Economic Analysis and Independent Regulatory Agencies
Draft Outline
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Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010, hereafter the "Dodd-Frank Act") contained at least 330 provisions expressly indicating that rulemaking was required or permitted to implement the legislation.[1] More than 80% of these provisions assigned rulemaking responsibilities or authorities to one or more of five "independent regulatory 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). The volume of rulemaking expected to result from the Dodd-Frank Act has increased concerns about the quality of the rules issued by these and other 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 certain types of rules.

Several legislative initiatives that were introduced during the 112th Congress would have required that all or certain independent regulatory agencies prepare cost-benefit analyses for their forthcoming rules. For example, the SEC Regulatory Accountability Act (H.R. 2308 and S. 2373) would have required the SEC to assess the costs and benefits of each intended regulation and adopt it only upon a reasoned determination that its benefits justify the costs. Another bill, the Independent Agency Regulatory Analysis Act (S. 3468), would have authorized the President to issue an executive order requiring independent regulatory agencies to analyze their forthcoming "economically significant" rules "to the extent permitted by law." However, not everyone believes independent regulatory agencies should be subject to these types of analytical requirements.

Overall Research Objective

The primary objective of this report 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 "major" rules (e.g., those expected to have an annual effect on the economy of $100 million or more). If the research indicates that certain independent regulatory agencies are not preparing such analyses, the report will discuss the reasons why, including any considerations that

[1] Curtis W. Copeland, *Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act,* CRS-R41472, November 3, 2010, available at http://www.llsdc.org/attachments/files/255/CRS-R41472.pdf.

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 cost-benefit or other economic 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. 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"). The report will not address whether independent regulatory agencies' rules or economic analyses should be subject to review by OIRA or other parties. In this light, the report will not evaluate the Independent Agency Regulatory Analysis Act of 2012 or any other pending legislation dealing with imposing cost-benefit analysis requirements on independent agencies. Major rules are focused on in this report because some analytical requirements only apply to such rules, and they are more likely to trigger other requirements than rules that are not considered major.

Overall Methodology

To address these objectives, the report will (1) provide a background on independent regulatory agencies and their rulemaking activity in recent years; (2) discuss various crosscutting and agency-specific analytical requirements that apply to independent regulatory agencies, as well as some that do not currently apply; (3) discuss recent studies by 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 (as well as the policy responses of certain independent regulatory agencies to these studies); and (4) examine the preambles of recent major final rules issued by these agencies during calendar year 2012 to determine the extent to which cost-benefit and other types of analyses have been conducted.

Using information from follow-up interviews conducted with officials in the independent regulatory agencies that issued these rules, the report will then discuss why economic analyses were not prepared for certain rules, or (if the analyses were prepared) how the analyses were used in agency decision-making. Finally, the report will offer conclusions and recommendations for further action.

Report Outline

1. Independent Regulatory Agencies and Rulemaking Activity

GAO data show that independent regulatory agencies generally do not issue as many rules, or as many major rules, as most cabinet departments and independent agencies. Among independent regulatory agencies, the Federal Communications Commission (FCC) published the most final rules from January 2007 through July 2012, but the SEC, the Federal Reserve System, and the CFTC published the most

major rules during this period. (Notably, CFTC issued no major rules until 2011, but has published 14 in the last 18 months of this period.) Other agencies issued very few major rules during this period (e.g., the Consumer Product Safety Commission and the Federal Trade Commission), or none at all (FDIC). The Nuclear Regulatory Commission (NRC) annually issues a major rule revising the fees the agency charges to applicants and licensees, and sometimes issues other major rules.

2. Crosscutting Analytical Requirements

Some crosscutting analytical requirements apply to independent regulatory agencies (e.g., the Paperwork Reduction Act or "PRA"), but others do not (e.g., Executive Order 12866/OMB Circular A-4, and the Unfunded Mandates Reform Act). Some of the applicable analytical requirements give the agencies substantial discretion regarding whether their provisions are triggered (e.g., the Regulatory Flexibility Act), or are unlikely to be triggered because of the nature of most independent regulatory agencies' rules (e.g., the National Environmental Policy Act). A PRA analysis is triggered only if the rule has a collection of information.

3. Agency-Specific Analytical Requirements

The statutes governing rulemaking in independent regulatory agencies vary in the degree to which they explicitly require cost-benefit or other types of economic analysis.

