Economic Analysis and Independent Regulatory Agencies

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March 29, 2013

This draft report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees.

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I. Executive Summary

A number of individuals and organizations have recommended that independent regulatory agencies be required to prepare cost-benefit or other types of economic analyses before issuing certain rules. Others, however, have opposed such requirements. This report (1) provides information on independent regulatory agencies and their rulemaking activity in recent years; (2) discusses various crosscutting and agency-specific analytical requirements that apply to such agencies, as well as some that do not apply; (3) discusses recent reports by the Office of Management and Budget (OMB), the Government Accountability Office, agency inspectors general, and others regarding the extent to which certain independent regulatory agencies prepare cost-benefit and other types of analyses; and (4) examines the preambles of "major" final rules issued during FY2012 by these agencies to determine the extent to which cost-benefit and other types of analyses have been conducted. The report also uses interviews conducted with officials in five of the independent regulatory agencies to examine why certain analyses were not prepared for certain rules, or (if the analyses were prepared) how the analyses were used in agency decision making. The report does not take a position regarding any legislative initiatives, and does not address whether independent regulatory agencies' rules or economic analyses should be subject to review by OMB or other parties.

Agency-specific economic analysis requirements vary significantly, with some independent regulatory agencies (e.g., the Consumer Product Safety Commission) required to prepare a regulatory analysis of costs and benefits for certain rules; some (e.g., the Commodity Futures Trading Commission and the Securities and Exchange Commission) required to "consider" costs and benefits or other factors associated with their rules; and others (e.g., the Federal Communications Commission) not formally subject to any agency-specific economic analysis requirements. Previous studies indicate that independent regulatory agencies often do not quantify or monetize regulatory benefits, and often quantify and monetize only paperwork costs. (However, some of the studies appear to understate the extent to which economic analyses are done.) Examination of the 22 major rules issued by independent regulatory agencies during FY2012 indicates a somewhat similar pattern. Only one rule contained any quantitative benefit information, but 18 of the 22 rules contained at least some quantitative or monetized information about expected costs. Although paperwork costs were most commonly quantified and monetized, some of the rules were primarily about reporting and recordkeeping, so most of their costs appeared to be paperwork related. Some agency officials noted that their agencies are not required to prepare cost-benefit analyses, and said that data on costs and benefits are often not available, particularly when they are required to regulate in new areas with tight statutory deadlines.

The report recommends a series of "best practices" that independent regulatory agencies could use to improve their economic analyses. For instance, it proposes that these agencies voluntarily adopt general principles for economic analysis contained in OMB Circular A-4; use a baseline for analysis that includes both statutorily mandated requirements and those resulting from agency discretion; quantify and monetize

regulatory costs and benefits whenever possible; prepare analyses that are as transparent and reproducible as possible; and include in the proposed and final rule a summary statement or table concisely showing estimates of benefits, costs, and transfers. Other recommended best practices include the development of agency-specific written guidance on economic analysis, making analysis an early part of rule development, and using the expertise in other agencies (perhaps using the Council of Independent Regulatory Agencies as a forum) and the Office of Information and Regulatory Affairs (OIRA) within OMB. Finally, the report recommends the use of expedited PRA reviews and adequate funding for any increased analytical requirements.

II. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010, hereafter the "Dodd-Frank Act") was enacted in the wake of what many believe was the worst U.S. financial crisis since the Great Depression. However, enactment of the legislation was only the beginning of the policy process. According to the Congressional Research Service (CRS), the Dodd-Frank Act contained at least 330 provisions that expressly indicated that rulemaking was either required (about 150 provisions) or permitted (about 180 provisions).[1] More than 80% of the provisions assigned rulemaking responsibilities or authorities to one of five federal agencies: the Securities and Exchange Commission (SEC), the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission (CFTC), the Federal Deposit Insurance Corporation (FDIC), and the newly-created Consumer Financial Protection Bureau (CFPB). Dozens of other provisions in the act gave joint rulemaking responsibility or authority to two or more of these agencies (e.g., CFTC and the SEC).

All five of these agencies are considered "independent regulatory agencies," which are defined in the Paperwork Reduction Act (44 U.S.C. § 3502(5)) as 19 enumerated agencies and "other similar agenc[ies] designated by statute as a Federal independent regulatory agency."[2] Other types of executive branch agencies may be generally

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[1] U.S. Congressional Research Service, *Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, by Curtis W. Copeland, CRS Report R41472, November 3, 2010, available at http://www.llsdc.org/attachments/files/255/CRS-R41472.pdf. Other organizations have reached similar conclusions. For example, the Davis-Polk law firm has identified 398 rulemaking requirements, and produces a monthly tracking report. See http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/.

[2] Specifically, § 3502(5) lists the following as "independent regulatory agencies":

> the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency.

The United States International Trade Commission was subsequently added as one of the "other similar agenc[ies] designated by statute as a Federal independent regulatory agency." See 19 U.S.C. §1330(f) (stating that the United

categorized as Cabinet departments (e.g., the Departments of Transportation and the Treasury) and "independent" agencies that are not part of Cabinet departments, but are not independent regulatory agencies (e.g., the Environmental Protection Agency (EPA) and the Office of Personnel Management).[3] Perhaps the most agreed upon characteristic of an independent regulatory agency is what is termed "for cause" removal protection, which is intended to provide a measure of independence from presidential direction and control.[4] The heads of Cabinet departments and independent agencies generally serve "at the pleasure of the President" and therefore can be removed at any time. In contrast, the heads of independent regulatory agencies, whether part of a multi-member board like the SEC or a single administrator like the CFPB, can only be removed by the President for some type of "cause." In some cases, the underlying statute describes the type of conduct that can lead to removal,"[5] but in other cases, the "cause" is not spelled out in law.[6] In still other cases, courts have concluded that the leadership of certain agencies has "for cause" removal protection even in the absence of an explicit statement to that effect.[7]

Another characteristic of independent regulatory agencies and their separation from the President is that their rules are not subject to most executive order rulemaking requirements. Perhaps most notably, Executive Order (EO) 12866,[8] issued by President Clinton in 1993, requires Cabinet departments and independent agencies to provide the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) a cost-benefit or other type of economic analysis before issuing "economically significant" regulatory actions (e.g., proposed and final rules expected to have an annual impact on the economy of $100 million or more).[9] The analysis is

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States International Trade Commission "shall be considered to be an independent regulatory agency for purposes of chapter 35 of title 44, United States Code"). The Interstate Commerce Commission was abolished effective January 1, 1996. Some of its regulatory functions were transferred to the newly created Surface Transportation board within the Department of Transportation. Other functions were either eliminated or transferred to the Federal Motor Carrier Safety Administration or to the Bureau of Transportation Statistics within the Department of Transportation.

[3] For a more detailed discussion of types of agencies, see David E. Lewis and Jennifer L. Selin, *Sourcebook of United States Executive Agencies*, First Edition, December 2012, prepared for the Administrative Conference of the United States, available at http://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final_12-Dec_Online.pdf.

[4] Other elements of independence include whether legislative proposals, testimony, and other documents presented to Congress must be cleared through OMB; whether the agency has independent litigating authority; and whether agency budget requests are submitted to OMB and Congress simultaneously. For more information on independent regulatory agencies, see Paul R. Verkuil, "The Purposes and Limits of Independent Agencies," *Duke Law Journal*, vol. 37 (1988), pp. 257-279.

[5] For example, members of the Consumer Product Safety Commission (CPSC) "may be removed by the President for neglect of duty or malfeasance in office but for no other cause." See 15 U.S.C. § 2053(a).

[6] For example, members of the Board of Governors of the Federal Reserve hold office for a term of 14 years "unless sooner removed for cause by the President." See 12 U.S.C. § 242.

[7] Lower courts have inferred the application of a "for cause" removal restriction in at least three agencies—the SEC, the National Credit Union Administration, and the Federal Election Commission. For a discussion of this issue, see CRS Report R42720, *Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues*, by Vivian S. Chu and Daniel T. Shedd (September 10, 2012), pp. 16-18, available at http://www.fas.org/sgp/crs/misc/R42720.pdf.

[8] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993.

[9] Section 3(f) of EO 12866 defines a "significant" regulatory action as one that satisfies any of four conditions: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the

required to include not only an assessment of anticipated costs and benefits (quantified, to the extent feasible), but also an identification of "potentially effective and reasonably feasible alternatives to the planned regulation… and an explanation why the planned regulatory action is preferable to the identified potential alternatives."[10] Independent regulatory agencies are not covered by these requirements in the executive order.[11]

The volume of rulemaking expected to result from the Dodd-Frank Act has increased concerns about the quality of the rules issued by independent regulatory agencies, and has led to calls from a variety of quarters that these agencies be required to prepare cost-benefit or other types of economic analyses before issuing economically significant rules.[12] For example, at a February 2011 congressional hearing, Professor Peter L. Strauss of Columbia Law School (and former general counsel of the Nuclear Regulatory Commission) referenced the analytical requirements in EO 12866 and said:

> [S]houldn't Congress also bring the independent regulatory commissions under these mandates? Presidents haven't done that, as I understand it, only because they fear the political costs to their relationship with you, with the Congress. Given the extraordinary range of rulemaking Dodd-Frank requires of independent commissions, Congress ought to welcome this change.[13]

Also, in its 2011 interim and final reports, the President's Council on Jobs and Competitiveness (a panel of non-governmental experts from business, labor, academia and elsewhere) recommended that legislation be enacted to require independent regulatory agencies to conduct cost-benefit analysis for all new "economically significant" regulatory actions.[14] In September 2012, seven former OIRA Administrators sent a letter to the Chairman of the Senate Committee on Homeland Security and Governmental Affairs stating that independent regulatory agencies "typically do not engage in the economic analysis that has come to be expected from executive agencies,"

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rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order. Rules fitting the first of these conditions are often referred to as "economically significant" regulatory actions.

[10] Ibid., Section 6(a)(3)(B).

[11] Section 3(b) of Executive Order 12866 defines an "agency" (unless otherwise indicated) as "any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies…." Independent regulatory agencies are, however, covered by the requirements in Section 4(b) and Section 4(c) of the executive order pertaining to the development of a unified regulatory agenda and a regulatory plan.

[12] Calls for independent regulatory agencies to be covered by cost-benefit analysis requirements are not new. See, for example, Robert H. Hahn and Cass R. Sunstein, "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis," *University of Pennsylvania Law Review*, volume 50 (2002), pp. 1489-1552, in which the authors said (p. 1494) that "the commitment to cost-benefit analysis has been far too narrow; it should be widened through efforts to incorporate independent regulatory commissions within its reach."

[13] Hearing before the Subcommittee on Courts, Commercial and Administrative Law, House Committee on the Judiciary, "APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?," February 28, 2011, Serial No. 112-17, p. 42. See http://judiciary.house.gov/hearings/printers/112th/112-17_64854.PDF for a copy of the hearing record. The other two witnesses at that hearing (Susan Dudley, former OIRA Administrator during the George W. Bush Administration, and Jeffrey A. Rosen, former general counsel at OMB and the Department of Transportation) also supported extending cost-benefit analysis requirements to independent regulatory agencies.

[14] See http://files.jobs-council.com/files/2011/10/JobsCouncil_Regulatory.pdf for a summary of the final report. See http://files.jobs-council.com/jobscouncil/files/2011/10/JobsCouncil_InterimReport_Oct11.pdf for a copy of the full interim report. The council, according to the White House website, "was created to provide non-partisan advice to the President on continuing to strengthen the Nation's economy and ensure the competitiveness of the United States and on ways to create jobs, opportunity, and prosperity for the American people."

and that those agencies "should be held to the same good-government standards as executive agencies."[15]

However, not everyone believes independent regulatory agencies should be subject to these types of analytical requirements. Some of the objections center on maintaining the independence of these agencies from the President. For example, Rena Steinzor of the Center for Progressive Reform said:

> Congress created independent agencies exactly so that they'd have some room to resist presidential political meddling. Subjecting these agencies to Executive Order requirements…defeats the whole point of making the agencies independent at the outset. Congress wanted these agencies to be able to use their unique expertise on policy matters to develop the best solutions to the social problems that Congress created them to address.[16]

Similarly, Amit Narang of Public Citizen said these agencies "independent for a reason," and legislation to make them subject to analysis requirements from the President "changes things to a great degree." [17] In October 2012, the heads of six independent regulatory agencies wrote to the Chairman and Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs expressing their concerns about pending legislation that would allow the President to require the agencies to prepare cost-benefit analyses for their economically significant rules.[18] Among other things, they said the bill would "give the President unprecedented authority to influence the policy and rulemaking functions of independent regulatory agencies and would constitute a fundamental change in the role of independent regulatory agencies."

A. Objectives, Scope, and Methodology

The primary objective of this report[19] is to assess the extent to which independent regulatory agencies currently prepare cost-benefit and other types of economic analyses in connection with the issuance of their "economically significant" or "major" rules.[20]

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[15] See http://portman.senate.gov/public/index.cfm/files/serve?File_id=563c60e4-3770-4329-b1aa-ff51752cd750 for a copy of the letter. Those signing the letter were Sally Katzen, John Spotila, Christopher C. DeMuth, Wendy Lee Gramm, Susan Dudley, James C. Miller III, and John D. Graham.

[16] Rena Steinzor, "The Independent Agency Regulatory Analysis Act, as Critiqued by Co-Sponsor Susan Collins and Me," at http://www.progressivereform.org/CPRBlog.cfm?idBlog=E42958C4-B61A-8FDA-62ACBF689F7D0313.

[17] Kevin Miller, "Bill Questions Oversight of Powerful Independent Agencies," *Morning Sentinel*, September 13, 2012, p. B.2, at http://www.onlinesentinel.com/news/bill-questions-oversite-of-powerful-independent-agencies_2012-09-12.html.

[18] See http://www.buckleysandler.com/uploads/104/doc/10-26-12%20Agency%20Letter%20to%20Lieberman%20re%20S%203468.pdf for a copy of this letter. Agency heads signing the letter were from the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, CFPB, the SEC, FDIC, and the National Credit Union Administration. The then-pending legislation, S. 3468 in the 112th Congress, is discussed later in this report.

[19] This report can be viewed as related to an earlier report the author prepared for ACUS on the analytical requirements in rulemaking. See http://www.acus.gov/wp-content/uploads/downloads/2012/03/COR-Copeland-Report-CIRCULATED.pdf for a copy of that report.

[20] The Congressional Review Act (5 U.S.C. § 804(2)) defines a "major" rule as "any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for

Major or economically significant rules are the focus of this report because some current analytical requirements only apply to such rules (e.g., EO 12866), and they are more likely to trigger other requirements than non-major rules. As discussed later in this report, such rules are also the focus of several recent legislative proposals.

If the research indicates that certain independent regulatory agencies are not preparing cost-benefit or other economic analyses for these rules, the report will discuss the reasons why, including any considerations that may be unique to such agencies or categories of agencies (e.g., financial regulatory agencies). If the research indicates that certain independent regulatory agencies are preparing such analyses, the report will discuss how those agencies use the results in crafting their rules. Finally, the report will identify any "best practices" that appear applicable to the preparation and use of economic analyses by independent regulatory agencies.

To address these objectives, the report (1) provides background information on rulemaking requirements in general and the rulemaking activity of independent regulatory agencies in recent years; (2) discusses various crosscutting and agency-specific analytical requirements that apply to independent regulatory agencies, as well as some that do not apply; (3) discusses recent reports by OMB, the Government Accountability Office (GAO), agency inspectors general, and others regarding the extent to which certain independent regulatory agencies prepare cost-benefit and other types of analyses; and (4) examines GAO major rule reports and the preambles of major final rules issued during FY2012 by these agencies to determine the extent to which cost-benefit and other types of analyses have been conducted.[21] The report also uses interviews conducted with officials in five of the independent regulatory agencies that issued many of these rules (i.e., the SEC, CFTC, the Nuclear Regulatory Commission (NRC), the Consumer Product Safety Commission (CPSC), and the Federal Communications Commission (FCC)) to examine why analyses were not prepared for certain rules, or (if the analyses were prepared) how the analyses were used in agency decision making.[22]

The report does not take a position regarding any legislative initiatives, and does not address whether independent regulatory agencies' rules or economic analyses should be subject to review by OIRA or other parties.[23] Nor will the report examine whether

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consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act." The definitions of "major" and "economically significant" rules are similar, and most "economically significant" rules are also considered "major." Some rules may be considered "major" that are not "economically significant" (e.g., rules that would have a significant adverse effect on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets). See p. 5 of OMB guidance on the CRA, available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m99-13.pdf.

[21] The major final rules and the agencies issuing them were identified using the GAO rules database that was developed pursuant to the CRA The GAO database may be accessed at http://gao.gov/legal/congressact/fedrule.html.

[22] Officials in two other agencies, the Federal Reserve System and the Consumer Financial Protection Bureau, would not agree to an interview.

[23] The Administrative Conference of the United States has supported presidential review of independent regulatory agencies' rules for nearly 25 years. See ACUS Recommendation 88-9, which says "As a matter of principle,

agencies are understating the impact of their rules to avoid being considered "major" or "economically significant,"[24] or whether the agencies are conducting retrospective reviews of existing regulations. The term "economic analysis" is used in this report to refer to a variety of analyses that are required before agencies issue final rules, including (but not limited to) cost-benefit analysis (sometimes referred to as "benefit-cost analysis").

III. Background

As **Table 1** below shows, from January 2007 through December 2012, independent regulatory agencies generally did not issue as many final rules, or as many major final rules, as certain Cabinet departments and independent agencies like EPA. Among the independent regulatory agencies, the FCC published the most final rules during this six-year period, but the SEC, the Federal Reserve System, and CFTC published the most major final rules.

Table 1: Final and Major Final Rules Issued by Selected Agencies, 2007 – 2012

Agency	Final Rules	Major Final Rules
Independent Regulatory Agencies		
CFTC	72	15
CFPB	33	1
CPSC	44	2
FCC	421	7
FDIC	59	0
FERC	85	3
Federal Reserve System	68	17
FTC	44	1
NCUA	67	0
NRC	103	8
SEC	119	39
Departments/Independent Agencies		
Agriculture	947	33
Commerce	1,966	5

presidential review of rulemaking should apply to independent regulatory agencies to the same extent it applies to the rulemaking of Executive Branch departments and other agencies." The recommendation is available at http://www.acus.gov/acus-recommendations/presidential-review-of-agency-rulemaking/.

[24] Others have focused on this issue. See Joseph Aldy, Art Fraas, and Randal Lutter, "Financial Regulation Sans Analysis," *Politico*, June 21, 2012, available at http://www.politico.com/news/stories/0612/77644_Page2.html, in which the authors call on OMB to "establish regular and formal consultations with all the independent financial regulatory agencies to ensure reasoned and consistent determinations as to whether their regulations are 'major.'"

Energy	111	20
Health/Human Services	521	131
Homeland Security	4,609	15
Labor	133	17
Transportation	4,245	26
EPA	2,808	33
All Other Agencies	2,791	113
Total	19,246	485

Note: Table shows independent regulatory agencies with at least 20 final rules published during the period, and other agencies with substantial numbers of final rules. The Comptroller of the Currency published 44 final rules and 4 major rules during this period, but was not an independent regulatory agency until July 2010. From then through December 2012, it published 21 final rules and 2 major final rules (14 rules and 1 major rule after the transfer of functions from the Office of Thrift Supervision). CFPB did not exist before enactment of the Dodd-Frank Act in July 2010. "FERC" is the Federal Energy Regulatory Commission, "FTC" is the Federal Trade Commission, and "NCUA" is the National Credit Union Administration.

Source: GAO rules database, available at http://gao.gov/legal/congressact/fedrule.html. Accessed March 25, 2013.

Table 2 below shows the number of rules and major rules issued by certain independent regulatory agencies, by year, from January 2007 through December 2012. As the table indicates, the annual pace of rulemaking in some agencies has been relatively stable over time (e.g., the NRC), but has changed in other agencies (e.g., CFTC). Most of the NRC's major rules were considered "major" because they annually established licensing, inspection, and annual fees of more than $100 million that are charged to the agency's applicants and licensees, not because of traditional regulatory compliance costs or benefits.[25] The FCC issued the largest number of final rules each year, but had not issued a major rule since 2008 (when it issued five such rules). In contrast, CFTC issued no major rules until August 2011, but issued 15 major rules in the next 13 months – reflecting its increased rulemaking responsibilities since the enactment of the Dodd-Frank Act in July 2010.

Table 2: Final and Major Final Rules Issued by Selected Independent Regulatory Agencies by Year, 2007 – 2012

Agency	Rules	2007	2008	2009	2010	2011	2012
CFTC	All	14	6	7	5	20	20
	Majors	0	0	0	0	6	9
CFPB	All	0	0	0	0	17	16
	Majors	0	0	0	0	0	1

[25] The Omnibus Budget Reconciliation Act of 1990, as amended (42 U.S.C. § 2214) generally requires the NRC to recover through fees approximately 90% of its budget authority, which in recent years has been just under $1 billion. See, for example, U.S. Nuclear Regulatory Commission, "Revision of Fee Schedules; Fee Recovery for FY 2010," 75 *Federal Register* 34219, June 16, 2010.

Agency	Rules	2007	2008	2009	2010	2011	2012
CPSC	All	3	8	7	11	7	8
	Majors	0	0	0	1	1	0
FCC	All	59	91	93	59	67	52
	Majors	2	5	0	0	0	0
FDIC	All	2	14	17	8	12	6
	Majors	0	0	0	0	0	0
FERC	All	13	19	12	13	16	12
	Majors	1	1	1	0	0	0
FRS	All	10	11	18	8	15	6
	Majors	0	2	6	6	3	0
NCUA	All	10	10	11	16	16	4
	Majors	0	0	0	0	0	0
NRC	All	21	15	12	15	14	26
	Majors	2	1	2	1	1	1
SEC	All	19	21	20	23	21	15
	Majors	5	7	7	9	8	3

Note: Table shows the same independent regulatory agencies as included in Table 1.

Source: GAO's rules database, available at http://gao.gov/legal/congressact/fedrule.html. Accessed March 25, 2013.

The pace of agency rulemaking may be affected by legal challenges and agencies' responses to those challenges. A May 2012 article in *Bloomberg Businessweek* noted a July 2011 case (discussed later in this report) in which an SEC rule was successfully challenged for having an insufficient cost-benefit analysis, and said the agency's rulemaking subsequently "ground to a near-halt, with just 24 agency economists working full-time to provide analyses for dozens of proposed policies, including 24 unfinished Dodd-Frank rules."[26] As **Table 2** shows, the pace of major and non-major rulemaking at the SEC does appear to have slowed somewhat during 2012. However, SEC officials told the author of this report that the slower pace may also be a function of adopting highly

[26] Steven Sloan, "Cost-Benefit Analysis Puts the Brakes on Dodd-Frank," *Bloomberg Businessweek*, May 7, 2012, available at http://www.bloomberg.com/news/2012-05-07/cost-benefit-analysis-puts-the-brakes-on-dodd-frank.html.

complex rules in areas unfamiliar to the agency (e.g., "Disclosure of Payments by Resource Extraction Issuers"[27] and "Conflict Minerals"[28]), and because of the tens of thousands of comment letters the agency has received regarding some of its recent rules.

A. Some Crosscutting Analytical Requirements Are Not Directly Applicable to Independent Regulatory Agencies

Rulemaking in most executive branch agencies is governed by statutes like the Administrative Procedure Act of 1946 (APA, 5 U.S.C. §§ 551-559), which generally requires agencies to publish a notice of proposed rulemaking (NPRM), give "interested persons" an opportunity to comment, publish a final rule (accompanied by a concise statement of basis and purpose), and not make that final rule effective until at least 30 days after its publication. Section 706(2)(A) of the APA instructs courts reviewing regulations to set aside any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Another crosscutting rulemaking requirement is the Congressional Review Act (CRA, 5 U.S.C. §§ 801-808), which requires agencies to submit their final rules to GAO and Congress before they can take effect,[29] and generally requires agencies to delay the effective dates of "major" final rules (e.g., those expected to have an annual effect on the economy of $100 million or more) until 60 days after the date that the rules are published in the *Federal Register* or submitted to Congress, whichever is later.[30] The Act also requires GAO to provide a report to the congressional committees of jurisdiction within 15 calendar days after each major rule is submitted or published, with the report summarizing the issuing agency's compliance with relevant rulemaking requirements.[31]

As discussed later in this report, several other crosscutting rulemaking requirements – the Paperwork Reduction Act, the Regulatory Flexibility Act, and the National Environmental Policy Act – require most federal agencies to prepare some type of analysis before publishing their rules in the *Federal Register*. However, other crosscutting analytical requirements are not directly applicable to independent regulatory agencies. Two of these non-applicable requirements are discussed below – EO 12866 and the Unfunded Mandates Reform Act of 1995 (UMRA, 2 U.S.C. §§ 1532-1538). Although EO 12866 appears to have a substantial effect on agency rulemaking behavior, UMRA does not appear to have had much effect.

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[27] 77 *Federal Register* 56365, September 12, 2012.

[28] 77 *Federal Register* 56273, September 12, 2012.

[29] 5 U.S.C. § 801(a)(1).

[30] 5 U.S.C. § 801(a)(3).

[31] 5 U.S.C. § 801(a)(2)(A). To access these reports, see http://www.gao.gov/decisions/majrule/majrule.php. In the reports, GAO generally summarizes the agencies' economic analyses, and does not prepare its own analysis.

1. Executive Order 12866

Executive Order 12866 replaced EO 12291, issued by President Reagan in 1981, which had also required cost-benefit analysis for certain high-profile rules.[32] Section 1(a) of EO 12866 provides a "Regulatory Philosophy," and states that covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies)[33]

> should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

Section 1(b) of EO 12866 delineates certain "Principles of Regulation" that covered agencies "should adhere to" (to the extent permitted by law and where applicable). For example, the agencies are told that they should:

- design their regulations "in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity."

- assess both the costs and the benefits of their intended regulations and, "recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[34]

- tailor their regulations "to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory

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[32] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 19, 1981. Section 3 of this executive order required covered agencies to "prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis" for their "major" rules (e.g., rules expected to have an annual effect on the economy of $100 million or more).

[33] Section 3(b) of Executive Order 12866 defines an "agency" as in 44 U.S.C. § 3502(1), excluding independent regulatory agencies as defined in 44 U.S.C. § 3502(10), "unless otherwise indicated." The only portions of the executive order that apply to independent regulatory agencies are the planning mechanisms in Section 4(b) and Section 4(c). In a memorandum to agencies, Sally Katzen, then Administrator of OIRA, said that "while the President's 'Statement of Regulatory Philosophy and Principles' (Sec. 1) applies by its terms only to those agencies that are not independent, the IRCs are requested on a voluntary basis to adhere to the provisions that may be pertinent to their activities." See http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/eo12866_implementation_guidance.pdf for a copy of this memorandum.

[34] The requirement that agencies adopt regulations only if the benefits "justify" the costs is seen as a somewhat different threshold than the one in Executive Order 12291, which had required agencies to determine that regulatory benefits "outweigh" the costs.

objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."

a) Analytical Requirements

The primary analytical requirements in EO 12866 are in Section 6(a)(3) of the executive order. For each "significant" regulatory action (during recent years, an average of more than 600 proposed rules, final rules, and other actions per year),[35] covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) are generally required to provide to OIRA:

> An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.[36]

OIRA does not consider this "assessment" language to require a formal cost-benefit analysis. However, for each "economically significant" regulatory action (an average of about 120 actions each year during recent years),[37] the executive order's requirements are more detailed. Agencies are generally required to provide OIRA with the above information, as well as the following:

> i. An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
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> ii. An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
>
> iii. An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.[38]

This language has been interpreted by OIRA to require a formal cost-benefit or other type of economic analysis.

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[35] Data on the number of reviews are available at http://www.reginfo.gov/public/do/eoCountsSearch.

[36] Section 6(a)(3)(B) of EO 12866.

[37] According to the OMB review database (http://www.reginfo.gov/public/do/eoCountsSearch), OIRA reviewed 600 economically significant regulatory actions between January 1, 2007, and December 31, 2011, for an average of 120 per year.

[38] Section 6(a)(3)(C) of EO 12866.

b) OMB Circular A-4

The analytical requirements in EO 12866 are further elaborated in OMB Circular A-4,[39] which says a good economic analysis contains three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.

- With regard to need, Circular A-4 states that the agency should describe the statutory or judicial directives that authorize the action, and describe the problem that it intends to address. The underlying problem can involve a market failure (e.g., a monopoly that adversely affects consumers, or inadequate information about a product) or other social purposes (e.g., to combat discrimination).

- After determining that federal regulation is needed, Circular A-4 requires the agency to consider a reasonable number of alternative regulatory approaches available within the statutory authority provided to the agency. For example, the circular says agencies should consider different compliance dates, enforcement methods, levels of stringency, requirements based on firm size or geographic region; performance standards instead of design standards, market approaches instead of direct controls; and informational measures instead of regulation. The agency should also consider other alternatives to federal regulation, including the option of state or local regulation.

- With regard to analytical approaches, the circular says agencies should consider using both cost-benefit analysis and cost-effectiveness analysis.[40] When all benefits and costs can be expressed in monetary units, cost-benefit analysis can clearly indicate which approach is most efficient in terms of net benefits.[41] However, in many (and perhaps most) cases, agencies are not able to express all of the benefits or costs in monetary units. In such cases, Circular A-4 states that cost-benefit analysis "is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs."[42] Analysts should therefore attempt to quantify benefits or costs as much as possible (e.g., tons of pollution avoided, or the

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[39] OMB Circular A-4, September 17, 2003, available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf. The circular took effect for "economically significant" proposed rules on January 1, 2004, and for "economically significant" final rules on January 1, 2005.

[40] According to Circular A-4 (p. 11), cost-effectiveness analysis "can provide a rigorous way to identify options that achieve the most effective use of the resources available without requiring monetization of all of relevant benefits or costs. Generally, cost-effectiveness analysis is designed to compare a set of regulatory actions with the same primary outcome (e.g., an increase in the acres of wetlands protected) or multiple outcomes that can be integrated into a single numerical index (e.g., units of health improvement)."

[41] For example, if Option A has expected costs of $100 million and expected benefits of $200 million, the net benefits are $100 million. If Option B has expected costs of $200 million, and expected benefits of $400 million, the net benefits are $200 million. In this scenario, Option B produces the largest net benefits.

[42] OMB Circular A-4, p. 10.

number of children who will not suffer discrimination), and "exercise professional judgment" in determining whether non-quantified factors are important enough to justify consideration of the regulation. The circular also indicates that cost-effectiveness analysis must be used with care.[43]

The circular also requires an "accounting statement" with tables reporting benefit and cost estimates for each major final rule. For rules involving annual economic effects of $1 billion or more, the circular says agencies should present a "formal quantitative analysis of the relevant uncertainties about benefits and costs," including estimates of the central tendency (e.g., mean and median), ranges, and other characteristics of the distribution.

c) Supplemental Publications

The Obama Administration has published several documents that supplement, but do not change, these requirements. On October 28, 2010, OMB published an agency checklist for the regulatory impact analyses required by EO 12866 and Circular A-4.[44] It contains repeated references to provisions in the executive order and the circular, and states that nothing in the checklist "alters, adds to, or reformulates existing requirements in any way." Among other things, the checklist asks whether the agency's analysis (1) has a reasonably detailed description of the need for the regulatory action, (2) explains how the action will meet that need, (3) quantifies and monetizes the expected costs and benefits of the action to the extent feasible, (4) explains and supports a reasoned justification that the benefits of the regulatory action justify the costs, (5) assesses the potentially effective and reasonable alternatives to the action (including at least one alternative that is more stringent and less stringent), and (6) explains why the planned regulatory action is preferable to those alternatives.

On January 18, 2011, President Obama issued Executive Order 13563 on "Improving Regulation and Regulatory Review."[45] The executive order is described as "supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in EO 12866 of September 30, 1993." It reiterates many of the principles in the 1993 executive order (e.g., that benefits should "justify" costs, and that agencies should select the regulatory alternative that maximizes net benefits). The primary new element was a requirement that agencies develop a plan for the retrospective review of their existing regulations to determine if any should be modified, streamlined, expanded, or repealed. The order defined a covered agency in the same way as Executive Order 12866, and therefore did not apply to independent regulatory agencies.

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[43] For example, the circular states that the "alternative that exhibits the smallest cost-effectiveness ratio may not be the best option, just as the alternative with the highest benefit-cost ratio is not always the one that maximizes net benefits."

[44] See http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf for a copy of the checklist.

[45] Executive Order 13563, "Improving Regulation and Regulatory Review," 76 *Federal Register* 3821, January 21, 2011.

On July 11, 2011, President Obama issued Executive Order 13579 requesting, but not requiring, independent regulatory agencies to follow the principles in EO 13563 "to the extent permitted by law." Section l(a) of the executive order states that, "to the extent permitted by law, [regulatory] decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative)." The executive order also instructed each of those agencies to develop plans for the review of its existing rules, "consistent with law and reflecting its resources and regulatory priorities and processes."[46] On July 22, 2011, the OIRA Administrator issued a memorandum to the heads of independent regulatory agencies providing guidance on the implementation of Executive Order 13579.[47] Among other things, the memorandum states "agencies may well find it useful to engage in a retrospective analysis of the costs and benefits (both quantitative and qualitative) of regulations chosen for review. Such analyses can inform judgments about whether to modify, expand, streamline, or repeal such regulations, and can also provide valuable insight on the strengths and weaknesses of pre-regulatory assessments, which can be used to enhance the agency's analytic capability."[48]

On February 7, 2011, OMB published a document entitled "Regulatory Impact Analysis: Frequently Asked Questions."[49] Again, OMB said "nothing said here is meant to alter existing requirements in any way." Among other things, OMB indicated that:

- A rule may be considered "economically significant" if it expected to have $100 million in costs, benefits, or budgetary "transfers" in any one year (e.g., federal grants, food stamps, Medicare or Medicaid reimbursements, and crop payments), and rules that do not cross that threshold but adversely affect a small sector of the economy and would threaten to create significant job loss would still be considered "economically significant."

- Agencies' regulatory impact analyses should be presented in plain language, and should include a clear executive summary of their central conclusions and an accounting statement with a table summarizing the expected costs, benefits, and transfers.

- When considering regulatory alternatives, agencies should begin by asking whether to regulate at all, and should consider deferring to regulation at the state or local level. If federal regulation is needed, agencies should consider analyzing at least three options: the preferred option, a more stringent option, and a less stringent one. Agencies should also generally include a sensitivity analysis showing how results can vary with changes in assumptions, data, and analytical approaches.

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[46] Executive Order 13579, "Regulation and Independent Regulatory Agencies," 76 *Federal Register* 41587, July 14, 2011.

[47] See http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf for a copy of this memorandum.

[48] Ibid., p. 5.

[49] See http://www.whitehouse.gov/sites/default/files/omb/circulars/a004/a-4_FAQ.pdf for a copy of this document.

d) EO 12866/Circular A-4 in Practice

EO 12866 and Circular A-4 appear to have a substantial effect on rulemaking within the covered departments and agencies. Of the 100 major rules issued in 2010, 83 were issued by non-independent regulatory agencies covered by the executive order. Of these, the agencies mentioned EO 12866 in all 83 rules, and prepared some type of regulatory analysis in 73 of the rules.[50] Unlike some other crosscutting analytical requirements, EO 12866 does not give the agencies substantial discretion to decide whether the requirements are triggered, and does not exempt final rules that are issued without a notice of proposed rulemaking.

2. Unfunded Mandates Reform Act

Section 202 of UMRA requires covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to, among other things, prepare a written statement containing specific descriptions and estimates for any proposed rule or any final rule for which a proposed rule was published that includes any federal mandate that may result in the expenditure of $100 million or more (indexed for inflation) in any year by state, local, or tribal governments, in the aggregate, or the private sector. The written statement is to contain (among other things) a "qualitative and quantitative assessment of the anticipated costs and benefits ... as well as the effect of the Federal mandate on health, safety, and the natural environment." It is also generally required to include estimates of future compliance costs, and any disproportionate budgetary effects on particular regions, governments, or segments of the private sector, and estimates of effects on the national economy, including effects on job creation, productivity, full employment, and international competitiveness. Also, Section 205 of UMRA generally requires agencies preparing a written statement to "identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule," or explain why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted, or why the provisions are inconsistent with law. However, UMRA's analytical requirements do not apply if the agency issues the final rule without a previous notice of proposed rulemaking, if the rule is not considered a "mandate" (e.g., a condition of federal financial assistance, or a duty arising from participation in a voluntary federal program); if it incorporates requirements specifically set forth in law; and for various other reasons.

a) UMRA in Practice

[50] These data, and those in subsequent sections of the report citing the major rules issued in 2010, are drawn from the author's previous report for ACUS. See http://www.acus.gov/wp-content/uploads/downloads/2012/03/COR-Copeland-Report-CIRCULATED.pdf for a copy of this report.

In practice, UMRA seldom results in regulatory analyses that are not already required by EO 12866. Because of numerous exceptions and exclusions in the Act, the set of rules that are subject to UMRA's analytical requirements are a subset of the rules that are subject to the analytical requirements in EO 12866. In 1998, GAO reported that 78 of the 110 economically significant final rules issued in the first two years of UMRA's implementation did not require a written statement for one or more reasons.[51] In 2004, GAO said that federal agencies identified only 9 of the 122 major and/or economically significant rules published in 2001 or 2002 as containing mandates under UMRA.[52] GAO also reported that 65 of the 113 rules that had not triggered UMRA had impacts on nonfederal parties that those affected might perceive as unfunded mandates. In February 2011 congressional testimony, GAO reiterated these conclusions, noting that there are 14 reasons why a rule would not be considered a "mandate" under UMRA.[53]

Of the 100 major rules issued in 2010, the agencies prepared a written statement pursuant to Section 202 of UMRA in only 4 rules. In the remaining rules, the agencies either did not mention the statute at all (23 rules), referred to another analysis as satisfying the requirements of UMRA (9 rules), or cited one of the many exemptions and exceptions to UMRA coverage, such as no "expenditures" of at least $100 million in a year (30 rules), no UMRA "mandate" as defined in the Act (16 rules), or no prior notice of proposed rulemaking (9 rules).

