consider reliance on SEC no-action letters for purposes of the good faith immunity provision set out in Exchange Act section 23(a) and Securities Act section 19(a)).

168 HAZEN, supra note 4, § 1.4, at 19; see also Loss, supra note 125, at 164-65 (bemoaning the fact that securities lawyers are “drown[ing] in” no-action letter precedent and emphasizing that “ninety percent of these letters are sheer, unadulterated, repetitious garbage”).

169 See supra notes 95-96 and accompanying text.

170 The benefits and costs of public participation in agency rulemaking have been examined at length by a number of administrative law scholars. See, e.g., Anthony, supra note 43; Anthony, Interpretive Rules, Policy Statements, supra note 163; Michael Asimow, Nonlegislative Rulemaking and Regulatory Reform, 1985 DUKE L.J. 381; Michael Asimow, On Pressing McNollgast to the Limits: The Problem of Regulatory Costs, 57 LAW & CONTEMP. PROBS., Winter 1994, at 127 [hereinafter Asimow, Regulatory Costs]; Michael Asimow, Public Participation in the Adoption of Interpretive Rules and Policy Statements, 75 MICH. L. REV. 520 (1977) [hereinafter Asimow, Public Participation]; Arthur Earl Bonfield, Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy Under the A.P.A., 23 AMN. L. REV. 101 (1971). Securities law scholars have recognized the benefits of public participation in SEC rulemaking and have criticized the agency for pursuing strategies that develop law without such participation. See e.g., KARMEL, supra note 34, at 96 (criticizing the SEC for pursuing many of its policy goals through the initiation of enforcement actions rather than through the formal rulemaking process).
changes, and soliciting public comments before regulatory interpretations become "'chiseled into bureaucratic stone,""\textsuperscript{171} furthers democratic values by including all SEC constituencies in the policy formation process.\textsuperscript{172} In contrast, policymaking through the no-action letter process often involves a private negotiation between the SEC staff and the requestor (frequently a professional association or industry group lobbying on its membership's behalf). This private arrangement substantially increases the likelihood of agency capture\textsuperscript{173} and special interest decisionmaking.\textsuperscript{174} Indeed, requesting that an SEC division announce a favorable regulatory interpretation in a no-action letter is far easier than convincing the full Commission to promulgate that view in an official SEC release or rule for all to see—not to mention to challenge in court.\textsuperscript{175}

\textsuperscript{171} Alcaraz v. Block, 746 F.2d 593, 610 (9th Cir. 1984) (quoting American Fed'n of Gov't Employees v. Block, 655 F.2d 1153, 1157 (D.C. Cir. 1981)).
\textsuperscript{172} See Asimow, Regulatory Costs, supra note 170, at 129 (emphasizing that "rulemaking procedures are refreshingly democratic: people who care about legislative outcomes produced by agencies have a structured opportunity to provide input into the decisionmaking process").
\textsuperscript{173} Agency capture occurs when certain constituencies subject to regulation successfully influence governmental processes to obtain favorable outcomes for group members. See Jonathan R. Macey, Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty, 15 CARDOZO L. REV. 909, 922 (1994). According to Professor Macey, "[t]he predictable phenomenon of agency 'capture' by special interest groups has led to [SEC] subsidies to favored constituencies, particularly securities analysts, institutional investors, market professionals (traders and market makers), and retail brokerage firms." Id. (footnotes omitted). Professor Macey observes that many of these subsidies take the form of particular SEC rules or regulations, citing, for example, a subsidy of over $1 billion dollars when the SEC issued a regulation requiring securities issuers to supply data in particular formats that the securities analysts and institutional investors would have had to pay to obtain. Id. n.31. Professor Macey's concerns about capture would only be heightened in the case of no-action letters which, unlike rules and regulations, are generally issued without any prior notice or opportunity for public comment. For the viewpoint that Professor Macey exaggerates the agency capture problem at the SEC, see David L. Ratner, The SEC at Sixty: A Reply to Professor Macey, 16 CARDOZO L. REV. 1765, 1776 (1995) (arguing that "[u]nlike the regulators of banks, thrift institutions, and insurance companies, which have acted principally as protectors and advocates for their constituents, the SEC has frequently been at loggerheads with some of the most powerful organizations in the securities industry, particularly the New York Stock Exchange").
\textsuperscript{174} See Asimow, Public Participation, supra note 170, at 574 (contending that public input in rulemaking works to offset "institutional biases that may exist in favor of or against the regulated group").
\textsuperscript{175} See Anthony, Interpretive Rules, Policy Statements, supra note 163, at 1319 (observing that "nonlegislative documents often are less clear and definite than legislative rules, and may enable the agency to operate at a lower level of visibility"). Moreover, regulatory changes announced by an agency in legislative rules would be subject to judicial review under the so-called "hard-look" doctrine. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 57 (1983) (holding that a reasoned explanation must accompany an agency's changes in policy and that a court may invalidate a legislative rule if it is not assured adequately of its reasonableness). It is unclear, however, whether courts would apply the "reasoned explanation" requirement in State Farm to interpretive changes announced in formats other than legislative rules such as SEC releases. See Anthony, Interpretive Rules, Policy Statements, supra note 163, at 1319 n. 30.
Moreover, the lack of public participation in the no-action letter process may result in regulatory interpretations that suffer in quality. Public participation in the rulemaking process enhances the SEC's policies by ensuring that "the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."\(^\text{176}\) By excluding the regulated and protected public from the process, the SEC deprives itself of pertinent information and insight from those most interested in and informed on the subject matter.\(^\text{177}\) In addition, ad hoc development of regulatory interpretations through no-action letters relieves the SEC of the need to justify its policies to both the regulated and protected public.\(^\text{178}\) This may lead to regulatory interpretations that are inconsistent with each other or with the broader statutory framework.\(^\text{179}\)

Finally, using no-action letters as a policymaking tool frequently contravenes the spirit, and arguably the letter, of the APA's notice and comment provisions.\(^\text{180}\) This concern somewhat dissipates when the SEC limits its regulatory interpretations announced in no-action letters to interpretations that one could reasonably and fairly imply from existing statutes or SEC rules. These no-action letter interpretations fall squarely within the APA's provision exempting "interpretive rules" from notice and comment requirements.\(^\text{181}\) The SEC's choice to announce these regulatory interpretations in no-action letters necessarily means that the staff will formulate them without the aforementioned benefits of public participation.\(^\text{182}\) But when the SEC staff is truly interpreting a previously enacted statute or legislative rule,

\(^{176}\) American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (citations and internal quotation marks omitted).

\(^{177}\) See Asimow, Public Participation, supra note 170, at 574 (contending that "[t]he primary reason that public participation leads to better rules is that it provides a channel through which the agency can receive needed education").

\(^{178}\) See, e.g., New Jersey v. Department of HHS, 670 F.2d 1262, 1281 (3d Cir. 1981) (discussing values served by imposing on agencies the obligation to hold their policies out for public scrutiny).

\(^{179}\) See Campbell, supra note 11, at 1350 (contending that the resale rules developed through no-action letters "are confusing, ephemeral, poorly promulgated, and flout both the language of the 1933 Act and proper administrative procedure"); Maynard, supra note 11, at 838 n.23 (contending that the SEC's "development of the definition of an exchange, through the ad hoc approach of the no-[a]ction letter process, is not supported by the language of the statute"); see also Lowenfels, Conflicts, supra note 12, at 304 (contending that "[n]o-action letters have often represented positions inconsistent with established substantive law" which result in "not only confusion but occasionally a de facto overruling of formal legislative, judicial, or administrative policies").

\(^{180}\) 5 U.S.C. § 553(b) & (c) (1994); see also supra note 32 (discussing the APA).

\(^{181}\) See supra notes 32, 41-43 and accompanying text.

\(^{182}\) See supra notes 170-79 and accompanying text.
its ability to essentially bind the public in an unforeseen way is significantly curtailed by the specific terms of the provision.\textsuperscript{183}

Unfortunately, many of the so-called regulatory interpretations in no-action letters go far beyond reasonable and fair explanations of existing statutes or SEC rules. Rather than employing the no-action letter process as a vehicle to announce regulatory interpretations, the SEC has, on occasion, used the no-action letter process to graft new, substantive standards and obligations onto existing statutes or SEC rules.\textsuperscript{184} For example, the SEC will often impose on investment advisers, broker-dealers, and other market participants substantive obligations that do not originate out of any specific language in a statute or SEC rule.\textsuperscript{185} The SEC then applies these grafted norms in the course of its regulatory reviews, compliance examinations, and enforcement decisions as if they were regulatory requirements.\textsuperscript{186} For the practical

\textsuperscript{183} \textit{See} Anthony, Interpretive Rules, Policy Statements, \textit{supra} note 163, at 1313-14. Professor Anthony argued forcefully that:

An agency may nonlegislatively announce or act upon an interpretation that it intends to enforce in a binding way, so long as it stays within the fair intendment of the statute and does not add substantive content of its own. Because Congress has already acted legislatively, the agency need not exercise its own delegated legislative authority. Its attempts to enforce an interpretation can be viewed as simply implementing existing positive law previously laid down by Congress. . . . The same is true where the agency interprets its own previously promulgated legislative rules.

\textit{Id.} (citations omitted).

\textsuperscript{184} \textit{See} Brown, \textit{supra} note 11, at 287; Campbell, \textit{supra} note 11, at 1349-50; Lowenfels, Conflicts, \textit{supra} note 12; \textit{see also} Hart, \textit{supra} note 11, § 11.01 (noting that the grounds for the exclusion of shareholder proposals under Rule 14a-8(c) are quite ambiguous and that the Rule's substantive scope and meaning have been shaped largely by the staff through the issuance of no-action letters). On some occasions, substantive standards and obligations embodied in no-action letters are eventually codified into SEC rules and regulations through the formal rulemaking process. The criteria for "foreign offering exemptions" contained in Regulation S under the Securities Act, 17 C.F.R. §§ 230.901-904 (1997), constitute well known examples. \textit{See} Samuel Wolff, \textit{Offshore Distributions Under the Securities Act of 1933: An Analysis of Regulation S}, 23 Law & Pol'y Int’l Bus. 101, 114-23 (1992) (noting that before commencing the formal rulemaking process for Regulation S, the SEC staff began effecting a new territorial philosophy through no-action letters and describing certain no-action letters that the SEC staff wrote prior to Regulation S that outline significant positions subsequently taken in Regulation S).

\textsuperscript{185} \textit{See} Brown, \textit{supra} note 11, at 276 (contending that "[t]he staff has used [Investment Advisers Act Rule 206(4)-1’s] prohibition on false and misleading statements to implement a number of substantive requirements not supported by the language of the rule"). Professor Rutheford Campbell launches similar criticism in the area of securities resales under the Securities Act. He maintains:

Procedurally, many of the resale "rules" have been generated through no-action letters . . . often with little regard for statutory language, theoretical consistency, or sound process. As a result, de facto regulations have been generated without any meaningful opportunity for public comment. In short, the Commission has dramatically reduced its own accountability by pursuing its rulemaking through no-action letters.

Campbell, \textit{supra} note 11, at 1340.

\textsuperscript{186} \textit{See} Brown, \textit{supra} note 11, at 287; Campbell, \textit{supra} note 11, at 1340; \textit{see also} Lowenfels, Problems, \textit{supra} note 12, at 1266 (maintaining that the SEC staff often uses the no-
reasons discussed above, many market participants grudgingly accept the fact that they are bound, in effect, by the substantive standards and obligations the SEC has announced in the guise of regulatory interpretations in no-action letters.

Similarly, the SEC has used the no-action letter process to rescind, as a practical matter, provisions in existing statutes and SEC rules that were originally intended to operate for the benefit of the investing public. For example, as one securities law scholar has observed, in several no-action letters issued in 1994 and 1995, the staff "quietly . . . re-interpreted" the free-writing prohibition in section 5(b) of the Securities Act to permit the use of written term sheets prior to the delivery of a final prospectus in certain specialized offers. Although this small revision did not "dismantle" the Securities Act, it did represent a "paradigm shift" toward a regulatory model more concerned with capital formation, and less concerned with "protection of the individual investor and fidelity to the statutory language of the federal securities laws."

The SEC's ability to use the no-action letter process to articulate new substantive standards and obligations or to change existing ones is extremely troubling because it allows the SEC to accomplish indirectly what the APA forbids it to accomplish directly. That is, the SEC is able to announce in no-action letters what are, in effect, new regulatory requirements or obligations without providing prior notice or the opportunity for public comments. Yet, under current law, it seems

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187 See supra notes 159-62 and accompanying text.
190 Id. at B4, B6 (emphasis added). Professor Maynard has also criticized the SEC's use of no-action letters to rescind, as a practical matter, certain statutory protections. Maynard, supra note 11, at 837. In the context of her observation that the SEC initially used no-action letters to establish regulatory policy regarding proprietary trading systems, she maintained that:

continuing reliance on administrative development of the definition of an exchange, through the ad hoc approach of the no-action letter process, is not supported by the language of the statute nor in the best interests of the investing public from a policy perspective. Rather, the SEC should be required to apply and enforce the statutory definition of the term "exchange" as written by Congress—unless and until Congress takes action to modify this definition.

Id. at 838 n.23 (emphasis added); see also infra notes 193-201 and accompanying text (discussing the so-called Cracker Barrel controversy).
191 See Brown, supra note 11, at 277; Campbell, supra note 11, at 1340; Lowenfels, Conflicts, supra note 12, at 320; Lowenfels, Problems, supra note 12, at 1266.
that the public can do little to directly challenge these "spurious rules" as a violation of the APA.\textsuperscript{192}

In \textit{New York City Employees' Retirement Systems v. SEC},\textsuperscript{193} shareholders in Cracker Barrel Old Country Store, Inc. ("Cracker Barrel") sought a declaratory judgment, stating that the SEC had violated the APA by effectively amending the "ordinary business operations" exception in Rule 14a-8's shareholder proposal rule to include proposals raising important social or political issues regarding a company's employment matters.\textsuperscript{194} The shareholders maintained that the SEC vio-

\textsuperscript{192} Professor Anthony developed the term "spurious rules" to describe those agency rules that go beyond mere interpretation of existing statutes or rules, and that have practically binding effects, but nonetheless were promulgated without adhering to APA notice and comment procedures. Anthony, supra note 43, at 9-10, 14. According to Anthony, spurious rules

fit within the APA's definition of "rules" but are not legislative rules, because they were not promulgated by use of the APA's legislative rulemaking procedures. They are not exempt interpretive rules, because they do not interpret. And, although they are a subset of policy statements, they are \textit{not exempt} policy statements, because they should have been made legislatively. Such rules have no legal force, but because they are treated as binding by the agency, they are spuriously given the appearance of legal force.

\textit{Id.} at 10. Under this taxonomy, many purported regulatory interpretations in no-action letters would fall within Professor Anthony's category of spurious rules. For example, one can approximately describe the investment adviser "rules" that Professor Brown noted, supra note 11, at 263-89, and the resale "rules" that Professor Campbell noted, supra note 11, at 1340, 1350, as spurious rules.

\textsuperscript{193} 45 F.3d 7 (2d Cir. 1995).

\textsuperscript{194} \textit{Id.} at 9-10. The NYCERS shareholders requested that Cracker Barrel include in its 1992 proxy material a proposal that the company implement an employment policy prohibiting discrimination on the basis of sexual orientation. \textit{Id.} NYCERS submitted this proposal in response to a specific announcement by Cracker Barrel that it would no longer employ individuals in its operating units "whose sexual preferences fail to demonstrate normal heterosexual values which have been the foundation of families in our society." \textit{Id.} at 9.

As Rule 14a-8 required, Cracker Barrel notified the SEC of its intention to omit the NYCERS proposal. In so doing, counsel for Cracker Barrel opined that the proposal was properly excludable under Rule 14a-8(c)(7), which provides an exclusion for proposals that implicate "ordinary business operations." \textit{Id.} Cracker Barrel's counsel also sought a no-action letter from the SEC. \textit{Id.} at 9-10.

The SEC staff's interpretation of the "ordinary business operations" exclusion in its favorable no-action letter to Cracker Barrel marked a dramatic departure from the manner in which it had previously interpreted this exclusion. In 1976, after a period of notice and comment, the SEC modified Rule 14a-8(c)(7) to provide a "significant political or social issue exception" to the rule's "ordinary business" exclusion. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,812, at 87,123, 87,130-31 (Nov. 22, 1976) [hereinafter Proposals by Security Holders Release]. This 1976 modification to Rule 14a-8 restricted the exclusion to cover only those proposals that "involve business matters that are mundane in nature" and do not involve matters that have "significant policy, economic or other implications inherent in them." \textit{Id.} at 87,131. The SEC administered this aspect of the proxy rule's "ordinary business operations" exclusion throughout the next seventeen years, and the staff issued numerous no-action letters expressing the view that a shareholder's proposal could not be excluded under Rule 14a-8(c)(7) because it raised a significant policy issue. See \textit{HAFT, supra} note 11, § 11.04[7] (discussing examples of nonex-
lated the APA when it used a no-action letter to announce this substantive change to Rule 14a-8 without first subjecting the proposed change to the APA's required notice and comment procedures.

Although the shareholder-plaintiffs prevailed at the district court level, the Second Circuit subsequently reversed the decision. According to the court, because no-action letters are not legally binding, the Cracker Barrel no-action letter necessarily fell within the APA's exemption for "interpretive rules." The SEC therefore was not required to provide notice and comment prior to announcing its changed policy regarding Rule 14a-8. The Second Circuit treated as insignificant the explicit contradiction between the purported interpretation in the no-action letter and the pre-existing formal and official interpretation of this SEC rule. Indeed, rather than focus-

cludable policy issues including: nuclear power and safety, withdrawing business from countries with poor human rights records and increasing business in countries working to improve human rights, and health and environmental hazards).