- Before issuing a consumer product safety rule, CPSC is required to "consider" (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 classes subject to the 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; and (D) any ways to minimize adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices. (15 U.S.C. § 2058(f)(1)) Also, the agency is prohibited from issuing a rule unless it has prepared a "final regulatory analysis" containing a description of (1) potential benefits and costs, and who is likely to receive the benefits and bear the costs; (2) alternatives that were considered, their benefits and costs, and why those options were not selected; and (3) issues raised in public comments about the preliminary analysis, and the Commission's assessment of those issues. The agency is also required to publish the analysis with the final rule. (15 U.S.C. § 2058(f)(2))
- Before issuing a regulation under Chapter 1 of Title 7, United States Code, CFTC is required to "consider the costs and benefits of the action of the Commission." Costs and benefits are to be evaluated in light of several

"considerations" (e.g., "protection of market participants and the public," "the efficiency, competitiveness, and financial integrity of futures markets," "sound risk management practices," and "other public interest considerations"). (7 U.S.C. § 19(a))

- In determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each "Federal banking agency" is required to "consider" any "administrative burdens" on depository institutions, as well as the "benefits of such regulations." (12 U.S.C. § 4802(a)) "Federal banking agency" is defined as the Office of the Comptroller of the Currency, the FDIC, and the Board of Governors of the Federal Reserve System. (12 U.S.C. 1462(5), incorporating the definition in 12 U.S.C. 1813(q))
- In developing rules and regulations pursuant to Chapter 2B of Title 15, United States Code, the SEC is required to "consider among other matters the impact any such rule or regulation would have on competition." The agency is also prohibited from adopting any rule that would "impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter." The SEC must include in the statement of basis and purpose the "reasons for the Commission's… determination that any burden on competition is necessary or appropriate in furtherance of the purposes of this chapter." (15 U.S.C. § 78w(a)(2)) Also, whenever the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary, appropriate, or consistent with the public interest, it is also required to "consider" whether the rule "will promote efficiency, competition, and capital formation" in addition to the protection of investors. (15 U.S.C. § 78c(f)), (15 U.S.C. § 80a-2(c)), and (15 U.S.C. § 77b(b))
- Section 1022(b)(2)(A) of the Dodd-Frank Act (12 U.S.C. § 5512) states that the newly established Consumer Financial Protection 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, and the impact on consumers in rural areas."

Therefore, some statutes explicitly require cost-benefit analysis, but others only require agencies to "consider" costs and benefits (or other factors that don't specifically include costs and benefits) when issuing rules. The U.S. Court of Appeals for the District of Columbia Circuit and others have viewed the SEC provision (to "consider" the impact on competition) as requiring the agency to determine the economic implications of its rules "as best it can."[2] Other observers disagree with

[2] *Business Roundtable v. SEC* (D.C. Cir., No 10-1305), July 22, 2011 .

this conclusion, however, noting that Congress knows how to require cost-benefit analysis and did not do so in this case.[3]

4. Previous Reports on Independent Regulatory Agencies' Analyses

Previous reports have concluded that independent regulatory agencies often do not monetize or quantify expected regulatory costs and benefits.

- OMB's annual reports repeatedly indicate that the agencies sometimes monetize costs, but only rarely monetize benefits.[4] The NRC and the SEC were much more likely to monetize costs than other independent regulatory agencies.
- Inspectors general for five banking agencies reported in June 2011 that the agencies often did not provide quantitative information on costs and benefits, but also noted that the underlying statutes did not require them to do so. The agencies often provided qualitative information on costs and benefits. [5]
- GAO reported in November 2011 that the independent regulatory agencies issuing rules pursuant to the Dodd-Frank Act were not specifically required to prepare cost-benefit analyses. [6] GAO said the agencies had little or no discretion regarding most of the rules it examined, and where discretion was allowed, the agencies almost always identified the problem and examined alternatives, and often assessed benefits and costs. But the agencies did not monetize any of the benefits, and monetized costs in only one rule.
- The Committee on Capital Markets Regulation (CCMR) reported in March 2012 that it had "deep concern" about agencies' analyses for Dodd-Frank Act rules, noting that about 30% of the 192 rules it examined contained no cost-

[3] 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.

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

[5] The reports were requested by 10 Republican Senators on the Senate Committee on Banking, Housing, and Urban Affairs.

