CONDENSING THE ALPHABET SOUP: MISSED ADMINISTRATIVE RULEMAKING CONCERNS IN *U.S. SECURITIES & EXCHANGE COMMISSION V. ALPINE SECURITIES CORPORATION*

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INTRODUCTION

For decades, the political landscape in the United States, characterized by deadlock in Congress and increasingly polarized relations among the country's major political parties, has put the responsibility of keeping the government functioning in the hands of the administrative state.[1] An absence of regular, substantive legislation (and a President willing to sign the bills given to her by Congress into law) leaves the advancement of meaningful policy to the rulemaking functions of federal executive agencies.[2] Agency rules, developed pursuant to Congressional commands, aim to ensure that private industries will keep air and water clean, make sure drugs are safe, and, among other things, not play fast and loose with America's finances.[3] Accordingly, as society becomes more complex, agencies are frequently responsible for developing a plethora of rules that can satisfactorily stand up to every intricacy that arises.[4]

In the face of a looming stalemate with Congress in 2014, former President Obama famously said, "I've got a pen, and I've got a phone" to

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1 *See* Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1739 (2015); Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 411 (2009); Charlie Savage, *E.P.A. Ruling Is Milestone in Long Pushback to Regulation of Business*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/us/supreme-court-epa-administrative-state.html [https://perma.cc/BSV6-X8UC].

2 *See* Azi Paybarah, *Congress Proved to Be Productive as Democrats Navigated with Slim Majority*, WASH. POST. (Sept. 30, 2022, 4:26 PM), https://www.washingtonpost.com/politics/2022/09/30/congress-democrats-legislation-biden-agenda [https://perma.cc/6QC2-P7Z4] (citing a Pew Research study on the legislative productivity of recent Congresses, which found that the 116th Congress was one of the least productive in five decades measured by the sheer amount of legislation passed—substantive legislation, "meaning they changed written law, spent money or established policy, no matter how minor," made up only about two-thirds of what was produced).

3 Savage, *supra* note 1.

4 *See* Susan E. Dudley, *The Ambition of the Administrative State*, GEO. WASH. U. REGUL. STUD. CTR. (Aug. 31, 2019), https://regulatorystudies.columbian.gwu.edu/ambition-administrative-state [https://perma.cc/8V6X-C4N4] ("The Code of Federal Regulations has ballooned from fewer than 20,000 pages in 1938 to more than 185,000 in 2018, and regulatory agencies continue to issue thousands of new regulations each year.").

drive his administration's policy goals forward.[5] Subsequently, both the Trump and Biden administrations regularly ordered agencies to work toward advancing policy goals where Congress was unable to provide substantive solutions.[6] Nonetheless, there is often heated debate over whether the administrative state has too much power and needs to be substantially reeled in.[7] Recently, the Supreme Court's decision in *West Virginia v. Environmental Protection Agency*, in addition to restricting the Environmental Protection Agency's (EPA) effort to effectively combat climate change, called the future of the entire administrative state's potency into question by effectively establishing a judicial veto over agency actions not explicitly authorized by Congress that would have previously been awarded substantial deference.[8]

In the age of an increasingly dense administrative state, it is very attractive to have a system of reasonable practices to promulgate agency rules more efficiently.[9] It is also important to have a regulatory landscape that is as clear and easily navigable as possible.[10] At what point, though, do those goals cause tension with one another? Does the call for efficiency

5 Rebecca Kaplan, *Obama: I Will Use My Pen and Phone to Take on Congress*, CBS NEWS (Jan. 14, 2014, 12:44 PM), https://www.cbsnews.com/news/obama-i-will-use-my-pen-and-phone-to-take-on-congress [https://perma.cc/7DVU-H6YV]. ("I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward in helping to make sure our kids are getting the best education possible, making sure that our businesses are getting the kind of support and help they need to grow and advance, to make sure that people are getting the skills that they need to get those jobs that our business are creating." (quoting a statement President Obama made to reporters before his first Cabinet meeting of 2014)).

6 Brianna Rauenzahn, *A Fili-Busted Balance of Power*, REGUL. REV. (Nov. 2, 2021), https://www.theregreview.org/2021/11/02/rauenzahn-fili-busted-balance-power [https://perma.cc/DKE2-3G3Y]. Former President Obama ultimately issued 276 executive orders in the course of his two terms in office, while former President Trump outpaced Obama by issuing 220 orders in half that time. *Id.* President Biden issued 66 executive orders less than a year into his presidency. *Id.*

7 *See, e.g.*, William Yeatman, *Supreme Court Makes "Major" Improvement to Administrative Law in* West Virginia v. EPA, CATO INST.: CATO AT LIBERTY (July 1, 2022, 11:02 AM), https://www.cato.org/blog/supreme-court-makes-major-improvement-administrative-law-west-virginia-v-epa [https://perma.cc/FB9S-DDXG]; Shahrzad Shams, *The Court's Extremist Agenda to Dismantle 20th Century Gains*, ROOSEVELT INST. (July 13, 2022), https://rooseveltinstitute.org/2022/07/13/the-courts-extremist-agenda-to-dismantle-20th-century-gains [https://perma.cc/4LRL-L8RQ].

8 Shams, *supra* note 7. *See generally* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022).

9 *See* Todd Rubin, *Rules for the Rule-Makers*, REGUL. REV. (May 31, 2021), https://www.theregreview.org/2021/05/31/rubin-rules-for-rule-makers [https://perma.cc/437M-86XT].

10 *See, e.g.*, Rohit Chopra, *Rethinking the Approach to Regulations*, CONSUMER FIN. PROT. BUREAU (June 17, 2022), https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations [https://perma.cc/CAD6-H3XA]; Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

and collaboration create a situation that makes compliance more difficult and cumbersome?

One sector subject to an extremely elaborate and dense federal regulatory scheme is financial services,[11] and rightfully so. Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934 (Exchange Act) to protect investors following the 1929 stock market crash that led to the Great Depression.[12] Similarly, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act following the 2008 financial crisis.[13] These three Acts, as well as the other federal laws regulating the financial industry, have the monumental task of safeguarding the economic wellbeing of the public by promoting efficient and fair capital markets.[14] Tasked with carrying out and enforcing these laws, agencies like the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC)[15] developed and regularly update thorough and complex sets of rules designed to encourage frequent disclosure and prevent broker-dealers from taking advantage of members of the investing public.[16] In 2020, the Second Circuit examined the scope of the SEC's regulatory and enforcement authority in *SEC v. Alpine Securities Corp*.[17] The court's decision raised questions regarding the validity of certain rulemaking practices.[18] The SEC sought enforcement of its Rule 17a-8, which incorporates separate Treasury regulations by reference.[19] The ensuing litigation from the SEC's enforcement action raised concerns over whether the Commission was inappropriately enforcing the Treasury's rules and whether the

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11 Christine Lellis, *10 Most Regulated Industries in the U.S.*, PERILLON (Feb. 8, 2022), https://www.perillon.com/blog/10-most-regulated-industries-in-the-us#:~:text=Finance%20and%20insurance%2C%20transportation%2C%20and,U.S.%20on%20a%20federal%20level [https://perma.cc/ZX4T-FGLR].

12 *The Role of the SEC*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/role-sec [https://perma.cc/829A-AP22]; *The Laws That Govern the Securities Industry*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry [https://perma.cc/4LAA-D66P].

13 *The Role of the SEC*, *supra* note 12; Adam Hayes, *Dodd-Frank Act: What It Does, Major Components, and Criticisms*, INVESTOPEDIA, https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp [https://perma.cc/W8FL-9SRV] (Aug. 2, 2023).

14 *The Laws That Govern the Securities Industry*, *supra* note 12; *The Role of the SEC*, *supra* note 12.

15 Throughout this Case Note, the Securities and Exchange Commission may be referred to as either "the SEC" or "the Commission."

16 *Securities and Exchange Commission*, FED. REG., https://www.federalregister.gov/agencies/securities-and-exchange-commission [https://perma.cc/LK75-9Z85]; *Commodity Futures Trading Commission*, FED. REG., https://www.federalregister.gov/agencies/commodity-futures-trading-commission [https://perma.cc/BV5N-TLXZ].

17 U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 80–83 (2d Cir. 2020).

18 *See generally infra* Part IV.

