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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 752

PETITION FOR RULEMAKING

REPLY OF JOINT SHIPPERS

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Dated: April 4, 2019

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The Agricultural Retailers Association, American Chemistry Council, American Malting Barley Association, Corn Refiners Association, Freight Rail Customer Alliance, Industrial Minerals Association – North America, Institute of Scrap Recycling Industries, Louisiana Chemical Association, National Association of Chemical Distributors, National Industrial Transportation League, Private Railcar Food and Beverage Association, The Chlorine Institute, The Fertilizer Institute, and the Vinyl Institute (collectively "Joint Shippers") hereby reply to the Petition For Rulemaking filed by the Association of American Railroads ("AAR") in the above-captioned docket on March 14, 2019 (the "Petition"). AAR has petitioned the Surface Transportation Board ("Board"), pursuant to 5 U.S.C. § 553, to amend 49 C.F.R. Part 1110 to require the Board to perform a cost-benefit analysis ("CBA") in all rulemaking proceedings except those described in § 1110.3(a), to consider the cumulative impacts of such proposed rules, and to rely upon the most reliable and up-to-date data that is reasonably obtainable in such analyses. For the reasons set forth below, the Petition should be denied.

INTRODUCTION AND SUMMARY

As a general matter, the Joint Shippers support the use of CBAs in appropriate rulemaking proceedings. The Joint Shippers believe that regulatory impact assessments are a key component of the Federal regulatory process. The impact, or cost-benefit, assessments can enhance the transparency of the regulatory process, create a consistent framework for data collection and the identification of data gaps and uncertainties, allow for a useful comparison of alternative approaches, and establish a basis for the measurement of net benefits. For the Board, such assessments can be particularly useful to understand the broader impacts of railroad market power over captive shippers upon our nation's economy, including impacts on service and deadweight economic losses resulting from non-competitive rates and service.

AAR's Petition, however, places the cart before the horse. The Board first must address important questions regarding its ability to conduct meaningful and independent analyses. The Board is a small agency that currently lacks the resources to conduct meaningful CBA on the complex economic regulatory subjects within its jurisdiction. The AAR is keenly aware of this fact and is engaged in a thinly-veiled attempt to exploit it by using this Petition to delay pending rulemaking proceedings to which AAR is opposed. Therefore, although the Joint Shippers support the greater use of CBA in Board rulemaking proceedings, the Board should not delay pending proceedings while it considers how to conduct CBA and acquires the necessary resources to do so.

Although CBA can be valuable a tool in the rulemaking process, there is not a one-size-fits-all approach for all types of rulemakings. The CBA process is a means to an end, not an end in itself. Some types of rulemakings are more amenable to CBAs than others. Statutory mandates also must take precedence over CBA results. That does not mean that a CBA has no place at all in Board rulemakings, but rather that such analyses should be applied with flexibility.

The Board must consider these matters in determining how to implement a CBA requirement for rulemaking proceedings before it actually adopts such a requirement through a binding rule.

ARGUMENT

A. The Board Should Develop CBA Standards and Procedures Initially Through A Policy Statement Or Memoranda, Before It Considers A Rule Requiring CBA.

The AAR Petition asks the Board to require CBA in rulemaking proceedings through the adoption of proposed rules that would be codified in the Code of Federal Regulations. It is premature, however, for the Board to adopt CBA by rulemaking before it has developed procedures and obtained the resources that are necessary to conduct meaningful analyses. Otherwise, the Board will have legally obligated itself to requirements that it presently cannot satisfy. Therefore, the Board should develop CBA standards and procedures initially through a policy statement or internal memorandum – the approach of nearly all agencies undertaking similar rulemakings.

By petitioning the Board to adopt a CBA requirement by regulation and apply it to nearly all types of substantive rulemakings,[1] AAR is asking the Board to go down a path that no other independent agency has followed and that even the executive branch agencies do not uniformly follow. No other agency, either executive branch or independent, appears to have adopted rules comparable to those that AAR has proposed.[2] Rather, they have waded into the CBA process through policy statements or internal memoranda, typically as part of general rulemaking

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[1] The only excluded proceedings are those in 49 C.F.R. § 1110.3(a), which encompasses "[i]nterpretive rules, general statements of policy, and rules relating to organization, procedure, or practice…:"

[2] The Joint Shippers have identified only one agency that even has codified a portion of its CBA requirement in the CFR, namely, the Federal Communications Commission through the Order attached as Exhibit D to the AAR Petition. The FCC rule identifies cost-benefit analysis for rulemaking proceedings as a function of the newly-created Office of Economics and Analytics.

guidelines. The Joint Shippers urge the Board initially to consider a CBA requirement through these more typical means before it considers adopting a CBA requirement by rule.

The AAR's proposed rules also go beyond what other agencies have done in another significant respect. Most agencies only perform a CBA for rulemakings that will have an annual effect on the economy of at least $100 million.[3] AAR would have the Board perform a CBA on all rulemakings regardless of their annual economic effect. Given the difficulty of performing CBAs on economic regulations and the substantial resource requirements to do so, any CBA policy adopted by the Board should exclude rulemakings below the $100 million impact threshold that other agencies have adopted.

If the Board decides to adopt a CBA policy, the Joint Shippers commend to the Board the memoranda approach taken by the Securities and Exchange Commission ("SEC") which is attached to the AAR Petition as Exhibit C. The SEC is one of the few independent agencies that has opted to employ CBA in its rulemaking proceedings. Notably, however, the SEC has not codified CBA as a requirement in its rules. Instead, over the course of a 17-page memorandum, the SEC has developed detailed guidance on the economic analyses it will conduct in rulemakings. Although the SEC guidance generally follows the approach in OMB Circular A-4,[4] which provides guidance for the conduct of CBA by executive branch agencies, the SEC addresses that approach within the context of its specific statutory mission. For example, the SEC Memorandum provides guidance on the identification of benefits and costs that are most pertinent to the financial services industry and discusses the difficulties with reliably estimating

[3] *See* Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), §§ 3(f)(1), 6(a)(3)(C).

[4] U.S. Office of Management and Budget, Circular A-4 (Sept. 17, 2003) ("OMB Circular A-4"), available at https://tinyurl.com/yaork9v2.

those factors and how to handle those situations.[5] The Board would benefit from taking a similar approach.

Notably, the Department of Transportation ("DOT") has not codified a CBA requirement in any of its rules, nor have any of the agencies under DOT's umbrella. Rather, DOT has implemented CBA through issuance of a policy statement.[6] CBA is but one element of the DOT Order which also specifies policies that govern the development and issuance of DOT regulations, the division of responsibilities across DOT offices, detailed procedures for all stages in the rulemaking process, and policies regarding public contacts at each stage of the process. This DOT Order is commendable for its holistic approach to incorporating CBA into the rulemaking process.

B. **The Board Must Conduct A CBA Consistent With Its Implementing Statute.**

Any CBA requirement that the Board adopts, whether by rule, policy statement or memorandum, must carefully consider the policies and mandates of the ICC Termination Act ("ICCTA") and implement CBA in a holistic manner that is consistent with them. Conventional CBA procedures and outcomes are not always consistent with statutory policies and mandates. Not all statutory policies and mandates are intended to improve economic efficiency or remedy market failures; some are designed to ensure fairness, reduce risks to a level that policymakers have decided is desirable even when below the economically efficient level, or promote some other policy objective.[7] In the case of the ICCTA, the common carrier obligation and the

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[5] Petition, Ex. C, pp. 10-14.

[6] *Policies and Procedures for Rulemakings* ("DOT Order"), DOT Order 2100.6 (Dec. 20, 2018) (attached to AAR Petition as Exhibit A).

[7] Jerry Ellig, *Why and How Independent Agencies Should Conduct Regulatory Impact Analysis*, 29 Cornell J. L. & Pol'y 1, 17 (2018).

multiple and sometimes competing rail transportation policies highlight the most prominent statutory mandates that may not always be consistent with CBA results.[8]

Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching* (served July 27, 2016), illustrates the need to accommodate multiple statutory mandates in a rulemaking proceeding. The Board's proposals in that rulemaking implement the statutory standards for reciprocal switching at 49 U.S.C. § 11102(c)(1) and the national rail transportation policies at § 10101(1, 2, 4, 5, 7 & 12), which seek to rely upon competition "to the maximum extent practicable." Through those statutory provisions, Congress has determined that switching should be granted when "practicable and in the public interest" or "necessary to provide competitive rail service." The Board has proposed to implement the "public interest" standard by conducting a form of CBA upon each specific request for switching, thereby obviating the need to perform a CBA on the rule itself (*see* proposed § 1145.2(a)(1)(iii)). The Board has proposed to implement the "necessary to provide competitive rail service" standard by determining whether the incumbent carrier possesses market dominance which constitutes a finding that there are no effective competitive alternatives to a rail carrier (*see* proposed §1145.2(a)(2)(ii)). That same market dominance standard also is a statutory prerequisite for rate regulation. *See* 49 U.S.C. § 10707(a). Thus, these two standards for reciprocal switching reflect policy judgments that Congress has made through the statute as to when competitive rail service is necessary, which lessens the role and significance of a CBA in that rulemaking proceeding.

This situation is not unique to the Board. Other agencies also have statutory mandates which they have reconciled with CBA through detailed guidelines for conducting rulemaking proceedings. For example, the Commodity Futures Trading Commission has adopted

[8] *See* 49 U.S.C. §§ 10101 (rail transportation policies) and 11101 (common carrier obligation).

rulemaking guidelines that expressly acknowledge "[q]uantitative benefits need not always be greater than costs because there may be a statutory mandate or policy rationale behind the rule."[9] The Board should include a similar qualification for any CBA procedures that it may adopt and it should expressly identify statutory policies and mandates that may not be consistent with CBA outcomes.

C. The Board Must Consider Resource Needs And Other Factors That May Limit Its Ability To Conduct A Meaningful And Independent CBA.

The Board should not incorporate CBA into rulemaking proceedings without first ensuring it has the resources and data to conduct truly independent analyses, and the flexibility and capability to address the challenges of conducting a meaningful CBA on economic regulations.

1. Adequate resources and independent data sources are critical to conducting an independent and meaningful CBA.

A recent Congressional Research Service report cautioned that:

> Presidential and congressional requirements for [CBA] should also recognize that data availability may be an implementation issue, and that additional resources may be necessary for the agencies conducting these analyses. In some cases, the data that agencies need to estimate the costs and benefits of their rules may not exist, or may only be available from regulated entities. Although there is no "typical" [CBA] (just as there is no "typical" rule), the cost of conducting many individual regulatory analyses has been in the hundreds of thousands of dollars. If more agencies were required to prepare more detailed analyses for more rules, it is likely that

[9] 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, Ex. 2, pp. 6-7, available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf.

> the agencies would make the argument that they would be unable to do so without additional resources.[10]

The Board is a small agency with limited resources, and performing rigorous CBA requires significant resources, data, expertise and time that will tax the Board's existing personnel and financial resources.

AAR is being disingenuous when it asserts that "there is no basis for concluding the reforms offered here will create an undue burden or otherwise slow down the Board's regulatory proceedings."[11] A 1997 study by the Congressional Budget Office concluded that the median cost of 85 CBAs conducted between 1990 and 1996 was $270,000, but some of the analyses cost more than $1 million.[12] We are now over two decades beyond that study period which suggests much higher costs today.[13]

The Joint Shippers agree with the AAR that complete, relevant, reliable, and up-to-date data is critical to conduct a meaningful CBA. The Board, however, must not make itself dependent upon data and analyses presented by stakeholders in response to a rulemaking proceeding. A key CBA purpose is to act as an information tool capable of providing an objective assessment of a rule's potential effects. Such independent assessments contrast with advocacy of policies by groups that may "exaggerate or minimize risks, costs, or likely outcomes

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10 Maeve P. Carey, Cong. Research Serv., R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process* 30 (Dec. 9, 2014) (footnotes omitted) (attached as Exhibit 2).

11 Petition at 18.

12 Congressional Budget Office, *Regulatory Impact Analysis: Costs at Selected Agencies and Implications for the Legislative Process*, March 1997, available at http://www.cbo.gov/ftpdocs/40xx/doc4015/1997doc04-Entire.pdf.

13 For example, the NITL spent six figures just on economic consultants to perform the financial impact analysis requested by the Board in Ex Parte No. 711, *Petition for Rulemaking To Adopt Revised Competitive Switching Rules*, slip op. (served July 25, 2012), which was more akin to a narrower distribution analysis of wealth transfer effects than a full-blown conventional CBA that measures net societal impacts.

of a certain regulation."[14] Over-reliance upon the participants in a rulemaking proceeding to provide quality data and analysis for a CBA jeopardizes that independence and objectivity.

Data availability is of particular concern with respect to the Board's rules. Other than the costed waybill sample ("CWS") and Uniform Rail Costing System ("URCS"), there appear to be few independent data sources on the rail industry. Most relevant data appears to be in the exclusive possession of the railroads themselves. Is the Board willing to require, and the rail industry willing to provide, the level of data necessary to perform a truly independent and objective CBA in appropriate circumstances? Will the Board make that data, including the confidential CWS, available to non-rail stakeholders to review and critique the Board's CBAs when relevant? These are important questions that need to be answered before the Board adopts any form of CBA requirement.

2. CBA is particularly difficult to perform on economic regulations and poses substantial pitfalls that the Board needs flexibility to avoid.

CBA has a role in many types of rulemaking proceedings. The vast majority of federal regulations for which a CBA is conducted, however, pertain to environment, safety and health. A much smaller universe of federal regulation entails economic regulation of an entire industry comparable to the Board's regulation of the rail industry. The former has costs and benefits that are far more amenable to quantification and monetization in a CBA than the latter. For example, the cost of implementing a safety requirement or installing anti-pollution equipment is typically known or readily susceptible to estimation and so are the benefits of doing so. In contrast, behavioral responses to economic regulations are subject to much greater uncertainty and are less susceptible to quantification and monetization. Such difficulties may explain why neither of the

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[14] David W. Perkins and Maeve P. Carey, Cong. Research Serv., R44813, *Cost-Benefit Analysis and Financial Regulator Rulemaking* 2 (April 12, 2017) (attached hereto as Exhibit 1).

two independent agencies with missions most comparable to the Board's, the Federal Energy Regulatory Commission ("FERC") and the Federal Maritime Commission ("FMC"), have adopted CBA requirements for their rulemaking proceedings.

As a threshold matter, when it comes to conducting a CBA on economic regulations, the Board must be careful not to confuse costs and benefits with wealth transfers. For example, rate regulations that reduce the rate a railroad may charge may be perceived as a benefit to the shipper and a cost to the railroad, but in fact constitute a wealth transfer. [15] CBA is a tool used to measure the *net* economic effects, with wealth transfers only a secondary concern.[16] The proposed reciprocal switching rules in EP 711 (Sub.-No. 1) are an example that implicates both concepts. Rate reductions from greater competition are wealth transfers, whereas the economic efficiency benefits of competition to society through the reduction of economic deadweight loss would be the proper focus of a CBA. The net economic effects of regulation require a determination of the most economically efficient outcome for society as a whole, not for the rail industry or its customers.

The Board also must ensure that it has the ability to quantify and monetize the costs and benefits of economic regulations that it is likely to encounter in its rulemaking proceedings with the data available to it. The impacts of economic regulation are substantially dependent upon behavioral responses. Unlike other sectors, the objects of economic regulation are not goods or equipment, but the activities of individuals and firms and their interactions in interrelated markets for intangible goods and services.[17] For example, the effects of changes in rail

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[15] *See* OMB Circular A-4, at p. 38.

[16] Perkins and Carey, p. 14 (Exhibit 1).

[17] *Id.*, p. 13.

economic regulations administered by the Board depend upon the behavior and reactions of railroads and their customers in response to those changes, which are hard to accurately predict.[18]

Compounding this difficulty is the fact that the shippers which benefit from rail regulations represent scores of different industries which may respond to, or be affected by, the same regulations quite differently. This complicates evaluation and measurement of the causal channels through which regulatory changes impact the broader economy.[19] For example, how would the Board quantify and monetize the impact of a proposed standard for regulating rail rates or granting reciprocal switching across so many different industries or even among differently-situated shippers within each industry, especially given that the Board has no special knowledge or expertise in those industries.

The Office of Management and Budget ("OMB") acknowledges that, "[w]hen important benefits and costs cannot be expressed in monetary units, BCA [benefit-cost 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."[20] In such circumstances, the recommended CBA procedures depend upon the same exercise of professional judgment in which the Board already engages.[21] The resulting risk is that "CBAs involving such a high degree of uncertainty and contestable assumptions…, [i]nstead of providing an authoritative rationale for a regulation…, would provide an opportunity for parties aiming to protect their own

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18 *Id.*

19 *Id.*

20 OMB Circular A-4, at 10.

21 *Id.* at 10, 27.

interests—not social welfare—to challenge certain beneficial regulations by offering competing but similarly subjective CBAs."[22]

The Board must ensure that it has the capability and resources to surmount the foregoing challenges before adopting a regulatory requirement to perform CBA as part of its rulemaking proceedings.