What made the Cracker Barrel no-action letter so noteworthy was its complete repudiation of the "significant policy implications" exception to Rule 14a-8's "ordinary business operations" exclusion in instances where a shareholder proposal concerned employment matters. Indeed, after stating that "the line between includable and excludable employment-related proposals based on social policy considerations had become increasingly difficult to draw," the no-action letter, addressed to Cracker Barrel, communicated to the public the following ostensible interpretation:

"The Division has reconsidered the application of Rule 14a-8(c)(7) to employment-related proposals in light of these concerns and the staff's experience with these proposals in recent years. As a result, the Division has determined that the fact that a shareholder proposal concerning a company's employment policies and practices for the general workforce is tied to a social issue will no longer be viewed as removing the proposal from the realm of ordinary business operations of the registrant. Rather, determinations with respect to any such proposals are properly governed by the employment-based nature of the proposal."


NYCERS v. SEC, 843 F. Supp. 858 (S.D.N.Y. 1994) (granting declaratory judgment and enjoining the SEC from issuing any no-action letter inconsistent with the SEC's initial interpretation of Rule 14a-8 without first submitting the rule for notice and comment), rev'd in part, 45 F.3d 7 (2d Cir. 1995).

NYCERS, 45 F.3d at 9.

Id. at 11-12.

See id. at 12. The Second Circuit expressly held that "insofar as the Cracker Barrel no-action letter does not affix any legal relationships, it is an interpretive rule." Id. at 13 (emphasis added).

See id. (recognizing that the Cracker Barrel letter was "not a garden variety no-action letter" because "it expressly abandoned a previous SEC rule"). The Second Circuit's holding that the Cracker Barrel letter constituted an interpretive rule is all the more extraordinary in light of its correlative holding that the "significant policy implications" rule announced in the SEC's 1976 Release was a legislative rule because it "create[d] a basis for an SEC enforcement action." Id. It is difficult to understand how a rule that "expressly abandon[s]" a prior legislative rule can be properly characterized as "interpretive." In-
The Second Circuit, however, pointed out that the shareholders remained free to challenge the SEC's regulatory interpretation of Rule 14a-8 indirectly. They could have, according to the court, instituted a private suit in federal district court against the company for improperly omitting the shareholder proposal in violation of Rule 14a-8.

The Cracker Barrel no-action letter controversy therefore stands as an important reminder that while grudging acceptance of the SEC's de facto regulatory requirements may often be the least costly option available to public investors and market participants, it is not the only alternative. Some recalcitrants may look to courts—rather than to SEC no-action letters—for definitive statements of their obligations and rights under the federal securities laws. In looking to the deed, where agencies have promulgated ostensible interpretations that contradict interpretations announced in prior legislative rules, courts have invalidated the ostensible interpretations for failure to adhere to APA notice and comment requirements. See, e.g., National Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (explaining that where an agency has initially promulgated a statutory interpretation in a legislative rule, the agency may not subsequently repudiate its announced interpretation of that rule without proceeding through the notice and comment procedures required under the APA for amendments of a rule); Homemakers N. Shore, Inc. v. Bowen, 832 F.2d 408, 412 (7th Cir. 1987) ("[W]hen an agency gets out the Dictionary of Newspeak and pronounces that for purposes of its regulation war is peace, it has made a substantive change for which the APA may require procedures."); see also Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995) (noting briefly that notice and comment would be required if any agency rule "adopted a new position inconsistent with any of the [agency's] existing regulations" or if it "'effect[ed] a substantive change in the regulations'" (citations omitted). The district court's decision to enjoin the SEC from issuing any further no-action letters on that issue until submitting the new rule to notice and comment therefore seems to be more in line with prior precedents. See NYCERS, 843 F. Supp. at 880-81.

Litigation, however, is by no means the only recourse when public investors or market participants disagree with a regulatory interpretation in a no-action letter—administrative and legislative arenas are also available. The Cracker Barrel no-action letter, for instance, triggered a strong and almost immediate public outcry from institutional and individual shareholder activists, who vowed to fight a multi-fronted battle to ensure that the Commission reversed its Cracker Barrel position. See Court Rules SEC Failed to Comply with APA in Gay Rights Proxy Dispute, 25 Sec. Reg. & L. Rep. (BNA) 1420, 1421 (Oct. 22, 1993) (quoting New York City Comptroller Elizabeth Holtzman that if the SEC fails to reconsider its view, "Congress should vote to change the law to prevent such situations as the Cracker Barrel employee discrimination from continuing unchallenged in the future"). To that end, after NYCERS lost in the Second Circuit, 30 institutional investors, whose combined portfolios were worth approximately $100 billion, submitted to the Commission a formal
courts, the protected and regulated public expects a judiciary that will do more than merely rubber-stamp the disputed regulatory interpretation. Indeed, these individuals and entities clearly depend on a judiciary that will review the record and form its own conclusions regarding the meaning of any ambiguous regulatory provisions.

II
JUDICIAL TREATMENT OF REGULATORY INTERPRETATIONS IN SEC NO-ACTION LETTERS

Like market participants and members of the investing public, federal courts presented with ambiguous provisions in securities statutes and SEC rules often face situations where reliance on regulatory interpretations in SEC no-action letters appears warranted. However, regulatory interpretations in no-action letters pose particular problems for courts. On the one hand, courts are bound by princi-

rulemaking petition "urging] that the SEC reverse its Cracker Barrel interpretation." See Petition for Rule Change, Letter from the Interfaith Center on Corporate Responsibility, Calvert Group, Ltd. and the City of New York, Office of the Comptroller, to Jonathan G. Katz, Secretary, SEC 3 (July 27, 1995) (copy on file with author). Shareholder groups also successfully lobbied Congress, resulting in legislation requiring the SEC to study "whether shareholder access to proxy statements . . . has been impaired by recent statutory, judicial, or regulatory changes" and to evaluate "the ability of shareholders to have proposals relating to corporate practices and social issues included as part of proxy statements." National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 510(b)(1), 110 Stat. 3416, 3450 [hereinafter NSMIA].

In September 1997, in partial response to its congressional mandate, the SEC proposed a number of changes to SEC Rule 14a-8, including one that would "[r]everse the Cracker Barrel policy, making it easier for shareholders to include in companies' proxy materials employment-related proposals that raise significant social policy matters." Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39,093, 62 Fed. Reg. 50,682 (Sept. 26, 1997) [hereinafter September 1997 Release]. Although shareholder groups are clearly enthusiastic about the SEC's proposals to rescind the Cracker Barrel policy, they have mounted substantial opposition to a number of other proposed changes to Rule 14a-8 that the SEC included in its September 1997 Release. See Cornish F. Hitchcock, SEC Moves to Silence Shareholders, LEGAL TIMES, Nov. 17, 1997, at 27, 28 (stating that "[t]he proposed changes, if implemented, would mark a major step backward" in advancing "the goals of shareholder democracy and corporate accountability"). Reacting to this storm of protest, the SEC's Division of Corporation Finance Director recently announced that the staff will likely revise certain proposals included in the September 1997 Release, and that the Commission will likely consider these modified proposals during the summer of 1998. See Lane Predicts Personal Grievance Exemption in Shareholder Proposal Rules to Change, 30 Sec. Reg. & L. Rep. (BNA) 359, 359 (Mar. 6, 1998) (reporting statements by Corporation Finance Division Director Brian Lane).

It therefore appears probable that the SEC eventually will resolve the Cracker Barrel controversy, which has lasted more than five years, through an amendment to Rule 14a-8 specifying that employment-related proposals raising significant social policy matters will not be excludable from proxy materials pursuant to the "ordinary business operations" exception in Rule 14a-8(c)(7). If the SEC ultimately adopts this amendment, its ultimate irony should be acknowledged—the SEC will have utilized the legislative rulemaking process (including APA procedures of notice and comment) to formally and officially revoke a purportedly informal and unofficial interpretation of Rule 14a-8 that was articulated through the vehicle of a no-action letter.
ples the Supreme Court developed in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*\(^{203}\) and *Bowles v. Seminole Rock & Sand Co.*\(^{204}\) that generally require judicial deference to an administrative agency’s reasonable interpretation of an ambiguous regulatory provision, even if a court would have arrived at an alternative interpretation using its own methods of statutory construction.\(^{205}\) On the other hand, if *Chevron’s* and *Seminole Rock’s* principle of “automatic deference” does not extend to regulatory interpretations in no-action letters, judicial reliance on no-action letters as authoritative statements of securities law may result in an abdication of the judiciary’s interpretative responsibilities.\(^{206}\)

Part II briefly reviews the automatic deference principles that the Supreme Court established in *Chevron* and *Seminole Rock*. It then discusses the various ways in which courts have relied on no-action letters in the course of resolving securities law disputes. After identifying a number of problems with this current jurisprudence, Part II contends that automatic judicial deference to regulatory interpretations in no-action letters is never warranted. This Part also articulates important normative reasons why courts should subject no-action letters to independent and meaningful scrutiny before relying on them as interpretative authority.

A. Judicially Crafted Principles of Automatic Deference

The Supreme Court’s decisions in *Chevron*,\(^ {207}\) decided in 1984, and *Seminole Rock*,\(^ {208}\) decided in 1945, set out similar mandates for automatic deference to agency interpretations, and grounded those mandates in similar rationales. Yet judicial application of the automatic deference principle sometimes varies. This variance is in part due to “format requirements” which many courts impose when applying *Chevron*, but seldom impose when applying *Seminole Rock*. In other words, some courts require administrative agencies to express their interpretations in particular formats in order to qualify for *Chevron’s* automatic deference principle.\(^ {209}\)

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\(^{204}\) 325 U.S. 410 (1945).
\(^{205}\) See *infra* notes 206-54 and accompanying text.
\(^{206}\) See *infra* Part II.C.1.
\(^{208}\) 325 U.S. 410 (1945).
\(^{209}\) See *infra* notes 239-40 (citing related cases). Compare Anthony, *Which Interpretations Bind Courts?*, *supra* note 18, at 40-42 (contending that courts should apply *Chevron’s* deference principle only when an agency promulgates a regulatory interpretation in a format that was specifically authorized by Congress to have the force of law) with Weaver, *Format Requirements*, *supra* note 18, at 610-18 (contending that the format requirements advocated by Professor Anthony are not a precondition for *Chevron* deference and are ill advised as a
1. The Decisions in Chevron and Seminole Rock

In the landmark case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,

the Supreme Court considered the standards that federal courts must apply to settle interpretive issues in connection with agency-administered statutes. In so doing, it formulated what is generally regarded as a two-step approach. At step one, a reviewing court must determine whether Congress has specifically addressed the interpretive question at issue. If the court discerns a clear congressional intent regarding the meaning of the statute, then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." The question of deference to the agency's interpretation, therefore, arises only at step two.

For a more extensive discussion of format requirements, see also infra Part II.A.3.


In making this determination, a court is to use "traditional tools of statutory construction" to ascertain whether Congress spoke to the "precise question at issue." *Chevron*, 467 U.S. at 843 n.9. However, strong disagreements among Justices as to which "traditional tools" are appropriate, as well as differences over the way in which those tools should be utilized, have often resulted in inconsistent application of the *Chevron* doctrine by the Supreme Court. See Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L.Q. 351 (1994); Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Capocphy and Incoherence in the Administrative State, 95 COLUM. L. REV. 749, 750 (1995); see also Antonin Scalia, Judicial Deferece to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 521 (contending that most statutes can be declared unambiguous by analyzing the statute's text and its relationship with other laws); Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court, 39 AM. U. L. REV. 277, 281 (1990) (noting the controversy among Supreme Court Justices as to whether legislative history is an appropriate tool of statutory construction); cf. Nicholas S. Zeppos, The Use of Authority in Statutory Interpretation: An Empirical Analysis, 70 TEX. L. REV. 1073, 1091-99 (1992) (discussing the wide variety of materials that courts review and consider in ascertaining congressional intent).

As Professor Richard Pierce recently has noted, if Justice Scalia's strict textualist approach to statutory construction captures acceptance by other members of the Supreme Court, the Court will be far less likely to reach step two in its *Chevron* analysis because the Court will be far less likely to find a statute ambiguous. Pierce, supra note 212, at 752 (contending that if the "hypertextualist" movement persists, it may have the "effect of virtually emasculating the *Chevron* doctrine"); see also Merrill, supra note 212, at 354 (noting that "the general pattern in the Court appears to suggest something of an inverse relationship between textualism and use of the *Chevron* doctrine"). Indeed, Justice Scalia has acknowledged explicitly this inverse relationship. Scalia, supra note 212, at 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.")
When a court determines that Congress has not spoken on the meaning of a particular statutory term, it proceeds to *Chevron*’s second step. Under this analysis, if an agency has proffered a statutory interpretation,

the court does not simply impose its own [statutory] construction . . . , as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s [interpretation] is based on a permissible construction of the statute.\(^{215}\)

Thus, unless an agency’s statutory interpretation is arbitrary, capricious, or otherwise unreasonable, a court must accord that interpretation “controlling weight,” even if the court believes that other, and potentially better, interpretations exist.\(^{216}\) It is in this sense that judicial deference may be characterized as “automatic.”\(^{217}\)

Whereas *Chevron* sets out the revolutionary principle of automatic deference to address situations involving ambiguities in congressional statutes,\(^{218}\) a well-aged and far less disputatious Supreme Court deci-

\(^{215}\) *Chevron*, 467 U.S. at 843 (citations omitted).

\(^{216}\) Id. at 844.

\(^{217}\) Other commentators have described *Chevron*’s mandate of judicial deference in similar terms. See, e.g., Anthony, *Judicial Deference*, supra note 18, at 122 (explaining that “*Chevron* requires outright acceptance” of reasonable agency interpretations); Manning, *supra* note 18, at 617 (stating that both *Chevron* and *Seminole Rock* require “binding deference”: a reviewing court must “accept an agency’s reasonable interpretation of ambiguous legal texts, even when a court would construe those materials differently as a matter of first impression”); Merrill, *supra* note 39, at 971 (“*Chevron* rests on a principle of mandatory deference: courts are compelled to defer to agency interpretations . . . ”).

\(^{218}\) See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456-57 (1989) (arguing that *Chevron* “defined deference in a way that . . . was far more extreme than earlier articulations of the model had been”); Merrill, *supra* note 39, at 971 (contending that *Chevron* marks “a significant transformation”); Starr, *supra* note 211, at 284 (describing the *Chevron* decision as “revolutionary”); Sunstein, *supra* note 18, at 2075 (“*Chevron* promises to be a pillar in administrative law for many years to come.”). Many of these scholars also have launched profound criticism at *Chevron*’s mandate of automatic deference. See Farina, *supra*, at 525-26 (contending that the *Chevron* doctrine undermines separation of powers in favor of the executive branch); Merrill, *supra* note 39, at 971, 1003-1212 (suggesting that the Court should replace *Chevron*’s doctrine of mandatory deference with a principle of discretionary deference, treating agency interpretations as “executive precedent” that would be entitled to more or less deference depending on various contextual factors); *Chevron* Panel Discussion, *supra* note 211, at 366-68 (comments by Professor Sunstein) (arguing that *Chevron* undermines the judiciary’s traditional role as statutory interpreter and accords too much discretion to administrative agencies); Sunstein, *supra* note 18, at 2091 (arguing that *Chevron* should be inapplicable “when the particular context suggests that deference would be a poor reconstruction of congressional desires”). But *Chevron*’s mandate of automatic deference also has its supporters. See Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303-04 (1988); Starr, *supra* note 211, at 307-09; Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117-29 (1987). There is also substantial debate among scholars as
sion previously called for automatic deference to agency interpretations when the interpretations related to an ambiguity in an agency's own rule or regulation. In Bowles v. Seminole Rock & Sand Co., the Court maintained that "the ultimate criterion" for a court's construction of an ambiguous rule or regulation is the agency's administrative interpretation of that rule or regulation. Thus, "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' As long as the agency's interpretation is reasonable, the reviewing court must automatically defer, even though the agency's interpretation may not be "the best or most natural one by grammatical or other.

219 In contrast to the plethora of scholarship critiquing and often criticizing Chevron deference, see supra note 218, Professor John Manning has observed that "Seminole Rock deference has long been one of the least worried-about principles of administrative law." Manning, supra note 18, at 614; see also id. at 613 ("The Chevron and Seminole Rock principles, which are functionally similar, could not have garnered more disparate reactions from the legal community."). Professor Manning attributes the paucity of academic commentary and criticism regarding Seminole Rock to the "'common sense' idea that an agency 'is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purpose in issuing the rule.'" Id. at 614 (quoting 1 Davis & Pierce, supra note 28, § 6.10). But see infra note 223 for Professor Manning's and other recent commentary challenging this "common sense" idea.

220 325 U.S. 410 (1945).

221 Id. at 414.

222 Stinson v. United States, 508 U.S. 36, 45 (1993) (quoting Seminole Rock, 325 U.S. at 414); see also Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 95 (1995) (concluding that the Secretary of HHS's interpretation of an HHS regulation "is a reasonable regulatory interpretation, and we must defer to it"); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) ("Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting Seminole Rock, 325 U.S. at 414).
standards." Both Seminole Rock and Chevron therefore impose on courts the obligation to accept all but unreasonable interpretations of ambiguous provisions—even in circumstances where, as a matter of first impression, courts would have construed those provisions differently.

2. Rationale for Automatic Deference

The Court predicated the deference principle in Chevron and Seminole Rock on a similar rationale. As the Supreme Court recently reminded us, Chevron's automatic deference doctrine is founded on the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." Thus, while many courts prior to Chevron stressed an agency's superior expertise as the basis for deferring to an agency's statutory construction, the Chevron Court

223 Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991). The Supreme Court appears to view the "plainly erroneous or inconsistent with the regulation" inquiry under Seminole Rock interchangeably with a "reasonableness" standard. Guernsey Mem'l Hosp., 514 U.S. at 103; see also Anthony, Supreme Court and the APA, supra note 18, at 5 (noting that the Court's formulation of Seminole Rock deference "contains no expressed element of review for reasonableness," but recognizing the possibility that "the term 'plainly erroneous' embraces a reasonableness component because otherwise it is hard to conceive a meaning for that phrase that is not already comprehended in the 'inconsistent' test").