19 *See* 17 C.F.R. § 240.17a-8 (2023); 31 C.F.R. § 1023.320 (2023); *see also infra* Part IV.

incorporation by reference and automatic updating of rules from other agencies violates the Administrative Procedure Act (APA).[20] Both questions were effectively unanswered by the Second Circuit Court of Appeals.[21]

This Case Note argues that the Second Circuit's decision opens the door to a new kind of federal agency rulemaking that can skirt the requirements outlined in the APA and create overlapping enforcement regimes for violations of regulations.[22] This Case Note further argues that incorporation by reference of regulations promulgated by other administrative agencies is inappropriate in the rulemaking process.[23] Finally, this Case Note proposes that when an agency would like to defer to the rules of another, it should borrow from the existing text when writing its own rule, thus both simplifying the regulatory landscape and remaining within the bounds of the APA's requirements.[24]

This Case Note proceeds in five Parts. Part I provides the background of the relevant statutes and regulations at issue.[25] It also discusses the federal administrative rulemaking practices that will be important in this Case Note's analysis of the Second Circuit's holding in *SEC v. Alpine*.[26] Part II describes the facts and procedural history of the case.[27] Part III describes the issues on appeal, the Second Circuit's holdings and rationales, as well as the arguments presented by each side.[28] Part IV of this Case Note discusses the lingering questions created by the Second Circuit's holdings.[29] Part IV then analyzes the arguments regarding who has appropriate enforcement authority of the Currency and Foreign Transactions Reporting Act of 1970, colloquially known as the Bank Secrecy Act (BSA), and discusses concerns over how the SEC constructed Rule 17a-8, incorporating another agency's rules by reference.[30] Lastly, Part V proposes that the practice of regulatory diffusion is the best solution for agencies looking to incorporate existing regulations into their own rules.[31] This Case Note reiterates, in

[20] *See infra* Part IV.
[21] *See infra* Part IV.
[22] *See infra* Section IV.B.2.
[23] *See infra* Part V.
[24] *See infra* Part V.
[25] *See infra* Section I.A.
[26] *See infra* Section I.B.
[27] *See infra* Part II.
[28] *See infra* Part III.
[29] *See infra* Part IV.
[30] *See infra* Part IV.
[31] *See infra* Part V.

conclusion, that the Second Circuit's holdings were erroneous and create more problems than they solve.[32]

I. Background

A. *Relevant Statutes and Regulations*

1. The Bank Secrecy Act

The chief disputes in *SEC v. Alpine* stem from the interpretation of rules promulgated pursuant to the BSA, which imposes various recordkeeping and reporting requirements on U.S. financial institutions.[33] The BSA requires financial institutions to file with the Treasury certain records deemed appropriate where they may have a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[34] The BSA vests authority to promulgate rules in accordance with the goals of the Act in the Treasury Secretary alone.[35] The initial Treasury rules promulgated pursuant to the BSA just required that financial institutions, originally only banks that provided fund depository and transfer services, keep records and report transactions relating to withdrawals or domestic and foreign transactions over a certain dollar amount.[36]

In 2001, Congress amended the BSA through the USA PATRIOT Act, which was passed in an effort to provide a comprehensive legal framework to combat a threat of foreign terrorism following the September 11 attacks.[37] The amendment required the Treasury, after consultation with the SEC and the Board of Governors of the Federal Reserve System, to expand the existing rules to require broker-dealers to report any suspicious transactions.[38] The Treasury Secretary delegated

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32 *See infra* Conclusion.

33 U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 72–73 (2d Cir. 2020); 12 U.S.C. § 1829b.

34 12 U.S.C. § 1829b(a)(2); 31 U.S.C. § 5311(1)(A).

35 12 U.S.C. § 1829b(b)(1); *see Alpine*, 982 F.3d at 73.

36 Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 21 (1974).

37 *Alpine*, 982 F.3d at 73; 31 U.S.C. § 5318(n)(2)(A); *see Surveillance Under the USA/PATRIOT Act*, ACLU, https://www.aclu.org/other/surveillance-under-usapatriot-act [https://perma.cc/AP6M-HSKQ]. *See generally* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code).

38 *Alpine*, 982 F.3d at 73. Brokers, as defined by the Securities Exchange Act, are individuals or entities "engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). Dealers are individuals or entities that are "engaged in the business of buying and selling securities." *Id.* § 78c(a)(5)(A).

rulemaking authority under the BSA to the Financial Crimes Enforcement Network (FinCEN), which is within and overseen by the Treasury Department.[39] FinCEN subsequently, in 1996, promulgated rules requiring registered broker-dealers to file suspicious activity reports (SARs) for certain transactions.[40] Under FinCEN's rules, broker-dealers must file a SAR if a transaction

> involves or aggregates funds or other assets of at least $5,000, and the broker-dealer knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part) . . . [i]nvolves funds derived from illegal activity . . . [, i]s designed, whether through structuring or other means, to evade any requirements of this chapter or of any other regulations promulgated under the Bank Secrecy Act[, or] . . . [h]as no business or apparent lawful purpose . . . .[41]

2. Section 17(a) of the Securities Exchange Act

The Exchange Act gives the SEC broad authority to promulgate rules regulating broker-dealers, so as to carry out the requirements in each of the Act's sections for, among other things, the protection of investors and the maintenance of efficient capital markets.[42] Section 17(a) of the Exchange Act provides that

> [e]very . . . registered broker or dealer . . . shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.[43]

Notable regulations promulgated pursuant to section 17(a) include Rules 17a-3 and 17a-4, which outline, among other things, minimum requirements for records that broker-dealers must make and how long

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39 Amendment to the Bank Secrecy Act Regulations—Requirement that Brokers or Dealers in Securities Report Suspicious Transactions, 67 Fed. Reg. 44048, 44048 (July 1, 2002) (to be codified at 31 C.F.R. pt. 103); *see Alpine*, 982 F.3d at 73.

40 31 C.F.R. § 1023.320(b)(1) (2023); Amendment to the Bank Secrecy Act Regulations—Requirement that Brokers or Dealers in Securities Report Suspicious Transactions, 67 Fed. Reg. at 44049.

41 31 C.F.R. § 1023.320(a) (2023).

42 *See* 15 U.S.C. § 78b. The statute explains that regulation of capital markets is a matter of public interest to "protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions." *Id.*

43 *Id.* § 78q(a)(1).

they need to retain those records.[44] In 1981, after FinCEN adopted its transaction reporting requirements under the BSA, the SEC promulgated Rule 17a-8.[45] The rule requires broker-dealers to comply with FinCEN's SAR reporting guidelines.[46] The language at issue in *SEC v. Alpine* reads: "[E]very registered broker or dealer 'who is subject to the requirements of the Currency and Foreign Transactions Reporting Act of 1970 [Bank Secrecy Act] shall comply with the reporting, recordkeeping and record retention requirements of chapter X of title 31 of the Code of Federal Regulations.'"[47] Instead of providing its own language in Rule 17a-8, the SEC merely required compliance with the FinCEN regulations.[48] In essence, the SEC engaged in "incorporation by reference."[49] FinCEN's regulations incorporated into Rule 17a-8 are not static and have updated since the SEC initially promulgated the rule, notably following the 2001 amendment to the BSA.[50] The SAR reporting requirements promulgated by FinCEN did not exist until 1996 and were not required to be filed by broker-dealers until 2001 in response to Congress's amendment of the BSA and roughly two decades after the SEC first published Rule 17a-8.[51] The SEC argued at the time of publication that Rule 17a-8 is in direct accordance with the goals of the Exchange Act, as requiring the additional documents would be consistent with "the Commission's obligation to enforce broker-dealer recordkeeping . . . and retention requirements."[52] The Commission is able to bring civil actions (and administrative actions, as well) against violators of its rules; thus, it can sue to enforce Rule 17a-8 in federal district court.[53] However, that rule is wholly parasitic on the

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44 17 C.F.R. § 240.17a-3; 17 C.F.R. § 240.17a-4 (2023); *see also Books and Records*, FINRA, https://www.finra.org/rules-guidance/key-topics/books-records [https://perma.cc/WZB2-ELTM].

45 *See* Record Keeping by Brokers and Dealers, 46 Fed. Reg. 61454, 61454 (Dec. 17, 1981) (to be codified at 17 C.F.R. pt. 240).

46 17 C.F.R. § 240.17a-8 (2023).

47 982 F.3d 68, 74 (2d Cir. 2020) (quoting 17 C.F.R. § 240.17a-8 (2023)). The chapter and title cited in the regulation's text are a direct reference to FinCEN's rules for SAR reporting as part of its BSA enforcement regime.

48 *Id.*

49 *See infra* Section I.B.1.

50 *See* Rule Changes to SAR Reporting Requirements, FED. REG., https://www.federalregister.gov [https://perma.cc/5YNH-PZF5] (search "SAR reporting" in the main field; then filter by "Financial Crimes Enforcement Network" in the "Agency" column; then filter by "Rule" in the "Type" column). There are a variety of rule changes displayed under chapter X of title 31 published as far back as 1999. *See id.*

51 USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 356, 115 Stat. 272, 324–25 (codified as amended at 31 U.S.C. §§ 5311, 5318); *see supra* note 40 and accompanying text.

52 Recordkeeping by Brokers and Dealers, 46 Fed. Reg. 61454, 61454 (Dec. 17, 1981) (to be codified at 17 C.F.R. pt. 240).

53 *See* 15 U.S.C. § 78u; *see also About the Division of Enforcement*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/enforce/Article/enforce-about [https://perma.cc/G4WE-YZPT]. Section 27 of

FinCEN regulation; in a very real sense, SEC enforcement of Rule 17a-8 involves the enforcement of another agency's regulation.[54] The problem raised by *SEC v. Alpine* is whether the Commission has the authority to do so.[55]

B. *Relevant Administrative Rulemaking Practices*

1. Incorporation by Reference

Incorporation by reference is a common, though infrequently discussed, practice that federal administrative agencies use in their rulemaking processes.[56] The practice was created by Congress through the Freedom of Information Act (FOIA) and allows agencies to incorporate other published material, such as various data and industry standards created by expert trade organizations, into their proposed and final rules without reprinting it in the Federal Register.[57] Standards incorporated by reference are often highly technical, such as "testing protocols for environmental performance properties of insulation for wire and cable," and require a degree of expertise to both write and comprehend.[58] This practice is permitted so long as the agency gets approval from the Office of the Federal Register (OFR) and the material is "reasonably available to the class of persons affected" by the rule.[59] However, whether or not Congress intended to make sure that the incorporated material is easily accessible to the public, it provided no additional guidance on what "reasonably available" actually means.[60] Currently, the minimum extent of the practice only requires two copies of the incorporated material to be left in repositories in Washington D.C. or its suburbs.[61] In addition to authorizing this practice, Congress and the

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the Exchange Act establishes exclusive original jurisdiction in federal court for cases regarding the violation of the securities laws. 15 U.S.C. § 78aa(a).