[6] U.S. Government Accountability Office, *Dodd-Frank Act Regulations: Implementation Could Benefit from Additional Analysis and Coordination*, GAO-12-151, November 10, 2011.

benefit analysis (often when the requirements were traceable to the statute), and about 45% contained only non-quantitative analyses. [7]

- Arthur Fraas and Randall Lutter of Resources for the Future reported in April 2011 that most independent regulatory agencies' rules contained little quantitative information on benefits and costs (other than paperwork burden), and did not meet other analytical standards expected of cabinet departments and independent agencies. [8]

5. Analyses for Rules Issued During Calendar 2012

To be determined. Preliminarily, examination of the economic analyses discussions in the preambles to major rules issued by independent regulatory agencies reveals a continuation of the patterns discussed in previous studies. Independent regulatory agencies often provided lengthy qualitative discussions of expected costs and benefits at length, but any quantitative or monetized discussions were usually limited to paperwork costs. Most of the 2012 major rules were issued by CFTC pursuant to the Dodd-Frank Act, and the agency typically provided multi-page qualitative discussions of expected burdens and benefits. If the rule contained a collection of information, the agency typically monetized the paperwork burden. CFTC often noted that (1) many regulatory provisions were mandated by the act, and therefore were not accounted for in the agency's discussion of costs and benefits; and (2) public comment letters did not provide quantitative data regarding expected costs and benefits.

Other independent regulatory agencies provided somewhat more information. The SEC often provided quantitative (but not monetized) information on expected costs, but little information on expected benefits. In the Nuclear Regulatory Commission's annual rule revising its fee schedules, the agency estimated the amount of funds expected to be recovered from applicants and licensees, but did not examine alternatives or prepare a cost-benefit analysis (because the statute prescribes the actions to be taken).

The agencies certified that none of the major rules issued in calendar year 2012 required an analysis under the Regulatory Flexibility Act. About half of the rules contained a collection of information that triggered the requirements of the Paperwork Reduction Act.

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[7] The Committee's views were in a letter to the Chairmen and Ranking Members of the Senate and House banking committees. To view a copy of this letter, see http://capmktsreg.org/pdfs/2012.03.07_CBA_letter.pdf.

[8] 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.

6. Agency Officials Explain Nature of Economic Analyses

To be determined. However, most independent regulatory agency officials are expected to say that although their agencies consider the expected costs and benefits of forthcoming rules, they are not subject to the analytical requirements in Executive Order 12866/OMB Circular A-4, and that the agency-specific analytical provisions in their statutes do not specifically require a cost-benefit analysis.

- 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."[9]
- 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."[10]
- In April 2012, the SEC Chairman testified that the Commission has considered potential costs and benefits in its rulemaking since the early 1980s, but "no statute requires the Commission to conduct a formal cost-benefit analysis."[11]
- The NRC said in its regulatory analysis guidelines that it is not required to prepare a cost-benefit analysis, but has been voluntarily doing so for more than 35 years.

7. Conclusions and Recommendations

To be determined. Preliminarily, however, although Congress is sometimes clear that certain independent regulatory agencies should prepare a cost-benefit analysis before issuing certain rules (e.g., CPSC), Congress is less clear about the analysis that it expects when it requires agencies to "consider" costs and benefits or other factors. If Congress wants to eliminate this uncertainty and clearly state that all or certain independent regulatory agencies should prepare cost-benefit or other types of

[9] OIG/CFTC, p. 3.
[10] 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.
[11] 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.

economic analyses, it could either amend the individual statutes governing rulemaking in those agencies, or Congress could enact crosscutting legislation that would apply to some or all of them.

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 (1) 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; and (2) whether agencies' administrative costs should be included in the cost estimates. Alternatively, Congress could require agencies to follow the "best practices" identified in OMB Circular A-4.

A somewhat different approach would be for Congress to authorize the President to require independent regulatory agencies to prepare cost-benefit analyses for certain rules. Doing so would resolve any questions about whether the President could take such action, but would also make independent regulatory agencies less independent of the President than ever before. In addition, such a grant of authority would appear to strengthen the power of the President vis-à-vis the Congress, but that grant could be limited by the way the authority is structured (e.g., by making clear that the result of the analysis does not constitute a "supermandate" that trumps existing statutory requirements).

Even if the agencies are not legally required to prepare cost-benefit analyses, none of the statutes prohibit the agency from doing so. Best practices in this area are generally considered those outlined in OMB Circular A-4 and, more recently, the SEC's March 2012 guidance on economic analysis in rulemakings: (1) identify the need for the rule (e.g., market failure or statutory requirement) and explain how the rule will meet that need; (2) describe the economic baseline (pre-statute, in the case of non-discretionary rules) against which the rule's effects should be measured; (3) identify reasonable alternatives to the proposed approach that are available to the agency; and (4) identify (and quantify, to the extent possible) the expected costs and benefits of both the proposed rule and the reasonable alternatives, as well as any uncertainties underlying those estimates. Agencies may also want to consider consultations with each other (e.g., through the ACUS Council of Independent Regulatory Agencies) or with OIRA (e.g., as CFTC recently did through a memorandum of understanding).