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4.0 Who Mobilizes? An Analysis of Stakeholder Responses to Financial Regulatory Consultations

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4.1 Introduction

The making of financial regulatory policy is often a contested terrain in which a variety of stakeholders, ranging from trade associations to consumer groups, mobilize over and contribute to the process of contemporary financial rulemaking. As a number of contributions in this publication make clear, the characteristics of the engagement of different stakeholders constitute not only an important determinant of what rules will be implemented, but also of whether the regulation will unduly favour certain stakeholders over others. Despite this widespread recognition, existing scholarship in this area has failed to pay adequate attention to which stakeholders mobilize in the financial regulatory rulemaking process, and what this means for our understanding of how regulatory capture might be mitigated.

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This chapter will present the findings of a recent survey of written letter responses from stakeholders to financial regulatory consultations. Our analysis reveals a number of significant empirical trends in terms of which groups mobilize over financial regulation more than others, how and where stakeholder mobilization is different in finance as opposed to other areas of regulation, and whether or not the recent financial crisis has affected these trends. We show evidence that while the mobilization of stakeholders outside the business community is very low, financial regulatory policies also attract the mobilization of a greater diversity of business participants than is commonly acknowledged by theories of regulatory capture.

Our analysis is divided into three parts. In the first part we review some of the existing literature which has explored why the rule setting phase of financial regulation is understood to be associated with a very particular kind of stakeholder mobilization. In the second part we explicate results from a new dataset on response letters to financial regulatory policy consultations by different kinds of stakeholder groups. The third part then lays out some of the implications of our findings.

4.2 Sectoral diversity in the financial rulemaking process – a review of the literature

The interaction with different business groups, consumer groups and other stakeholders through formal consultations and bilateral meetings represents a central mechanism through which regulatory authorities gauge information regarding the impact that different regulatory decisions may have on different groups, as well as their general sentiment. In a complex environment such as in financial markets where the outcome of regulatory policies is characterized by a significant degree of uncertainty, the capacity to continuously receive information and feedback from stakeholders is deemed crucial to produce informed regulatory policies and limit their unintended consequences.

At the same time, the characteristics of mobilizing different groups which seek to influence the rulemaking process are also considered to

be one of the factors influencing the potential that regulation will be captured by special interests. In this regard, regulatory capture is understood as more likely to occur in those instances where the mobilization of a narrow range of groups directly targeted by a given regulation will dominate the policymaking process, while other, more diffuse groups such as consumer groups will be hindered from making their mark. In contrast, when stakeholder mobilization is more diverse the opposite effect is anticipated. A more diverse set of stakeholders mobilizing would ensure that regulators are exposed to a greater variety of information and perspectives, as well as reduce their dependency on the information received by any single group of stakeholders, reducing the risk of capture.

From this perspective, the literature on financial regulatory policymaking in particular has often presented finance as an area particularly prone to capture. A number of reasons have been posited as likely to constrain the plurality of stakeholders mobilizing in financial regulatory policymaking. First, the technical complexity that characterizes financial regulatory debates increases the information asymmetries between the financial groups directly targeted by the specific piece of regulation and other stakeholders, thus limiting the capacity of the latter group to actually engage.[3] Second, the temporary horizon within which the costs and benefits of regulatory measures will manifest themselves varies across different stakeholders. While the costs imposed by more stringent regulatory policies are more readily apparent to the financial industry group being directly targeted, the impact of financial regulatory policies on other stakeholders may be more indirect and difficult to decipher in the short-term, thus limiting the incentives of these groups to mobilize.[4] Third, even when the costs of different regulatory solutions are also easier to detect in the short-term for those stakeholders that are only indirectly affected, the capacity of stakeholders, such as investors and consumers of financial

[3] Baker (2010). 'Restraining regulatory capture? Anglo- America, crisis politics and trajectories of change in global financial governance', *International Affairs*, 86(3): 647-63.