54 *See infra* Part IV.

55 U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68 (2d Cir. 2020); *see infra* Part IV.

56 JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 287 (6th ed. 2018).

57 *Id.*; Nina A. Mendelson, *Private Control Over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 748–49, 753–61 (2014).

58 Mendelson, *supra* note 57, at 791–92.

59 5 U.S.C. § 552(a); *see also* Mendelson, *supra* note 57, at 742, 748; Emily S. Bremer, *Introducing Incorporation by Reference*, REGUL. REV. (Aug. 24, 2022), https://www.theregreview.org/2022/08/24/bremer-introducing-incorporation-by-reference [https://perma.cc/BNM7-9FQ6].

60 Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 503 (2013).

61 *Id.* at 507.

Executive Branch actually encouraged it in an effort to utilize more private standards, rather than spend the time and resources writing new "government-unique" standards.[62] This encouragement, at least in part, was due to a recognition of limited resources for executive agencies and a desire to have the agencies operate more quickly and efficiently within their means.[63]

Incorporation by reference is a controversial practice, often restricting the public's opportunity to participate in notice and comment as required by the APA.[64] The standards incorporated by agencies are private and often copyrighted material from trade organizations.[65] These materials can be very expensive and if members of the public want to view them without paying for access, they would potentially need to travel to Washington D.C. on their own time and at their own expense and request an appointment for viewing.[66]

Proponents of the practice point to a clear advantage of incorporating private material by reference: it is a faster and more cost-efficient way for agencies to promulgate rules because they save time and do not have to devote a substantial number of resources to creating new "government-unique" standards.[67] Importantly, the standards incorporated by reference are typically created by trade organizations that are experts in the field to be regulated, which will presumably lead to better rules.[68] Additionally, it is easier both to develop and to enforce standards through the use of this practice.[69] Lastly, supporters argue that incorporating private standards by reference promotes a valuable private-public partnership, which incentivizes private trade organizations to advance standards that serve the interests of both the public and the government.[70]

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62 Mendelson, *supra* note 57, at 749; *see also* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1397–98 (1992).

63 *See* Strauss, *supra* note 60, at 503–04.

64 Bremer, *supra* note 59; 5 U.S.C. § 553(c); *see id.* § 552(a).

65 Lubbers, *supra* note 56, at 288; *see, e.g.*, Mendelson, *supra* note 57, at 756.

66 Mendelson, *supra* note 57, at 761.

67 Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 140, 149 (2013).

68 *See id.* at 149–50.

69 *Id.* at 149; *see also id.* at 150 (discussing and displaying the thousands of voluntary consensus standards incorporated by reference into federal regulations, organized in a chart).

70 *Id.* at 140; *see also, e.g.*, Rebecca Day & Tom Mielke, *Incorporation by Reference: Using External Expertise to Make Coast Guard Regulations More Efficient*, 67 PROC. MARINE SAFETY & SEC. COUNCIL, no. 1, Spring 2010, at 26–27 (describing the practice of incorporation by reference and how it is beneficial to the regulatory practices of the U.S. Coast Guard).

Critics of incorporation by reference argue that the practice diminishes disclosure in the rulemaking process.[71] Although current practice does technically make the incorporated standards available to the public by keeping a couple of printed copies available in Washington D.C., critics argue that this is not "reasonably available" for the public.[72] Realistically, the cost of paying either for access to the incorporated standard or for the travel to Washington D.C. is prohibitively expensive for many individuals and small businesses that are subject to federal regulations.[73] Professor Peter Strauss, a leading critic of the practice, points out that the legislative history of FOIA indicates that Congress did not anticipate that access to incorporated material would be limited as a result of copyright restrictions (and thus, generally inaccessible to the public), but rather that the material would be compiled and available on the competitive market by leading law publishers, and therefore readily available in law libraries for free public access throughout the country.[74] In practice, however, this has not been the case, and although the OFR must approve any request by an agency to incorporate by reference in lieu of publishing in the Federal Register, there has been no guidance from the OFR on the extent to which it considers access costs in determining whether an incorporated standard is "reasonably available."[75] Furthermore, critics argue that entities more heavily regulated by federal agencies tend to be larger, and accordingly have an overall advantage in influencing and complying with policy than the general public does; prohibitions on access, like the cost boundaries created by private standards, exacerbate this imbalance.[76]

There are, however, various restrictions on incorporating by reference that are designed to keep the practice from running amok and circumventing the Administrative Committee of the Federal Register's (ACFR) and the APA's requirements. First, as discussed above, there is a statutory requirement that any material an agency seeks to incorporate by reference needs to be approved by the OFR, and an agency's failure to follow this requirement will lead to invalidation of its proposed rule.[77]

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71 *See* Strauss, *supra* note 60, at 538.

72 *See supra* notes 59–61 and accompanying text.

73 Mendelson, *supra* note 57, at 744. For example, one standard incorporated by reference into the prescription drug compendia within Medicare's rules reportedly had an access cost of six thousand dollars. *Id.*

74 Strauss, *supra* note 60, at 519.

75 Mendelson, *supra* note 57, at 744.

76 *See, e.g.*, Nina A. Mendelson, *Taking Public Access to the Law Seriously: The Problem of Private Control Over the Availability of Federal Standards*, 45 ENV'T L. REP. NEWS & ANALYSIS 10776, 10780 (2015).

77 5 U.S.C. § 552(a)(1); LUBBERS, *supra* note 56, at 391; *see supra* note 59 and accompanying text.

Additionally, the ACFR promulgates rules for the practice of incorporation by reference.[78] Most notably, these rules prohibit the incorporation by reference of material previously published in the Federal Register and material published in the United States Code.[79] In promulgating this restriction, the OFR argued that incorporated material "must not detract from the legal and practical attributes of [the Federal Register] system," and that using previously published regulations and statutes "would be destructive of the central publication system for Federal regulations envisioned by Congress when it enacted the Federal Register Act and the Administrative Procedure Act."[80]

The regulations also prohibit the automatic updating of a regulation when incorporated material is updated—in other words, dynamic updates.[81] When agencies submit a final rule with material incorporated by reference, they must indicate the exact version of such material.[82] The OFR explicitly states that future changes to incorporated material are not included in the reference.[83] Importantly, this restriction is in line with the requirements of the APA as it mandates that agencies make clear what the law is at any given point in time.[84] Dynamic incorporation deprives the public of the requisite notice and opportunity to comment.[85] It also may exacerbate the access problems of incorporation by reference.[86] It is important to note that these particular concerns about the practice stem from the fact that incorporated material is most often privately owned, rather than readily available to the public, notwithstanding the restrictions on legislative and regulatory material.[87]

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78 *See* 1 C.F.R. § 51.7 (2023).

79 *Id.* § 51.7(c).

80 Approval Procedures for Incorporation by Reference, 47 Fed. Reg. 34107, 34107 (Aug. 6, 1982) (to be codified at 1 C.F.R. pt. 51). This prohibition was previously an implied presumption, but out of concern for what the OFR understood the Congressional goals of the APA to be, the OFR codified the regulation. *Id.*

81 Bremer, *supra* note 67, at 184.

82 *Id.*

83 *Id.* at 185.

84 *Id.*

85 *Id.* at 186.

86 *See id.* Any changes to private standards would likely be subject to new copyright restrictions and thus a new fee requirement (or travel requirement) to view the update and allow the public to be cognizant of the latest regulation, whether there is an opportunity to comment on the change or not. *See supra* notes 59–61 and accompanying text.

87 *See supra* notes 71–73 and accompanying text. *See generally* Mendelson, *supra* note 57; Strauss, *supra* note 60.

2. Regulatory Diffusion

Federal administrative agencies frequently use substantially similar, if not the exact same, text to regulations from other agencies when promulgating their own rules.[88] Jennifer Nou and Julian Nyarko call this phenomenon "regulatory diffusion."[89] Unlike incorporation by reference, agencies engaging in regulatory diffusion take large portions of substantive regulatory text from one another and directly integrate it into the language of their own rules.[90] This often occurs even between agencies that do not share concurrent statutory authority.[91] For example, two decades after the Department of Education promulgated its Title IX regulations, twenty-one other agencies copied substantial portions of text from those final rules.[92] Over the course of roughly two decades, the practice of regulatory diffusion has increased gradually and substantially.[93] In 2000, less than three percent of regulatory texts were borrowed from existing regulations.[94] As of 2020, roughly one in every ten new paragraphs of regulatory text is borrowed from previously published material in the Code of Federal Regulations (CFR).[95] In a recent study examining the scope of cross-agency diffusion, Professors Nou and Nyarko examined which federal agencies lead in supplying diffused regulatory material to other agencies and considered either of the following two factors: the depth of an agency's influence on published regulatory text as a whole and the agency's breadth of influence on other agencies.[96] Notably, the study found that the Department of Treasury was far and away most borrowed from.[97]

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88 *See generally* Jennifer Nou & Julian Nyarko, *Regulatory Diffusion*, 74 STAN. L. REV. 897 (2022).