B. Presidential Authority

Although scholars have long debated the limits of presidential authority in rulemaking,[54] it is unclear whether the President currently has the constitutional or statutory authority to unilaterally direct independent regulatory agencies to prepare cost-benefit or other types of economic analyses before issuing certain rules.[55] Over the years, various observers have cited legal opinions reportedly written by the Office of Legal Counsel (OLC) within the Department of Justice that supposedly state that the President already has this authority, based on his Article II responsibility to "take Care that the Laws are faithfully executed."[56] A common refrain is that President Reagan and President Clinton decided not to extend the analytical requirements in EO 12291 and EO 12866 to independent regulatory agencies for political, not legal, reasons. For example, in April 2011, Sally Katzen, OIRA Administrator during the Clinton Administration and one of the authors of EO 12866, said that both President Reagan and President Clinton consulted the Department of Justice and decided not to include independent regulatory agencies in their executive orders requiring cost-benefit analysis "not because they did not have the authority to do so, but rather for political reasons."[57] She went on to say that "[w]ith the

[51] U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions*, GAO/GGD-98-30, February 4, 1998.

[52] U.S. General Accounting Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

[53] Testimony of Denise M. Fantone, Director, Strategic Issues, U.S. Government Accountability Office, before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, House Committee on Oversight of Government Management, available at http://www.gao.gov/products/GAO-11-385T.

benefit of hindsight, presidential advisers today might reach a different judgment."[58] In September 2012, seven former OIRA Administrators sent a letter to the Chairman of the Senate Committee on Homeland Security and Governmental Affairs stating (in part) that "[l]egal advisors to both President Reagan and President Clinton concluded that the president has the legal power to extend these requirements to independent agencies, but both presidents chose not to do so out of deference to Congress."[59] However, the letter did not cite any particular OLC opinion in support of this statement.

A review of publicly available OLC opinions[60] indicated that the only opinion issued during the Reagan or Clinton Administrations that directly addressed this subject was issued on February 13, 1981.[61] If anything, this opinion supports the opposite proposition – i.e., that independent regulatory agencies are *less* subject to presidential direction than other types of agencies. In its only reference to independent regulatory agencies, the opinion stated that:

> [I]t is unclear to what extent Congress may insulate Executive agencies from presidential supervision. Congress is also aware of the comparative insulation given to the independent regulatory agencies, and it has delegated rulemaking authority to such agencies when it has sought to minimize presidential interference. By contrast, the heads of non-independent agencies hold their positions at the pleasure of the President, who may remove them from office for any reason. It would be anomalous to attribute to Congress an intention to immunize from presidential supervision those who are, by force of Art. II, subject to removal when their performance in exercising their statutory duties displeases the President.

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[54] See, for example, Christopher S. Yoo, Steven G. Calabresi, Anthony J. Colangelo, "The Unitary Executive in the Modern Era, 1945-2004," *Iowa Law Review*, vol. 90 (Jan. 2005), pp. 601- 731; Robert Percival, "Presidential Management of the Administrative State: The Not-So Unitary Executive," *Duke Law Journal*, vol. 51 (December 2001), pp. 963-1013; Peter L. Strauss, "Overseer, or 'The Decider': The President in Administrative Law," *George Washington University Law Review*, vol. 75 (2007), pp. 696-760; Thomas O. Sargentich, "The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration," *Administrative Law Review*, vol. 59 (2007), pp. 1-36; and Elena Kagan, "Presidential Administration," *Harvard Law Review*, vol. 114 (June 2001), pp. 2245- 2385.

[55] See letter from Jim Tozzi, Center for Regulatory Effectiveness, to John Morall, Office of Management and Budget, January 24, 2002, available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/comments/comment83.pdf. Mr. Tozzi cites the January 13, 1981, OLC opinion, and says "It unclear whether it would be constitutionally permissible to apply the requirements of an Executive Order 12291or 12866to independent agencies."

[56] See, for example, Christopher C. DeMuth and Douglas H. Ginsburg, "Commentary: White House Review of Agency Rulemaking," *Harvard Law Review*, volume 99 (March 1986), pp. 1075-1088, at note 13, available at http://www.thecre.com/pdf/20110620_OMB_Review_DeMuth_Ginsburg.pdf.

[57] See http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_KatzenRemarks.pdf for Ms. Katzen's comments. To view the Department of Justice memorandum during the Reagan Administration, see http://www.thecre.com/pdf/DJMemoReaganEO12291PDF.pdf. As discussed later in this report, the final version of this memorandum does not clearly state that the President could require independent regulatory agencies to engage in cost-benefit or other types of economic analysis.

[58] Ms. Katzen repeated those sentiments at a March 21, 2012, congressional hearing before the Subcommittee on Courts, Commercial and Administrative Law, House Committee on the Judiciary. See http://judiciary.house.gov/hearings/Hearings%202012/Katzen03212012.pdf, p. 4.

[59] See http://portman.senate.gov/public/index.cfm/files/serve?File_id=563c60e4-3770-4329-b1aa-ff51752cd750 for a copy of the letter.

[60] See http://www.justice.gov/olc/memoranda-opinions.html for opinions back to 1992. Other searches of OLC opinions were performed using Westlaw and Lexis-Nexis.

[61] See http://thecre.com/pdf/DJMemoReaganEO12291PDF.pdf for a copy of this memorandum.

1. A February 12, 1981, Document

Some of those who have written and commented on this issue have cited an OLC opinion dated February 12, 1981 – the day before the above-mentioned opinion.[62] However, the February 12 document may not be a formally issued OLC opinion. It was first mentioned during a June 1981 hearing on "The Role of OMB in Regulation," when then-OMB Director James Miller cited it as support for the potential application of Executive Order 12291 to independent regulatory agencies.[63] When Mr. Miller and then-White House Counsel C. Boyden Gray expressed reluctance to provide the OLC opinion (because the executive order as issued did not cover independent regulatory agencies), Subcommittee Chairman John Dingell instructed them to do so "at your earliest convenience." At that point, Mr. Miller said his earlier answer "*was predicated on a citation of the wrong opinion. The opinion I had in mind was the one that went with the Executive order. There was an earlier opinion that I think….*" (Emphasis added.) Mr. Dingell then said "All right. In order to be helpful to you, we will take both documents." The hearing record includes a copy of the February 12 document as well as the February 13 OLC opinion that was later included in the Reagan Administration's regulatory plan,[64] and which has been cited by those who worked at OMB at the time.[65] Citations to the February 12 document almost always directly or indirectly reference this June 1981 hearing record.[66]

The February 12 document contains a six-page section on "Independent Regulatory Commissions" that was eliminated from the OLC opinion that was issued on February

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[62] See, for example, American Bar Association, Section of Administrative Law and Regulatory Practice, Letter to OIRA, March 16, 2009 (hereafter, "Administrative Law Section Letter"), available at http://www.reginfo.gov/public/jsp/EO/fedRegReview/ABANET_comments.pdf; and CRS Report R42720, *Presidential Review of Independent Regulatory Commission Rulemaking: Legal* Issues, by Vivian S. Chu and Daniel T. Shedd, September 10, 2012, available at http://www.fas.org/sgp/crs/misc/R42720.pdf. A copy of this February 12 document is available from the author of this report.

[63] U.S. House of Representatives, Hearing before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, "Role of OMB in Regulation," 97th Congress, First Session, June 18, 1981, Serial No. 97-70, pp. 100-101. Mr. Miller was asked about a statement in an April 1981 issue of *Regulation* magazine in which he said the Reagan Administration chose not to apply EO 12291 to independent regulatory agencies for policy, not legal, reasons.

[64] See http://www.regulatorycheckbook.org/uploads/7/1/7/4/7174353/simms_1981_olc_memo_on_eo_12291.pdf.

[65] See, for example, The Center for Regulatory Effectiveness, "A Blueprint for OMB Review of Independent Agency Regulations," March 2002, written by Jim Tozzi, available at http://www.thecre.com/pdf/blueprint.pdf; and Douglas H. Ginsburg, "White House Review of Agency Rulemaking," footnote 10, available at http://www.thecre.com/pdf/20110529_White%20House%20Review%20of%20Agency%20Rulemaking.pdf.

[66] See, for example, Administrative Law Section Letter, which cites the opinion (in footnote 30) as "Memorandum for the Hon. David Stockman, Dir., Office of Mgmt. & Budget, from Larry L. Simms, Acting Ass't Atty. Gen., Office of Legal Counsel 7 (Feb. 12, 1981), reprinted in Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 158 (1981) ("[U]nder the best view of the law" the proposed executive order, eventually issued as Exec. Order No. 12,291 "can be imposed on the independent agencies."); and CRS Report R42720, which cites the opinion (in footnote 102) as "Mem. for the Hon. David Stockman, Director of OMB, from Larry L. Simms, Acting Ass't Atty. Gen., Off. of Legal Counsel 7 (Feb. 12, 1981), *reprinted in* Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 97th Cong., 1st Sess. 158 (1981) [hereinafter Second 1981 OLC Opinion]."

13. Perhaps the clearest indication that the February 12 document may not be an issued OLC opinion, and therefore should not be cited as such, is that it states that the proposed executive order (what would become EO 12291) would require independent regulatory agencies to prepare regulatory impact analyses before issuing certain rules. However, the executive order as published in the *Federal Register* (less than a week later, on February 17, 1981) and in the official list of executive orders does *not* contain that requirement.[67] During the June 1981 hearing on the "Role of OMB in Regulation," Mr. Gray noted that fact as a reason why it was not appropriate to release the "earlier opinion" to the congressional committee.[68]

Also, the February 12 document states that "under the best view of the law, these and other requirements of the Order can be imposed on the independent agencies." Those citing the February 12 document sometimes quote that sentence.[69] However, the February 12 document goes on to say that "an attempt to exercise supervision of these agencies through techniques such as those in the proposed Order would be lawful only if the Supreme Court is prepared to repudiate certain expansive dicta in the leading case on the subject, and that an attempt to infringe the autonomy of the independent agencies is very likely to produce a confrontation with Congress, which has historically been jealous of its prerogatives with regard to them."

2. An Earlier OLC Opinion

Although the February 13, 1981, OLC opinion appears to be the only one officially issued since the start of the Reagan Administration to address (albeit inconclusively) the issue of presidential authority over independent regulatory agency rulemaking, there was at least one OLC opinion regarding this issue nearly four years earlier during the Carter Administration. In a July 22, 1977, opinion, OLC responded to a request from the Associate Director of the Domestic Counsel asking "whether President by Executive order has the authority to extend to the independent regulatory agencies proposals designed to improve administrative processes within the Executive branch." In its opinion, OLC said:

> it would appear that the proposals contained in Part I of your memorandum can be extended by the President to the independent regulatory agencies. The purpose of the proposals is to improve procedure, set up work schedules and plans for the more efficient discharge of the agencies' duties, and improve the proficiency of personnel by appropriate training programs directed to the drafting of regulations. In the light of the President's overall fiscal responsibilities it also appears appropriate for him to require

[67] 46 *Federal Register* 13193. Section 1(d) of EO 12291 defines a covered "agency" as "any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10)." Therefore, independent regulatory agencies are not covered by any of the executive order's requirements.

[68] On p. 100 of the previously mentioned hearing record, Mr. Gray stated "I do not think it would be appropriate to release that opinion until such time as we extend the Executive order to the independent agencies, since the Executive order does not apply to the independent agencies."

[69] See, for example, the Section on Administrative Law Letter, footnote 30.

> that the agencies take into account the economic impact of their decisions, although he probably cannot dictate the precise effect the agencies are to give to that impact.[70]

In a March 1978 memorandum for the President regarding the signing of what would later become Executive Order 12044, then-OMB Director James T. McIntyre stated that the relationship of the President to independent regulatory agencies "has long been the subject of dispute." He went on to say the following:

> There is, however, no clear legal definition of the extent to which a President may direct the activities of an independent commission through Executive Orders. The Department of Justice is of the opinion that the President has the constitutional and statutory authority to require independent agencies to comply with the procedural reforms in this Executive Order. That view is strongly contested by all but one of the independent agencies that commented (the Nuclear Regulatory Commission made no objection), and by many Senators and Congressmen. [71]

Ultimately, however, the McIntyre memorandum recommended that independent regulatory agencies be excluded from the language of the executive order because doing so "would provoke a confrontation with the Congress and attract attention away from the substantial improvements the Order can make in the management of regulation in the Executive Branch."

It bears noting that the "procedural reforms" in EO 12044 were relatively modest when compared to those in EO 12291. For example, the requirement in EO 12291 that agencies choose the least costly approach to a particular regulatory objective went further than the requirement in EO 12044, which simply required agencies to analyze and consider alternative regulatory approaches. Also, the regulatory oversight functions were divided among many offices during the Carter Administration – OMB, the Council on Wage and Price Stability (CWPS), a Regulatory Analysis Review Group (RARG), and a "regulatory council," whereas Executive Order 12291 consolidated these functions within OIRA. Another major difference was the amount of influence that OIRA had compared to its predecessors. Under EO 12044, CWPS and RARG had primarily an advisory role. In contrast, under EO 12291, OIRA could overrule agency determinations regarding whether the rule was "major" (and therefore required a regulatory impact analysis), and could delay the regulation until the agency had adequately responded to its concerns (e.g., if it believed the agency had not considered all reasonable alternatives, that its analysis was not sound, or that it was contrary to administration policy). OIRA's significant influence on rulemaking was underscored by its organizational position within OMB—the agency that reviews and approves the rulemaking agencies' budget requests.

Finally, and perhaps most importantly, the nature and transparency of the review process was significantly different under EO 12291. Under the Carter Administration's approach,

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[70] Memorandum for Simon Lazarus, Associate Director, Domestic Counsel, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, "President's Authority to impose procedural reforms on the Independent Regulatory Agencies," July 22, 1977, available at http://www.thecre.com/pdf/Carter_DOJOpinion072277.PDF. The opinion went on to say, however, that a presidential requirement that independent regulatory agencies conduct a general review of their substantive rules "could well be considered to constitute an invasion of the agencies' quasi-legislative autonomy."

[71] See http://www.thecre.com/pdf/Carter_OMBMemoMarch1978.PDF for a copy of this memorandum.

RARG and CWPS prepared and filed comments on agencies' regulatory proposals during the formal public comment period, after they were published in the Federal Register. In the case of RARG filings, a draft of the comments was circulated to all RARG members, and the comments and any dissents were placed in the public record at the close of the comment period. In contrast, OIRA's reviews occurred before the rules were published for comment, and EO 12291 did not require that OIRA's comments on the draft rule be disclosed. This pre-publication review process made OIRA's regulatory reviews under EO 12291 qualitatively different than in EO 12044.

Given the context of the 1977 OLC opinion, citation of that opinion 35 years later in a somewhat different context could be problematic. Even if requiring independent regulatory agencies to prepare cost-benefit analyses is viewed as a "procedural" requirement, doing so in the context of OIRA review and possible reversal of an agency rule because of that review or failure to comply with those analytical requirements might be considered a substantive directive.

3. A Congressional Grant of Authority

Although it is unclear whether the President currently has the authority to require independent regulatory agencies to prepare cost-benefit analyses before issuing a proposed or final rule, it seems clear that Congress could *provide* the President with that authority. In a March 9, 1995, memorandum for the Attorney General regarding the legality of an executive order issued pursuant to a statute,[72] the Office of Legal Counsel said "The Supreme Court has instructed that '[t]he President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself.' *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)." In this case, OLC said that the President's authority to issue Executive Order 12954 was statutory; specifically, the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 471), which said "The President may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act." [73] Therefore, the opinion said an executive order issued pursuant to this authorization would be valid as long as the President acted to "effectuate" the provisions of the underlying statute, and as long as those actions were not inconsistent with any specific provisions of the statute. In the *Youngstown Sheet & Tube Co.* case, Justice Jackson's opinion concurring in the judgment indicated that the President's authority is strongest when acting with the express or implied authorization of Congress.[74] Surely, an executive order issued pursuant to an express grant of statutory authority would fall into this area, and the burden of proof would fall to those who would question that authority.

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[72] See http://www.justice.gov/olc/eostrike.htm.

[73] 40 U.S.C. § 486(a).

[74] 343 U.S. 579, 635 (1952) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

However, providing the President with the statutory authority to issue an executive order requiring independent regulatory agencies to prepare cost-benefit analyses before issuing certain rules would make independent regulatory agencies less independent of the President than is currently the case. Such action would also represent a transfer of power from Congress to the President in an arena that various Presidents have been asserting power for more than 30 years.[75] Any such congressional grant of authority could, however, be limited by the way the authority is structured (e.g., making clear that the result of any such analysis does not constitute a "supermandate" that trumps existing statutory requirements, or by describing how any such analyses should be conducted).[76]

C. Legislative Initiatives

Several bills introduced during the 112th Congress would have required all or certain independent regulatory agencies to prepare cost-benefit or other types of analyses for their forthcoming rules. For example:

- H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011, would (among other things) have required independent regulatory analyses to perform the economic analyses required by UMRA.

- S. 358, the Regulatory Responsibility for Our Economy Act of 2011, would have put into statute many of the broad regulatory goals enunciated in EO 12866 (e.g., that federal agencies should adopt regulations only upon a reasoned determination that the benefits justify the costs, tailor regulations to accomplish regulatory objectives while imposing the least burden on society, select regulatory approaches that maximize net benefits, and allow for public participation).[77] The bill defined a covered "agency" to include independent regulatory agencies.

- S. 602, the "Clearing Unnecessary Regulatory Burdens (CURB) Act," would have codified and expanded the cost-benefit analysis requirements that are currently in EO 12866. Specifically, the bill would generally have required all

[75] See, for example, Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," *Michigan Law Review*, vol. 80 (1981), pp. 193-247; and CRS Report RL33862, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, by Curtis W. Copeland, January 3, 2008, which characterized the changes made by the executive order as "a clear expansion of presidential authority over rulemaking agencies."

[76] For example, Section 3(a) of S. 3468 states that independent regulatory agencies may be required to comply with regulatory analysis requirements applicable to other agencies "to the extent permitted by law." NRC officials said it was not clear whether this language would require cost-benefit analysis for the agency's fee structure rules (in which the agency is statutorily required to collect 90% of operating expenses), or for "adequate protection" rules that currently are not required to have an analysis, and for which courts have ruled the agency cannot take costs into consideration in setting such levels of protection.

[77] Exempt from these principles and other requirements in the bill are regulations that (1) are issued through formal rulemaking procedures in 5 U.S.C. § 556 and 5 U.S.C. § 557; (2) pertain to military or foreign affairs functions, other than procurement regulations and regulations involving the import or export of non-defense articles or services; and (3) are limited to agency organization, management, or personnel matters.

agencies (including independent regulatory agencies) to quantify regulatory benefits and costs of their "significant" rules "to the extent feasible," and to assess the costs and benefits "potentially effective and reasonably feasible alternatives to the planned significant regulatory action."

- S. 817, the Independent Agencies and the Unfunded Mandates Reform Act, would have amended the Congressional Budget and Impoundment Control Act of 1974 (as amended UMRA) and changed the definition of an "agency" to include independent regulatory agencies. However, the bill would have exempted "rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee."

- S. 1615, the "Financial Regulatory Responsibility Act of 2011," would have (among other things) (1) prohibited 10 federal financial regulatory agencies (including the SEC, CFTC, CFPB, FDIC, and the Federal Reserve System) from issuing proposed or final rules unless specified analyses have been included in them; (2) prohibited the agencies from publishing any final rule if the agency determines that the quantified costs are greater than the quantified benefits; (3) required the agencies to make available on their websites sufficient information about the data, methodologies, and assumptions used to allow reproduction of the analyses; and (4) required the chief economist of each agency to report to certain congressional committees within five years on the economic impact of the regulations.

- H.R. 1840 would have amended Section 15(a) of the Commodity Exchange Act (7 U.S.C. § 19(a)) to require CFTC (1) to consider the costs and benefits, both qualitative and quantitative, of an intended regulation; and (2) to propose or adopt a regulation only on a reasoned determination that the benefits justify the costs. In making the cost-benefit determination, the agency would have been required to consider such factors as the impact on market liquidity in the futures and swaps markets, as well as alternatives to direct regulation.

- H.R. 2289, the "FCC ABCs Act," would have amended the Communications Act of 1934 (47 U.S.C. § 154) and required the FCC to include in each proposed and final rule an analysis of the benefits and costs. However, the bill specifically states that it does not authorize any appropriations for the express purpose of carrying out these analyses.

- H.R. 3309 would have required the FCC, before adopting or amending an "economically significant" rule, to: (1) analyze the specified market failure, actual consumer harm, burden of existing regulation, or failure of public institutions that warrants the rule or amendment; and (2) determine that the benefits justify its costs.

- The SEC Regulatory Accountability Act (H.R. 2308 and S. 2373) would have amended Section 23 of the Securities Exchange Act of 1934 (15 U.S.C. § 78w) and required the SEC to (among other things) (1) identify and evaluate the significance of the problem that the proposed regulation is designed to address in order to assess whether any new regulation is warranted; and (2) use the SEC Chief Economist to assess the costs and benefits of the intended regulation and adopt it only upon a reasoned determination that its benefits justify the costs.

- The Regulatory Accountability Act (H.R. 3010) would have required all agencies (including independent regulatory agencies) to make all preliminary and final factual determinations based on evidence and to consider: (1) the legal authority under which a rule may be proposed, (2) the specific nature and significance of the problem the agency may address with a rule, (3) whether existing rules have created or contributed to the problem the agency may address with a rule and whether such rules may be amended or rescinded, (4) any reasonable alternatives for a new rule, and (5) the potential costs and benefits associated with potential alternative rules.

- The Startup Act 2.0 (H.R. 5893 and S. 3217) would have (among other things) required the head of any federal or independent regulatory agency, before issuing a proposed major rule, to analyze the problem that the rule intends to address, and to prepare a cost-benefit analysis.

Another bill, the Independent Agency Regulatory Analysis Act (S. 3468), would have taken a somewhat different approach. Instead of Congress directly requiring independent regulatory agencies to analyze their forthcoming rules, the bill would have authorized the President to issue an executive order requiring the agencies to conduct such analyses for their draft economically significant proposed and final rules "to the extent permitted by law."[78] The President would also have been authorized to require independent regulatory agencies to submit such rules and analyses to OIRA, as well as any draft "significant" proposed or final rules. In addition, the bill would have permitted the executive order to require that OIRA place its assessment of the agency's analysis in the public record. If OIRA determined that an agency had not complied with the analysis requirements, the executive order could have required the agency to respond and justify its position.[79] The stated purpose of S. 3468 was to "affirm the authority of the President to require independent regulatory agencies to comply with regulatory analysis requirements applicable to executive agencies."

[78] The bill would have also permitted the executive order to require independent regulatory agencies to comply (to the extent permitted by law) with "regulatory analysis requirements applicable to other agencies."

[79] The bill stated that independent regulatory agencies' compliance with the executive order is not judicially reviewable, but any analysis or OIRA determinations pursuant to the executive order would be part of the record of agency actions in any other judicial review.

As noted previously, a number of individuals and organizations have expressed support for these kinds of legislative initiatives. In September 2012, a bipartisan group of seven former OIRA Administrators sent a letter to the Chairman of the Senate Committee on Homeland Security and Governmental Affairs expressing their "strong support" for S. 3468, saying the bill would improve the quality of rulemaking by independent regulatory agencies by extending to them the "same principles of regulation that have long governed executive agencies."[80] The Business Roundtable has also voiced support for the bill, saying "cost-benefit analysis and OMB review of major rules represent a sound and prudent management approach, which should not be limited to just a subset of regulatory agencies."[81]

1. Objections

However, other observers do not believe that independent regulatory agencies should be subject to these types of analytical requirements, with many of the concerns centering on a perceived reduction in the agencies' independence from the President. For example, on October 26, 2012, the heads of six independent regulatory agencies wrote to the Chairman and Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs expressing their concerns about S. 3468.[82] Their concerns centered on the proposed submission of the agencies' rules to OIRA, but also addressed other issues.

> Independent regulatory agencies were established by Congress to exercise policymaking functions – and in particular, rulemaking functions – independent of the control of any Administration. Independent regulatory agencies have sought to implement statutes in a manner faithful to the statutory language and consistent with our respective missions without imposing unnecessary costs. S. 3468 authorizes the President to require independent regulatory agencies to submit their rulemakings to OMB's Office of Information and Regulatory Affairs for prior review. This would give any president unprecedented authority to influence the policy and rulemaking functions of independent regulatory agencies and would constitute a fundamental change in the role of independent regulatory agencies.

Other objections to these kinds of legislative initiatives have focused on the validity and usefulness of cost-benefit analysis itself in this arena. For example, one observer, noting the volume of rulemaking expected to be issued by CFTC under the Dodd-Frank Act, questioned whether the costs and benefits of the agency's rules can be "measured with enough precision to make meaningful estimates of the net benefit of all these regulations," and said "it is not clear that [cost-benefit analysis] can provide a clear path

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[80] See http://portman.senate.gov/public/index.cfm/files/serve?File_id=563c60e4-3770-4329-b1aa-ff51752cd750 for a copy of this letter.

[81] See, for example, a letter from Business Roundtable supporting S. 3468, available at http://businessroundtable.org/news-center/brt-letter-supporting-s.3468-the-independent-agency-regulatory-analys1/. See also Thomas Hemphill, "It's Time to Regulate the Regulators," *Real Clear Markets*, September 21, 2012, at http://www.realclearmarkets.com/articles/2012/09/21/its_time_to_regulate_the_regulators_99895.html.

[82] See http://www.buckleysandler.com/uploads/104/doc/10-26-12%20Agency%20Letter%20to%20Lieberman%20re%20S%203468.pdf for a copy of this letter.

to better regulation of commodities and other markets."[83] Similarly, a witness testifying before the House Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law described cost-benefit analysis as

> a flawed technique for distinguishing between useful and counterproductive regulations. More fundamentally, the problems arising from the current regulatory process, for the most part, are not the result of regulations lacking justification or whose costs exceed their benefits. Instead, the primary problem is inadequate resources to allow agencies to fulfill their statutory responsibilities and fulfill their tasks of achieving public policy goals.[84]

Another observer described what he considered to be the "limitations of cost-benefit analysis," saying (1) regulatory costs are generally much easier to identify and quantify than benefits; (2) cost estimates are commonly drawn from data supplied by the regulated industry, which has an "inherent incentive to maximize cost estimates;" (3) once regulations are imposed, regulated parties are often able to minimize compliance costs below expected levels; and (4) costs are borne by regulated parties, while benefits are often realized in the form of harms not inflicted on broader segments of society.[85] This observer also noted that when multiple regulations are intended to provide an integrated solution to a problem, requiring a separate cost-benefit analysis for each regulation could result in the benefits of a comprehensive regulatory strategy being overlooked.

Still other concerns focus on whether the new analytical requirements would negatively affect the ability of certain independent regulatory agencies to issue their rules in a timely fashion. The previously-mentioned October 2012 letter from the heads of six independent regulatory agencies stated that S. 3468 "would interfere with our ability to promulgate rules critical to our missions in a timely manner and would likely result in unnecessary and unwarranted litigation in connection with our rules."[86] Similarly, representatives of a child safety group said that by "mandating a new layer of economic analysis requirements, S. 3468 would significantly delay or prevent the implementation of the safety protections issued by the [Consumer Product Safety Commission], leaving American children without the critical protections created by the Consumer Product Safety Improvement Act."[87] One of the particular concerns about S. 3468 is that rules would not be sent to OIRA until after commissioners had reached a compromise, and any adverse comments from OIRA could "throw the commission back to the drawing board."[88]

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[83] John Kemp, "Opinion: Dodd-Frank Risks Cost-Benefit Train Wreck," *Reuters Hedgeworld*, March 7, 2012.

[84] Testimony of Robert L. Glicksman, U.S. Congress, House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, *Raising the Agencies' Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need*, 112th Cong., 1st sess., March 28, 2011, Serial No. 112-34, p.80, available at http://judiciary.house.gov/hearings/printers/112th/112-34_65485.PDF.

[85] Blaine F. Aikin, "Are Cost-Benefit Analyses Exploited?," *Investment News*, September 30, 2012, available at http://www.investmentnews.com/article/20120930/REG/309309968#. The author was describing the results of a study by Better Markets entitled "Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC."

[86] See http://www.buckleysandler.com/uploads/104/doc/10-26-12%20Agency%20Letter%20to%20Lieberman%20re%20S%203468.pdf for a copy of this letter.

[87] Linda Ginzel and Boaz Keysar, co-founders of Kids in Danger, "Undermining Vital Child Protections," *The Hill's Congress Blog*, November 5, 2012, at http://thehill.com/blogs/congress-blog/economy-a-budget/265967-undermining-vital-child-protections.

[88] Cheryl Bolen, "Prospects Dim for Regulatory Reform, But Some Eyeing Independent Agencies," *BNA Daily Report*

IV. Analytical Requirements and Independent Regulatory Agencies

Several crosscutting analytical requirements are already potentially applicable to rules issued by independent regulatory agencies. Also, some of the statutes that provide independent regulatory agencies with rulemaking authority contain certain provisions that may require some type of regulatory analysis. Most independent regulatory agencies, however, are not explicitly required to prepare cost-benefit analyses before issuing their rules.

A. Crosscutting Analytical Requirements Applicable to Independent Regulatory Agencies

At least three crosscutting analytical requirements are generally applicable to independent regulatory agencies: the Regulatory Flexibility Act (RFA), the Paperwork Reduction Act (PRA), and the National Environmental Policy Act (NEPA).[89] However, those analyses are focused on particular issues (e.g., effects on small entities and paperwork burden), not overall costs and benefits. Also, whether these requirements actually result in an analysis depends on the nature of the rule being issued, and (at least in the case of the RFA and NEPA) agency discretion.

1. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. §§ 601-612) requires federal agencies to assess the impact of their forthcoming regulations on "small entities," which the Act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. "Agency" is defined in the RFA by referring to the definition in the Administrative Procedure Act (5 U.S.C. § 551(1)), which generally defines it as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."[90]

Section 603 of the RFA requires agencies to prepare an "initial regulatory flexibility analysis" (IRFA) before publishing a proposed rule, which is to contain (1) a description

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for Executives, October 4, 2012, p. A-15.

[89] Two executive orders (EO 12630 on "takings" and EO 12898 on certain environmental and human health risks) also contain analytical requirements and arguably cover independent regulatory agencies, but are only rarely mentioned and hardly ever triggered. Other crosscutting analytical requirements (e.g., privacy assessments under the E-Government Act, 44 U.S.C.A. § 3601 note) are also rarely invoked.

[90] The definition goes on to exclude such entities as the Congress, the courts of the United States; the governments of the territories or possessions of the United States; and the government of the District of Columbia.

of the reasons why the rule is being considered, (2) a statement of the rule's objectives and legal basis, (3) a description of and, where feasible, an estimate of the number of small entities to which the rule would apply; (4) a description of the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the classes of small entities that will be subject to the rule and the types of professional skills necessary for preparation of any report or records; and (5) an identification of all federal rules that may duplicate, overlap, or conflict with the proposed rule. The IRFA is also to contain "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities," such as differing compliance or reporting requirements or timetables, simplification of requirements, and exemptions for small entities.

When an agency issues a final rule for which a proposed rule is required, the agency is required to prepare a "final regulatory flexibility analyses" (FRFA), which is required to contain (1) a state of the need for and objectives of the rule; (2) a summary of the significant issues raised by the public comments in response to the IRFA, the agency's assessment, and any changes made pursuant to those comments; (3) a description of and an estimate of the number of small entities to which the rule will apply, or an explanation of why the estimate is not available; (4) a description of the steps the agency has taken to minimize the significant economic impact on small entities, including a "statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected."[91] In complying with the requirements for an IRFA and a FRFA, agencies are permitted to provide "either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable."[92]

However, the agency is not required to prepare an IRFA or a FRFA if the rule published without an NPRM,[93] or if the agency certifies that the rule is not expected to have a "significant economic impact on a substantial number of small entities."[94] Agencies are required to publish such certifications in the *Federal Register* at the time the proposed and final rules are published, along with a statement providing the factual basis for such certification.[95] Section 612 of the RFA requires the Small Business Administration's

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[91] 5 U.S.C. § 604.

[92] 5 U.S.C. § 607.

[93] See U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Publish Final Actions Without Proposed Rules*, GAO/GGD-98-126, August 31, 1998, which discovered that about half of all final rules published in 1997 had no prior NPRM, including 11 of 67 major rules.

[94] 5 U.S.C. § 605(b).

[95] The RFA initially did not permit judicial review of agencies' actions under the act. However, amendments to the act in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA, 5 U.S.C. § 601 note) permitted judicial review regarding, among other things, agencies' regulatory flexibility analyses for final rules and any certifications that their rules will not have a significant impact on small entities. As a result, a small entity that is adversely affected or aggrieved by an agency's determination that its final rule would not have a significant impact on small entities could seek judicial review of that determination within one year of the date of the final agency action. In granting relief, a court may remand the rule to the agency or defer enforcement against small entities.

(SBA) Chief Counsel for Advocacy to monitor agency compliance with the Act and to report at least annually to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

a) The RFA In Practice

In practice, federal agencies often do not perform a "formal" RFA analysis for their final rules. For example, of the 100 major rules that were issued in 2010, the agencies indicated that a regulatory flexibility analysis was not required for 72 rules, because (1) the rules were not expected to have a "significant economic impact on a substantial number of small entities" (53 rules),[96] (2) the agency was not required to issue a notice of proposed rulemaking (12 rules),[97] or (3) the agency relied on an analysis prepared for a similar rule (7 rules). Independent regulatory agencies were somewhat more likely to prepare an RFA analysis than other types of agencies. Of the 19 major rules that were issued either solely or jointly by independent regulatory agencies in 2010, the agencies concluded that no analysis was needed in 8 rules.[98]

The RFA does not define the terms "significant economic impact" or "substantial number of small entities," thereby giving federal agencies substantial discretion regarding when the act's analytical requirements are formally initiated. In addition, some agencies do not consider an RFA analysis to be required if the rule is expected to have significant positive effects on small entities.[99] GAO has examined the implementation of the RFA several times within the past 20 years, and a recurring theme in GAO's reports is a lack of clarity in the Act and a resulting variability in its implementation.[100] In 2001, GAO testified that the promise of the RFA might never be realized until Congress or some other entity defines what a "significant economic impact" and a "substantial number of small entities" mean in a rulemaking setting.[101] However, other observers have indicated that the definitions of these terms should remain flexible because of significant differences in each agency's operating environment.[102]

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[96] Nevertheless, in 11 of these 54 rules, the agencies indicated that they conducted an analysis meeting the requirements of the RFA.

[97] The RFA states (5 U.S.C. § 604(a)) that a final regulatory flexibility analysis is required "When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking."

[98] One of these eight rules was issued jointly by five agencies. Four of the five agencies (all independent regulatory agencies) said the rule would not have a significant economic impact on a substantial number of small entities. The fifth agency (the Office of the Comptroller of the Currency within the Department of the Treasury) said the rule would have such impacts, and prepared a regulatory flexibility analysis.

[99] See, for example, U.S. Department of Health and Human Services, "Patient Protection and Affordable Care Act; Establishment of Consumer Operated and Oriented Plan (CO-OP) Program," 76 *Federal Register* 43237, July 20, 2011, in which the department said that the Centers for Medicare and Medicaid Services interprets the RFA analysis requirement "as applying only to regulations with negative impacts." However, the department said it routinely prepares a voluntary analysis when there are significant positive impacts.

[100] See, for example, U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T, April 24, 2001.

[101] U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T, April 24, 2001.

[102] See, for example, page 17 of the SBA Office of Advocacy's guidance on the implementation of the RFA, available

2. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. §§ 3501-3520) was originally enacted in 1980, but was subsequently amended in 1986 and again in 1995. One of the purposes of the PRA is to minimize paperwork burden for individuals, small businesses, and others resulting from a collection of information by or for the federal government.[103] The PRA requires agencies to justify any covered collection of information from the public by establishing the need and intended use of the information, estimating the burden that the collection will impose on respondents, and showing that the collection is the least burdensome way to gather the information.[104] "Agency" is defined in the act as

> any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include (A) the General Accounting Office; (B) Federal Election Commission; (C) the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or (D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities.[105]

"Burden" is broadly defined in the Act to include all of the "time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency," including any time or other expenditure needed to review instructions, acquire technology, or search data sources.[106] Paperwork burden is most commonly estimated in terms of "burden hours," which is a function of (1) the frequency of an information collection, (2) the estimated number of respondents, and (3) the amount of time that the agency estimates it takes each respondent to complete the collection. A "collection of information" is defined as "obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public" of information from 10 or more persons, not including agencies or employees of the federal government. Regulations implementing the PRA state that "any collection of information addressed to all or a substantial majority of an industry is presumed to involve ten or more persons."[107]

The original PRA established OIRA within OMB to provide central agency leadership and oversight of government-wide efforts to reduce unnecessary paperwork burden and improve the management of information resources. Agencies must receive OIRA approval (signified by an OMB control number displayed on the information collection) for each collection request before it is implemented, and those approvals must be renewed at least every three years. Failure to obtain OIRA approval for an active

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at http://www.sba.gov/sites/default/files/rfaguide.pdf, which says "Significance should not be viewed in absolute terms…."

[103] 44 U.S.C. § 3501(1).

[104] 44 U.S.C. § 3506(c).

[105] 44 U.S.C. § 3502(1).

[106] 44 U.S.C. § 3502(2).

[107] 5 CFR 1320.3(c)(4)(ii).

collection, or the lapse of that approval, represents a violation of the act, and triggers the PRA's public protection provision. Under that provision, no one can be penalized for failing to comply with a collection of information subject to the Act if the collection does not display a valid OMB control number.[108] OIRA can disapprove any collection of information if it believes the collection is inconsistent with the requirements of the PRA. However, multi-headed independent regulatory agencies can, by majority vote of the leadership, void any OIRA disapproval of a proposed information collection.[109]

a) The PRA in Practice

In rulemaking, the PRA is triggered only if the rule contains a covered "collection of information." In 21 of the 100 major rules that were issued in 2010, the agencies indicated that the rule did not contain a collection of information, so no PRA analysis was performed. Several other rules also did not trigger a PRA analysis because of statutory exemptions or other factors.[110] Of the 19 major rules that were issued solely or jointly by independent regulatory agencies that year, the agencies did a PRA analysis in 15 of them. One rule did not mention the PRA, two rules did not have a collection of information, and the agency referenced an earlier PRA analysis in another rule.