D. **The Board Should Not Delay Pending Rulemaking Proceedings.**

However the Board elects to proceed in response to AAR's Petition, it should not delay pending rulemaking proceedings. Despite AAR's inferences to the contrary, CBA cannot be implemented at the drop of a hat. That is particularly true for a small agency like the Board with substantial resource constraints and no prior experience conducting CBA. It could take years for the Board to develop the capacity to perform meaningful CBA on complex economic regulations. Rather, the Board should follow the examples of DOT and OMB by excluding pending rulemaking proceedings should it decide to adopt a CBA requirement, so as not to delay important regulatory reforms.[23]

The motives underlying AAR's petition are a relevant factor for the Board to consider. AAR is engaged in an undisguised attempt to erect additional hurdles to regulatory reform initiatives that have reached advanced stages in the rulemaking process, after having languished before the Board for many years. Indeed, the Petition makes Docket Nos. EP 711 (Sub-No. 1), and EP 704 (Sub-No. 1), in particular, examples for conducting a CBA. Delaying these proceedings, however, would do more harm than good.

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[22] Perkins and Carey, p. 14 (Exhibit 1).

[23] DOT Order, p. 1. *See also* OMB Circular A-4, p. 48 (excluding regulatory analyses for draft proposed rules submitted to OMB before January 1, 2004).

The Board already has done more in EP 711 to identify costs than in any other recent rulemaking proceeding. In response to the NITL petition for rulemaking in EP 711, the Board requested analyses from commenters on the financial impact of reciprocal switching on the rail industry and granted access to the confidential waybill sample to perform that analysis.[24] Although the NITL provided the requested analysis, AAR did not fully respond to the Board's request on the grounds that "it is not possible to predict the level of rail rates or the precise amount of lost revenues…."[25] Yet AAR now would require the Board to do precisely what it has claimed is not possible, and more.[26] It appears that AAR may hope that the difficulty of performing a CBA in EP 711 will preclude the Board from taking any action at all. But as discussed in Part B above, reciprocal switching rules implicate statutory mandates that the Board must carefully consider when deciding whether and how to perform a conventional CBA, and the Board's proposed rules account for CBA in evaluating individual switching requests consistent with those statutory mandates.

Similarly, the Board's EP 704 (Sub-No. 1) proceeding is derived from the exemption revocation statute and would potentially restore STB oversight over rail transportation of

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[24] *See* note 13, *supra*.

[25] "Opening Comments of the Association of American Railroads," STB Ex Parte No. 711, p. 15 (filed March 1, 2013).

[26] In yet another ironic example involving the AAR, there is an ongoing battle over recent decisions of the AAR Tank Car Committee, which enacts standards for tank cars. In those decisions, the railroad members with majority control over the Committee's decisions have exploited the AAR Interchange Rules to impose costly requirements in excess of those contained in DOT regulations. Because railroads do not own or otherwise supply tank cars to their customers, additional tank car requirements cost the railroads nothing – but they reap most of the benefits. The majority is incentivized to make decisions for its own benefit while disregarding the costs imposed on other stakeholders. To avoid such inequitable outcomes, the minority, non-railroad, Committee members have entreated AAR to perform CBAs before adding new requirements. AAR has consistently refused.

several different commodities.[27] This statutory provision expressly requires the Board to determine if such restoration is consistent with the National Rail Transportation policy, including "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the [shipping] public . . . ."[28] and "to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers . . . ."[29] Thus, in the context of the pending EP 704 (Sub No. 1) proceeding, the Board already must evaluate certain economic and public interest impacts, such as whether the regulatory benefits achieved when the existing exemptions were first granted continue to exist today based on substantial changes to both the statute and the rail industry that have occurred since the exemptions were granted decades ago.

AAR also ignores the unique circumstances associated with exemption revocations that make its proposed rules impractical to apply. Specifically, revocation of a class exemption under the statute would restore STB oversight and allow those impacted industries to obtain direct access to all of the Board's regulatory procedures. It is not limited to a single regulation or proposal. Once the Board determines that exemption revocation is justified based on the evidence before it, there are no alternatives to STB oversight that Congress contemplated. Additionally, measuring the cumulative impacts of exemption revocation would require a highly speculative and extremely burdensome exercise for a small agency such as the Board to reasonably predict which STB procedures likely would be used, and the extent of such use, by each of the impacted industries. Accordingly, the Board should not accommodate AAR's

[27] 49 U.S.C. § 10502(d).

[28] 49 U.S.C. § 10101(4).

[29] 49 U.S.C. § 10101(5).

attempt to create new roadblocks that are designed to further delay the outcome of the EP 704 (Sub No. 1) proceeding.

It is especially troubling that AAR's petition for a CBA rule comes in the late stages of pending rulemaking proceedings to reform a *status quo* that has benefited the rail industry, often at the societal cost of less competition and economically inaccessible regulatory remedies. That *status quo* includes regulations that were not subjected to a CBA and may not be justified if they were today. In addition to reciprocal switching and exemptions discussed above, the stand-alone cost ("SAC") methodology, which is the rail industry's self-proclaimed "gold standard" for rate regulation, is a prominent example of a *status quo* rule that would be of questionable benefit if it were subjected to a CBA. Does anyone other than the rail industry contend that a SAC case, which requires years and costs millions to litigate, has benefits that outweigh those costs? AAR's Petition is an attempt to entrench a *status quo* that would be of dubious value if the same CBA requirements had applied to them.

Therefore, if the Board implements CBA, it should not delay pending rulemaking proceedings, particularly EP 711 (Sub-No. 1) and EP 704 (Sub-No. 1), which would enhance rail competition and create greater balance in the rail regulatory regime. Those proceedings are at advanced stages and already have been subjected to extensive expert scrutiny of potential impacts and, in the case of reciprocal switching, extensive financial impact analysis. The utility of delaying those proceedings, most likely for several more years, pending the development of CBA guidelines, the acquisition of sufficient resources, and actually conducting CBAs and subjecting them to public comment is dubious, whereas the harm in such a lengthy delay is unquestionable. The Board has ample information to apply its expert judgment to complete pending rulemakings without further delay.

CONCLUSION

The Joint Shippers support the use of CBA in in the Board's rulemaking proceedings. Many of the Joint Shippers have first-hand experience with CBA in rulemaking proceedings before other agencies and offer their experience to assist the Board in developing procedures consistent with the Board's mandates. But the Board should take a cautious and deliberate approach to implementing CBA. The Board should not implement CBA unless and until it concludes it has the resources and data sources to conduct meaningful, independent and truly objective analyses. The Board also must consider the role and significance of a CBA for economic regulations and reconcile that role to its statutory mandates. To foster these objectives, before requiring CBA by rule as AAR proposes, the Board initially should develop CBA standards and procedures through a policy statement or memorandum, which is the same path followed by nearly all other agencies which already perform CBA in their rulemaking proceedings. Because this will require a substantial amount of time and effort to complete, the Board must not delay long-pending rulemaking proceedings for the implementation of CBA. For the foregoing reasons, the Board should deny AAR's Petition.

Respectfully submitted,

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Dated: April 4, 2019

Exhibit 1

Cost-Benefit Analysis and Financial Regulator Rulemaking

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CRS REPORT
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Summary

Cost-benefit analysis (CBA) in the federal rulemaking process is the systematic examination, estimation, and comparison of the potential economic costs and benefits resulting from the promulgation of a new rule. Agencies with rulemaking authority implement regulations that carry the force of law. While this system allows technical rules to be designed by experts that are to some degree insulated from political considerations, it also results in rules being implemented by executive branch staff that arguably are not directly accountable to the electorate.

One method for Congress to increase accountability is to require the regulators to conduct analyses of likely effects of proposed regulations. In this way, an agency demonstrates that it gave reasoned consideration to the effects of the proposed rules. CBA is an important type of such analysis, as comparing costs and benefits can be useful in determining whether or not a regulation is beneficial. However, performing CBA can be a difficult and time-consuming process, and it produces uncertain results because it involves making assumptions about future outcomes. Some observers argue that financial regulation CBA is particularly challenging. This raises questions about what parameters and level of detail agencies should be required to include in their CBA.

While most federal regulatory agencies are directed by Executive Order 12866 and Office of Management and Budget Circular A-4 in their performance of CBAs, financial regulators are generally not subject to these directives. Financial regulators are statutorily required to perform certain CBA: requirements such as the Paperwork Reduction Act (P.L. 104-13) and Regulatory Flexibility Act (P.L. 96-354) generally apply to all financial regulators; financial regulators that regulate the banking system are subject to requirements set out in the Riegle Community Development and Regulatory Improvement Act (P.L. 103-325); and agencies such as the Securities and Exchange Commission (SEC), the Consumer Financial Protection Bureau (CFPB,) and the Commodities Futures Trading Commission (CFTC) face requirements specific to them. However, the requirements facing individual financial regulators generally allow them to perform analysis under less specific instruction than is contained in the requirements that are cited above and apply to nonindependent regulatory agencies.

Whether the requirements facing financial regulators should allow for this discretion is a contentious issue. Some observers assert that financial regulators should maintain a relatively high degree of discretion over when and how to conduct CBA. They argue that characteristics of the financial industry and regulation make CBAs in this area especially uncertain and contestable, and assert that financial regulation effects depend entirely on human and market reactions; finance plays a central role in a huge, complex economic system; and financial regulations' effects are more likely (relative to other types of regulation) to include transfers between groups not well accounted for in net measurements. They further argue that requisite CBAs that are uncertain and contestable are more likely to disguise agency discretion as objective fact and provide the opportunity for interested parties to challenge socially beneficial regulation with their own subjective, self-interested analyses.

Other observers assert that financial regulators should face more stringent requirements than they currently do. They refute claims that financial CBAs are necessarily more uncertain or contestable than in other areas. Also, they argue that tools and techniques would be developed to overcome challenges if CBAs were required. They further argue that even uncertain and contestable CBAs are effective in disciplining agencies because they create transparency of the agency's evaluations of proposed regulations and allow for outside assessment of that evaluation.

Recent Congresses have been active on this issue, and the House has passed several bills in the 115th Congress that would increase CBA requirements. Recent proposals would affect either all regulators including financial regulators, financial regulators as a group, or individual financial regulators.

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Introduction

Congress has granted many federal agencies the authority to issue regulations that carry the force of law. This grant of authority raises the issue of how those agencies should be held accountable for the regulations they implement. One method of maintaining accountability is requiring agencies to analyze the potential effects of new regulations—sometimes called *regulatory analysis* or *regulatory impact analysis*—before implementing them and making the analyses public during the rulemaking process.[1] An important and commonly performed type of regulatory analysis is a *cost-benefit analysis* (CBA)—a systematic examination, estimation, and comparison of the economic costs and benefits resulting from the implementation of a new rule. By performing and making public such analyses, an agency demonstrates that it has given reasoned consideration to the necessity and efficacy of a rule and the effects it will have on society.

Most agencies regulating the financial industry are not subject to certain statutes or other requirements that apply to most executive branch agencies, allowing them to operate with a relatively high degree of independence from the President and Congress.[2] These financial regulators—along with other agencies that have similar independence—are often referred to as *independent regulatory agencies*.[3] Agencies are given this independence in part so that experts writing technical rules have some degree of insulation from political considerations.[4] One aspect of these regulatory agencies' independence is that they are not subject to certain requirements that direct other agencies to perform CBAs with certain parameters and executive review. Some observers argue that this independence is appropriate and that subjecting financial regulators to increased requirements would inhibit implementing necessary, beneficial regulation. However, others argue that financial regulators should be subject to greater requirements to increase accountability. The debate has drawn increased attention in recent years as regulators promulgate and continue to promulgate rules mandated and authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203). In response, a number of bills in recent Congresses have proposed increased requirements.

This report examines issues related to financial regulators and CBAs, including potential difficulties facing such regulators and methods available to them when preforming a CBA; the analytical requirements the agencies currently face; and the arguments for and against increasing requirements on financial regulators. This report also briefly describes several examples of proposed legislation that would change the requirements facing financial regulators.

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[1] The federal rulemaking process is guided by a set of procedures and requirements developed by Congress and various Presidents over the last 60 to 70 years. This report focuses on requirements related to cost-benefit analysis faced by financial regulators. For a more detailed examination of the federal rulemaking process, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[2] As explained later in this report, financial regulators are typically thought to include the Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Securities and Exchange Commission, Bureau of Consumer Financial Protection, Office of Financial Research, Office of the Comptroller of the Currency, and National Credit Union Administration.

[3] The independent regulatory agencies are listed at 44 U.S.C. §3502(5) and also later in this report.

[4] For more information on the history and reasons for financial regulator independence see CRS Report R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues*, by Henry B. Hogue, Marc Labonte, and Baird Webel.

Overview of Cost-Benefit Analysis

CBA can help ensure that regulators demonstrate that their decisions are based on an informed estimation of likely consequences during the development, issuance, and implementation of rules. In the analysis, economists and other experts use theory, modeling, statistical analysis, and other tools to estimate the likely outcomes if a particular regulation were to be implemented. These outcomes are compared with the likely outcomes if no regulation or a different regulation were implemented. Then the good outcomes (benefits) can be weighed against bad outcomes (costs) of a regulatory action to determine whether and to what degree a regulation is on net beneficial to society.

Benefits may include such outcomes as deaths and injuries avoided, acres of rare habitat saved, or a decreased probability of financial crisis. Costs may include outcomes such as increased production costs for companies, regulation compliance cost to companies, and increased prices for consumers. *Externalities*—the effects experienced by parties that are not directly involved in the market transactions covered by the regulation—also should be included in the analysis to the extent possible.[5] If it were the case that regulators were expected to make decisions with complete information, all societal costs and benefits would need to be accurately and precisely estimated. These outcomes would be *quantified* (assigned accurate numerical values) and *monetized* (assigned an accurate dollar value). Proposed rules would be finalized and implemented only if benefits were expected to exceed costs, and in a form that maximized net benefits.[6]

However, societal costs and benefits may be difficult to accurately estimate, quantify, and monetize.[7] Therefore, performing most CBAs involves some degree of subjective human judgement and uncertainty, and predicted results are often expressed as a range of values. As discussed in more detail in the "Financial Regulator Requirements Debate" section, some argue that performing CBAs for financial regulation is particularly challenging, due largely to the high degree of uncertainty over precise regulatory costs and outcomes.

This raises questions about the appropriate scope, level of detail, and degree of quantification that should be required of analysis performed in the rulemaking process. On one hand, overly lenient requirements could allow agencies to implement overly burdensome regulation with limited benefit without due consideration of consequences. In addition, a CBA can be an informational tool that estimates the potential effects of a rule and informs the agency and the public as various groups advocate for certain policies—and potentially exaggerate or minimize risks, costs, or likely outcomes of a certain regulation.[8]

In contrast, overly onerous analytic requirements could risk impeding the implementation of necessary, beneficial regulation because performing the analysis would be too time consuming, too costly, or simply not possible. Another concern is that if agencies face highly burdensome requirements, they may have an incentive to achieve policy goals through other methods—such as issuing policy statements, guidance documents, and technical manuals—that create less accountability than the rulemaking process. In addition, a CBA itself can be costly and is

[5] Tevfik F. Nas, *Cost-Benefits Analysis: Theory and Application,* 2nd ed. (Lanham, MD: Lexington Books, 2016), pp. 47-54.

[6] Eric A. Posner and E. Glen Weyl, "Benefit-Cost Paradigms in Financial Regulation," *Coase-Snador Institute for Law and Economics Working Paper No. 660,* March 2014, p. 3.

[7] Robert W. Hahn and Cass R. Sunstein, "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis," *University of Pennsylvania Law Review,* vol. 150 (2002), pp. 1489-1505.

[8] Ibid.

performed by departments and agencies funded by general taxes and fees on industry.[9] Finally, requiring uncertain and contestable CBAs may allow self-interested parties to impede socially beneficial regulation by challenging agency analysis in court and offering their own subjective analysis.[10] For these reasons, stringent CBA requirements may themselves generate more costs than benefits.

Current Cost-Benefit Analysis Requirements

As mentioned above, CBA can be a useful tool for ensuring good regulations are implemented and that regulatory agencies are accountable. However, requirements to perform such analyses may restrict agencies from effectively regulating. This section examines current CBA requirements, including those that apply to nonfinancial regulators and those that direct financial regulators more specifically. It also reviews certain government reports examining the methods and results of recent regulatory CBAs performed by financial regulators under the existing requirements.