224 See Manning, supra note 18, at 617. Seminole Rock's doctrine of automatic deference recently has come under fire for raising problems and concerns that possibly may trump those that Chevron created. See id. (contending that Seminole Rock accords agencies the power of self-interpretation, which encourages agencies to promulgate vague and imprecise regulations, and which contradicts a major separation of powers premise "that a fusion of lawmaking and law-exposition is especially dangerous to our liberties"); see also Anthony, Supreme Court and the APA, supra note 18, at 8-11 (arguing that Seminole Rock's mandate allows an agency to act as judge in its own interpretive cause and, therefore, is inconsistent with "[s]ection 706 of the APA [which] declares that the reviewing court... shall determine the meaning or applicability of the terms of an agency action" (quoting APA section 706)). Dissenting Justices in two recent Supreme Court opinions have also begun to question the theoretical underpinnings of Seminole Rock. Guernsey Mem'l Hosp., 514 U.S. at 110 (O'Connor, J., dissenting) (contending that by interpreting its regulations in a manual, the HHS deprived the public of "a valuable opportunity to comment on the regulation's wisdom and... [t]he chance to challenge the ultimate rule in court"); Thomas Jefferson University, 512 U.S. at 525 (Thomas, J., dissenting) (contending that deference to an agency's construction of its own "hopelessly vague" regulation "disserves the very purpose behind the delegation of lawmaking power to administrative agencies, which is to resolve... ambiguity in a statutory text") (citations and internal quotations omitted).


226 See Cohn S. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 574-78 (1995) (discussing administrative expertise as a factor of judicial deference);
grounded the concept of judicial deference more directly in the democratic processes of representative government. As stated in *Chevron*:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. . . . [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”

*Chevron* therefore marks the Court’s explicit recognition that the process of statutory interpretation often involves, and in many instances requires, policymaking. And the Court held that by leaving statutes ambiguous, Congress expresses its intention that politically accountable administrative agencies—rather than unelected and unaccountable courts—are to fill any gaps.

Unlike in *Chevron*, the Supreme Court in *Seminole Rock* did not provide an explicit rationale for the automatic deference principle set out therein. In more recent decisions, however, the Court has elab-

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Merrill, *supra* note 39, at 973 & nn.15-17 (citing cases). The Supreme Court also cited the EPA’s expertise as a factor for deference in *Chevron*, *Chevron*, 467 U.S. at 865, and continues to reference expertise as an additional supporting rationale for *Chevron*’s mandate. See, e.g., Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651-52 (1990) (“Indeed, the judgments about the way the real world works that have gone into the PBGC’s anti-follow-on policy are precisely the kind that agencies are better equipped to make than are courts. This practical agency expertise is one of the principal justifications behind *Chevron* deference.”).

227 See Merrill, *supra* note 39, at 978 (contending that *Chevron* “broke new ground by invoking democratic theory as a basis for requiring deference to executive interpretations”); Seidenfeld, *supra* note 218, at 97 (“*Chevron* comports with a more recent model of administrative authority that derives from the political theory of pluralistic democracy.”).


229 See id.; see also Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991) (“[T]he resolution of ambiguity in a statutory text is often more a question of policy than of law.”); Pierce, *supra* note 218, at 303 (noting that *Chevron* recognizes that “agencies are the best equipped institutions to resolve policy questions in the statutes that grant the agency its legal power”); Sunstein, *supra* note 18, at 2087-88 (“*Chevron* is best understood and defended as a frank recognition that sometimes interpretation . . . includ[es] judgments about how a statute is best or most sensibly implemented. *Chevron* reflects a salutary understanding that these judgments of policy and principle should be made by administrators rather than judges.”).

230 See *Chevron*, 467 U.S. at 865-66.

231 See Manning, *supra* note 18, at 629, 630 n.107.
orated on why courts owe such great deference to an agency's reasonable interpretation of its own rule. In *Pauley v. BethEnergy Mines, Inc.*, for example, the Court pointed out that an agency's interpretation of its own rule or regulation may, like statutory construction, "entail the exercise of judgment grounded in policy concerns." Automatic deference to an agency's interpretation of its own rules and regulations further reflects the presumption that Congress intended to call on the "agency's unique expertise and policymaking prerogatives." Thus, as with *Chevron*, *Seminole Rock* adopts a form of deference that is predicated on a congressional delegation of "interpretive lawmaking power to the agency rather than to the reviewing court."

3. Format Requirements for Agency Interpretations

Although courts have focused much attention on format requirements for *Chevron* deference, judicial discussions of format requirements for *Seminole Rock* deference have been rare. In *Chevron*, the regulatory interpretation at issue was embodied in a regulation that the Environmental Protection Agency ("EPA") promulgated after a notice and comment period, pursuant to congressionally delegated rulemaking authority. While the Supreme Court noted these facts, the *Chevron* opinion did not indicate whether its automatic deference principle was limited to agency interpretations articulated in that format. In the nearly fourteen years since *Chevron*, the Court has declined to specify whether *Chevron* deference is preconditioned on an agency announcing its statutory interpretation in a particular format. As Professors Davis and Pierce have observed, "[t]he absence of a definitive pronouncement by the Supreme Court on that issue...

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232 *BethEnergy Mines*, 501 U.S. at 697; *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (stating that broad deference to an agency's interpretation of its own regulation "is all the more warranted" when the interpretation "'entail[s] the exercise of judgment grounded in policy concerns'") (quoting *BethEnergy Mines*, 501 U.S. at 697).


234 *Id.* at 153; *see also* Manning, *supra* note 18, at 627. Similarly, Professor Russell Weaver has contended that:

[W]hen an agency interprets its own regulations, it acts under discretionary authority delegated by Congress. Although an agency's express authority may only allow it to promulgate, amend, and/or enforce regulations, that authority carries with it the implied authority to interpret regulations as necessary to the effectuation of the agency's authorized duties.

Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. Prrt. L. Rev. 587, 610 (1984) (emphasis added). *But see* Manning, *supra* note 18, at 631 (pointing out that "Seminole Rock takes the further step of justifying its approach by reference to the agency's role in drafting a regulation, which is thought to give it unique competence to discern the meaning of the text being construed").

235 *Chevron*, 467 U.S. at 855-59.

236 *See 1 Davis & Pierce, supra* note 28, § 3.5, at 28 (Supp. 1996) (noting that the Supreme Court seems "unable or unwilling to say whether a court should accord Chevron deference to agency interpretations of statutes contained in interpretive rules").
has created . . . both intercircuit divisions and, in some circuits, intracircuit divisions.”

The restrictive reading of *Chevron* that some courts have adopted holds that *Chevron* deference applies only to agency interpretations issued in legislative rules or final adjudicative decisions. Based on this narrow reading, when an agency’s interpretation is embodied in another format, such as an “interpretive rule” or a “policy statement” exempted from the APA’s notice and comment provisions, many courts have held that automatic deference is unwarranted. Instead, courts adopting a restrictive version of *Chevron* independently evaluate the agency’s statutory interpretation, and accept it only if the court finds it persuasive. In other words, a court may defer to an agency’s

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237 Id. See infra notes 245-48 and accompanying text for discussion of the Supreme Court’s conflicting indications of how to resolve this format issue.

238 The theory is that because *Chevron* deference is predicated on a congressional delegation of lawmaking authority, an agency’s statutory interpretation “qualifies” for such great deference only when the agency is actually exercising that authority in a format that Congress intended to have the force of law. See Anthony, Which Interpretations Bind Courts?, supra note 18, at 42-61 (highlighting legislative rules and adjudicative decisions as clear examples of formats sufficient for issuing interpretations that can bind courts, and contrasting them with interpretive rules and policy statements that cannot bind courts even if they are reasonable and consistent with the statute); see also Michael Herz, Deferring Runaway: Separating Interpretation and Lawmaking Under *Chevron*, 6 ADMIN. L.J. AM. U. 187, 232-33 (1999) (maintaining that courts should accord *Chevron* deference only when the agency interpretation involves delegated lawmaking as opposed to interpretive pronouncements regarding congressional intent); Sunstein, supra note 18, at 2093 n.106 (contending that “an agency that has been given power to make rules, but that simply announces a view one way or another without going through the rulemaking process, would not receive deference” under a restrictive reading of *Chevron*).

239 See supra notes 32, 41-44 (discussing exemptions from APA notice and comment requirements).

240 See, e.g., Downey v. Crabtree, 100 F.3d 662, 666 (9th Cir. 1996) (stating that program statements not subject to notice and comment are only “entitled to some deference”); Freeman v. National Broad. Co., 80 F.3d 78, 83 (2d Cir. 1996) (refusing to give *Chevron* deference to an agency interpretation because “[u]nlike regulations, interpretations are not binding and do not have the force of law”); Atchison, Topeka & Santa Fe Ry. Co. v. Peña, 44 F.3d 437, 442 (7th Cir. 1994) (en banc) (noting that it is the notice and comment process that “entitles the administrative rules to judicial deference” under *Chevron*), aff’d on other grounds sub nom. Brotherhood of Locomotive Eng’rs v. Atchison, Topeka & Santa Fe R.R. Co., 516 U.S. 152 (1996); Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 841 (6th Cir. 1994) (declining to accord *Chevron* deference to an “agency’s policy statements and interpretative rulings, which, unlike agency regulations, are not published for comment and do not have to endure other rule-making formalities’’); Nalle v. Commissioner, 997 F.2d 1134, 1138 (5th Cir. 1993) (stating *Chevron* deference is not appropriate for an IRS interpretive regulation); Reich v. Parker Fire Protection Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) (explaining that high level of *Chevron* deference is not appropriate when an interpretation is embodied in an agency manual); Doe v. Reivitz, 830 F.2d 1441, 1445-47 (7th Cir. 1987) (refusing to afford *Chevron* deference to HHS interpretive documents not subject to notice and comment).

241 The Supreme Court acknowledged the fact that an agency’s statutory interpretation may be persuasive, even though it is not controlling in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Court held that an agency’s statutory interpretation articulated in bulletins and informal rulings may offer “guidance” in instance where Congress did not dele-
statutory interpretation embodied in a format other than a legislative rule or adjudicative decision, but a court is not required to do so. Professor Robert Anthony is the administrative law scholar most often associated with the view that such format requirements operate to limit *Chevron* deference.242

Under the more expansive reading of *Chevron*, automatic deference applies to various types of statutory interpretations promulgated by agencies charged with administering federal statutory schemes. Under this reading, even if an agency chooses to announce a statutory interpretation in the form of an interpretive rule or policy statement that is exempt from APA notice and comment requirements, the reviewing court must give the interpretation, if reasonable, controlling weight.243 This interpretation of *Chevron* has also commanded acceptance by a number of scholars.244


gate rulemaking or adjudicatory power to the agency. *Id.* at 140. Today, many courts follow *Skidmore* when the automatic deference principles of *Chevron* are found inapplicable. See, e.g., *Freeman*, 80 F.3d at 83-84 (stating that "interpretations are not binding and do not have the force of law," but "are entitled to some deference" under the dictates of *Skidmore*); *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993) (applying *Skidmore* to the Secretary of Labor's interpretative regulations); *Parker Fire Protection Dist.*, 992 F.2d at 1026 (applying *Skidmore* to the Secretary of Labor's interpretation of the Fair Labor Standards Act); *Reivitz*, 830 F.2d at 1447 (stating that *Skidmore* analysis is appropriate for an agency's interpretive rule). *Skidmore*’s "persuasive authority" approach is discussed extensively infra Part III.A. 242 Anthony, *Which Interpretations Bind Courts?*, supra note 18, at 4 (explaining that under *Chevron*, "[t]he threshold issue for the court is always one of congressional intent: did Congress intend the agency’s interpretation to bind the courts? The touchstone in every case is whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used."); see also Anthony, *Supreme Court and the APA*, supra note 18, at 18 (Interpretations set forth in nonlegislative rules “should not automatically be accepted by the courts, and thereby made binding, even assuming they are reasonable. Rather, a reviewing court should itself interpret the statute. In doing so, it should give careful attention and respectful consideration to the agency’s position.” (citing *Skidmore*)).

243 See *United States v. LaBonte*, 70 F.3d 1396, 1404 (1st Cir. 1995) (stating that "Chevron deference is the proper criterion for determining whether a guideline (or, for that matter, commentary that suggests how a guideline should be read) contravenes a statute and that “[t]he Chevron two-step approach fits that type of inquiry like a glove"), *rev'd*, 117 S. Ct. 1673, 1679 n.6 (1997) (finding statute unambiguous, and, therefore, not deciding whether deference was owed under *Chevron*); *Warren v. North Carolina Dep't of Human Resources*, 65 F.3d 385, 391 (4th Cir. 1995) (stating *Chevron* deference is appropriate for an agency's interpretation of a statute published in the USDA's Administrative Notices, although not "formally enacted in the form of regulations"); *Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (9th Cir. 1995) (accordng *Chevron* deference to a statutory interpretation embodied in an HHS letter), *cert. denied*, 516 U.S. 1093 (1996); *Johnson City Med. Ctr. v. United States*, 999 F.2d 973, 975-77 (6th Cir. 1999) (citing *Chevron* and according "some deference" to statutory interpretation set forth in IRS Revenue Ruling); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 921-22 (D.C. Cir. 1991) (stating, with respect to an EPA rule issued in a decision letter rather than by notice and comment rulemaking, that "it simply is not the law of this circuit that an interpretive regulation does not receive the *Chevron* deference accorded a legislative regulation").

244 See *Weaver, Format Requirements*, supra note 18, at 627 (advocating a position that is "diametrically opposed to" Professor Anthony's, and thereby contending that "Chevron deference should be extended to interpretive rules"); see also *Farina, supra note 218, at 471"
As noted above, the Supreme Court has declined to extend *Chevron* deference to statutory interpretations by administrative agencies lacking congressionally delegated rulemaking or adjudicatory powers. However, the Court has not yet resolved the question of whether courts must accord *Chevron* deference when an agency with congressionally delegated rulemaking or adjudicative authority does not in fact use that authority, but instead announces its statutory interpretation in an alternative format. In some cases, the Court appears to distinguish between the weight that a reviewing court must accord to legislative rules, on the one hand, and interpretive rules or policy statements on the other. Nonetheless, in a number of other cases, the Court has cited *Chevron* and appears to have deferred to statutory interpretations that agencies did not promulgate under APA notice and comment procedures.

Whereas commentators have hotly debated *Chevron*’s applicability to regulatory interpretations embodied in formats other than legisla-

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n.79 (observing that “*Chevron*’s articulation of the deferential model appears to be indifferent to the ‘legislative’/‘interpretive’ rule construct”); Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 Duke L.J. 346, 357 (noting that interpretations of *Chevron* appear to have caused a “blurring of the distinction between legislative and interpretative rules”); Weaver, *Format Requirements*, supra note 18, at 617 (“[I]f deference is premised on general assessments of agency authority, courts justifiably might defer to a wider range of interpretations including those contained in interpretive rules and enforcement guidelines. After all, each such interpretation is issued pursuant to delegated authority.”); see also infra note 378 (discussing Justice Scalia’s view that the legislative rule/interpretive rule distinction for purposes of deference is an “anachronism”).

245 See supra text accompanying notes 234-35.

246 EEOC v. Arabian Am. Oil Co. (“ARAMCO”), 499 U.S. 244, 257-58 (1991) (holding that the Court need not defer to the EEOC’s statutory interpretation of Title VII because the agency was not the recipient of congressionally-delegated lawmaking power under Title VII); see also infra note 378 (discussing ARAMCO more extensively).

247 City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 339 & n.5 (1994) (stating that because it found clear congressional intent, the Court “need not consider whether an agency interpretation expressed in a memorandum like the Administrator’s in this case is entitled to any less deference under *Chevron* than an interpretation adopted by rule published in the Federal Register, or by adjudication”).

248 See, e.g., Stinson v. United States, 508 U.S. 36, 44 (1993) (noting that commentary by the Federal Sentencing Commission is not entitled to *Chevron* deference because “[c]ommentary, unlike a legislative rule, is not the product of delegated authority for rulemaking”); Martin v. OSHRC, 499 U.S. 144, 157 (1991) (commenting that although interpretive rules and enforcement guidelines are “not entitled to the same deference as norms that derive from the exercise of the Secretary’s delegated lawmaking powers, these informal interpretations are still entitled to some weight on judicial review,” and citing cases including *Skidmore*).

tive rules or adjudicatory decisions, doctrinal controversy regarding *Seminole Rock's* applicability has been rare. The Supreme Court and lower federal courts routinely accord controlling weight to an agency's interpretation of its own rules, even when the agency promulgated the interpretation without the benefit of a notice and comment period. In *Seminole Rock*, for example, the regulatory interpretation of an informal interpretative bulletin was at issue. More recently, the Supreme Court has applied *Seminole Rock's* principle of automatic deference to interpretations contained in a Department of Labor enforcement citation, commentary to the Federal Sentencing Guidelines authored by the Federal Sentencing Commission, and agency guidelines set forth in an HHS manual, none of which the respective agencies promulgated pursuant to the notice and comment process. Thus, the decision in *Seminole Rock* affords administrative agencies great latitude in selecting the formats in which they may announce controlling interpretations of their own rules and regulations.