3. National Environmental Policy Act

The National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4347) requires federal agencies to include in every recommendation or report related to "major Federal actions significantly affecting the quality of the human environment" a detailed statement on the environmental impact of the proposed action. If a rule is expected to have significant environmental effects, the agency must prepare an environmental impact statement (EIS), take public comments, publish a final EIS, and publish a record of decision. The environmental impact statement must delineate the direct, indirect, and cumulative effects of the proposed action. Agencies are also required to include in the statement (1) any adverse environmental effects that cannot be avoided should the proposal be implemented, (2) alternatives to the proposed action, (3) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and (4) any irreversible and irretrievable commitments of resources that would be involved if the proposed action should be implemented. If it is unclear whether the rule will have such effects, the agency may first prepare an

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[108] For an up-to-date inventory of OMB-approved information collections, see http://www.reginfo.gov/public/do/PRAMain.

[109] 44 U.S.C. § 3507(f). For more information on the PRA, see U.S. Congressional Research Service, *Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates*, by Curtis W. Copeland and Vanessa K Burrows, CRS Report R40636, June 15, 2009, available at http://graphics8.nytimes.com/packages/pdf/nyregion/2009/records/paperworkreductionreportbycrs.pdf.

[110] In two rules issued by the Department of Agriculture, the department cited Section 2904 of the Food, Conservation, and Energy Act of 2008 as providing that any regulations issued under Title II would be issued "without regard to" the PRA. In nine other rules, the agencies took other types of actions (e.g., referred to or requested reinstatement of an earlier collection of information).

environmental assessment (EA), which may reveal significant effects (which would then require an EIS) or no significant effects (in which case the agency would issue a "finding of no significant impact," or FONSI, and proceed with the issuance of the rule). Both the EA and the EIS should discuss the need for the rule, alternative courses of action, and environmental effects, although the EIS process is more complex. If an agency determines that a category of actions will not have "significant" environmental effects, it may publish a categorical exclusion to the analysis requirement in the *Federal Register* and take public comments on the exclusion. [111]

a) NEPA in Practice

In practice, NEPA environmental impact statements are not often prepared for agency rules. Of the 100 major rules issued by all agencies in 2010, the agencies mentioned NEPA in only 25 rules, and concluded that only 2 of the rules required a new environmental impact statement. In the remaining 23 rules, the agencies either prepared an environmental assessment but ultimately issued a "finding of no significant impact" (10 rules), referenced an earlier environmental impact statement (6 rules), cited a categorical exemption to NEPA (6 rules), or said a NEPA analysis was not necessary (1 rule). Of the 19 major rules that were issued solely or jointly by independent regulatory agencies that year, NEPA was only mentioned in 1 rule, and there the agency invoked a categorical exclusion to the statute.

The infrequency with which NEPA was mentioned or triggered in these rules is understandable, as many independent regulatory agencies' rules (e.g., those establishing banking procedures) are not likely to have an environmental impact. An FCC official told the author of this report that NEPA only applies to a very small subset of Commission proceedings (e.g., tower sitings). Also, NEPA requires a detailed statement on the environmental impact of rules that are "major Federal actions significantly affecting the quality of the human environment" – a phrase that is subject to agency interpretation. As discussed in a Congressional Research Service report, just about every word in the term "major Federal actions significantly affecting the quality of the human environment" has been disputed, scrutinized, and defined by the courts.[112]

4. Other Possible Crosscutting Analytical Requirements

Some have argued that other crosscutting rulemaking requirements implicitly require independent regulatory agencies to prepare cost-benefit analyses for certain rules. For example, as noted in a previous report for ACUS, a Department of Transportation official said that one could argue that the Administrative Procedure Act's "arbitrary and

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[111] See http://ceq.hss.doe.gov/ for more information on NEPA.

[112] U.S. Congressional Research Service, *Overview of National Environmental Policy Act (NEPA) Requirements*, by Kristina Alexander, CRS Report RS20621, January 11, 2008, available at http://www.nationalaglawcenter.org/assets/crs/RS20621.pdf.

capricious" standard is essentially an analytical requirement, noting that Justice Antonin Scalia asserted long before he became a judge that agencies would have to do a cost-benefit analysis to show that their rules are "reasonable" under the APA.[113] However, the APA has not been traditionally considered an analytical requirement.

Others have asserted that the Congressional Review Act could be read to require agencies to prepare economic analyses for their "major" rules. For example, in his comments regarding a possible new executive order on rulemaking,[114] Jim Tozzi of the Center for Regulatory Effectiveness said the following:

> The Act defines "major rule" as one determined to be major by OIRA under the definition of "major." 5 U.S.C. § 804(2). The definition states: "The term 'major rule' means any rule *that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds* has resulted in or is likely to result in -- (A) an annual effect on the economy of $100,000 or more; (B) a major increase in costs or price for consumers, individual industries, Federal, State of local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States- based enterprises to compete with foreign-based enterprises in domestic and export markets." [Emphasis added]
>
> In other words, agencies must provide OIRA with sufficient information for OIRA to make a determination to Congress as to whether a rule is "major", with the only exception being Federal Reserve monetary policy rules. *For this reason alone, all agencies, including independent agencies, must send their rules, along with their estimates of monetary impacts and impacts on competition, employment, investment, productivity, and international trade, to OIRA for a determination of whether the rule is "major."* This requirement also clearly implies that OIRA should be able to analyze such impact information independently in order to provide Congress with its own opinion on impact, not just act as a conduit for the submitting agency's opinion.[115]

During interviews for this report, Art Fraas and Randall Lutter of Resources for the Future voiced similar views, saying that the CRA arguably constitutes a requirement for all agencies (including independent regulatory agencies) to prepare at least cost analyses to support their and OIRA's "major rule" determinations.[116] However, the CRA has not been traditionally viewed as an analytical requirement.

B. Agency- or Issue-Specific Analytical Requirements

In addition to the crosscutting analytical requirements that may apply to independent regulatory agencies (particularly, the RFA and the PRA), agency or issue-specific

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[113] Curtis W. Copeland, *Regulatory Analysis Requirements: A Review and Recommendations for Reform*, p. 40, available at http://www.acus.gov/wp-content/uploads/downloads/2012/03/COR-Copeland-Report-CIRCULATED.pdf. As one author noted, in the courts' application of the "hard look" doctrine under the APA, they "examine the agency's explanatory material to determine whether the agency used the correct analytical methodology…" Thomas O. McGarity, "The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld," *Texas Law Review*, volume 75 (1997), p. 527.

[114] See http://www.reginfo.gov/public/jsp/EO/fedRegReview/Jim_Tozzi_attachment.pdf for a copy of these comments.

[115] Ibid., p. 6. The italicized sections were emphasized in the original.

[116] Telephone interview with Art Fraas and Randall Lutter, Resources for the Future, September 11, 2012.

statutory provisions may also require certain independent regulatory agencies to conduct some type of analysis or consider certain effects when issuing certain kinds of regulations. Some of these agencies have also issued supplementary guidance or memoranda elaborating on these statutory provisions, and some of the agencies' commissioners have commented on these requirements or guidance documents. This section of the report summarizes those statutory provisions and guidance documents in the independent regulatory agencies that have issued the most final rules and/or major final rules in recent years.

1. Securities and Exchange Commission

Section 23(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. § 78w(a)(2)) states that the SEC and the Secretary of the Treasury, "in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition." It goes on to say that the Commission and the Secretary "shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter," and requires them to include the reasons for such a determination in the rule's statement of basis and purpose. In addition, whenever the Commission is "engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest," the Exchange Act (15 U.S.C. § 78c(f)), the Investment Company Act of 1940 (15 U.S.C. § 80a-2(c)), the Securities Act (15 U.S.C. § 77b(b)), and the Investment Advisers Act (15 U.S.C. § 80b-2(c)) each require the Commission to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."

a) SEC Compliance Handbook

According to the SEC's Office of the Inspector General (OIG),[117] the SEC Compliance Handbook, prepared by agency's Office of the General Counsel and last revised in October 1999, includes the following points in its overview of cost-benefit analysis for SEC rulemakings:

- The proposing release should identify possible direct and indirect costs and benefits for members of the industry, relevant market segments, and types of investors and issuers. It should also discuss any available data and solicit comments and additional data.

[117] See http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_13_11.pdf for a copy of the June 2011 report. See http://www.sec-oig.gov/Reports/AuditsInspections/2012/Rpt%20499_FollowUpReviewofD-F_CostBenefitAnalyses_508.pdf for a copy of the January 2012 report. SEC officials said the Compliance Handbook was a "non-public document," but verified that the characterization of it in the OIG report was correct.

- The adopting release should include a substantive, qualitative discussion of the costs and benefits and the staff's final quantitative analysis of any available data. A strong cost-benefit section should include both quantitative and qualitative analysis.

- A cost-benefit analysis should address both "micro," or compliance, costs, and "macro" costs, such as distributional effects or changes in investment or order flows.

- The agency's economists must concur in any numbers used in the cost-benefit analysis, and all numbers should be verified.

The Compliance Handbook also reportedly notes that the benefits of SEC rules "are generally difficult to quantify" and that in many cases it will not be possible to do so. In such cases, it says, "[a] detailed qualitative assessment of the anticipated benefits will thus be necessary."

b) September 2010 Memorandum

In response to questions regarding the extent to which the SEC should use cost-benefit analysis in Dodd-Frank Act rules, then-SEC General Counsel David Becker issued a memorandum in September 2010 stating that the Commission's rulewriters need not consider the costs and benefits of implementing statutory provisions when the agency has little or no discretion to consider alternative approaches.[118] Specifically, the memorandum stated that when the Commission is making no policy choices, "there are no choices to analyze or explain."

The former SEC inspector general later testified about how the September 2010 memorandum affected two Dodd-Frank Act rules that considered only the costs and benefits of discretionary components and did not establish a pre-statute baseline.

> In the first example, the Shareholder Approval of Executive Compensation and Golden Parachute Compensation rulemaking, we found that the SEC's cost-benefit analysis was confined to the costs and benefits of the provisions that went beyond the requirements of the Act. The SEC's cost-benefit analysis did not discuss the costs and benefits of "say-on-pay" votes, frequency votes or disclosures and votes on golden parachute compensation that are mandated by the Dodd-Frank Act. Similarly, in the rulemaking related to Issuer Review of Assets in Offerings of Asset-Backed Securities, we found that the SEC cost-benefit analysis did not discuss the costs and benefits of the requirement for issuers to perform a review of the underlying assets and disclose the nature of the review. The [OIG] report explained that had the SEC analysis included a calculation of the costs of the mandatory provisions of the rulemaking, both Congress and the public might use

[118] Memorandum from David M. Becker, General Counsel, "Thoughts About Best Practices in Drafting Economic Analysis Sections of Releases for Dodd-Frank Related Rulemakings," September 27, 2010. SEC officials said the memorandum was an internal "non-public document," but that the OIG report included virtually all of its substantive provisions.

> this information to consider whether to seek to repeal or weaken the mandatory provisions.[119]

c) March 2012 SEC Guidance

After reports on SEC's economic analysis practices by the SEC inspector general and GAO, congressional inquiries, and several court decisions, on March 16, 2012, the SEC Office of the General Counsel and the Division of Risk, Strategy, and Financial Innovation (RSFI) issued a memorandum to the staff of the rulewriting divisions and offices providing new guidance on economic analysis.[120] Among other things, the March 2012 guidance changed the SEC's position on whether statutorily mandated provisions should be accounted for in the economic analysis of a rule. Specifically, it said:

> where a statute directs rulemaking, rulewriting staff should consider the overall economic impacts, including *both* those attributable to Congressional mandates *and* those that result from an exercise of the Commission's discretion. This approach will often allow for a more complete evaluation of alternative means of meeting the mandate and give the most complete picture of a rule's economic effects, particularly because there are many situations in which it is difficult to distinguish between the mandatory and discretionary components of a rule.[121] (Emphasis in the original.)

Although the SEC has indicated that it voluntarily follows the "spirit" of Executive Order 12866 and OMB Circular A-4 in preparing cost-benefit analyses for its rules (and references the circular repeatedly in the March 2012 guidance), the agency also contends that it is not required to prepare such analyses. For example, the March 2012 guidance references the above-mentioned statutory requirements to "consider" certain factors before issuing certain rules, but then states "No statute expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities," and says that "as an independent regulatory agency the SEC is not obligated to follow the guidelines for regulatory economic analysis by executive agencies" in the executive order or the circular.[122] The SEC Chairman said virtually the same thing in congressional testimony one month later.[123]

d) April 2012 Hearing on SEC Analyses

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[119] Testimony of H. David Kotz before the TARP, Financial Services and Bailouts of Public and Private Programs Subcommittee, House Committee on Oversight and Government Reform, April 17, 2012, available at http://oversight.house.gov/wp-content/uploads/2012/04/4-17-12-Kotz-Testimony.pdf.

[120] See http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf for a copy of this memorandum. Hereafter referred to as "March 2012 guidance."

[121] Ibid., p. 8.

[122] Ibid., p. 3.

[123] Testimony of Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission, before the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, House Committee on Oversight and Government Reform, April 17, 2012, pp. 4-5, available at http://oversight.house.gov/wp-content/uploads/2012/04/4-17-12-Schapiro-Testimony.pdf.

On April 17, 2012, the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs of the House Committee on Oversight and Government Reform held a hearing entitled "The SEC's Aversion to Cost-Benefit Analysis."[124] At that hearing, the SEC Chairman said the agency "has for years considered economic analysis to be a critical element of its rulewriting process," and the agency's "substantive rule releases include more extensive economic analysis than those of any other federal financial regulator."[125] She also noted the issuance of the March 2012 revised guidance on economic analyses in SEC rulemaking, and said the following:

> Among the specific steps that we have been taking and that are included in the current staff guidance are: involving our economists in the rulemaking process before preferred approaches are decided; assuring that rule releases clearly identify the justification for the proposed rule, such as a market failure or statutory mandate; where a statute directs rulemaking, considering the overall economic impacts of the rule, including those attributable to congressional mandates and those resulting from the Commission's exercise of discretion; quantifying the costs and benefits where feasible and, where not feasible, transparently explaining why not; more fully integrating analysis of economic issues in the Commission's rule releases; explicitly encouraging commentors to provide quantitative, verifiable estimates of costs and benefits; greater discussion of reasonable alternatives not chosen.[126]

Other witnesses at the hearing applauded the issuance of the March 2012 revised guidance, indicating that it appeared to signal a new approach to cost-benefit analysis at the agency.[127]

e) Support for SEC Guidance

Others have also expressed support for the new SEC guidance. Michael Livermore, executive director of the Institute for Policy Integrity at New York University, was quoted as saying that the SEC "is finally starting to figure it out," and that this "new approach just might save Dodd-Frank."[128] The authors of a forthcoming article in the *Yale Journal on Regulation* commended the publication of this guidance as "an important first step toward making economic analysis of future rules both meaningful and feasible."[129] They went on to say the following:

> The SEC should continue to define what it means to "consider" efficiency, competition and capital formation, and to define how to construe these terms in particular rules, as well as their the relationship of these criteria to the SEC's primary mission, "the

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[124] See http://oversight.house.gov/wp-content/uploads/2012/09/2012-04-17-Ser.-No.-112-139-SC-Tarp-The-SECs-Aversion-to-Cost-Benefit-Analysis.pdf for a copy of the hearing record. (Hereafter cited as "SEC hearing.")

[125] To view the Chairman's written statement, see http://www.sec.gov/news/testimony/2012/ts041712mls.htm.

[126] SEC hearing, p. 6.

[127] For example, former SEC inspector general H. David Kotz said the memorandum was a "very good start," and that it "changes the way things are done completely." See p. 105 of the transcript, available at http://oversight.house.gov/wp-content/uploads/2012/09/2012-04-17-Ser.-No.-112-139-SC-Tarp-The-SECs-Aversion-to-Cost-Benefit-Analysis.pdf.

[128] Ben Protess, "As Wall Street Fights Regulation, It Has Backup on the Bench," *New York Times*, September 24, 2012, available at http://dealbook.nytimes.com/2012/09/24/as-wall-street-fights-regulation-it-has-backup-on-the-bench/?src=rechp&pagewanted=print.

[129] Bruce Kraus and Connor Raso, op. cit., p. 4.

> protection of investors." This effort, at both the staff and Commission levels, should help reclaim the judicial deference that the Commission's decisions are due.

Similarly, Henry G. Manne, dean emeritus of the George Mason University School of Law, described the SEC guidance as a "highly sophisticated, comprehensive plan for cost-benefit analysis of SEC rules," and said it "seemingly represents a revolutionary turnaround from the past practices and culture of the agency."[130]

2. Commodity Futures Trading Commission

Section 15(a) of the Commodity Exchange Act (CEA, 7 U.S.C. § 19(a)) states that, before issuing certain regulations or orders, CFTC must "consider the costs and benefits of the action of the Commission." It also states that those costs and benefits "shall be evaluated in light of - (A) considerations of protection of market participants and the public; (B) considerations of the efficiency, competitiveness, and financial integrity of futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations."[131]

a) Templates and Guidelines

In September 2010, the CFTC Office of the General Counsel and the CFTC Office of the Chief Economist created a template for a uniform cost-benefit analysis methodology to be used in Dodd-Frank Act proposed rules.[132] That template stated, in part, that Section 15(a) "does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission 'consider' the costs and benefits of its actions."[133] It went on to say that CFTC "could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act."

In May 2011, the same two offices developed "Staff Guidance on Cost-Benefit Considerations for Final Rulemakings under the Dodd-Frank Act."[134] In that guidance, CFTC staff were told to "consider costs and benefits in the Final Rulemakings utilizing the principles set forth in Executive Order 13563 in a manner that is reasonably feasible and appropriate, and consistent with the underlying statutory mandate [in Section 15(a) of

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[130] Henry G. Manne, "Economics and Financial Regulation," *Regulation*, Summer 2012, p. 23, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102793.

[131] Subsection (a)(3) states that these requirements do not apply to "(A) An order that initiates, is part of, or is the result of an adjudicatory or investigative process of the Commission. (B) An emergency action. (C) A finding of fact regarding compliance with a requirement of the Commission."

[132] OIG/CFTC, Exhibit 1.

[133] OIG/CFTC, p. 3.

[134] Memorandum from Dan M. Berkovitz, General Counsel, and Andrei Kirilenko, Chief Economist, to Rulemaking Teams, "Staff Guidance on Cost-Benefit Considerations for Final Rulemakings under the Dodd-Frank Act," May 13, 2011, available as Exhibit 2 in the June 2011 CFTC OIG report, available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf.

the Commodity Exchange Act]." In a footnote, the guidance stated that the term "reasonably feasible and appropriate" meant "the extent to which (i) certain analyses, quantitative or qualitative, is needed to address comments received ('appropriate') and (ii) whether such an analysis may be performed with available resources ('reasonably feasible')."[135] Rulemaking teams were allowed to "choose ... quantitative analysis to respond to comments received."[136] The guidance went on to say that additional analysis is primarily needed when the comments raise specific concerns about costs and benefits, and that "[q]uantitative benefits need not always be greater than costs because there may be a statutory mandate or policy rationale behind the rule...."[137]

The May 2011 CFTC guidance also stated that the costs and benefits of each regulatory alternative should be compared to a common baseline "whenever the Commission has discretion as to whether and how to implement a Dodd-Frank provision." It went on to say that if comments from the public raise concerns about rulemaking provisions that "merely replicate the statutory provisions the Commission is required to promulgate without the exercise of discretion, then cost-benefit considerations may not be a factor in the promulgation of the rule."[138]

In February 2012, CFTC Commissioner Scott O'Malia criticized this aspect of the agency's cost-benefit analysis standards in the context of a final rule issued by the agency imposing certain reporting and recordkeeping requirements on swap dealers and major swap participants. Among other things, the Commissioner said that CFTC took the position that it would "ignore comments related to required rulemaking provisions that mirror statutory language in spite of the fact that the Commission always has some level of discretion in determining the means to achieve such mandates."[139] He went on to say "It is unacceptable that the Commission ignores pre-Dodd-Frank reality and establishes its own economic baseline for its rulemakings. This practice defies not only common sense, but rigorous and competent economic analysis as well."

Nevertheless, CFTC continued to exclude costs and benefits attributable to the statute from its analyses. For example, in a final rule issued in April 2012,[140] CFTC said "the costs and benefits stemming from these regulations, in large part, are attributable to the baseline statutory mandate."[141] The agency went on to say that the cost-benefit analysis "considers the material cost and benefit implications of these final rules in comparison to

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[135] Ibid., pp. 1-2.

[136] Ibid., p. 3.

[137] Ibid., pp. 6-7.

[138] May 2010 CFTC memo.

[139] Opening Statement of Commissioner Scott D. O'Malia Regarding Open Meeting on One Final Rule and One Proposed Rule, February 23, 2012, available at http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement022312.

[140] U.S. Commodity Futures Trading Commission, "Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants," 77 *Federal Register* 20128, April 3, 2012.

[141] Ibid., p. 20168.

baseline costs imposed by the statutory requirements."[142] It also said "costs and benefits that necessarily result from these basic statutory requirements are considered to be the 'baseline' against which the costs and benefits of the Commission's final rules are compared or measured."[143]

b) CFTC MOU with OIRA

In February 2012, CFTC Commissioner Scott O'Malia sent a letter to the Acting Director of OMB requesting that OMB review the cost-benefit analysis in three "Internal Business Conduct Rules" voted on by the Commission that day.[144] He said his concern was that the analysis had "failed to comply with the standards for regulatory review" outlined in OMB Circular A-4, EO 12866, EO 13563, and EO 13579.[145]

In May 2012, CFTC entered into a memorandum of understanding (MOU) with OIRA permitting OIRA staff to provide technical assistance to the agency's staff during the implementation of the Dodd-Frank Act, "particularly with respect to the consideration of the costs and benefits of proposed and final rules."[146] The MOU makes clear, however, that the "provision and acceptance of this technical assistance shall not be interpreted to alter in any way the current relationship between OIRA and CFTC during the rulemaking process," and the "sharing of documents shall not constitute submission of such materials to OIRA for review." It was signed by the CFTC Chairman and the Administrator of OIRA, and was later referenced in a June 2012 House Appropriations Committee report,[147] which said

> The Committee is encouraged by the signing of a Memorandum of Understanding between the Commission and the Office of Information and Regulatory Affairs (OIRA) dated May 9, 2012, allowing technical assistance to be given to the Commission by OIRA staff. The Committee directs the Commission to receive technical assistance in the cost-benefit process from OIRA on all future rulemakings.

3. "Federal Banking Agencies"

In determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, Section 302 of the Riegle Community Development and

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[142] Ibid., p. 20167.

[143] Ibid., p. 20171.

[144] See http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/omalialetter022312.pdf for a copy of this letter. An OMB official told the author of this report that OMB did not respond to the O'Malia letter in writing.

[145] None of these documents require CFTC to prepare a cost-benefit analysis for its rules, or to submit its rules to OMB.

[146] OIRA's website contains a copy of the MOU, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/oira_cftc_mou_2012.pdf. It was discussed in Jimila Trindle, "CFTC Taps Help for Cost Analysis on New Rules," *Wall Street Journal Online*, May 10, 2012, available at http://online.wsj.com/article/SB10001424052702304070304577396192653277890.html.

[147] Available at http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt542/pdf/CRPT-112hrpt542.pdf.

Regulatory Improvement Act (12 U.S.C. § 4802(a)) requires each "Federal banking agency" to "consider, consistent with the principles of safety and soundness and the public interest - (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of such regulations." The term "Federal banking agency" is defined as the Board of Governors of the Federal Reserve System, the FDIC, and the Comptroller of the Currency.[148]

a) Federal Reserve System

A June 2011 report by the OIG for the Board of Governors of the Federal Reserve System said that statutes related to the Board's rulemaking authority, including the Federal Reserve Act and the Bank Holding Company Act of 1956, "generally do not require economic analysis as part of the agency's rulemaking activities."[149] The OIG report also stated that the APA "does not mandate that economic analysis occur as part of the notice and comment process," and that the Dodd-Frank Act does not require economic analysis as part of every rulemaking, or for any of the five rules the OIG examined. The OIG described several "considerations, assessments, policy goals, or substantive requirements" in the Dodd-Frank Act underlying those five rules, but did not describe any of them as economic analysis requirements. The report noted that EO 12866 and EO 13563 do not apply to the agency, but also said "the Board's General Counsel told us that the Board conducts its rulemaking activities in a manner that is generally consistent with the philosophy and principles outlined in the Executive orders."[150] The only analytic requirements that the OIG indicated applied to the agency's rules were the PRA and the RFA.

The OIG report indicated that the agency's written procedures for rulemaking are in a document entitled "Rulemaking Procedures—Improving Board Regulations; Policy Statement."[151] However, the report also noted that the document had not been recently updated, and that no rulemaking team members cited the document. The document reportedly indicates that the extent of regulatory analysis varies depending on the regulation, and the OIG report confirmed that this was the case. The OIG recommended that this document be updated and broadly disseminated, and that the Board consider establishing documentation standards for rulemaking economic analysis to help ensure reproducibility on an internal basis."[152]

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[148] 12 U.S.C. § 1462(5), incorporating the definition in 12 U.S.C. § 1813(q). The Office of Thrift Supervision (OTS) had been considered a "Federal banking agency." However, Section 312 of the Dodd-Frank Act merged OTS with the Office of the Comptroller of the Currency, FDIC, the Board of Governors of the Federal Reserve System, and the Consumer Financial Protection Bureau (CFPB) as of July 21, 2011.

[149] Office of the Inspector General, Board of Governors of the Federal Reserve System, "Response to a Congressional Request Regarding the Economic Analysis Associated with Specified Rulemakings," June 13, 2011, p. 6. The report is available at http://www.federalreserve.gov/oig/files/Congressional_Response_web.pdf.

[150] Ibid., p. 9.

[151] The Federal Reserve Service, Volume IV, Part 8, Subpart 8-040.

[152] Federal Reserve OIG report, p. 20.

Although not mentioned in the OIG report, the Federal Reserve Board also has certain rulemaking authority under the Electronic Funds Transfer Act, as amended by the Dodd-Frank Act (15 U.S.C. § 1693b), which states that when issuing rules under this authority,[153] the agency must

> prepare an analysis of economic impact which considers the costs and benefits to financial institutions, consumers, and other users of electronic fund transfers, including the extent to which additional documentation, reports, records, or other paper work would be required, and the effects upon competition in the provision of electronic banking services among large and small financial institutions and the availability of such services to different classes of consumers, particularly low income consumers.[154]

The Act also requires the Board to demonstrate "to the extent practicable" that the "consumer protections of the proposed regulations outweigh the compliance costs imposed upon consumers and financial institutions."[155]

b) Federal Deposit Insurance Corporation

A June 2011 FDIC OIG report noted the applicability of the RFA and the PRA, and said that the "Small Business Regulatory Enforcement Fairness Act also requires the FDIC to conduct cost-benefit analyses of final rules."[156] In fact, however, that act only requires agencies to submit a cost-benefit analysis to GAO if the agency has prepared one for the final rule at issue.[157] The OIG report pointed out that FDIC is not covered by EO 12866 and EO 13563, or by OMB Circular A-4, but said the agency's May 1998 *Statement of Policy on the Development and Review of FDIC Regulations and Policies* "generally addresses the spirit of, and principles found in, the two executive orders and OMB guidance."[158]

According to the agency's website, this *Statement of Policy* "recognizes the FDIC's commitment to minimizing regulatory burdens on the public and the banking industry and the need to ensure that FDIC regulations and policies achieve regulatory goals effectively."[159] After determining the need for a regulation, the statement of policy says "[n]ew reporting and recordkeeping requirements are carefully analyzed," and "potential benefits associated with the regulation or statement of policy are weighed against the

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[153] The Board's authority includes rules related to reasonable interchange transaction fees for electronic debit card transactions (15 U.S.C. § 1693o-2).

[154] 15 U.S.C. § 1693b(a).

[155] Ibid.

[156] Office of the Inspector General, Federal Deposit Insurance Corporation, "Evaluation of the FDIC's Economic Analysis of Three Rulemakings to Implement Provisions of the Dodd-Frank Act," Report No. EVAL-11-003, June 2011, p. 1 of the Executive Summary. The report is available at http://www.fdicoig.gov/reports11%5C11-003EV.pdf, and is hereafter referred to as "OIG/FDIC."

[157] Specifically, the portion of SBREFA known as the Congressional Review Act states that rulemaking agencies must submit to GAO, and make available to each house of Congress, "a complete copy of the cost-benefit analysis of the rule, if any" (5 U.S.C. § 801(a)(1)(b)(i)).

[158] OIG/FDIC, p. 1 of the Executive Summary.

[159] See http://www.fdic.gov/regulations/laws/plans/index.html for these comments. The policy is available at 63 *Federal Register* 25157, May 7, 1998, http://www.gpo.gov/fdsys/pkg/FR-1998-05-07/pdf/98-12059.pdf.

potential costs."[160] However, this statement of policy does not require a formal cost-benefit analysis for the agency's rules, and only mentions this analysis in the context of new reporting and recordkeeping requirements. The June 2011 OIG report characterizes the analysis as "discretionary," and stated that the policy statement "is not prescriptive in terms of the analysis that must be performed in order to comply with its principles because the nature of analysis required depends on the particular rulemaking."[161]

c) Comptroller of the Currency

Section 315 of the Dodd-Frank Act amended the PRA (44 U.S.C. § 3502(5)) to designate OCC as an independent regulatory agency. Previously, OCC had been part of the Department of the Treasury, and therefore was subject to Executive Order 12866 and OMB Circular A-4, as well as the Unfunded Mandates Reform Act. As an independent regulatory agency, however, OCC is no longer subject to those analytical requirements.

The Department of the Treasury's June 2011 OIG report on economic analysis at OCC cites three statutory requirements for such analyses – the RFA, the PRA, and the above-mentioned Riegle Community Development and Regulatory Improvement Act (12 U.S.C. § 4802(a)).[162] The report stated that OCC "has processes in place to ensure the rigor and consistency of economic analysis performed in connection with rulemaking,"[163] and that those processes were developed and in place prior to the passage of the Dodd-Frank Act when the agency was still subject to Executive Order 12866, Circular A-4, and UMRA. It also said that the agency's *Guide to Rulemaking Procedures* describe the requirements for economic analysis in support of rulemaking. However, the report said that a "process for the actual preparation, review, and approval of economic analysis in support of rulemaking is in place but has not been documented in a formal policies and procedures manual."[164]

4. Consumer Financial Protection Bureau

CFPB was created by Title X of the Dodd-Frank Act, which consolidated and transferred supervisory and enforcement authority over a number of consumer financial products and services to the Bureau on July 21, 2011. Title X and Title XIV of the Act contain numerous provisions that require or permit CFPB to issue regulations implementing the statute's provisions.[165]

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[160] 63 *Federal Register* 25158, May 7, 1998.

[161] OIG/FDIC, p. 9.

[162] Office of the Inspector General, Department of the Treasury, "Dodd-Frank Act: Congressional Request for Information Regarding Economic Analysis by OCC," June 13, 2011, available at http://www.treasury.gov/about/organizational-structure/ig/Documents/OIG-CA-11-006.pdf.

[163] Ibid., p. 3.

[164] Ibid., p. 4.

[165] For information on the rules that CFPB was expected to issue, see CRS Report R41380, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Regulations to be Issued by the Consumer Financial Protection Bureau*,

Section 1022(b)(2)(A) of the Dodd-Frank Act (12 U.S.C. § 5512) establishes certain "standards of rulemaking" for CFPB. Specifically, it states that the Bureau "shall consider—(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons, as described in section 1026 [depository institutions and credit unions with $10 billion or less in assets], and the impact on consumers in rural areas." Section 1100G of the act amended the RFA and requires CFPB to include in its initial regulatory flexibility analysis a description of any projected increase in the cost of credit for small entities and any significant alternatives to the proposed rule that accomplish the same objectives but minimize any increase in the cost of credit for small entities.

5. Nuclear Regulatory Commission

According to "Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission" (NUREG/BR-0058, Rev. 4),[166] the NRC is not statutorily required to prepare regulatory analyses as part of its rulemaking process, but has been voluntarily conducting them since 1976, and has been voluntarily complying with the general regulatory analysis requirements applicable to Cabinet departments and independent agencies since OMB began issuing regulatory analysis guidance in 1981 (primarily EO 12866 since it was issued in 1993).[167] The NRC guidelines state that the "ultimate objective of this regulatory process is to ensure that all regulatory burdens are needed, are justified, and will achieve intended regulatory objectives with minimal impacts."[168] The fourth revision of the guidelines was issued in 2004 to (among other things) make "conforming changes based on OMB's Circular A-4."[169] Specific elements that the guidelines indicate should be included in an NRC regulatory analysis document include:

- a statement of the problem and NRC objectives for the proposed regulatory action;
- identification and preliminary analysis of alternative approaches to the problem;

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by Curtis W. Copeland. For more information on CFPB itself, see CRS Report R41338, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title X, The Consumer Financial Protection Bureau*, by David H. Carpenter.

[166] See http://pbadupws.nrc.gov/docs/ML0428/ML042820192.pdf for a copy of these guidelines (hereafter referred to as "NRC Guidelines"). The guidelines are also available at http://www.nrc.gov/reading-rm/doc-collections/nuregs/brochures/br0058/br0058r4.pdf. For information on rulemaking at the NRC, see NRC Management Directive 6.3, "The Rulemaking Process," available at http://pbadupws.nrc.gov/docs/ML0516/ML051680185.pdf.

[167] Also, an August 14, 2012, "notation vote paper" prepared for the NRC Commissioners by the NRC program staff (SECY-12-0110) states "No legislation or regulation requires a regulatory analysis for NRC-initiated actions," and that "the regulatory analysis process may be modified or eliminated at the discretion of an NRC office director or higher authority." See http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2012/2012-0110scy.pdf.

[168] NRC Guidelines, p. 1.

[169] Ibid., p. 2.

- estimation and evaluation of the values and impacts for selected alternatives, including consideration of the uncertainties affecting the estimates;

- the conclusions of the evaluation of values and impacts and, when appropriate, the safety goal evaluation;

- the decision rationale for selection of the proposed regulatory action; and

- a tentative implementation schedule and implementation instrument for the proposed regulatory action.[170]

In some cases (e.g., when a rule is a "significant regulatory action" as defined in EO 12866), the guidelines indicate that additional information may be beneficial, including items in Circular A-4 such as "a more expansive treatment of monetized health and safety benefits and the characterization of key attributes that are not readily quantified."[171] However, the guidelines also state that "NRC initiatives rarely meet the high economic and policy thresholds of Circular A-4, and therefore, for most NRC regulatory analyses this level of analysis would not be required nor justified given the increased level of effort involved."[172] The guidelines also mention crosscutting analytical requirements in the RFA, the PRA, and NEPA.[173]

In addition, a statutory provision known as the "backfit rule" requires the NRC to make the determination that new requirements applied to operating facilities will result in a "substantial increase in the overall protection of public health and safety," and that this increased protection justifies the direct and indirect costs of implementing the new requirement.[174] A "backfit" for a power reactor is defined as "the modification of or addition to systems, structures, components, or design of a facility; or the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission's regulations or the imposition of a regulatory staff position interpreting the Commission's regulations that is either new or different from a previously applicable staff position."[175] However, the backfit rule does not apply when (among other things) the NRC finds that regulatory action is necessary to ensure that the reactor "facility provides adequate protection to the health and safety of the public and is in accord with the common defense and security."[176]

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[170] Ibid., p. 17.

[171] Ibid., pp. 18-19.

[172] Ibid., p. 19.

[173] Ibid., pp. 36-38.

[174] 10 C.F.R. § 50.109(a)(3). The NRC regulation, 10 C.F.R. § 50.109, is the NRC's backfit rule for nuclear power reactors. The NRC has similar backfit rules for other types of facilities it regulates, namely, 10 C.F.R. § 70.76 (backfits pertaining to licenses for the use and possession of special nuclear material), § 72.62 (backfits pertaining to independent spent fuel storage installations and monitored retrievable storage installations) and § 76.76 (backfits pertaining to gaseous diffusion plants).

[175] 10 C.F.R. § 50.109(a)(1).

[176] 10 C.F.R. § 50.109(a)(4)(ii).

a) Prohibition on Considering Costs

According to an August 2012 "notation vote paper" from the NRC staff to the Commissioners entitled "Consideration of Economic Consequences Within the U.S. Nuclear Regulatory Commission's Regulatory Framework," "NRC requirements relating to the adequate protection of public health and safety do not consider costs."[177] The paper points out that Section 182 of the Atomic Energy Act (AEA), as amended, requires the NRC to "take those actions it deems necessary to achieve 'adequate protection' of public health and safety. Courts have interpreted the AEA to mean that costs must not be considered by the NRC when it determines that a given regulatory action is necessary for adequate protection."[178] Although the term "adequate protection" is not defined in the statute, the paper says that it "must be defined without regard for the economic costs that must be borne by the licensee."[179] Once the adequate protection standard has been satisfied, as determined by the professional judgment of NRC's technical staff, the NRC may consider further protective and other measures, beyond "adequate protection." For these measures, the Commission can take costs into account under section 161 of the AEA."[180]

The August 2012 "economic consequences" paper was prepared to examine whether the NRC's regulatory framework should be changed in the wake of the Fukushima Dai-ichi nuclear power plant accident, and laid out three options should the Commission want to expand consideration of offsite property damage. The paper recommended that NRC staff "systematically update and enhance regulatory analysis guidance," saying such action would "enhance the currency and consistency of the existing framework through updates to guidance documents integral to performing cost-benefit analyses in support of regulatory, backfit, and environmental analysis."[181]

6. Consumer Product Safety Commission

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[177] "Consideration of Economic Consequences Within the U.S. Nuclear Regulatory Commission's Regulatory Framework," SECY-12-0110, August 14, 2012, hereafter referred to as the "economic consequences" paper. See http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2012/2012-0110scy.pdf, p. 2.

[178] Ibid, Enclosure 3, "NRC Legal Authorities Concerning Offsite Property Damage." See *Union of Concerned Scientists v. NRC,* 824 F.2d 108 (D.C. Cir. 1987); *Union of Concerned Scientists v. NRC,* 880 F.2d 552 (D.C. Cir. 1989).

[179] The paper states "If there is more than one method of achieving adequate protection, the NRC may take cost into account in selecting the method. Only in this event may the NRC take cost into account for adequate protection matters. 10 CFR 50.109(a)(7) ('[S]hould it be necessary or appropriate for the Commission to prescribe a specific way to comply with its requirements or to achieve adequate protection, then cost may be a factor in selecting the way, provided that the objective of compliance or adequate protection is met.')"