89 *Id.* at 897. This is distinguishable from incorporation by reference, which points to text that originates from somewhere other than within the rule being promulgated.

90 *Id.* at 899–900.

91 *Id.* at 902.

92 *Id.* at 900.

93 *Id.* at 906.

94 *Id.*

95 *Id.*; *see supra* Section I.B.1.

96 Nou & Nyarko, *supra* note 88, at 926–27.

97 *Id.* at 927. On the scale Professors Nou and Nyarko designed, the Department of Treasury had a weighted score of 1,332, close to twice as high as the second-most influential agency, which was the Office of Management and Budget. *Id.* The authors note that their primary model does not account for the sheer amount of regulatory activity performed by any given agency. *Id.* When the level of activity is factored into a relative score, the Treasury is still a standout leader, arriving in second only behind the EPA. *Id.* at 967. Two of the agencies that borrow substantially from the Treasury are the Federal Deposit Insurance Corporation and the Federal Reserve System. *Id.* at 934.

There are a variety of reasons why agencies engage in regulatory diffusion when drafting rules, including directives to do so from either the President or Congress, pressure from interest groups, and a preference for using successful rules that have either been already well interpreted or have survived litigation.[98] The most notable justifications, however, are preserving time and resource costs, as well as promoting interagency consistency and collaboration.[99] Borrowing the text of an existing regulation avoids the expense, time, and effort of promulgating rules from scratch.[100] This practice is not devoid of concerns, including the eventual development of "template regulations" that are not adequately tailored to the policy goals of the agency using them, as well as the risk of "stifl[ing] policy innovation" by too frequently copying existing regulatory text.[101] That said, the use of existing text when writing new rules allows agencies to avoid the risk of creating unintended inconsistencies and conflicts with other regulations within the already complex CFR.[102] This justification is further supported by the idea that those being regulated do not have to worry about navigating an excessively complex indexing scheme in order to comply.[103] In the subsequent Sections of this Case Note, the facts and issues on appeal of *SEC v. Alpine* will demonstrate the problems that can arise as a result of overlapping regulatory schemes, incorporating the rules of other agencies by reference, and the need for the simplification and streamlining of the administrative state.[104]

II. Facts and Procedural History

Alpine Securities Corporation (Alpine) is a broker-dealer duly registered with the Financial Industry Regulatory Authority (FINRA).[105] The SEC and FINRA, over various multimonth periods in 2011, found that Alpine's SAR reporting was deficient because of missing information in certain reports, a complete failure to report on some occasions, and a

98 *See id.* at 936–39.

99 *Id.* at 940–41.

100 *Id.* at 940; *see* McGarity, *supra* note 62, at 1390–91.

101 Nou & Nyarko, *supra* note 88, at 947–49.

102 *Id.* at 940–41.

103 *See id.*

104 *See infra* Parts II, III, & IV.

105 U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 75 (2d Cir. 2020). FINRA is a self-regulatory organization that operates under the authority of the SEC. Adam Hayes, *Self-Regulatory Organization (SRO): Definition and Examples*, INVESTOPEDIA, https://www.investopedia.com/terms/s/sro.asp [https://perma.cc/R8GZ-JYXH] (June 30, 2021).

failure to maintain support files for submitted reports.[106] In 2015, the SEC observed that for half of the SARs from Alpine that it reviewed, Alpine's reporting was again inadequate and Alpine often intentionally obscured these deficiencies.[107] Thus, the SEC found Alpine in violation of FinCEN's recordkeeping and reporting requirements and, accordingly, in violation of section 17(a) of the Exchange Act and Rule 17a-8.[108]

In 2017, the SEC brought a civil enforcement action against Alpine over the SAR reporting violations in the Southern District of New York.[109] The SEC moved for partial summary judgment, relying on Alpine's defective SARs to demonstrate violations of the books and records requirements of the Exchange Act.[110] Alpine cross-moved for summary judgment, arguing that the Treasury Department had exclusive enforcement authority with regard to the SAR reporting requirements of the BSA.[111] The district court denied Alpine's motion and granted the SEC's motion in part.[112]

The district court reasoned in denying Alpine's motion that Rule 17a-8 was a reasonable interpretation of the Exchange Act as the SEC determined that the use of SARs would, in addition to the purposes of the BSA, "serve to protect investors by providing information relevant to determining whether there is any market manipulation."[113] The district court also reasoned that the SEC did not violate the APA in its promulgation of Rule 17a-8, noting that the 1981 notice of the final rule, which was subject to notice-and-comment procedures, unambiguously declared the intent of the SEC to have the rule evolve with any changes promulgated by the Treasury Department.[114]

Alpine appealed to the Second Circuit on five issues, all of which the court affirmed in favor of the SEC.[115] Alpine subsequently petitioned for certiorari to the Supreme Court of the United States on the question of whether "the SEC's assertion of independent authority to interpret and enforce the BSA contravene[s] Congress's decision to entrust

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106 *Alpine*, 982 F.3d at 75–76.

107 *Id.* at 75.

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.* at 75–76; *see also* 5 U.S.C. § 553(b)–(c) (notice-and-comment requirements for federal agency rulemaking).

115 *Alpine*, 982 F.3d at 76–85; *see infra* Part III.

enforcement of the BSA's comprehensive anti-money-laundering regime to the Treasury Department."[116] The Court denied Alpine's petition.[117]

III. Issues on Appeal and the Second Circuit's Holding

In a unanimous majority opinion, absent any concurrences, the Second Circuit held that the SEC's promulgation of Rule 17a-8 was well within its authority and thus that the enforcement against Alpine was appropriate.[118]

A. *Whether the SEC's Enforcement in This Action Was Appropriate*

Alpine's first argument was that the SEC's action was an unauthorized effort to enforce the BSA, enforcement of which Congress placed solely with Treasury.[119] In a particularly thin discussion, the Second Circuit found no need to address whether it would have been appropriate for the SEC to enforce the BSA or a FinCEN regulation since it characterized the action as arising under the Exchange Act.[120] According to the court, the SEC's SAR requirements were perfectly consistent with the Commission's own goals of recordkeeping and reporting under section 17(a).[121]

Alpine pointed to the regulations in chapter X of title 31, the FinCEN regulations requiring SAR compliance, to assert that the Treasury, and FinCEN by extension, considered itself to be the only body charged with interpreting and enforcing the BSA.[122] To the extent that the SEC is involved in the BSA regulations, Alpine argued that the SEC only had authority to examine for violations of SAR reporting (as discussed in Section IV.A, "examination authority"), and at the very most, had a duty

116 Petition for Writ of Certiorari at i, Alpine Sec. Corp. v. Sec. & Exch. Comm'n, 142 S. Ct. 461 (2021) (No. 21-82) (mem.), 2021 WL 3115302.

117 *Alpine*, 142 S. Ct. 461; *see also Alpine Securities Corp. v. Securities and Exchange Commission*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/alpine-securities-corp-v-securities-and-exchange-commission [https://perma.cc/9M79-6ALD].

118 *Alpine*, 982 F.3d 68 at 72–73.

119 *Id.* at 76; *see* Page Proof Brief for Defendant-Appellant (Redacted) at 30–39, *Alpine*, 982 F.3d 68 (No. 19-3272), 2020 WL 103930.

120 *Alpine*, 982 F.3d at 76.

121 *Id.* ("The fact that Rule 17a-8 requires broker-dealers to adhere to the dictates of the BSA in order to comply with the recordkeeping and reporting provisions of the Exchange Act does not constitute SEC enforcement of the BSA.").

122 Page Proof Brief for Defendant-Appellant (Redacted), *supra* note 119, at 30–31 (citing, as an example, 31 C.F.R. § 1010.810(d), which states that "[a]uthority for the imposition of civil penalties for violations of this chapter lies with the Director of FinCEN").

to submit evidence of reporting violations to FinCEN, which would ultimately be the body to bring an enforcement action should it feel it necessary.[123]

In reply, the SEC argued that as the agency with the most authority to oversee broker-dealers, the Commission had ample authority to bring the suit because the SAR requirements set by the Treasury were helpful in advancing the goals of the securities laws.[124] The SEC highlighted that not only did the enforcement action not conflict with the Treasury's authority to administer the BSA, it additionally helped to enhance the government's goal of obtaining information from financial institutions necessary for investigating criminal and regulatory violations.[125] The SEC further stated that Congress gave the Commission substantial authority to regulate broker-dealers because of the important role broker-dealers play as disseminators of information in the marketplace.[126] The Commission claimed that because the reporting and recordkeeping requirements set out in section 17(a) of the Exchange Act are essential for the protection of investors, incorporating the Treasury's requirements for BSA enforcement in promulgating Rule 17a-8 was a reasonable judgment consistent with the purposes and goals of the Exchange Act.[127]

B. *Whether Rule 17a-8 Is a Reasonable Interpretation of Section 17(a)*

Alpine next contended that Rule 17a-8 was invalid because its requirement of compliance with the BSA was not a reasonable interpretation of the Exchange Act.[128] The court took the SEC's side on this issue as well, reasoning that, between both FinCEN's rules and Rule 17a-8, there was no clear conflict.[129] The court reasoned that the collaborative nature of the relationship between FinCEN and the SEC over BSA compliance suggested that there was congressional intent for the Commission to also assume an enforcement role.[130] However, the court did not reference the Treasury's delegation of plenary enforcement

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123 *Id.* at 31–32 (further arguing that the SEC did not report the violations to FinCEN before bringing the action and, therefore, was not acting even within the scope of its duty).