Requirements for Nonfinancial Regulators: Executive Order 12866 and OMB Circular A-4

The primary requirement for most agencies to calculate estimates of costs and benefits when issuing rules is under Executive Order (E.O.) 12866, which was issued in 1993 by President William Clinton.[11] E.O. 12866 requires covered agencies—that is, agencies other than independent regulatory agencies, which includes most of the financial regulators—to submit "significant" rules to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for review, along with an initial cost and benefit assessment.[12] For rules that are determined to be significant because their annual economic effect is likely to exceed a $100 million threshold, covered agencies are required to conduct a more in-depth CBA. Specifically, the order requires agencies to provide to OIRA an assessment of anticipated costs and benefits of the rule, and an assessment of the costs and benefits of "reasonably feasible alternatives" to the rule.[13] Other E.O. 12866 provisions encourage agencies to consider costs and

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[9] Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," *Duke Law Journal*, vol. 41 (1992), pp. 1385-1398.

[10] John C. Coates IV, "Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications," *Yale Law Journal*, vol. 124 (2015), pp. 898-902.

[11] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993. For more detailed information about this and other cost-benefit analysis requirements in the rulemaking process, see CRS Report R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, coordinated by Maeve P. Carey.

[12] Significant rules are defined in E.O. 12866 §3(f) as the following:

> Any regulatory action that is likely to result in a rule that may (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 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 the Executive order.

[13] E.O. 12866 §6(a)(3)(C).

benefits during the rulemaking process for all rules, although those other provisions do not require a complete, detailed cost-benefit analysis for non-economically significant rules.[14]

E.O. 12866 has remained in effect since 1993, and it was reaffirmed in 2011 in E.O. 13563 by President Barack Obama.[15] E.O. 13563 states that covered agencies should (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, (2) tailor regulations to impose the least burden on society, and (3) select regulatory approaches that maximize net benefits. It also directs agencies to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[16]

In September 2003, OMB finalized Circular A-4 on regulatory analysis, which refined and replaced an earlier OMB guidance document, providing good-guidance practices to agencies for conducting their CBAs.[17] The circular states that it was "designed to assist analysts in the regulatory agencies by defining good regulatory analysis ... and standardizing the way benefits and costs of Federal regulatory actions are measured and reported." The document provides some specific information that agencies should generally include in their analyses, such as the statutory or judicial directives that authorize the action; the underlying problem or market failure prompting the regulation; consideration of a "reasonable number" of regulatory alternatives; and both a cost-benefit analysis and a cost-effectiveness analysis. Circular A-4 remains the current OMB guidance for agencies preparing CBAs under E.O. 12866 requirements.

Exception for Independent Regulatory Agencies from Executive Order 12866

The exception for independent regulatory agencies in Executive Order 12866 is similar to the exception found in Executive Order 12291, in which President Ronald Reagan first established centralized regulatory review in OIRA and required cost-benefit analysis of certain regulations in 1981.[18] This decision is widely understood to have been based on political considerations regarding the statutorily designed independence of these agencies.[19] In short, President Reagan—and subsequent Presidents—viewed these agencies as having been designed by Congress to be independent of the President, and as such chose not to subject them to presidential (OIRA) review. The statutory categorization of those agencies had been codified in the Paperwork Reduction Act of 1980, which designated a special set of procedures for those agencies' information collection approvals from OMB. E.O. 12291, and later E.O. 12866, referenced the

[14] For example, Section 1(b)(6) requires agencies to "assess both the costs and the benefits of the intended regulation 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." Section 1(b)(11) requires agencies to "tailor [their] regulations to impose the least burden on society," while "obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations." These provisions are considered to be more like guiding principles, however, rather than specific requirements for cost-benefit analysis.

[15] E.O. 13563, "Improving Regulations and Regulatory Review," 76 *Federal Register* 3821, January 21, 2011.

[16] E.O. 13563 §1(c).

[17] OMB Circular A-4, "Regulatory Analysis," September 17, 2003, at https://georgewbush-whitehouse.archives.gov/omb/circulars/a004/a-4.html. The circular took effect for "economically significant" proposed rules on January 1, 2004, and for "economically significant" final rules on January 1, 2005.

[18] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 19, 1981. This decision was reportedly made for political, not legal, reasons.

[19] See, for example, Sally Katzen, "Can Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Commissions?" Opening Remarks, Washington, D.C., April 7, 2011, at http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_KatzenRemarks.pdf, pp. 2-3.

PRA's list of agencies to identify the excepted agencies.[20] Currently, the list of independent regulatory agencies includes the following financial regulators:[21]

- Board of Governors of the Federal Reserve System,
- Commodity Futures Trading Commission,
- Federal Deposit Insurance Corporation,
- Federal Housing Finance Agency,
- Securities and Exchange Commission,
- Bureau of Consumer Financial Protection,
- Office of Financial Research,
- Office of the Comptroller of the Currency, and
- National Credit Union Administration.

When President Clinton issued Executive Order 12866 in 1993, he, like President Reagan, chose to exempt the independent regulatory agencies from the order's CBA requirements. Similarly, President Obama continued to exempt independent regulatory agencies from CBA requirements with E.O. 13563, although his OIRA Administrator encouraged those agencies to "give consideration to all [E.O. 13563's] provisions" in a memorandum issued soon after the executive order.[22] In July 2011, President Obama issued E.O. 13579, "Regulation and Independent Regulatory Agencies."[23] The executive order encouraged independent regulatory agencies to comply with some of the principles in E.O. 13563 that were directed to Cabinet departments and independent agencies (e.g., public participation, integration and innovation, flexible approaches, and science). In a separate memorandum issued the same day as the executive order, the President said he was taking these actions with "full respect for the independence of your agencies."[24] E.O. 13579 did not, however, directly apply the cost-benefit principles in E.O. 12866 and 13563 to independent regulatory agencies, nor did it require these regulators to conduct CBA before issuing their rules.

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[20] 44 U.S.C. §3502(5).

[21] The complete list of independent regulatory agencies is as follows: "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, and any other similar agency designated by statute as a Federal independent regulatory agency or commission." 44 U.S.C. §3502(5). The United States International Trade Commission is one of the "other similar agenc[ies] designated by statute as a Federal independent regulatory agency" although it is not specifically listed in that provision of the *U.S. Code*. See 19 U.S.C. §1330(f) (stating that the United States International Trade Commission "shall be considered to be an independent regulatory agency for purposes of chapter 35 of title 44, United States Code").

[22] Memorandum from Cass R. Sunstein, Administrator of OIRA, "Executive Order 13563, 'Improving Regulation and Regulatory Review'," February 2, 2011.

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

[24] Presidential Memorandum, "Regulation and Independent Regulatory Agencies," July 11, 2011, at https://obamawhitehouse.archives.gov/the-press-office/2011/07/11/memorandum-regulation-and-independent-regulatory-agencies.

CBA Requirements on Financial Regulators

As previously discussed, the financial regulators are exempt from many of the analytical requirements and guidance documents that are applicable to executive agencies, including E.O. 12866 and OMB Circular A-4. However, financial regulators may be required to conduct CBA or other regulatory analyses under cross-cutting statutes or pursuant to the underlying statutes that provide them with rulemaking authority.

Requirements facing financial regulators arguably require a relatively narrow analysis or allow for more agency discretion compared to the requirements discussed above under E.O. 12866. For example, agencies may be required to "consider" or "estimate" costs, benefits, or other economic effects, but the degree to which those considerations must be quantified and monetized estimates is not specified. However, the requirements facing financial regulators are not trivial, and financial regulations have been vacated following judicial review when the court found the CBA performed during rulemaking to be deficient.[25]

Cross-Cutting Analytical Requirements

The following statutes contain analytical requirements that apply to all federal regulatory agencies, including the financial regulators.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (P.L. 96-354) 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. Under the RFA, all regulatory agencies, including the financial regulators, must prepare a "regulatory flexibility analysis" at the time proposed and certain final rules are issued. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.[26] However, these analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a "significant economic impact on a substantial number of small entities."[27]

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1980 (P.L. 96-511) pertains to certain aspects of the rulemaking process, albeit not the rules themselves.[28] The PRA's primary purpose is to minimize the paperwork burden for individuals, small businesses, and others resulting from the collection

[25] For example, see Business Roundtable v SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

[26] Section 1100G of the Dodd-Frank Act (P.L. 111-203) added a requirement to 5 U.S.C. §603 of the RFA that for covered rules, the Consumer Financial Protection Bureau should include of a number of specific items in their impact analysis, including "any projected increase in the cost of credit for small entities."

[27] 5 U.S.C. §§601-612. Neither of the terms "significant" or "substantial" in this context is defined in the RFA.

[28] For more information on the PRA, see CRS Report R40636, *Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates*, by Curtis W. Copeland and Vanessa K. Burrows. The authors of that report have left CRS; questions about its content may be directed to Maeve P. Carey.

of information by or for the federal government, which often stems from regulatory requirements: many information collections, recordkeeping requirements, and third-party disclosures are contained in or are authorized by regulations as monitoring or enforcement tools.[29] In fact, these paperwork requirements are sometimes a primary component of requirements stemming from financial regulation.

The PRA requires agencies to justify any 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.[30] Paperwork burden is most commonly measured in terms of "burden hours." The burden-hour estimate for an information collection is a function of the frequency of the information collection, the estimated number of respondents, and the amount of time that the agency estimates it takes each respondent to complete the collection. 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.[31] OIRA can disapprove any collection of information if it believes the collection is inconsistent with PRA requirements. However, multiheaded independent regulatory agencies can, by majority vote of the leadership, void any OIRA disapproval of a proposed information collection.[32]

Analytical Requirements Applicable Solely to Banking Regulators

The Riegle Community Development and Regulatory Improvement Act (Riegle Act) imposes analytical requirements on rulemaking for the federal banking regulators—the Federal Reserve, the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC). One of the Riegle Act's primary purposes is to reduce administrative requirements for insured depository institutions, and the scope of the analysis required reflects that specific aim. When determining the effective date and compliance requirements of new rules that impose additional reporting, disclosure, or other requirements on depository institutions, the federal banking regulators must take into consideration: "(1) Any administrative burden that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of such regulations."[33]

Agency-Specific Requirements for CBA

Certain individual agencies—the Securities and Exchange Commission (SEC), the Consumer Financial Protection Bureau (CFPB), and the Commodity Futures Trading Commission (CFTC)—are statutorily required to perform certain analysis in rulemaking specific to the agency. As mentioned previously, the parameters of analysis when "considering" cost and benefits are to

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[29] The act generally defines a *collection of information* as the obtaining or disclosure of facts or opinions by or for an agency (Cabinet departments and independent agencies as well as independent regulatory agencies) by 10 or more nonfederal persons.

[30] 44 U.S.C. §§3501-3520.

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

[32] 44 U.S.C. §3507(f). Some, but not all, financial regulators are multiheaded. For example, the Consumer Financial Protection Bureau has a single head, while the Securities and Exchange Commission is multiheaded.

[33] 12 U.S.C. §4802(a).

a degree left to agency discretion, although analysis could be subject to judicial review if a party were to challenge the regulation in court.

The SEC is subject to requirements to analyze the effect of its rules, with an emphasis on market efficiency and competition. The National Securities Market Improvement Act (P.L. 104-290) requires the SEC to "consider or determine whether an action is necessary or appropriate in the public interest ... [and] whether the action will promote efficiency, competition, and capital formation."[34] The Securities Exchange Act (P.L. 73-291) requires the SEC to perform economic analysis on "the impact any such rule or regulation will have on competition."[35]

The CFPB must specifically consider the costs and benefits to consumers and the companies to which the new rules apply. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (P.L. 111-203) requires the CFPB to "consider (1) 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 (2) the impact of proposed rules on covered persons ... and the impact on consumers in rural areas."[36]

The CFTC must evaluate costs and benefits of new rules and the analysis must include several specified considerations. The Commodity Exchange Act (P.L. 74-675) requires the CFTC to "consider the costs and benefits of the action" before promulgating a rule, and "the costs and benefits of the proposed Commission action 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."[37]

Cost-Benefit Analysis in Practice

Reports on the characteristics of the agency-performed CBAs—including independent regulatory agencies—can illustrate what analyses are done in practice as part of rulemaking.

Section 624 of the Treasury and General Government Appropriations Act of 2001 (31 U.S.C. §1105 note)—sometimes known as the "Regulatory Right-to-Know Act"—requires OMB to issue an annual report to Congress on regulatory costs and benefits. The report generally includes an assessment of the CBAs for major rules done by agencies as a part of rulemaking.[38] The 2016 report indicated that independent financial regulatory agencies issued 8 major final rules during FY2015, and that although benefits and costs were considered during the rulemaking process for all these rules, they were not always monetized.[39] Six of these rules provided monetized costs, but

[34] 15 U.S.C §77b(b).

[35] 15 U.S.C §78w(a)(2).

[36] 12 U.S.C §5512.

[37] 12 U.S.C §19.

[38] For the purposes of this annual report to Congress, OMB defines "major rules" as any rule that meets one of three conditions: the rule is designated as major under the Congressional Review Act (5 U.S.C. §804(2)); the rule hits the analysis threshold under the Unfunded Mandates Reform Act of 1995 (UMRA); or the rule is designated as "economically significant" under section 3(f)(1) of Executive Order 12866. The three definitions are similar, and generally any rule that is expected to have an annual effect of $100 million or is in some way expected to materially affect some aspect of the economy or the public—such as competition, productivity, employment, environment, or public health or safety—is considered a major rule.

[39] Office of Management and Budget, Office of Information and Regulatory Affairs, 2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, (continued...)

none provided monetized benefits. In comparison, executive departments and agencies subject to E.O. 12866 implemented 30 major rules: 21 analyses monetized both benefits and costs; 6 monetized costs but not benefits; 2 monetized benefits but not costs; and 1 did not monetize costs or benefits.[40]

The Government Accountability Office (GAO) releases an annual report on Dodd-Frank regulations that examines analyses done by financial regulators. These reports typically make an assessment of the degree to which the analyses—for rulemaking related to Dodd-Frank provisions—were consistent with the directives of OMB Circular A-4, even though the regulators are not required to follow the directives. In general, GAO has found that financial regulator analysis is consistent with that guidance. For example, in the 2016 report, GAO notes,

> Independent federal financial regulators are not required to follow OMB's Circular A-4 when developing regulations, but they told us that they try to follow this guidance in principle or spirit. Regulators generally included the key elements of OMB' s guidance in their regulatory analyses for these major rules. To assess the extent to which the regulators follow Circular A-4, we examined 5 major rules ... Specifically, we examined whether the regulators (1) identified the problem to be addressed by the regulation; (2) established the baseline for analysis; (3) considered alternatives reflecting the range of statutory discretion; and (4) assessed the costs and benefits of the regulation. We found that all five rules we reviewed were consistent with OMB Circular A-4.[41]

Challenges and Variants of Cost-Benefit Analysis

CBA of any type of regulation faces challenges in making an accurate assessment of the regulation's effects. Over recent decades, academics and agency experts have developed sophisticated and useful techniques to do these types of analyses, but they generally contain a degree of uncertainty.[42] Some challenges include

- behavioral changes of people as they adapt to a new regulation, which are difficult to predict;
- quantification that must overcome uncertainty over the causal relationship between the regulation and outcomes; and
- monetization, which is difficult for outcomes that do not have easily discernable monetary values.

Variations of CBAs address some of these difficulties, including

- cost-effectiveness analysis, which compares costs of alternative regulation when benefits cannot be accurately quantified or monetized;

(...continued)

2016, at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf.

[40] This count excludes "transfer rules." Transfer rules are rules that primarily caused income transfers, usually from taxpayers to program beneficiaries. The OMB annual report typically focuses on rules that have effects largely through private sector mandates.

[41] U.S. Government Accountability Office, *Dodd-Frank Regulations: Agencies' Efforts to Analyze and Coordinate Their Recent Final Rules*, GAO-17-188, December 2016, pp. 18-23, at http://www.gao.gov/assets/690/681868.pdf.

[42] Jonathan S. Masur and Eric A. Posner, "Unquantified Benefits and the Problem of Regulation Under Uncertainty," *Cornell Law Review*, vol. 102 (August 17, 2015), pp. 87-95.

- breakeven analysis, which can establish the likelihood or under what conditions a regulation would be beneficial;
- qualitative analysis with expert judgement, in which experienced professionals describe and explain likely effects that cannot be quantified and make a judgement as to how costs compare with benefits; and
- retrospective analysis, which estimates the *realized* costs and benefits following some period of time—often years—*after* implementation of rules.