[180] *Union of Concerned Scientists v. NRC,* 824 F.2d 108 (D.C. Cir. 1987); *Union of Concerned Scientists v. NRC,* 880 F.2d 552 (D.C. Cir. 1989).

[181] NRC Notation Vote Paper, p. 9.

CPSC has rulemaking authority under at least nine statutes, including the Consumer Product Safety Act (CPSA, 15 U.S.C. §§ 2051 et seq.); the Federal Hazardous Substances Act (FHSA, 15 U.S.C. §§ 1261 et seq.); the Flammable Fabrics Act (FFA, 15 U.S.C. §§ 1191 et seq.); and the Poison Prevention Packaging Act (PPPA, 15 U.S.C. §§ 1471 et seq.). Before issuing a consumer product safety final rule under the CPSA,[182] the agency must satisfy several statutory analytical requirements:

- 15 U.S.C. § 2058(f)(1) states that the agency must "consider, and shall make appropriate findings for inclusion in such rule with respect to - (A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce; (B) the approximate number of consumer products, or types or classes thereof, subject to such rule; (C) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and (D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety."

- 15 U.S.C. § 2058(f)(2) states that CPSC "shall not promulgate a consumer product safety rule unless it has prepared ... a final regulatory analysis of the rule containing the following information: (A) A description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs. (B) A description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen. (C) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues. The Commission shall publish its final regulatory analysis with the rule."

- 15 U.S.C. § 2058(f)(3) says the Commission "shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule) - (A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product; (B) that the promulgation of the rule is in the public interest; (C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product; (D) in the case of a rule which relates to a risk of injury with respect to which persons who would be subject to such rule have adopted and implemented a voluntary consumer product safety standard,

[182] The statute also establishes requirements before the issuance of proposed rules (15 U.S.C. § 2058 (c)). The focus of this report is on analytical requirements for final rules.

> that - (i) compliance with such voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or (ii) it is unlikely that there will be substantial compliance with such voluntary consumer product safety standard; (E) that the benefits expected from the rule bear a reasonable relationship to its costs; and (F) that the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated."

Other CPSC authorizing statutes contain similar analysis requirements. For example, for final product safety rules issued under the Federal Hazardous Substances Act, 15 U.S.C. § 1262(i)(1) states:

> The Commission shall not promulgate a regulation under section 1261(q)(1) of this title classifying an article or substance as a banned hazardous substance or a regulation under subsection (e) of this section unless it has prepared a final regulatory analysis of the regulation containing the following information: (A) A description of the potential benefits and potential costs of the regulation, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs. (B) A description of any alternatives to the final regulation which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen. (C) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues. The Commission shall publish its final regulatory analysis with the regulation.

The statute goes on to say that the Commission must conclude "that the benefits expected from the regulation bear a reasonable relationship to its costs," and that the rule "imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the regulation is being promulgated." Similar requirements can be found in the Flammable Fabrics Act (15 U.S.C. § 1193(j)).

a) PPPA Rules

However, CPSC rules issued pursuant to the Poison Prevention Packaging Act of 1970 (15 U.S.C. § 1472), as amended by the Consumer Product Safety Improvement Act of 2008 (CPSIA, P.L. 110-314), do not appear to be required to have a cost-benefit analysis. Specifically, Section 233 of CPSIA amended Section 3 of the PPPA as follows:

> Nothing in this Act shall be construed to require the Consumer Product Safety Commission, in establishing a standard under this section, to prepare a comparison of the costs that would be incurred in complying with such standard with the benefits of such standard.

CPSC Commissioner Robert S. Adler said this provision means that "while cost- benefit analysis was not forbidden, it was not necessary."[183] However, he also said

[183] Statement of Commissioner Robert S. Adler Regarding the Notice of Proposed Rulemaking Requiring Child-Resistant Packaging for Imidazolines," January 19, 2012, available at http://www.cpsc.gov/pr/adler01192012_1.pdf.

> the Commission must consider a host of factors before moving forward with PPPA rulemaking, including the reasonableness of the proposed standard, the available scientific, medical, and engineering data, the manufacturing practices of affected industries, and the nature and use of the specific household substance in question. Although these findings do not constitute a formal cost-benefit analysis, they cover much of the same terrain, and do so in a way best designed for the type of regulation envisioned in the PPPA.

b) July 2011 Hearing

On July 7, 2011, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce held a hearing at which several independent regulatory agencies testified about their response to the issuance of Executive Order 13563.[184] CPSC Commissioner Adler testified that the Commission has been required since 1981 amendments to the CPSA to "conduct an extensive cost-benefit analysis when we promulgate safety rules."[185] He said these statutory provisions (15 U.S.C. § 2058(f)(1), 15 U.S.C. § 2058(f)(2), and 15 U.S.C. § 2058(3)) "easily match, if not surpass, in their stringency and scope the cost-benefit provisions of the various executive orders on cost-benefit analysis recommended by the Office of Management and Budget."[186] Commissioner Adler also noted, however, that the agency has issued only nine mandatory safety rules in the last 30 years, "opting instead to work with the voluntary standards sector and to negotiate individual Corrective Action Plans for the recall of specific hazardous products."[187] He also said that certain labeling requirements do not require the same level of regulatory analysis as other types of safety rules.

Another perspective was offered at the July 2011 hearing by CPSC Commissioner Anne M. Northup, who said that most of the regulations mandated by CPSIA are not required to be issued pursuant to the above-mentioned provisions that require cost-benefit analysis, and that the Commission "has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA."[188] She also said that such an analysis would reveal that many of the regulations that the act required to be issued "cannot be justified."

7. Federal Trade Commission

The Federal Trade Commission Act (15 U.S.C. § 46) gives the FTC the authority to issue trade regulations that define certain acts to be "unfair or deceptive," or practices "in or affecting commerce." The agency also has rulemaking authority under a variety of other

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[184] See http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72377/pdf/CHRG-112hhrg72377.pdf for the full hearing record.

[185] See http://republicans.energycommerce.house.gov/Media/file/Hearings/Oversight/070711/Adler.pdf, p. 1.

[186] Ibid., pp. 2-3.

[187] Ibid., p. 1.

[188] See http://republicans.energycommerce.house.gov/Media/file/Hearings/Oversight/070711/Northup.pdf, p. 5.

statutes, including the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act), which requires the FTC to consider (among other things) the "burdens imposed on senders of lawful commercial electronic mail."[189]

Perhaps more notably, the Federal Trade Commission Improvements Act of 1980 (P.L. 96-252, 94 Stat. 374) states that any covered rule[190] promulgated by the FTC under Sections 46 and 57a of Title 15, United States Code, must include

> (A) a concise statement of the need for, and the objectives of, the final rule; (B) a description of any alternatives to the final rule which were considered by the Commission; (C) an analysis of the projected benefits and any adverse economic effects and any other effects of the final rule; (D) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and (E) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.[191]

The FTC is also required to include in each rule "a statement of the manner in which the public may obtain copies of the preliminary and final regulatory analyses."[192]

C. Agencies With No Specific Analytical Requirements

Although most independent regulatory agencies are required to at least "consider" certain factors before issuing certain rules, other agencies are not covered by such requirements. As noted above, the NRC is not statutorily required to prepare cost-benefit analyses for any of its rules (although the agency said it has voluntarily done so for decades). Also, although the FCC issues rules under a variety of statutes (e.g., the Communications Act of 1934 (47 U.S.C. § 151 et seq.); the Children's Internet Protection Act (P.L. 106-554, 114 Stat. 2763); and the Protecting Children in the 21st Century Act (15 U.S.C. § 6551 et seq.)), none of these statutes require the FCC to conduct cost-benefit or other types of analyses before issuing regulations. FCC officials confirmed to the author of this report that, aside from the RFA and the PRA, there are currently no statutory provisions that specifically require the FCC to prepare a cost-benefit analysis or other type of economic analysis.[193]

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[189] 15 U.S.C. § 7704 (c)(1).

[190] Amendments to existing rules are covered only if they are expected to have certain economic effects (e.g., a $100 million annual effect on the national economy).

[191] 15 U.S.C. § 57b-3(b)(2).

[192] 15 U.S.C. § 57b-3(b)(3).

[193] FCC officials said that although some might interpret the APA's requirement for "reasoned decision making" as an analytical requirement, it does not specifically require the agency to do any type of analysis. They also said there were a few provisions in statute that require the agency to "consider" certain factors (e.g., a requirement in the Telecommunications Act of 1996 that the agency consider whether competition has made certain rules unnecessary, and therefore should be repealed or amended), but they do not apply to all FCC rulemaking and do not require the preparation of a cost-benefit analysis.

FERC also does not appear to be required to prepare cost-benefit analyses before issuing its regulations. The agency has rulemaking authority under the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. § 2601 et seq.); the Natural Gas Act of 1938 (15 U.S.C. § 717 et seq.); and the Federal Power Act, as amended (16 U.S.C. § 791(a) et seq.). None of these statutes explicitly require cost-benefit analysis.

D. What Does "Consider" Costs and Benefits Mean?

The discussion in the previous sections is summarized in **Table 3** below, which indicates that only three of these independent regulatory agencies are specifically required to prepare some type of cost-benefit analysis before issuing certain final rules. Most of the other statutory provisions mentioned above only require the agencies to "consider" the economic effects of their regulatory actions, or do not require an analysis at all.

Table 3: Summary of Selected Agency-Specific Statutory Analytical Requirements

Agency	Statutory Analytical Requirements
Cost-benefit analysis requirements	
CPSC (consumer product safety and other rules)	Prepare regulatory analysis describing potential benefits and costs of rule, benefits and costs of alternatives considered, and why alternatives not selected (15 U.S.C. § 2058(f)(2).
Federal Reserve (electronic funds transfers)	Prepare an analysis of economic impact that considers the costs and benefits to financial institutions, consumers, and other users of electronic fund transfers (15 U.S.C. § 1693b).
FTC	Include statement of need/objectives, analysis of projected benefits and any adverse effects, and an explanation of why the alternative was chosen (15 U.S.C. § 57b-3(b)(2)).
"Consider" requirements	
SEC	Consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation (e.g., 15 U.S.C. § 77b(b)). Also, consider the impact of the rule on competition (15 U.S.C. § 78w(a)(2)).
CFTC	Consider the costs and benefits of the action of the Commission before promulgating a regulation (7 U.S.C. § 19(a)).
Banking agencies (Riegle Act)	Consider any administrative burdens that a rule would place on depository institutions, as well as the benefits of the rule (12 U.S.C. § 4802(a)).
CFPB (Dodd-Frank Act)	Consider the potential benefits and costs of upcoming rules on consumers and others (12 U.S.C. § 5512).
No Requirements	
FCC	None.
FERC	None.
NRC	None.

Source: Analysis of agency-specific statutory requirements.

It is unclear whether a requirement that an agency "consider" costs and benefits or other factors constitutes a requirement that the agency prepare a formal cost-benefit analysis. As noted previously, the SEC's March 2012 guidance says "No statute expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities." Likewise, the CFTC Office of General Counsel and Office of Chief Economist concluded that 7 U.S.C. § 19(a) "does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission 'consider' the costs and benefits of its actions."[194]

However, others in these agencies have taken a different view. For example, in opening remarks at a February 2011 meeting on rulemakings under the Dodd-Frank Act, CFTC Commissioner Jill E. Sommers noted that the agency's rules contain "very short, boilerplate 'Cost-Benefit Analysis' sections" noting that the Commission need only "consider" costs and benefits.[195] She then asked "how can we appropriately consider costs and benefits if we make no attempt to quantify what the costs are?" She went on to say the following:

> But more importantly from a good government perspective, while it is true that Section 15(a) of the Commodity Exchange Act does not require the Commission to quantify the cost of a proposal, or to determine whether the benefits outweigh the costs, Section 15(a) certainly does not prohibit the Commission from doing so. We simply have chosen not to.
>
> Clearly, when it comes to cost-benefit analysis, the Commission is merely complying with the absolute minimum requirements of the Commodity Exchange Act. That is not in keeping with the spirit of the President's recent Executive Order on "Improving Regulation and Regulatory Review." We owe the American public more than the absolute minimum. As we add layer upon layer of rules, regulations, restrictions and new duties, we should be attempting to quantify the costs of what we are proposing. And we should most certainly attempt to determine whether the costs outweigh the benefits. The public deserves this information and deserves the opportunity to comment on our analysis. That is good government. Our failure to conduct a critical analysis of costs and benefits simply because we are not required to is not good government.[196]

In February 2012, another CFTC Commissioner, Scott D. O'Malia, said "we set the bar low here at the Commission for our cost-benefit analyses, and accept what is 'reasonably feasible.'" He went on to say that he had "reached a tipping point and can no longer tolerate the application of such weak standards to analyzing the costs and benefits of our rulemakings. Our inability to develop a quantitative analysis, or to develop a reasonable comparative analysis of legitimate options, hurts the credibility of this Commission and undermines the quality of our rules.[197]

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[194] The template was replicated in the CFTC OIG report, available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf. The quoted material is on p. 3 of that report.

[195] See http://www.cftc.gov/PressRoom/SpeechesTestimony/sommerstatement022411 for a copy of these remarks.

[196] Ibid.

[197] Opening Statement of Commissioner Scott D. O'Malia Regarding Open Meeting on One Final Rule and One Proposed Rule, February 23, 2012, available at http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement022312.

1. Business Roundtable v. SEC

Certain courts have recently viewed these "consider" provisions as effectively requiring some type of detailed cost-benefit analysis. For example, on July 22, 2011, in *Business Roundtable v. SEC*,[198] the U.S. Court of Appeals for the District of Columbia Circuit vacated an SEC final rule on proxy access,[199] saying the Commission acted arbitrarily and capriciously for having failed to assess the economic implications of a rule adequately.[200] The Court specifically referenced (on p. 3 of the opinion) the requirements in Section 3(f) of the Exchange Act and Section 2(c) of the Investment Company Act of 1940 that the SEC "consider" the impact of the rule on efficiency, competition, and capital formation. Although the SEC had lengthy discussions in the final rule of paperwork burden (14 pages in the *Federal Register*), a "cost-benefit analysis" (17 pages), effects on competition and other factors (5 pages), and an RFA analysis (3 pages), the Court said (on p. 7 of the opinion) that the SEC had "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters." Citing an earlier case involving the SEC,[201] the Court said that the agency has a "statutory obligation to determine as best it can the economic implications of the rule."

The *Business Roundtable* decision has evoked a sizable and varied reaction. Some observers have concluded that this decision has "elevated the importance of economic analysis in rulemaking to implement" the Dodd-Frank Act.[202] Another said the decision was "a warning shot across the bow that the analysis must be professional and capable of withstanding rigorous attack."[203] Henry G. Manne, dean emeritus at the George Mason University School of Law, wrote that the decision "seems to stand for the proposition that many agency rules…will now have to stand the test of a rigorous cost-benefit analysis before they can receive the sanction of legality."[204] One article indicated that the SEC had become "gun-shy" after losing this case, and had become "reluctant to publish its

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[198] 647 F.3d 1144 (D.C. Cir. 2011).

[199] U.S. Securities and Exchange Commission, "Facilitating Shareholder Director Nominations," 75 *Federal Register* 56668, September 16, 2010.

[200] See http://www.cadc.uscourts.gov/internet/opinions.nsf/89BE4D084BA5EBDA852578D5004FBBBE/$file/10-1305-1320103.pdf to view a copy of this decision.

[201] *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005). In this case, the court held that the Commission violated the Administrative Procedure Act by not adequately considering the costs mutual funds would incur to comply with the rule and by failing adequately to consider a proposed alternative to one provision in the rule. The court also cited *American Equity Investment Life Insurance Company v. SEC*, 613 F.3d 166, 167–68 (D.C. Cir. 2010) as another case in which the SEC failed "adequately to assess the economic effects of a new rule."

[202] See, for example, Yin Wilczek, "D.C. Circuit's Proxy Access Ruling Raises Importance of Economic Review, Panel Says," *BNA Daily Report for Executives*, August 2, 2011, p. EE-4; and David S. Hilzenrath, "Wall Street Finds Relief in Court from SEC Rules," *Washington Post*, August 12, 2011, p. A-10.

[203] Robert Barnett, "The Need for Rigorous Cost-Benefit Analysis in Regulations," *BSN Newsletter*, May 2012, available at http://www.bsnlawfirm.com/newsletter/OP0512_Barnett.pdf.

[204] Henry G. Manne, "Economics and Financial Regulation," *Regulation*, Summer 2012, p. 23, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102793.

remaining rules until the proposals have been thoroughly vetted."[205] Harvey Goldshmid, a law professor at Columbia and a former SEC commissioner, was quoted as saying that the Court had "given tremendous power to business groups, causing the agencies to operate out of fear."[206] Another article indicated that the *Business Roundtable* decision

> calls into question the practical ability of the SEC and other financial regulatory agencies with statutory economic analysis mandates to adopt future rules that will withstand timely challenge. Other financial regulators are alarmed, and with good reason, since their economic analyses of their own rules are generally less sophisticated than the SEC's.[207]

Citing the *Business Roundtable* decision, several business groups subsequently filed legal actions questioning the analyses used in two CFTC rules.[208] In October 2012, the American Petroleum Institute (with the Chamber of Commerce and other parties) filed a complaint in the District Court for the District of Columbia against the SEC, alleging (among other things) that the agency "paid lip service to the requirement for cost benefit analysis."[209] In November 2012, the SEC was sued over the agency's rule regarding conflict minerals from the Congo, citing questions regarding whether the Commission's economic analysis was sufficient.[210] Paul Clement, former solicitor general during the George W. Bush Administration, was quoted as saying "It's common-sense litigation 101. If you keep winning, you keep going back."[211]

a) Objections to Business Roundtable

Some, however, view the D.C. Circuit's decision in the *Business Roundtable* case and in other cases as legally flawed. For example, in a 2012 article in the *Texas Law Review*, James D. Cox and Benjamin J.C. Baucom said that the "level of review invoked by the

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[205] Peter Madigan, "Cost-benefit defeat weighing on 'gun-shy' SEC," Risk Magazine, July 4, 2012, available at http://www.risk.net/risk-magazine/feature/2189269/cost-benefit-defeat-weighing-gun-shy-sec.

[206] Ben Protess, "As Wall Street Fights Regulation, It Has Backup on the Bench," *New York Times*, September 24, 2012, available at http://dealbook.nytimes.com/2012/09/24/as-wall-street-fights-regulation-it-has-backup-on-the-bench/?src=rechp&pagewanted=print.

[207] Bruce Kraus and Connor Raso, "Rational Boundaries for SEC Cost-Benefit Analysis," *Yale Journal on Regulation*, volume 2 (2013 forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139010.

[208] See *International Swaps and Derivatives Ass'n v. Commodity Futures Trading Commission*, Civil Action No. 1:11-CV-2146-RLW (D.D.C. Dec. 2011), in which the organizations said that the requirement to evaluate costs and benefits in light of certain factors "requires the Commission to conduct a cost-benefit analysis." See also *Investment Co. Institute v. United States Commodity Futures Trading Commission*, Civil Action No. 1:12-cv00612 (D.D.C. April 2012). In December 2012, the district court granted CFTC's motion for summary judgment and dismissed plaintiffs' challenge to the commission's cost-benefit analysis. See 2012 U.S. Dist. LEXIS 175941 (D.D.C. Dec. 12, 2012), appeal docketed, No. 12-cv-00612 (D.C. Cir. Dec. 27, 2012).

[209] *American Petroleum Institute, et al. v. United States Securities and Exchange Commission*, Civil Action No. 12-1668 (D.D.C. Oct. 10, 2012), available at http://www.chamberlitigation.com/sites/default/files/cases/files/2012/Complaint%20--%20API%20and%20Chamber%20of%20Commerce,%20et%20al.%20v.%20SEC%20%28D.C.%20District%20Court%29.PDF.

[210] *National Association of Manufacturers v. United States Securities and Exchange Commission*, Civil Action no. 12-1422, United States Court of Appeals for the District of Columbia Circuit, November 21, 2012.

[211] Ben Protess, "As Wall Street Fights Regulation, It Has Backup on the Bench," *New York Times*, September 24, 2012, available at http://dealbook.nytimes.com/2012/09/24/as-wall-street-fights-regulation-it-has-backup-on-the-bench/?src=rechp&pagewanted=print.

D.C. Circuit in *Business Roundtable* and its earlier decisions is dramatically inconsistent with the standard enacted by Congress."[212] The authors described the legislative history of the SEC's review standard that was added to existing law by the National Securities Markets Improvement Act of 1996 (i.e., that the agency consider whether the action would "promote efficiency, competition, and capital formation"), noting that a requirement that the SEC "demonstrate serious economic analysis" that was in the competing Senate bill was not agreed to by House-Senate conferees.[213] They also said the following:

> Looking just at the language of the statute, the operative verb in the Review Standard is "consider": the Review Standard does not require the SEC to "determine" whether a rule will actually promote efficiency, competition, or capital formation. In fact, Congress included a "determination" requirement in the first draft of the provision, then removed it in subsequent versions.
>
> The contemporary meaning of "consider" suggests that if, after "considering" whether a proposed rule would "promote efficiency, competition, and capital formation," the SEC concludes that it would not promote those goals, the Review Standard does not require the SEC to abandon the rule. Indeed, the plain import of the Review Standard is that it does not require the SEC to come to a conclusion about a proposed rule's effect on efficiency, competition, and capital formation; it does not prevent adoption of a rule because of indeterminacy of the rule's impact. For that matter, the plain language of the Review Standard does not require the SEC to state a strong reason why a rule should be passed even if, upon consideration, it appears the rule would not promote efficiency, competition, or capital formation.[214]

The authors said that the different review standards established for other agencies "further supports the view that Congress, when it wished for costs and benefits to be assessed, certainly knew how to impose that requirement for an agency's rulemaking."[215]

A forthcoming article in the *Yale Journal on Regulation* by Bruce Kraus and Connor Raso takes a similar position, arguing that the Court's substantive criticism of the SEC in the *Business Roundtable* decision was "unfounded under any procedural standard."[216] The authors also said the decision "has left the SEC and other independent financial regulators in a tough spot, as far as future rulemaking is concerned, especially with dozens of rules mandated by Dodd-Frank in the works." They said the agency faces a "significant analytic burden" that

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[212] James D. Cox and Benjamin J.C. Baucom, "The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority," *Texas Law Review*, volume 90 (2012), pp. 1812-1847.

[213] Others, however, take a different view of congressional intent. Citing language in the House committee report for the 1996 legislation, and the Conference report for the 1999 legislation, Hester Peirce of the Mercatus Center at George Mason University argues that Congress wanted the SEC to do cost-benefit analyses for the agency's rules. See "Economic Analysis by Federal Financial Regulators," Working Paper No. 12-31, October 2012, available at http://mercatus.org/sites/default/files/FinancialRegulators_Peirce_v1-0_1.pdf, pp. 13-14.

[214] Ibid., p. 1821.

[215] Ibid., p. 1823.

[216] Bruce Kraus and Connor Raso, "Rational Boundaries for SEC Cost-Benefit Analysis," *Yale Journal on Regulation*, volume 2 (2013 forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139010. Kraus was co-chief counsel of the SEC's Division of Risk, Strategy, and Financial Innovation. Raso is an attorney-advisor in the Office of General Counsel at the Consumer Financial Protection Bureau. See also Dennis Kelleher, et al., *Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC: A Report from Better Markets, Inc*. (Jul. 30, 2012), which says at p. 19 that the "plain fact is that the Securities Laws do not include any language requiring the SEC to conduct cost-benefit analysis when it promulgates rules."

> may not be theoretically possible to meet, even absent resource constraints. The SEC and CFTC are required by law to regulate new markets, notably the notoriously opaque derivatives markets, where data are scare largely because there has been no regulation before. This burden is compounded by the fact that the agencies find themselves faced at the time of this writing with small budget increases from a Congress that would never have passed Dodd-Frank to begin with.[217]

Kraus and Raso also argue that the assumption of rationality underlying cost-benefit analysis may conflict with the bipartisan commission structure of independent regulatory agencies in which "logrolling" compromises are often needed to reach a decision. In an interview with the author of this report, Kraus said his overall view was that economic analyses should be informative, not dispositive, in regulatory decision making.

V. Previous Reports Examining Economic Analysis Practices at Independent Regulatory Agencies

A number of reports and other documents have been published during the previous two years providing information regarding the extent to which independent regulatory agencies are required to prepare cost-benefit and other types of analysis in connection with their rulemaking activities, and the extent to which these agencies actually do so. These include OMB's annual reports on the costs and benefits of federal regulations, inspectors general reports, two GAO reports, and papers prepared by scholars in the area.

A. OMB Reports on Regulatory Costs and Benefits

OMB's annual reports on the costs and benefits of regulations indicate the extent to which different types of federal agencies are estimating the costs and benefits of their rules.[218] Although the OMB reports primarily focus on major rules issued by Cabinet departments and independent agencies, they also include a brief discussion of major rules issued by independent regulatory agencies. Because OMB does not review independent regulatory agencies' rules under Executive Orders 13563 and 12866, the OMB reports state that this discussion is based solely on data provided by these agencies to GAO under the Congressional Review Act.

In its draft 2012 report, OMB said that Cabinet departments and independent agencies issued a total of 54 major final rules during FY2011.[219] Thirty of the 54 rules were

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[217] Ibid., p. 29.

[218] In 2001, Section 624 of the Treasury and General Government Appropriations Act, 2001, (31 U.S.C. § 1105 note), sometimes known as the "Regulatory Right-to-Know Act," put in place a permanent requirement for an OMB report on regulatory costs and benefits. Specifically, it requires OMB to prepare and submit with the President's budget an "accounting statement and associated report" containing an estimate of the total costs and benefits (including quantifiable and nonquantifiable effects) of federal rules and paperwork, to the extent feasible, (1) in the aggregate, (2) by agency and agency program, and (3) by major rule.

[219] U.S. Office of Management and Budget, *2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities*, available at

considered budget "transfer" rules, and the agencies quantified and monetized the transfer amounts in all of them. For 13 of the remaining 24 rules, the issuing agencies quantified and monetized both benefits and costs, with annual costs estimated to be between $5.0 billion and $10.2 billion, and annual benefits estimated between $34.3 billion and $98.5 billion. The issuing agencies were able to estimate only costs in six other rules (estimated to be between $400 million and $1.1 billion), and were able to estimate only benefits in three rules (estimated to be between $600 million and $700 million). For the final two rules, neither benefits nor costs were quantified and monetized.

During the same period, five independent regulatory agencies issued 17 major rules (most of which were designed to regulate the financial sector). In Table 1-7 of the OMB draft report, OMB interpreted GAO's major rule reports to indicate that, although 11 of the 17 rules had some information on benefits or costs, the issuing agencies did not monetize both the expected benefits and costs of any of the rules. The SEC provided some benefit or cost information for 9 of its 10 rules; the agency monetized costs for 5 rules, but did not monetize benefits in any of them. In contrast, OMB said the GAO reports indicated that the Federal Reserve System did not estimate benefits or costs for any of its four major rules. The NRC reportedly monetized the cost of its one rule, but did not monetize the benefits. CFTC and CPSC each issued one major rule, but reportedly did not estimate the benefits or costs in either of them.

OMB said in the draft report that it does not review the substance of rules issued by these independent regulatory agencies, and "does not know whether the rigor of the analyses conducted by the agencies is similar to that of the analyses performed by agencies subject to OMB review."[220] OMB went on to say that obtaining better information on the benefits and costs of rules issued by independent regulatory agencies would be "highly desirable," and said the "absence of such information is a continued obstacle to transparency, and it might also have adverse effects on public policy."[221] The draft report noted that Executive Order 13579 had requested (but not required) that independent regulatory agencies follow the general principles of Executive Orders 12866 and 13563.

1. Previous OMB Reports

Previous OMB reports evidenced the same patterns of analysis, with Cabinet department and independent agencies more frequently reporting cost and/or benefit information for their rules (particularly those rules not involving transfer payments). For example:

- In the 2011 report (reflecting FY2010 rules), OMB reported that Cabinet departments and independent agencies issued a total of 66 major final rules.[222] For 32 budget transfer rules, the agencies monetized only the

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http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf.

[220] Ibid., p. 28.

[221] Ibid., pp. 28-29.

[222] Office of Management and Budget, *2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, June 2011, available at http://www.whitehouse.gov/sites/

transfer amounts. For 18 of the remaining 34 rules, the issuing agencies quantified and monetized both benefits and costs. For 10 other rules, the agencies monetized only costs or benefits, but not both. For six rules, the agencies did not quantify or monetize benefits or costs. The OMB report (Table 1-7) also indicated that, according to the GAO major rule reports, independent regulatory agencies did not provide monetized estimates of both costs and benefits for any of the 17 major rules they issued during FY2010. The report said that the SEC monetized costs for six of its nine rules, and in one joint rule issued by the FTC and the Federal Reserve System, the agencies assessed only costs. The Federal Reserve System issued five other rules, but reportedly did not provide monetized estimates of benefits for costs in any of them.

- In the 2010 report (reflecting FY2009 rules), OMB reported that Cabinet departments and independent agencies issued 66 major final rules, including 22 budget transfer rules. Of the remaining 44 rules, the agencies reportedly quantified and monetized both benefits and costs for 16 of the rules. The agencies estimated only costs in 12 rules, and estimated only benefits in three Department of the Interior bird-hunting rules. Reportedly using information from GAO's major rule reports, Table 1-7 of the OMB report indicates that independent regulatory agencies issued 13 major final rules, and monetized both costs and benefits for only one of the rules (issued by the SEC). In five other rules (three issued by the SEC and two issued by the NRC), the agencies monetized only costs. The Federal Reserve System reportedly did not provide information on benefits or costs for any of its three rules.[223]

- In the 2009 report (reflecting FY2008 rules), OMB reported that Cabinet departments and independent agencies issued 42 major final rules, including 21 budget transfer rules. Of the remaining 21 social regulations, the agencies quantified and monetized both benefits and costs for 13 of the rules. In six rules the agencies monetized only costs, and monetized only benefits in one bird-hunting rule. Table 1-7 interprets GAO's major rule reports to indicate that independent regulatory agencies issued 11 major final rules, and monetized both costs and benefits for only one of the rules (issued by the NRC). In two other rules (one each by the NRC and the Federal Energy Regulatory Commission), the agencies monetized only costs. The FCC reportedly did not provide information on costs or benefits for any of its four rules.[224]

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default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

[223] See http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf for a copy of this report.

[224] See http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/2009_final_BC_Report_01272010.pdf for a copy of this report.

- In the 2008 report (reflecting FY2007 rules), OMB reported that Cabinet departments and independent agencies issued 40 major final rules. For the 18 social regulations (i.e., non-transfer rules), they quantified and monetized both benefits and costs for 12 of the rules. Four of the remaining six rules were homeland security rules in which only costs were monetized,[225] and two rules were bird-hunting rules for which only benefits were monetized. Using information from GAO's major rule reports, Table 1-7 says that independent regulatory agencies issued 10 major final rules during this period, only one of which (issued by the SEC) had monetized benefits and costs. Two other rules reportedly had only monetized benefits and two others had only monetized costs.[226]

2. Summary

Table 4 below summarizes the information provided in OMB's 2008 report through the draft 2012 report regarding independent regulatory agencies' rules issued from FY2007 through FY2011 (reportedly relying on information from GAO's major rule reports). The SEC issued 38 of the 68 final rules issued by independent regulatory agencies during this period (nearly 56%), and accounted for 37 of the 47 rules (nearly 79%) that reportedly had at least some information on benefits or costs. Nineteen of the 38 SEC rules (50%) contained monetized cost information, and 6 of the 7 NRC rules (nearly 86%) did so. In comparison, the other independent regulatory agencies were reportedly much less likely to provide monetized cost information (only 2 out of 23 rules, or less than 9%). None of the agencies were described as frequently providing information on monetized benefits (4 out of 68 rules, or less than 6%), and some agencies reportedly provided neither monetized costs nor benefits for any of their rules (e.g., 13 Federal Reserve System (FRS) rules, and 6 FCC rules).

Table 4: OMB Data on Benefit and Cost Information in Major Rules Issued by Independent Regulatory Agencies, FY2007 - FY2011

Agency	Major Final Rules Issued	Rules with Some Information on Benefits or Costs	Rules with Monetized Benefits	Rules with Monetized Costs
CFTC	1	1	0	0
CPSC	1	0	0	0
FCC	6	0	0	0

[225] OMB has frequently noted that most homeland security rules do not have quantified or monetized estimates of benefits. See, for example, http://www.whitehouse.gov/omb/assets/legislative_reports/ 2009_final_BC_Report_01272010.pdf.

[226] See http://www.whitehouse.gov/sites/default/files/omb/assets/information_and_regulatory_affairs/2008_cb _final.pdf for a copy of this report.

FERC	1	1	0	1
FRS	13	1	0	0
NRC	7	6	1	6
SEC	38	37	3	19
FRS/FTC	1	1	0	1
Total	68	47	4	27

Source: OMB annual reports on regulatory costs and benefits, 2008 through 2012.

3. Analysis of the OMB Reports

The OMB reports describing the degree to which independent regulatory agencies provide cost and benefit information are widely quoted,[227] including by the seven former OIRA Administrators in their September 2012 letter supporting S. 3468.[228] Therefore, it is important to examine the underlying GAO reports as well as the rules that those reports describe to validate the information that OMB provided.

In the executive summary of the 2012 draft OMB report (reflecting rules issued during FY2011), OMB said the following:

> The Government Accountability Office (GAO) reported that none of the 17 rules assessed both anticipated benefits and costs.[229]

However, although GAO's major rule reports for these 17 rules indicated that none of the independent regulatory agencies provided monetary estimates of both benefits and costs, the GAO reports frequently indicated that the agencies at least qualitatively "assessed" both expected benefits and costs. In fact, Table 1-7 of the 2012 draft OMB report indicates that at least 10 of the 17 rules contained some kind of "Information on Benefits and Costs," and 6 rules had monetized cost information.

[227] See, for example, Thomas Hemphill, "It's Time to Regulate the Regulators," *Real Clear Markets*, September 21, 2012, at http://www.realclearmarkets.com/articles/2012/09/21/its_time_to_regulate_the_regulators_99895.html; Arthur Fraas and Randall Lutter, "On the Economic Analysis of Regulations at Independent Regulatory Commissions," *Administrative Law Review*, volume 63 (Special Edition, 2011), pp. 237-241; Testimony of Sally Katzen before the Subcommittee on Courts, Commercial and Administrative Law, House Committee on the Judiciary, March 21, 2012, available at http://judiciary.house.gov/hearings/Hearings%202012/Katzen03212012.pdf; Susan E. Dudley, "Independent Regulatory Agencies Should be More Accountable," *Regulatory Policy Commentary*, September 25, 2012, available at http://regulatorystudies.gwu.edu/images/commentary/dudley_independent_regulatory_agency.pdf; and CRS Report R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, by Curtis W. Copeland, August 30, 2011, available at http://www.fas.org/sgp/crs/misc/R41974.pdf.

[228] See http://portman.senate.gov/public/index.cfm/files/serve?File_id=563c60e4-3770-4329-b1aa-ff51752cd750 for a copy of the letter. It states: "According to a 2011 Office of Management and Budget report, it appears that roughly half of the major rules developed by independent agencies over a 10-year period provided no information on either costs or benefits. In 2011, not one of the 17 major rules issued by independent agencies was based on a complete benefit-cost analysis. The same was true in 2010 (17 major rules, none with a complete benefit- cost analysis) and in 2009 (13 and 0)."

[229] See http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf, p. 4.

In Table 1-7 of the 2012 draft report, OMB said that (according to the GAO major rule reports) 6 of the 17 major rules had no information on costs and benefits at all.[230] However, several of these rules actually did contain at least some cost information, and the relevant GAO major rule reports often so indicated. For example:

- OMB interpreted the GAO report on a CPSC rule on "Safety Standards for Full-Size Baby Cribs and Non-Full Sized Baby Cribs" (75 FR 81766)[231] to state that the rule had no information on benefits or costs. Although the preamble to the rule did not contain a designated cost-benefit section, it did contain a substantive five-page discussion of expected costs and effects within the Regulatory Flexibility Act section. For example, for both full-size and non full-size cribs, the agency discussed the market; the impact on small businesses (manufacturers, importers, retailers, and child care centers); alternatives considered; and other information. The agency estimated that the total one-time cost to child care centers of replacing all of their full-size cribs would be approximately $97 million, and the total one-time cost of replacing non-full-size cribs was estimated to be approximately $290 million.[232] Also, the PRA section of GAO's major rule report stated that CPSC "estimates that there are approximately 1.3 million children's apparel and footwear products that will require an average of 3 hours for the recordkeeping. Thus, the total hour burden of the recordkeeping associated with the final rule is 5.4 million hours. Additionally, the total cost of the recordkeeping associated with the testing and certification rule is approximately $197 million."[233] In addition, as part of the proposed rule (75 FR 43307), CPSC provided estimates of the expected paperwork burden to both industry and the government, and monetized those estimates. The agency referenced those estimates in the final rule.

- OMB interpreted the GAO report on a Federal Reserve System rule regarding "Debit Card Interchange Fees and Routing" (76 FR 43394) to state that the rule had no information on benefits or costs. However, in a section of the rule entitled "EFTA 904(a) Economic Analysis," the agency said the following:

> Section 904(a)(2) of the [Electronic Fund Transfer Act] requires the Board to prepare an economic analysis of the impact of the regulation that considers the costs and benefits to financial institutions, consumers, and other users of electronic fund transfers. The analysis must address the extent to which additional paperwork would be required, the effect upon competition in the provision of electronic fund transfer services among large and small financial

[230] See http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf, pp. 29-31.

[231] Section 104(b) of the Consumer Product Safety Improvement Act of 2008 required CPSC to promulgate consumer product safety standards for durable infant or toddler products. Section 104(b) required that the standards include full-size and non-full-size baby cribs, and Section 104(c) specified that the crib standards would cover used as well as new cribs.

[232] 75 *Federal Register* 81783, 81784. CPSC officials told the author of this report that because 98% of the child care centers affected were small entities, the FRFA was essentially a cost-benefit study.

[233] See http://gao.gov/products/GAO-12-250R.