124 Final Brief for the Sec. & Exch. Comm'n, Appellee at 33–40, *Alpine*, 982 F.3d 68 (No. 19-3272), 2020 WL 1131384.

125 *Id.* at 33–34.

126 *Id.* at 34–35.

127 *Id.* at 35–36.

128 U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 77 (2d Cir. 2020).

129 *Id.*

130 *Id.* at 80 ("Congress intended for the SEC to maintain its compliance authority and from the outset, it was envisioned by both agencies that the SEC would have enforcement authority over broker-dealers.").

authority to FinCEN, a problematic omission considering the statutorily prescribed extent of the SEC's involvement was as a body for consultation rather than enforcement.[131] Furthermore, the court addressed that since Congress was well aware that, because the SEC enforced SAR provisions through Rule 17a-8 and had not limited the Commission's ability to do so, there was never an indication of disapproval over joint SAR reporting enforcement.[132] The court examined Rule 17a-8 under *Chevron*, which placed a heavy burden on Alpine to prove that the SEC's interpretation of section 17(a) was unreasonable.[133] Effectively borrowing the SEC's argument, the court reasoned that the SARs would support the aims of the Exchange Act.[134] Alpine argued against reliance on *Chevron*, but the court ignored these objections and found Alpine did not meet its burden.[135]

Alpine further contended that there is a history in federal courts of rejecting attempts from agencies to expand their jurisdictions into those of other agencies.[136] Alpine supported this argument with cases from other circuits, which addressed similar problems of federal agencies expanding their authority into another's jurisdiction.[137] Alpine also asserted that the Supreme Court had, in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, supplied a framework more applicable to this situation, providing that where there is a specific authorization by Congress to target specific problems, general authorization by another agency not addressed is precluded.[138]

Alpine lastly argued that the SEC only subsumed some, but not all, of the SAR provisions, pointing chiefly to the penalties outlined by

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131 *See id.*; *see also* 31 U.S.C. § 5318 (including the SEC in its definition of "federal functional regulators"). Note that all explicit rulemaking authority throughout this section is vested in the Secretary of the Treasury and references to federal functional regulators are only present for the purposes of consultation. *Id.*

132 *Alpine*, 982 F.3d at 80.

133 *Id.* at 77 (stating that the *Chevron* analysis requires the reviewing court to ask whether Congress has spoken directly on a particular issue; that if the statute is ambiguous or silent on the question, the court proceeds with the analysis of whether the interpretation is reasonable; and that if Congress did not clearly speak on the issue, the reviewing court needs to respect the agency's interpretation so long as it is permissible).

134 *Id.*

135 Page Proof Brief for Defendant-Appellant (Redacted), *supra* note 119, at 33; *Alpine*, 982 F.3d at 77.

136 Page Proof Brief for Defendant-Appellant (Redacted), *supra* note 119, at 34.

137 *Id.* at 34–37; *see, e.g.*, *infra* notes 178–99 and accompanying text (discussing *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013)).

138 Page Proof Brief for Defendant-Appellant (Redacted), *supra* note 119, at 35; 566 U.S. 639, 645 (2012).

Congress.[139] The Exchange Act recordkeeping provisions enforce a strict liability regime for violations with substantial monetary penalties, whereas there is no strict liability outlined in the BSA and the penalties are substantially smaller than those in the Exchange Act.[140] Alpine argued that the SEC's contention that broker-dealers can expect a different standard of proof and penalties than financial institutions in other sectors was a plain contravention of the enforcement scheme outlined in the BSA.[141]

The SEC rebutted Alpine's arguments by stating that where Congress wants to limit an agency's authority to regulate, it speaks clearly in doing so, and further asserting that in an age of overlapping regulatory authority, courts need to proceed with caution when limiting one agency's ability to regulate simply because another can.[142] The Commission further contended that Alpine provided no evidence to show that Congress wanted to limit the SEC's authority under the Exchange Act.[143] In response to Alpine's argument regarding specific authorizations of Congressional authority to agencies, the SEC asserted that the general/specific canon only should be used to resolve a situation where dual enforcement from one agency would limit the enforcement ability of another.[144] The Commission claimed that such a situation did not exist under these circumstances.[145]

C. *Whether Rule 17a-8 Violated the Administrative Procedure Act*

Alpine's third argument was that Rule 17a-8 violates the notice-and-comment requirements of the Administrative Procedure Act by automatically incorporating future BSA updates.[146] The Second Circuit, siding with the SEC, concluded that the public had ample opportunity for notice and comment on Rule 17a-8, as well as the rule's potential to adopt future, additional reporting requirements promulgated by the Treasury.[147] The court came to this conclusion without examining the OFR rules, brought to its attention by Alpine, that prohibit incorporating

139 Page Proof Brief for Defendant-Appellant (Redacted), *supra* note 119, at 38; *see* 31 U.S.C. § 5321.

140 Page Proof Brief for Defendant-Appellant (Redacted), *supra* note 119, at 38.

141 *Id.*

142 Final Brief for the Sec. & Exch. Comm'n, Appellee, *supra* note 124, at 46.

143 *Id.* at 48–49.

144 *Id.* at 53–54.

145 *Id.* at 55.

146 U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 80 (2d Cir. 2020).

147 *Id.* at 81.

dynamically updating rules by reference.[148] The court further reasoned that the SEC did not incorporate FinCEN's regulations irrespective of their consistency with the goals of the Exchange Act, because the Commission collaborated with FinCEN on subsequent updates to the SAR regulations.[149] The court's assumption, of course, discounts the possibility that FinCEN could ignore the Exchange Act's objectives despite the SEC's collaboration.[150] Accordingly, the court found that there were no APA concerns created by Rule 17a-8 because the public was completely aware of the collaborative and interrelated nature of the SEC's and FinCEN's regulatory amendment process.[151]

Alpine's primary contention regarding this issue was that because of the dynamic updates, the SEC would subsume any future rule changes without putting Rule 17a-8 through additional notice-and-comment proceedings.[152] Alpine rebuffed the SEC's argument that the public had ample notice because the Commission had clearly stated, when Rule 17a-8 initially was posted for notice and comment, that the rule would allow for any additional regulations that the Treasury might adopt.[153] Lastly, Alpine pointed to regulations from the OFR that prohibit the incorporation by reference of rules that update dynamically.[154]

The SEC insisted that the public had a full and complete notice-and-comment opportunity for Rule 17a-8, which made clear that there would be future incorporation of Treasury rules.[155] In the same vein, the SEC pointed out that the public had ample opportunity to comment on FinCEN's promulgation of the SAR reporting requirements, as well as other subsequent FinCEN rules that could be incorporated.[156] Lastly, the SEC argued there was no dynamic incorporation by reference problem in this case because the concerns that arise from dynamic incorporation stem from private standards in federal regulations.[157]

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148 *See* Page Proof Brief for Defendant-Appellant (Redacted), *supra* note 119, at 43–44.

149 *Alpine*, 982 F.3d at 82.

150 *See, e.g.*, *infra* note 233 and accompanying text (discussing statutory amendments by Congress).

151 *Alpine*, 982 F.3d at 82–83.

152 Page Proof Brief for Defendant-Appellant (Redacted), *supra* note 119, at 40–41.

153 *Id.* at 41.

154 *Id.* at 43.

155 Final Brief for the Sec. & Exch. Comm'n, Appellee, *supra* note 124, at 56.

156 *Id.* at 56–57.

157 *Id.* at 58; *see infra* Section IV.B.

D. *Remaining Issues*

The district court granted summary judgment to the SEC on the basis of SARs showing 2,720 violations of Rule 17a-8 by Alpine.[158] Alpine argued principally that the district court erred in its grant of summary judgment by deferring to the SEC's interpretation of FinCEN guidance and applying what Alpine called a "purely mechanical" test to find that Alpine was not in compliance with the requirements.[159] The Second Circuit rejected both arguments as meritless.[160]

Alpine's final assignment for error was that the district court abused its discretion in imposing a $12 million penalty for its numerous violations of the SAR reporting requirements.[161] The SEC asked for penalties of $10,000 for each SAR violation and $1,000 for each support-tier violation, totaling $22.7 million.[162] Alpine argued that the total fine should have been between $80,000 and $720,000.[163] Ultimately, in consideration of the fact that, over the years of required compliance, Alpine's violations of the reporting rules decreased (but did not stop), the district court held that a penalty of $12 million was appropriate.[164] The Second Circuit found that, given the evidence of Alpine's violation and the district court's reasoning in reaching its final calculation of the penalty, the district court did not abuse its discretion.[165] Alpine argued to the contrary that the imposition of the penalty was erroneous because the district court concluded that Alpine acted with "scienter," despite the fact that the district court specifically reasoned that a finding of scienter was not a necessary factor to impose a tier-one penalty in an action brought by the SEC.[166] The Second Circuit dismissed Alpine's argument as meritless.[167]

IV. ANALYSIS

There are two pertinent questions that linger following the Second Circuit's holding in this case. Both are administrative law questions that

158 U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 83 (2d Cir. 2020).
159 *Id.*
160 *Id.*
161 *Id.* at 85.
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.* at 85–86.
167 *Id.* at 86.