B. Judicial Decisions Regarding Regulatory Interpretations in No-Action Letters

When the SEC announces interpretations of securities statutes or SEC rules in formal and official formats, application of the Supreme Court's deference principles is relatively straightforward. Courts should accord automatic deference to a reasonable regulatory interpretation articulated in an SEC rule or order regardless of whether the interpretation clarifies an ambiguity in a securities statute or in an SEC rule. Moreover, under the principle of *Seminole Rock*,

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250 See supra note 219; infra note 255.
252 Martin, 499 U.S. at 157.
253 Stinson, 508 U.S. at 44. In *Stinson*, the Court unanimously reversed an Eleventh Circuit decision that declined to follow a particular commentary interpreting a Federal Sentencing Guideline because the commentary, while potentially "persuasive," was "of only limited authority" and not "binding" on the federal courts. *Id.* at 39 (quoting Eleventh Circuit opinion). After analogizing the Sentencing Guidelines to legislative rules, the Court proceeded to view the commentary accompanying the Guidelines as interpretive rules. Citing *Seminole Rock*, the Court concluded that a commentary interpreting a Guideline binds a federal court unless it is inconsistent with the Guideline, violates the Constitution or a federal statute, or is clearly erroneous. *Id.* at 45.
255 See Anthony, *Supreme Court and the APA*, supra note 18, at 6 (bemoaning the fact that the Supreme Court and lower courts "appear to be willing to accept any 'interpretation' that is not inconsistent with the regulation, and to give it 'controlling weight' under *Seminole Rock*, regardless of the format in which it is issued, and regardless of agency failure to observe notice-and-comment rulemaking procedures").
256 See supra Part I.A.1.
257 See United States v. O'Hagan, 117 S. Ct. 2199, 2217-18 (1997) (citing *Chevron* and according "controlling weight" to SEC Rule 14e-3 which interpreted the ambiguous phrase
all courts should accord automatic deference to a reasonable regulatory interpretation articulated in an SEC release, provided that the interpretation seeks to clarify an SEC rule. The unresolved issue is whether courts should apply automatic deference to reasonable statutory interpretations articulated in SEC releases. Courts that restrict Chevron-type deference to legislative rules or adjudicative decisions would appear to answer no. Conversely, courts that apply Chevron's mandate to interpretive rules and policy statements might well accord automatic deference to reasonable statutory interpretations conveyed in SEC releases.

When the SEC announces a regulatory interpretation in a no-action letter, application of the Supreme Court's deference principles becomes far more difficult. In that case, application requires answering a number of questions. For example, are Commission-approved no-action letters similar enough to SEC releases to warrant automatic deference under either Seminole Rock or Chevron? How should a court regard a regulatory interpretation in a staff no-action letter that was never presented to the Commission or that the Commission refused to review? Moreover, if a court concludes that automatic deference is not required, should the court nonetheless consider the regulatory interpretation in the no-action letter? If so, how much weight should it accord the letter? And by what standards should a court make this determination?

"reasonably designed to prevent . . . acts and practices [that] are fraudulent" in Exchange Act section 14(e) to include acts of insider trading that the Rule proscribed) (omission and alteration in original); Board of Trade v. SEC, 923 F.2d 1270, 1273 (7th Cir. 1991) (applying the principle in Chevron and deferring to an SEC order interpreting Exchange Act section 3(a)(1)); see also Dyer v. SEC, 266 F.2d 33, 38 (8th Cir. 1959) (noting that Congress's grant of legislative and regulatory power to the SEC in connection with proxy solicitation "requires general judicial acceptance of any properly adopted rule, regulation or general order, unless it undebatably is unrelated to, non-facilitative of, or in conflict with, the policy of the Act, or unless it otherwise is so arbitrary or burdensome as to be legally unreasonable").


See SEC v. R.G. Reynolds Enters., 952 F.2d 1125, 1132 & n.7 (9th Cir. 1991) (citing Skidmore and stating that an interpretation of Exchange Act section 3(a)(10) expressed in an SEC Release, although "entitled to substantial weight," is "not conclusive").
Although federal courts disagree about how to treat regulatory interpretations in no-action letters, courts consistently evade answering these difficult questions. The result is sheer confusion, both at the appellate and district court levels.

1. Federal Appellate Court Views Regarding No-Action Letters

Thus far, no federal appellate court has directly confronted the issue of whether regulatory interpretations in no-action letters warrant the type of automatic deference prescribed in Seminole Rock. The D.C. Circuit and the Second Circuit have, however, addressed this question in the context of Chevron deference, but only with a rather cursory analysis.

In Medical Committee for Human Rights v. SEC, the D.C. Circuit offered the first federal appellate court view on the weight that courts should accord to regulatory interpretations in no-action letters in litigation. In that case, the court assumed without elaboration that a no-action letter containing a Rule 14a-8 interpretation imposed on the shareholder-plaintiffs the "added burden in a private action of overcoming [that interpretation] in face of the principle that the agency is entitled to judicial deference in the construction of its proxy rules." Years later in Roosevelt v. E.I. Du Pont de Nemours & Co., the D.C. Circuit indicated that, for purposes of deference, courts could draw a distinction between SEC views expressed in no-action letters and those expressed in more formal and official formats. Accordingly, the court maintained that "the principle of deference described in Chevron" was inapplicable to a regulatory interpretation in a no-action letter because the letter did not "rank[ ] as an agency adjudication or rulemaking." Two recent decisions by different Second Circuit panels also reveal variations on the issue of judicial deference to no-action letters. In Amalgamated Clothing & Textile Workers Union v. SEC, the Second Circuit noted with approval the SEC's contention that no-action let-

261 Id. at 667. To support its contention that a regulatory interpretation in a no-action letter would command judicial deference, the Medical Committee court cited Union Pacific Railroad Co. v. Chicago & North Western Railway Co., 226 F. Supp. 400 (N.D. Ill. 1964), a case involving the SEC's proxy solicitation rules, where the court held that "the determinations and positions of the responsible authorities of the SEC carry significant weight and command deference in the courts." Id. at 406.
263 Id. at 427 n.19. The D.C. Circuit cited a collection of no-action letters in C.L. Grimes v. Centerior Energy Corp., 909 F.2d 529, 532 (D.C. Cir. 1990), although in that case (also a private lawsuit under Rule 14a-8), the court gave no indication as to why or how it was relying on the cited no-action authority. The Grimes court's ruling, however, was consistent with the SEC's position in its no-action letter to the defendant. Id. at 532-33.
264 15 F.3d 254 (2d Cir. 1994).
ters are "not entitled to the high level of judicial deference afforded formal policy statements or rule-making orders of the SEC." 265 Several months later, another panel of the Second Circuit referenced this statement in NYCERS v. SEC. 266 In that case, the Second Circuit maintained that although a "court would treat [a] no-action letter as persuasive, [a] court need not give it the same high level of deference that is accorded formal policy statements or rule-making orders." 267

Because the issue of judicial deference to no-action letters was not central to the holdings in these D.C. Circuit and Second Circuit cases, the courts' unsupported conclusory statements are somewhat understandable. 268 Yet, interestingly, the Roosevelt court and both Second Circuit panels noted the inapplicability of Chevron deference in cases where the regulatory ambiguity at issue involved SEC Rule 14a-8. 269 A more thoughtful analysis of the deference issue would have considered and reconciled the automatic deference principle articulated in Seminole Rock, because the ambiguity existed in the SEC's own rule rather than in a statutory provision. 270 It is also noteworthy that the full Commission reviewed and affirmed the no-action letters at issue in NYCERS and Amalgamated. Yet, both Second Circuit decisions concluded that automatic deference to the letters was unwarranted without first distinguishing an interpretation of an SEC rule in a Commission-approved no-action letter from an interpretation of an SEC rule set forth in an SEC release. 271

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265 Id. at 257-58 n.3 (citing Chevron).
266 45 F.3d 7 (2d Cir. 1995). For further discussion of this opinion, see supra notes 193-202 and accompanying text.
267 Id. at 13.
268 The legal issue in both Medical Committee and Amalgamated involved whether Commission approved no-action letters were "orders" within the meaning of the judicial review provision in Exchange Act section 25(a). See supra notes 113-14. The principal issue in NYCERS involved whether the SEC had violated the APA when it promulgated the Cracker Barrel no-action letter without providing the public with prior notice and the opportunity for public comment. See supra notes 193-202 and accompanying text. And while the disputes in Grimes and Roosevelt required the court to rule on the substantive meaning of SEC Rule 14a-8(c)(7)'s exclusion for "ordinary business operations," both courts ruled in a matter that was consistent with the position that the SEC took in the no-action letters it sent to the defendants. Roosevelt, 958 F.2d at 429; Grimes, 909 F.2d at 532.
269 See NYCERS, 45 F.3d at 12; Amalgamated, 15 F.3d at 257; Roosevelt, 958 F.2d at 427 n.19.
270 See supra notes 218-23 and accompanying text.
271 See NYCERS, 45 F.3d at 13; Amalgamated, 15 F.3d at 257-58. The Second Circuit's failure in NYCERS to properly address the dictates of Seminole Rock is even more pronounced in a later section of its opinion. See NYCERS, 45 F.3d at 14. The court acknowledged the NYCERS shareholders' "warning" that judicial validation of the SEC's action in the Cracker Barrel letter would encourage the SEC "to skirt the entire notice and comment process by using no-action letters to amend legislative rules." Id. However, in the courts' words, it was "not persuaded by their prophecy of doom," in part because "[a]gency rules that have not undergone notice and comment receive much closer scrutiny from the courts than do those that have cleared the procedural hurdles." Id. Focusing entirely on
The Second Circuit's statement in *NYCERS* that a court "need not" accord no-action letters the "same high level of deference" that it accords formal SEC pronouncements is similarly troublesome.\(^{272}\) While appearing to liberate courts from the obligation of automatic deference that *Seminole Rock* and *Chevron* impose, this statement may also encourage district courts to regard independent judicial review of no-action letters as an option rather than an obligation. Had the Second Circuit maintained its *Amalgamated* formulation—that no-action letters are not entitled to high level deference—it would have provided lower courts with far clearer direction.

2. Federal District Court Views Regarding No-Action Letters

a. District Court Decisions Deferring to No-Action Letters

The conflicting signals that federal appellate courts have sent on the judicial deference issue have forced district courts to resolve their dilemmas ad hoc. And most federal district courts presented with regulatory interpretations in no-action letters have, in fact, deferred to that authority in resolving interpretive issues.\(^{273}\) On some occasions, courts explicitly have cited to *Seminole Rock* or *Chevron* as the reason for according a regulatory interpretation "controlling weight."\(^{274}\) More frequently, however, courts have simply treated no-action letters as definitive interpretations of the law and have failed to perform independent inquiries as to the meaning of the disputed regulatory provision.\(^{275}\)

A number of courts that have accorded no-action letters controlling weight appear to have based this determination on the grounds that the no-action letter both reflects the Commission's views and is equivalent to an SEC order—a formal adjudicative decision that would properly trigger automatic deference. For example, in *Brooks v. Standard Oil Co.*,\(^{276}\) the court considered a Division of Corporation Finance no-action letter that agreed not to recommend enforcement action against Standard Oil for omitting the shareholder-plaintiff's proposed resolution from its proxy materials.\(^{277}\) The no-action letter expressed the staff's opinion that Standard Oil could omit the propo-
sal pursuant to Rule 14a-8(c)(1)\textsuperscript{278} because the resolution was not a proper subject for shareholder action under the law of the state of incorporation.\textsuperscript{279} Citing \textit{Seminole Rock}, the court concluded that the regulatory interpretation in the no-action letter was entitled to "controlling weight."\textsuperscript{280} The \textit{Brooks} court offered the following explanation:

"Rules and regulations adopted by administrative agencies pursuant to Congressional authorization are best interpreted, in the first instance, by the agency which has been entrusted with the power and authority to write them. Here, the Commission has interpreted and construed its own rule contrary to that which plaintiff contends is the proper interpretation. This court cannot hold, on the proof before it, unaided as it is by the vast experience of daily contact with the practical workings of this rule (which the Commission has had), that the interpretation should be set aside."\textsuperscript{281}

The court's analysis, however, failed to distinguish between the staff and the Commission, and then compounded that error by analogizing the no-action letter to an SEC order.\textsuperscript{282} Further, the \textit{Seminole Rock} citation suggests that deference to the no-action letter was automatic rather than discretionary.\textsuperscript{283}

Other courts have acknowledged the difference between staff and Commission views, but appear to have granted no-action letters automatic deference despite this distinction. For example, in \textit{United Mine Workers of America v. Pittston Co.},\textsuperscript{284} the court explicitly recognized that

\textsuperscript{278} 17 C.F.R. § 240.14a-8(c)(1) (1997).

\textsuperscript{279} \textit{Brooks}, 308 F. Supp. at 812.

\textsuperscript{280} \textit{Id.} at 813. (quoting \textit{Seminole Rock}, 325 U.S. at 414).

\textsuperscript{281} \textit{Id.} at 813-14 (quoting Peck v. Greyhound Corp., 97 F. Supp. 679, 681 (S.D.N.Y. 1951)).

\textsuperscript{282} \textit{Id.} at 813.

\textsuperscript{283} See \textit{id.} at 813. A number of courts subsequently followed the \textit{Brooks} approach. See, \textit{e.g.}, \textit{NYCERS v. Dole Food Co.}, 969 F.2d 1430, 1435-36 (2d Cir. 1992) (Pollack, J., concurring) (vacating lower court decision for mootness but citing \textit{Seminole Rock} and chastising the lower court for disregarding what was a "classic case for deferral to the SEC"); \textit{NYCERS v. Brunswick Co.}, 789 F. Supp. 144, 147 (S.D.N.Y. 1992) (noting that "the SEC" had recently issued five no-action letters on proposals similar to plaintiffs; that the SEC had "upheld" the exclusion of each proposal; and, citing \textit{Brooks}, concluding that it should "defer to the SEC's interpretation of its rule"); \textit{see also Strougo v. Bear Stearns & Corp.}, No. 95 Civ. 6592 (RPP), 1997 WL 458667, at *4 (S.D.N.Y. Aug. 11, 1997) (contending that the defendants' compliance with a generic no-action letter issued to the Investment Company Institute "would be sufficient for purposes of satisfying Rule 10b-10," and that if the defendants could prove compliance with the no-action letter "as a matter of law such compliance would not support an inference of fraudulent intent in a securities fraud pleading"); \textit{SEC v. Burns}, 614 F. Supp. 1360, 1365 (S.D. Cal. 1985) (maintaining that interpretive statement by the Director of Trading and Markets Division must be upheld unless it "is unreasonable" and declining to accept defendant's argument that "judicial deference is only due formal opinions adopted by the Commission").

the regulatory interpretation articulated in a letter from the Chief Counsel of the Division of Corporation Finance was "not a decision made by the agency itself or its commissioners." Nonetheless, rather than independently determining whether the defendant properly claimed "discretionary authority" over the shareholder plaintif's proposal pursuant to SEC Rule 14a-4(c), the court gave "a considerable degree of deference" to the Division's determination that the defendant did not possess such discretionary authority. Citing both Brooks and Chevron, the court contended that deference to the Division's letter was appropriate in the absence of official agency action, "because the opinion nevertheless emanate[d] from the cognizant agency entity and its chief legal advisor."

The above cases notwithstanding, courts seldom explicitly reference the holdings in Seminole Rock or Chevron to justify deferring to a regulatory interpretation in a no-action letter. Rather, most courts relying on no-action letters have done so without specifying why—let alone how—they are relying on that authority. In such cases, it is difficult to discern whether the court has actually granted controlling weight to a no-action letter, or whether the court independently considered the regulatory ambiguity and arrived at an interpretation that comported with the one articulated in the no-action letter. But good reasons exist for suspecting that the former scenario more accurately describes the process.

The opinion in Shearson Lehman Hutton Holdings Inc. v. Coated Sales, Inc. provides an illustration of the problem presented when courts cite no-action letters, but fail to specify how and why they are relying on that authority. In that case, the court addressed, among

285 Id. at 95,270 n.8.
286 17 C.F.R. § 240.14a-4(c) (1997).
288 Id. at 95,270 n.8. In Pittston, the court's decision to defer to the staff's judgment raises particular concerns because the staff "applie[d] the law to the facts of [the] case." Id. at 95,274 (citing International Union v. Brock, 816 F.2d 761, 764 (D.C. Cir. 1987)). That is, the court accepted the staff's determination that the defendant knew of the plaintiff's proposal within a "reasonable time," and it therefore accorded deference to a factual finding made in the course of an informal exchange between the SEC staff and a company seeking advice regarding compliance with an SEC rule. Id. The Pittston court's decision to accord substantial deference to a staff no-action letter was later cited in Larkin v. Baltimore Bancorp, 769 F. Supp. 919, 927 (D. Md. 1991), aff'd, 948 F.2d 1281 (4th Cir. 1991). Noting that "the SEC approved" the specific transaction at issue in a staff letter sent to defendants, the court stated, citing Pittston, that "[t]he SEC's action in this respect is entitled to deference." Larkin, 769 F. Supp. at 927; see also Union Pacific Ry. Co. v. Chicago & N.W. R.R. Co., 226 F. Supp. 400, 406 (N.D. Ill. 1964) (stating that "[w]here, as here, circumstances assure that agency consideration has been given to the merits of a question, the determinations and positions of the responsible authorities of the SEC carry significant weight and command deference in the courts").
289 See cases discussed infra notes 290-99 and accompanying text.
other issues, whether provisions in SEC Rule 144\textsuperscript{291} operated as a limitation on Shearson-Lehman's ability to liquidate restricted stock that a customer had pledged as collateral for a loan.\textsuperscript{292} In resolving this interpretive issue, the court relied on interpretations of Securities Act Rule 144(k) that the SEC staff had issued many years earlier in no-action letters to other brokerage firms.\textsuperscript{293} After noting that the no-action letters posited "the very circumstances here presented," and without offering independent analysis of the SEC rule or the applicable statutory exemption under which the SEC promulgated it, the court appeared to accept the SEC staff's position on the meaning of Rule 144.\textsuperscript{294} Thus, the court appeared to have accorded these no-action letters controlling weight without explicitly acknowledging it.