> institutions, and the availability of such services to different classes of consumers, particularly low income consumers.[234]

In the following section entitled "Cost/Benefit Analysis," the agency said "The Section-by-Section Analysis above, as well as the Final Regulatory Flexibility Analysis and Paperwork Reduction Act analysis below, contain a more detailed discussion of the costs and benefits of various aspects of the proposal. This discussion is incorporated by reference in this section." The section-by-section analysis was more than 50 pages in the *Federal Register*, and qualitatively discussed the costs and benefits of different aspects of the rule. A subsequent section of the preamble discussed "Effects of the Rule on Various Parties," including effects on consumers, issuers, merchants, and other parties. Also, the RFA section of the GAO major rule report stated that the Federal Reserve System had concluded that the rule may have a significant economic effect on a substantial number of small entities, and discussed steps that the agency would take to address concerns about those effects.[235]

- OMB interpreted the GAO report on a separate Federal Reserve System rule on "Debit Card Interchange Fees and Routing" (76 FR 43478) as stating that the rule had no cost or benefit information. However, both the rule and the GAO report contained the following quantitative information on paperwork burden:

> The Board estimates that the 380 issuers would take, on average, 160 hours (one month) to develop and implement policies and train appropriate staff to comply with the recordkeeping provisions under § 235.4. This one-time annual PRA burden is estimated to be 60,800 hours. On a continuing basis, the Board estimates issuers would take, on average, 40 hours (one business week) annually to review its fraud prevention policies and procedures, updating them as necessary, and estimates the annual PRA burden to be 15,200 hours. The Board estimates 380 issuers would take, on average, 5 minutes to comply with the reporting provision under § 235.4(c) (annual certification), and estimates the annual reporting burden to be 32 hours. The total annual PRA burden for this information collection is estimated to be 73,032 hours.[236]

OMB interpreted the GAO major rule reports to state that 11 of the 17 major rules had no monetized cost information. However, the agencies did monetize information on anticipated paperwork costs in several of these rules, and the GAO reports included this information, or referenced OMB's review of the agencies' paperwork estimates. For example:

- OMB interpreted the relevant GAO report to provide that an SEC rule on disclosures for asset-backed securities required by Section 943 of the Dodd-Frank Act (76 FR 4489) contained no monetized estimates of costs or

[234] 75 *Federal Register* 43462.

[235] See http://gao.gov/products/GAO-11-895R.

[236] 76 *Federal Register* 43486. For the GAO report, see http://gao.gov/products/GAO-11-896R.

benefits. The "Benefit-Cost Analysis" section of the rule contained only qualitative descriptions of costs and benefits. However, the PRA section contained detailed estimates of the disclosure rule's primary direct costs. For example, the SEC estimated that it would take a total of 230,040 hours for a securitizer to set up the mechanisms to file the initial Form ABS-15G disclosures, and estimated that 25% of those hours would require outside professional assistance, at a cost of about $23 million. Subsequent quarterly filings were estimated to take 21,600 hours, with outside costs of $2.16 million; and annual confirmations that no repurchases had occurred were estimated to be 450 hours, and $45,000 in outside costs. Therefore, total internal burden hours were estimated at $189,068, and total external costs were estimated to be about $25.2 million. The SEC also estimated that it would take nearly 91,000 hours annually for respondents to provide new Rule 17g-7 disclosures. The GAO major rule report contained all of this information.[237]

- Similarly, OMB interpreted the relevant GAO report to indicate that another SEC rule on issuer review of assets in offerings of asset-backed securities (76 FR 4231) also had no monetized estimates of benefits or costs. Although the "Benefit-Cost Analysis" section of the preamble contained only qualitative descriptions, the PRA section discussed paperwork costs, and estimated that the total increased burden attributable to S-1 and S-3 rules would be approximately 7,000 hours, with a cost associated with the use of outside professionals of $8,397,000. The GAO major rule report contained all of this information.[238]

- OMB interpreted a GAO report regarding a CFTC rule on "Whistleblower Incentives and Protection" (76 FR 53172) to say that it had no monetized cost information. However, the preamble to the rule provided estimates of expected paperwork burden, and certain other costs associated with the collection of information. (The rule required the Commission to pay eligible whistleblowers a monetary award for voluntarily providing original information about violations leading to a successful enforcement action.) Specifically, CFTC estimated that the total annual burden related to completing two required forms would be about 340 hours, and that some filers would incur about $9,000 in attorney fees associated with these filings. The GAO major rule report said, "the Commission notes that the Paperwork Reduction Act related costs are included in the overall compliance costs considered with respect to the final rule," and that the proposed collections of information had been submitted to OMB for review.[239] Although the GAO report did not include the above burden estimates, it noted that OMB approved the paperwork requirements included in the final rule.

[237] See http://gao.gov/products/GAO-11-353R.

[238] See http://gao.gov/products/GAO-11-341R.

[239] See http://gao.gov/products/GAO-11-934R.

- OMB interpreted a GAO report regarding a similar SEC rule on "Whistleblower Incentives and Protections" (76 FR 34299) that it contained no monetized cost information. Although the "Economic Analysis" section was qualitative in nature, the Commission estimated in the PRA section of the rule that Form TCR would have an annual burden of 10,500 hours, and Form WB-APP would have an annual burden of 258 hours. In addition, the agency said "that each year whistleblowers will incur the following total amounts of attorneys' fees for completion of the whistleblower program forms: (i) $75,000 for the completion of Form TCR; (ii) $24,000 for the completion of Form WB-APP."[240] GAO's major rule report reflected these burden hour estimates, but did not include the monetized information.[241] However, OMB approved the paperwork requirements in the rule, including the monetized cost information.

- OMB interpreted a GAO report on an SEC rule implementing "Amendments to the Investment Advisers Act of 1940" (76 FR 42950) to state that the rule contained no monetized cost information. However, the rule did provide detailed cost information regarding the rule's information disclosure requirement. Specifically, the agency estimated the total annual paperwork burden at 246,652 hours per year, a reduction of 21,805 from the previously approved burden. The SEC also said that registered investment advisors were expected to incur an annual cost burden of $10,056,250, a reduction from the current approved cost burden of $22,775,400. Although the GAO major rule report did not include these numbers, it noted that the rule contained collections of information that had been submitted to OMB for review.[242] Also, OMB approved the paperwork requirements in the rule, including the monetized cost information.

For other rules, OMB interpreted the GAO major rule reports to say they had no estimates of benefits or costs, but the rules appeared to be considered "major" only because they delayed the effective dates of previous major rules. GAO noted this fact in its major rule reports, and each of the previous major rules contained cost and benefit information. For example:

- OMB interpreted the GAO report on a Federal Reserve System rule regarding "Electronic Fund Transfers" (75 FR 50683, August 17, 2010) to provide that it had no information on benefits or costs. This rule delayed the effective date of certain gift card disclosure provisions in a final rule that had been published earlier in the year (75 FR 16580, April 1, 2010). The delay was necessary because Congress changed the underlying statute after the earlier final rule was published and required the delay in order to permit the sale of

[240] 76 *Federal Register* 34355.

[241] See http://gao.gov/products/GAO-11-764R.

[242] See http://gao.gov/products/GAO-11-862R.

existing card stock through January 31, 2011.[243] GAO noted the statutorily required delay in its major rule report.[244] The Federal Reserve System said the paperwork estimates provided in the earlier rule were unchanged (although delayed). In that earlier rule, the agency estimated that the requirements would impose a one-time burden increase of 192,800 hours on entities regulated by the Federal Reserve, and a continuing annual increase of 19,280 hours.[245] The agency said that entities regulated by other agencies under the statute could see a one-time increase of more than 2.7 million burden hours, and a continuing annual increase of 275,000 hours.

- OMB interpreted the GAO report on an SEC rule regarding "Regulation SHO" (75 FR 68702, November 9, 2010) to provide that it had no information on benefits or costs. However, this rule merely extended by less than four months the compliance date of a major rule that had been published eight months earlier (75 FR 11232, March 10, 2010) to "give certain exchanges additional time to modify their current procedures for conducting single-priced opening, reopening, and closing transactions for covered securities that have triggered Rule 201's circuit breaker in a manner that is consistent with the goals and requirements of Rule 201. Further, the extended compliance period will give industry participants additional time for programming and testing for compliance within the requirements of the rule."[246] GAO noted the reasons for this delay in its major rule report, and said the extension would delay both the costs and benefits of the original rule.[247] The SEC provided monetized estimates of costs in the March 2010 rule,[248] and said in the November 2010 rule that this extension would delay both costs and benefits.

Also, OMB said that, according to the relevant GAO report, an NRC major rule had monetized the costs of the rule, but had not monetized the benefits. However, the rule at issue was a budgetary transfer rule, not a rule involving traditional regulatory compliance costs. The NRC is required by law (42 U.S.C. § 2214) to publish the rule each year revising the fee schedules charged to applicants and licensees so that the agency can

[243] Public Law 111-209, July 27, 2010.

[244] See http://gao.gov/products/GAO-11-164R.

[245] 75 *Federal Register* 16613.

[246] 75 FR 68702.

[247] See http://gao.gov/products/GAO-11-212R.

[248] The Commission estimated that the original rule would have an average one-time initial cost of $86,880 per self-regulating organization (SRO) trading center and $68,381 per non-SRO trading center required to establish the written policies and procedures under this rule. The Commission also estimated an average annual on-going cost of $18,588 per trading center to ensure that the written policies and procedures are up-to-date and remain in compliance. In addition, the Commission estimated an average annual cost of $102,768 per trading center for on-going monitoring for and enforcement of trading in compliance with the rule. The Commission also estimated that this rule would have an average one-time initial cost of $68,381 per broker-dealer establishing the written policies and procedures under the rule. The Commission estimates an average annual on-going cost of $18,588 per broker-dealer to ensure that written policies and procedures are up-to-date and remain in compliance. In addition, the Commission estimated an average annual cost of $102,768 per broker-dealer for on-going monitoring for and enforcement of trading.

recover 90% of its budget authority for the fiscal year.[249] GAO's major rule report notes this statutory fee recovery requirement as the reason why the NRC did not prepare a cost-benefit analysis for the rule.[250] The monetized "cost" information provided in the rule reflected the amount of fees expected to be collected during the year (about $916 million). According to the NRC, the inspections and other services funded by these fees "provide a direct benefit to NRC licensees."[251] More generally, the NRC's mission is reportedly to "license and regulate the nation's civilian use of byproduct, source and special nuclear materials to ensure adequate protection of public health and safety, promote the common defense and security, and protect the environment."[252] Six of the eight NRC major final rules in **Table 1** above involved these fee schedules. In the portion of the draft OMB report that discusses costs and benefits for Cabinet departments and independent agencies like EPA, OMB focuses on what it terms "non-budget" rules – not these kinds of transfer rules.

Therefore, it appears that the information in at least this most recent OMB report regarding cost and benefit information provided by independent regulatory agencies is not entirely correct. Rules characterized as containing no information on benefits and costs sometimes contained such information (albeit primarily qualitative in nature), or did not contain such information because they were only delaying the compliance dates of previous rules (which contained cost and benefit information). Rules described as containing no monetized cost information sometimes contained monetary estimates of paperwork burden. And one rule described as containing no benefit and cost information was actually a transfer rule, and reflected an industry's payment of user fees as required by law.

a) Earlier Reports

A quick review of OMB reports from previous years indicated the same types of issues. The following examples are drawn from the 2011 OMB report[253] (covering rules issued during FY2010):

- OMB indicated that an SEC rule on "Facilitating Shareholder Director Nominations" (75 FR 56668) contained no monetized information on benefits or costs. Although most of the rule's effects were described in qualitative terms, the rule did contain some monetized cost and benefit information. For example, the agency estimated that the disclosure burden of Rule 14a-11 on reporting companies and registered investment companies

[249] U.S. Nuclear Regulatory Commission, "Revision of Fee Schedules; Fee Recovery for Fiscal Year 2011," 76 *Federal Register 36780*, June 22, 2011.

[250] See http://gao.gov/products/GAO-12-866R.

[251] 76 *Federal Register* 36780.

[252] See http://www.nrc.gov/about-nrc/nrc-slides-who-we-are.pdf, p. 8.

[253] Office of Management and Budget, *2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

was 4,113 hours of personnel time and $548,000 for the services of outside professionals. The disclosure burden to shareholders of Schedule 14N was estimated at 7,870 hours of shareholder time and more than $1 million for the services of outside professionals. At another place in the preamble the agency estimated costs to companies to prepare and submit a notice of intent to exclude certain proposals at $11,484 hours and more than $1.5 million for the services of outside professionals. Printing and mailing costs for proxy materials were estimated to be between $2.6 million and $7.4 million. One benefit described in the rule was reduced printing and postage costs (compared to traditional proxy contests), which was estimated at $18,000 for the average nominating or shareholder group.

- The report indicated that another SEC rule on "Money Market Fund Reform (75 FR 10060) had no monetized information on benefits or costs. However, the agency estimated that "each money market fund will incur $24,000 and all fund complexes will incur $3.9 million annually for the boards of directors to initially designate and determine the reliability and sufficiency of the designated NRSROs' credit ratings for use in determining eligibility of portfolio securities."[254] The agency also estimated that the aggregate cost to firms preparing a report at $288,510; the total cost to document, review, and adopt certain policies and procedures at $1,137,000; the total on-time cost for fund complexes to develop and refine stress test procedures at $16 million; and other stress test-related costs at $24 million.

In other cases, the agencies estimated paperwork burden hours, but just did not monetize those hours by multiplying by an hourly rate (e.g., $30 per hour). For example, the report indicated that a Federal Reserve System rule on electronic fund transfers (74 FR 59033) contained no monetized compliance cost information. The preamble to the rule stated that the total one-time paperwork burden for respondents would be 38,560 hours, but would increase to 98,462 hours for Federal Reserve-regulated financial institutions that are required to comply with Regulation E. The agency also estimated that more than 5 million consumers would each spend as much as 5 minutes reviewing and responding to an opt-in notice, increasing the total burden by 428,058 hours. Overall, the burden increase was estimated at 466,618 hours. Although the agency did not monetize this increase in paperwork burden, it was not required to do so by either the PRA or the legislation under which the rule was issued.

Overall, the 2011 OMB report stated that GAO "reported that none of the 17 rules assessed both anticipated benefits and costs."[255] In fact, however, GAO's reports on those major rules indicated that although the agencies may not have monetized or even quantified benefits information in these rules, the agencies often provided at least

[254] 75 *Federal Register* 10010.

[255] OMB 2011 report, p. 4.

qualitative assessments of both benefits and costs.[256] In many of the rules, those costs were quantified, and sometimes were monetized.

b) CRS Examination of OMB Reports

The Congressional Research Service has also examined OMB's 2011 report and the draft 2012 report, and reported that the OMB reports and the GAO reports on which they were based sometimes "differed" in their assessments of the cost-benefit analyses conducted by the independent regulatory agencies.[257] In those cases, CRS said it reviewed the rule as published in the *Federal Register* to resolve differences. CRS also reported that the OMB reports did not include any information on three OCC major rules that the GAO database indicated had been published. In two of these three rules, CRS said the agency monetized costs but not benefits. CRS also said that OMB did not provide any information on a rule issued by the National Labor Relations Board that described both costs and benefits, but monetized only costs. Finally, CRS noted that although the GAO major rule reports indicated that CPSC did not conduct a cost-benefit analysis for its two major rules, the rules themselves indicated that the agency's regulatory flexibility analysis included monetization of potential costs to small entities.

B. Inspectors General Reports on Banking Agencies

Because of concerns regarding the implementation of the Dodd-Frank Act, on May 4, 2011, the 10 Republican Senators on the Senate Committee on Banking, Housing, and Urban Affairs jointly requested that the offices of the inspectors general (OIGs) for five independent regulatory agencies in the banking area provide them with information about the economic analysis requirements applicable to rulemaking in those agencies.[258] The five agencies were the Board of Governors of the Federal Reserve System, the SEC, CFTC, OCC, and FDIC. The five OIGs provided written responses to the Senators in June 2011, and those responses are summarized below.

1. Board of Governors of the Federal Reserve System

As mentioned earlier in this report, the OIG for the Board of Governors of the Federal Reserve System concluded that the statutes related to the Board's rulemaking authority,

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[256] For example, GAO's reports for all nine of the major rules issued by the SEC that year indicated that the agency discussed both costs and benefits in all nine rules.

[257] U.S. Congressional Research Service, *Independent Regulatory Agencies, Cost-Benefit Analysis, and Presidential Review of Regulations*, by Maeve P. Carey and Michelle D. Christensen, CRS Report R42821, November 16, 2012. See Table 1, pp. 11-12.

[258] See http://crapo.senate.gov/documents/RepublicanBankingCommitteeDoddFrankLetter.pdf for a copy of this letter. The letter also asked the OIGs to describe internal policies and procedures governing economic analyses of proposed rules, the degree to which agency staff understand and follow applicable requirements, the qualifications of the staff who conduct the analyses, and other aspects of those analyses.

including the Federal Reserve Act and the Bank Holding Company Act of 1956, "generally do not require economic analysis as part of the agency's rulemaking activities."[259] The OIG noted the applicability of the PRA and the RFA to the Board's rulemaking, but said they only require "narrowly tailored evaluations of the rulemaking's paperwork burden and effect on small entities, respectively."[260] The OIG said that Board generally conducts some type of economic analysis, but said the nature of the analysis "varied according to the applicable rule. Many elements of the Dodd-Frank Act affected the scope of the economic analysis conducted, including (1) substantive requirements contained in the statute; (2) statutory references requiring the rulemaking team to consider existing standards, applicable international standards, or prudential requirements; and (3) a statutorily mandated report on the topic."[261] In particular, the OIG said certain statutory requirements "may leave limited agency discretion for the rulemaking, including the economic analysis necessary to support the proposed rule."[262]

As requested, the OIG examined the agency's actions with regard to five proposed rules under the Dodd-Frank Act.[263] The OIG concluded that "each proposed rulemaking complied with the PRA and the RFA," and that "the Board conducts the quantitative economic analysis necessary to satisfy statutory requirements, including 'consideration' requirements. On a discretionary basis, the Board also conducts the quantitative economic analysis it deems necessary to support the rulemaking."[264] Two of the five rules did not involve quantitative economic analysis. Quantitative methods in the other rules reportedly included the use of "historical data to perform a decision-tree analysis linking mortgage loan characteristics to loan performance," and "an assessment of the costs and benefits to consumers of 30-year versus 40-year loan terms to determine a 'standard loan' definition."[265]

2. Securities and Exchange Commission

The SEC OIG has issued two recent reports examining the agency's analyses of Dodd-Frank Act rules – one in June 2011, and one in January 2012.

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[259] Office of the Inspector General, Board of Governors of the Federal Reserve System, "Response to a Congressional Request Regarding the Economic Analysis Associated with Specified Rulemakings," June 13, 2011, p. 6. The report is available at http://www.federalreserve.gov/oig/files/Congressional_Response_web.pdf.

[260] Ibid, p. 7.

[261] Ibid., pp. 11-12.

[262] Ibid., p. 7.

[263] The five rules were (1) Credit Risk Retention (Risk Retention), 76 *Federal Register* 24090 (April 29, 2011); (2) Risk-Based Capital Standards: Advanced Capital Adequacy Framework-Basel II; Establishment of a Risk-Based Capital Floor (Risk-Based Capital Floor), 75 *Federal Register* 82317 (December 30, 2010); (3) Margin and Capital Requirements for Covered Swap Entities (Margin and Capital Requirements), 76 *Federal Register* 27564 (May 11, 2011); (4) Regulation Z; Truth in Lending (Ability to Repay), 76 *Federal Register* 27390 (May 11, 2011); and (5) Financial Market Utilities, 76 *Federal Register* 18445 (April 4, 2011).

[264] FRS OIG report, op cit., p. 15.

[265] Ibid.

a) June 2011 SEC OIG Report

The June 2011 SEC OIG report[266] stated that even though Executive Order 12866 and OMB Circular A-4 do not apply to the Commission, "SEC Chairmen have made a commitment to Congress that the SEC will conduct cost-benefit or economic analyses in connection with its rulemaking activities,"[267] and said that "the Commission's current rulemaking procedures are closely aligned with the requirements" of the executive order and the circular.[268] The OIG also noted that the SEC's website states that "we take into account benefits and costs in our rulemakings [and] assess alternative regulatory approaches," and that the SEC Chairman stated during a congressional hearing in March 2011 that the SEC does conduct cost-benefit analyses.[269] However, the OIG also pointed out that another SEC Commissioner stated in a May 2011 speech that the "Commission has not engaged in a cost-benefit analysis of the rulemakings that were essentially dictated by the law."[270] She reportedly went on to say "By limiting our cost-benefit analysis to those measures over which the Commission has full discretion, we fail to consider all the costs and benefits that will result from a particular regulatory action."[271]

The SEC OIG report stated that the "potential costs and benefits were set forth in each of the six proposed rules" that they were asked to examine,[272] although the agency was "rarely able to quantify the economic impact of a proposed rule."[273] The agency did, however, ask for public comments on costs and benefits, and identified and asked for comments on regulatory alternatives "[w]here permitted by the Dodd-Frank Act." SEC reportedly did not estimate the costs and benefits of alternatives, and did not ask for public comments on this issue. Overall, though, the OIG concluded that "a systematic cost-benefit analysis was conducted for each of the six rules reviewed," and "incorporated all aspects of the principles of the applicable Executive Orders and the SEC's internal compliance handbook."[274]

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[266] Office of the Inspector General, U.S. Securities and Exchange Commission, "Report of Review of Economic Analyses Performed by the Securities and Exchange Commission in Connection with Dodd-Frank Rulemakings," June 13, 2011, available at http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_13_11.pdf (hereafter referred to as "OIG/SEC").

[267] In support of this statement, the OIG noted that SEC Office of General Counsel officials quoted former SEC Chairman Arthur Levitt, who said there was an expectation that the SEC would perform cost-benefit analyses as part of the rulemaking process. See OIG/SEC, p. 4.

[268] OIG/SEC, p. 4.

[269] Ibid., p. 5, citing testimony by SEC Chairman Mary Shapiro before the Subcommittee on Financial Services and General Government, House Committee on Appropriations, March 15, 2011.

[270] Ibid., pp. 5-6, citing a speech by Commissioner Kathleen Casey at an SEC open meeting regarding rules for Nationally Recognized Statistical Rating Organizations held on May 18, 2011.

[271] SEC OIG report, op cit., p. 6.

[272] The six rules were (1) Credit Risk Retention, 76 *Federal Register* 24090 (April 29, 2011); (2) Clearing Agency Standards for Operation and Governance, 76 *Federal Register* 14472 (March 16, 2011); (3) Registration and Regulation of Security-Based Swap Execution Facilities, 76 *Federal Register* 10948 (February 28, 2011); (4) Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, 76 *Federal Register* 8068 (February 11, 2011); (5) Registration of Municipal Advisors, 76 *Federal Register* 824 (January 6, 2011); and (6) Conflict Minerals, 75 *Federal Register* 80948 (December 23, 2010).

[273] Ibid., p. 18.

[274] Ibid., p. 42.

b) Role of Economists in Rulemaking

In April 2012, the SEC Chairman testified before a House subcommittee that the agency created the Division of Risk, Strategy, and Financial Innovation (RSFI) in September 2009 "to provide more focus on the economic effects of our rules and to increase the involvement of economists in the rulewriting process."[275] RSFI is, she said, "directly involved in the rulemaking process by helping to develop the conceptual framing for, and assisting in the subsequent writing of, the economic analysis contained in the Commission's rulemaking releases." However, in its June 2011 report, the SEC OIG concluded that the level of involvement of the RSFI "varied considerably from rulemaking to rulemaking."

c) January 2012 SEC OIG Report

In a January 2012 follow-up report on five other Dodd-Frank rules,[276] the SEC OIG said "the extent of quantitative discussion of cost-benefit analyses varied among rulemakings" and that none of the rules examined "attempted to quantify either benefits or costs other than information collection costs as required by the Paperwork Reduction Act."[277] The report also said the SEC "generally focused on discretionary components," and (consistent with a then-current September 2010 SEC general counsel memorandum) did not estimate the costs and benefits of elements in the Dodd-Frank Act for which the Commission did not have rulemaking discretion.[278] Citing the opinion of its expert on these issues, the OIG said that focusing only on discretionary elements in the statute "may not be fulfilling the essential purposes of such analyses—providing a full picture of whether the benefits of a regulatory action are likely to justify its costs and discovering which regulatory alternatives would be the most cost-effective." The OIG also concluded that the SEC "sometimes used multiple baselines in its cost- benefit analyses that were ambiguous or internally inconsistent," and rarely addressed the internal costs and benefits to the Commission itself. Among the OIG's recommendations were that the SEC's Office

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[275] Testimony of Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission, before the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, House Committee on Oversight and Government Reform, April 17, 2012, pp. 4-5, available at http://oversight.house.gov/wp-content/uploads/2012/04/4-17-12-Schapiro-Testimony.pdf., p. 3.

[276] See http://www.sec-oig.gov/Reports/AuditsInspections/2012/Rpt%20499_FollowUpReviewofD-F_CostBenefitAnalyses_508.pdf.

[277] Ibid, p. vi.

[278] In September 2010, the SEC General Counsel prepared a memorandum indicating that the Commission should not consider the economic effects of statutorily mandated portions of Dodd-Frank rules. (See Memorandum from David M. Becker, General Counsel, "Thoughts About Best Practices in Drafting Economic Analysis Sections of Releases for Dodd-Frank Related Rulemakings," September 27, 2010.) Specifically, the memorandum stated the following: "Where the Commission has a degree of discretion, the release should identify the discretion the Commission is exercising, the choices being made, and the rationale for those choices. To the extent that the Commission is exercising discretion, the release should discuss the costs and benefits of the choices proposed or adopted, including where possible, a quantification of the costs and benefits. With respect to those choices made by Congress, the release generally should cite to the legislative record to support and explain the benefits Congress intended by enacting the provision, but only as a matter of citation and not as a matter of assertion by the Commission. Where the Commission has no discretion, the release should say so. Because the Commission is making no policy choices, there are no choices to analyze or explain."

of the General Counsel reconsider its September 2010 guidance, and that the Commission use a pre-statute baseline whenever possible. It also recommended that the Commission generally use a single, consistent baseline in the cost-benefit analyses of rulemakings related to a particular topic, and consider including internal costs and benefits in the analyses of its rules. As noted earlier in this report, the SEC's March 2012 guidance changed the agency's position on the analytical baseline, and instructed rulewriting staff to consider economic effects of both the underlying statute and regulatory discretion.

3. Federal Deposit Insurance Corporation

The June 2011 FDIC OIG report[279] stated that, with regard to the three FDIC rules that it examined:[280]

> Each proposed rule implemented a specific congressional mandate in the Dodd-Frank Act legislation and, thus, the FDIC's consideration of alternatives or cost and benefit factors was limited by those statutory requirements. We found that for each proposed rule, FDIC staff: worked jointly with other financial regulatory agencies to ensure a coordinated rulemaking effort; performed quantitative analysis of relevant data; considered alternative approaches to the extent allowed by the legislation; requested comment from the public on numerous facets of the rules; and, where applicable, included information about the analysis that was conducted and assumptions that were used in the text of the proposed rule.[281]

For example, in an April 2011 rule on "credit risk retention," the OIG report stated that FDIC and the other agencies issuing the rule "performed quantitative analysis of data to understand the breadth and scope of securitizations that could be affected by the proposed rules as well as each technical aspect of the rulemaking."[282] Some of these analyses were done because of specific requirements in the authorizing legislation. For example, Section 941(e)(4)(B) of the Dodd-Frank Act required federal banking agencies to consider underwriting and product features that historical loan performance data indicate result in a lower risk of default. The OIG report indicated that the agencies satisfied this requirement by examining relevant data from three different sources.

4. Commodity Futures Trading Commission

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[279] Office of the Inspector General, Federal Deposit Insurance Corporation, "Evaluation of the FDIC's Economic Analysis of Three Rulemakings to Implement Provisions of the Dodd-Frank Act," Report No. EVAL-11-003, June 2011, p. 1 of the Executive Summary. The report is available at http://www.fdicoig.gov/reports11%5C11-003EV.pdf, and is hereafter referred to as "OIG/FDIC."

[280] The three rules were (1) Credit Risk Retention, 76 *Federal Register* 24090 (April 29, 2011); (2) Margin and Capital Requirements for Covered Swap Entities, 76 *Federal Register* 27564 (May 11, 2011); and (3) Risk-Based Capital Standards: Advanced Capital Adequacy Framework – Basel II; Establishment of a Risk-Based Capital Floor, 75 *Federal Register* 82317 (December 30, 2010).

[281] OIG/FDIC, pp. 2-3 of the Executive Summary.

[282] OIG/FDIC, p. 11.

The June 2011 CFTC OIG report[283] was actually the second of two reports that the OIG issued in 2011 regarding the cost-benefit analyses performed by the agency with regard to Dodd-Frank Act rules. The first was issued April 15, 2011, in response to a request from the chairman of the House Committee on Agriculture and the chairman of one of its subcommittees. In that report,[284] the CFTC OIG focused on four rules,[285] and discussed such issues as the difficulty in quantifying industry costs, confusion surrounding PRA analyses, the "need to avoid addressing costs and benefits for mandatory aspects of Dodd-Frank,"[286] and the failure to calculate the agency's internal costs in analyzing costs and benefits.[287] The report ultimately concluded that Commission staff viewed the requirement in Section 15(a) as "a legal issue more than an economic one, and the views of the Office of the General Counsel therefore trumped those expressed by the Office of the Chief Economist" – a development that the OIG did not believe "enhanced the economic analysis" of the four rules.[288] The OIG concluded that "a more robust examination of costs and benefits should only enhance the Agency's ability to defend its cost-benefit analyses," and (quoting a witness at a March 30 congressional hearing) that "economic analysis is more than about satisfying procedural requirements for regulatory rulemaking."

The June 2011 CFTC OIG report examined four other rules, and contained findings that were similar to the earlier report. The OIG said that three of the four rules were issued prior to March 2011, and said the agency "generally adopted a 'one size fits all' approach to section 15(a) compliance without giving significant regard to the deliberations addressing idiosyncratic cost and benefit issues that were shaping each rule, and often addressed in the preamble." The OIG said it was "pleased with the cost-benefit discussion" in the fourth rule, which reportedly was influenced by the April 2011 OIG report. The only deficiencies were described as "minor," and involved clarification of PRA costs and a lack of quantified costs to the agency to implement the regulation.[289]

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[283] Office of the Inspector General, U.S. Commodity Futures Trading Commission, "A Review of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act," June 13, 2011, available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf, hereafter referred to as "CFTC OIG June 2011 report."

[284] "An Investigation Regarding the Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act," available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigationreport.pdf, hereafter referred to as "CFTC OIG report, April 2011."

[285] The four rules were (1) Protection of Cleared Swaps, Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, April 27, 2011, 76 *Federal Register* 33818 (June 9, 2011); (2) Risk Management Requirements for Derivatives Clearing Organizations, 76 *Federal Register* 3698 (Jan 20, 2011); (3) Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 76 *Federal Register* 6715 (February 8, 2011); and (4) Core Principles and Other Requirements for Swap Execution Facilities, 76 *Federal Register* 1214 (January 7, 2011).

[286] According to the OIG, CFTC staff "uniformly stressed a desire to refrain from expressing mandatory rules in terms of costs and benefits," and said the analysis of costs associated with provisions required by Congress "would not be appropriate." See also CFTC OIG report, June 2011, p. 24.

[287] CFTC OIG report, April 2011, pp. 14-15.

[288] Ibid., p. 22.

[289] CFTC OIG report, June 2011, p. 28.

5. Comptroller of the Currency

The June 2011 OCC OIG report[290] stated that the agency "does follow statutory, regulatory, and its own internal requirements relevant to rulemaking and related economic analysis."[291] The OIG also said "OCC used quantitative and qualitative methodologies; considered alternatives and the impact of the alternatives; sought public input; and that OCC rulemaking was transparent and the results were generally reproducible."[292] The agency reportedly used quantitative methodologies to estimate costs, but the OIG noted that "the benefits cited for the proposed rules were generally qualitative statements."[293] Also, two of the three specific rules examined were not considered "significant" regulatory actions, and "therefore did not require a full cost/benefit analysis" or "an evaluation of alternatives."[294] Finally, the OIG pointed out that in the one rule that was subject to economic analysis, the agency's paperwork burden estimates were different in the PRA and the economic impact analysis sections.

C. GAO Reports on Analyses for Dodd-Frank Act Rules

In November 2011, GAO issued a report describing the analyses that had been done with regard to 10 final rules issued pursuant to the Dodd-Frank Act that had taken effect by July 21, 2011, and in which the agencies had rulemaking discretion.[295] GAO noted that the independent regulatory agencies issuing the rules were covered by certain crosscutting analytical requirements (e.g., the PRA and the RFA), but also said "none of the regulators are required to conduct benefit-cost analysis."[296] For example, GAO said Section 15(a) of the Commodity Exchange Act (7 U.S.C. § 19(a)) requires CFTC to "consider" the costs and benefits of its actions before issuing a rulemaking under the act, and requires that costs and benefits be evaluated in light of (1) the protection of market participants and the public; (2) the efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. However, GAO also said Section 15(a) "does not require

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[290] Office of the Inspector General, Department of the Treasury, "Dodd-Frank Act: Congressional Request for Information Regarding Economic Analysis by OCC," June 13, 2011, available at http://www.treasury.gov/about/organizational-structure/ig/Documents/OIG-CA-11-006.pdf.

[291] Ibid., p. 6.

[292] Ibid., p. 8.

[293] Ibid.

[294] The three rules examined were 1) Credit Risk Retention, 76 FR 24090 (April 29, 2011); (2) Risk-Based Capital Standards: Advanced Capital Adequacy Framework – Basel II, Establishment of a Risk-Based Capital Floor, 75 FR 82317 (Dec. 30, 2010); and (3) Margin and Capital Requirements for Covered Swap Entities, 76 FR 27564 (May 11, 2011).

[295] U.S. Government Accountability Office, *Dodd-Frank Act Regulations: Implementation Could Benefit from Additional Analysis and Coordination*, GAO-12-151, November 10, 2011. Section 1573(a) of the Department of Defense and Full-Year Continuing Appropriations Act of 2011 amended the Dodd-Frank Act and requires GAO to prepare an annual study of financial services regulations. GAO initially examined 32 rules, but eliminated 21 of the rules because the Dodd-Frank Act gave the agencies little or no discretion as to whether or how to implement them. One other rule was eliminated because the issuing agency (SEC) said it readopted an existing rule without change.

[296] Ibid., Highlights page.

CFTC to quantify the costs and benefits of a new regulation or determine whether the benefits outweigh its costs."[297]

In all of the 10 Dodd-Frank Act rules that were examined (3 major rules and 7 non-major rules),[298] GAO concluded that the agencies had (1) identified the problem that the regulation was intended to address, and in six cases, assessed the problem's significance; (2) examined reasonable alternatives, often requesting public comments on specific issues and examining alternative approaches in the context of responding to the comments; and (3) considered different compliance dates for enforcement to begin. In 7 of the 10 rules, GAO said the agencies assessed the benefits and costs of the alternative selected. The analyses generally included descriptions of the reasons for choosing among reasonable alternatives, descriptions of the benefits and costs that could not be monetized, and cross-references to data or studies on which the analysis was based.

On the other hand, GAO said the agencies did not monetize the expected costs in six of the seven rules, and did not monetize any of the expected benefits. GAO said that the "monetization of costs largely was limited to paperwork-related costs and excluded other direct and indirect costs, and monetization of benefits was non-existent."[299] In five of the seven rules, the agencies reportedly did not provide quantitative estimates of benefits or costs, and did not explain why costs and benefits could not be quantified or monetized. Although GAO recognized that estimating the future costs and benefits of financial rules can be difficult, GAO ultimately concluded that these analyses could have been done better if they had more closely adhered to the guidance provided in OMB Circular A-4. Therefore, to "strengthen the rigor and transparency of their regulatory analyses," GAO recommended that the federal financial regulators "take steps to better ensure that the specific practices in OMB's regulatory analysis guidance are more fully incorporated into their rulemaking policies and consistently applied."[300] In their written comments on the report, the independent regulatory agencies generally agreed with GAO's findings and conclusions, and "some agreed with the recommendations, while others neither agreed nor disagreed but stated actions they had taken or planned to take regarding the recommendations."[301]

1. GAO's December 2012 Report

On December 18, 2012, GAO issued a report examining the regulatory analyses for 54 substantive Dodd-Frank Act rules (including 19 major rules) that were issued and took

[297] Ibid., p. 10.

[298] GAO staff told the author of this report that although OMB Circular A-4 technically does not apply to non-major rules, they used the circular to represent "best practices" for all 10 of the rules because the agencies indicated that they followed the "spirit" of the circular in all of their rules. The seven non-major rules were all coded as "substantive" in the Unified Agenda.

[299] Ibid., p. 37.

[300] Ibid., p. 39.

[301] Ibid., p. 40.

effect between July 2011 and July 2012.[302] GAO said the agencies "conducted the regulatory analyses required by federal statutes" for all of the rules, and "generally considered, but typically did not quantify or monetize, the benefits and costs of these rules."[303] Specifically, 49 of the 54 substantive rules included discussions of potential benefits or costs. The cost discussions were primarily qualitative except for the PRA analyses, which generally included quantitative data such as hours or dollars spent to comply with paperwork requirements. Benefits were described as "largely qualitative and framed in terms of the objectives of the rules."[304] Although the agencies said they attempt to follow OMB's guidance in "principle or spirit," GAO concluded that they "did not consistently follow key elements of the guidance in their regulatory analyses." For example, although some agencies identified the benefits and costs of their chosen regulatory approach in proposed rules, they did not compare that approach to the benefits and costs of alternatives. By not more closely following OMB's guidance, GAO said the agencies "continue to miss an opportunity to improve their analyses."[305] GAO did not make recommendations in this report, but reiterated the recommendations in its November 2011 report that (among other things) federal financial regulators more fully incorporate OMB's guidance into their rulemaking policies.

D. Committee on Capital Markets Regulation Letter

In a March 2012 letter to the Chairmen and Ranking Members of the Senate and House banking committees, the Committee on Capital Markets Regulation (CCMR)[306] expressed its "deep concern about the inadequacy of cost-benefit analysis" in proposed and final rulemakings under the Dodd-Frank Act.[307] Specifically, CCMR said it reviewed the cost-benefit analysis provisions in 192 proposed and final rules, orders, and notices issued between July 2010 and September 2011 by a variety of agencies (most of which were independent regulatory agencies).[308] CCMR reported that 57 of the rules contained

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[302] U.S. Government Accountability Office, *Dodd-Frank Act: Agencies' Efforts to Analyze and Coordinate Their Rules*, GAO-13-101, December 18, 2012.