would have benefitted from the potential clarification through a decision from the Supreme Court or, at a minimum, a deeper discussion in the Second Circuit's opinion. The first question is which agency, between the Treasury and the SEC, actually has authority to enforce penalties for violations of the BSA. The Second Circuit only really addressed the argument that the SEC was enforcing the Exchange Act, alluding to collaboration and efficient government, but never truly settled on a formal answer as to whether the SEC had the authority, in addition to the Treasury, to enforce the BSA.[168] The other question is whether the incorporation by reference of public material of one agency by another can be reconciled with the objectives and requirements of the APA.[169]

A. *Agency Collaboration or Unauthorized Enforcement?*

The SEC is responsible for protecting investors, in part, by holding broker-dealers to stringent recordkeeping and disclosure standards.[170] The SARs designed by FinCEN are meant to flag suspicious activity, and it is reasonable to believe that if a broker-dealer is required to comply with the SAR reporting regime, noncompliance could be indicative of broader firm-wide culture of fraudulent behavior that could be harmful to the investing public.[171] With that in mind, the SEC presents a good argument that it is enforcing section 17(a) by requiring SAR disclosure through Rule 17a-8. However, the language of Rule 17a-8 leaves room for the contention that the SEC is not enforcing the Exchange Act but rather is creating an avenue to enforce the regulations promulgated by FinCEN in accordance with the BSA.[172]

When it first issued Rule 17a-8, the SEC stated that the Treasury gave it "responsibility for assuring compliance" with the BSA, but did not discuss enforcement in the same release beyond "on-site examinations of broker-dealer firms."[173] The Treasury, within the scope of the authority given to it by Congress, promulgated rules that gave the SEC *examination* authority (that is, authority to review regulated entities for evidence of

168 *See supra* Section III.B.

169 *See infra* Section IV.B.

170 *What We Do*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/what-we-do [https://perma.cc/HKA2-6BMR] (Nov. 22, 2021).

171 *See Alpine*, 982 F.3d at 75.

172 *See* 17 C.F.R. § 240.17a-8 (2023) (stating that "registered broker[s] or dealer[s] . . . *shall comply* with the . . . *requirements of chapter X of title 31*" (emphasis added)). There is no language in the rule that indicates that the SEC is requiring compliance with anything other than FinCEN's regulations. *Id.*

173 Recordkeeping by Brokers and Dealers, 46 Fed. Reg. 61454, 61454 (Dec. 17, 1981) (to be codified at 17 C.F.R. pt. 240).

noncompliance with FinCEN's rules) but did not cede any of its own enforcement authority.[174] The Commission's discussion of ensuring compliance through "on-site examination" in its adopting release is within the bounds of the partnership between the agencies envisioned by FinCEN's rules.[175] Mere collaboration, however, between the Commission and the Treasury with Congress's tacit approval does not intimate that Congress wanted the SEC to have independent enforcement authority of the BSA.[176] It is a slightly tenuous assumption by the court to say that Congress, by extension, wanted the SEC to have concurrent enforcement authority with FinCEN over broker-dealers regarding SAR compliance, thus opening up the possibility of double enforcement.[177]

In *Bayou Lawn & Landscape Services v. Secretary of Labor*, a 2013 case, the Eleventh Circuit dealt with a federal agency similarly acting beyond its delegated authority.[178] In *Bayou*, plaintiffs sought to participate in the H-2B visa program for nonagricultural foreign workers and sought an injunction to stop the U.S. Department of Labor (DOL) from enforcing its rules for the program on the grounds that the agency did not have the authority to promulgate those regulations.[179] Congress amended the Immigration and Nationality Act (INA) in 1986 to provide for separate visa programs, one for agricultural workers and another for nonagricultural workers.[180] H-2B visas cover nonagricultural workers.[181] In its initial iteration, the INA gave plenary rulemaking authority to the Attorney General of the United States, and Congress later transferred this authority to the Department of Homeland Security (DHS).[182] When Congress created the distinction between the two classes of workers, it gave rulemaking power to the DOL only for the agricultural workers; it did not extend the DOL's authority to the H-2B program.[183] Nonetheless, the DOL published proposals for new rules governing the H-2B program in the Federal Register on the basis that, although there was no express

174 31 C.F.R. § 1010.810(b)(6) (2023); *see also supra* Section III.A.

175 *See supra* notes 173–74.

176 *See* Page Proof Brief for Defendant-Appellant (Redacted), *supra* note 119, at 31.

177 U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 80 (2020); *see infra* notes 196–99 and accompanying text (discussing the differences between the enforcement regimes of the SEC and FinCEN).

178 713 F.3d 1080 (11th Cir. 2013).

179 Bayou Lawn & Landscape Servs. v. Solis, No. 12cv183, 2012 WL 12887385, at *1 (N.D. Fla. Apr. 26, 2012), *aff'd sub nom.* Bayou Lawn & Landscape Servs. v. Sec'y of Lab., 713 F.3d 1080 (11th Cir. 2013).

180 *Bayou*, 713 F.3d at 1083.

181 *Id.*

182 *Id.*

183 *Id.*

grant, authority could be implied because the statutory scheme indicated Congress intended to give it rulemaking power.[184]

The district court disagreed, granting the plaintiffs' requested injunction, and the Eleventh Circuit affirmed, reasoning that it was likely that the plaintiffs would succeed on the merits.[185] The DOL argued that, because the statute gave it express consultation authority, it was empowered to engage in unilateral rulemaking on the H-2B matter "to structure its consultation with DHS."[186] The Eleventh Circuit strongly rejected the DOL's argument, stating that it was an "absurd" interpretation of the statute and declined to adopt the DOL's definition of "consultation."[187] In *SEC v. Alpine*, the SEC acted similarly to the DOL in *Bayou*.[188] The extent of authority granted to the SEC was that of examination for the purpose of flagging violations to FinCEN, yet the Commission nonetheless went beyond the scope of that authority to engage in rulemaking and enforcement, just as the DOL engaged in rulemaking when it was only the designated consulting agency.[189]

The Second Circuit's reasoning in *SEC v. Alpine* substantially diverged from the reasoning of the Eleventh Circuit despite FinCEN and the SEC sharing a similar relationship to that analyzed in *Bayou*.[190] The BSA required the Treasury to promulgate rules for reporting suspicious transactions after *consultation* with the SEC.[191] Meanwhile, the Treasury has explicitly clarified its role as the sole enforcement authority (through FinCEN) of the BSA, as well as the SEC's role as one of multiple organizations that are authorized to *examine* to determine compliance.[192] The SEC itself recognized its limited examination authority, yet promulgated Rule 17a-8, which, as constructed, reads as direct enforcement of the rules meant for ensuring compliance with the BSA.[193]

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184 *Id.*

185 *Id.* at 1083, 1085.

186 *Id.* at 1084. The statute calls for consultation with "appropriate agencies of the Government" and goes on to clarify that those agencies are the Department of Labor and the Department of Agriculture. 8 U.S.C. § 1184(c)(1).

187 *Bayou*, 713 F.3d at 1084.

188 *See supra* notes 171–73, 185–87 and accompanying text.

189 *See supra* notes 171–73, 185–87 and accompanying text.

190 *See* U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 81 n.59 (2d Cir. 2020). *See generally Bayou*, 713 F.3d 1080.

191 *Alpine*, 982 F.3d at 73.

192 31 C.F.R. § 1010.810 (2023). Examination authority is delegated to, among others, the Comptroller of the Currency, the Federal Reserve Board of Governors, the SEC, and the Commissioner of Customs and Border Protection. *Id.* § 1010.810(b). The Treasury designated FinCEN as the sole authority for enforcement and there are no distinct carveouts to include any of the other agencies listed, including the SEC. *Id.* § 1010.810(d).

193 17 C.F.R. § 240.17a-8 (2023); Recordkeeping by Brokers and Dealers, 46 Fed. Reg. 61454, 61454 (Dec. 17, 1981) (to be codified at 17 C.F.R. pt. 240).

Further, and perhaps most importantly, Congress clearly prescribed the Treasury to be the sole rulemaking and enforcement authority of the BSA.[194]

The Second Circuit also proclaimed that there is no conflict between Rule 17a-8 and the objectives of the BSA.[195] This contention does not take into consideration the fact that the enforcement regimes of the BSA and the Exchange Act are substantially different from one another, both in the culpability standards and penalty size for each violation.[196] FinCEN, in enforcing the BSA, needs to show that the defendant, at a minimum, acted negligently, and the maximum penalty per violation it may impose is $1,180.[197] In contrast, the SEC has the ability to unilaterally enforce penalties through in-house administrative proceedings, where under its regime, it can impose culpability without proving negligence and impose fines as high as $97,523 per violation.[198] It is unlikely that Congress wanted to create a conflicting and muddled enforcement regime, and the unauthorized comingling of the SEC and FinCEN creates a similarly convoluted regulatory framework, potentially subjecting broker-dealers to double penalties for violations of the SAR reporting requirements.[199]

Despite all of the above considerations, the Second Circuit concluded that Congress and the Treasury intended for the SEC to have enforcement authority over broker-dealers regarding SAR compliance.[200] To confuse the matter, the Second Circuit held, under its *Chevron* analysis, that Alpine did not meet its burden of showing that Congress clearly expressed its intention to preclude the SEC from *examining* for SAR compliance in collaboration with FinCEN's authority, as well as under its authority from the Exchange Act, leaving the question of which agency can *enforce* the BSA effectively unanswered.[201] Under the statutory and regulatory framework, there is no dispute that the SEC can

194 *See* 31 U.S.C. § 5318. Furthermore, the statute explicitly designates the SEC as a body for consultation. *Id.* § 5318(g)(5), (o)(4)(E).