[4] Mattli and Woods (2009). *In Whose Benefit? Explaining Regulatory Change in Global Politics*, The Politics of Global Regulation. Mattli and Woods. Princeton, NJ, Princeton University Press.

services, to mobilize to protect their interests is constrained by the diffuse nature of these stakeholders and the limited organizational resources available to overcome collective action problems.[5] Fourth, the informal institutional context within which financial regulatory policies are developed is frequently described as constraining the mobilization of a plurality of stakeholders. The participation of financial industry groups is facilitated by the existing network they share with regulators, fostered by the common professional experiences, training, and revolving doors that link these actors together in a common "policy network".[6] The existence of this tight-knit community between regulators and the financial industry groups under their surveillance is often seen as an obstacle hindering the mobilization of those outsiders seeking to "break in" to the relatively closed financial regulatory policy network.[7]

Thus for a range of different reasons existing scholarship suggests that the plurality of stakeholders involved in financial regulatory policymaking should be quite low. While there is widespread agreement on this point, some scholarship emphasizes the cyclical nature of such a condition. Specifically, events such as financial crises or corporate scandals are understood to bring the distributional consequences of financial regulation into sharper focus, thus better enabling different stakeholders to assess the distributional consequences of financial regulation. In turn, such dynamics create a window of opportunity for policy entrepreneurs that would not normally mobilize to engage in the policymaking process, and add greater plurality to the regulatory debate.[8] For this reason, we might expect the diversity of actors involved to increase in the aftermath of crises and scandals.[9]

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[5] Olson (1965). *The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard University Press.

[6] Young (2012). 'Transnational regulatory capture? An empirical examination of the transnational lobbying of the Basel Committee on Banking Supervision.' *Review of International Political Economy*.

[7] Lall (2011). 'From failure to failure: The politics of international banking regulation.' *Review of International Political Economy*.

[8] Mattli and Woods (2009), *op. cit. in footnote* 2.

[9] Culpepper (2011). *Quiet Politics and Business Power: Corporate Control in Europe and Japan*, Cambridge, Cambridge University Press.

4.3 An empirical investigation of stakeholder mobilization in finance

While there are strong theoretical reasons why the diversity of stakeholders active in the financial regulatory arena may be constrained, this characteristic of the financial regulatory process is an empirical question. Furthermore, it is one frequently assumed but not assessed empirically in a systematic fashion. Who mobilizes in the financial regulatory policymaking process?

One key empirical resource for answering this question is provided by the common tendency in recent years for financial regulatory agencies to open regulatory proposals to formal consultative processes. Since the early 2000s in particular, regulatory agencies have undertaken policy consultations which ask for formal written comments by interested groups. Although policy consultations do not represent the only mechanism available for advocacy, the publicly available written responses to these consultations do provide a relatively systematic "trace" of which actors tend to mobilize in response to different regulatory policies.

As part of a larger study,[10] we generated a new dataset composed of the written responses of different stakeholders to a variety of policy consultations. These policy consultations took place in a wide variety of institutional contexts, in a number of different countries, and across a time period between 1997 (when data first started to become available) and 2012. While most of our data includes responses from the United States, our dataset also includes responses from Canada, Germany, and the United Kingdom. Given the greater relevance of financial regulatory policymaking occurring at a supranational level, we have also included different policy consultations held by the European Commission, as well as from international regulatory institutions such as the Basel Committee on Banking Supervision and the International Organization of Securities Commissions. In total we coded 13,466 comment letters in response to 292 different policy consultations across finance and other sectors, covering a total of 58

[10] This section draws upon data and analysis in 'Leveraged Interests: The Role of Corporate-Financial Coalitions in the Regulation of Finance' by Pagliari and Young (2012). Currently Under Review. Available at www.stefanopagliari.net

different governance bodies, ranging from the US Food and Drug Administration to the Canadian Council for Insurance Regulation to the Directorate-General for Internal Market within the European Commission.[11]

Table 1: Percentage of Respondents to Financial Sector Consultations

Respondent	*Percentage of Total Comment Letters*
Trade Unions	1.47
Consumer Groups	1.15
Research Institutions	3.65
NGOs	6.67
Business Groups	87.06

Table 1 summarizes the different kinds of stakeholders who respond to consultations around financial regulatory policies. These findings show how the diversity of interest group mobilization around financial regulatory policymaking appears relatively constrained. In this sense, NGO mobilization is a relatively rare occurrence. So too is the mobilization of interest groups representing more “diffuse” constituencies, such as consumer protection groups and trade unions.

Private business organizations – composed of firms, associations, and coalitions of business groups – clearly dominate financial regulatory policymaking. Yet the business community is a heterogeneous group. Which kind of businesses respond to financial sector consultations? To answer this question, we broke down this category according to the sector and industry of the different business respondents. For each policy consultation we have differentiated between three different groups of respondents: 1) those business groups that were directly targeted for regulation (“Target Group”); 2) other financial business groups who are not the direct target of the regulatory measure

[11] Of this total, 146 consultations concerned financial regulation of some kind, with 6379 response letters coded. 158 consultations concerned areas of regulation other than finance, with a total of 8196 response letters coded. For a more detailed description of the dataset see the Appendix in Pagliari and Young (2012).