[303] Ibid., p. 10.

[304] Ibid., p. 14.

[305] Ibid., Highlights page.

[306] CCMR describes itself on its website as "an independent and nonpartisan 501(c)(3) research organization dedicated to improving the regulation of U.S. capital markets. Thirty-three leaders from the investor community, business, finance, law, accounting and academia comprise the Committee's membership. The Committee co-Chairs are Glenn Hubbard, Dean of Columbia Business School, and John L. Thornton, Chairman of the Brookings Institution." See http://capmktsreg.org/.

[307] CCMR letter to the Chairman and Ranking Member of the Senate Committee on Banking, and the Chairman and Ranking Member of the House Committee on Financial Services, "Lack of Cost-Benefit Analysis in Dodd-Frank Rulemaking," March 7, 2012 (hereafter, "CCMR letter"). To view a copy of this letter, see http://capmktsreg.org/pdfs/2012.03.07_CBA_letter.pdf.

[308] The agencies were the Securities and Exchange Commission (which accounted for 54 rules), Commodity Futures Trading Commission, Federal Reserve, Federal Deposit Insurance Corporation, Financial Stability Oversight Council, Consumer Financial Protection Bureau, Office of Financial Research, Internal Revenue Service, Federal Housing Finance Authority, Office of Comptroller of the Currency, Office of Thrift Supervision, Department of Housing and Urban Development, Department of Treasury, Department of Energy, Department of Labor, National Credit Union Administration, Federal Trade Commission, and Farm Credit Administration.

no cost-benefit analysis, and another 85 rules contained only a non-quantitative analysis. The remaining 50 rules reportedly contained quantitative cost-benefit information, but most limited the analysis to a review of the costs of paperwork and other matters, and did not contain any analysis of the expected broader economic impact of the rules.

The agencies differed in the number and nature of their analytical actions. The SEC accounted for 54 of the 192 rules (not including joint rules with other agencies). Of these, 4 contained no cost-benefit analysis, 26 contained non-quantitative analysis, and 24 contained quantitative analysis. CCMR said that the SEC's analyses were usually more thorough than those prepared by other agencies, and more recent rules had better analyses than earlier ones.

CCMR noted that some agencies said that certain rules were not expected to have a significant economic impact (and therefore were not subject to certain analytical requirements), or contained costs that were imposed entirely by the Dodd-Frank Act itself. Nevertheless, CCMR encouraged the agencies to explain how they reached those conclusions. The Committee concluded that it would be an "unfortunate outcome" if many of the Dodd-Frank rules are ultimately invalidated because of inadequate cost-benefit analysis, and recommended that the agencies "improve their processes and conduct more thorough cost-benefit analysis."[309] CCMR recognized that doing so might require additional agency resources (e.g., to obtain data, hire economists, or engage third-party analysts), and said "we fully support the necessary funding."[310] The organization also said that, in calling for better cost-benefit analysis, it was not suggesting that Dodd-Frank Act rulemaking be delayed; "To the contrary, we firmly believe that certain changes mandated by Dodd-Frank are crucial to the functioning of the financial markets and should thus be put into effect as soon as possible."[311]

1. Analysis of CCMR Findings

Examination of the rules in the CCMR report that were characterized as not containing a cost-benefit analysis revealed that many of them were administrative in nature, appeared to have little apparent impact on non-federal entities, or actually contained a discussion of regulatory costs and benefits. For example, rules described as not having a cost-benefit analysis included the following:

- A July 21, 2011, CFPB rule (76 FR 43569) that simply listed the rules and orders that would be enforced by the agency (and that was specifically required by Section 1063(i) of the Dodd-Frank Act).

- An August 18, 2010, CFTC proposed rule (75 FR 50950) withdrawing an earlier proposed rule on position limits for futures and option contracts that

[309] CCMR letter, p. 4.
[310] Ibid., p. 5.
[311] Ibid.

had been issued prior to the enactment of the Dodd-Frank Act, and for which the statutory authority had been changed.[312]

- A September 20, 2011, CFTC rule (76 FR 58176) that contained a lengthy section entitled "consideration of costs and benefits."

- An August 13, 2010, FDIC rule (75 FR 49363) permanently raising the agency's standard maximum deposit insurance limit to $250,000. The agency had no discretion in setting the limit because it was expressly required in Section 335 of the Dodd-Frank Act, and the agency stated in the rule that "there would not be any compliance costs with displaying the official sign, because it would be provided by the FDIC free of charge."

- A September 2, 2010, National Credit Union Administration (NCUA) rule (75 FR 53841) that made permanent the standard maximum share insurance amount of $250,000. The agency said it was simply amending its share insurance and official sign regulations to conform to this statutory change in the Dodd-Frank Act. NCUA said it would provide insured credit unions with signs at no cost, and had made a downloadable graphic available on its web site.

- An August 5, 2011, FDIC rule (76 FR 47652) that simply transferred and redesignated certain rules relating to state savings associations that had been transferred to the agency from the Office of Thrift Supervision by the Dodd-Frank Act. The agency said it made "only technical changes to existing OTS regulations (such as nomenclature or address changes)."

- A July 7, 2011, SEC rule (76 FR 39769) delegating authority to the Director of the Division of Enforcement to disclose information relating to whistleblowers, and was considered by the agency to be a matter that "relates solely to agency organization, procedure, or practice and does not relate to a substantive rule."

- A December 23, 2010, Federal Reserve System rule (75 FR 80675) that the agency said "corrects certain cross-references and typographical errors in the regulation, staff commentary to the regulation, and the supplementary information " of an earlier rule (75 FR 66554, which the CCMR study also identified as having no cost-benefit analysis, but which had lengthy RFA and PRA discussions, including quantified estimates of paperwork burden).

- A July 22, 2011, "notice of intent" issued by the Federal Reserve System (76 FR 43953) that simply indicated that the agency intended to continue to enforce certain OTS regulations after those functions had been transferred to

[312] The CCMR database showed this action on a different date (October 18, 2010, not August 18, 2010), and did not indicate that the rule was being withdrawn.

the agency by the Dodd-Frank Act. The agency later issued a rule formally transferring those functions to the Board (76 FR 56508), which the CCMR study also said did not have a cost-benefit analysis.

- A September 26, 2011, Federal Reserve System rule (76 FR 59237) making it clear that certain motor vehicle dealers were exempt from certain reporting requirements until the effective date of forthcoming rules. (CFPB had issued a letter in April 2011 providing a similar assurance to those businesses covered by its regulations.)

- A September 2, 2011, Federal Reserve System proposed rule (76 FR 54717) that would "permit nonbank companies that own at least one registered securities broker or dealer, and that are required by a foreign regulator or provision of foreign law to be subject to comprehensive consolidated supervision, to register with the Board and subject themselves to supervision by the Board." Section 618 of the Dodd-Frank Act required the agency to issue the rule. The agency estimated that it would take each of the five companies expected to register with the Board eight hours to fill out the registration paperwork, for a total burden of 40 hours.

- A July 26, 2011, Federal Trade Commission (FTC) rule (76 FR 44462) rescinding its "Statements of General Policy or Interpretations Under the Fair Credit Reporting Act" (FCRA) because the Dodd-Frank Act transferred authority to issue interpretive guidance under FCRA to CFPB. FTC also stated that such statements of policy were not rules and did not have the force and effect of law.

- A March 28, 2011, Financial Stability Oversight Council (FSOC) proposed rule (76 FR 17038) that "would implement the requirements of the [Freedom of Information Act] by setting forth procedures for requesting access to FSOC records."

- A January 28, 2011, SEC rule (76 FR 2805) in which the agency delegated authority to the Chief Accountant with respect to proposed rule changes of the Public Company Accounting Oversight Board. The agency said the changes "relate solely to agency organization, procedures, or practices, and do not relate to a substantive rule."

- A June 22, 2011, SEC "exemptive order" (76 FR 36287) granting "temporary exemptive relief and other temporary relief from compliance with certain provisions of the Securities Exchange Act of 1934 concerning security-based swaps."

SEC officials told the author of this report that they too had looked at the SEC rules included in the CCMR study, and concluded that some of those rules did not require a

cost-benefit analysis. The author of the CCMR study told the author of this report that he still believed each of the above rules was substantive and should have had a cost-benefit analysis. However, he emphasized that was his position, and not that of the Committee.[313]

E. Resources for the Future Conference

On April 7, 2011, Resources for the Future (RFF) held a conference in Washington, D.C., exploring whether greater use of economic analysis could improve the quality of regulations issued by independent regulatory agencies.[314] As part of that conference, the organizers and visiting scholars at RFF – Arthur Fraas and Randall Lutter, both former OIRA staff members – presented the results of their own examination of independent regulatory agencies' rules.[315] After conducting what they termed a "quick and limited survey" of certain agencies' economic analyses, Fraas and Lutter concluded that the analyses conducted by "independent regulatory commissions" (IRCs) (other than the NRC) was "generally the minimum required by statute."

> IRC final rules generally address the requirements of the Regulatory Flexibility Act and the Paperwork Reduction Act. In many instances the IRCs appear to be issuing major regulations without reporting any quantitative information on benefits and costs—apart from the paperwork burden—that would routinely be expected from executive branch agencies covered by Executive Order 12866. Instead, they offer only a qualitative discussion of the benefits and costs. The IRCs present this discussion without any formal review of alternatives. Their analyses generally do not estimate possible unintended effects and do not consider behavioral change. And perhaps most importantly, with the exception of the estimates of paperwork burden prepared to meet the requirements of the Paperwork Reduction Act, they generally do not analyze economic effects in a manner intended to meet any identifiable standards for such analysis.[316]

Fraas and Lutter said the RFA analysis for some rules met "only the most generous definition of 'analysis,'" and said the agencies often did not monetize estimates of paperwork burden. They also said that certain issues were hardly addressed at all, particularly in rules issued by the Board of Governors of the Federal Reserve. Finally, they suggested several areas in which they believed economic analysis would "bring an important perspective to IRC regulatory policy decisions," such as (1) in health and safety rules issued by the NRC[317] and the CPSC; (2) transition issues associated with the

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[313] E-mail exchange with John Gulliver, Research Fellow, Committee on Capital Markets Regulation, September 16, 2012.

[314] For a summary of this conference, see http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_Summary.pdf. RFF describes itself as "a nonprofit and nonpartisan organization that conducts independent research – rooted primarily in economics and other social sciences – on environmental, energy, natural resource and environmental health issues."

[315] Arthur Fraas and Randall Lutter, "On the Economic Analysis of Regulations at Independent Regulatory Commissions," RFF DP 11-16, April 2011, available at http://www.rff.org/RFF/Documents/RFF-DP-11-16_final.pdf. This article was later published in the *Administrative Law Review* (volume 63, Special Edition, 2011, pp. 213- 241), available at http://www.hks.harvard.edu/m-rcbg/rpp/Fraas_Lutter_Ec_Anal_of_Regulations.pdf.

[316] Ibid., p. 2-3.

[317] As noted earlier in this report, the NRC is required by its organic authority, the AEA, to ensure adequate protection

adoption of more stringent rules; (3) rules regulating prices and production, or limiting the entry of new firms; (4) rules mandating information disclosure; and (5) the promotion of accountability and transparency to Congress and the public.

One of the presenters at the RFF conference was William P. Albrecht, Professor of Economics, Emeritus, at the University of Iowa, and a former acting CFTC chairman. Professor Albrecht examined several of the Dodd-Frank Act rules that the agency had issued, and concluded that none of the rules contained "any real [cost-benefit analysis]." However, he went on to say the following:

> Nor would one expect it to. Section 15(a) of the Commodity Exchange Act (CEA), which sets forth the duties of the agency, requires the CFTC to consider the costs and benefits of its proposed regulations, but it does not require quantification of them. [7 U.S.C. 19(a)] It also does not require the agency to determine whether the benefits exceed the costs nor whether the proposed rules are the most cost effective ways of achieving their goals. All the Act requires is that the CFTC consider the costs and benefits of its actions and to evaluate the costs and benefits in five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, financial integrity of financial markets; (3) price discovery; (4) sound risk management practices; and (5) other public considerations.
>
> This rather limited requirement was added to the Commodity Exchange Act in 2000. To the best of my knowledge, it has not had a significant impact on a single CFTC rule or regulation. Nor has it had a significant impact on any of the proposed Dodd-Frank rules.[318]

F. Mercatus Center Working Paper

An October 2012 working paper prepared by Hester Peirce for the Mercatus Center at George Mason University described, in its words, "just how little high-quality economic analysis the federal financial regulators charged with implementing Dodd-Frank and regulating the financial markets are doing. Although each regulator has a unique approach to economic analysis, all of their approaches fall short of the standard to which executive agencies are held. More fundamentally, the federal financial regulators are depriving themselves of analysis essential to the proper exercise of their rulemaking functions."[319] The report reviewed previous studies by the inspectors general, GAO, and others, and offered its own conclusions regarding particular agencies. For example, the report stated:

> In fulfilling its statutory mandate thus far, the CFPB has not chosen to embrace regulatory analysis as a way of better assessing the need for, alternatives to, and economic implications of its rules. Instead, the CFPB's approach has exhibited deficiencies that impair its usefulness as a rulemaking tool. For example, the CFPB has relied on speculative benefits; underestimated compliance costs; minimized

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regardless of cost. Once beyond the adequate protection standard, the NRC can consider costs.

[318] William P. Albrecht, *Cost-Benefit Analysis and the Commodity Futures Trading Commission*, April 7, 2011, pp. 2-3, available at http://www.rff.org/RFF/Documents/RFF-DP-11-24.pdf.

[319] Hester Peirce, "Economic Analysis by Federal Financial Regulators," Mercatus Working Paper No. 12-31, October 2012, available at http://mercatus.org/sites/default/files/FinancialRegulators_Peirce_v1-0_1.pdf.

> noncompliance costs, including the costs to consumers of reduced access to financial products and services; and deferred quantitative analysis.[320]

The report also criticized other financial agencies' analytical practices. For example, after quoting one of NCUA's board members as saying that it would be costly to conduct a regulatory analysis for every rule, the author said that that the agency "would be well-served by conducting prepromulgation regulatory analysis to better understand the need for, alternatives to, and implications of its rules before they take effect."[321] The report also said "FDIC's current efforts to rethink its approach to regulatory analysis are much needed to match FDIC practice with its stated belief that 'cost-benefit analysis [is] an important component of the rule-making process' and its stated claim that it 'seeks to undertake such analysis with rigor and transparency.'"[322] After noting a 1979 policy statement by the Federal Reserve Board, and a finding by the agency's inspector general that the amount of analysis is dictated by specific statutory mandates and other factors, the Mercatus report described this as a "somewhat haphazard approach to economic analysis [that] is not consistent with the policy statement's goal of producing a comprehensive regulatory analysis with certain minimum elements for every rule."[323] The report concluded by saying:

> Although some regulators are making an effort to conduct economic analysis, federal financial regulators generally have shied away from conducting thorough regulatory analysis designed to identify the problem necessitating regulation and the best solution (regulatory or otherwise) to achieve the desired result. Nor do they generally make formal economic analyses and the assumptions underlying them available for public review and comment. As a consequence, the massive Dodd-Frank rulemaking effort and other substantial initiatives in financial regulation are being undertaken without the benefit of the type of regulatory analysis that is a mandatory feature of rulemakings by executive agencies.[324]

VI. Analyses in Major Rules Published During FY2012 and Other Recent Rules

According to the GAO rules database,[325] independent regulatory agencies published a total of 22 final rules in the *Federal Register* during FY2012 (October 1, 2011, through September 30, 2012) that were considered "major" under the Congressional Review Act. CFTC published 10 of the 22 major rules during this period, the SEC published 4 major rules, and CFTC and the SEC jointly published 3 other major rules. Together, therefore,

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[320] Ibid., p. 19. In support of these statements, the author discussed several particular CFPB rules issued in July and August 2012. See footnotes 86 through 89 of the referenced report.

[321] Ibid., p. 22.

[322] Ibid., p. 24.

[323] Ibid., p. 26.

[324] Ibid., p. 36.

[325] Available at http://gao.gov/legal/congressact/fedrule.html.

the two agencies accounted for 17 of the 22 major rules published by independent regulatory agencies during the fiscal year. CFPB published two major rules during the period, and the NRC and CPSC each published one major rule. The Office of the Comptroller of the Currency, the Federal Reserve System, and FDIC jointly published one major rule. Each of these 22 major rules is discussed in **Appendix A** of this report, which provides identifying information about each rule (date published, effective date, regulation identifier number, and *Federal Register* citation); a brief description of the nature of the rule; cost-benefit information; PRA information; and RFA information drawn from GAO major rule reports and the preambles to the rules.

This review indicated what several previous studies had reported – that most of the agencies' discussions of expected regulatory benefits and (to a lesser degree) costs were qualitative in nature. As **Table 5** below shows, in 19 of the 22 rules, expected regulatory benefits were only discussed in qualitative terms. Only one rule provided some quantitative benefits information, and the remaining two rules (including one NRC budget transfer rule) did not contain any discussion of expected benefits. In 11 of the 22 rules, cost information was discussed only in qualitative terms (3 rules) or primarily in qualitative terms (8 rules). However, viewing the same rules from a different perspective, 18 of the 22 rules contained at least some quantitative or monetized information about expected costs. In most of these rules, the quantitative and monetized information was primarily confined to paperwork costs, but in at least four rules it appeared that most of the direct regulatory costs were expected to be paperwork related. In five other rules, the agencies quantified and monetized other types of costs.

Table 5: Summary of the 22 Major Final Rules Published by Independent Regulatory Agencies During FY2012

Agency	Title of Rule	Benefits	Costs	Other
CFTC (76 FR 69334, 11/08/2011)	Derivatives Clearing Organization General Provisions and Core Principles	Qualitative (e.g., protection of market participants)	Primarily qualitative, but paperwork monetized	Evaluated eight parts of rule in terms of five Section 15(a) factors
CPSC (76 FR 69482, 11/08/2011)	Testing and Labeling Pertaining to Product Certification	Declined to prepare cost-benefit analysis (CBA) because of CPSIA deadlines	Declined, but paperwork burden quantified and monetized	Lengthy RFA section included need, cost of testing, and alternatives
CFTC and SEC (76 FR 71128, 11/16/2011)	Reporting by Investment Advisers to Private Funds (Form PF)	Qualitative (e.g., improve risk monitoring and help commissions protect markets)	Primarily PRA-related; quantified and monetized paperwork burden	SEC's RFA analysis quantified and monetized costs to small entities; CFTC did Section 15(a) analysis
CFTC (76 FR 71626, 11/18/2011)	Position Limits for Futures and Swaps	Qualitative (transparency to prevent manipulative behavior)	Primarily qualitative, but quantified and monetized paperwork costs	Evaluated three parts of rule in terms of five Section 15(a) factors

Agency	Title of Rule	Benefits	Costs	Other
CFTC (76 FR 78776, 12/19/2011)	Investment of Customer Funds and Funds Held in Account for Foreign Futures	Qualitative (greater security and enhanced stability)	Qualitative (requires enhanced monitoring resources)	Evaluated rule in terms of five Section 15(a) factors
CFPB (76 FR 79308, 12/21/2011)	Fair Credit Reporting (Regulation V)	Qualitative (updating Regulation V)	Primarily PRA-related; monetized paperwork costs	Rule is mainly codification of transferred authority
SEC (76 FR 81793, 12/29/2011)	Net Worth Standard for Accredited Investors	Qualitative (reduced transaction costs, reduced incentives for manipulation)	Qualitative (some increased costs)	Did RFA analysis describing effects on small entities
CFTC (77 FR 1182, 01/09/2012)	Real-Time Public Reporting of Swap Transaction Data	Qualitative (improved market quality, risk management, and oversight)	Primarily PRA-related. Not in preamble, but quantified and monetized in PRA database	Also discussed the five Section 15(a) factors.
CFTC (77 FR 2136, 01/13/2012)	Swap Data Recordkeeping and Reporting Requirements	Qualitative (ensures fairness of swaps markets)	Primarily PRA-related. Not in preamble, but quantified and monetized in PRA database	Also discussed the five Section 15(a) factors.
CFPB (77 FR 6194) 02/07/2012	Electronic Fund Transfers (Regulation E)	Qualitative (more reliable information)	Primarily qualitative but quantified paperwork burden	Did RFA analysis describing effects on small entities
CFTC (77 FR 6336, 02/07/2012)	Protection of Cleared Swaps Customer Contracts and Collateral	Qualitative (greater assurance of safety)	Primarily qualitative; paperwork costs were quantified and monetized	Also discussed the five Section 15(a) factors
CFTC (77 FR 9734, 02/17/2012)	Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties	Qualitative (enhanced transparency and reduced information asymmetries)	Qualitative (e.g., costly disclosures and possible delays)	CBA was part of extensive discussion of five Section 15(a) factors for eight sections of the rule
SEC (77 FR 10358, 02/22/2012)	Investment Adviser Performance Compensation	Primarily qualitative, but some quantitative	Primarily qualitative, but some quantitative	Only two comments on CBA, and did not provide data
CFTC (77 FR 20128, 04/03/2012)	Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules	Qualitative (facilitates recognition and management of risk, disincentive to risky conduct)	Primarily qualitative (lack of data); however, PRA costs quantified and monetized	Also discussed Section 15(a) factors. CBA section 27 pages long
CFTC (77 FR 21278,	Customer Clearing Documentation, Timing of Acceptance	Qualitative (faster processing of swaps, reduced latency	Primarily qualitative (incremental costs "may be material");	Considered Section 15(a) factors for three groups of

Agency	Title of Rule	Benefits	Costs	Other
04/09/2012)	for Clearing, and Clearing Member Risk Management	period, improved access to swaps markets)	some paperwork monetized	rules; comprised CBA analysis
CFTC and SEC (77 FR 30596, 05/23/2012)	Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant,"….	Qualitative ("significant" benefits)	Quantified and monetized some costs, but no data on other costs	Commissions said benefits not possible to quantify due to lack of data, but CFTC did Section 15(a) analysis
NRC (77 FR 35809, 06/15/2012)	Revisions of Fee Schedules; Fee Recovery for Fiscal Year 2012	Unstated, although implicit	Quantified and monetized fees assessed on nuclear industry	Budget transfer rule, so "costs" are actually fees; also did RFA analysis
CFTC (77 FR 36612, 06/19/2012)	Core Principles and Other Requirements for Designated Contract Markets	Qualitative (greater specificity and transparency)	Primarily qualitative (resources, staff, automated systems), but paperwork quantified and monetized	Costs/benefits discussed in terms of five Section 15(a) factors organized by rule's 23 core principles
SEC (77 FR 45722, 08/01/2012)	Consolidated Audit Trail	Qualitative (promotes efficiency, competition, and capital formation)	Quantified and monetized (general and paperwork costs); some analysis deferred	SEC said some costs and benefits depend on actions by regulated entities
CFTC and SEC (77 FR 48208, 08/13/2012)	Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement;" …	Qualitative (improved oversight)	Primarily qualitative, but some monetized paperwork costs and provided wide ranges of other costs	CFTC had 19 pages of CBA, and more on Section 15(a) factors; SEC had 17 pages of economics
OCC, FRS, and FDIC (77 FR 53060, 08/30/2012)	Risk-Based Capital Guidelines: Market Risk	Qualitative (more sensitive to market risk, improved transparency)	OCC quantified and monetized capital costs and quantified paperwork burden	UMRA analysis by OCC included CBA
SEC (77 FR 56365, 09/12/2012)	Disclosure of Payments by Resource Extraction Issuers	Qualitative (transparency, improved investment decision making)	Monetized initial and ongoing costs of compliance, and paperwork costs.	Also said would have burden on competition; did RFA analysis

Source: Analysis of GAO major rule reports and major rule preambles. See Appendix for more details on these rules and their analyses.

In addition to (or as part of) cost-benefit studies of the rules, the GAO reports and rule preambles frequently indicated that the agencies also performed other types of economic analysis. For example:

- In all 13 rules published by CFTC (either alone or with the SEC), the agency discussed the economic effects of the rule in terms of the five Section 15(a) factors in the Commodity Exchange Act (i.e., protection of market participants and the public; efficiency, competitiveness, and financial

integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations).

- Six of the rules contained a regulatory flexibility analysis under the RFA, describing the expected effects of the rule on small businesses and other small entities. Even when the agencies certified that the rule would not have a "significant economic impact on a substantial number of small entities," the agencies sometimes did an analysis to reach that conclusion.

- In 15 of the 22 rules, the agencies did an analysis of paperwork under the PRA, quantifying and often monetizing expected burden and costs.[326] In several of these rules that focused on reporting and recordkeeping requirements, the agencies indicated that virtually all of the expected direct regulatory costs were caused by the collections of information.

A. Extent of Analysis and Explanations Within Particular Agencies

The following sections discuss the analyses that particular agencies did in particular major rules published during FY2012. In some cases, other substantive rules are also discussed (e.g., when an agency did not issue any major rules during FY2012).

1. Commodity Futures Trading Commission

As **Table 5** above indicates, in all 10 major rules that CFTC published by itself during FY2012, the agency provided only qualitative descriptions of expected benefits. In four of the rules, costs were also only discussed in qualitative terms, and in three other rules, the discussions of costs were primarily qualitative. In three other rules, the costs of the rules appeared to be primarily paperwork-related, and the agency quantified and monetized those costs. The CFTC Chief Economist told the author of this report that the agency's framework for considering costs and benefits has evolved over time, and that its discussions of costs and benefits are now more lengthy and sophisticated than in the past. He also said the state of analysis should continue to improve as they gain more experience and get comments from the public.

a) Difficulty in Quantifying Costs and Benefits

CFTC frequently indicated in the preambles to the FY2012 major rules that it was difficult to quantify or monetize expected costs or benefits. Problems cited included lack

[326] In five rules, the agencies said there were no collections of information covered by the PRA. In one rule, the agency said the paperwork burden was covered by another information collection. In another rule, the agency said it was simply transferring the burden from one agency to another, and the actual burden on regulated entities was unchanged.

of data, the fact that the public did not provide data in its comments on the rules, and the variable way that certain rules could be implemented. For example:

- In a November 8, 2011, rule on "Derivatives Clearing Organization General Provisions and Core Principles," CFTC said "because of the range of circumstances of different [derivatives clearing organizations, or DCOs], it is not feasible to estimate or quantify the costs of the safeguards imposed by the Commission's financial resource rules." [327] In another part of the same rule, the agency said "the possible future circumstances leading to and potential resulting consequences of a future default are too speculative and uncertain to quantify or estimate." Also, "Given the staffing and operational differences among DCOs, the Commission is unable to accurately estimate or quantify the additional costs DCOs may incur to comply with the new financial resource rules."

- In a November 18, 2011, rule on "Position Limits for Futures and Swaps," CFTC said "Quantifying the consequences or costs of market participation or trading strategies would necessitate having access to and understanding of an entity's business model, operating model, and hedging strategies, including an evaluation of the potential alternative hedging or business strategies that would be adopted if such limits were imposed. Because the economic consequences to any particular firm will vary depending on that firm's business model and strategy, the Commission believes it is impractical to develop any type of generic or representative calculation of these economic consequences."[328] CFTC also said "public comment letters provided little quantitative data regarding the costs and benefits associated with the Proposed Rules."

- In a February 17, 2012, rule on "Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties," CFTC said ""With respect to quantification of the costs and benefits of the final business conduct standards rules, the Commission notes that, because the Dodd-Frank Act establishes a new regulatory regime for the swaps market, there is little or no reliable quantitative data upon which the Commission can evaluate, in verifiable numeric terms, the economic effects of the final business conduct standards rules. No commenters presented the Commission with verifiable data pertinent to any of the proposed rules, stated whether such verifiable data exists, or explained how such cost data or any empirical analysis of that data would inform the choice of implementation pursuant to a specific provision of the Dodd-Frank Act or whether such data and resultant empirical analysis is ascertainable with a degree of certainty that could inform Commission deliberations."[329]

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[327] 76 *Federal Register* 69414.

[328] 76 *Federal Register* 71665.

[329] 77 *Federal Register* 9806. In a footnote, CFTC said "For example, with respect to potential costs associated with

- In the April 3, 2012, rule on "Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties," CFTC said the "Commission received approximately 51 comments addressing the cost and benefit considerations of the proposed rules, but few commenters presented to the Commission quantitative data pertinent to any of the proposed rulemakings, and no commenter stated whether such data is ascertainable with a degree of certainty that could inform Commission deliberations. After conducting a review of applicable academic literature, the Commission is not aware of any research reports or studies that are directly relevant to its considerations of costs and benefits of these final rules."[330]

- In an April 9, 2012, rule on "Customer Clearing Documentation" and other issues, CFTC said the costs and benefits were either "indirect, highly variable, or both and therefore are not subject to reliable quantification at this time."[331] Later in the rule, the Commission said "The incremental costs attributable to these rules cannot be quantified, due to the flexibility the rules provide regulated entities to meet the applicable standards and to the differing technology already in use by those entities."[332]

- In a June 19, 2012, rule on "Core Principles and Other Requirements for Designated Contract Markets," CFTC determined that in most instances, quantification of costs was "not reasonably feasible" because costs depend on the size and structure of designated contract markets (DCMs), which vary markedly, or because quantification required information or data in the possession of the DCMs to which the Commission does not have access, and which was not provided in response to the notice of proposed rulemaking.[333]

CFTC officials told the author of this report that Title VII of the Dodd-Frank Act has required the agency to regulate in markets that have never been previously regulated, and are therefore "dark" in terms of existing knowledge and experience. They said until these markets are regulated, the Commission has no authority to require data from individuals and organizations in these markets. The officials said the Commission has repeatedly

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restrictions on information flows from dealers to their counterparties and increased reliance by counterparties on dealers, there is no clear means of quantification because of the difficulty in designing metrics for these potential costs. In addition, because there is no historical period in which similar rules were in effect, there remains the formidable (and costly) challenge of comparing the current environment to the post-rule environment. This challenge is compounded by the likelihood that the effect of the rule will differ across dealers and across counterparties. Quantification of the potential delays in swap execution and higher associated fees faces similar challenges, including lack of available data over which to measure the effect (if any) of such delays. The combination of these factors makes it impractical to determine reliable estimates of these types of costs. Moreover, no commenters provided verifiable estimates. As a consequence, the discussion of these potential costs is undertaken in qualitative terms."

[330] 77 *Federal Register* 20167.

[331] 77 *Federal Register* 21292.

[332] 77 *Federal Register* 21298.

[333] 77 *Federal Register* 36666.

asked these entities to voluntarily provide the agency with cost information, but they have been unwilling to do so because the information about their businesses could put them at a competitive disadvantage. Some organizations have orally provided cost information in meetings and roundtable discussions, but "flat out refuse" to provide written materials. CFTC officials said another complicating factor is the expedited time frames in which these rules have to be issued per Dodd-Frank. The agency doesn't have the option to not issue the rules or miss the timeframes in order to generate more data for the analysis. Nothing in the statute says the agency can wait until it can get quantitative data. The officials also said the clearance process in the Paperwork Reduction Act has sometimes constrained their ability to collect cost information.

In addition to these reasons, the agency also contends that it is not statutorily required to quantify regulatory costs or benefits. In September 2010, the CFTC Office of General Counsel and Office of Chief Economist said that the agency's authorizing legislation "does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission 'consider' the costs and benefits of its actions."[334] CFTC officials said much the same thing in an interview with the author of this report (with one saying "we do exactly what we are told to do"), and pointed out that GAO took a similar position in its November 2011 report. In that report, GAO said that Section 15(a) of the Commodity Exchange Act "does not require CFTC to quantify the costs and benefits of a new regulation or determine whether the benefits outweigh its costs; rather, it requires CFTC to consider the costs and benefits of its actions."[335]

b) Baseline for Analysis

CFTC frequently indicated in the major rules that its analyses (particularly those related to Section 15(a) of the Commodity Exchange Act) were focused on the elements of the rule that were within the agency's discretion, not those provisions that were mandated by Congress. In other words, the agency appeared to be using the post-statutory baseline in its analyses. For example:

- In the above-mentioned November 8, 2011, rule on "Derivatives Clearing Organization General Provisions and Core Principles," the agency said "As these requirements are imposed by the Dodd-Frank Act, any associated costs and benefits are the result of statutory directives, as previously determined by the Congress, that govern DCO activities independent of the Commission's regulations. By its terms, CEA Section 15(a) requires the Commission to consider and evaluate the prospective costs and benefits of regulations and orders of the Commission prior to their issuance; it does not require the

[334] OIG/CFTC, p. 3.

[335] GAO-12-151, p. 10.

Commission to evaluate the costs and benefits of the actions or mandates of the Congress."[336]

- In a February 7, 2012, rule on "Protection of Cleared Swaps Customer Contracts and Collateral," CFTC said "To the extent that these new rules reflect the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those mandated by Congress in passing the legislation. However, the rules may generate costs and benefits attributable to the Commission's determinations regarding implementation of the Dodd-Frank Act's statutory requirements. The costs and benefits of the Commission's determinations are considered in light of five factors set forth in CEA section 15(a)."[337]

- In the above-mentioned April 3, 2012, rule on "Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties," CFTC said almost exactly the same thing: "To the extent that these new regulations reflect the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those resulting from Congress's statutory mandates in the Dodd-Frank Act. However, to the extent that the new regulations reflect the Commission's own determinations regarding implementation of the Dodd-Frank Act's provisions, such Commission determinations may result in other costs and benefits. It is these other costs and benefits resulting from the Commission's own determinations pursuant to and in accordance with the Dodd-Frank Act that the Commission considers with respect to the section 15(a) factors." CFTC also noted that the costs and benefits of the rule "in large part, are attributable to the baseline statutory mandate."[338]

- In the above-mentioned April 9, 2012, rule, under the heading "Consideration of Costs and Benefits," the agency again said: "To the extent that these final regulations repeat the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those resulting from Congress's statutory mandates in the Dodd-Frank Act. However, to the extent that the regulations reflect the Commission's own determinations regarding implementation of the Dodd-Frank Act's provisions, such Commission determinations may result in other costs and benefits. It is these other costs and benefits resulting from the Commission's determinations pursuant to and in accordance with the Dodd-Frank Act that the Commission considers with respect to the Section 15(a) factors."[339]

- In the above-mentioned June 19, 2012, rule, the Commission noted that the first section of each "core principle" was a codification of the statutory

[336] 77 *Federal Register* 69410.
[337] 77 *Federal Register* 6362.
[338] 77 *Federal Register* 20168.
[339] 77 *Federal Register* 21291.

language, and said it "did not consider the costs and benefits of these rules because they do not reflect the exercise of discretion by the Commission. Where the Commission includes additional regulations for a core principle, the Commission considered the costs and benefits."[340]

- In an August 13, 2012, rule defining such terms as "swap" and "security-based swap," CFTC said it "considered the "costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors."[341] However, the agency also said that it "also considers, qualitatively, costs and benefits relative to the status quo, that is, the pre-Dodd Frank Act regulatory regime, for historical context to help inform the reader."

CFTC officials told the author of this report that Section 15(a) of the Commodity Exchange Act (7 U.S.C. § 19(a)) requires the Commission to consider the costs and benefits "*of the action of the Commission*." Given this language, they said use of the post-statutory baseline seems appropriate, because use of a pre-statutory analytical baseline would go beyond the "action of the Commission," and would involve "second guessing" the actions of Congress when the statute was enacted.

2. Securities and Exchange Commission

As **Table 5** above indicates, the SEC did some type of analysis for all seven of the major rules that it published (either alone or with the CFTC) during FY2012. The analyses for the two rules published in the first half of the fiscal year were primarily qualitative in nature, but rules published later in the year appeared to be more likely to have quantitative and monetized cost information. Of the four major rules that the SEC issued by itself, the descriptions of the benefits were only qualitative in three of the four rules, and were primarily qualitative in the remaining rule. Costs were only qualitatively discussed in one rule, were primarily qualitative in one rule, and were quantified and monetized in the other two rules.

SEC officials told the author of this report that all substantive rules are analyzed to some extent, although the extent of analysis varies with the importance of the rule on a "sliding scale" (i.e., not a major/non-major break of rules in two "buckets"). They said the first step is to do an overall qualitative cost-benefit analysis, with a subsequent quantification of those elements for which there are data. SEC officials said costs and benefits are quantified only to the extent it is feasible to do so. They said the SEC looks for public data, asks the public for data, and tries to generate data on significant components of rules. If costs or benefits cannot be quantified, they said the agency tries to be transparent about why that is the case (e.g., reasons for the lack of data).

[340] 77 *Federal Register* 36666.

[341] 77 Federal Register 48307.

a) Difficulty in Quantifying Costs and Benefits

In several of the rules, the SEC indicated that it was difficult to provide quantified estimates of regulatory costs or benefits. For example:

- In a December 29, 2011, rule on "Net Worth Standard for Accredited Investors," the SEC said "there are no available data tracking Regulation D investment by household, so we cannot develop quantitative estimates of the economic impact of eliminating from the pool of accredited investors the households that no longer qualify based on the new net worth standard, or of providing exemptive or other relief from the new standard, which would keep such households in the accredited investor pool."[342]

- In a May 23, 2012, rule defining such terms as "swap dealer" and "security-based swap dealer," the SEC and CFTC determined that the programmatic benefits would be significant, though they "will not be entirely measurable, as it is not possible to quantify the benefits of mitigating or avoiding a future financial crisis, or the benefits of avoiding an unsuitable security-based swap transaction."[343]

- In a September 12, 2012, rule on "Disclosure of Payments by Resource Extraction Issuers," the SEC described the benefits of the agency's discretionary decisions in qualitative terms "because reliable, empirical evidence regarding the effects is not readily available to the Commission."[344]

SEC officials told the author of this report that a variety of factors can make it difficult to quantify certain regulatory costs and/or benefits:

- When the agency is asked to regulate a type of activity that has not been previously regulated (or has not even previously existed), and there are no data or prior experiences regarding how regulated parties will react to a new requirement.

- When regulated entities with relevant proprietary data do not want to provide the SEC with that information for competitive reasons, or otherwise want to keep the information nonpublic.

- When the agency has to get OMB clearance to collect information covered by the PRA (i.e., collections of information from 10 or more people).

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[342] 76 *Federal Register* 81803.

[343] 77 *Federal Register* 30724.

[344] 77 *Federal Register* 56403.