195 *Alpine*, 982 F.3d at 78.

196 Brief for the Cato Institute as Amicus Curiae in Support of Petitioner at 7–8, Alpine Sec. Corp. v. SEC, 142 S. Ct. 461 (2021) (No. 21-82), 2021 WL 3832197 (mem.). *Compare* 15 U.S.C. § 78u-2(b), *with* Financial Crimes Enforcement Network; Inflation Adjustment of Civil Monetary Penalties, 86 Fed. Reg. 7348, 7348–49 (Jan. 28, 2021) (to be codified at 31 C.F.R. pt. 1010).

197 Brief for the Cato Institute as Amicus Curiae in Support of Petitioner, *supra* note 196, at 7.

198 *Id.* at 7–8.

199 *See, e.g.*, California v. Kleppe, 604 F.2d 1187, 1199 (9th Cir. 1979) (holding that authorization in a particular statute to consult with the EPA did not imply the EPA's concurrent rulemaking authority with the Secretary of Interior, which would otherwise "impair or frustrate [Congressional intent and] the authority that the statute clearly provided.").

200 *Alpine*, 982 F.3d at 80; *see supra* notes 190–99 and accompanying text.

201 *Alpine*, 982 F.3d at 80.

examine for compliance.[202] However, promulgating a rule under the Exchange Act gives the Commission the ability to enforce it.[203] Under the current language of Rule 17a-8, the SEC is clearly stepping beyond the bounds of its examination and consultation authority, defined by FinCEN's BSA regulations, into an enforcement role.[204] By delegating examination authority to the SEC, the Treasury carefully considered its mandate under the BSA and determined that the SEC's involvement should not be extended as far as enforcement authority.[205] Explicitly requiring compliance with another agency's rules, which could be far broader than mere disclosure requirements, is very different from requiring documents and disclosures similar to, if not exactly the same as, SARs in accordance with the recordkeeping and retention goals of section 17(a) of the Exchange Act.[206] Accordingly, in its promulgation of Rule 17a-8, the SEC was not acting as a collaborative authority and was inappropriately enforcing the BSA, the responsibility for which lies solely with the Treasury, through FinCEN. The Second Circuit was incorrect in holding otherwise.

B. *A Novel Problem for Agency Rulemaking*

Rule 17a-8, in deferring to the requirements of the BSA created by FinCEN, does not use any of the language in FinCEN's rules.[207] Rather, by merely pointing to the title and chapter of the CFR where those rules reside, the SEC incorporated the reporting requirements of the BSA by reference.[208] Because the incorporated rules are public material, this hybrid situation presents novel issues different from those created by the traditional incorporation of private standards. Furthermore, in its current form, Rule 17a-8 is violative of the APA.

The court's primary justification for affirming summary judgment in favor of the SEC was that when the Commission promulgated Rule 17a-8, it was perfectly transparent about the fact that the rule would be

202 *See supra* notes 195–99 and accompanying text.

203 *About the Division of Enforcement*, *supra* note 53.

204 31 C.F.R. § 1010.810(b)(6) (2023); *see* 17 C.F.R. § 240.17a-8 (2023); *supra* note 54 and accompanying text.

205 *See* 31 C.F.R. § 1010.810(b)(6).

206 *See* 15 U.S.C. § 78q(a)(1).

207 *See* 17 C.F.R. § 240.17a-8 (2023).

208 Brief for the Cato Institute as Amicus Curiae in Support of Petitioner, *supra* note 196, at 2; *see also* Client Memorandum from Sullivan & Cromwell LLP, SCOTUS Denies Cert in Challenge to SEC's Suspicious Activity Reporting Regime (Nov. 15, 2021), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-scotus-denies-cert-in-challenge-to-sec-sar-regime.pdf [https://perma.cc/5CR3-SFVE].

updated pursuant to the Treasury's changes.[209] The court did not acknowledge that although the OFR's rules prohibiting incorporation of public material were not published until nearly a year after Rule 17a-8 was, there was a strong presumption that incorporating material created by another agency or that appeared in the U.S. Code was inappropriate.[210]

The OFR was also firm in its policy goals in codifying the presumption against this practice by stating that the Federal Register should not be an "index [for] material published elsewhere."[211] Furthermore, incorporating public material by reference flouts the Congressional objectives of FOIA and the APA to provide those being regulated with clarity and awareness of their responsibilities.[212] While incorporating public material by reference may be more convenient in an agency's rulemaking process, it presents several concerns relating to compliance with the APA, is devoid of many of the benefits of incorporating private standards, and only complicates navigating the administrative state for those subject to regulation.[213] The Second Circuit's opinion did not consider the potentially harmful precedent it set for allowing agencies to incorporate public material by reference. Accordingly, the court was incorrect in concluding that Rule 17a-8 is not violative of the APA.

1. Issues Unique to Incorporating Public Material

A clear difference between the concerns that arise with the incorporation of public material versus private material is the elimination of the access problem: regulations promulgated by any agency are viewable through an online search of the CFR.[214] The wide availability of public standards dilutes the downsides of incorporation by reference in this setting.[215] On the other hand, the core justifications for incorporation by reference—cost-effectiveness and efficiency—are just as relevant here as when private standards are incorporated.[216] When incorporating

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209 U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 81 (2d Cir. 2020).

210 Approval Procedures for Incorporation by Reference, 47 Fed. Reg. 34107, 34107 (Aug. 6, 1982) (to be codified at 1 C.F.R. pt. 51).

211 *Id.*

212 *See* Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) ("[D]isclosure . . . is the dominant objective of [FOIA].").

213 *See infra* Sections IV.B.

214 *See* Bremer, *supra* note 67, at 186; *see also* CODE OF FED. REGULS., https://www.ecfr.gov [https://perma.cc/6JW5-3ENQ].

215 *Cf. supra* notes 72–75 (discussing practical difficulties for those being regulated to access copies of incorporated material).

216 *See* Strauss, *supra* note 60, at 502–04.

another agency's rules by reference, there is effectively no cost in doing so, and by simply referencing the relevant chapter(s) and title(s) in the CFR, the cumbersome and time-consuming writing process can be completely avoided.[217]

However, where proponents of incorporation by reference point to the value of deferring to expert organizations who have a better understanding of the industries subject to regulation, the practice of incorporating other agency material can easily miss that benefit.[218] With public standards, there is a substantial risk that the agency being deferred to does not have the expertise or care about the legislative purposes of the agency incorporating the rule.[219] Permitting this practice can lead to the frequent creation of unnecessarily complex and confusing indexing throughout the administrative state, rather than a well-organized and clear set of regulations.[220]

This practice is also problematic because it is unfair to expect regulated entities, like small businesses and the general public, who might typically be subject to the jurisdiction of one agency, to monitor an array of other, potentially unrelated, agency rules for appropriate compliance.[221] Although, under these circumstances, there is no access barrier for those being regulated, there should be an ongoing objective to simplify and condense the administrative state.[222] This practice does just the opposite: it further widens the influence and compliance gap between the general public and larger entities with more resources by making the CFR more difficult to navigate and more obscure about what is required by someone subject to a federal rule.[223]

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217 *See* McGarity, *supra* note 62, at 1390–91.

218 Bremer, *supra* note 67, at 149–50.

219 *See, e.g.*, U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565–66 (D.C. Cir. 2004) ("[W]hen an agency delegates power to outside parties, lines of accountability may blur, . . . increas[ing] the risk that these parties will not share the agency's 'national vision and perspective,' and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme." (citing Nat'l Park & Conservation Ass'n v. Stanton, 54 F. Supp. 2d 7, 20 (D.D.C. 1999))).

220 *See supra* note 199 and accompanying text.

221 *See* Brief for the Cato Institute as Amicus Curiae in Support of Petitioner, *supra* note 196, at 10–11.

222 Unlike typical incorporation by reference where someone may need to travel to view or pay to view copyrighted references, the CFR is free to the public and easily accessible through the internet. *See* CODE OF FED. REGULS., *supra* note 214.

223 *See* Mendelson, *Private Control Over Access to the Law*, *supra* note 57, at 748.

2. Rules that Update Dynamically Are Still Prohibited

When private standards are incorporated, the standard available at the time is what governs; any changes are subject to an entirely new approval process, including notice and comment.[224] As discussed above, dynamic incorporation by reference violates notice and comment because it eliminates the public's opportunity to provide input into changes to incorporated standards.[225] Of course, a portion of this concern arises from the idea that incorporation by reference typically deals with private material and, under the circumstances created by incorporating public material, one could argue that a regulated individual or entity could simply monitor the referenced agency for free.[226] However, if an agency is incorporating public rules by reference and an update to an incorporated rule is exempt from notice and comment, the public will be completely removed from the process and the change would thus violate the APA.[227]

Rule 17a-8 only went through the notice-and-comment period once when the SEC originally published the rule in 1981.[228] There was a later revision to the Rule in 2011 but the SEC did not put it up for notice and comment, arguing that it did not need to do so because the adjustment only referenced a technical change in the reorganization of FinCEN regulations in the CFR.[229] This is not acceptable practice because even if Rule 17a-8 was approved when it was initially published, subsequent changes were not; the SEC should be publishing rule changes as often as FinCEN makes changes to the SAR requirements.[230] Moreover, there are foreseeable circumstances where updates to FinCEN's BSA regulations would be exempt from notice and comment. Rules involving military or foreign affairs functions are among those that are exempt from the notice-and-comment process.[231] The reference to foreign transactions in the BSA, especially following the 2001 amendment that substantially

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224 Bremer, *supra* note 67, at 137.