("Sectoral Cohabitants"); and 3) business respondents from outside finance ("Outsiders"). For instance, in the case of banking regulation, banks and banking associations would be the "target group", credit rating agencies or insurance companies would be "sectoral cohabitants", while manufacturing companies or agricultural associations would be "outsiders". The results of this analysis, summarized in Table 2, show how financial sector consultations are characterized by a plurality of different kinds of business respondents, with almost a quarter of the respondents being non-financial business groups.

Table 2: Percentage of Business Reponses to Financial Sector Consultations

Category of Business Respondent	*Explanation of Category*	*Percentage of Total Comment Letters*
Target Group	The respondent is the direct target of regulation.	45.12
Sectoral Cohabitant	The respondent is in the financial sector, but is not being targeted directly.	29.94
Outsider	The respondent is outside the financial sector.	24.95

The importance of non-financial business groups in financial regulatory debates has further been increased in the regulatory response to the global financial crisis. Using September 2008 as a dividing line among all written response letters, Table 3 illustrates the composition of respondents to financial sector consultations before and after the global financial crisis, with the column on the right calculating the percentage change over the two periods.

Table 3: Percentage of Respondents to Financial Sector Consultations, Before and After the Global Financial Crisis

Respondent	*Pre-Crisis*	*Post-Crisis*	*% Difference*
Trade Unions	0.31	2.02	+548
Consumer Protection	1.48	1.00	–32.41
Research Institutions	4.40	3.29	–25.07
NGOs	2.26	8.77	+288.73
Business Groups	91.56	84.92	–7.25
of Business Groups:			
Target Group	46.88	44.22	–5.66
Sectoral Cohabitants	35.19	27.24	–22.58
Outsiders	17.93	28.53	+59.08

These results suggest that the plurality of groups mobilizing over financial regulatory policymaking has changed in some important ways since the crisis. In particular, the number of trade union organizations, NGOs, and non-financial end users of financial services has increased significantly since the crisis, thus significantly diversifying the sectoral origin of groups which mobilize and limiting the predominance of financial industry groups targeted by regulation.

But how unique is the mobilization of stakeholders around financial regulatory policies compared to the regulation of other sectors? In order to assess this question, we also compared these financial consultations to a wide variety of consultations around regulatory policies concerning other sectors of the economy. In this regard, we selected consultations within sectors which each had (varying) similarities with the financial sector and which also emerge in discussions of regulatory capture. Specifically, we included consultations on the regulation of the energy sector, the health care industry, the agricultural sector, and the media and telecommunications industry. Table 4 illustrates our comparative results, showing the percentage of respondents across different sectors.

Table 4: Percentage of Respondents to Consultations in Different Regulated Areas

Respondent	*Agriculture*	*Energy*	*Telecoms*	*Health*	***Finance***
Trade Unions	1.07	1.12	1.06	0.32	**1.47**
Consumer Protection	0.74	0.94	0.92	1.83	**1.15**
Research Institutions	5.23	3.97	1.42	9.06	**3.65**
NGOs	14.22	9.14	3.48	10.84	**6.67**
Business Groups	78.74	84.83	93.12	77.94	**87.06**
of Business Groups:					
Target Group	83.18	69.68	84.07	64.71	**45.12**
Sectoral Cohabitants	5.71	11.07	11.28	19.10	**29.94**
Outsiders	11.12	19.25	4.65	16.19	**24.94**

Taken together, these results illustrate a number of empirical regularities that may be significant for understanding the dynamics of private sector influence in the policymaking process and the potential for capture. The first pattern which emerges in this data is the low level of civil society organizations such as NGOs as respondents to

financial sector consultations. Financial regulation features a very low level of engagement of consumer protection groups, although this is not strikingly different from other regulated sectors. Research institutions are less engaged in financial regulatory consultations than in most other sectors – a surprising finding given the highly technical nature of financial regulation.

A second pattern is the significantly greater diversity of business groups that tend to mobilize in response to financial sector consultations. When it comes to financial regulation, there appears to be greater mobilization of business groups that are not directly targeted by regulation than in any other sector, both from within the same sector ("Sectoral Cohabitants") than from the rest of the economy ("Outsiders"). Interestingly, only the regulation of the energy sector features a comparable number of outsiders mobilizing.