- When a rule gives regulated entities flexibility in how they can comply, and that flexibility can make it difficult to quantify how many entities will respond one way versus another. (The officials said they try to use compliance experience in similar types of rules, but that experience may not be a perfectly analogous situation.)

- When some benefits are inherently difficult to quantify/monetize (e.g., reductions in systemic risk), particularly when the agency is trying to determine the effect of one rule in relation to all of the rules being issued by the SEC and other federal agencies. (They said the agency uses academic work on reductions of systemic risk where relevant, but few of those studies address the impact of particular rules.)

- When rules involve information disclosure (either by the agency or regulated parties), with the theory being that the disclosed information will make certain risky behaviors less likely. They said that in this and other contexts it is difficult to know with any degree of certainty how behaviors will actually change, particularly in reaction to a single rule.

3. OCC, FDIC, and the Federal Reserve System

As noted earlier in this report, the Office of the Inspector General for the Board of Governors of the Federal Reserve System said in June 2011 that the statutes related to the Board's rulemaking authority "generally do not require economic analysis as part of the agency's rulemaking activities."[345] The OIG reports for OCC and FDIC also did not mention any agency-specific statutory requirements for economic analysis.

OCC, FDIC, and the Federal Reserve System published only one joint major final rule during FY2012 (the August 30, 2012, rule on "Risk-Based Capital Guidelines"). OCC conducted an analysis under the Unfunded Mandates Reform Act that included an assessment of the rule's costs and benefits.[346] The agency estimated that the cost of the additional capital to the 14 national banks affected by the rule would be approximately $178 million per year. The overall estimate of the cost of the final market risk rule was $179.5 million, which reflected capital costs and compliance costs associated with implementing the alternative measures of creditworthiness. Benefits were described in qualitative terms, including increased transparency, lowered risk of catastrophic losses, and reduced "procyclicality" of market risk capital. All three agencies also provided

[345] Office of the Inspector General, Board of Governors of the Federal Reserve System, "Response to a Congressional Request Regarding the Economic Analysis Associated with Specified Rulemakings," June 13, 2011, p. 6. The report is available at http://www.federalreserve.gov/oig/files/Congressional_Response_web.pdf.

[346] As noted earlier in this report, Section 315 of the Dodd-Frank Act amended the PRA (44 U.S.C. § 3502(5)) to designate OCC as an independent regulatory agency. UMRA defines an "agency" as not including independent regulatory agencies. However, an OCC official told the author of this report that it was unclear whether the agency was considered an independent regulatory agency for purposes of UMRA, since the statute does not define the term "independent regulatory agency" and does not reference the PRA definition. Therefore, he said OCC decided to err on the side of caution and conduct an UMRA analysis.

quantitative estimates of paperwork burden (84,452 total hours) in the notice of proposed rulemaking,[347] which were confirmed in the final rule.

4. Consumer Financial Protection Bureau

As noted earlier in this report, Section 1022(b)(2)(A) of the Dodd-Frank Act requires CFPB to "consider" (among other things) the potential benefits and costs of its rules to consumers and covered persons. CFPB Director Richard Cordray has been quoted as saying that the agency undertakes "extensive quantitative and qualitative research" before proposing rules, and takes costs and benefits into account before issuing its regulations. "If the burdens outweigh the benefits," he said, "its not the kind of rule we should go forward with."[348] Responding to criticism that some of the agency's rules are very long, he said "You can't have it both ways. You can't complain…that the bureau doesn't engage in sufficient, extensive cost-benefit analysis and then complain that we devote a lot of pages in our proposal to the same cost-benefit analysis that you told us you want."[349]

CFPB published two major rules during FY2012. The December 21, 2011, interim final rule on "Fair Credit Reporting (Regulation V"[350] was issued because of a transfer of authorities from other agencies, and did not impose any new substantive requirements on those subject to existing regulations. Nevertheless, the agency prepared an analysis of costs and benefits, describing the benefits in qualitative terms (e.g., saying that recodifying existing rules would facilitate compliance with the Fair Credit Reporting Act). Costs were expected to derive from a one-time revision in covered entities' disclosures, and estimated that these changes would impose total costs of more than $98 million across 214,000 firms. The agency said these costs might be overstated because multiple firms may use the same software vendors, and because affected firms are given more than one year to make the changes (and may make the changes during routine updates).

In the February 7, 2012, final rule on "Electronic Fund Transfers (Regulation E)"[351] CFPB said it did an analysis pursuant to the requirement in Section 1022(b)(2)(A) that the agency "consider" the potential costs, benefits, and impacts of its regulations. Because of what the agency described as a limited amount of publicly available data, CFPB said the analysis "generally proves a qualitative discussion of the benefits, costs,

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[347] 76 *Federal Register* 1889, January 11, 2011.

[348] Mike Ferullo, "Cordray Vows Consumer Bureau Will Limit Costs, Burdens of Dodd-Frank Regulations," *BNA Daily Report for Executives*, July 25, 2012, p. EE-8. These comments were made during a July 24, 2012, hearing on "Credit Crunch: Is the CFPB Restricting Consumer Access to Credit?" before the Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, House Committee on Oversight and Government Reform, Serial No. 112-166, p. 20, available at http://oversight.house.gov/wp-content/uploads/2012/10/2012-07-24-Ser.-No.-112-166-SC-TARP-Credit-Crunch-is-the-CFPB-Restricting-Consumer-Access-to-Credit.pdf.

[349] Ibid.

[350] 76 *Federal Register* 79308.

[351] 77 *Federal Register* 6194.

and impacts of the final rule."[352] Benefits were described in terms of consumers having reliable information on the costs of transfers, facilitating competitive shopping, and making consumers less susceptible to unfair and deceptive practices. Additional costs were expected as a result of updating systems, revising contracts, and changed protocols. As part of its PRA analysis, the Bureau estimated the total annual burden to comply with the rule at nearly 7.7 million hours, including about 3.4 million hours in one-time burden and nearly 4.3 million in ongoing burden.

CFPB also published several rules during FY2012 that were considered "significant/substantive" in the GAO rules database. In one such rule published in July 2012, the agency included a section entitled "Potential Benefits and Costs to Consumers and Covered Persons," noting that the analysis "considers the benefits, costs, and impacts of the key provisions of the rule against a pre-statutory baseline; that is, the analysis evaluates the benefits, costs, and impacts of the relevant statutory provisions and the regulation combined."[353] However, the agency also said "limited data are publicly available with which to quantify the potential benefits, costs, and impacts of the rule." Therefore, the agency said, benefits, costs, and other effects were primarily discussed in qualitative terms. Expected benefits from increased compliance included more accurate information, and therefore better decisions. Costs were described as companies possibly needing to hire or train personnel, and/or invest in new systems. The agency did try to estimate bank examination costs, which ranged from less than $12,000 in small firms to about $68,000 in larger firms. The total cost of responding to supervision by the six largest firms was estimated to be about $364,000 annually (0.008% of aggregate annual receipts).

The next most recent "significant/substantive" CFPB rule, issued in December 2011, republished a regulation reflecting the transfer of rulemaking authority to the agency from the Board of Governors of the Federal Reserve System, but said the rule "does not impose any new substantive obligations on persons subject to the existing Regulation E, previously published by the Board."[354] CFPB noted the requirement for cost-benefit analysis in Section 1022(b)(2)(A) of the Dodd-Frank Act, but also said the "manner and extent to which these provisions apply to interim final rules and to benefits, costs, and impacts that are compelled by statutory changes rather than discretionary Bureau action is unclear."[355] Several other CFPB "significant/substantive" rules issued during the fiscal year were also republications of rules reflecting transfers of rulemaking authority to the agency from other agencies by the Dodd-Frank Act.[356]

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[352] 77 *Federal Register* 6272.

[353] Consumer Financial Protection Bureau, "Defining Larger Participants of the Consumer Reporting Market," 77 *Federal Register* 42874, July 20, 2012, at 42892.

[354] Consumer Financial Protection Bureau, "Electronic Fund Transfers (Regulation E)," 76 *Federal Register* 81020, December 27, 2011.

[355] Ibid., at 81022.

[356] See, for example, Consumer Financial Protection Bureau, "Truth in Lending (Regulation Z)," 76 *Federal Register* 79768, December 22, 2011.

5. Consumer Product Safety Commission

In the one major rule that CPSC issued during FY2012 ("Testing and Labeling Pertaining to Product Certification," November 8, 2011), the agency did not estimate benefits or costs in general, but did quantify and monetize expected paperwork burden and assessed the potential impact on small entities. The rule contained a lengthy RFA section describing the need for the rule, the cost of testing, and alternatives that the agency considered to reduce the impact of the rule on small entities. In response to a comment asking CPSC to prepare a full cost-benefit analysis, the agency stated in the preamble that the rule was being promulgated under the Administrative Procedure Act and Section 3 of the Consumer Product Safety Improvement Act (CPSIA), and that "neither authority requires us to conduct a cost-benefit analysis. Moreover, by allowing in CPSIA expedited rulemaking, Congress made it clear that it did not want the Commission engaging in any unnecessary delay in promulgating this rule."[357] The agency then said, "While, in recognition of Congress's view as reflected in CPSIA, we decline to conduct a cost-benefit analysis for the final rule, we have changed the final rule to address some of the economic burden on manufacturers " and listed four examples of such changes. [358]

CPSC officials told the author of this report that the statutes under which the agency has most frequently issued rules (the Consumer Product Safety Act, the Federal Hazardous Substances Act, and the Flammable Fabrics Act) all require the agency to prepare a cost-benefit analysis for most product-related rules, and the agency did so in most rules prior to 2008. For example, in a 2006 rule addressing mattress flammability, GAO's major rule report stated:

> The Commission performed a cost-benefit analysis of the final rule. Using a discount rate of 3 percent and an expected 10-year mattress life, aggregate benefits of the final rule are expected to be $1,024 million to $1,307 million. The midpoint estimate for aggregate benefits is $1,166 million. The corresponding expected aggregate resource costs of the rule are $175 to $511 million. The midpoint estimate for aggregate costs is $343 million. The aggregate net benefits equal $514 to $1,132 million. The midpoint estimate for aggregate net benefits is $823 million.[359]

However, CPSC officials said the enactment of CPSIA in 2008 altered the agency's standard practice in several ways.

- Among other things, the statute required the agency to issue the November 2011 rule mentioned previously in an expedited manner. The officials said the tight deadlines in the statute made it virtually impossible to do a full cost-benefit analysis and make the findings that they would normally make, because they had little or no existing information on the number of makers of children's products, or what products they produce. Benefits would have been particularly hard to estimate with any precision, they said, because it

[357] 76 *Federal Register* 69484.

[358] Ibid.

[359] The rule examined was "Standard for the Flammability (Open Flame) of Mattress Sets," published on March 15, 2006, at 71 *Federal Register* 13472. To view the GAO report, see http://gao.gov/products/GAO-06-621R#mt=e-report.

would have required the agency to know what certification procedures (if any) the companies were already following and how many injuries would have been prevented because of the third party testing requirements.

- To address these data problems, they said the agency would have ideally had the time and resources to go out and survey the companies and gather these data. However, they said getting OMB clearance to conduct such a complicated survey under the PRA would have taken at least a year, and even longer to conduct the survey. Even at that point, they said the companies might not have even been able to answer the survey questions, because the respondents would have to know what the requirements were going to be before they were in place.

- The officials also said that this rule represented a departure from the scope of normal agency rulemaking; they said CPSC typically regulates a particular product, whereas this rule had to do with certifications for *all* children's products.

Finally, they pointed out that the rule implemented a specific statutory requirement, and the agency had little discretion in deciding how the rule should be written. However, they pointed out that the agency did an RFA analysis and a PRA analysis of the rule which, when taken together, described many of the rule's expected costs.

In general, the officials said the agency does whatever the law requires; doing anything more than that, they said, would be a policy choice by the agency. For example, when the law requires the agency to do a cost-benefit analysis (e.g., pursuant to CPSA, FFA, or FHSA), they said the agency does the analysis.[360] In those analyses, they said all of the different types of findings are addressed together in one briefing package for the Commission's review. They also include the work of others in the agency (e.g., epidemiologists and engineers). Each of those divisions would also send a memorandum to the Commission, along with the economics memorandum.

However, if the law under which the rule is issued says they do not have to do an analysis, and particularly if it has tight deadlines for issuance of the rule (as has been the case with regard to the CPSIA rules the agency has been issuing lately), then they said the agency might not do a cost-benefit type analysis. They noted that the agency always does an RFA analysis, and does a PRA analysis for any rule that contains a collection of information. For some rules (e.g., those that primarily affect small entities, or that primarily involve paperwork costs), they said those analyses do provide a useful measure of the cost impacts of the rule on small businesses.

CPSC officials said other factors affecting the extent to which the agency prepares regulatory analyses include staffing (the agency has a total of eight economists and five

[360] An example they cited was the recent proposed rule on magnets (77 FR 53781, September 4, 2012), which was issued under the CPSA, not the CPSIA.

attorneys who handle rulemaking issues) and the nature of the rules being issued. They pointed out that the November 2011 testing and certification rule was statutorily required, but how firms would actually react to it was unclear because CPSC was regulating in new space (a third party testing and certification requirement for a wide range of products, which was a new arena for the agency and businesses).

6. Federal Communications Commission

FCC did not publish any major final rules during FY2012, and had not done so since calendar year 2008, when the agency published five such rules. In each of those rules, GAO's major rule reports indicated that the agency "is not required to prepare, and did not prepare, a cost-benefit analysis for the final rule."[361] As noted earlier in this report, aside from the RFA and the PRA, there are currently no statutory provisions that specifically require the FCC to prepare a cost-benefit analysis or other type of economic analysis. Therefore, until the last year or so, they said the agency seldom prepared such analyses (a frequency that was described by one FCC official as "hit or miss").

However, FCC officials said the agency's willingness to do cost-benefit analyses underwent a "significant change" after President Obama issued Executive Order 13579, in which he encouraged (but did not require) independent regulatory agencies to comply with the principles and procedures in EO 13563 (which included many of the principles in EO 12866). After the issuance of these executive orders in 2011, the Chairman of the Commission reportedly sent a directive to agency staff that one official said "really encouraged us to find ways to make sure our actions were consistent with those directives." Since then, she said, there has been a "concerted effort to insert a more rigorous cost-benefit analysis into our rulemaking processes." FCC officials said it is now understood that it is "an expected part of the agency's decision making," and that when the Office of the General Counsel reviews rules for compliance with the APA and other statutes, they now look to see that the rule contains evidence of having considered costs and benefits.

The officials said FCC does not just do cost-benefit analyses for "major" rules, but instead views it as a "sliding scale" in which the more important rules generally get more analysis than less important ones. One senior FCC official said that when Congress mandates that the agency achieve a certain result, the agency's study might be more of a "cost-effectiveness" analysis than a cost-benefit analysis. In those cases, he said, the focus is on finding the least costly or most cost-effective way to accomplish the statutorily mandated objective. He said the emphasis in all of their studies is to work with rule writers early in the process, to build the administrative record and ask the right questions—not just to have a "cost-benefit" section in the rule.

[361] See, for example, GAO's report on "Commercial Mobile Alert System," August 14, 2008, 73 *Federal Register* 47550, available at http://gao.gov/products/GAO-08-1116R#mt=e-report.

a) Recent FCC Rules

FCC officials said that substantive rules that have come out within the previous year should evidence more analysis than earlier rules, although they cautioned that there won't always be a separate section of the preamble that says "cost-benefit analysis." To test whether the FCC is doing more in the way of economic analysis than in previous years, the author of this report examined several rules that the agency issued during calendar year 2012 that, while not "major" rules, were coded as "significant/substantive" in the GAO database.

One of the agency's most recent rules appears to have been predicated on analysis, and the agency committed to further analysis. In that September 2012 rule,[362] FCC responded to a petition for rulemaking and suspended its existing rules allowing for automatic pricing flexibility grants for special access services "in light of evidence that the proxies for measuring actual and potential special access market competition…do not accurately predict whether competition is sufficient to constrain special access prices and deter anticompetitive practices by price cap local exchange carriers." The agency also initiated a process to obtain data to conduct a special access market analysis "to determine the extent to which the special access market is competitive and develop special access pricing flexibility rules to replace the collocation-based competitive showings."

In another substantive rule, published in August 2012,[363] the agency said it would "remove regulatory barriers that today limit the use of spectrum for wireless backhaul and other point-to-point and point-to-multipoint communications. This will also facilitate better use of Fixed Service (FS) spectrum and provide additional flexibility to enable FS licensees to reduce operational costs and facilitate the use of wireless backhaul in rural areas. By enabling more flexible and cost-effective microwave services, the Commission can help foster deployment of broadband infrastructure across America." The agency appeared to have done some analysis of expected costs and benefits. For example, FCC said:

> We find that permitting smaller antennas in the 6, 18 and 23 GHz bands will benefit operators and consumers alike and that these benefits outweigh any potential costs. Our actions today will enable these spectrum bands to be used more intensively for wireless backhaul, public safety, and other critical uses. Even for a single link, which consists of two transmitters and two antennas, the cost savings from allowing smaller antennas can be substantial. Savings in installation costs for the link would likely be over $2,000 for two antennas. MetroPCS estimates that if a smaller antenna eliminates the need for wind loading studies or structural changes to a tower, the cost savings could run "into the tens of thousands, if not hundreds of thousands, of dollars." There would also be savings in operational costs. For example, if an operator using a 6 GHz link is able to use 3-foot antennas instead of 6-foot antennas, its site rental costs could decrease by $7,200 each year. There are also additional cost savings noted by FiberTower and others. When those cost savings are multiplied by the thousands of links that are authorized in the 6 GHz

[362] Federal Communications Commission, "Special Access for Price Cap Local Exchange Carriers," 77 *Federal Register* 57504, September 18, 2012.

[363] Federal Communications Commission, "Facilitating the Use of Microwave for Wireless Backhaul and Other Uses and Providing Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees," 77 *Federal Register* 54421, August 22, 2012.

> band each year, even if a relatively small percentage of authorized links could use smaller antennas, there could be many instances where operators could recognize cost savings. While the cost savings in the 18 and 23 GHz bands would be smaller, since there is less difference in the size of antennas, there would still be cost savings. On the other hand, there is some risk that a carrier taking advantage of these new rules may have to upgrade to a Category A antenna later.[364]

The agency also did an RFA analysis describing the need for the rule, the number of small entities affected, and the alternatives considered.

b) Why Certain Analyses Are Not Done

FCC officials indicated that one reason the agency did not prepare cost-benefit analyses more frequently in the past was the absence of a statutory requirement to do so. Had there been such a requirement, they said, the agency would have complied with the statute. One official noted, however, that some statutory provisions under which the agency issues rules are so specific that a cost-benefit analysis probably would not have affected agency decision making.

More recently, the officials indicated that the agency's ability to prepare a good analysis is sometimes hindered by difficulty in getting good data, particularly in relation to quantifying costs and benefits. One official said that sometimes there are data that could be useful in an analysis, but the data are proprietary or come with so many restrictions (e.g., nondisclosure provisions) that their use becomes problematic.

One FCC official described the Paperwork Reduction Act as a "major impediment" to gathering the data they need in analysis. He said the agency could not gather information from 10 or more individuals or companies without an OMB clearance (and sometimes from less than 10 individuals or companies, if the population to be surveyed constitutes a substantial portion of an industry).[365] However, he said that the Obama Administration had made "significant efforts" to minimize the hurdles to gathering such information within the limits of the PRA, allowing agencies to obtain streamlined approvals for certain information collections.

Another FCC official said the primary problem they have in doing analyses in certain areas (e.g., spectrum allocation) is that they are regulating in new space with new technology, there is "no record there," and therefore nobody knows how to quantify benefits or costs with any degree of precision. In such cases, he said, said they try to put a lower bound on benefits, and an upper bound on costs, to know whether the rule would produce positive net benefits.

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[364] Ibid., 77 *Federal Register* 54423.

[365] As noted earlier in this report, PRA regulations indicate that a covered "collection of information" can involve fewer than 10 individuals or organizations if those organizations represent a substantial portion of an industry. See 5 CFR 1320.3(c)(4)(ii).

7. Nuclear Regulatory Commission

The NRC issued one major rule during FY2012, a revision of the licensing, inspection, and annual fees that the NRC charges to its applicants and licensees.[366] The Omnibus Budget Reconciliation Act of 1990, as amended, and the Atomic Energy Act of 1954, as amended, require NRC to recover through fees approximately 90% of its budget authority. The agency did not prepare a cost-benefit analysis or identify alternatives because of these fee recovery requirements. Based on the appropriations for FY2012, NRC's required fee recovery amount was approximately $1,038.1 million for the year. After accounting for billing adjustments, the total amount billed as fees to licensees was about $901 million. Therefore, this rule was considered "major" only because it involved budget transfers of more than $100 million per year.

Six of the eight major rules that the NRC issued since 2007 were these fee schedule rules. One of the two non-fee schedule rules that were published during this period amended the definition of "total effective dose equivalent" and limited the routine reporting of annual doses to those workers whose annual dose exceeds a specific dose threshold or who request a report.[367] The rule also modified the labeling requirements for certain containers holding licensed material within posted areas in nuclear power facilities, and removed the requirement that licensees attempt to obtain cumulative exposure records for workers unless those workers are being authorized to receive planned special exposure. GAO's major rule report indicated that the NRC prepared a regulatory analysis of the rule, and determined that the total implementation cost to NRC of this final rule would be $68,000. The agency estimated that the total operating impact on the NRC would be between $650,000 and $980,000, and on "agreement states" would be between $1.9 million and $2.7 million.[368] NRC concluded that the net present value of this rule was between $135 million and $237 million (primarily driven by reduced industry operating costs), and estimated that the rule would reduce annual paperwork burden by 132,000 hours. The agency said it was issuing the rule "because the changes improve the effectiveness of the Commission's regulations and reduce unnecessary regulatory burden without affecting the level of protection for either the health and safety of workers and the public or for the environment."[369]

The other non-fee schedule rule amended the NRC's security regulations and added new security requirements pertaining to nuclear power reactors.[370] It established and updated generically applicable security requirements similar to those previously imposed by

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[366] U.S. Nuclear Regulatory Commission, "Revisions of Fee Schedules; Fee Recovery for Fiscal Year 2012," 77 *Federal Register* 35809, June 15, 2012.

[367] U.S. Nuclear Regulatory Commission, "Occupational Dose Records, Labeling Containers, and the Total Effective Dose Equivalent," 72 *Federal Register* 68043, December 4, 2007.

[368] Section 274 of the Atomic Energy Act provides a statutory basis under which NRC relinquishes to the states portions of its regulatory authority to license and regulate byproduct materials (radioisotopes); source materials (uranium and thorium); and certain quantities of special nuclear materials. See http://www.nrc.gov/about-nrc/state-tribal/agreement-states.html for more information about the agreement states program.

[369] 72 *Federal Register* 68058.

[370] U.S. Nuclear Regulatory Commission, "Power Reactor Security Requirements," 74 *Federal Register* 13926, March 27, 2009.

Commission orders issued after the terrorist attacks of September 11, 2001. Additionally, the rule added several new requirements not derived directly from the security order requirements but developed as a result of insights gained from implementation of the security orders, review of site security plans, implementation of the enhanced baseline inspection program, and NRC evaluation of force-on-force exercises. It also updated the NRC's security regulatory framework for the licensing of new nuclear power plants. The agency did a regulatory analysis for the rule, but did not discuss the results in the preamble, referring readers to a separate document. In that document,[371] the agency said that the rule would "result in a total one-time cost to all nuclear power plant sites of approximately $115.71 million, followed by total annual costs on the order of $38.65 million. The total present value of these costs is estimated at $590.23 million (using a 7-percent discount rate) and $857.33 million (using a 3-percent discount rate) over the next 30 years."[372] The average nuclear power plant was expected to incur a one-time cost of approximately $1.78 million followed by annual costs of approximately $594,600. Benefits were described in qualitative terms, including protection against radiological sabotage and increased effectiveness of licensees' security programs. Overall, the NRC concluded that the costs "are justified based on these qualitative benefits."

NRC officials interviewed for this report said the agency's procedures do not require staff to prepare a full cost-benefit analysis for its rules when the goal of the rule is to provide "adequate protection" of public health and safety. Nevertheless, they said the agency does prepare an analysis of costs for these rules to ensure the regulatory alternative selected is the most cost-effective alternative to achieve that "adequate" level of protection. They said NRC rules that go beyond "adequate protection" are required to have a complete analysis of benefits and costs. Also, for "backfitting" analyses, the agency must show that there will be a substantial increase in public health and safety. The officials said that in all of these analyses, the emphasis is on the cost side of the equation, with benefits almost always described in qualitative terms. They said that the NRC has decided not to use "break-even" analyses to describe benefits in terms of certain risk scenarios (as is done in some rules issued by the Department of Homeland Security) because the agency has no way of determining the probability of certain events (e.g., terrorist attacks), and did not feel comfortable simply postulating that some event "could" occur.[373] They said unlike the National Highway Traffic Safety Administration, the NRC does not have accident data to show the likelihood of certain catastrophic events.

The NRC officials said that regulatory analysts occasionally work with the technical teams writing the rules (including the preamble, rule language, and regulatory analyses, including NEPA and RFA analyses), but that technical members' general knowledge of costs for facility changes frequently allows selection of more cost efficient options early in rule development. The rule package then comes to the agency's office of general

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[371] U.S. Nuclear Regulatory Commission, "Regulatory Analysis of Final Power Reactor Security Requirements," available at http://pbadupws.nrc.gov/docs/ML0833/ML083390372.pdf.

[372] Ibid., p. i.

[373] "Break-even" analyses show at what point the value of the expected health benefits equals the cost. For more information, particularly showing its use in homeland security rules, see CRS Report R41140, *How Agencies Monetize "Statistical Lives" Expected to Be Saved By Regulations*, by Curtis W. Copeland, March 24, 2010, available at http://assets.opencrs.com/rpts/R41140_20100324.pdf, pp. 21-24.

counsel, which reviews the rule for legal sufficiency, internal consistency, and logic. NRC officials said the agency's fee structure rules do not contain a cost-benefit type of analysis. Instead, the agency's chief financial officer prepares the analysis based on the agency's actual costs of regulating the nuclear industry, and uses that information to determine the appropriate amount of fees.

VII. How Analyses Are Used in Agency Decision Making

Agency officials interviewed for this report frequently indicated that regulatory analysis is often woven into the early stages of the rulemaking process, with the preparation of a formal cost-benefit analysis not occurring until the preparation of the final release. Therefore, it is often difficult to determine exactly what constitutes the agencies' "analysis," or exactly how any such analysis affected agency decision making with regard to a particular rule. For example, CPSC officials said the economists often get involved with the divisions early in the rule writing process, giving them a sense of what the economic implications might be. NRC officials also indicated that technical staff develop agency rules and regulatory analysts occasionally work with technical staff on associated cost analyses. They also said the analyses would most likely affect decision making in the agency as part of the rule development process, when the agency is laying out the various alternatives that could be considered. That analysis, they said, would likely show which alternative was most cost-efficient.

CFTC officials also said that economists work with rule writing staff early in the process, asking questions about costs, benefits and alternatives. They described the analysis not as a single event, but as an "ongoing thought process." The officials said the leader of the rule writing team is from a line division, but other team members include representatives from the Office of the Chief Economist and the Office of General Counsel. They said team members continue to work together even after the rule is issued, monitoring the implementation of the rule. The officials also said there have been instances in which the analysis changed the nature of the final rule. For example, they said the analysis in one rule on swap dealers indicated that costs at one regulatory threshold would be very high, so the agency changed the threshold (from $100 million to $8 billion), and thereby reduced costs.

A senior FCC official said that the rule writers in the bureaus do most of the analytic work in the agency (since they know the subject matters best, and the record), but there is substantial interaction and consultation with economists during the process about how such studies should be done. He said that getting the analyses done early in the rulemaking process has been a "big push that we've been making." Another FCC official said preliminary analyses are prepared before any decisions are made about a rule, and are part of the agency's consideration of regulatory options. She said the analysis is not done to justify decisions already made. CPSC officials also said economic discussions during rule development frequently influence decision making, with the formal analysis

being done after the rule's dimensions are known. They also said that economic analyses are not done after the fact to justify decisions that have already been made.

Some agency officials indicated that regulatory analyses had changed the way that their agencies viewed an issue, or had other types of effects. SEC staff pointed to commissioners' public statements at an April 18, 2012, open meeting regarding rules defining swaps-related terms in which commissioners indicated that the analysis had been helpful to them in coming to an agreed-upon policy recommendation. SEC Chairman Mary Schapiro noted at that meeting that the "data analysis informed the de minimis thresholds, which have been tailored to the specifics of the products and the markets at issue, with a goal of preserving key counterparty and market protections while promoting regulatory efficiency." In particular, she said that for "security-based swaps other than credit default swaps, we were guided in part by data that showed that the size of this market is only a small fraction of the size of the CDS market."[374] Commissioner Troy A. Paredes went even further, saying

> …data ultimately came to play a key role in the rulemaking, especially in shaping the de minimis exception, including the phase-in. The Division of Risk, Strategy, and Financial Innovation's analysis gave the Commission a solid basis for evaluating the impact of different possible de minimis thresholds. To my mind, until our attention turned to the data, it was difficult to find adequate support for the various de minimis thresholds that were considered. As is the promise when decisions are rooted in data, Risk Fin's analysis allowed the Commission to make a more informed, disciplined choice in discharging our regulatory duties and to steer clear of what otherwise could have been an arbitrary conclusion about where to draw the de minimis line.[375]

CPSC officials also said that regulatory analyses had affected agency decision making, noting in particular that a 2008 proposed rule on upholstered furniture changed "pretty substantially" as a result of the economic analyses that were done during rule development. (The analysis reportedly indicated that some aspects of the original standard had high costs and little apparent benefits.) They also said there have also been instances in which an analysis led the agency to decide not to go forward with a rule.

On the other hand, FCC officials said it is often difficult to say exactly what effect analysis has on agency decision making. They said commissioners want to know how a rule is going to be viewed, and part of that is understanding how burdensome the rule will be. Although the information is certainly presented as part of the commissioners' decision-making process, but they cannot know how it affects them. When Commissioners decide not to go forward with a rule, they said it may be the analysis that leads them to that conclusion, or it may be something else entirely. Conceptually, however, they said that the analysis can help the Commissioners decide where along the rulemaking spectrum the agency ends up (e.g., the number of entities affected, and the types of options considered). They also pointed out that the analysis can come into play in responding to comments about the expected costs of the rule, either confirming or disconfirming those views.

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[374] See http://www.sec.gov/news/speech/2012/spch041812mls.htm.

[375] See http://www.sec.gov/news/speech/2012/spch041812tap.htm.

According to an August 2012 "economic consequences" paper prepared by the NRC's Executive Director for Operations, a regulatory analysis is an "analytical tool used by NRC decisionmakers to assist in determining whether the NRC should implement a proposed regulatory action." Citing the agency's 2004 revision of the regulatory analysis guidelines, it goes on to say that the analysis "is intended to be an integral part of the NRC's decision making, and should not be used to produce after-the-fact rationalizations to justify decisions already made, nor should it unnecessarily delay regulatory actions."[376] However, the notation vote paper also makes clear that courts have interpreted the Atomic Energy Act as prohibiting the NRC from taking regulatory costs into consideration when determining that a regulatory action is necessary for "adequate protection" of public health and safety. On the other hand, the paper points out that the NRC can consider costs when establishing levels of protection beyond "adequate."

NRC officials said the preliminary "back-of-the-envelope" analyses that are done by regulatory analysts and technical staff as part of the decision as to whether to go forward with a rule are the types of analyses that likely have the biggest effect on decision making (i.e., whether the staff recommend the rule to the Commission). The staff has to make the preliminary determination that a rule would provide "adequate" protection and, if the rule goes beyond what is required for adequate protection, must also determine that the anticipated costs of the rule can be justified in terms of the (generally qualitatively described) benefits anticipated. The officials said this analysis sometimes shows that certain rules with multiple related components may be justifiable in the aggregate, but that certain components could not be justified individually. As a result, there have been discussions within the Commission regarding when components are so related that the agency has to consider them as a group.

VIII. Concluding Observations

Although independent regulatory agencies have historically issued fewer final rules and fewer major rules than most Cabinet departments and independent agencies like EPA, the enactment of the Dodd-Frank Act in 2010 has substantially increased the level of rulemaking activity in certain agencies (e.g., CFTC). Other legislation has had a similar effect on other independent regulatory agencies (e.g., the enactment of CPSIA in 2008 that resulted in increased regulations issued by CPSC). More than a dozen bills were introduced in the 112th Congress that would have required such agencies to prepare cost-benefit and other types of economic analyses before issuing certain rules. One bill (S. 3468) would have authorized the President to issue an executive order requiring the agencies to prepare such analyses for their "economically significant" rules. (It is currently unclear whether the President could issue such an executive order in the absence of such authorizing legislation.) Similar bills have already been introduced during first few months of the 113th Congress.[377]

[376] NRC Notation Vote Paper, op cit., Enclosure 5, p. 1.

[377] For example, S. 450, the "Financial Regulatory Responsibility Act of 2013," would require "enhanced economic

Previous studies of the extent to which independent regulatory agencies conduct cost-benefit or other types of analyses have frequently reached the same overall conclusion – i.e., although these agencies often provide qualitative descriptions of the costs and benefits of their major rules, they often discuss those effects in quantitative or monetary terms only in the context of their discussions of paperwork costs. Some of these studies (e.g., OMB's annual reports to Congress on costs and benefits, and the CCMR letter to the House and Senate banking committees) suggest that independent regulatory agencies are doing little to assess potential costs and benefits. In fact, however, the agencies often at least qualitatively discuss regulatory costs and benefits (and often discuss at least some costs in quantitative or even monetary terms), or the rules themselves do not appear to merit a full cost-benefit analysis (e.g., because they simply delayed the effective dates of previous major rules, or were focused on relatively insignificant agency actions that would not have been covered by the cost-benefit analysis requirements in EO 12866 and OMB Circular A-4 had they been issued by Cabinet departments or independent agencies like EPA). Several of the major rules that OMB characterized as having no monetized cost information did, in fact, contain monetary estimates of at least some regulatory costs. CCMR characterized the agencies' cost-benefit analysis efforts as "inadequate," but the study included a number of rules that were not substantive, had little impact on non-federal entities, or actually contained discussions of costs and benefits.

Agency officials offered several reasons why independent regulatory agencies' analyses of major rules often are not as detailed or quantitative as those contemplated in Circular A-4. For example, they said statutes as the Dodd-Frank Act and CPSIA have sometimes required these agencies to regulate in new areas where little information about regulatory costs or benefits may exist. Although regulated entities may have relevant information that may allow the agencies to quantify costs and benefits, they may also be reluctant to provide such data for competitive reasons. Costs and benefits can also be difficult to estimate when rules give regulated entities flexibility in how they can comply with certain requirements, when disclosure requirements may or may not make certain risky behaviors less likely, or when the agencies are given tight deadlines to issue certain rules.

Agency officials also pointed out that most independent regulatory agencies are not specifically required in their authorizing statutes to prepare cost-benefit analyses, and (because Congress established these agencies to be more independent of the President) relevant executive orders and circulars do not cover them. Each of the independent regulatory agencies examined in this report has a unique statutory environment, and each has reacted to congressional, judicial, and presidential stimuli in different ways. For example:

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analysis and justification of regulations proposed by certain Federal banking, housing, securities, and commodity regulators." Covered agencies include the Board of Governors of the Federal Reserve System, CFPB, CFTC, FDIC, the Comptroller of the Currency, NCUA, and the SEC. H.R. 1003 would "improve consideration by the Commodity Futures Trading Commission of the costs and benefits of its regulations and orders." H.R. 1062 would also require an assessment of costs and benefits before the Securities and Exchange Commission issues its rules.

- The SEC arguably has the least specific statutory requirements (i.e., to "consider" the effects of the agency's rules on efficiency, competition, and capital formation), and in recent years was regarded by OMB and others as having prepared the best economic analyses of all independent regulatory agencies. However, the confluence of two OIG reports, two GAO reports, congressional hearings, and the *Business Roundtable* decision have caused the agency to improve its performance even further, and to issue new analytical guidance that closely adheres to OMB Circular A-4. For example, SEC guidance now instructs the agency's analysts to use a pre-statutory baseline in estimating costs and benefits (as recommended in the circular), even when the agency's rules closely reflect statutory requirements. The agency has also hired more economists, and has reportedly slowed down the pace of its rulemaking until they have been thoroughly analyzed and approved.

- CFTC is required to "consider the costs and benefits" of the agency's regulatory actions, but has taken a different approach than the SEC with regard to the baseline, reiterating the agency's earlier position that regulatory costs and benefits should be measured against the post-statutory environment. As a result, costs and benefits that are directly attributable to statutes like the Dodd-Frank Act are not taken into account in those analyses.

- Federal "banking agencies" (i.e., the Comptroller of the Currency, FDIC, and the Board of Governors of the Federal Reserve System) are required to "consider" any administrative burdens that their regulations would place on depository institutions, as well as the benefits of those regulations. These agencies' OIGs indicated that these and other statutory rulemaking provisions do not require the agencies to prepare a cost-benefit analysis.

- Before issuing consumer product safety rules, CPSC is statutorily required to prepare a "regulatory analysis" containing a description of potential costs and benefits, and a description of the costs and benefits of alternatives that were considered by the Commission. However, the agency has interpreted legislation enacted in 2008 with tight regulatory deadlines and other features as effectively negating those analytical requirements. Noting these deadlines, the agency said in its most recent major rule "we decline to conduct a cost-benefit analysis," but did take certain actions to reduce regulatory burden.

- FCC statutes do not require the agency to prepare cost-benefit or other types of analyses for its rules, and FCC officials said cost-benefit analysis at the agency was "hit-or-miss" until the Chairman decided in 2011 that the agency should do more to comply with Executive Order 13563 and Executive Order 13579.

- The NRC is not statutorily required to prepare cost-benefit analyses, but has been voluntarily conducting regulatory analyses for more than 35 years. The agency's guidelines conform to the general principles of Circular A-4. However, the agency's analyses focus primarily on regulatory costs, and courts have interpreted the Atomic Energy Act as not permitting the NRC to take costs into consideration when a regulatory action is necessary for "adequate protection" of public health and safety.