This section examines these challenges and variants as they relate to CBA generally. There is debate over whether the challenges are particularly daunting for financial regulation CBA and to what degree different types of analysis can solve these problems. An examination of the arguments related to financial regulator CBA requirements can be found in the following section, entitled "Financial Regulator Requirements Debate."

Challenges of CBA

One difficulty in performing cost-benefit analysis is trying to accurately determine the human behavioral response to the implementation of a regulation.[43] For example, consider a hypothetical and very simplified CBA that analyzes a new requirement that financial institutions make additional disclosures to customers about a certain type of loan. To estimate the benefit to consumers who avoided entering into a bad financial arrangement, the analysis would have to estimate, among other things, how many potential customers would read the disclosure and would elect not to use the product on the basis of that information. Of these, how many would then seek out a substitute credit source? Predicting human choices such as these involves modeling consumer behavior in this market, statistical interpretations of available data, and some degree of uncertainty.

Quantification of outcomes also poses challenges in determining causation and measuring magnitudes of effects.[44] Returning to the hypothetical regulation outlined above, suppose lenders also would be required to report additional performance data, such as default rates, about the loans. The additional cost of reporting could decrease loan profitability. In such a case, lenders will likely reduce the availability of these loans. An important cost of this regulation might be reduced economic growth by the contraction of credit. Making an estimation of this cost would involve macroeconomic modeling, statistical interpretation, and uncertainty.

After an estimate has been made of the quantity and magnitude of outcomes, those effects must be monetized because measuring the varied effects of a regulation requires a common unit of measurement. This becomes problematic when attempting to assign a dollar value to outcomes that do not have market prices.[45] For example, imagine a proposed regulation aimed at reducing the number of home foreclosures. An important benefit might be the avoidance of the emotional distress families may experience as a result of being forced to move from their homes and finding alternative housings. Assigning a dollar value to this outcome would require sophisticated techniques and would likewise involve uncertainty.

[43] John C. Coates IV, "Cost Benefit Analysis of Financial Regulation: A Reply," *The Yale Law Journal Forum*, January 22, 2015, pp. 311-312.

[44] Jonathan S. Masur and Eric A. Posner, "Unquantified Benefits and the Problem of Regulation Under Uncertainty," *Cornell Law Review*, vol. 102 (August 17, 2015), pp. 87-95.

[45] Ibid.

Finally, regulatory benefits may often be more difficult to monetize than major costs. Costs are often economic costs, which may be more easily monetized, such as an industry's reduction in economic activity or the added expense of complying with regulation. Benefits may be harder to quantify because of the difficulty in determining causation and because the outcomes are harder to price.[46] Financial regulation benefits that may be difficult to monetize include the emotional distress of foreclosure cited in the previous example, consumer and investor confidence in knowing they are protected from fraud, and decreased probability of a financial crisis.

Variants of CBA

Quantified and monetized estimates generally provide the clearest measurement and comparison of the costs and benefits of proposed regulation. However, variants of CBA can be performed when full quantification and monetization is not entirely possible due to the challenges described above. Some of these variants include *cost-effectiveness analysis*, *breakeven analysis*, and *qualitative analysis with expert judgement*.[47] Also, agencies sometimes do *retrospective analysis*. Although not a part of rulemaking and so beyond the scope of this report, it deserves mention because this type of analysis is the subject of proposals to assess the regulatory system and identify regulations that should be amended or repealed.

Cost-Effectiveness Analysis

Cost-effectiveness analysis may be useful if benefits of a regulation are hard to monetize. In these analyses, an outcome is identified as necessary or sufficiently important to the advancement of social welfare, such as preventing cancer cases, preserving wetlands, or reducing the likelihood of financial crises. A set of alternative regulations—ranging from stringent to lenient—is then analyzed to determine how well each alternative achieves the objective outcome and at what cost. This comparison is useful for identifying the most effective form of regulation.[48]

Breakeven Analysis

Breakeven analysis may be useful when estimates of either benefits or costs or both face a relatively large degree of uncertainty, and the estimates fall within a wide range. In these analyses, the magnitudes of the quantified costs and benefits are compared to determine what values of the unquantified variables would have to be for the regulation to break even or impose no net cost on society. The analysis—in the face of a relatively high level of uncertainty—can reveal under what circumstances a regulation would benefit society or at least identify which regulations are most or least likely to do so.[49] For example, consider another highly stylized analysis of a hypothetical regulation aimed at reducing cases of a certain disease. The cost of the regulation is estimated to be $50 million; how many cases would be avoided can only be estimated in the range of 10,000-50,000; and monetizing the benefit of avoiding a case is problematic. Given these hypothetical values, the breakeven value of avoiding one case of the disease is between $1,000 and $5,000. To use extreme examples for the purpose of illustration: if

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[46] Ibid.

[47] This list is not exhaustive, but rather an illustrative list of certain variants that have been suggested to address some of the challenges of financial regulation CBA.

[48] Office of Management and Budget, *Circular A-4*, September 17, 2003, pp. 10-12.

[49] Cass R. Sunstein, "Financial Regulation and Cost-Benefit Analysis: A Comment," *The Yale Law Journal Forum*, vol. 124 (January 22, 2015), pp. 270-279.

this disease is the common cold, it could be argued that the regulation is overly burdensome; but if the disease is fatal, it could be argued that the regulation should be implemented.

Qualitative Analysis with Expert Judgement

Wherever benefits and costs cannot be quantified to a reasonably informative degree of certainty and precision, they could be analyzed qualitatively. This analysis type describes the factors considered, the rationale used in making a policy choice, and the regulators' professional judgement in assessing the regulation's welfare effects.[50]

Retrospective Analysis

Retrospective analysis estimates the *realized* costs and benefits following some period of time—often years—*after implementation* of rules. This analysis eliminates some uncertainties about what outcomes will be observed under the regulation. However, the results of the analysis still involve assumptions and uncertainty in assessing the degree to which the regulation caused the observed outcomes or estimating what outcomes would have been realized if the regulation had never been implemented.[51] Retrospective analysis is different from most of the analysis covered in this report, in that it is an *ex post* analysis performed after implementation and so cannot be part of the rulemaking process.

Financial Regulator Requirements Debate

Most observers agree that performing CBA is often a useful tool for the regulatory rule-writing process. However, whether financial regulators should be required to perform CBAs with specified parameters that would be subject to review is a matter of long-standing debate, probably at least in part due to their exemption from E.O. 12866. In addition, the issue may have attracted increased attention in recent years as many financial regulations have been implemented in response to the financial crisis, particularly after the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Some observers argue that financial regulators should maintain a relatively high degree of discretion over the role and form of CBAs in the rule-writing process. They assert

- certain characteristics of the finance industry—discussed in detail below—necessitate CBAs with more easily contestable assumptions and uncertain results than in other industries; and
- performing highly contestable and uncertain CBAs does not discipline agencies, but instead may provide an opportunity for interested parties to impede socially beneficial regulation.

Others argue that financial regulators should be subject to more stringent requirements than is currently the case. They assert

- performing CBAs for regulation of the finance industry does not pose greater difficulties than for regulation of other industries, and imposing requirements on

[50] Cass R. Sunstein, "Financial Regulation and Cost-Benefit Analysis: A Comment," *The Yale Law Journal Forum*, vol. 124 (January 22, 2015), pp. 276; Office of Management and Budget, *Circular A-4*, September 17, 2003, pp. 10, 27.

[51] Administrative Conference of the United States, *Administrative Conference Recommendation 2014-5: Retrospective Review of Agency Rules*, December 4, 2014.

financial regulators would spur them to overcome methodological and other challenges; and

- financial CBAs—despite contestable and uncertain results—would be the best tool for ensuring that regulation is implemented responsibly with due consideration of consequences.

This section presents the two sides of this debate.

Arguments That Financial Regulator Discretion is Appropriate

Some observers assert that performing CBAs for financial regulation is different from other types of regulation. They claim financial regulation CBAs are more uncertain and contestable, and this limits the effectiveness of CBA requirements. Therefore, the argument goes, the CBA requirements facing most regulators would not be appropriate for financial regulators.[52] Others advocate more generally for a relatively high degree of agency discretion to use expert judgement.[53]

One potential reason for greater uncertainty in financial CBA is that the outcomes are almost wholly dependent on human behavioral responses. Unlike regulation of other sectors, the objects of regulation are not chemicals or pieces of machinery, but the activities of individuals and financial firms and their interactions in interrelated markets for intangible financial goods. The behaviors of a pollutant in an ecosystem, a drug in the human body, or material in a car during a crash are governed by biological, chemical, and physical laws. The implementation of a regulation does not change these reactions. However, the behavior and reactions in the financial system are governed by human behavior within a system of laws and regulations. A new regulation changes the system itself and its effects result entirely from human behavioral changes. This may make the effects—especially the first-order, direct effects—harder to accurately predict than in other industries.[54]

For example, if certain factories were required to install a piece of equipment that prevented the release of a pollutant, the cost of the equipment is identifiable and the direct effect of how much of the pollutant would be captured can likely be measured. In contrast, if a requirement is implemented on banks to hold more liquid assets, the cost to banks is uncertain because it depends on what types of assets banks choose to shed from their balance sheets, what they add, and what effect those actions have on the market prices of those assets. It is also unclear how to quantifiably measure the *liquidity* of the financial system or its resultant benefits.

Another reason cited as a potential cause for uncertain estimates is the central role the financial system plays in the entire economy. For most industries, changes in factors such as production cost, price, and quantity demanded and supplied resulting from regulations can be calculated using relatively well-vetted economic models. However, the causal channels through which financial changes affect overall economic activity are complex with no consensus macroeconomic model that can be used to make precise estimates.[55]

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[52] John H. Cochrane, "Challenges for Cost-Benefit Analysis of Financial Regulation," *The University of Chicago Journal of Legal Studies*, vol. 43 (June 2014), pp. S100-S102.

[53] John C. Coates IV, "Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications," *Yale Law Journal,* vol. 124 (2015), pp. 1003-1011.

[54] Jeffrey N Gordon, "The Empty Call for Benefit-Cost Analysis in Financial Regulation," *Columbia Law and Economics Accepted Paper No. 464,* July 2014, pp. 4-8.

[55] John C. Coates IV, "Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications," *Yale Law*
(continued...)

In addition, innovation in finance—unlike innovation in industries using physical equipment and chemical processes—faces few physical constraints, possibly allowing the financial system to change more quickly than other industries. Therefore, estimating how a regulation implemented today will affect markets years in the future is challenging.[56] For example, in the years leading up to the financial crisis, private label sub-prime mortgage securitizations and collateralized debt obligations grew very rapidly and to a level of importance in the financial system that would have been difficult to have foreseen when many regulations were being developed.

Another confounding factor in financial CBA is that for many financial regulation objectives there is not always consensus about whether outcomes are benefits or costs. For example, most agree improved health outcomes are beneficial, and increased consumer prices and industry cost should be counted as costs. However, the cost-benefit tally for financial regulation is sometimes not as clear cut. If a consumer protection provision is expected to reduce a certain kind of high-interest-rate lending, experts might reasonably argue over to what degree this is a benefit versus a cost; it is a benefit to the extent it reduces an abusive practice, but a cost to the extent it reduces the availability of a needed credit source. Often such a lack of clarity arises because the effects of financial regulation often consist largely of wealth transfers between various groups—such as transfers between lenders and borrowers or between businesses seeking to raise capital and investors. CBA is a tool most often used to measure the *net* economic effects, and economic transfers between groups are typically a secondary concern.[57]

Proponents of greater agency discretion argue that placing more stringent requirements on financial regulators for conducting CBAs could potentially make issuing regulations more costly and time consuming. Those proponents argue that increasing CBA requirements could lead agencies to block or delay the issuance of individual regulations, and that over time, this could ultimately result in less stringent regulation.[58]

Proponents of agency discretion further assert that CBAs involving such a high degree of uncertainty and contestable assumptions would not discipline agencies. Instead of increasing accountability and regulatory efficiency, they argue CBAs could disguise agency judgement as objective, scientific measurement. Instead of providing an authoritative rationale for a regulation, they argue requirements would provide an opportunity for parties aiming to protect their own interests—not social welfare—to challenge certain beneficial regulations by offering competing but similarly subjective CBAs.[59]

Arguments That Stricter Requirements on Financial Regulators Are Needed

In contrast, some observers believe that regulatory analysis requirements for financial regulators are not stringent enough. Proponents of increased CBA argue that the challenges facing financial

(...continued)

Journal, vol. 124 (2015), pp. 999-1001.

[56] Ibid, pp. 1002-1003.

[57] John H. Cochrane, "Challenges for Cost-Benefit Analysis of Financial Regulation," *The University of Chicago Journal of Legal Studies*, vol. 43 (June 2014), pp. S87-S92.

[58] See, for example, David M. Driesen, "Is Cost-Benefit Analysis Neutral," *University of Colorado Law Review*, vol. 335 (2006).

[59] John C. Coates IV, "Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications," *Yale Law Journal*, vol. 124 (2015), pp. 898-902.

regulators are not substantively more difficult than those facing other regulators when performing CBA. They note that all regulation elicits uncertain human behavioral responses.[60] For example, the direct effects of antitrust regulation—where CBA plays an important role—similarly are almost entirely based on the reaction of firms, consumers, and markets. They also challenge the claim that financial innovation is especially rapid compared with other industries, citing the rapid advances in agriculture and pharmaceuticals. In addition, the largest financial regulation effects may actually be easier to monetize because they largely involve changes in monetary transactions rather than health or environmental outcomes that involve assigning a dollar value to nonmarket outcomes.[61]

Proponents of stricter requirements also take issue with the argument that the centrality of finance to the economy represents a reason for exemption from CBA requirements. First, they again disagree that estimating financial effects is uniquely and prohibitively complex, noting the sophistication of CBA performed by other regulators. Next, they argue that the potential to cause very large effects across the entire economy *increases* the importance of CBA in financial regulation, because implementing harmful financial regulation is more consequential than if the industry were more peripheral to the economy and had small economic effects.[62]

Proponents further assert that financial regulation CBA seems to face such difficult challenges because it has been exempt from certain requirements and oversight. Other regulators—once faced with similar problems—have overcome challenges because requirements spurred them to develop agency expertise and methods for performing CBA. They argue that if faced with similar requirements financial regulators, experts, and consultants would similarly devise solutions.[63] Some academics have already started to propose methods to address questions specific to the financial industry.[64]

Furthermore, CBA's proponents argue uncertainty and imprecision are not valid reasons for foregoing financial CBA. They note that most CBAs involve some degree of uncertainty and assumptions. Nevertheless, by requiring agencies to perform the analysis, the assumptions used in evaluating the regulation are articulated and transparent, and their merits can be evaluated. Even if estimated outcomes fall over a wide range of values, an analysis can still make an assessment of the likelihood a regulation will be beneficial and how its costs can be minimized. In these ways, they argue uncertain CBAs can play an important role in showing when a proposed regulation is hard to justify or easy to defend. Proponents argue CBAs—despite possible limitations—are the best alternative for identifying good and bad regulations and have rightly become an important and often required part of rulemaking. For these reasons, they assert financial regulators should face requirements similar to those facing regulators of other industries.[65]

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[60] Cass R. Sunstein, "Financial Regulation and Cost-Benefit Analysis," *Yale Law Journal Forum*, January 22, 2015, pp. 263-267.

[61] Eric A. Posner and E. Glen Weyl, "Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms," *Yale Law Journal Forum*, January 22, 2015, pp. 246-257.

[62] Ibid.

[63] Richard L. Revesz, "Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation," *Yale Journal of Regulation* (forthcoming), Vol. 34, No. 2 (2017), pp. 1-44.

[64] Eric A. Posner and E. Glen Weyl, "Benefit-Cost Analysis for Financial Regulation," *American Economic Review*, Vol. 103, No. 3 (2013), pp. 1-5.

[65] Cass R. Sunstein, "Financial Regulation and Cost-Benefit Analysis," *Yale Law Journal Forum*, January 22, 2015, pp. 263-267.

Selected CBA Legislation

A number of bills have been introduced and seen action in recent Congresses that would impose additional regulatory impact analysis requirements on financial regulators, including bills that would impose more stringent CBA requirements. Examples include bills that would impose certain requirements on all agencies, including the financial regulators; bills that address independent or financial regulators specifically; and bills affecting only one financial regulator.[66]

115th Congress

- The Regulatory Accountability Act (H.R. 5) passed the House on January 11, 2017. The bill would make several changes to the rulemaking process of all agencies by amending the Administrative Procedure Act. Among the changes, agencies would have to consider alternatives to the new regulation and the potential costs and benefits of the alternatives. The bill would extend requirements for CBA to all agencies, including independent regulatory agencies.
- The OIRA Insight, Reform, and Accountability Act (H.R. 1009) passed the House on March 1, 2017. The bill, among other measures, would codify into law OIRA authority of reviewing agency CBA in rulemaking. This authority would also be extended to independent regulatory agencies.
- The SEC Regulatory Accountability Act (H.R. 78) passed the House on January 12, 2017. The bill would impose additional cost-benefit requirements for the SEC, would specify parameters and considerations that must be part of the analysis, and would require the SEC to retrospectively assess the impact of adopted regulation.
- The CFTC Commodity End-User Relief Act (H.R. 238) passed the House on January 12, 2017. The bill would expand the number of considerations that CFTC is statutorily required to include in its CBAs from 5 to 12. The additional considerations include the cost of compliance with the regulation and alternatives to direct regulation.