These results stand in contrast to the expectations of those theories of regulatory capture which have postulated that the diversity of actors mobilizing around financial regulatory policies would be hindered by collective action problems and information asymmetries. Instead, the analysis in this section reveals how the mobilization of groups surrounding the development of financial rules is different from what we find in the regulation of other areas, and most importantly, more sectorally diverse than theories of regulatory capture assume. This anomaly can be explained in part by considering the special position that the financial sector occupies in the rest of the economy and the numerous ties that link financial firms with the real economy, either directly or indirectly. Since numerous financial regulatory policies are likely to have an impact over the rest of the economy, this may create strong incentives for a broader range of business groups to mobilize.

4.4 Policy implications

What are the policy implications of this analysis for the potential that a piece of financial regulation will unduly narrowly favour the stakeholders being regulated? Our analysis above suggests two broad implications.

On the one hand, the relative under-representation of stakeholders outside of the business community, in particular consumer advocates, NGOs, and trade unions within financial sector policymaking compared to other areas of economic policymaking, suggests that the likely diversity of perspectives and concerns that reach the regulatory process is limited in important ways. Non-business groups have the potential to represent diffuse interests in society that might be under-represented by the business community. The greater diversity of actors who mobilize within the business community might be interpreted as limiting the risk that any onset of special interests will disproportionately influence the policymaking process, by creating greater potential for these groups to "balance" each other out.

However, there are other reasons to suggest that the opposite outcome might result. Manufacturing firms that mobilize over financial regulation do not necessarily advocate opposing positions as do banks when it comes to bank regulation; nor is it necessarily the case that agricultural stakeholders oppose the views and the advocacy of institutional investors. Owing to the unique structural location of finance in the economy – as private progenitors and managers of credit – the short-term preferences of non-financial business groups might actually be more often aligned with financial sector groups than opposed to their positions.

Indeed, since the financial crisis in particular efforts to regulate numerous areas of finance, such as hedge funds, banking, and derivatives regulation have featured cross-sectoral business coalitions comprising both financial and non-financial business groups.[12] In this context, financial industry groups have actively altered their lobbying strategies in order to tie their interests to those of other non-financial stakeholders, highlighting the diffuse costs of new regulatory rules. One example of such a strategy is the fact that the publication of the Basel III agreement was preceded by a publication of the Institute of International Finance (IIF), the main association representing internationally active banks, which denounced the costs the implementation of the Basel III agreement would pose on the real economy. The IIF asserted these costs would be as far as eight

[12] See Pagliari and Young (2012) for an explication of this phenomenon.

times higher than those estimated by the Basel Committee.[13] Hedge Fund associations such as the Alternative Investment Management Association (AIMA) have directed their opposition to the Alternative Investment Fund Manager Directive (AIFMD) by highlighting the costs that the regulation would pose for pension funds across Europe, declaring that '[i]f they suffer lower returns as a result of the Directive, it's not only Europe's pension funds but Europe's pensioners of both today and tomorrow who will suffer'.[14] Banks that act as derivative dealers have claimed that the measures introduced by US Congress to regulate OTC derivatives markets would cost US companies as much as $1 trillion in terms of capital requirements, thus decreasing their capacity to generate employment opportunities.[15] In many of these and other instances financial industry groups have been joined by non-financial businesses and trade associations who share similar concerns and partially overlapping policy agendas.

This strategy has often been effective as elected politicians are generally wary of introducing regulatory measures that may negatively affect employment and growth, in particular during a period of weak economic growth. Under these conditions, regulators are likely to face strong pressures from a plurality of business groups as well as their political masters to be more lenient in the implementation of regulatory policies that may harm the economy, or if a trade-off exists between the goal of bolstering the safety of financial institutions and preserving the flow of credit to the rest of the economy.

In these cases, the mobilization of a broader variety of business groups inside and outside finance does not necessarily mitigate the capacity of financial groups to capture the policymaking process, but may actually reinforce their influence in the policymaking process. The acknowledgement of this possibility has led important commentators

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[13] IIF (2010). 'Interim Report on the Cumulative Impact on the Global Economy of Proposed Changes in the Banking Regulatory Framework', Institute of International Finance.

[14] AIMA (2009). 'European Directive Could Cost European Pension Industry 25 Billion Euros Annually', London, Alternative Investment Management Association.

[15] ISDA (2010). 'US Companies May Face US $1 Trillion in Additional Capital and Liquidity Requirements As a Result of Financial Regulatory Reform, According to ISDA Research', International Swaps and Derivatives Associations.

and policymakers to flag 'deceptive lobbying',[16] wherein Representative Barney Frank warned against the risk of financial institutions 'taking the end users in effect as hostages to get out from under some of these requirements'.[17] The extent of such practices and others like it is unknown, but it does appear that financial industry groups tend to be increasingly savvy at connecting their own advocacy endeavours to the fate of other groups in the business community.