Agency officials frequently indicated that the less quantitative nature of their analyses is partly due to the nature of their agencies' statutory analytical requirements. More than one agency official told the author of this report that their agency does what the law requires them to do. The agencies often view requirements to "consider" costs and benefits, effects on competition, or other effects as not requiring cost-benefit analyses on the level described in OMB Circular A-4. Even in the wake of the July 2011 *Business Roundtable* decision, SEC's March 2012 guidance memorandum states "No statute expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities."

Several independent auditors who have examined these agencies' statutes and rules have reached the same conclusion. For example, the OIG for the Board of Governors of the Federal Reserve System said in its June 2011 report that the statutes related to the agency's rulemaking authority "generally do not require economic analysis on the part of the agency's rulemaking activities."[378] GAO said in its November 2011 report on rules issued under the Dodd-Frank Act that "none of the regulators are required to conduct benefit-cost analysis."[379] Others, however, contend that agencies cannot "consider" those effects without preparing some type of analysis, and that agencies should clearly spell out why quantitative analysis is not possible for certain rules.

In some statutes, Congress has specifically directed certain agencies to prepare cost-benefit analyses. Congress is less clear in other statutes, which only require agencies to "consider" the costs and benefits of their actions, or "consider" the effects of their rules on competition and other factors. Some contend that Congress obviously knows how to require independent regulatory agencies to prepare cost-benefit analyses, since it has done so in some but not all of the agencies' underlying statutes. Therefore, requiring agencies to "consider" cost, benefits, or other factors appears to represent a lower analytic standard. Several recent court decisions, however, have interpreted these "consider" requirements to constitute a de facto requirement that the agencies prepare extensive cost-benefit analyses.

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[378] Office of the Inspector General, Board of Governors of the Federal Reserve System, "Response to a Congressional Request Regarding the Economic Analysis Associated with Specified Rulemakings," June 13, 2011, p. 6. The report is available at http://www.federalreserve.gov/oig/files/Congressional_Response_web.pdf.

[379] GAO-12-151, Highlights.

A. Congressional Options

Congress has several options as it considers how to react to the current situation. Congress could decide to keep in place the current set of statutory provisions governing rulemaking analysis by independent regulatory agencies. If so, it is likely that regulated entities will continue to challenge the agencies' rules, and the courts will continue to determine what Congress intended when the statutes state that agencies must "consider" costs, benefits, or other factors before issuing certain rules.

On the other hand, Congress could enact legislation clearly stating whether or not independent regulatory agencies should prepare cost-benefit or other types of economic analyses before issuing their rules. Regardless of how the issue is resolved (i.e., either requiring agencies to prepare such analyses or stating that they need not do so), taking action would allow Congress to reclaim the authority to determine the meaning of the statutory requirements that it enacts. If Congress decides to require independent regulatory agencies to prepare cost-benefit analyses, it could do so either by amending each agency's statutory rulemaking authority, or by enacting crosscutting legislation that is applicable to all such agencies. Either way, Congress could also make clear how these new requirements are to interact with, or supplant, existing analytical requirements and other statutory provisions (e.g., provisions that courts have interpreted as not permitting costs to be taken into account in agency decision making).

Agency-specific or crosscutting legislation could also clearly indicate how independent regulatory agencies' cost-benefit analyses should be conducted. For example, the legislation could clearly state whether the agencies' estimates of costs and benefits should include provisions that are mandated in the statute, or be confined to discretionary elements in the rule. Alternatively, Congress could require the agencies to follow the "best practices" that have been identified in OMB Circular A-4 for their "major" or "economically significant" proposed and final rules. Referencing the circular in a statute would, however, make the long-term effect of any such requirement contingent upon possible future changes in the circular by future presidential administrations.

B. Agency Options

Even if Congress decides not to enact legislation requiring all or certain independent regulatory agencies to prepare cost-benefit analyses, few would argue that the agencies should not consider the anticipated effects of their rules before they are issued as carefully as possible. Most independent regulatory agencies assert that they already do so, but most would also likely agree that they could take additional actions on their own to improve the quality of the economic analyses that they prepare for at least their major rules. Current statutory requirements that these agencies "consider" costs and benefits or other factors represent an analytical "floor," not a "ceiling," and generally do not limit what the agencies are able to do voluntarily to support such considerations. Even agencies with no specific statutory requirements for cost-benefit analysis are arguably not

prohibited from doing such analyses. To do more, agencies could voluntarily adhere to variety of analytical "best practices" that have been described in the literature and elsewhere.

1. Circular A-4 Principles

Perhaps the most widely cited compendium of analytical "best practices" is OMB Circular A-4, which states that it is "designed to assist analysts in regulatory agencies by defining good regulatory analysis… and standardizing the way benefits and costs of Federal regulatory actions are measured and reported."[380] Several of the independent regulatory agency officials interviewed for this report cited Circular A-4 as a useful compendium of best practices, and some reference it in their own written procedures (e.g., the SEC's March 2012 guidance document and the NRC's 2004 Regulatory Analysis Guidelines). Also, as noted earlier in this report, GAO's November 2011 report recommended that federal financial regulators take steps to better ensure that the specific practices in Circular A-4 are "more fully incorporated into their rulemaking policies and consistently applied.[381] Some of the agencies agreed with the recommendations, while others cited actions they had taken or planned to take regarding the recommendations.[382] GAO reiterated this recommendation in its December 2012 report.[383]

Both Circular A-4 and a more recently issued regulatory impact analysis "primer" summarizing the circular identify three basic elements of a good regulatory analysis: (1) a statement of need for the regulatory action, including a description of the problem that the agency seeks to address, any statutory or judicial directives, and the extent of agency discretion permitted; (2) an examination of plausible alternative regulatory approaches (e.g., no regulation, State or local regulation, differing levels of stringency, informational measures, and the use of performance objectives instead of detailed regulatory directives); and (3) an estimate of the benefits and costs – both quantitative and qualitative – of the proposed regulatory action and its main alternatives. Although neither the circular nor the primer address statutory analytical requirements like the RFA and the PRA, these three general principles appear applicable to them as well. As **Table 6** below illustrates, the RFA, the PRA, and EO 12866 (on which Circular A-4 is based) each require agencies to identify the rule's need and/or legal basis, assess costs and/or benefits, and identify the alternatives considered.

Table 6: Similar Elements in Analyses Pursuant to the RFA, the PRA, and EO 12866

[380] In fact, Circular A-4 replaced a 1996 "best practices" document that was issued as guidance in 2000, and reaffirmed in 2001.

[381] GAO-12-250, p. 39.

[382] Ibid., p. 40.

[383] GAO-13-101, Highlights.

Elements Required in Analysis	RFA	PRA	EO 12866
Need/legal basis	IRFA is to include a "description of the reasons why action by the agency is being considered" and "the objectives of, and legal basis for," the rule; FRFA to include a "statement of the need for, and objectives of, the rule."	*Federal Register* notice is to include a "brief description of the need" for the information collection, and the submission to OMB is to include the statutory authority for the collection.	Agencies are to provide to OMB a "description of the need for the regulatory action and…how the regulatory action will meet that need"; also an "explanation of the manner in which the regulatory action is consistent with a statutory mandate."
Assessment of costs and/or benefits of the rule	FRFA is to include a "description of… [the] compliance requirements" including the number and classes of affected small entities and the skills needed.	Notice to include an "estimate of the burden that shall result" from the information, and agency review includes a "specific, objectively supported estimate of burden."	Agencies are to provide an "assessment, including the underlying analysis," of costs and benefits anticipated from the action, including quantification (if feasible).
Alternatives and reasons for selection	IRFA is to "discuss significant alternatives" to the rule; FRFA to include "steps the agency has taken to minimize" the economic effects of the rule, and explain why other significant alternatives not selected.	Agencies are to certify to OMB and provide evidence that paperwork burden has been reduced to extent possible (e.g., through consideration of different reporting provisions, exemptions, and simplified provisions).	Economic analysis is to include an "assessment… of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation." Agencies are to explain why the planned action is preferable to the alternatives.

Source: Examination of RFA, PRA, and EO 12866 analytical requirements. This table was drawn from the author's previous report for ACUS, available at http://www.acus.gov/wp-content/uploads/downloads/2012/03/COR-Copeland-Report-CIRCULATED.pdf.

Circular A-4 goes into great detail in a variety of other areas. The sections below mention several of those areas in the context of independent regulatory agencies – defining the baseline for the analysis, quantifying and monetizing the benefits and costs, transparency and reproducibility, and summarizing the results of the analysis. However, as a general principle, it appears that the independent regulatory agencies could voluntarily adopt these three principles to provide the basic organizing structure for their regulatory analyses.

Recommendation: Independent regulatory agencies should voluntarily adopt the general principles for economic analysis contained in OMB Circular A-4 to structure their analyses: (1) identify the need for the regulation, (2) examine plausible alternative regulatory approaches, and (3) estimate the benefits and costs of those alternatives.

a) Defining the Analytical Baseline

A major issue arising from the OIG reports is whether independent regulatory agencies' analysis should include the costs and benefits of regulatory provisions that are directly traceable to the underlying statute. This is a particularly important issue with regard to the development of regulations under the Dodd-Frank Act, which the agencies indicate contains numerous provisions that give the agencies little or no discretion in terms of how their rules can be written. Circular A-4 states that if substantial portions of a rule simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action, the issuing agency "should use a pre-statute baseline."[384] However, the circular goes on to say that if analysts "are able to separate out those areas where the agency has discretion, you may also use a post-statute baseline to evaluate the discretionary elements of the action."[385]

Both the SEC and CFTC initially took the position that their cost-benefit analyses should not include statutorily directed requirements. In March 2012, though, the SEC adopted a new position that is consistent with Circular A-4. Specifically, the guidance states that "where a statute directs rulemaking, rulewriting staff should consider the overall economic impacts, including *both* those attributable to Congressional mandates and those that result from an exercise of the Commission's discretion." (Emphasis in the original.) However, the CFTC major rules issued during FY2012 clearly indicate that the agency does not include costs or benefits attributable to statutory provisions. CFTC officials pointed out that Section 15(a) of the Commodity Exchange Act requires the agency to consider the costs and benefits *of the agency's action*, not the effects of congressional decisions. Other independent regulatory agencies have indicated that they also treat the baseline issue differently.[386] The baseline issue may illustrate a broader principle – i.e., that agencies may have to tailor their consideration of Circular A-4 and other "best practices" to their own statutory and regulatory environment.

Recommendation: Consistent with applicable laws, independent regulatory agencies' analyses should generally include both statutorily mandated requirements and those

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[384] See http://www.whitehouse.gov/omb/circulars_a004_a-4. Similarly, the OMB "primer" on regulatory analysis states that "For regulations that largely restate statutory requirements, the analysis should use a pre-statutory baseline," and therefore should include costs and benefits attributable to the statute. See http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf, pp. 4-5.

[385] GAO examined the issue of statutory discretion in 1999, and determined that the statutes underlying some controversial rules gave the issuing agencies little or no discretion in how the rules could be written. See U.S. General Accounting Office, *Regulatory Burden: Some Agencies' Claims Regarding Lack of Rulemaking Discretion Have Merit*, GAO/GGD-99-20, January 8, 1999.

[386] For example, CPSC officials told the author of this report that the agency uses the "pre-statute status quo" in calculating costs and benefits, even when the agency has little or no discretion. FCC officials, on the other hand, said that when developing estimates of costs and benefits for rules in which the agency has little or no discretion, the agency generally uses a post-statutory baseline. However, they also said it is rare that statutes give the agency little or no discretion, so the issue of what baseline to use does not come up that often. NRC officials said agency decisions on rulemaking are affected by the baseline (e.g., when the agency issues a rule requiring certain practices that the industry has been doing voluntarily for years, or that were previously covered in NRC orders). The NRC's regulatory analysis guidelines make clear that both baselines should be analyzed: (i) no credit for industry voluntary action in terms of benefits, and therefore all costs for compliance with the proposed regulatory requirement; and (ii) credit for industry voluntary action (thereby reducing the expected level of benefits) but also marginal costs of compliance with the proposed regulatory action beyond that already incurred under the industry voluntary action. This is reflected in NUREG/BR-0058, Revision 4, at Section 4.3.1, pp. 24-26.

resulting from the agency's discretion. Showing both types of effects separately can improve transparency and allow the public to understand whether Congress or the agency is responsible for regulatory burden.

b) Quantifying and Monetizing Benefits and Costs

In some areas, independent regulatory agencies have indicated that it may be difficult to determine the future costs and benefits of a rule with any degree of precision or certainty, such as:

- when regulating in "new space" or "dark markets" that the agency has not previously regulated (e.g., derivatives clearing organizations);

- when it is difficult to know how the behaviors of individuals and organizations will change, such as when the agency gives regulated entities flexibility in how to respond (as agencies are generally encouraged to do), or when the objective of the rule is information disclosure (on the assumption that the disclosed information will make certain risky behaviors less likely); or

- when regulated parties are reluctant to provide proprietary information on compliance costs or other effects for fear of disclosing their competitive positions.

Circular A-4 states that agencies should quantify and monetize regulatory benefits and costs "whenever possible." When effects cannot be quantified, the circular says agencies should present any relevant quantitative information, and should "provide a discussion of the strengths and limitations of the qualitative information," including information on the "key reason(s) why they cannot be quantified." If unquantified benefits or costs affect a policy choice, the circular says that agencies should

> provide a clear explanation of the rationale behind the choice. Such an explanation could include detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs. Also, please include a summary table that lists all the unquantified benefits and costs, and use your professional judgment to highlight (e.g., with categories or rank ordering) those that you believe are most important (e.g., by considering factors such as the degree of certainty, expected magnitude, and reversibility of effects).

OMB has recognized these kinds of "significant limitations" quantifying and monetizing benefits and costs on Cabinet departments and independent agencies in its annual reports to Congress on the costs and benefits of regulations. For example, in the 2011 report, OMB said:

> When agencies subject to Executive Orders 13563 and 12866 have not quantified or monetized the benefits or costs of regulations, or have not quantified or monetized important variables, it is because of an absence of relevant information. Many rules have

> benefits or costs that cannot be quantified or monetized in light of existing information, and the aggregate estimates presented here do not capture those non-monetized benefits and costs. In fulfilling their statutory mandates, agencies must often act in the face of substantial uncertainty about the likely consequences. In some cases, quantification of various effects is highly speculative. For example, it may not be possible to quantify the benefits of certain disclosure requirements, simply because the impact of some such requirements cannot be specified in advance. In other cases, monetization of particular categories of benefits (such as ecological benefits and homeland security benefits) can present significant challenges. As Executive Order 13563 recognizes, some rules produce benefits (such as reductions in discrimination on the basis of disability or prevention of rape) that cannot be easily or adequately captured in monetary equivalents.[387]

In the absence of empirical information about future costs and benefits, though, regulatory agencies can make informed estimates of how regulated entities will respond, and be transparent about their assumptions and how those estimates were derived. Agencies can also use other types of analysis. For example, when benefits are difficult to quantify, OMB recommends that agencies use "breakeven analysis" to show how high the unquantified or unmonetized benefits would have to be in order for the benefits to justify the costs.[388] Circular A-4 states that cost-effectiveness analysis can help the agency "identify options that achieve the most effective use of the resources available without requiring monetization of all of relevant benefits or costs."

Recommendation: Independent regulatory agencies should quantify and monetize regulatory costs and benefits whenever possible. If costs or benefits cannot be quantified or monetized, agencies should explain why and take other actions to promote understanding of regulatory decision making (e.g., cost-effectiveness analysis or breakeven analysis).

c) Transparency and Reproducibility

Circular A-4 also indicates that regulatory analyses should be transparent and reproducible, with agencies disclosing how they prepared the economic analyses, underlying assumptions, uncertainties associated with the estimates, why certain approaches were used, and agencies' efforts to obtain data. As a result of such disclosures, the circular states that a "qualified third party reading the analysis should be able to understand the basic elements of your analysis and the way in which you developed your estimates." It goes on to say that agencies should generally post the analysis and supporting documents on the internet so the public can review the findings, and should disclose the use of outside consultants. If "compelling interests" (e.g., privacy, intellectual property, or trade secrets) prevent the public release of data or key elements

[387] See OMB's 2011 report on regulatory costs and benefits, p. 4, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

[388] Ibid., p. 5.

of the analysis, the circular says that agencies "should apply especially rigorous robustness checks to analytic results and document the analytical checks used." [389]

In addition, FCC officials said a "best practice" might be including the analysis as part of the notice of proposed rulemaking, thereby getting all of the stakeholders involved in the process, which gives the agency more information on which to base its judgments. In FCC rules, they said the analysis is marbled through the different sections of the NPRM, not in a separate "cost-benefit analysis" section. They said the agency asks the public for information relevant to those analyses, along with their underlying assumptions, so they can replicate that information.

Recommendation: Independent regulatory agencies' regulatory analyses should be as transparent and reproducible as possible. In particular, agencies should disclose how the analyses were conducted, post the analyses on the internet, and summarize the methods and results in the notice of proposed rulemaking.

d) Summarizing the Results

OMB Circular A-4 requires agencies to include in their rules "an accounting statement with tables reporting benefit and cost estimates for each major final rule for your agency." The circular suggested that agencies report benefit and cost estimates within three mutually exclusive categories: monetized; quantified but not monetized; and qualitative but not quantified or monetized. Transfers should be reported separately to "avoid the misclassification of transfer payments as benefits or costs."

Rules that include such accounting statements summarizing the agency's analysis of costs and benefits are generally much easier for the public to read than rules that contain voluminous discussions of costs and benefits, but no summary information. This is particularly true when the agency also discusses other considerations in the rule (e.g., effects on competition, price discovery, and capital formation), sometimes for multiple individual parts of the rule. The author's review of the 22 major rules published by independent regulatory agencies during FY2012 indicated that many agencies' discussions of costs and benefits sometimes went on for dozens of pages in the *Federal Register*, and frequently did not contain any type of executive summary or accounting statement. Such lengthy (and often qualitative) discussions make it difficult for readers to discern for themselves whether the benefits of the rule "justify" the costs.

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[389] See also Memorandum for the President's Management Council, increasing Openness in the Rulemaking Process-Improving Electronic Dockets (May 28,2010), http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf, which states, "To the extent feasible, and consistent with applicable laws, regulations, and policies, agencies should make their electronic regulatory dockets on Regulations.gov consistent with their paper-based dockets. Both dockets should provide the public with access to all relevant materials. To the extent that they are part of a rulemaking, supporting materials (such as notices, significant guidances, environmental impact statements, regulatory impact analyses, and information collections) should be made available by agencies during the notice-and-comment period by being uploaded and posted as part of the electronic docket."

Recommendation: Independent regulatory agencies should include in the notice of proposed rulemaking and in the final rule a summary statement or table concisely showing the agencies' overall estimates of costs, benefits, and transfer payments.

2. Other Possible "Best Practices"

In addition to the "best practices" delineated in Circular A-4, this research indicated several other practices that independent regulatory agencies might want to consider – having agency-specific written guidance on economic analysis, making analysis part of early rule development, and tapping into the expertise of other agencies and OIRA.

a) Agency-Specific Written Guidance

Agencies may also want to consider whether to have agency-specific written policies and procedures to guide agency staff in determining whether particular rules should contain an economic analysis, and if so, how that analysis should be conducted. Agency officials interviewed for this report differed somewhat on whether having an agency-specific guidance document was necessary. SEC officials thought it was, saying a document like the March 2012 memorandum puts all of the agency's "best practices" in one place. In addition to establishing a standard process, they said a guidance document provides a "common language" about these issues, and helps ensure that everyone is approaching issues like the baseline the same way. CPSC officials, however, said they follow the general principles in Circular A-4, and did not know what an agency-specific guidance document would add. (They said there had been discussions about having agency-specific guidance, but the agency has never decided to do it.) They also said, however, that the need for an agency-specific document might be less at CPSC than other independent regulatory agencies (e.g., the financial agencies) in that that their rules are about consumer products, and are therefore, more akin to other health and safety agencies already covered by Circular A-4.

Several of the June 2011 inspector general reports on Dodd-Frank Act rulemaking noted the absence of up-to-date agency-specific analytical guidance. For example, the Department of the Treasury OIG said the Comptroller of the Currency's rulemaking procedures contained no documented process for the preparation, review, and approval of economic analyses in support of rulemaking. The OIG for the Federal Reserve Board said the agency's rulemaking procedures had not been updated and no rulemaking team members cited the document.

Recommendation: Each independent regulatory agency should consider developing written economic analysis guidance tailored to its particular statutory and regulatory environment. That guidance should represent the agency's "best practices," and can help ensure that the agency's analyses are consistently conducted.

b) Making Analysis Part of Rule Development

Several of the independent regulatory agencies indicated that a "best practice" was to make regulatory analysis an early part of the rule development process. For example, both SEC and FCC officials said economists are part of the rulemaking process from the earliest stages of rule development. The CFTC Chief Economist said that economists work with line staff early in the process, asking questions about costs, benefits and alternatives. He described the analysis as an "ongoing thought process," and said there are weekly meetings where information is shared across rule writing teams.

When analysis is done early in the rulemaking process, the agencies often indicated that the analysis was more likely to have an effect on agency decision making and on the substance of the final rule. For example, NRC officials said early "back-of-the-envelope" analyses help the agency decide whether to go forward with a rule. Later in the process, agency positions may "harden," making it less likely that the analysis will have an effect. Nevertheless, none of the agencies indicated that the analyses that they perform were done to justify decisions that were already made.

Recommendation: To help ensure that regulatory analysis is used in decision making, independent regulatory agencies should make the analysis an early part of rule development.

c) Using the Expertise of Others

Independent regulatory agencies could also attempt to obtain additional expertise regarding cost-benefit and economic analysis from other agencies, or from OIRA. Several of the agencies indicated that they often consult with other agencies to gain analytical insights, particularly from agencies that are issuing similar types of rules. CFTC officials described this as "crowd sourcing," and said it can allow for broader consideration of issues and a wider range of ideas and perspectives.

ACUS created the Council of Independent Regulatory Agencies (CIRA) in 1982 as a way to share information on issues unique to such agencies, and it now meets on a bi-monthly basis.[390] CIRA could provide the platform through which agencies share information on how to prepare cost-benefit and other types of economic analyses generally, or with regard to particular types of rules (e.g., under the Dodd-Frank Act). SEC officials told the author of this report that some such discussions already occur at CIRA meetings, and agreed that formalization of those discussions could be considered a "best practice."

Independent regulatory agencies might also find it useful to consult with OIRA regarding cost-benefit analysis issues. As noted earlier in this report, in May 2012, CFTC entered into a memorandum of understanding with OIRA permitting OIRA staff to provide

[390] See http://www.archive.org/stream/gov.acus.1982.cira/gov.acus.1982.cira_djvu.txt for the CIRA statement of policy.

technical assistance to the agency's staff during the implementation of the Dodd-Frank Act, "particularly with respect to the consideration of the costs and benefits of proposed and final rules."[391] The agreement was later referenced in a House Appropriations Committee report,[392] which said the Committee was "encouraged" by the MOU, and directed the Commission to receive OIRA technical assistance "on all future rulemakings." In July 2012, as part of a meeting to consider two final rules and one proposed rule, CFTC Commissioner Scott O'Malia said the three rules were "the first to benefit from our recently signed memorandum of understanding" with OIRA, and said the rules had "benefited both from OMB's technical assistance and from the Commission's commitment to putting forth rules that utilize appropriate baselines, include replicable quantitative analysis (when possible), and reflect the consideration of a range of policy alternatives. I look forward to the continuing coordination between OMB and the Commission to further improving our cost benefit analysis."[393]

CFTC officials told the author of this report that the Commission decided to reach out to OIRA because of the experience and expertise in economic analysis that resides there. They also said that having "another set of eyes" examine some of the complicated rules that the agency was developing could only improve the analysis. They said Commission staff meets with OIRA staff to discuss their suggestions and recommendations, and that OIRA has been a useful "sounding board" by suggesting elaborations of certain issues and alternative approaches.

Other independent regulatory agencies may also find it useful to use OIRA as a "sounding board," but may want to include the same type of independence provisions that are in the CFTC memorandum (i.e., that the agreement does not alter the relationship between OIRA and the agency during the rulemaking process, and that sharing of documents does not constitute submission of the documents to OIRA for review). SEC officials said they have also spoken with OIRA about establishing an MOU with the agency, but no final decision has been made.

Recommendation: When additional analytical expertise or experience is needed, independent regulatory agencies should consult with other agencies (e.g., through the Council of Independent Regulatory Agencies) and/or with OIRA (perhaps using memoranda of understanding to document the nature of the relationship).

3. Other Considerations

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[391] A copy of the MOU is available from the author. It was discussed in Jimila Trindle, "CFTC Taps Help for Cost Analysis on New Rules," *Wall Street Journal Online*, May 10, 2012, available at http://online.wsj.com/article/SB10001424052702304070304577396192653277890.html.

[392] Available at http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt542/pdf/CRPT-112hrpt542.pdf.

[393] Comments by Commissioner Scott D. O'Malia at "Twenty-Eighth Commission Meeting to Consider: (1) Two Final Rules Providing an Exemption from the Clearing Requirement for End-Users and Further Defining Certain Product Definitions under Title VII of the Dodd-Frank Act; and (2) One Proposed Rule Providing Relief for Certain Cooperatives from the Clearing Requirement," July 10, 2012, available at http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071012.

Finally, two other considerations bear mentioning in the context of improving agencies' ability to prepare sound economic analyses – expedited PRA reviews and possible additional funding to allow agencies to prepare such studies.

a) Expedited PRA review

Officials from several of the agencies interviewed for this report indicated that the Paperwork Reduction Act sometimes made it difficult for them to gather the data needed to estimate the costs and benefits of forthcoming rules. For example, an FCC official described the PRA as a "major impediment" to gathering data they need in analysis. SEC and CFTC officials said the PRA made it more difficult for the agency to gather cost information, as they have to go through the sometimes-lengthy analytical and comment process as input for a related economic analysis.

The PRA does provide for "emergency" or "fast-track" OIRA reviews in certain situations.[394] Specifically, an agency may request that OIRA authorize a collection of information upon the agency head's determination that:

> (A) a collection of information- (i) is needed prior to the expiration of time periods established ... ; and (ii) is essential to the mission of the agency; and
>
> (B) the agency cannot reasonably comply with the provisions of [the PRA] because—(i) public harm is reasonably likely to result if normal clearance procedures are followed; (ii) an unanticipated event has occurred; or (iii) the use of normal clearance procedures is reasonably likely to prevent or disrupt the collection of information or is reasonably likely to cause a statutory or court ordered deadline to be missed.[395]

Once the agency head requests an expedited authorization, the act requires OIRA to "approve or disapprove any such authorization request within the time requested by the agency head and, if approved, shall assign the collection of information a control number."[396] If the agency head made such an authorization request of OIRA, he or she could then also specify a short time frame for OIRA to approve such a request, and conduct the collection of information "without compliance with the provisions of [the PRA] for a maximum of 180 days after the date on which the Director received the request to authorize such collection."[397] OIRA would not need to provide 30 days of public comment prior to an approval or disapproval decision within the agency head-specified timeframe regarding the collection of information authorization request.[398] Nor

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[394] For more information, see OMB's PRA primer, p. 4, available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf.

[395] 44 U.S.C. § 3507(j)(1); *see also* 5 C.F.R. § 1320.13.

[396] 44 U.S.C. § 3507(j)(2).

[397] Ibid.

[398] 44 U.S.C. § 3507(b). Section 3507(b) states: "The Director shall provide at least 30 days for public comment prior to making a decision under subsection (c), (d), or (h), except as provided under subsection (j)." Subsection (c) addresses proposed collections of information not contained in a proposed rule.

would the agency head need to provide a 60-day notice in the *Federal Register* soliciting public comment.[399]

Also, in a May 28, 2010, memorandum to agency heads (including independent regulatory agencies), the OIRA Administrator encouraged agencies to use "generic clearances," which were described as providing "a significantly streamlined process by which agencies may obtain OMB's approval for particular information collections."[400] Most such clearances "cover collections that are voluntary, low-burden (based on a consideration of total burden, total respondents, or burden per respondent), and uncontroversial."

Some expedited or generic approvals appear to have been used with regard to the collection of information related to independent regulatory agencies' economic analyses. For example, an FCC official told the author of this report that the Obama Administration had made "significant efforts" to minimize PRA-related hurdles, allowing the agency to obtain streamlined PRA approvals for certain information collections. Other agencies may be able to obtain similar kinds of treatment if the heads of those agencies were to request expedited approvals for data collections needed to complete analyses in the face of statutory or judicial deadlines for rule issuance.

In June 2012, ACUS recommended that agencies "should use all available processes for OMB approval for information gathering," including "OMB's available generic clearances and fast track procedures."[401] The recommendation went on to say that "OMB is encouraged to continue using its generic clearance authority for this and other purposes, as appropriate and permitted by law." Therefore, the following recommendation should be viewed as complementary to and an extension of the June 2012 ACUS recommendation.

Recommendation: Independent regulatory agencies and OIRA should use whatever flexibilities exist within the Paperwork Reduction Act to expedite the collection of information needed in agencies' economic analyses.

b) Funding

This report takes no position on whether legislation should be enacted, or executive orders should be issued, requiring independent regulatory agencies to prepare cost-benefit analyses before issuing proposed or final rules. However, any such effort should recognize that while regulatory analysis may result in certain benefits (e.g., rules with

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[399] 44 U.S.C. § 3506(c)(2)(A). Section 3506(c)(2)(A) states: "With respect to the collection of information and the control of paperwork, each agency shall ... except as provided under ... section 3507(j), provide 60-day notice in the Federal Register, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information, to solicit comment."

[400] See http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf.

[401] ACUS Recommendation 2012-4, "Paperwork Reduction Act," p. 5, available at http://www.acus.gov/wp-content/uploads/downloads/2012/06/Final-Recommendation-2012-4-Paperwork-Reduction-Act.pdf.

higher benefits, less cost, or both), analysis also carries with it certain costs, both in terms of money and in the time required to issue the rule. Ironically, therefore, any requirement for cost-benefit analysis should itself be subjected to a type of cost-benefit analysis to determine whether the marginal benefits derived from the effort justify those costs.

Various studies during the past 30 years have provided information on the costs of doing cost-benefit and other types of regulatory impact analyses (RIAs). These studies indicate that (1) just as there is no such thing as a "typical" rule, there is no "typical" cost-benefit or other type of analytic study; (2) federal agencies may not have systematic data on analytic costs; and (3) preparing an RIA can be expensive and time consuming for an agency.

- A 1982 GAO study examined the costs of 38 RIAs conducted in 1981 by eight agencies, including EPA, the National Highway Traffic Safety Administration, and the Coast Guard.[402] GAO reported that the cost of these studies averaged $212,000 ($539,000 in 2012 dollars),[403] with costs ranging from $34,000 to $1.2 million ($87,000 to $3.1 million in 2012 dollars). GAO noted that these costs did not include expenses for gathering data, and that the RIAs focused primarily on estimating ex ante costs rather than both costs and benefits. GAO also said that it was "concerned that the high costs of analysis and the shrinking budgets of several regulatory agencies will leave them with inadequate resources. If the agencies lack adequate resources, the quality of the analyses may fail to improve, and the regulatory analysis requirement may fail in its objective of improving agency rulemaking."[404]

- In 1984, GAO reported that a 1983 cost-benefit analysis of regulations setting air-quality standards cost $1.8 million in contractor expenses and 12.3 staff years to complete, for a total of about $2.4 million ($5.6 million in 2012 dollars). [405]

- Also in 1984, Paul Portney estimated the average cost of a regulatory impact analysis at about $400,000 ($891,000 in 2012 dollars), including the costs associated with agency personnel supervising the analysis, staff from OMB who review the analysis, and interagency groups needed to mediate disputes between OMB and other agencies.[406]

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[402] U.S. General Accounting Office, *Improved Quality, Adequate Resources, and Consistent Oversight Needed If Regulatory Analysis Is to Help Control Regulations*, GAO/PAD-83-6, November 2, 1982.

[403] All adjustments to 2012 dollars were made using the Bureau of Labor Statistics CPI Inflation Calculator, available at http://www.bls.gov/data/inflation_calculator.htm.

[404] GAO/PAD-83-6, p. 3.

[405] U.S. General Accounting Office, *Cost-Benefit Analysis Can Be Useful in Assessing Environmental Regulations Despite Limitations*, GAO/RCED-84-62, April 6, 1984.

[406] Paul R. Portney, "The Benefits and Costs of Regulatory Analysis," in V. Kerry Smith, ed., *Environmental Policy Under Reagan's Executive Order: The Role of Cost-Benefit Analysis* (Chapel Hill: University of North Carolina Press, 1984), pp. 229-231.

- In 1987, EPA published a study of 15 RIAs that had been conducted between 1981 and 1986.[407] Of the 12 analyses with cost data, the average cost was about $675,000 ($1.37 million in 2012 dollars), with actual costs ranging from $212,000 to $2.3 million ($432,000 to $4.7 million in 2012 dollars). EPA also said that the total costs of these RIAs was about $10 million, but said this cost was small compared to the estimated $10 billion in improvements expected from the rules.

- In 1995, EPA estimated that it spent about $120 million per year ($182 million in 2012 dollars) performing the required risk assessments and cost-benefit analyses.[408] Of that total, EPA said that $55 million paid the salaries of 690 agency staff members, and the remaining $65 million went to contractors.

- In 1996, GAO reported that the 27 RIAs that EPA issued after the enactment of the Clean Air Act Amendments of 1990 cost an average of $480,000 ($708,000 in 2012 dollars), with the cost of individual studies ranging from $46,000 to $3.8 million ($68,000 to $5.6 million in 2012 dollars).[409] GAO also reported that EPA did not have a systematic way to track RIA costs. Only two of four EPA program offices within the Office of Air and Radiation were able to identify and report contract costs for the RIAs, and none of the offices were able to provide reliable data on in-house costs.

- In 1997, the Congressional Budget Office (CBO) issued a report on the costs of 85 regulatory impact analyses (RIAs) from six offices in four agencies – EPA, the Coast Guard, the Federal Aviation Administration, and the National Highway Traffic Safety Administration. [410] The average cost per RIA was about $570,000 ($815,000 in 2012 dollars), with a range of $14,000 to more than $6 million per analysis ($20,000 to $8.6 million in 2012 dollars). CBO said that the average amount of time to complete the studies was 3 years, but the individual analyses ranged from 6 weeks to 12 years.

Requiring independent regulatory agencies to prepare additional analyses would likely require additional agency staff and other resources, which in some cases could ultimately be passed on to regulated entities.[411] For example, in its cost estimate for H.R. 373 (the Unfunded Mandates Information and Transparency Act of 2011), CBO said the new

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[407] U.S, Environmental Protection Agency, Office of Policy Analysis, *EPA's Use of Benefit-Cost Analysis 1981-1987*, August 1987.

[408] Letter from the Environmental Protection Agency, Office of Policy, Planning and Evaluation, to Congressman Cardiss Collins, House committee on Reform and Oversight, May 17, 1995.

[409] U.S. General Accounting Office, *EPA's Costs of Preparing Regulatory Impact Analyses*, GAO/RCED-97-15R, December 6, 1996, available at http://archive.gao.gov/paprpdf1/157946.pdf.

[410] U.S. Congressional Budget Office, *Regulatory Impact Analysis: Costs at Selected Agencies and Implications for the Legislative Process*, March 1997, available at http://www.cbo.gov/doc.cfm?index=4015&type=0.

[411] See http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr373.pdf.

analytical requirements placed on independent regulatory agencies "would require additional resources to carry out." Specifically, CBO estimated that

> at least 12 independent regulatory agencies would face an increased workload and would eventually incur costs of $1 million annually. We expect that it would take two years to reach that level of effort, resulting in gross costs of $43 million over the 2013-2022 period. Under current law, four of those agencies, the Federal Energy Regulatory Commission, the Federal Communications Commission, the Nuclear Regulatory Commission, and the Securities and Exchange Commission, are authorized to collect fees sufficient to offset their appropriation each year. CBO assumes that future appropriations would direct agencies to exercise that authority. Thus, CBO estimates that implementing the bill would have a net discretionary cost of $1 million in 2014 and $9 million over the 2013-2022 period, subject to the availability of appropriated funds.

In its cost estimate for H.R. 2308 (the SEC Regulatory Accountability Act), CBO estimated that the SEC "would need 20 additional staff positions to handle the new rulemaking, reporting, and analytical activities required under the bill," and implementing the legislation would cost the agency "$22 million over the 2013-2017 period, assuming appropriation of the necessary amounts, for additional personnel and overhead expenses."[412] Assuming that fees collected by the Commission would increase as a result of these costs, CBO also said that the bill "would increase the costs of existing mandates on private entities required to pay those fees." Similarly, in its cost estimate for H.R. 1840, CBO estimated that CFTC "would need an additional 25 positions to handle the increased workload under the bill. CBO estimates that implementing H.R. 1840 would cost $27 million over the 2013–2017 period, assuming appropriation of the necessary amounts."[413]

CFTC officials would not discuss whether CBO's estimate regarding H.R. 1840 was correct, or any aspects of pending legislation. SEC officials said they could not say whether the CBO estimate regarding H.R. 2308 was correct or not, or whether fee collections would increase as a result of the increased costs. However, they said it is fair to say that if the agency was required to do more analyses, it would require either more resources, or the agency would have to cut back on certain current activities. In particular, they said quantifying costs and benefits to the degree contemplated in OMB Circular A-4 could be resource intensive, and could require the agency to draw resources away from other analyses that the agency believes are more important.

NRC officials said that although the agency's current analysis guidelines generally reflect Circular A-4, strict application of the circular to the agency's few major rules would likely require more resources, and significantly more work. CPSC officials said the agency has only eight economists and five attorneys, and said strict application of Circular A-4 to all of their rules (including rules promulgated under the Consumer Product Safety Improvement Act) could have a major effect, and would likely require added resources. However, they said application of the circular's requirements to only

[412] See http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr2308.pdf.

[413] See http://cbo.gov/sites/default/files/cbofiles/attachments/hr1840.pdf.

major rules (as Circular A-4 currently applies) would not have as much of an effect, because the agency does not issue that many major rules.

Even those who have been critical of independent regulatory agencies' current analytical efforts have supported additional funding for these efforts. For example, in its letter to the Senate and House banking committees, CCMR said it recognized that more thorough cost-benefit analysis might require additional agency resources (e.g., to obtain data, hire economists, or engage third-party analysts), and said "we fully support the necessary funding."

Recommendation: To the extent that independent regulatory agencies are required to do more economic analyses of their proposed and final rules, additional funding for those analyses should be provided.