114th Congress

- The Independent Agency Regulatory Analysis Act of 2015 (S. 1607) would have authorized the President to subject independent regulatory agencies to CBA requirements that exist in executive order—such as EO 12866. Notably, this would include the E.O. 12866 requirement that major rules be submitted for OIRA review with an initial cost and benefit assessment.
- Section 612 of the Financial CHOICE Act of 2016 (H.R. 5983) would have required financial regulators to perform certain analyses as part of the rulemaking process, including a quantitative and qualitative assessment of all anticipated direct and indirect costs and benefits of the regulation. Proposed rules found to have quantified costs greater than quantified benefits would require a congressional waiver before being implemented.

[66] This list is not comprehensive but rather a sample of representative bills.

- Bills that would have imposed new analysis requirements on individual financial regulators include the Federal Reserve Accountability and Transparency Act of 2015 (H.R. 113), the Fed Oversight Reform and Modernization Act (H.R. 3189), and the CFPB Dual Mandate and Economic Analysis Act (H.R. 5211).

Conclusion

Congress likely will continue to face questions over what appropriate CBA requirements for financial regulators should be. A reasoned and systematic examination of likely consequences of a regulation is a useful practice to ensure good and avoid bad regulation. However, calibrating requirements to reach this outcome is difficult. Excessively lenient requirements could allow bad regulation to be implemented, because regulators could promulgate regulations without due consideration of their likely effects. On the other hand, excessively stringent requirements could block good regulation from being implemented, because the time and resources required to perform the analysis could make the cost to regulators prohibitively high. The calibration is complicated by the difficulties and uncertainties involved in performing CBA. Additional lack of clarity is involved in financial regulation, because experts disagree over whether CBA is especially difficult and uncertain in that field. These factors suggest that the question of what CBA requirements financial regulators should face may not be easily settled.

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Exhibit 2

Congressional Research Service
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Cost-Benefit and Other Analysis Requirements in the Rulemaking Process

Maeve P. Carey, Coordinator
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December 9, 2014

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Summary

Regulatory analytical requirements (e.g., cost-benefit and cost-effectiveness analysis) have been established incrementally during the last 40 to 50 years through a series of presidential and congressional initiatives. The current set of requirements includes Executive Order 12866 and Office of Management and Budget (OMB) Circular A-4, the Regulatory Flexibility Act (RFA), and the Unfunded Mandates Reform Act (UMRA). These requirements vary in terms of the agencies and rules they cover, and the types of analyses that are required. For example, a regulatory analysis under the Regulatory Flexibility Act is not required if the agency head certifies that the rule will not have a "significant economic impact on a substantial number of small entities."

The most extensive and broadly applicable of the requirements are in Executive Order 12866 and OMB Circular A-4, but they do not apply to independent regulatory agencies. The statutes that provide rulemaking authority to independent regulatory agencies often require them to "consider" regulatory costs and benefits, and they often have less explicit requirements for cost-benefit analysis, if any. An OMB report indicated that independent regulatory agencies provided some information and costs and benefits in 76 of the 118 major rules they issued from FY2003 to FY2012. Cabinet departments and other agencies estimated monetary costs and benefits for some, but not all, of their rules.

Several bills have been introduced in the 113th Congress that would codify and/or expand the current requirements for cost-benefit analysis. Congress could decide to keep the existing analytical framework in place, or could enact one or more of these reform proposals. Another more comprehensive approach could be to consolidate all of the analytical requirements in one place, and perhaps expand those requirements to include more agencies or rules, or to require different types of analysis. To do so, or to simply cover independent regulatory agencies by the executive order, the President could arguably amend Executive Order 12866 and OMB Circular A-4, or Congress could enact legislation. Any such changes must be cognizant of the state of existing law and practice in this area, and the resources and data required for agencies to carry out the analyses.

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Introduction

A common concern voiced by proponents of regulatory reform in recent decades has been that the costs associated with certain regulations outweigh the benefits that the regulations are intended to provide. Another, and somewhat related, view is that more intelligent regulatory policies could achieve the same social goals (e.g., cleaner environment, safer workplaces) at less cost, or could achieve more ambitious goals at the same cost.[1] To improve the quality and effectiveness of federal rules and minimize burden, regulatory reform proponents have frequently advocated greater use of a range of analytic tools during the rulemaking process, including cost-benefit analysis (sometimes referred to as benefit-cost analysis) and cost-effectiveness analysis.[2]

Cost-benefit analysis, in this context, involves the systematic identification of all of the costs and benefits associated with a forthcoming regulation, including nonquantitative and indirect costs and benefits, and how those costs and benefits are distributed across different groups in society. A proposed regulatory requirement is judged to pass the "cost-benefit test" if the sum of its anticipated benefits outweighs, or otherwise justifies, the sum of its present and future costs in present value terms. Cost-effectiveness analysis seeks to determine how a given goal can be achieved at the least cost. In contrast to cost-benefit analysis, the concern in cost-effectiveness analysis is not with weighing the merits of the goal, but with identifying and comparing the costs of alternatives to reach that goal (e.g., in terms of dollars per life saved).

The prospective (also known as *ex ante*) estimates of benefits and costs that are done before rules are issued are necessarily uncertain and heavily dependent on numerous assumptions. Particularly difficult to quantify are long-term or uncertain effects of rules where subtle interactions between various factors are often not well understood or directly measurable. Cost-benefit analysis is particularly controversial when it seeks to rationalize inherent value trade-offs and to place a value on benefits not traded in the market (e.g., health or lives).[3] Also, Congress has required cost-benefit analysis in some statutes (as discussed in detail later in this report), prohibited it in other statutes,[4] and not precluded it in still other statutes.[5] These issues notwithstanding, many economists believe that, when used carefully and with adequate data, cost-benefit analysis can be an effective tool in regulatory decision making.[6]

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[1] See, for example, Tammy O. Tengs and John D. Graham, "The Opportunity Costs of Haphazard Social Investments in Life-Saving," in *Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, Robert W. Hahn, ed. (New York: Oxford University Press, 1996). For a counter argument, see Richard W. Parker, "Grading the Government," *The University of Chicago Law Review*, vol. 70 (Fall 2003), pp. 1345-1486.

[2] See, for example, Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago: American Bar Association, 2002); and Robert W. Hahn and Cass R. Sunstein, "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis," Working Paper 02-4, AEI-Brookings Joint Center for Regulatory Studies, March 2002.

[3] See, for example, Lisa Heinzerling and Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection* (Washington: Georgetown University, 2002).

[4] *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

[5] *Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208 (2009).

[6] See Kenneth J. Arrow, et al*., Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles* (Annapolis: The Annapolis Center, 1996). More recently, an analysis of the comments submitted to the Office of Management and Budget in 2009 regarding possible changes to Executive Order 12866 concluded that none of the commenting regulatory scholars advocated that cost-benefit analysis should be abandoned, or that cost-benefit analysis alone should be the determinative factor in regulatory decisionmaking. See Helen G. Boutrous, "Regulatory (continued...)

Although many federal agencies are currently required to prepare cost-benefit analyses and cost-effectiveness analyses for certain rules before they are published in the *Federal Register*, proposed legislation has been introduced in the 113th Congress to expand those requirements to more agencies and more types of rules, and to produce more detailed analyses. This report identifies a number of those bills, but first describes the existing requirements for cost-benefit and other types of analysis in the federal rulemaking process. It also discusses options for changing the current set of analytical requirements. The report does not, however, attempt to address issues related to the quality of the analyses that agencies develop, or whether agencies use the results of cost-benefit analyses to guide decision making.[7]

Cross-Cutting Regulatory Analysis Requirements

The current set of regulatory analytical requirements has been established incrementally during the last 40 to 50 years through a series of presidential and congressional initiatives, including statutes, executive orders, circulars, and other documents. Those initiatives vary in terms of the agencies and rules they cover, and the types of analyses that are required. Most of the analytical requirements cover Cabinet departments and "independent agencies" such as the Environmental Protection Agency (EPA), but some also cover "independent regulatory agencies" such as the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the Nuclear Regulatory Commission (NRC).[8]

Presidential Initiatives

Each President within the past 40 years has required some form of regulatory analysis before agencies' rules are published in the *Federal Register*. For example:

- In 1971, President Nixon required agencies to develop a summary of their regulatory proposals, a description of the alternatives that they considered, and the costs of those alternatives.[9]
- In 1974, President Ford required agencies to develop an "inflation impact statement" for each major proposed rule.[10]

(...continued)

Review in the Obama Administration: Cost-Benefit Analysis for Everyone," *Administrative Law Review*, vol. 62 (Winter 2010), pp. 252-253.

[7] Various studies have been done over the years assessing the quality of agencies' cost-benefit analyses. See, for example, U.S. General Accounting Office, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses,* GAO/RCED-98-142, May 26, 1998; Richard D. Morgenstern, ed., *Economic Analyses at EPA: Assessing Regulatory Impact* (Washington: Resources for the Future, 1997); and Robert W. Hahn, ed., *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* (Washington: AEI Press, 1996).

[8] As used in this report, the term "independent regulatory agencies" refers to the boards and commissions identified as such in the Paperwork Reduction Act (44 U.S.C. § 3502(5)), including the SEC, the FCC, the NRC, and the Federal Energy Regulatory Commission. The term "independent agencies" refers to other agencies that answer directly to the President, but are not part of Cabinet departments (e.g., EPA, the Social Security Administration, and the General Services Administration).

[9] For more information on this initiative, see http://www.thecre.com/ombpapers/20060130_nixon.html.

[10] Executive Order 11821, "Inflation Impact Statements," 39 *Federal Register* 41501, November 29, 1974.

- In 1978, President Carter required agencies to prepare a regulatory analysis that examined the cost-effectiveness of the alternative regulatory approaches for major rules.[11]

Current broadly applicable cost-benefit analysis requirements in the rulemaking process are primarily traceable to President Reagan's Executive Order 12291, which was issued in February 1981.[12] Under that executive order, the "covered agencies" (Cabinet departments and independent agencies, but not independent regulatory agencies) were generally required to (1) refrain from taking regulatory action "unless the potential benefits to society for the regulation outweigh the potential costs to society," (2) select regulatory objectives to maximize net benefits to society, and (3) select the regulatory alternative that involved the least net cost to society. The order also required covered agencies to prepare a "regulatory impact analysis" for each "major" rule, which was defined as any regulation likely to result in (among other things) an annual effect on the economy of $100 million. Those analyses were required to contain a description of the potential benefits and costs of the rule, a determination of the net benefits of the rule, a description of alternative approaches that could substantially achieve the regulatory goal at lower cost, and an explanation of why those approaches were not selected.

Executive Order 12866

Executive Order 12291 remained in place until September 1993, when President Clinton issued Executive Order 12866.[13] The Clinton executive order, which is still in effect, revoked the Reagan order, but established analytical principles and requirements that are similar (although not identical) to those it replaced. For example, in its "Statement of Regulatory Philosophy" in Section 1(a), Executive Order 12866 states that the "covered agencies" (again, Cabinet departments and independent agencies, but not independent regulatory agencies)[14]

> 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 Executive Order 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

[11] Executive Order 12044, "Improving Government Regulations," 43 *Federal Register* 12661, March 24, 1978.

[12] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 19, 1981.

[13] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993. To view a copy of this order, see http://www.whitehouse.gov/omb/inforeg/eo12866.pdf.

[14] Section 3(b) of Executive Order 12866 states that "'Agency,' unless otherwise indicated, means 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, as defined in 44 U.S.C. 3502(10)." Although the cost-benefit and rule submission requirements in the executive order do not apply to independent regulatory agencies, some parts do (e.g., Section 4(b) relating to the Unified Regulatory Agenda, and Section 4(c) relating to the Regulatory Plan).

- 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";[15] and
- 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 objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."

The heart of the economic analysis requirements is in Section 6 of Executive Order 12866, which differentiates between "significant" and "economically significant" rules. "Significant" rules are defined as those that satisfy 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 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.[16]

Rules fitting the first of these conditions are often referred to as "economically significant" or "major" regulatory actions.[17]

Section 6(a)(3)(B) of Executive Order 12866 states that, for each "significant" regulatory action, covered agencies are to provide to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) a general "assessment of the potential costs and benefits of the regulatory action." However, Section 6(a)(3)(C) of the executive order states that, for each "economically significant" regulatory action, agencies are to also provide to OIRA (unless prohibited by law):

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[15] The requirement that agencies adopt regulations only if the benefits "justify" the costs was 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.

[16] Section 3(f) of Executive Order 12866.

[17] The definition of an "economically significant" regulatory action is very similar to the definition of a "major rule" under the Congressional Review Act (5 U.S.C. § 804(2)): "(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for 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."

> (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;
>
> (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.

In emergency situations, or when an agency is required by law to act more quickly than normal review procedures allow, the rulemaking agency is required to comply with the order's requirements "to the extent practicable."[18] Section 10 of Executive Order 12866 states that nothing in the order affects otherwise available judicial review,[19] and it goes on to say that the order "is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable by law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person."

OMB Circular A-4

In January 1996, OIRA published a document that described "best practices" for preparing the economic analyses called for by the executive order.[20] In essence, the best practices document said that the analysis should (1) clearly state the need for the proposed action (e.g., market failure) and make clear why federal regulation (as opposed to other methods such as state regulation or subsidies) is the appropriate solution, (2) clearly show that the agency considered the most important alternative approaches, and (3) assess the incremental costs and benefits of the proposed action. The best-practices document also stated that cost-effectiveness analysis should be used where possible to evaluate alternatives.

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[18] Section 3(a)(3)(D) of Executive Order 12866.

[19] The Administrative Procedure Act (APA) provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. §§ 702, 704. Judicial review may be invoked under the APA if a plaintiff is "adversely affected or aggrieved" by any final agency action "within the meaning" of the statute at issue. 5 U.S.C. § 702. For more information, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey and Daniel T. Shedd.

[20] This "best practices" document was developed by an interagency group co-chaired by the Administrator of OIRA and a member of the Council of Economic Advisors. The document was revised and issued as guidance in 2000. To view a copy of the best practices document, see http://www.whitehouse.gov/omb/inforeg/riaguide.html.

In September 2003, OMB and the Council of Economic Advisors finalized OMB Circular A-4 on "Regulatory Analysis," which refined and replaced the 1996 best practices document.[21] The circular states that it was "designed to assist analysts in the regulatory agencies by defining good regulatory analysis ... and standardizing the way benefits and costs of Federal regulatory actions are measured and reported."[22] It also states that a "good regulatory analysis should include the following 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."[23]

- With regard to need, OMB 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). The statement of need should also consider other alternatives to federal regulation, including the option of state or local regulation.
- After determining that federal regulation is needed, OMB 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.
- With regard to analytical approaches, the circular states that agencies should use both cost-benefit analysis and cost-effectiveness analysis. 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.[24] 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, OMB 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."[25] Analysts should therefore attempt to quantify benefits or costs as much as possible (e.g., tons of pollution avoided, or the 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.

[21] OMB Circular A-4, "Regulatory Analysis," September 17, 2003. The circular is available at http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/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.

[22] Ibid., p. 1.

[23] Ibid., p. 2.

[24] 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.

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

Although some contend that certain benefits cannot be monetized (e.g., deaths or illnesses avoided),[26] agencies have developed a variety of methods of doing so, often by determining the number of "statistical lives" that the rules are expected to extend or save, and then multiplying that number by an estimated "value of a statistical life" (VSL).[27] OMB Circular A-4 notes that academic studies have identified VSLs from $1 million to $10 million, but it does not recommend that agencies use a particular VSL. In 2009, the Department of Transportation's (DOT's) VSL was $6.0 million while the Environmental Protection Agency's (EPA's) VSL was nearly $7.9 million.[28]

OMB Circular A-4 describes cost-effectiveness analysis as a way to "identify options that achieve the most effective use of the resources available without requiring monetization of all of relevant benefits or costs."[29] It allows analysts to compare a set of regulatory actions with the same primary outcome. For example, the analysis may indicate that one option costing $100 million is expected to save 50 lives (i.e., $2 million per life saved), while another option costing $200 million is expected to save 200 lives during the same period (i.e., $1 million per life saved).