225 *Id.*; *see supra* notes 59–65 and accompanying text.

226 *See* Strauss, *supra* note 60, at 498.

227 *See* Bremer, *supra* note 67, at 186 ("By permitting automatic modifications to administrative regulations without the agency conducting a rulemaking, dynamic incorporation robs the public of the opportunity to examine and comment on changes to the incorporated material.").

228 Record Keeping by Brokers and Dealers, 46 Fed. Reg. 61454 (Dec. 17, 1981) (to be codified at 17 C.F.R. pt. 240).

229 Technical Amendments to Rule 17a-8: Financial Recordkeeping and Reporting of Currency and Foreign Transactions, 76 Fed. Reg. 11327 (Mar. 2, 2011) (to be codified at 17 C.F.R. pt. 240).

230 *See* 5 U.S.C. § 552(a)(1)(D).

231 *Id.* § 553(a)(1).

adjusted the language of the Act to discuss combatting foreign terrorism, shows a clear path to exemption from notice and comment for FinCEN.[232]

Future amendments to the BSA by Congress present an additional notice-and-comment concern when incorporating public material that updates dynamically. In a hypothetical scenario, if Agency *A* incorporates by reference a rule promulgated by Agency *B*, and if the goals of the two agencies are not aligned, why should Agency *B* care to take into consideration the concerns of a member of the public who is commenting about a prospective rule update not aligning with the objectives of Agency *A*? An agency is beholden to its statutory goals before anything else and needs to promulgate rules accordingly.[233]

FinCEN altered its regulations to comport with the changes prescribed by Congress in its amendments to the BSA through the PATRIOT Act in 2001.[234] It is thus conceivable that further Congressional amendments to the BSA, which could change the objectives of the law, and consequently those of the FinCEN rules, could yield a version of the statute that is not aligned with the goals of the Exchange Act. The purpose section of the original iteration of the BSA was very brief.[235] While there is no competing goal currently with that of the SEC, the 2001 amendment completely filled the purpose section with objectives regarding counterterrorism, and included no additions specifically about financial services.[236] As demonstrated in the foregoing paragraphs, the practice of incorporating public rules by reference causes more problems than it solves and detracts from the broader goal of providing a clearer regulatory landscape.[237]

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232 U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 73 (2d Cir. 2020); *see* Shultz, 416 U.S. at 21. *See generally* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code).

233 *See* Brief for the Cato Institute as Amicus Curiae in Support of Petitioner, *supra* note 196, at 2–3; Jessica Bergman Asbridge, *Whose Job Is It Anyway? The Department of Labor's Authority to Make Labor Market Determinations Under the H-2B Program*, 64 DRAKE L. REV. 273, 295 (2016) ("Permitting an agency that Congress selected to administer a statute to redelegate its discretionary authority to another agency would ignore Congress's decisions as to important policy issues.").

234 Proposed Amendment to the Bank Secrecy Act Regulations—Requirement of Brokers or Dealers in Securities to Report Suspicious Transactions, 66 Fed. Reg. 67670 (Dec. 31, 2001). The final version of this Rule was published in the Federal Register in 2002. Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Requirement that Brokers or Dealers in Securities Report Suspicious Transactions, 67 Fed. Reg. 44048 (July 1, 2002).

235 Act of Sept. 13, 1982, Pub. L. No. 97-258, § 5311, 96 Stat. 877, 995 (codified as amended at 31 U.S.C. § 5311) ("It is the purpose of this subchapter (except section 5315) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.").

236 *See generally* 31 U.S.C. § 5311.

237 *Supra* notes 224–36 and accompanying text; *see supra* note 9 and accompanying text.

V. PROPOSAL: SIMPLIFYING REGULATORY LANDSCAPE THROUGH DIFFUSION

The Second Circuit's approval of Rule 17a-8's construction opens the door for agencies to incorporate the material of other agencies by reference. At a minimum, this may lead to a more confusing and opaque administrative state.[238]

Realistically, requiring the disclosure of suspicious transactions to the SEC is likely helpful to the objectives of section 17(a).[239] After all, broker-dealers dodging transparency could very well be engaged in other activity that is harmful to the investing public.[240] But incorporating FinCEN's rules by reference is not an appropriate way for the SEC to mandate disclosure for the manifold reasons discussed in this Case Note.[241] There is, however, another viable option for the SEC to require the same level of disclosure without inappropriately enforcing the BSA or writing a rule that could violate the APA: regulatory diffusion.[242] Harmonizing both of FinCEN's and the SEC's regulations would create a rule that would indisputably be a valid enactment and would beneficially contribute to simplifying the CFR.[243] Furthermore, the Treasury is a frequent contributor to interagency diffusion, as it is a clear leader in donating text to regulations created in other departments.[244]

Critics of regulatory diffusion may argue that the distinction between copying the text of a rule and merely referencing it is a pure formality, because the two are effectively the same practice.[245] However, if incorporation by reference of existing regulatory material is unavailable, agencies are more likely to think seriously about the text of their rules.[246] In theory, if the SEC wanted to adopt the FinCEN regulations, it would of course have the option to copy the text outright, but it also would have the option to review the text and decide whether it aligns with the Commission's statutory objectives completely or if it would benefit from minor tweaking. The availability of incorporation by

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238 *See supra* note 223 and accompanying text.

239 *See* 15 U.S.C. § 78q(a)(1); *see also* U.S. Sec. & Exch. Comm'n v. Alpine Sec. Corp., 982 F.3d 68, 77 (2d Cir. 2020).

240 *See, e.g.*, Donald C. Langevoort, *Fraud and Deception by Securities Professionals*, 61 TEX. L. REV. 1247, 1253–58 (1983) (discussing "constructive" fraud and subsequent hypotheticals).

241 *See supra* Section IV.B.

242 *See supra* Section I.B.2.

243 *See* Bremer, *supra* note 67, at 186; Nou & Nyarko, *supra* note 88, at 42.

244 *See* Nou & Nyarko, *supra* note 88, at 30; *supra* notes 96–97.

245 *See supra* Part IV.

246 *See* Nou & Nyarko, *supra* note 88, at 49 ("Rulewriters eager to avoid litigation risk would avoid importing language from other agencies without careful thought.").

reference would allow agencies to sweep issues under the rug, sight unseen.[247] Regulatory diffusion, on the other hand, provides a cost-effective and swift avenue for promulgating appropriate and well-tailored regulations while avoiding the potential risk of slowing policy innovation and the unwieldy burdens of traditional rulemaking.[248]

The SEC itself is no stranger to the practice of regulatory diffusion.[249] The Dodd-Frank Act requires consultation between the SEC and the CFTC over the regulation of credit default swaps.[250] After Dodd-Frank's passage, both agencies issued a rule in accordance with the Act, and commenters were divided over which agency's approach they preferred.[251] After the CFTC issued a final rule, the SEC reopened commenting and commenters then overwhelmingly requested that the SEC make its rules consistent with those of the CFTC, and the Commission obliged.[252] Doing so allowed for regulatory consistency between the agencies within the scope of their dual authority under the Dodd-Frank Act, making the regulatory environment substantially clearer to those subject to its rules.[253]

If the SEC truly promulgated Rule 17a-8 to advance the reporting requirements set out in section 17(a) of the Exchange Act, revising the rule through regulatory diffusion would be indicative of a true commitment to that statutory objective. Although it might be slightly more cumbersome to periodically update the rule, directly borrowing text from FinCEN's regulations is easier than going through the entire rulemaking process from scratch. This would result in a more uniform regulatory code and, with each update, the public will have the opportunity to examine and comment.[254]

CONCLUSION

The Second Circuit's conclusions in *SEC v. Alpine* allowed the SEC to hold Alpine accountable for its clear failure to follow SAR reporting guidelines, despite enforcement being the job of the Treasury Department through FinCEN.[255] In so holding, the court ignored the

247 Mendelson, *supra* note 76, at 10780.

248 Nou & Nyarko, *supra* note 88, at 49–50; *see* Bremer, *supra* note 67, at 151.

249 *See* Nou & Nyarko, *supra* note 88, at 42–43.

250 15 U.S.C. § 8302(a)(1).

251 Nou & Nyarko, *supra* note 88, at 42.

252 *Id.* at 42–43.

253 *Id.* at 43.

254 *See id.*; Bremer, *supra* note 67, at 186.

255 *See supra* Part III.

glaring administrative law practice concerns that arose in the course of this enforcement action: whether one agency can justify imposing on another's plenary responsibilities under its own implied statutory demands, and whether in the rulemaking process, administrative agencies can incorporate by reference existing regulations that update dynamically.[256] In failing to thoroughly address these problems, the court created an avenue for administrative agencies to both cut corners in their rulemaking, and, at the same time, further complicate the CFR for individuals and entities subject to regulation.[257]

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256 *See supra* Section IV.B.

257 *See* 31 U.S.C. § 5311.