How is it possible to ensure that the mobilization of business groups in financial regulatory policymaking mitigates rather than reinforces the influence of those special interests? First, the relative under-representation within financial regulatory policymaking of stakeholders from outside the business community compared to other sectors suggests that public policy intervention should be deployed towards enhancing the capacity of voices outside the business community to participate in the regulatory process. The objective of redressing some groups' underrepresentation may also require the pooling of resources to subsidize the mobilization of existing consumer groups, or the creation of independent agencies tasked to represent these concerns in the regulatory process.[18]

Second, beyond granting channels of access to the policymaking process, public policy intervention should be directed towards facilitating the capacity of those groups for whom the impact of the regulation in question is less immediate, such non-financial end users, in order to allow these groups to assess the impact that specific financial regulatory issues will have on them. For instance, granting full access to the information available to regulators, including their data, analyses, and draft texts, could compensate, at least in part, for the information asymmetry between the financial industry groups target of regulation and other stakeholders.[19] These mechanisms may reduce

[16] Johnson (2011). 'Deceptive Lobbying on Derivatives', *New York Times*, Economix Blog, 17 February 2011.

[17] Paletta (2010), 'Late Change Sparks Outcry Over Finance-Overhaul Bill', *Wall Street Journal,* 1 July 2010.

[18] Schwarcz (forthcoming). 'Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation', in *Preventing Regulatory Capture: Special Interest Influence, and How to Limit It*, by Carpenter and Moss (forthcoming). Cambridge, Cambridge University Press.

the risk that the mobilization of non-financial stakeholders will not occur uniquely around the information provided by financial industry groups targeted for regulation.

Third, regulators should play a more careful game when setting out new regulatory reforms. Interest group advocacy can be conceived as an 'informational subsidy'[20] to policymakers' efforts to understand the impact of regulatory policies. This may be helpful in particular circumstances, but it is only logical that most outside stakeholders have incentives to over-represent this impact. The distortions that this may bring to the policymaking process may be mitigated by developing a more standardized and transparent process of cost-benefit analysis within the regulatory policymaking process itself, by endowing regulatory agencies with more capacity to conduct robust impact analysis before policies are released, as well as by delegating the task of estimating the costs of regulatory policies to independent task forces capable of providing an independent and expert assessment.

Fourth, the anticipation of a widespread mobilization of financial and non-financial groups around the implementation of regulatory policies which may potentially impact the real economy signifies that regulators need to be given a clearer mandate regarding how to navigate the trade-off that often exists between bolstering financial stability and protecting the flow of credit to the real economy. This represents a grey area in the mandate of regulatory agencies and such ambiguity creates room for undue influence in the regulatory process of short-term political pressures. At the same time, greater independence from the political process is required to allow regulators to withstand widespread pressure which could emerge during a downturn to water down the implementation of reforms in order to limit any negative impact on the real economy.[21]

[19] Ayres and Braithwaite (2006). 'Tripartism: Regulatory Capture and Empowerment', *Law & Social Inquiry*, 16(3): 435-96.

[20] Hall and Deardorff (2006). 'Lobbying as Legislative Subsidy', *American Political Science Review*, 100(1): 69-84.

[21] See Green (this volume), and Valencia and Ueda (2012), 'Central Bank Independence and Macro-prudential Regulation', IMF Working Paper, WP/12/101, International Monetary Fund.

4.5 Conclusion

In this research note we have explored the unique kind of stakeholder mobilization that surrounds the rule-setting phase of financial regulation. Explicating some results from a new dataset on response letters to a variety of different regulatory policy consultations, we illustrated two important features of financial regulatory policymaking. First, financial regulation appears to be associated with a less plural degree of stakeholder mobilization when it comes to non-business groups such as NGOs, trade unions and consumer groups. Second, we demonstrated that when it comes to the mobilization of different stakeholders within the business community itself, financial regulation is associated with a great plurality of groups which mobilize.

While this latter result might be interpreted as limiting the ability of financial industry groups to exercise excessive influence over the regulatory process, we have argued that there are reasons to think otherwise, since many non-financial business groups share similar concerns about the diffuse costs of financial regulation. Different policy adjustments are required to ensure that this business plurality may function as a mitigating factor against the risk of capture, rather than amplifying the influence of special interests.