The circular also discusses a variety of other economic analysis issues, including measuring costs and benefits against a baseline (i.e., the way the world would look absent the proposed regulation); discounting when benefits and costs do not occur within the same time period; and how uncertainty should be treated (e.g., ranges, probability distributions, and estimates of expected value). For particularly large rules with annual economic effects of $1 billion or more, agencies are instructed to

> present a formal quantitative analysis of the relevant uncertainties about benefits and costs. In other words, you should try to provide some estimate of the probability distribution of regulatory benefits and costs. In summarizing the probability distributions, you should provide some estimates of the central tendency (e.g., mean and median) along with any other information you think will be useful such as ranges, variances, specified low-end and high-end percentile estimates, and other characteristics of the distribution.[30]

Finally, OMB Circular A-4 provides guidance on the regulatory accounting statements that are required under the Regulatory Right-to-Know Act,[31] and summarizes analytical requirements in other statutes and executive orders.

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[26] Lisa Heinzerling and Frank Ackerman, "Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection," Georgetown University, 2002.

[27] For a summary of those efforts, see CRS Report R41140, *How Agencies Monetize "Statistical Lives" Expected to Be Saved By Regulations*, by Curtis W. Copeland.

[28] Ibid.

[29] OMB Circular A-4, p. 11.

[30] Ibid., p. 40.

[31] 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. The accounting statement is also required to contain an analysis of the impacts of federal regulation on state, local, and tribal governments, small businesses, wages, and economic growth.

Executive Orders 13563 and 13579

Executive Order 13563, issued by President Obama in January 2011, reiterated many of the general principles of regulation in Executive Order 12866.[32] For example, it says covered agencies (Cabinet departments and independent agencies) must (to the extent permitted by law): (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, (2) tailor regulations to impost the least burden on society, and (3) select regulatory approaches that maximize net benefits. It also directs agencies to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." Section 6 of the executive order requires covered agencies to develop a plan under which they would periodically review their existing significant rules. Although the executive order does not apply to independent regulatory agencies, a February 2011 memorandum from the OIRA Administrator encouraged those agencies to "give consideration to all its provisions."[33]

In July 2011, President Obama issued Executive Order 13579, "Regulation and Independent Regulatory Agencies."[34] The executive order encouraged independent regulatory agencies to comply with some of the principles in Executive Order 13563 that were directed to Cabinet departments and independent agencies (e.g., public participation, integration and innovation, flexible approaches, and science), and said independent regulatory agencies "should" develop a plan for the periodic review of their rules. In a separate memorandum issued the same day as the executive order, the President said he was doing so with "full respect for the independence of your agencies."[35] Executive Order 13579 does not, however, directly apply the cost-benefit principles in Executive Orders 12866 or 13563 to independent regulatory agencies, and does not require them to conduct any type of economic analysis before issuing their rules.

Analytical Requirements in Other Executive Orders

In addition to the broadly applicable analytical requirements in Executive Order 12866 and related guidance, several other executive orders have required covered agencies (Cabinet departments and independent agencies) to analyze their regulations for particular purposes. For example:

- Executive Order 13045 on "Protection of Children from Environmental Health Risks and Safety Risks," issued in April 1997, requires each covered agency, "to the extent permitted by law and appropriate, and consistent with the agency's mission," to "address disproportionate risks to children that result from environmental health risks or safety risks."[36] For any substantive rulemaking action that "is likely to result in" an economically significant rule that concerns

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

[33] Memorandum from Cass R. Sunstein, Administrator of OIRA, "Executive Order 13563, 'Improving Regulation and Regulatory Review'," February 2, 2011, available at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.

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

[35] See http://www.whitehouse.gov/the-press-office/2011/07/11/memorandum-regulation-and-independent-regulatory-agencies.

[36] Executive Order 13045, "Protection of Children From Environmental Health Risks and Safety Risks," 62 *Federal Register* 19883, April 23, 1997.

"an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children," the agency must provide OIRA with "an evaluation of the environmental health or safety effects of the planned regulation on children," as well as "an explanation of why the planned regulation is preferable to other potentially and reasonably feasible alternatives considered by the agency."

- Executive Order 13132 on "Federalism," issued in August 1999, requires covered agencies to prepare a "federalism summary impact statement" whenever they issue a rule that has "significant federalism implications."[37] The assessment is to contain "a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met." The executive order says the consultation and impact statement requirements apply "to the extent practicable."[38]
- Executive Order 13175 on "Consultation and Coordination with Indian Tribal Governments" requires covered agencies to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." In addition, the order states that no agency shall promulgate a regulation that has tribal implications and preempts tribal law without first consulting with tribal officials, providing OMB with a "tribal summary impact statement," and making available to OMB any written communications the tribal officials submitted to the agency.[39]
- Executive Order 13211, issued in May 2001, requires covered agencies (to the extent permitted by law) to prepare and submit to OMB a "Statement of Energy Effects" for "significant energy actions."[40] The statement, which is to be published in the proposed rule and the final rule, is to include a detailed statement of "any adverse effects on energy supply, distribution, or use" for the action, and reasonable alternatives and their effects.

None of these executive orders apply to independent regulatory agencies, and all of them give federal agencies substantial discretion to define key terms (e.g., "disproportionately affect," "significant federalism implications," and "significant energy actions") that determine the degree to which they cover agencies' rules.

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[37] Executive Order 13132, "Federalism," 64 *Federal Register* 43255, August 10, 1999.

[38] Executive Order 12612, the previous executive order on federalism, also gave federal agencies broad discretion to determine the applicability of its requirements. GAO examined the implementation of this order and concluded that its analytical requirements were rarely implemented. See U.S. General Accounting Office, *Federalism: Previous Initiatives Have Had Little Effect on Agency Rulemaking*, GAO/T-GGD-99-3, June 30, 1999.

[39] Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," 65 *Federal Register* 67249, November 9, 2000. This executive order was re-emphasized in a memorandum from President Obama in 2009; see Memorandum for the Heads of Executive Departments and Agencies, "Tribal Consultation," November 5, 2009, at http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president.

[40] Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 *Federal Register* 28355, May 22, 2001.

Supplemental Publications

On October 28, 2010, OMB published an agency checklist for the regulatory impact analyses required by Executive Order 12866 and OMB Circular A-4.[41] 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 one that is less stringent), and (6) explains why the planned regulatory action is preferable to those alternatives.

On February 7, 2011, OMB published a document entitled *Regulatory Impact Analysis: Frequently Asked Questions*.[42] Again, OMB said "nothing said here is meant to alter existing requirements in any way." Among other things, OMB indicated the following:

- A rule may be considered "economically significant" if it is expected to have $100 million in costs, benefits, or transfers in any one year, and rules that do not cross that threshold but could 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.

In August 2011, OMB issued a primer to "assist agencies in developing regulatory impact analyses (RIAs), as required for economically significant rules by Executive Order 13563, Executive Order 12866, and OMB Circular A-4." The primer contains nine steps for conducting a proper regulatory impact analysis: (1) describe the need for the regulatory action; (2) define the baseline; (3) set the time horizon of analysis; (4) identify a range of regulatory alternatives; (5) identify the consequences of regulatory alternatives; (6) quantify and monetize the benefits and costs; (7) discount future benefits and costs; (8) evaluate non-quantified and non-monetized benefits and costs; and (9) characterize uncertainty in benefits, costs, and net benefits.[43]

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

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

[43] See http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-(continued...)

Congressional Initiatives

Congress has also required federal agencies to analyze the effect of certain rules before they are issued. Some of the requirements are potentially applicable to a range of agencies and regulations, while other requirements are focused on particular agencies or types of rules (e.g., those affecting the environment or small businesses). In addition to the cross-cutting requirements discussed below, there are many other requirements that are tied to particular agencies and statutes. For example, Section 1102(b) of the Social Security Act (42 U.S.C. §1302(b)) requires the Department of Health and Human Services to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals.[44]

Unfunded Mandates Reform Act

The statutory provisions that most closely approximate the types of analysis required in Executive Order 12866 are in Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. §§1532-1538).[45] Before promulgating a rule containing a mandate that may result in the expenditure of $100 million or more in any one year by the private sector, or by state, local, and tribal governments in the aggregate, UMRA requires covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to prepare a written statement containing (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." The written statement 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. OIRA has primary responsibility for monitoring agency compliance with Title II of UMRA, and publishes an annual report on the implementation of Title II.[46] UMRA provides for limited judicial review of agency compliance with these analytical requirements. Specifically, Section 401(a)(2)(B) states that if an agency fails to prepare the written statement required in Section 202, "a court may compel the agency to prepare such written statement."

As the Government Accountability Office (GAO, formerly the General Accounting Office) pointed out several times during the past 15 years, however, UMRA's analytical requirements do not apply to most economically significant rules, give agencies substantial discretion regarding their implementation, and do not require agencies to do much more than is already required in Executive Order 12866. For example, the requirements in Section 202 of UMRA are not triggered if the agency issues a final rule without a previous notice of proposed rulemaking. (About half of

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44 42 U.S.C. § 1302. The department is not required to prepare the analysis if the final rule is issued without a prior notice of proposed rulemaking.

45 For an overview of UMRA, see CRS Report R40957, *Unfunded Mandates Reform Act: History, Impact, and Issues*, by Robert Jay Dilger and Richard S. Beth.

46 In recent years, OIRA's annual report on UMRA has been combined with its report on the costs and benefits of federal regulations. See, for example, Office of Management and Budget, Office of Information and Regulatory Affairs, *2010 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/legislative/reports/2010_Benefit_Cost_Report.pdf.

all final rules do not have a prior proposed rule.)[47] Also, UMRA does not apply unless there are "expenditures" of at least $100 million in a year (which may not be the same as "impact on the economy" or even "cost"), and does not apply to "voluntary" programs or conditions of federal financial assistance. Agencies do not have to estimate certain effects if they determine such estimates are not "reasonably feasible." In February 1998, GAO reported that, because of the way the statute was written, Title II of UMRA had little effect on agencies' rulemaking actions during its first two years of implementation.[48] In May 2004, GAO again reported that UMRA's written statement requirements did not apply to most major or economically significant final rules issued in 2001 and 2002, even though some of the rules "appeared to have potential financial impacts on affected nonfederal parties similar to those of the actions that were identified as containing mandates at or above the act's thresholds."[49] In February 2011, GAO reiterated these conclusions, noting that there are at least 14 reasons why a rule would not be considered a "mandate" under UMRA.[50]

National Environmental Policy Act

Other statutory analytical requirements have been enacted with regard to particular issues or constituencies. For example, the National Environmental Policy Act (NEPA) 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.[51] 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. As discussed in a separate CRS 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.[52]

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (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

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[47] U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998.

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

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

[50] 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.

[51] For more information, see CRS Report RL33152, *The National Environmental Policy Act (NEPA): Background and Implementation*, by Linda Luther.

[52] CRS Report RS20621, *Overview of National Environmental Policy Act (NEPA) Requirements*, by Kristina Alexander.

including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, Cabinet departments and independent agencies as well as independent regulatory agencies must prepare a "regulatory flexibility analysis" at the time proposed and certain final rules are issued. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.[53]

However, these analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a "significant economic impact on a substantial number of small entities." The RFA does not define "significant economic impact" or "substantial number of small entities," thereby giving federal agencies substantial discretion regarding when the act's analytical requirements are initiated. Also, the RFA's analytical requirements do not apply to final rules for which the agency does not publish a proposed rule, and some agencies do not consider an RFA analysis to be required if the rule is expected to have significant positive effects on small entities.[54]

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. For more than 25 years, however, courts have ruled that agencies need not prepare regulatory flexibility analyses if the effects of a rule on an industry are indirect.[55] Therefore, for example, if a federal agency is issuing a final rule establishing a health standard that is implemented by states or other entities, the federal agency issuing the rule need not prepare a regulatory flexibility analysis even if it is clear that the implementation ultimately will have significant effect on a substantial number of small entities.[56]

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[53] Section 1100G of the Dodd-Frank Act added a requirement to § 603 of the RFA that for covered rules, the Consumer Financial Protection Bureau should include of a number of specific items in their impact analysis, including "any projected increase in the cost of credit for small entities."

[54] 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.

[55] See, for example, *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985).

[56] For example, when EPA published a final rule establishing national ambient air quality standards (NAAQS) for particulate matter in October 2006, the agency certified the rule as not triggering the RFA "because NAAQS themselves impose no regulations on small entities." In its cost-benefit analysis for the rule, EPA estimated the cost of installing controls to meet the health standard at $5.6 billion in 2020. See U.S. Environmental Protection Agency, "National Ambient Air Quality Standards for Particulate Matter; Final Rule," 71 *Federal Register* 61144, 61217. (EPA made the same argument in other rules. See U.S. Environmental Protection Agency, "Primary National Ambient Air Quality Standard for Sulfur Dioxide," 74 *Federal Register* 64810, at 64865, December 8, 2009; and "National Ambient Air Quality Standards for Carbon Monoxide," 76 *Federal Register* 8158, at 8195, February 11, 2011.) In a similar case (continued...)

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. For example, in 1991 GAO reported that each of the four federal agencies that it reviewed had a different interpretation of key RFA provisions.[57] In 1994, GAO again reported that agencies' compliance with the RFA varied widely from one agency to another and that agencies were interpreting the statute differently.[58] In a 1999 report, GAO concluded that agencies had broad discretion to determine what the statute required.[59] In a 2000 report, GAO said that the Environmental Protection Agency (EPA) had certified more than 95% of its final rules issued in the late 1990s, and characterized EPA as having a "high threshold" for analysis (albeit within the discretion permitted in the statute).[60] In all of these reports, GAO suggested that Congress consider clarifying the act's requirements and/or give the Small Business Administration (SBA) or some other entity the responsibility to develop criteria for whether and how agencies should conduct RFA analyses.[61] In 2001, GAO testified that the promise of the RFA may 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.[62] However, other observers have indicated that the definitions of these terms should remain flexible because of significant differences in each agency's operating environment.[63]

Paperwork Reduction Act

Other analytical requirements pertain to certain aspects of the rulemaking process, albeit not the rules themselves. The Paperwork Reduction Act (PRA) (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 the paperwork burden for individuals, small businesses, and others resulting from the collection of information by or for the federal government. The act generally defines a "collection of information" as the obtaining or disclosure of facts or opinions by or for an agency (Cabinet departments and independent agencies as well as independent regulatory

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(*American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999)), affirmed in part and reversed in part, *Whitman v. American Trucking Associations*, 532 U.S. 457 (2001), the U.S. Court of Appeals for the District of Columbia ruled that EPA had complied with the RFA because the states, not EPA, had the direct authority to impose requirements to control ozone and particulate matter consistent with EPA health standards.

[57] U.S. General Accounting Office, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16, January 11, 1991.

[58] U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GGD-94-105, April 27, 1994.

[59] U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999.

[60] U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193. September 20, 2000, p. 31.

[61] Section 612 of the RFA requires the SBA Chief Counsel for Advocacy to "monitor" agencies' compliance with the RFA, but does not require SBA to issue binding rules defining key terms.

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

[63] See, for example, page 17 of the SBA Office of Advocacy's guidance on the implementation of the RFA, available at http://www.sba.gov/sites/default/files/rfaguide.pdf, which says "Significance should not be viewed in absolute terms…." For more information on the RFA, see CRS Report RL34355, *The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms*, coordinated by Maeve P. Carey.

agencies) by 10 or more nonfederal persons. Many information collections, recordkeeping requirements, and third-party disclosures are contained in or are authorized by regulations as monitoring or enforcement tools. In fact, these paperwork requirements are the essence of many agencies' regulatory provisions.[64] The PRA requires agencies to justify any 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.

The original PRA established OIRA 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 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.[65] 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.[66]

Coverage of Analytical Requirements Varies

As the above discussion indicates, the cross-cutting executive order and statutory analytical requirements vary substantially in terms of the types and amount of analysis required, and the agencies and rules that they cover:

- Executive Order 12866 and OMB Circular A-4 contain the most detailed requirements, and cover all rules with a $100 million annual "effect on the economy," but the executive order and the circular do not apply to independent regulatory agencies.
- The Unfunded Mandates Reform Act contains analytical requirements that are somewhat similar to those in Executive Order 12866, but it applies to only a small percentage of the rules that are covered by the executive order because of substantial limitations in the scope of the act's requirements (e.g., UMRA does not apply to independent regulatory agencies, or to rules that are conditions of

[64] For example, Environmental Protection Agency's Toxics Release Inventory (TRI) program is essentially a database created through collections of information imposed on businesses to inform the public about chemical hazards in their communities. TRI reports require businesses in certain industries to report the quantity of any of more than 600 chemicals entering each environmental medium on site, transfers of the chemical in wastes to off-site locations, on-site treatment methods and efficiency, and source reduction and recycling activities.