The dearth of case law and formal SEC interpretations regarding the more complex areas of securities regulation undoubtedly has caused other courts to treat no-action letters as effective substitutes for full Commission interpretations articulated in formal and official formats. For example, in \textit{Clemente Global Growth Fund, Inc. v. Pickens},\textsuperscript{295} the court sought to resolve whether the limited partnership defendants qualified for an exemption from registration as an investment company pursuant to section 3(c)(1) of the Investment Company Act.\textsuperscript{296} The court appears to have grounded its decision on regulatory interpretations in no-action letters, expressly noting that "there [was] scarce case law on arcane issues such as beneficial ownership for [section] 3(c)(1) purposes" and that "instead, much of the 'law' in such areas is found in the informal SEC interpretations contained in the no-action letters."\textsuperscript{297} Other courts have described no-action letters as SEC "holdings" or "rulings" that are entitled to deference.\textsuperscript{298} In addition, a number of courts have relied on regulatory interpretations in

\textsuperscript{291} 17 C.F.R. § 230.144.
\textsuperscript{292} \textit{Coated Sales}, 697 F. Supp. at 640-41.
\textsuperscript{293} \textit{Id.}
\textsuperscript{294} \textit{Id.} at 640.
\textsuperscript{296} \textit{Id.} at 964; \textit{see also} 15 U.S.C. § 80a-3(c)(1) (1994).
\textsuperscript{297} \textit{Clemente Global}, 705 F. Supp. at 965 n.2.
\textsuperscript{298} \textit{See}, e.g., \textit{SEC v. Smith}, No. 92-CO 811, 1992 WL 67832, at *3 (N.D. Ill. Mar. 26, 1992) (characterizing a no-action letter issued to an unrelated third party as an SEC holding and applying the regulatory interpretation set out in the letter to determine whether defendant is an "investment adviser" within the meaning of section 2(a)(11) of the Investment Advisers Act); \textit{Fulco v. American Cable Sys.}, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,980, at 95,485, 95,489-90 (D. Mass. Oct. 4, 1989) (relying on several SEC "rulings" in no-action letters that permitted companies to avoid Exchange Act section 12(g) class registration of similar, but distinct, classes of securities); \textit{Peck v. Greyhound Corp.}, 97 F. Supp. 679, 681 (S.D.N.Y. 1951) (deferring to a no-action letter that permitted defendant to exclude plaintiff's shareholder proposal and noting that while not formal agency action, the Division of Corporation Finance's "ruling" should be followed because of the Commission's "vast experience of daily contact with the practical working of this rule").
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no-action letters without expressly characterizing their status, but apparently deferring to them as if they were official interpretations embodied in SEC releases.\footnote{See, e.g., Bormann v. Applied Vision Sys., Inc., 800 F. Supp. 800, 808 (D. Minn. 1992) (relying on no-action letters as authority for determining whether defendant's acts were manipulative or deceptive within the meaning of SEC Rule 10b-9); Austin v. Consolidated Edison Co., 788 F. Supp. 192, 195 (S.D.N.Y. 1992) (deferring to long standing interpretation of Rule 14a-8 as reflected in more than 50 no-action letters published over a ten-year period); Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358, 1364-65 (M.D.N.C. 1990) (relying on no-action letters as interpretive authority regarding the five "integration" factors set out in Securities Act Regulation D); SEC v. Wall St. Publ'g Inst., Inc., 591 F. Supp. 1070, 1081 (D.D.C. 1984) (referring collectively to regulatory interpretations in no-action letters and SEC releases, and stating that "the Commission's interpretation[s] are entitled to substantial deference"), rev'd on other grounds, 851 F.2d 365 (D.C. Cir. 1988).} These judicial practices serve as further evidence that courts may be automatically deferring to no-action letters without acknowledging, and in some cases even disclaiming, that they are doing so.

b. District Court Decisions Opting Against Deference to No-Action Letters

Although most courts that have considered regulatory interpretations in no-action letters have deferred to that authority, a minority of courts have explicitly rejected no-action letter authority in favor of their own interpretation of the regulatory ambiguity at issue in the litigation.\footnote{See, e.g., NYCERS v. Dole Food Co., Inc., 795 F. Supp. 95, 100-01 (S.D.N.Y. 1992) (stating that although no-action letters "are entitled to deference, they do not bind this Court" and rejecting the no-action letter authority because the SEC "shifted rationales" for excluding shareholder proposals on national health insurance pursuant to Rule 14a-8), vacated as moot, 969 F.2d 1430 (2d Cir. 1992); NYCERS v. American Brands, Inc., 634 F. Supp. 1382, 1389 n.6 (S.D.N.Y. 1986) (stating that the "SEC staff's views on shareholder proposals are only rendered as an informal convenience to both management and proponents" and refusing to defer to a favorable no-action letter issued to defendant, in part, because the issue involved an interpretation of foreign antidiscrimination law, an area in which the SEC lacks "expertise").} Some of these courts appear to have done so because they accepted the SEC's characterization of these letters as "advisory only," and therefore considered themselves unconstrained to depart from them.\footnote{See, e.g., Bradford v. Moench, 809 F. Supp. 1473, 1498 (D. Utah 1992) ("The fact that the SEC issued no-action letters in regard to specific requests does not mean that all industrial loan corporations fall within the banking exemption. Each letter represents the decision of the SEC not to enforce the securities laws in that particular case."); Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199, 239 (D. Md. 1976) (stating that pure no-action letters do not "reflect the opinions of the SEC" and that "citation of those letters as precedent for interpreting the federal securities laws . . . is inappropriate" (quoting SEC letter to court)), aff'd, 546 F.2d 25 (4th Cir. 1976); cf. Board of Trade v. SEC, 883 F.2d 525,} Furthermore, at least two courts have rejected liti-
gants' requests for deference in situations where the no-action letter appeared to be inconsistent with case law or other formal authority interpreting the regulatory provision at issue. Thus, although there have been instances where courts have refused to defer to regulatory interpretations in no-action letters, these courts do not appear to have consistently followed any particular approach to the deference issue.

To date, Judge Kimba Wood's opinion in Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc. provides the most thoughtful judicial analysis of deference issues with respect to no-action letter authority. Consistent with the regulatory interpretation articulated in its Commission-approved and highly controversial Cracker Barrel no-action letter, the SEC staff advised Wal-Mart that it would not recommend enforcement action if Wal-Mart excluded from its proxy materials a shareholder proposal that the Amalgamated Clothing & Textile Workers Union ("ACTWU") submitted pursuant to Rule 14a-8(c)(7)'s exception for "ordinary business operations," even though the proposal raised important social and political issues regarding the company's employment and retail practices. Acting in reliance on both its no-action letter and the more extensive regulatory interpretation articulated in the Cracker Barrel letter, Wal-Mart distributed its proxy materials without including ACTWU's proposal. Shortly thereafter, ACTWU filed a lawsuit against Wal-Mart in federal district court. Wal-Mart subsequently requested that the court defer to the Commission-approved regulatory interpretation of Rule 14a-8(c)(7) articulated in both its no-action letter and the Cracker Barrel letter.

530 (7th Cir. 1989) (characterizing a "pure" no-action letter issued by the staff and affirmed by the Commission as a "prosecutorial decision").

303 See Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877 (S.D.N.Y. 1993); SEC v. Energy Group of America, Inc., 459 F. Supp. 1254, 1258-41 (S.D.N.Y. 1978) (noting that "SEC positions" in no-action letters are entitled to substantial, but not conclusive, weight, and rejecting regulatory interpretations in no-action letters issued to similarly-situated individuals, because two recent Supreme Court decisions established the controlling test for whether an instrument is an "investment contract" within the meaning of section 2(1) of the Securities Act and section 3(a)(10) of the Exchange Act).


305 See supra note 193.

306 See Wal-Mart, 821 F. Supp. at 888. ACTWU sought to submit to a shareholder vote a request for Wal-Mart's directors to prepare and distribute reports about: (1) Wal-Mart's equal employment opportunity ("EEO") and affirmative action policies and programs, and (2) Wal-Mart's efforts to both publicize its EEO policies to suppliers and purchase goods and services from minority and female owned suppliers. See id. at 879.

307 See id. at 888.

308 See Defendant Wal-Mart's Memorandum in Support of Its Motion to Dismiss Plaintiffs' Complaint at 14, Wal-Mart, 821 F. Supp. 877 (S.D.N.Y. 1993) (No. 92-5517) (asserting that "[b]ecause Rule 14a-8 and the rights created thereby are exclusively a creature of the SEC, that agency's [no-action letter] views concerning the Rule's meaning and application are entitled to substantial deference").
Judge Wood first contended that an individual no-action letter is "not an expression of agency interpretation to which the court must defer." She recognized, however, that no-action letters often can provide substantial insight into the meaning of the SEC's "ordinary business exception" to Rule 14a-8's requirement that companies include shareholder proposals in their proxy materials. Yet in this case, the Cracker Barrel regulatory interpretation that the staff echoed in its no-action letter to Wal-Mart sharply deviated from the standard that the SEC had previously expressed in the official SEC Release that accompanied amendments to Rule 14a-8. Accordingly, Judge Wood refused to defer to the no-action letter because upon weighing the two conflicting regulatory interpretations, she considered herself obligated to follow the one articulated in the official SEC Release.

Although Judge Wood reached the right result in Wal-Mart for apparently the right reasons, her analysis of the deference issue left a number of issues unresolved. For example, Judge Wood did not offer analysis to support her contention that automatic deference is not required when regulatory interpretations are articulated in no-action letters. Rather, she cited Roosevelt v. E.I. Du Pont de Nemours & Co. in which the D.C. Circuit made the conclusory statement that "no-action letter[s] do[ ] not 'rank[ ] as an agency adjudication or rulemaking.'" Moreover, Judge Wood's analysis is of little guidance to a court presented with a regulatory interpretation in a no-action letter that is not diametrically opposed to an "official" interpretation that the SEC previously issued. Because no-action letters frequently constitute the only interpretive guidance available to a court, a broader framework for considering the question of deference requires development.

310 Id. at 884.
311 Id. at 890 (emphasizing that the SEC Release specifically stated that the exclusion for "ordinary business operations" applies only to proposals that are "'mundane in nature,'" and that do not involve any "'substantial policy or other considerations'" (quoting Proposals by Security Holders Release, supra note 194, at 52,998) (emphasis added)); see also supra note 194 (discussing the SEC staff's interpretation of the "ordinary business operations" exclusion).
312 Wal-Mart, 821 F. Supp. at 890. At the outset of her analysis, Judge Wood maintained that "[w]hen a court interprets an administrative regulation, the 'ultimate criterion' is the agency's interpretation of the regulation, which becomes of controlling weight unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" Id. at 883 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). Thus, it appears that Judge Wood accorded automatic deference to the regulatory interpretation embodied in the 1976 SEC Release which accompanied the newly amended Rule 14a-8. See supra note 194.
313 Id. at 885 (second alteration in original) (quoting Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 427 n.19 (D.C. Cir. 1992)).
314 See supra notes 150-51, 164 and accompanying text.
C. Analysis of Automatic Deference in the Context of No-Action Letters

The preceding discussion of the judiciary’s treatment of regulatory interpretations in no-action letters reveals three distinct problems with current jurisprudence. First, doctrinal uncertainty exists regarding whether the dictates in *Chevron* and *Seminole Rock* apply to regulatory interpretations articulated in no-action letters. Second, even courts that have correctly answered this doctrinal question generally fail to articulate—and presumably to recognize—the normative reasons why independent judicial review of no-action letters is so critical. Finally, courts tend to evaluate regulatory interpretations in no-action letters on an ad hoc basis, and have yet to develop an appropriate framework for addressing the competing considerations. In particular, courts lack guidelines by which to evaluate the persuasiveness of regulatory interpretations in no-action letters.

1. *The Doctrinal Case Against Automatic Deference*

As previously discussed, automatic deference principles are grounded in congressional grants of authority to create law through agency rulemaking or adjudication. Such grants of authority evidence Congress’s desire to place an administrative agency in the role of national policymaker—within the bounds set out in the statutory scheme. Agencies fulfill this policymaking role, in part, by announcing interpretations of statutes or their own rules. Courts must therefore give reasonable regulatory interpretations controlling weight; any lesser degree of deference would substitute the judiciary for the administrative agency as national policymaker.

This analysis reveals why courts are never required to defer automatically to regulatory interpretations in no-action letters that the Commission has neither approved nor affirmed. While staff analysis of a regulatory ambiguity may offer insight and guidance as to what the Commission regards as the law, only the SEC’s five commissioners—whom the President appoints and the Senate confirms—possess the authority to “speak” for the regulatory agency. Although the SEC staff may in fact engage in policymaking through announcing regulatory interpretations in no-action letters, these policy choices

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315 See supra Part II.A.2.
316 See *Addison v. Holly Hill Fruit Prods.*, Inc., 322 U.S. 607, 619 (1944) (holding that agency rulemaking cannot exceed the scope of rulemaking authority in the statutory provision); see also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (holding that the SEC’s authority to proscribe certain fraudulent acts in Rule 10b-5 is limited by the scope of the terms of the enabling provision in Exchange Act section 10(b)).
317 See supra notes 225-30 and accompanying text.
319 See supra text accompanying notes 119, 141-48, 182.
lack the political legitimacy of those that the full Commission makes when acting under its congressionally delegated authority.\textsuperscript{320} Thus, while democratic theory may require courts to defer to policy choices that the full Commission has made, it most certainly does not demand deference to SEC staff choices.\textsuperscript{321} As Professor Russell Weaver has recognized, "[d]eference principles assume that the responsible administrative agency has authoritatively interpreted a regulatory provision."\textsuperscript{322} Therefore, neither \textit{Chevron} nor \textit{Seminole Rock} mandate judicial deference to regulatory interpretations in staff no-action letters that the Commission has neither reviewed nor affirmed.

A recent Supreme Court opinion, \textit{Heintz v. Jenkins},\textsuperscript{323} confirms the validity of this analysis. In that case, the Court addressed the ques-
tion of whether the Fair Debt Collection Practices Act applied to an attorney regularly engaged in consumer debt collection litigation on behalf of his creditor. The attorney-defendant pointed to a "Commentary" on the Act by the Federal Trade Commission's ("FTC") staff that interpreted the Act not to cover attorneys engaged in the defendant's type of activities. The Court maintained that it could not give "conclusive weight" to this statement, specifically noting the Commentary's disclaimer that it was "not binding on the [FTC] or the public." Thus, as Heintz's analysis suggests, the SEC's distinction between "staff views" and "Commission views" excludes most no-action letters from the automatic deference principle in Chevron and Seminole Rock.

Yet, because the full Commission reviews and affirms some no-action letters, additional analysis of the judicial deference issue is necessary. Indeed, when the Commission indicates approval of a staff no-action letter, a more compelling case for automatic deference arises—the agency officials possessing congressionally delegated policymaking authority have now authorized the regulatory interpretation. Moreover, interpretations of SEC rules announced in SEC releases command automatic deference pursuant to Seminole Rock. Some courts also consider themselves bound under Chevron to accord controlling weight to statutory interpretations embodied in SEC releases. Those advocating judicial deference may therefore argue that courts should treat the regulatory interpretations in Commission-approved no-action letters like SEC releases.

Yet further analysis reveals why automatic deference is unwarranted even in instances where the Commission has reviewed and affirmed the regulatory interpretation in a no-action letter. The logical starting point is the Commission's own characterization of its action as an "informal statement." This stance demonstrates the Commission's consistent position that it may reconsider the regulatory interpretations articulated in no-action letters. Similarly, the "informal" label attached to Commission-approved no-action letters highlights the tentative nature of the policy choices the SEC announces in those letters. Thus, a doctrine demanding automatic deference to Commission-approved no-action letters would undermine the flexibility that the SEC has sought to maintain, and could yield a litigation result that

325 Heintz, 514 U.S. at 292.
326 See id. at 298.
327 Id.
328 See supra Part I.B.3 (discussing Commission review of no-action letters).
329 See supra note 258 and accompanying text.
330 See supra text accompanying note 257.
331 See supra notes 108-09 and accompanying text.
the SEC does not intend. In other words, automatic deference to regulatory interpretations in no-action letters would elevate those interpretations to law, regardless of the SEC’s intentions.332

Applying the principles in *Chevron* and *Seminole Rock* to the regulatory interpretations in Commission-approved no-action letters would also produce a paradoxical result. That is, a regulatory interpretation that is generally too tentative and informal for purposes of direct pre-enforcement judicial review333 would nonetheless be authoritative and definitive enough to warrant automatic judicial deference. As a number of courts have previously recognized, the doctrine of automatic judicial deference, on the one hand, and the doctrines of ripeness and finality of agency action, on the other hand, are often related sides of the same administrative coin.334 However, according automatic deference to the tentative and informal interpretations in no-action letters produces far greater problems than premature judicial review. Specifically, it *binds* courts and the public to a reasonable agency interpretation even though that agency has yet to officially adopt that interpretation.

Finally, the argument that even Commission-approved no-action letters are too informal to warrant automatic deference finds support in another recent Supreme Court decision. In *Smiley v. Citibank (South Dakota), N.A.*,335 a unanimous Court noted that a statutory interpretation articulated in a letter from the Comptroller of Currency to the President’s Committee on Consumer Interests did not establish “bind-

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333 *See supra* note 114 and accompanying text; *cf.* Abbott Lab. v. Gardner, 387 U.S. 136, 149-51 (1967) (drawing a distinction between “definitive” agency regulations, which are reviewable even if they are not yet enforced, and “tentative” agency positions, which are not usually reviewable).