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

[66] 44 U.S.C. 3507(f). For more information on the PRA, see CRS Report R40636, *Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates*, by Curtis W. Copeland and Vanessa K. Burrows. The authors of that report have left CRS; questions about its content may be directed to the coordinator of this report, Maeve P. Carey.

financial assistance, rules issued without a notice of proposed rulemaking, or rules that do not require $100 million in "expenditures" in a year).

- The Regulatory Flexibility Act is broader than either the executive order or UMRA in that it covers independent regulatory agencies, but the RFA does not apply to rules issued without a notice of proposed rulemaking, or to rules that the agencies certify will not have a "significant economic impact on a substantial number of small entities." Some agencies certify that more than 90% of their rules will not have that impact, and therefore are not required to do the analysis.
- The Paperwork Reduction Act covers independent regulatory agencies, but it only covers agencies' collections of information, not the rules themselves.

Table 1 below summarizes this information, showing that the requirement with most extensive analytical requirements and broad coverage (Executive Order 12866) does not apply to independent regulatory agencies, and the requirements that do apply to independent regulatory agencies (the RFA and the PRA) are more limited in the types of analysis required.

Table 1. Depth and Coverage of Analytical Requirements Vary

Analytical Requirement	Cabinet Departments and Independent Agencies	Independent Regulatory Agencies
Extensive Analytical Requirements and Broad Rule Coverage		
Executive Order 12866 and OMB Circular A-4	Yes	No
Limited Analytical Requirements and/or Narrow Rule Coverage		
Other executive orders	Yes	No
Unfunded Mandates Reform Act	Yes	No
NEPA	Yes	Yes
Regulatory Flexibility Act	Yes	Yes
Paperwork Reduction Act	Yes	Yes

Source: CRS.

Analytical Requirements Applicable to Selected Independent Regulatory Agencies

Although independent regulatory agencies are not covered by the analytical requirements in Executive Order 12866 and OMB Circular A-4, that lack of coverage may be ameliorated if the individual statutes that provide rulemaking authority to these agencies require cost-benefit or other types of economic analysis. This section of the report examines the analytical requirements in the underlying statutes for selected independent regulatory agencies.

Economic Analysis and Banking Agencies

Because of concerns regarding the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010), 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.[67] The five agencies were the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Office of the Comptroller of the Currency (OCC) within the Department of the Treasury, and the Federal Deposit Insurance Corporation (FDIC). The five OIGs provided written responses to the Senators in June 2011, and those responses are summarized below.

Board of Governors of the Federal Reserve System

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."[68] 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."[69]

Securities and Exchange Commission

The SEC OIG report identified several statutory provisions that require the commission to analyze the impact of its rules.[70] For example, the report noted that the National Securities Market Improvement Act (15 U.S.C. §77b(b)) requires the SEC to consider whether an action "will promote efficiency, competition, and capital formation" whenever it is "engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest." Also, Section 23(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. §78w(a)(2)) states that:

> The Commission 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. The Commission and the Secretary of the Treasury 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. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this chapter, the reasons for the Commission's or the Secretary's determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this chapter.

[67] The Senators 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.

[68] 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.

[69] Ibid., p. 7.

[70] 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 (hereinafter referred to as "OIG/SEC").

The OIG noted that the RFA and the PRA apply to SEC rulemaking, and that Executive Order 12866 and OMB Circular A-4 do not apply. Nevertheless, the OIG said that "SEC Chairmen have made a commitment to Congress that the SEC will conduct cost-benefit or economic analyses in connection with its rulemaking activities,"[71] and said that "the Commission's current rulemaking procedures are closely aligned with the requirements" of the executive order and the circular.[72] 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.[73]

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."[74] She reportedly went on to say that "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."[75]

Federal Deposit Insurance Corporation

The 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."[76] However, that act only requires agencies to submit a cost-benefit analysis to the Government Accountability Office if the agency has prepared one for the final rule at issue.[77] The report noted that FDIC is not covered by Executive Orders 12866 and 13563 or OMB Circular A-4, but said the agency had issued a *Statement of Policy on the Development and*

[71] 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.

[72] OIG/SEC, p. 4.

[73] 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.

[74] 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.

[75] In a somewhat related development, on July 22, 2011, the U.S. Court of Appeals for the District of Columbia vacated an SEC final rule on proxy access, saying the Commission acted arbitrarily and capriciously for having failed to assess the economic implications of a rule adequately. *Business Roundtable v. SEC*, D.C. Cir., No 10-1305, July 22, 2010. In particular, 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 (C*hamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005)), the Court said that the agency has a "statutory obligation to determine as best it can the economic implications of the rule." Some observers believe that this case has "elevated the importance of economic analysis in rulemaking to implement" the Dodd-Frank Act. 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.

[76] 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 hereinafter referred to as "OIG/FDIC."

[77] 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)).

Review of FDIC Regulations and Policies that "generally addresses the spirit of, and principles found in, the two executive orders and OMB guidance."[78]

In terms of agency-specific requirements, the FDIC OIG report identified Section 302 of the Riegle Community Development and Regulatory Improvement Act (12 U.S.C. §4802(a)), which states:

> 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 shall 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.

Commodity Futures Trading Commission

The June 2011 CFTC OIG report noted that Section 15(a) of the Commodity Exchange Act (7 U.S.C. §19(a)) requires the agency to consider costs and benefits before issuing certain regulations.[79] Specifically, Section 15(a) states the following:

> Before promulgating a regulation under this chapter ... , the Commission shall consider the costs and benefits of the action of the Commission. The costs and benefits of the proposed Commission action 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.[80]

In light of this requirement, in September 2010, the CFTC Office of General Counsel and Office of Chief Economist created a template for a uniform cost-benefit analysis methodology to be used in Dodd-Frank Act proposed rules.[81] 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."[82] 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."

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

[79] 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, and is hereinafter referred to as "OIG/CFTC." The CFTC OIG had previously issued an April 15, 2011, report in response to a congressional request entitled "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_investigation_041511.pdf.

[80] 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."

[81] OIG/CFTC, Exhibit 1.

[82] OIG/CFTC, p. 3.

In May 2011, the same two offices developed "Staff Guidance on Cost-Benefit Considerations for Final Rulemakings under the Dodd-Frank Act."[83] 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 the Commodity Exchange Act]." Rulemaking teams were allowed to "choose ... quantitative analysis to respond to comments received."[84] The guidance goes 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."[85]

Comptroller of the Currency

Section 315 of the Dodd-Frank Act amended the PRA (44 U.S.C. §3502(5)) to designate OCC, which is an agency within the Department of the Treasury, as an independent regulatory agency. Prior to the Dodd Frank Act, OCC was not considered an independent regulatory agency and therefore was subject to Executive Order 12866 and OMB Circular A-4, as well as the Unfunded Mandates Reform Act. OCC still remains a component of the Department of the Treasury, but because it is designated as an independent regulatory agency under the PRA, OCC is no longer subject to those requirements.

After discussing the applicability of analytical requirements in the RFA and the PRA, the Treasury OIG report[86] noted requirements in the Riegle Community Development and Regulatory Improvement Act ("Riegle Act," 12 U.S.C. §4802(a)), which states:

> 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 shall 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 agencies" is defined in Section 4801 of the Riegle Act (12 U.S.C. §1813) as the "Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation." Therefore, although its OIG did not mention it, the Board of Governors of the Federal Reserve System also appears to be covered by this requirement.

Summary of the OIG Reports

Although the OIG reports identified statutory cost-benefit requirements that are applicable to all five of the independent regulatory agencies, those requirements are not as directive or as detailed

[83] Ibid., Exhibit 2.

[84] Ibid., Exhibit 2, p. 3.

[85] Ibid., Exhibit 2, pp. 6-7.

[86] 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.

as those in Executive Order 12866 or OMB Circular A-4. The statutory requirements often only require the agencies to "consider" costs and benefits, but do not specifically require the agencies to conduct a detailed analysis or to demonstrate that the benefits of their rules exceed or justify the costs. For example:

- The National Securities Market Improvement Act requires the SEC to "consider" whether an action "will promote efficiency, competition, and capital formation," and the Securities Exchange Act of 1934 requires the agency to "consider" the impact that a rule would have on competition.
- The Riegle Act requires the FDIC, the OCC, and the Board of Governors of the Federal Reserve System to "consider ... any administrative burdens that such regulations would place on depository institutions ... [and] the benefits of such regulations."
- The Commodities Exchange Act requires CFTC to "consider the costs and benefits of the action of the Commission."

That lack of specificity notwithstanding, however, it is unclear how these agencies will be able to "consider" regulatory costs and benefits if they do not perform some type of systematic economic analysis of their proposed regulations. In the previously mentioned July 2011 decision by the U.S. Court of Appeals for the District of Columbia involving an SEC rule, the court said that the agency has a "statutory obligation to determine as best it can the economic implications of the rule."[87]

Consumer Financial Protection Bureau

Although not included in the 10 Senators' May 4 letter to the OIGs, the Bureau of Consumer Financial Protection (often referred to as the Consumer Financial Protection Bureau, or CFPB) within the Federal Reserve System is also expected to issue Dodd-Frank Act regulations that will be of interest to financial institutions, the public, and Congress. CFPB was created by Title X of the Dodd-Frank Act, which consolidated many federal consumer protection responsibilities into the bureau. The act 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 the CFPB to issue regulations implementing the statute's provisions.[88]

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, and the impact on consumers in rural areas.

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[87] *Business Roundtable v. SEC*, D.C. Cir., No 10-1305, July 22, 2010, citing *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005).

[88] For information on the rules that CFPB are 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*, 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.

Therefore, CFPB, like the other banking agencies, appears to be required to "consider" costs and benefits before issuing its rules, but is not specifically required to prepare detailed cost-benefit analyses to accomplish that goal.

Consumer Product Safety Commission

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.[89] One of the agencies represented at the hearing was the Consumer Product Safety Commission (CPSC). CPSC Commissioner Robert S. Adler testified that the commission has been required since 1981 amendments to the Consumer Product Safety Act to "conduct an extensive cost-benefit analysis when we promulgate safety rules." He said these provisions "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." Specifically, he noted a number of provisions in the agency's organic statute that require the CPSC to conduct a regulatory analysis prior to issuing a consumer product safety rule.[90] 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."[91] 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 by CPSC Commissioner Anne M. Northup, who said that most of the regulations mandated by the Consumer Product Safety Improvement Act of 2008 (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."[92] She also said that such an analysis would reveal that many of the regulations that the act required to be issued "cannot be justified."

Implementation of Cost-Benefit Requirements

As noted previously in this report, Executive Order 12866 requires covered agencies to prepare cost-benefit analyses only if their rules are expected to be "economically significant" or "major" (e.g., are expected to have a $100 million annual effect on the economy). A 2011 CRS report examined 100 rules issued during calendar year 2010 that OIRA and the agencies considered to be "major," and concluded that 37 of the rules appeared to be major because they involved annual transfers of $100 million in funds from one party to another party, most commonly the transfer of federal funds to the recipients of those funds (e.g., grants, food stamps, Medicare or Medicaid funds, special pay for members of the military, and crop payments).[93] Ten other rules appeared to

[89] U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *The Views of the Independent Agencies on Regulatory Reform*, 112th Cong., 1st sess., July 7, 2011, H.Hrg. 112-71 (Washington: GPO, 2011).

[90] 15 U.S.C. §2058(f).

[91] Ibid., pp. 13-28.

[92] Ibid., pp. 29-53.

[93] CRS Report R41651, *REINS Act: Number and Types of "Major Rules" in Recent Years*, by Maeve P. Carey and (continued...)

be major because they were expected to prompt $100 million or more in annual consumer spending, or because they were establishing fees for the reimbursement of particular federal functions (e.g., issuance of passports and oversight of the nuclear power industry). Thirty-nine rules appeared to be major because they were expected to result in at least $100 million in annual compliance costs, regulatory benefits, or both. In 20 of those 39 rules, estimated annual costs and benefits were both expected to exceed $100 million. In 14 of the 20 rules, the agencies' lowest estimates of regulatory benefits were larger than the highest estimated compliance costs. In only one rule were the lowest costs greater than the highest benefits, and the agency indicated that this result was caused by the lack of discretion provided in the underlying statute.[94]

OMB Annual Reports on Costs and Benefits

OMB's annual reports on the costs and benefits of regulations also indicate the extent to which federal agencies are estimating the costs and benefits of their rules.[95] In the 2013 report, reflecting rules issued during FY2012, OMB reported that executive agencies issued a total of 47 major final rules.[96] Twenty-two of these rules are considered "transfer" rules, which involve monetary transfers. The issuing agencies quantified the amount of the transfer for all but two of these rules. For 14 of the remaining 25 rules, the issuing agencies quantified and monetized both benefits and costs, with annual costs estimated to be between $14.8 billion and $19.5 billion, and annual benefits estimated at between $53.2 billion and $114.6 billion. For the other 11 rules, the agencies monetized only costs or benefits, but not both.

The OMB report also indicated that independent regulatory agencies issued 23 major final rules during FY2012. Seventeen of these 23 rules included some information on the associated costs and benefits. Seven of these rules provided monetized costs, while none provided monetized benefits. The SEC monetized costs for 3 of its 5 rules and 2 of the 3 rules that were issued jointly with the CFTC. The CFTC issued 10 rules in FY2012, 2 of which had monetized costs. There were also 2 rules issued by the CFPB, which included neither monetized costs nor benefits. OMB said that even when these agencies did cost-benefit analyses, it did "not know whether the rigor of the analyses conducted by these agencies is similar to that of the analyses performed by agencies subject to OMB review."[97] OMB went on say the following:

> We emphasize that for the purposes of informing the public and obtaining full accounting, it would be desirable to obtain better information on the benefits and costs of the rules issued

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(...continued)

Curtis W. Copeland. The definitions of "economically significant" and "major" are almost identical.

94 Other rules appeared to be considered major because of increased costs or prices (albeit less than $100 million per year), or for multiple reasons.

95 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.

96 Office of Management and Budget, *2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, May 2013, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/2013_cost_benefit_report-updated.pdf.

97 Ibid., p. 35.

by independent regulatory agencies. The absence of such information is a continued obstacle to transparency, and it might also have adverse effects on public policy.[98]

Previous OMB Reports

Previous OMB reports evidenced the same patterns of analysis. For example:

- In the 2012 report (reflecting rules issued during FY20011), OMB reported that executive agencies issued 53 major final rules, of which 30 were budgetary transfers. For 12 of the remaining 23 rules, both costs and benefits were quantified, with estimated benefits between $34.3 billion and $89.5 billion and estimated costs between $5.0 billion and $10.1 billion. For nine additional rules, the issuing agency was able to identify either costs or benefits, but not both. Independent regulatory agencies issued 17 major final rules in FY2011. None of these included monetized benefits, while six included monetized costs (one from the NRC and five from the SEC).[99]
- In the 2011 report (reflecting rules issued during FY2010), OMB reported that executive agencies issued 66 major final rules. Thirty-two of these rules were budgetary transfers. Eighteen of these rules included monetized costs and benefits, with combined estimated benefits between $18.8 billion and $86.1 billion and estimated costs between $6.5 billion and $12.5 billion. For 10 additional rules, the issuing agency monetized costs or benefits, but not both. Independent regulatory agencies issued 17 major final rules. None of these rules included monetized benefits, while eight included monetized costs. Six of these rules were issued by the SEC, one was issued by the NRC, and one was jointly issued by the Federal Reserve System and the FTC.[100]

Appendix C of the 2013 OMB report provided information on the number of major rules issued by independent regulatory agencies during the 10-year period from October 1, 2003, through September 30, 2012. That information, shown in **Table 2** below, indicates that 64% of agency rules included information on either associated costs or benefits.

Table 2. Independent Regulatory Agencies and Cost-Benefit Analysis: FY2003 Through FY2012

Agency	Major Rules Issued	Major Rules with Some Benefit or Cost Information
Consumer Financial Protection Bureau	2	2
Commodity Futures Trading Commission	11	8

[98] Ibid.

[99] See http://www.whitehouse.gov/sites/default/files/omb/inforeg/2012_cb/2012_cost_benefit_report.pdf for a copy of this report.

[100] See http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf for a copy of this report.

Agency	Major Rules Issued	Major Rules with Some Benefit or Cost Information
Commodity Futures Trading Commission / Securities and Exchange Commission	3	2
Consumer Product Safety Commission	3	1
Federal Communications Commission	13	1
Federal Deposit Insurance Commission / Federal Reserve System / Office of the Comptroller of the Currency	1	0
Federal Energy Regulatory Commission	1	1
Federal Reserve System	16	3
Federal Trade Commission	2	1
Nuclear Regulatory Commission	12	4
Securities and Exchange Commission	54	53
Total	118	76

Source: OMB's 2013 report on costs and benefits, Appendix C.

The CRS and OMB reports suggest several broad conclusions about the current state of regulatory analysis. First, many of the rules for which agencies are required to prepare cost-benefit analyses are "major" for reasons unrelated to regulatory compliance costs. Therefore, although economic analyses of these rules may be appropriate for transparency or other reasons, it may be unlikely that the analyses will result in significantly reduced compliance costs or increased regulatory benefits. Second, Cabinet departments and independent agencies like EPA are more likely to prepare cost-benefit analyses that produce monetized estimates of costs and benefits than independent regulatory agencies. However, not all rules issued by Cabinet departments and independent agencies contained such estimates. When monetary estimates of costs and benefits are available, estimated benefits are generally higher than estimated costs. Finally, some independent regulatory agencies (e.g., the SEC and the NRC) appear to be more likely to estimate at least the costs of their regulations than other independent regulatory agencies (e.g., the FCC and the Federal Reserve System).

December 2013 GAO Report

In December 2013, GAO published a report on regulatory analyses conducted for rules issued under the Dodd-Frank Wall Street Reform and Consumer Protection Act.[101] In that report, GAO concluded that the agencies issuing rules under Dodd-Frank generally completed the analyses that were required in those rules. Most of the agencies issuing rules under Dodd-Frank are

[101] U.S. Government Accountability Office, *Agencies Conducted Regulatory Analyses and Coordinated by Could Benefit from Additional Guidance on Major Rules*, GAO-14-67, December 2013, http://www.gao.gov/assets/660/659586.pdf.

independent regulatory agencies, and, as such, were sometimes required to conduct analyses under the PRA and the RFA. GAO examined a total of 59 "substantive" rules, 10 of which were "major." For the major rules, according to GAO, agencies generally relied on the key elements of OMB Circular A-4 in conducting their analyses.

Regulatory Reform Legislation in the 113th Congress

A number of bills have been introduced in the 113th Congress that would codify, expand, or otherwise modify existing requirements for cost-benefit or other types of regulatory impact analysis. Some of the bills would expand the principles and requirements in Executive Order 12866 to all agencies or rules, some would require cost-benefit analysis by certain agencies, and other bills would modify the analytical requirements in the RFA or UMRA. A few examples of these bills are listed below.[102]

- H.R. 899, the Unfunded Mandates Information and Transparency Act of 2014, would amend the current analysis requirements in UMRA by making those requirements more broad (i.e., by requiring them to be completed for a greater number of rules) and by requiring a more detailed level of analysis.
- H.R. 2122, the Regulatory Accountability Act of 2013, would make several changes to the rulemaking process by amending the Administrative Procedure Act (APA). Among those changes would be a requirement for agencies to conduct cost-benefit analysis when issuing rules, which is not currently required under the APA.
- H.R. 2542, the Regulatory Flexibility Improvements Act of 2013, would amend and expand current analysis requirements under the RFA.
- H.R. 3863 and S. 2099, the Sound Regulation Act of 2014, would amend the APA to require that agencies conduct cost-benefit analysis when issuing rules.
- H.R. 5184 and S. 2153, the National Regulatory Budget Act of 2014, would establish an Office of Regulatory Analysis as an independent establishment in the executive branch that would be required to conduct its own cost-benefit analysis.
- S. 1173, the Independent Agency Regulatory Analysis Act of 2014, would authorize the President to subject independent regulatory agencies to cost-benefit analysis requirements that exist in executive order (discussed above) and do not currently apply to independent regulatory agencies.

Concluding Observations

As the preceding discussion indicates, many federal agencies are already required to conduct cost-benefit and other types of analysis before they issue certain proposed or final rules. These requirements have been added incrementally by various statutes and executive orders during the

[102] Not included in this list are bills whose primary purpose is something other than changing regulatory impact analysis requirements, or bills that would change regulatory analysis requirements for one agency or a small group of agencies (e.g., financial regulators).

past 40 to 50 years, and sometimes require agencies to perform the same general types of analyses. For example, virtually all of the elements of the written statements that agencies are required to prepare pursuant to UMRA were already required by Executive Order 12866 (e.g., quantitative and qualitative estimates of costs and benefits, effects on the national economy, consideration of a range of alternatives, selection of the alternative that is least costly, most cost-effective, or least burdensome, or an explanation of why that alternative was not selected). The drafters of UMRA appear to have recognized the overlap, stating in Section 202(c) of the statute (2 U.S.C. §1534) that an agency may prepare the written statement "in conjunction with or as part of any other statement or analysis." Section 605(a) of the RFA (5 U.S.C. §605(a)) contains the same type of statement.

Also, many of the current requirements have substantial exclusions and exceptions, or give federal agencies substantial discretion to decide whether an analysis is required. For example, the RFA's analytical requirements do not apply to rules that are issued without a prior notice of proposed rulemaking, and agencies can avoid regulatory flexibility analyses if they certify that their rules do not have a "significant" economic impact on a "substantial" number of small entities. UMRA does not apply to independent regulatory agencies, and contains more than a dozen other ways that "economically significant" rules would not be covered by its requirements. Executive orders on children, federalism, and energy permit agencies to escape coverage of their analytical requirements if they conclude the effects of their rules will not have "disproportionate" effects on children, will not have "significant federalism implications," or do not involve "significant energy actions." Executive Order 12866 and OMB Circular A-4 contain some of the most inclusive and far-reaching analytical requirements, but they do not apply to independent regulatory agencies, or to rules that are not "economically significant."

Congressional Options

Congress could decide to keep the existing analytical framework in place. Alternatively, Congress could decide to enact one or more of the bills listed above, perhaps resulting in more analyses being performed, more detailed analyses, or both. Some of these bills would result in substantial changes to the current requirements discussed above, while other bills would not substantially change the nature or number of regulatory analyses that certain agencies would perform. Finally, enacting one or more of the bills would add to the existing, incrementally developed combination of statutes, executive orders, and OMB circulars that covers some agencies and rules but not others, and could potentially be confusing to agencies and the public.

Another, more comprehensive approach could be to consolidate all of the analytical requirements in one place, and perhaps expand those requirements to include more agencies or more rules, or to require different types of analysis for the rules that are covered. Since Executive Order 12866 and OMB Circular A-4 currently contain the most detailed and inclusive analytical requirements, perhaps the easiest way to accomplish that goal would be to add elements to the executive order and circular and ensure that certain agencies and types of economic effects are included (e.g., effects on small entities, or state, local, or tribal governments). The President could arguably make most of these changes by amending the executive order and the circular without congressional action.[103] In 2011, OMB said obtaining better information on the costs and benefits

[103] Commenters at an April 2011 Resources for the Future conference stated that both President Reagan and President Clinton obtained legal opinions from the Office of Legal Counsel at the Department of Justice stating that Executive Orders 12291 and 12866 could cover independent regulatory agencies. However, according to Sally Katzen, President (continued...)

of independent regulatory agencies' rules was "desirable," and described the absence of such information as an "obstacle to transparency" that may be having "adverse effects on public policy."[104] For more than 20 years, the Administrative Conference of the United States and the American Bar Association have recommended that independent regulatory agencies' rules be reviewed by OIRA.[105]

However, expanding the executive order's cost-benefit analysis requirements to independent regulatory agencies, and requiring those agencies to submit their covered rules and analyses to OIRA for review, may trigger resistance by those in Congress and elsewhere who believe these agencies should remain more independent of presidential influence than Cabinet departments or agencies like EPA. Sally Katzen, OIRA Administrator for five years during the Clinton Administration, favors expansion of the executive order's requirements to independent regulatory agencies, and has suggested that a "sense of the Congress" resolution indicating that such a course would be desirable "would go a long way to ameliorate any concerns in that regard."[106]

Another option would be to amend the executive order to require independent regulatory agencies to prepare cost-benefit analyses, but not require them to submit their rules to OIRA for review.[107] If Congress was to establish a "congressional office of regulatory analysis" as is contemplated in H.R. 214 from the 112th Congress (introduced by Representative Don Young on January 7, 2011), then perhaps the rules and analyses could be submitted there.[108] Or, to maintain a measure of independence, the independent regulatory agencies could be required to submit their rules and analyses to OIRA, but the agencies could be given the same type of authority they have with regard to PRA submissions—to override any objections from OIRA by a majority vote of the agency's leadership.[109]

(...continued)

Clinton's OIRA Administrator, the decision not to cover them was reportedly a political, not a legal, determination. See http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_KatzenRemarks.pdf, pp. 2-3.

[104] 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, p. 31, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

[105] Administrative Conference of the United States, ACUS Recommendation 88-1, "Presidential Review of Agency Rulemaking," 1988, available at http://www.law.fsu.edu/library/admin/acus/305889.html. Comments from the American Bar Association on presidential supervision on rulemaking, March 16, 2009 (citing House of Delegates, Recommendation: Presidential Review of Rulemaking (Annual Meeting 1990)), available at http://www.reginfo.gov/public/jsp/EO/fedRegReview/ABANET_comments.pdf. See also the American Bar Association's statement in support of S. 1173, the Independent Agency Regulatory Analysis Act of 2013, at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013sept16_indregagencies_l.authcheckdam.pdf.

[106] Testimony of Sally Katzen before the Senate Committee on Homeland Security and Governmental Affairs, "Federal Regulation: A Review of Legislative Proposals, Part II," July 20, 2011, available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=6b0123b5-c6b2-42f2-9bfa-1b588af931d4. See also Sally Katzen, "Expand Centralized Regulatory Review to Independent Agencies," August 9, 2011, available at http://www.law.upenn.edu/blogs/regblog/2011/08/expand-centralized-regulatory-review-to-independent-agencies.html.

[107] Sally Katzen has suggested that the rules could be submitted to GAO or the Congressional Budget Office. See Sally Katzen, "Expand Centralized Regulatory Review to Independent Agencies," August 9, 2011, available at http://www.law.upenn.edu/blogs/regblog/2011/08/expand-centralized-regulatory-review-to-independent-agencies.html.

[108] Other options include GAO or the Congressional Budget Office, although those agencies would likely require additional resources to take on this responsibility.

[109] See 44 U.S.C. §3507(f).

Codification of Executive Order's Requirements

Alternatively, Congress could decide to enact legislation codifying and expanding the executive order's requirements to cover independent regulatory agencies, and requiring different types of analyses. Supporters of this approach include Susan Dudley, OIRA Administrator for two years during the George W. Bush Administration, who has said codification could (1) signal congressional support for cost-benefit analysis principles, (2) apply the requirements to independent regulatory agencies, and (3) make compliance with the requirements judicially reviewable.[110] She also said that legislation could emphasize certain types of analyses that have been found lacking (e.g., effects on employment or indirect effects). Support has also come from Professor Peter L. Strauss of Columbia Law School, who testified in February 2011 that codifying in one statute the analytic requirements in Executive Order 12866 and elsewhere, and "framing them to permit needed regulation to proceed efficiently, would in my judgment be a highly desirable step."[111]

Other observers, however, have opposed codification of the cost-benefit analysis requirements in Executive Order 12866. For example, Sally Katzen has said that (1) the executive order's requirements have been successfully implemented for more than 30 years (as evidenced by the fact that OMB's reports regularly show that the costs of rules exceed the benefits); (2) even if the executive orders were not working well, there is no evidence that putting the requirements in statutes would make them work better; (3) the executive orders permit Presidents to emphasize different things during their administrations, which would be lost if the requirements were put in statute; and (4) codification of cost-benefit analysis requirements "would be amending a host of previously enacted statutes that either are silent on the role of costs in the formulation of regulations or do not permit the consideration of such factors."[112]

Another option to cover all or some of the independent regulatory agencies by the requirements of Executive Order 12866 would be for Congress to amend the statutory definition of an "independent regulatory agency" that is referenced in the executive order. Executive Order 12866 defines an "agency" as (unless otherwise indicated) "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, as defined in 44 U.S.C. §3502(10)." That definition (which is actually in 44 U.S.C. §3502(5)) lists the agencies considered to be independent regulatory agencies (e.g., CFTC, SEC, FCC, and the NRC), and also says it includes "any other similar agency designated by statute as a Federal independent regulatory agency or commission." Congress could amend this provision, stating that, for purposes of Executive Order 12866, all or certain of these agencies would be covered by the analytical and/or rule submission requirements in the executive order.[113] This

[110] Testimony of Susan E. Dudley before the Senate Committee on Homeland Security and Governmental Affairs, "Federal Regulation: A Review of Legislative Proposals, Part II," July 20, 2011, available at http://www.hsgac.senate.gov/hearings/federal-regulation-a-review-of-legislative-proposals-part-ii, pp. 16-17.

[111] Testimony of Peter L. Strauss before the Subcommittee on Courts, Commercial and Administrative Law, House Committee on the Judiciary, "The APA at 65 – Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?," February 28, 2011, available at pdf http://judiciary.house.gov/index.cfm/2011/2/hearing-on-the-apa-at-65-is-reform-needed-to-create-jobs-promote-economic-growth-and-reduce-costs-0.

[112] Sally Katzen, "Why Congress Should Not Codify Cost-Benefit Analysis Requirements," July 7, 2011, available at http://www.law.upenn.edu/blogs/regblog/2011/06/why-congress-should-not-codify-requirements-for-economic-analysis-of-new-regulations.html.

[113] The scope of any such amendment would likely need to be confined to confined to Executive Order 12866 to avoid affecting other statutes and executive orders that reference the statutory definition of an independent regulatory agency.

approach would not, however, prohibit the President or any future President from amending or revoking the executive order.

Contextual Considerations

Whether done by presidential or congressional action, any effort to consolidate or reform the analytical requirements in rulemaking should be cognizant of the state of existing law in this area. Congress has required cost-benefit analysis in some statutes, prohibited it in other statutes,[114] and not precluded it in still other statutes.[115] Both Executive Orders 12866 and 13563 contain the phrase "to the extent permitted by law" when referencing the principles of rulemaking and the analytical requirements, confirming that agencies must adhere to the requirements contained in their authorizing statutes, and may only apply the principles and procedures of the executive orders if the statutes permit them to do so. Should Congress decide to enact legislation superseding existing law, it should do so in full recognition of the likely consequences.

Presidential and congressional requirements for cost-benefit analysis should also recognize that data availability may be an implementation issue, and that additional resources may be necessary for the agencies conducting these analyses. In some cases, the data that agencies need to estimate the costs and benefits of their rules may not exist, or may only be available from regulated entities.[116] Although there is no "typical" cost-benefit analysis (just as there is no "typical" rule), the cost of conducting many individual regulatory analyses has been in the hundreds of thousands of dollars.[117] If more agencies were required to prepare more detailed analyses for more rules, it is likely that the agencies would make the argument that they would be unable to do so without additional resources.[118]

[114] *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

[115] *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

[116] See, for example, Arthur Levitt, Jr., "Don't Gut the S.E.C.," *New York Times*, August 7, 2011, p. A19, who noted that when he was chairman of the SEC, the data needed to do a cost-benefit analysis was only available from large auditing firms, who would not provide the data. See also U.S. Government Accounting Office, *Federal Water Requirements: Challenges to Estimating the Cost Impact on Local Communities,* GAO-06-151R (December 1, 2005), which reported that local communities often lack the institutional knowledge or historical records on treatment technologies and, as a result, may not be able to provide cost information.

[117] A 1997 study by the Congressional Budget Office concluded that the median cost of 85 analyses conducted between 1990 and 1996 was $270,000, but some of the analyses cost more than $1 million. See Congressional Budget Office, *Regulatory Impact Analysis: Costs at Selected Agencies and Implications for the Legislative Process*, March 1997, available at http://www.cbo.gov/ftpdocs/40xx/doc4015/1997doc04-Entire.pdf. See also U.S. General Accounting Office, *EPA's Costs of Preparing Regulatory Impact Analyses,* GAO/RCED-97-15R (December 6, 1996), which reported that 27 EPA analyses cost about $13 million, or an average of about $480,000 each. The cost of the individual studies ranged from $46,000 to $3.8 million.

[118] After the July 22, 2011, decision regarding the SEC's proxy access rule, the Committee on Capital Markets Regulation (described on its website as an independent and nonpartisan 501(c)(3) research organization dedicated to improving the regulation of U.S. capital markets) released a statement saying, in part, that the SEC and other commissions "will not be able to do the necessary cost-benefit analysis without adequate funding," and went on to say that "we support such funding." See http://www.capmktsreg.org/pdfs/2011.07.27%20Proxy%20Access%20statement.pdf.

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