334 *See Amalgamated Clothing & Textile Workers Union v. SEC*, 15 F.3d 254, 257 n.3 (2d Cir. 1994) (denying petition for judicial review of a Commission-approved no-action letter and endorsing SEC counsel’s statement at oral argument that when the “full Commission comments on staff no-action positions, these views and positions are not entitled to the high level of judicial deference afforded formal policy statements or rule-making orders of the SEC or other administrative agencies”); Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 673-76 (D.C. Cir. 1970) (finding Commission-approved no-action letter “ripe” for review and noting that the doctrine of judicial deference would operate to prejudice plaintiffs if review were not permitted), *vacated as moot*, 404 U.S. 403 (1972); *see also* Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 437 (D.C. Cir. 1986) (holding that letter authored by the head of the EPA’s Pesticide Division was “ripe” for pre-enforcement judicial review and noting that it could “divine no reason why the letter . . . would not be entitled to deference”); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 702 (D.C. Cir. 1971) (holding that an interpretive letter authored by the head of an agency was “final” for pre-enforcement judicial review, in part, because the letter would be “entitled to deference . . . as a matter of law from a court reviewing the question”).

ing agency policy” because it was “too informal.”

Although it did not elaborate on why it classified the letter as “too informal,” the Court’s observation is nonetheless noteworthy for suggesting that the doctrine of judicial deference may not operate below a base level of formality. The Court also acknowledged that even an agency head can engage in actions that are informal.

Thus, automatic deference by the courts is warranted as a doctrinal matter only when the SEC has announced a regulatory interpretation in a formal and official format such as an SEC rule, order, or, perhaps, release. The announcement and publication of a regulatory interpretation in one of these formats carry with it the presumption that the full Commission has made an affirmative and carefully considered decision regarding the course of its regulatory policy. Courts should, therefore, never read Chevron and Seminole Rock as requiring deference to a regulatory interpretation in a no-action letter, regardless of whether the letter has been subjected to Commission review.

2. Normative Reasons Impelling Independent Review

Eliminating the doctrinal uncertainty as to whether courts must accord no-action letters automatic deference will significantly reduce judicial confusion regarding the status and legal significance of no-action letters. But even a court confident that it need not defer to regulatory interpretations in no-action letters may not fully appreciate why it should not merely rubber-stamp these interpretations in the course of resolving a securities law dispute. Courts undoubtedly would be more inclined to regard independent review as an obligation if they were more fully aware of the numerous values served by subjecting no-action letters to meaningful scrutiny.

First, unlike SEC rules, which adhere to APA procedures for notice and comment, the Commission generally develops regulatory interpretations in no-action letters without participation from the general public. While a similar lack of participation occurs when the agency articulates interpretive views in SEC releases, the nature of the no-action letter process exacerbates concerns about the fairness and quality associated with the regulatory interpretations announced therein. In other words, particularly with respect to those no-action letters that reflect controversial or otherwise difficult policy choices,

\[\text{Vol. 83:921}\]

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336 Id. at 1734.
337 Id.
338 See supra notes 256-57 and accompanying text.
339 See supra notes 170-78 and accompanying text; see also supra note 147 (recognizing that the SEC staff often considers feedback from the regulated community in determining whether to modify regulatory interpretations set out in prior no-action letters).
the informal nature of the no-action letter process increases the possibility that groups with substantial power and influence will drive the agency's decisions.\textsuperscript{340} Furthermore, this process simultaneously decreases the likelihood that the SEC will have before it all relevant data and views regarding the best direction for its regulatory policy.\textsuperscript{341} Independent judicial review of regulatory interpretations in no-action letters therefore serves as an important check against special interest decisionmaking and hasty adoption of policies that fail to adequately balance the statutory aims.\textsuperscript{342} It also restores fairness to the administrative process by ensuring that the public will not be "bound by a proposition they had no opportunity to help shape."\textsuperscript{343}

The lack of public participation in the development of the regulatory interpretations announced in no-action letters also raises concerns relating to the congressional policy behind the APA's notice and comment requirements: Congress intended to exempt from these requirements only those rules that actually interpret provisions in previously enacted statutes or legislative rules.\textsuperscript{344} While the vast majority of no-action letters that the SEC issues may fall squarely within this exemption, a significant number do not.\textsuperscript{345} Independent judicial scrutiny of all regulatory interpretations in no-action letters therefore helps ensure that the SEC does not use the informal no-action letter process to amend, as a practical matter, provisions in statutes or SEC rules. Indeed, even if the full Commission has reviewed and approved a regulatory interpretation in a no-action letter, the courts should never permit such an interpretation to vitiate provisions in securities statutes that Congress enacted or rules the SEC promulgated for investors' benefit or protection. If the SEC concludes as a matter of sound policy that such protections are no longer necessary and thus wishes to change them, the Commission must do so formally, through the adoption of new rules following the requisite notice and comment period.\textsuperscript{346} Courts should simply not allow the no-action process to cre-

\textsuperscript{340} See supra notes 178-75 (contending that the no-action letter process increases the risk of agency capture).

\textsuperscript{341} See supra note 177 and accompanying text (contending that the no-action letter process fails to capitalize on insights and expertise possessed by those shut out of what is, in effect, a private negotiation between the SEC staff and the individual or entity requesting the letter).

\textsuperscript{342} Cf. Seidenfeld, supra note 218, at 129-33 (emphasizing the benefits that would be gained if Chevron's deferential approach were substituted with one that focused more on an agency's reasoned decisionmaking).


\textsuperscript{344} See supra notes 32, 40-44.

\textsuperscript{345} See supra notes 184-200 and accompanying text.

\textsuperscript{346} See supra notes 191-98 and accompanying text. Until recently, if the SEC believed that a statutory requirement under either the Securities Act or the Exchange Act was no
ate informal "adjustments" that effectively amend regulatory provisions.\footnote{347} However, the judiciary can ensure that it is not giving legal effect to what is clearly improper agency conduct only by carefully scrutinizing the regulatory interpretations in no-action letters.

Similarly, independent judicial scrutiny of regulatory interpretations in no-action letters helps ensure that substantive obligations or standards that one cannot reasonably and fairly imply from existing statutes or rules will not bind the regulated community.\footnote{348} Indeed, if the SEC had promulgated as SEC rules many of the practical requirements that no-action letters currently impose, the APA would have obligated the SEC to provide the public with prior notice and an opportunity for comment.\footnote{349} Thus, the judiciary’s refusal to give legal effect to regulatory "requirements" that one cannot reasonably and fairly imply from existing provisions curtails the SEC’s ability to circumvent the APA’s notice and comment requirements by announcing spurious rules via no-action letters.\footnote{350}

Finally, considerations of fundamental fairness impel courts to carefully scrutinize regulatory interpretations in no-action letters. It was no longer necessary for the protection of investors, its sole choice was to approach Congress with its suggestions for statutory amendment. Today, however, through provisions in the NSMIA, \textit{supra} note 202, the SEC has an alternative avenue for regulatory change: it now has the authority to provide broad exemptions from these statutory provisions. Specifically, under newly added section 28 of the Securities Act, the SEC may now by\textit{ rule or regulation}\footnote{347} exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions from any provision or provisions of [the Securities Act] or of any rule or regulation issued [thereunder], to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

15 U.S.C. § 77z-3 (Supp. II 1996). Exchange Act section 36 now contains a similar provision, though under the Exchange Act, the SEC may act by issuing orders, as well as by rules and regulations. \textit{See id.} § 78mm(a)(1). Although the extent to which the SEC intends to act upon this new exemptive authority is far from clear, the existence of this alternative avenue for regulatory change heightens the judiciary’s important role in ensuring that de facto exemptions are granted through the rulemaking or order vehicles specified in the statute—rather than through the informal no-action letter process.

As noted previously, see \textit{supra} notes 304-12 and accompanying text, Judge Wood’s independent scrutiny of the \textit{Cracker Barrel} no-action letter in \textit{Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.}, 821 F. Supp. 877 (S.D.N.Y. 1993), worked to ensure that the shareholders were not bound by the SEC’s attempt to use the no-action letter to amend, as a practical matter, the regulatory provisions in Rule 14a-8 that required Wal-Mart to include the proposal. In contrast, judicial "rubber-stamping" of the regulatory interpretation of Rule 14a-8 set out in the \textit{Cracker Barrel} no-action letter would have given that regulatory change the force of law without requiring the SEC to take any formal rulemaking action. In short, that approach would have upheld a "spurious rule." \textit{See supra} notes 190-92 and accompanying text.

\textit{See supra} notes 140, 161, 185 (discussing observations by Professor Brown regarding "rules" applied to investment adviser advertising); \textit{supra} notes 142, 177, 185 (noting observations by Professor Campbell regarding "rules" applied to resales of registered securities).\footnote{349} \textit{See supra} note 32.\footnote{350} \textit{See supra} note 192 for a discussion of spurious rules.
deed, individuals and entities submitting no-action letter requests, as well as certain third parties (such as shareholders in Rule 14a-8 cases), all have strong interests in the enforcement positions and interpretive advice provided in no-action letters.\footnote{See supra notes 78-85 and accompanying text.} However, because the regulatory interpretations articulated in those letters lack binding legal effect, the Constitution generally does not obligate the SEC to provide those parties with a full and fair opportunity to be heard.\footnote{A constitutional obligation of due process applies to informal agency adjudications if agency action will deprive a person of "liberty" or "property," U.S. Const. amend. V, as those terms have been defined by the Supreme Court. Because staff determinations in no-action letters (or even Commission determinations on review) lack any binding legal effect, the individual requestor or an interested third-party would be hard pressed to demonstrate the potential deprivation necessary for due process rights to attach. \textit{See generally RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW & PROCESS § 6.3 (2d ed. 1992) (discussing the Due Process Clause as a source of procedural requirements for agency actions).}} This becomes a concern if courts treat no-action letters as SEC orders or rulings and accept the agency's conclusions on factual and legal issues without meaningful review. When this treatment occurs, no-action letters will practically bind recipients and interested third parties, even though such persons lacked a full and fair opportunity to present their arguments at the time the SEC effectively decided the issue.

3. \textit{The Need for a Framework}

The preceding discussion of the consequences that result when courts rely on no-action letters brings to light why the judiciary should undertake more thoughtful review of the regulatory interpretations announced therein. Yet a judicial approach that would ignore no-action letter authority would impose a remedy perhaps worse than the malady. Indeed, as the "persons who are continuously working with the provisions of the statute involved," SEC staff officials have developed particular expertise that may assist courts with the interpretation of ambiguous regulatory provisions. Moreover, as noted in Part I of this Article, securities law practitioners and their clients often shape their advice and actions around the regulatory interpretations that the SEC articulates through the no-action letter vehicle.\footnote{\textit{See supra} notes 50-52; supra Part I.C.2.} Thus, while a court should never treat the views that the SEC staff expresses in a no-action letter as dispositive, it would be both inefficient and unwise for a court to cast those interpretive views aside without considering their potential validity.

The Second Circuit's suggestion in \textit{New York City Employees' Retirement System v. SEC} that courts may treat no-action letters as "persuasive" authority therefore seems entirely appropriate.\footnote{NYCERS v. SEC, 45 F.3d 7, 13 (2d. Cir. 1995).} But how do
courts, generally unfamiliar with the workings of specific provisions in securities statutes and SEC rules, determine whether a particular no-action letter is, in fact, persuasive? Once again, in the specific context of judicial reliance on no-action letters, the case law generally fails to articulate sufficient standards. The final Part of this Article seeks to fill this void.

III
A PROPOSED FRAMEWORK FOR EVALUATING REGULATORY INTERPRETATIONS IN SEC NO-ACTION LETTERS

As long as there are litigants seeking to win securities cases, federal courts will be urged to defer to regulatory interpretations in no-action letters. Like all attorneys, securities law practitioners are trained to make full use of the legal methods available to them, including the tried and true method of citation to “authority,” even authority that is not binding. In appropriate cases, this legal method may prove very useful to courts. Although regulatory interpretations in no-action letters are never appropriate formats for the automatic deference articulated in Chevron or Seminole Rock, regulatory interpretations in no-action letters may nonetheless enlighten a court struggling with ambiguous provisions in federal securities statutes or SEC rules. Courts should therefore regard no-action letters as potentially relevant, albeit noncontrolling, authority.

But the fact that a court has unfettered discretion in the deference/no deference debate provides little practical assistance to the judge who must determine the appropriate weight to accord a regulatory interpretation in a no-action letter, particularly when the judge is faced with a dearth of formal and official SEC interpretive authority. Recognizing this conundrum, Part III proposes a solution that balances a court’s need for expertise and regulatory insight with the regulated and protected public’s right to obtain meaningful judicial review. Initially, this Part reviews the Supreme Court’s decision in

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356 See Atchison, Topeka & Santa Fe Ry. Co. v. Peña, 44 F.3d 437, 443 (7th Cir. 1994) (en banc) (noting that although “we certainly do not defer to them,” Seventh Circuit practice involves careful consideration of the opinions of “sister circuits”), aff’d on other grounds sub nom. Brotherhood of Locomotive Eng’rs v. Atchison, Topeka & Santa Fe R.R. Co., 516 U.S. 152 (1996); Caron, supra note 19, at 669 (contending that “taxpayers and the [Internal Revenue] Service . . . cite letter rulings in their arguments, and courts often refer to letter rulings in the course of their opinions,” even though the IRS Code specifies that private letter rulings “‘may not be used or cited as precedent’” (quoting I.R.C. § 6110(j)(3) (1988)); Arthur B. Spitzer & Charles H. Wilson, The Mischief of the Unpublished Opinion, Litigation, Summer 1995, at 3-4 (noting that litigants routinely cite unpublished federal court opinions as “‘persuasive authority’” except in those circuits that flatly prohibit any citation to such opinions).
357 See supra notes 150-51 and accompanying text.
Skidmore v. Swift & Co., one of the first cases in which the Court explicitly recognized that an agency interpretation may be persuasive even though a court is not required to defer to it. After explaining why Skidmore's "persuasive authority" approach is particularly well-suited for resolving issues of judicial deference to no-action letters, it discusses some correlative benefits that could accrue from judicial adherence to this approach. This Part concludes by applying the persuasiveness factors suggested in Skidmore and its progeny to the specific context of no-action letters.

A. The "Persuasive Authority" Approach

When courts speak of "deference" to an agency's regulatory interpretation, rather than using the term to describe the principle of automatic deference set out in Chevron or Seminole Rock, they may mean only that the agency's interpretation deserves "consideration," and that the final interpretation of a regulatory provision's meaning rests with the court. Indeed, a number of courts have acknowledged that the term "deference" is susceptible to multiple meanings—sometimes courts use it in the automatic sense, but on other occasions, courts use it to indicate discretion based on the degree to which a particular interpretation is persuasive. The concept that an administrative interpretation may be persuasive, even when it is not controlling, has its roots in the Supreme Court's decision in Skidmore v. Swift & Co.


Skidmore involved a lawsuit for overtime pay that a group of firefighters brought against their employer under the Fair Labor Standards Act ("FLSA"). The firefighters claimed that, under the FLSA, they were entitled to overtime pay because time spent on-call at their

358 323 U.S. 134 (1944).
359 See supra Part II.A.1.
360 See 1 DAVIS & PIERCE, supra note 28, § 6.3 (describing two forms of judicial deference); Diver, supra note 226, at 565 (discussing multiple meanings of the term "deference"); Merrill, supra note 99, at 1016 (noting that whereas judicial practice has traditionally treated deference on a sliding scale, Chevron makes "deference an all-or-nothing proposition").
363 Id. at 135.
employer's premises counted toward "working time" within the meaning of the FLSA.\textsuperscript{364} The employer contended that the FLSA did not require "waiting time" to be counted as "working time."\textsuperscript{365}

Recognizing this statutory provision's ambiguity, the Court noted that "Congress did not utilize the services of an administrative agency" to issue rules or adjudicate decisions under the FLSA.\textsuperscript{366} Congress did, however, create an Office of Administrator of the Wage and Hour Division of the Department of Labor, and charged that Administrator with the duty to bring injunctive actions for violations of the Act.\textsuperscript{367} Accordingly, the Court recognized that the Administrator had to draw conclusions about the meaning of the FLSA to properly enforce it.\textsuperscript{368}

The Court also noted that the Administrator, in connection with his enforcement duties, "set[s] forth his views of the application of the Act under different circumstances in an interpretive bulletin and in informal rulings."\textsuperscript{369} The Administrator intended these bulletins and informal rulings to "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it."\textsuperscript{370} The Court also observed that some of the circumstances discussed in the bulletin were analogous to the firefighters' dispute with their employer.\textsuperscript{371}

Because the FLSA limited the Administrator's authority to enforcement power, the Court did not consider itself bound by his interpretation of the mandatory overtime provisions.\textsuperscript{372} Yet the Court recognized that the Administrator, in pursuance of his enforcement duties, had "accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution."\textsuperscript{373} Accordingly, the Court concluded that "the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."\textsuperscript{374} The Court then suggested that the weight courts give to a particular interpretation should depend on a variety of factors, including: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later

\textsuperscript{364} Id.
\textsuperscript{365} Id. at 135-36.
\textsuperscript{366} Id. at 137.
\textsuperscript{367} See id.
\textsuperscript{368} Id. at 137-38.
\textsuperscript{369} Id. at 138.
\textsuperscript{370} Id.
\textsuperscript{371} Id. at 138-39.
\textsuperscript{372} Id. at 140.
\textsuperscript{373} Id. at 137-38.
\textsuperscript{374} Id. at 140 (emphasis added).
pronouncements, and all those factors which give it power to persuade, if lacking power to control.\textsuperscript{375}

Although subsequent Supreme Court decisions citing Skidmore have referred to its approach as a type of “deference,”\textsuperscript{376} the Skidmore Court clearly intended only that lower courts should consider the Administrator's views when independently interpreting the statute. To avoid this confusion, this Article will therefore use the term “Skidmore-type deference” to distinguish Skidmore's persuasive authority approach from the automatic deference approaches in Chevron and Seminole Rock.

2. Current Application of Skidmore

Today, courts typically use Skidmore-type deference in one of two situations. First, like in Skidmore, and as the Supreme Court recently reaffirmed in EEOC v. Arabian American Oil Co.,\textsuperscript{377} Skidmore-type deference governs a court's analysis of an agency's statutory interpretation when that agency was not the recipient of congressionally delegated rulemaking or adjudicative authority.\textsuperscript{378} Second, as noted in Part II, courts that read Chevron to apply only to legislative rules or to adjudicative decisions generally apply Skidmore's persuasiveness factors to the statutory interpretations that an agency announces in alternative formats, such as interpretive rules or policy statements.\textsuperscript{379} Thus, many lower courts have applied Skidmore-type deference to statutory interpretations that agencies promulgated in formats such as guidelines, manuals, and bulletins.\textsuperscript{380} In so doing, courts “respectfully consider” all regulatory interpretations that an agency advances in a nonlegisla-

\textsuperscript{375} Id.
\textsuperscript{376} See, e.g., EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (citing Skidmore factors in ascertaining the “level of deference” that is due Title VII interpretive guidelines promulgated by the EEOC); General Electric Co. v. Gilbert, 429 U.S. 125, 140-46 (1976) (same).
\textsuperscript{377} 499 U.S. 244 (1991).
\textsuperscript{378} Id. at 257-59. In this case, the Supreme Court applied Skidmore rather than Chevron to Title VII “guide[l]ine[s]” promulgated by the EEOC after explicitly noting that the agency was not the recipient of any congressionally delegated lawmaking power under Title VII. Id. at 258. Moreover, after concluding that the EEOC's interpretation did not fare well under Skidmore's standards, the Court rejected the agency's statutory interpretation in favor of the more narrow construction that the defendant advanced. Id. at 258-59. Although Justice Scalia concurred with this result, he maintained that after Chevron, the “legislative rules vs. other action’ dichotomy . . . is an anachronism.” Id. at 260 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia therefore proposed replacing the Skidmore approach with a mandate according Chevron deference to all reasonable agency interpretations of ambiguous statutes, regardless of whether they are classified as legislative or interpretive. Id. Justice Scalia, however, appears to stand alone in this view. See Jamie A. Yavelberg, Note, The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. ARAMCO, 42 Duke L.J. 166, 191-95 (1992).
\textsuperscript{379} See cases cited supra note 241.
\textsuperscript{380} See cases cited supra note 241.
tive rule or nonadjudicative format, but accept only those interpretations that are persuasive. This approach leaves a court free to choose among competing regulatory interpretations.

Because Skidmore's flexible approach allows courts to retain independent interpretive authority over regulatory ambiguities, administrative law scholars have often touted Skidmore-type deference in a variety of additional situations. Professors Robert Anthony and John Manning, for instance, each have recently advocated reconsideration of Seminole Rock's automatic deference principle, and they have asserted that courts should follow Skidmore's superior approach when presented with regulatory interpretations purporting to clarify an agency's own rule. Professor Ronald Weaver has also suggested Skidmore as an appropriate approach for courts to follow when presented with interpretive statements made by individual agency employees. Thus, in administrative law circles at least, stock in Skidmore-type deference seems to be trading at an all time high.

3. Skidmore's Relevance to Cases Involving No-Action Letters

Skidmore's flexible principles of judicial deference are particularly well-suited for courts trying to determine whether and how to rely on regulatory interpretations in no-action letters. In many ways, the particular situation at issue in Skidmore recurs whenever the SEC announces regulatory interpretations in no-action letters.

First, like the Administrator in Skidmore, the SEC staff lacks congressionally delegated power to promulgate legislative rules and adjudicatory orders. Instead, the SEC staff performs the day-to-day

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381 Anthony, Which Interpretations Bind Courts?, supra note 18, at 13 ("Under [the Skidmore] approach, the agency interpretation is a substantial input and counts for something, much as legislative history may count. But the authoritative act of interpretation remains with the court. The court considers the agency view, and approves it only if it is deemed correct."); Yavelberg, supra note 378, at 197-201 (arguing that Skidmore applies to all agency interpretations embodied in nonlegislative rules).

382 Anthony, Supreme Court and the APA, supra note 18, at 10 (contending that substantial injustice results when an agency acts as judge in its own interpretive cause, and asserting that courts should apply Skidmore's respectful consideration doctrine when "agency interpretations of their own regulations are set forth in informal rulemaking formats" (emphasis omitted)); Manning, supra note 18, at 686-87 (contending that the categorical presumption adopted by Seminole Rock conflicts with the constitutionally inspired norm against the combination of lawmaking and law-exposition, and that the Skidmore model "is a particularly appropriate standard of judicial review for agency interpretations of agency regulations").

383 Weaver, Individual Statements, supra note 18, at 1021 (maintaining that courts might respect individual statements in situations where those statements do not "qualify" for Chevron or Seminole Rock deference). Additionally, Professor Merrill has advocated a replacement of Chevron's mandatory deference model with an "executive precedent" approach, affording courts greater discretion to accept or reject agency interpretations depending on a number of factors including: agency expertise, agency consistency with prior interpretations, and the persuasiveness of the agency's reasoning. Merrill, supra note 39, at 1016-22.
administration of the securities laws, a function that includes the enforcement of those laws.\textsuperscript{384} And while the securities laws provide that only the full Commission may institute enforcement proceedings,\textsuperscript{385} the SEC staff, particularly division directors and other high level officials, clearly has broad investigative powers, and its enforcement action recommendations carry significant weight.\textsuperscript{386} Accordingly, through the performance of its investigative and administrative responsibilities, the SEC staff, like the Administrator in \textit{Skidmore}, has amassed considerable expertise with respect to the administration of the relevant regulatory scheme.

Second, the Administrator in \textit{Skidmore} and the SEC staff utilize similar vehicles for announcing their interpretive views to the regulated and protected public. \textit{Skidmore}'s description of the interpretive bulletin and informal rulings as "a practical guide to employers and employees as to how the office representing the public interest in [the statute's] enforcement will seek to apply it,"\textsuperscript{387} strikingly resembles the SEC's description of, and its intention behind, the no-action letter process.\textsuperscript{388} Thus, like the Administrator's views in \textit{Skidmore}, the SEC staff's interpretive views provide practical guidance to the regulated and protected public regarding how officials responsible for administering the federal securities laws will seek to enforce them. In both cases, however, these interpretive views are not legally binding and must be tested in subsequent proceedings.

Finally, like no-action letters, the rulings and interpretive bulletins that the \textit{Skidmore} Administrator used to announce regulatory interpretations were informal vehicles developed without the public participation that generally accompanies the promulgation of legislative rules. Thus, in both instances, independent judicial review serves as a check against regulatory interpretations that an agency may have articulated either without full information or to the advantage of only one particular constituency.\textsuperscript{389}

Despite this congruence, however, courts faced with requests for deference to regulatory interpretations in no-action letters have largely ignored the import of the \textit{Skidmore} decision. Indeed, no court thus far has cited the decision to justify reliance on no-action letter authority, and no court has explicitly cited \textit{Skidmore}'s factors as a means of determining the persuasiveness of a no-action letter. And

\begin{itemize}
\item \textsuperscript{384} See Office of Public Affairs, \textit{supra} note 4, at 26-34.
\item \textsuperscript{385} See 17 C.F.R. § 202.5(d) (1997).
\item \textsuperscript{386} See supra text accompanying note 162.
\item \textsuperscript{387} Skidmore v. Swift & Co., 323 U.S. 134, 138 (1944).
\item \textsuperscript{388} See supra note 44 and accompanying text.
\item \textsuperscript{389} See supra notes 170-79 and accompanying text (discussing the inverse relationship between formality of regulatory interpretations and success in achieving high quality interpretations).
\end{itemize}
even though some courts presented with no-action letter authority may already follow a Skidmore-type deference approach, they could significantly enhance the clarity of their decisions by explicitly recognizing it as the Skidmore approach.

B. Advantages of Skidmore's Persuasive Authority Approach

In addition to fostering clearer and more carefully reasoned judicial opinions, consistent use of the Skidmore approach in connection with no-action letters may yield a number of correlative benefits that exceed the general advantages of independent judicial review of regulatory interpretations in no-action letters discussed above in Part II. For instance, the Skidmore approach may spur SEC staff members to prepare no-action letters that more fully explain and justify their positions so that a court will find the regulatory interpretations contained therein more persuasive. Reasoned decisions of this nature, rather than conclusory statements, would substantially assist not only courts but also securities law practitioners and their clients. Indeed, the SEC staff's tendency to grant no-action relief without expressing explicit legal conclusions has consistently frustrated securities law practitioners. No-action letters that include reasoned analyses would be of far greater assistance to attorneys in fulfilling their dual roles as advisor and transaction-planner. By eliminating the need for many follow-up no-action letters requesting clarification in the face of marginally different facts, well-reasoned no-action letters would also reduce corporate transaction costs and preserve agency resources. Finally, no-action letters that the staff prepares in the form of reasoned decisions may serve as a self-imposed check against special interest decisionmaking.

The consistent application of a Skidmore-type framework in analyzing no-action letter authority might even generate qualitatively better securities law. Indeed, the views of securities law practitioners who

390 See supra Part II.C.2.
391 Cf. Manning, supra note 18, at 687-88 ("By emphasizing the 'thoroughness' of agency reasoning, Skidmore gives an agency a clear incentive to supply a full explanation of the way its action relates to the regulation on which it is premised." (quoting Skidmore, 323 U.S. at 140)); Seidenfeld, supra note 218, at 125-38 (highlighting important values served when courts emphasize reasoned decisionmaking in reviewing agency interpretations of statutes).
392 See Lowenfels, Problems, supra note 12, at 1277 (recommending that all no-action replies "should be prepared in the form of reasoned decisions explaining and justifying the positions taken"); see also Haft, supra note 11, at viii (pointing out the conclusory nature of most no-action letters).
393 See supra notes 45-49 and accompanying text.
394 See supra notes 168-69 and accompanying text.
395 Cf. Seidenfeld, supra note 218, at 154 (contending that, in general, "[r]equiring the agency to justify its interpretation in terms of the goals underlying the statute will make the agency think twice before pursuing a special interest agenda").
represent market participants and members of the investing public could help a court resolve an interpretive issue. These attorneys, many of whom are distinguished SEC alumni, provide their own expertise and regulatory insight into how particular regulatory provisions relate to the statutory framework and the overall policies and purposes of the federal securities laws.\textsuperscript{396} The Skidmore approach permits a court to consider practitioner's views as well as the interpretive views advanced by the SEC staff. Accordingly, it allows the court to choose the best interpretation from several competing alternatives.\textsuperscript{397}

C. Evaluating the Persuasiveness of a No-Action Letter

Skidmore and its progeny highlight several general factors that courts should consider when evaluating the persuasiveness of an agency's regulatory interpretation. Because application of these factors may not be immediately obvious to courts presented with no-action letter authority, the remainder of this Article discusses the specific factors that a court should consider most seriously in determining whether and how to rely on regulatory interpretations in no-action letters.

1. \textit{Is the Statute or Rule Ambiguous?}

As a threshold matter, a federal court considering reliance on regulatory interpretations in no-action letters must determine whether the regulatory provision is, in fact, ambiguous. That is, questions of deference should arise only when the meaning of the words in the agency's regulation is unclear,\textsuperscript{398} or when "the traditional tools of statutory construction" fail to resolve the ambiguity.\textsuperscript{399} Clearly, if either Congress or the Commission has previously spoken on the pre-

\textsuperscript{396} See supra note 48 (discussing the "revolving-door" between the SEC and private securities practice).

\textsuperscript{397} See Anthony, Which Interpretations Bind Courts?, supra note 18, at 62-63 (maintaining that the Skidmore approach permits courts to deliberate their "own best estimate" as to the meaning of regulatory provision); see also Davis & Pierce, supra note 28 (Supp. 1996), § 3.5, at 28 (noting that, in many cases, "the difference between Chevron deference and Skidmore deference is outcome determinative"). Moreover, if the Commission disagrees with a court's interpretation of an SEC rule, the Commission can always formally amend the rule to more clearly reflect the policy it wishes to pursue. See Manning, supra note 18, at 695 n.392 ("Agencies have the ability to amend regulations to correct judicial error and resolve conflicts among the circuits.").

\textsuperscript{398} See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); see also Martin v. OSHRC, 499 U.S. 144, 150-51 (1991) (stating that a reviewing court must initially examine the regulation's language to ensure that it "is not free from doubt" (quoting Ehlert v. United States, 402 U.S. 99, 105 (1971))); National Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (stating that "[d]eference to agency interpretations is not in order if the rule's meaning is clear on its face" (citations and internal quotation marks omitted)).

cise regulatory issue, then the regulatory interpretation in the no-action letter has no place in the dispute's resolution.400

The importance of a court's careful consideration of this threshold question cannot be overstated. Some litigants, for example, may urge judicial deference to a no-action letter even when the Commission has clearly set out its intentions in a release announcing the adoption of an SEC rule.401 Because a court is obligated to follow the rules that the SEC promulgates during the rulemaking process, it should look for guidance in no-action letters only after it has concluded that the relevant rules do not address the interpretive issue.402

Through this inquiry, a court reduces the risk of relying on a no-action letter that conflicts with the policy choices that either Congress made when enacting the statutory provision, or the Commission made in promulgating an SEC rule developed through a process that included public participation. Although the SEC staff, or the Commission itself, may later disagree with those choices and consequently may be disinclined to prosecute activities that run afoul of those policies, a court is still obligated to follow the law as stated in the existing statute or SEC rule. As noted in Part I of this Article, any change in that law must result from legislative action—either through a statutory amendment by Congress, or in the case of an SEC rule, via promulgation of a new rule in accordance with APA rulemaking procedures.403

2. Quality of Reasoning

Once a court has determined that a regulatory provision is ambiguous, it should next examine the content of the no-action letter or letters to which deference is urged. This examination requires consideration of several questions. For example, does the letter contain an explicit interpretation of a statutory provision or an SEC rule? Or is the letter a pure no-action letter which, by its terms, does not purport to express any legal conclusions regarding the applicability of statu-

400 Of course, when Congress has spoken on statutory meaning, even an "official" interpretation by the SEC would be irrelevant, for "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43; see also Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986) ("The traditional deference courts pay to agency interpretations is not to be applied to alter the clearly expressed intent of Congress.").

401 See, e.g., supra notes 304-14 and accompanying text (discussing Wal-Mart's requests for judicial deference to the Cracker Barrel no-action letter, even though the regulatory interpretation that the no-action letter announced flatly contradicted the interpretation set forth in the SEC Release that announced the adoption of revised Rule 14a-8).


403 See supra note 32.
tory provisions in the federal securities laws? If the former, does the SEC staff support its regulatory interpretation with analysis based on the statutory or regulatory text? Does the staff reference congressional or SEC policy goals? Can one reasonably and fairly imply the regulatory interpretation from the text of the provision? And if the staff's letter is a pure no-action letter, does the staff nonetheless appear to base it on an underlying interpretive rationale?

The answers to each of these questions should affect the weight that a court accords a no-action letter cited as authority in litigation. A no-action letter which contains a regulatory interpretation supported by lucid reasoning based on regulatory language would be, in most instances, very persuasive. For example, a no-action letter could serve as persuasive authority by illuminating how the pieces of a statute or SEC rule fit together. Moreover, in some instances involving ambiguous provisions of an SEC rule, the officials rendering the interpretation in the no-action letter may be the same individuals who drafted the rule. Such insight into the regulatory text typically would be very useful to a court rendering a decision as to regulatory meaning. Alternatively, a staff no-action letter may assess the legality of particular transactions in light of the policy underlying the statutory or regulatory framework. Or, in the case of a disfavorable no-action letter, the staff may refute or distinguish the alternative interpretations that counsel for the requestor advanced. Under any of

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404 Cf. Manning, supra note 18, at 688 (contending that, under the Skidmore approach, an agency's "success in persuading a court exercising independent judgment will hinge directly on the quality of the agency's expression of its understanding of the relevant text and the way it fits within the regulatory and statutory scheme in issue").


406 See Manning, supra note 18, at 688-89 (contending that agency familiarity with the technical words or terms of art in its own rules and regulations may assist courts in resolving ambiguities).

407 As Professor Diver has observed, [A] correct identification of the enactor's intention . . . does not usually complete the interpretive process. Rarely will the enactor have had in mind the specific situation confronted by the interpreter. More likely, the enactor envisioned some general condition or idea, or perhaps some specific ideals of a more general condition. The lawfinder must then take a final and more avowedly creative step of determining which "interpretation" of the statute will produce that general condition.

Diver, supra note 226, at 577 (citation omitted). As the officials who work with the regulatory provisions on a daily basis, the SEC staff may well be in a superior position to anticipate which regulatory interpretations would best work to produce the result that Congress or the full Commission intended.

408 Cf. Seidenfeld, supra note 218, at 129 (contending that under a deference approach that emphasizes reasoned decisionmaking, "[t]he agency should also respond to any likely contentions that its interpretation will have deleterious implications").
these scenarios, a reviewing court could reasonably conclude that the staff's regulatory interpretation is entitled to *Skidmore*-type deference.

In contrast to no-action letters containing well-reasoned regulatory interpretations based on regulatory text or identifiable policy goals, a pure no-action letter containing little, if any, rationale for the enforcement recommendation would typically be far less persuasive. Such a letter provides courts with little guidance in construing regulatory ambiguities. And while a court is certainly free to speculate about the staff's reasons for adopting a favorable enforcement position, if it chooses to extrapolate an interpretive rationale from a pure no-action letter, the court risks setting a legal precedent based on a rationale that the SEC never in fact advocated. A court should also bear in mind that the staff often intentionally leaves no-action letters vague to allow the agency time to determine the direction it wishes its regulatory policy to take.

Least persuasive would be purported interpretations that one cannot reasonably and fairly imply from the text of existing statutes and SEC rules. These no-action letters represent particularly inappropriate candidates for deference because they announce spurious rules that the SEC should have presented to the public for notice and comment. By refusing to defer to these no-action letters, courts can ensure that the SEC's informal processes do not operate to effectively circumvent the rulemaking provisions that Congress set out in the APA.

3. **Review and Approval by the Commission**

As noted above, Commission review and approval of a no-action letter does not transform a regulatory interpretation from informal

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409 Recent commentary by two securities law practitioners emphasizes potential risks when interpretive rationales are extrapolated from pure no-action letters. Susan P. Serota & Edmond FitzGerald, *Registration of Deferred Compensation Obligations: The SEC's New Position*, INSIGHTs, July 1996, at 10. These commentators observed that, for many years, practitioners "reasonably inferred" from a series of no-action letters that acquiesced in the nonregistration of certain deferred employee compensation plans that the staff interpreted these plans not to be "securities" within the meaning of section 2(1) of the Securities Act. *Id.* at 12. They then pointed out that, based on recent statements by the SEC staff, it appears as though registration was not required because the transactions constituted a "private placement" and that "contrary to popular belief, the staff ha[d] never relied on the 'no security' theory." *Id.* at 12 (internal quotation marks omitted). Although Ms. Serota and Mr. FitzGerald found this explanation "puzzling," they nonetheless recommended that public companies reassess whether they can continue to offer such plans without Securities Act registration. *Id.* at 14-15.

410 See *supra* notes 145-46 (discussing likely reasons why the SEC used no-action letters to set policy regarding proprietary trading systems).

411 See *supra* note 192 (discussing Professor Anthony's characterization of certain rules as "spurious").

412 See *supra* note 32.
advice into an official agency action meriting automatic deference—
nor should it.413 Nonetheless, no-action letters that the Commission has reviewed should generally be entitled to greater weight than those regulatory interpretations lacking the Commission’s approval. Such review and approval help to ensure that the staff’s policy choices are, in fact, consistent with the Commission’s overall goals. Thus, when the Commission has reviewed regulatory interpretations, courts deferring to those interpretations are less likely to set legal precedents with which the Commission disagrees. Furthermore, to the extent that courts premise Skidmore-type deference on considerations of interbranch comity, they can feel more secure in respecting those regulatory interpretations that the Commission has reviewed and approved.414

4. **Consistent Application**

The Court in *Skidmore* also identified “consistency with earlier and later pronouncements” as a factor bearing on the persuasiveness of an agency’s regulatory interpretation.415 Although the *Skidmore* Court did not explain why consistency is relevant to an interpretation’s persuasiveness, other courts subsequently have clarified the applicability of this factor.416 Consistency functions as a persuasiveness factor to the extent that a regulatory interpretation is based on claims of “original meaning” or “drafters’ intent.”417 Thus, as Judge Easterbrook pointed out, consistency matters “when the agency is seeking to persuade” by offering the court “a view into the understanding of the original interpretive community.”418 Indeed, it is often argued that consistency with contemporaneous interpretations of regulatory provisions constitutes the most reliable authority, because officials present at the time the agency adopts a particular provision may have special insight into the drafters’ motivations.419

Under this reasoning, when an interpretation is predicated on drafters’ intent, courts should view no-action letters that depart from

413 See *supra* notes 331-37 and accompanying text (contending that since the SEC has chosen to characterize its review and approval of a no-action letter as an “informal action,” courts should take the SEC at its word and treat its approval as such).
414 Cf. *Merrill*, *supra* note 39, at 1014 (discussing the values served by grounding deference in norms of interbranch comity).
418 *Id.* at 446 (Easterbrook, J., concurring).
419 See, e.g., *Diver*, *supra* note 226, at 567 (asserting that contemporaneous constructions “may impress judges for the same reason that many people find eyewitness accounts more reliable than subsequent reconstructions”).
prior interpretations as less persuasive than consistently maintained positions.420 However, when a regulatory interpretation in a no-action letter is based on other factors, a change of position should not necessarily weigh against its persuasiveness. For example, changes in securities markets may justify a departure from the staff’s previous interpretation of a particular statute or SEC rule. Developments in technology represent another source of change that may necessitate reinterpretation of previously settled interpretive issues.421 As one administrative law scholar has argued, “a constantly shifting policy may indicate that the agency is doing its job, reflecting the expertise, accountability, and flexibility that justified placing the decision in its hands.”422 In contrast, absent these intervening developments, no-action letters that announce broad and sweeping interpretive changes should prompt skepticism. Indeed, under such circumstances, a court should consider whether the SEC had ulterior motives for conveying those interpretations via no-action letters rather than through formal and official SEC rules or releases.

420 Cf. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) (noting that “an agency’s interpretation of a statute or regulation that conflicts with a prior interpretation is ‘entitled to considerably less deference than a consistently held agency view’” (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (internal quotation marks omitted)); Gilbert, 429 U.S. at 141-43 (citing Skidmore and refusing to defer to an EEOC interpretive guideline in part because of the inconsistency in the agency’s position over time); United Hous. Found., Inc. v. Forman, 421 U.S. 837, 858-59 n.25 (1975) (refusing to defer to an SEC interpretation articulated in an amicus brief because it was inconsistent with prior SEC interpretations).

421 Innovations such as electronic delivery of prospectuses and company “bulletin board” Internet trading systems certainly must now be assimilated into a statutory scheme developed without such technology in mind. See, e.g., Brown & Wood, SEC No-Action Letter, 1995 WL 67287, at *6 (Feb. 17, 1995) (interpreting the term “prospectus” in sections 2(10), 5, and 10 of the Securities Act to include a prospectus encoded in an electronic format); Real Goods Trading Corp., SEC No-Action Letter, [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,226, at 77,131 (June 24, 1996) (permitting a company to establish a passive electronic bulletin board on the Internet, where investors could post indications of interest to buy or sell company stock, without requiring a company to register as either a broker-dealer pursuant to section 15(a) of the Exchange Act or an investment adviser pursuant to section 203(a) of the Investment Advisers Act). Regulatory interpretations that the SEC announces in no-action letters also can serve as gap fillers in the period of time before the Commission determines to set forth new interpretations in SEC releases. See Electronic Delivery Release, supra note 44, at 85,112 (announcing interpretive views on the electronic delivery of documents such as prospectuses, annual and semiannual reports, and proxy solicitation materials under the Securities Act, the Exchange Act, and the Investment Company Act).

422 Herz, supra note 283, at 198; see also Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877, 886 (S.D.N.Y. 1993) (noting that “a change in SEC position [in a no-action letter] does not necessarily reveal capricious action by the agency; changes in conditions and public perceptions justify changes in the SEC’s construction” of certain regulatory provisions); David M. Gossett, Comment, Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes, 64 U. Chi. L. Rev. 681, 702-08 (1997) (contending that changes in an agency’s statutory interpretation may be warranted to properly fulfill an agency’s regulatory mandate).
A court's analysis of whether the staff has consistently maintained a particular regulatory interpretation in no-action letters over a long period of time is relevant for an additional reason: consistent, longstanding staff positions may signal Commission approval of these positions. Typically, when the Commission disagrees with a no-action letter, the Commission announces this disagreement and advises the public that it may no longer rely on the letter as authority. Although the Commission cannot be expected to inform itself of each of the staff's thousands of no-action letters, the Commission is much more likely to be familiar with the staff's frequently repeated and consistently applied interpretive advice. Thus, no-action letters reflecting longstanding and consistent interpretive positions are likely to represent views that the Commission in fact shares.

5. **Staff Expertise**

*Skidmore* and its progeny have factored administrative expertise into the determination of whether a regulatory interpretation is persuasive. As the individuals who administer the federal securities laws on a daily basis, the SEC staff can certainly claim particular expertise in applying often complex and technical regulatory provisions to equally complicated transactions and undertakings. The extent to which expertise becomes a factor favoring *Skidmore*-type deference should therefore be a function of whether the particular regulatory interpretation in the no-action letter does *in fact* draw on the staff's administrative expertise.

In an increasingly technological world where investment products and business financing techniques change constantly, the SEC staff will often be in the best position to evaluate how these new products and techniques fit into the regulatory framework that Congress and the Commission may have developed without these changes in mind. Accordingly, no-action letters that evaluate innovative and technically complex factual situations or transactions will typically be more persuasive than letters evaluating factual scenarios that were

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423 *See supra* note 152 and accompanying text.
424 *Cf.* Smiley v. Citibank (S.D.), N.A., 116 S. Ct. 1730, 1733 (1996) ("To be sure, agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist.").
425 *See* Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 390 (1984) (deferring to agency interpretation in part because the agency had "longstanding expertise in the area"); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (according "great deference" to a Title VII interpretation expressed in an EEOC guideline); Skidmore v. Swift & Co., 323 U.S. 134, 137-38 (1944); *see also* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 n.9 (1980) (noting that "to the extent that deference to administrative views is bottomed on respect for agency expertise, it is unrealistic to draw a radical distinction between opinions issued under the imprimatur of the [Federal Reserve] Board and those submitted as official staff memoranda").
foreseeable when the policymakers drafted the particular regulatory provision.\textsuperscript{426} Additionally, regulatory interpretations that proffer advice on the workings of technical and arcane statutory or regulatory provisions will be more useful to a court than no-action letters seeking to interpret less complicated provisions.\textsuperscript{427}

In light of these considerations, it is ironic that litigants have most frequently advocated judicial deference to no-action letters in Rule 14a-8 shareholder proposal cases and, in so doing, have emphasized the SEC staff’s expertise.\textsuperscript{428} Courts, however, should be wary of arguments touting staff expertise in the context of Rule 14a-8 no-action letters.

For instance, in many cases involving Rule 14a-8, the reviewing court must address the issue of whether a shareholder’s proposal properly can be excluded under the Rule’s exception for “ordinary business operations.”\textsuperscript{429} This, in turn, often requires the court to determine whether the shareholder’s proposal implicates a matter of “significant policy considerations.”\textsuperscript{430} Yet determining whether a shareholder’s proposal involves a “mundane business matter” or a “matter of social or political importance” typically does not draw on expertise unique to the SEC staff.\textsuperscript{431} A federal district judge is there-

\textsuperscript{426} See no-action letters cited supra note 419. Indeed, as then-Judge Kenneth Starr observed:

\begin{quote}
Courts are often ill equipped to master the complexities of these sometimes labyrinthine statutes that govern highly technical matters beyond the expertise of a generalist judiciary. In addition to the complexity of the subject matter, these statutes often regulate technologies not even in existence when the governing statute was enacted. In such cases, the courts are faced with a daunting search . . . to figure out what a reasonable Congress would decide if the specific issue were put before it.
\end{quote}

Kenneth W. Starr, \textit{Observations About the Use of Legislative History}, 1987 Duke L.J. 371, 372; see also Weaver, supra note 234, at 609-10 (contending that an agency’s “greater appreciation of the subtleties and intricacies of its regulatory program” generally makes the agency eminently more qualified to determine the meaning of its regulations).

\textsuperscript{427} Cf. \textit{Aluminum Co. of America}, 467 U.S. at 390 (deferring to agency interpretation in part because the “subject under regulation is technical and complex”); Akindemowo v. INS, 61 F.3d 282, 285 (4th Cir. 1995) (“Deference . . . is particularly apropos here because the immigration laws ‘ha[ve] produced a complex and highly technical regulatory program.’”) (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991))); Methodist Hosp. v. Shalala, 38 F.3d 1225, 1229 (D.C. Cir. 1994) (maintaining that the complexity of a statute “adds to the deference which is due” an agency’s interpretation); Evans v. Commissioner, Me. Dep’t of Human Servs., 933 F.2d 1, 7 (1st Cir. 1991) (stating that, where the statute under interpretation is “highly technical and complex,” the agency should have greater interpretive leeway).

\textsuperscript{428} See supra notes 276-83, 298-99, 304-12 and accompanying text.

\textsuperscript{429} 17 C.F.R. § 240.14a-8(c)(7) (1997).

\textsuperscript{430} See supra note 194 (discussing the SEC’s interpretation of the ordinary business operations exception in Rule 14a-8 set forth in the SEC Release announcing the adoption of the revised rule).

\textsuperscript{431} Linda Quinn, a former Director of the Division of Corporation Finance, shared the following insight regarding the staff’s methodology for interpreting this aspect of the ordi-
fore as capable an interpreter as an SEC staff member. Accordingly, in Rule 14a-8 cases involving the "ordinary business operations" exception, a court should accord little weight to no-action letters based on staff expertise.432

Regulatory interpretations in no-action letters may also rest upon the staff's interpretation of state or foreign law, or statutory or regulatory provisions that another federal administrative agency administers. On some occasions, the staff's interpretive judgments concerning the meaning of this other law may in fact be based on the staff's experience with securities products or transactions.433 Yet on other occasions—particularly with respect to many of Rule 14a-8's enumerated exceptions—the staff based its regulatory interpretations in no-action letters on its interpretations of law far removed from its area of expertise.434 Instances involving interpretations of collateral legal issues unrelated to securities law therefore represent another area where arguments in favor of Skidmore-type deference are less convincing.435

432 Cf. Kivitz v. SEC, 475 F.2d 956 (D.C. Cir. 1973). Reviewing a lawyer's disbarment order under Rule 2(e) of the Commission's Rules of Practice, the court said:

Here we have not been confronted with an issue which depends upon the Commission's expertise so often involved in the agency's administration of its special field.... [The case] is not concerned with some speciality developed in the administration of the Act entrusted to the agency. Rather, this case arises in an area we know something about.

Id. at 961.


434 See, e.g., NYCERS v. American Brands, Inc., 634 F. Supp. 1382, 1389 n.6 (S.D.N.Y. 1986) (contending that deference to an SEC no-action letter was unwarranted because Rule 14a-8(c) exception called for an interpretation of antidiscrimination law in Northern Ireland, a regulatory area in which the staff possessed no particular expertise); see also Eaton Corp., SEC No-Action Letter, 1988 WL 233733, at *9 (Feb. 24, 1988) (stating that an interpretation of Ohio state contract law was necessary to determine whether the company may omit shareholder proposal pursuant to Rule 14a-8(c) (2) of the Exchange Act); Transamerica Corp., SEC No-Action Letter, 1992 WL 43436, at *13 (Mar. 3, 1992) (interpreting Title VII of the Civil Rights Act of 1964 to determine whether exclusion of shareholder proposal is permissible pursuant to Rule 14a-8(c) (2) of the Exchange Act). See generally 4 Loss & SELIGMAN, supra note 10, at 2012 (discussing no-action letters and contending that the SEC staff has developed a "common law" of excludable proposals under state law).

435 See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256-58 (1991) (finding EEOC interpretive guideline unpersuasive under Skidmore, in part because issue involved the extraterritorial application of a congressional statute, a legal issue that did not draw upon particular administrative expertise).
6. **Reliance Interests**

As a final factor, courts faced with requests for deference to no-action letters should in some cases consider market participants' reliance interests. Indeed, in evaluating the persuasiveness of an agency's regulatory interpretation, courts have often considered the extent to which the public may have altered its conduct in reliance on the agency's interpretation.\(^4\) As the Supreme Court recognized in *Udall v. Tallman*,\(^3\)

"[G]overnment is a practical affair intended for practical men. Both officers, law-makers, and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."\(^4\)

Regulatory interpretations in no-action letters clearly do not fall within the provisions of the federal securities laws that insulate defendants from liability for acts done or omitted in good faith conformity with SEC rules or regulations.\(^4\) Nonetheless, a court may, in the proper circumstances, take good faith reliance into account when determining the meaning of an ambiguous regulatory provision. For instance, reliance interests would be directly relevant in a case where the SEC had instituted an enforcement action against a defendant who had reasonably relied on a regulatory interpretation issued to a similarly situated third party. If the prior regulatory interpretation was based on sound reasoning, the court may well decide to adopt that interpretation rather than the new litigation position that the SEC is now advocating.\(^4\)

On the other hand, defendants' reliance interests should carry relatively little weight, as a separate and distinct factor, in cases that private plaintiffs initiate. A court's willingness to consider a defen-

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\(^{436}\) See Merrill, *supra* note 39, at 1018-19.

\(^{437}\) 380 U.S. 1 (1965).

\(^{438}\) Id. at 17 (quoting United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915)).

\(^{439}\) See *supra* note 166 and accompanying text (discussing good faith reliance provisions in section 19(a) of the Securities Act and section 23(a) of the Exchange Act).

\(^{440}\) Cf. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (noting that ad hoc agency interpretations made in the course of litigation "that are wholly unsupported by regulations, rulings, or administrative practice" are not entitled to judicial deference); Shoshone Indian Tribe v. Hodel, 903 F.2d 784, 788 (10th Cir. 1990) (stating, in response to a claim of reliance on prior interpretation, that "where an administrative agency interprets a regulation consistently over a long period of time, publicly, and through careful and sound reasoning, modifications of the interpretation should be scrutinized by the courts").
dant's reliance on a no-action letter may effectively deprive the private plaintiff of a legal remedy to which he may be entitled. Accordingly, in securities litigation between private parties, a court should focus primarily on the previously identified factors that relate more directly to the validity of the regulatory interpretation set forth in the no-action letter.

CONCLUSION

Securities law practitioners and their clients have a number of reasons for regarding the regulatory interpretations in no-action letters as a source of de facto law. However, for reasons related to both doctrine and policy, it is important for courts to treat regulatory interpretations in no-action letters more like "lore," albeit lore that an experienced, qualified, and well-respected source—the staff of the SEC—has generated. Accordingly, courts should never automatically defer to no-action letters in rendering decisions regarding the meaning of ambiguous regulatory provisions. Rather, courts should rely only on those regulatory interpretations in no-action letters that they find persuasive. The factors outlined in this Article provide a practical framework for making this determination.

441 See supra note 352 and accompanying text (discussing the unfairness that may result for private litigants from a court's failure to accord meaningful review to a no-action letter).