COMMITTEE ON CAPITAL MARKETS REGULATION

A Balanced Approach to Cost-Benefit Analysis Reform

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Founded in 2006, the Committee on Capital Markets Regulation is dedicated to enhancing the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system.

Our reports and releases provide lawmakers and regulators with concrete policy recommendations based on rigorous empirical research. We support the use of robust cost-benefit analysis as a critical component of financial regulatory reform. Our membership includes thirty-two leaders drawn from the finance, investment, business, law, accounting, and academic communities. The Committee is chaired jointly by Glenn Hubbard (Dean, Columbia Business School) and John L. Thornton (Chairman, The Brookings Institution) and directed by Prof. Hal S. Scott (Nomura Professor and Director of the Program on International Financial Systems, Harvard Law School).

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A Balanced Approach to Cost-Benefit Analysis Reform: Executive Summary of Policy Recommendations

This position paper of the Committee on Capital Markets Regulation (the "**Committee**") sets forth a balanced approach to strengthening the cost-benefit analysis requirements applicable to the independent agencies tasked with implementing regulatory reform of our financial system. The Committee believes that the approach outlined below will maximize the economic efficiency of our regulatory system, minimize procedural burdens on regulators, and help to insulate new rulemakings from judicial challenge:

- **Mandate consistent standards.** Congress should subject all independent financial regulatory agencies to consistent cost-benefit standards. Such standards should focus on both the macroeconomic effects of proposed and final rules (including rules whose intended effects are "deregulatory" in nature) as well as firm- and industry-specific microeconomic effects. Where feasible—and only to the extent feasible—analyses should attempt to quantify the costs and benefits of proposed regulations. Such standards should apply exclusively to agency rulemaking and not to adjudications or other discretionary agency actions. Consistent with the objectives of the Jumpstart Our Business Startups Act, agency cost-benefit analyses should evaluate, where applicable, the disparate impact of new regulations on emerging growth companies. Analyses conducted in accordance with the standards should be subject to the same public notice and comment procedures applicable to agency rulemakings generally.

- **Focus on economically significant rules.** In order to conserve scarce agency resources, cost-benefit analysis should be performed only on the most economically significant rulemakings. The Committee would therefore support appropriate congressional action to revise the SEC and CFTC's authorizing statutes in accordance with this limitation.

- **Subject agency analyses to OIRA review.** As is already the case for executive agencies, Congress should require that independent agencies submit all economically significant proposed and final rules—along with the supporting cost-benefit analysis—to the Office of Information and Regulatory Affairs ("**OIRA**") within the Office of Management and Budget for a non-binding assessment of the agency's cost-benefit analysis. Such OIRA assessments should not be directly reviewable in court, nor should OIRA assessments be binding upon the independent agencies. OIRA's evaluation should be placed in the public rulemaking record.

- **Utilize outside resources and pilot studies.** The Committee would encourage the independent agencies to **outsource cost-benefit studies to non-partisan experts**, where appropriate. We also support the use of tailored **pilot studies** where feasible.

- **Prospectively require retrospective review of existing rules.** Congress should require that agencies engage in the retrospective review of existing "major rules" at regular intervals. Such "look-backs" would include a substantive review of existing regulations and would incorporate analysis of whether a given regulation remains justified from a cost-benefit perspective. To relieve agencies of excessive burdens, such regulatory review should be instituted on a prospective basis only.

- **Modify standard of judicial review.** The Committee supports modifying the scope of judicial review in cases where OIRA has provided a positive assessment of an agency's cost-benefit analysis. Accordingly, the Committee urges congressional action to amend the Administrative

Procedure Act's "arbitrary and capricious" and "substantial evidence" standards so as to raise the evidentiary burdens of petitioners challenging agency rules on cost-benefit grounds.

- **Facilitate information collection.** The Committee supports appropriate revisions to the Paperwork Reduction Act to the extent that it currently restricts agencies from obtaining critical data from market participants for purposes of performing robust cost-benefit analyses or designing pilot programs.

- **Devote adequate resources to cost-benefit analysis.** While cost-benefit analysis should be pursued as a key agency objective irrespective of funding levels, the Committee supports increasing the budget and resources of the independent financial regulatory agencies and OIRA in line with these expanded cost-benefit obligations.

- **Re-propose vulnerable rules.** To the extent that any Dodd-Frank rule is, in the judgment of the proposing agency, potentially subject to a successful legal challenge, the Committee would encourage agencies to re-propose any such rule in accordance with these recommendations.

A Balanced Approach to Agency Cost-Benefit Analysis Reform

The need for robust cost-benefit analysis of new financial regulations has never been more evident, particularly as regulators finalize implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1] Yet choosing the least burdensome regulatory alternative is not only good policy—it is also the law.

Inadequate cost-benefit analysis jeopardizes numerous Dodd-Frank Act rulemakings by exposing them to the risk of legal challenge. In some cases, courts have already invalidated agency rulemakings on grounds of inadequate cost-benefit analysis. The result has been to delay implementation of important reforms. Even where rules are ultimately upheld, the threat of judicial censure casts a pall of uncertainty over the financial industry and hampers the recovery of financial markets and the real economy.

Since its founding in 2006, the Committee on Capital Markets Regulation (the "**Committee**") has consistently advocated the application of cost-benefit analysis principles to the design of financial regulations. This position paper sets forth a balanced approach to cost-benefit analysis that seeks to maximize economic efficiency, minimize procedural burdens on regulators, and help to insulate new rulemakings from judicial challenge.

Scope of the Problem: The Dodd-Frank Act, Cost-Benefit Analysis, and the Courts

The passage of the Dodd-Frank Act launched an unprecedentedly intense period of rulemaking for the six major independent financial regulatory agencies: the Securities and Exchange Commission (the "**SEC**"), the Commodity Futures Trading Commission (the "**CFTC**"), the Federal Reserve System (the "**Fed**"), the Federal Deposit Insurance Corporation (the "**FDIC**"), the Office of the Comptroller of the Currency (the "**OCC**"), and the Consumer Financial Protection Bureau ("**CFPB**"). While the end of the initial rulemaking phase is in sight, a number of significant rulemakings have yet to be finalized, including the so-called "Volcker Rule."

The regulatory process does not end with the issuance of a final rule. Agency rulemaking procedures—in particular, agency cost-benefit analysis protocols—have been increasingly subjected to judicial scrutiny. As recent court decisions have made clear, it is critical that financial regulatory agencies cease producing "cost-benefit analyses . . . [that] read as if they were written by lawyers trying to make a plausible case for a precooked conclusion, rather than as a rigorous analysis based on actual data and solid scientific methods."[2] At best, litigation over the adequacy of the rulemaking process represents a costly delay, as arguments wend their way through the court system over months and years. At worst—where a rulemaking is ultimately invalidated—agency resources are needlessly wasted as regulators return to the drawing board to produce an enhanced cost-benefit analysis that could and should have been undertaken in the first instance. Judicially rejected rulemakings also subject agencies to significant reputational harm and undermine regulatory credibility. In the meantime, market participants and investors are left mired in uncertainty. Various constituencies will disagree over the efficacy and necessity of many Dodd-Frank Act provisions, but all should agree that regulatory uncertainty, compounded by years of legal fees and resource drainage, is a suboptimal outcome for the administrative state.

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code) (the "**Dodd-Frank Act**").
[2] Jonathan D. Guynn, *The Political Economy of Rulemaking After* Business Roundtable, 99 VA. L. REV. 641, 642 (2013).

SEC & CFTC

Courts sitting in review of agency rulemakings have generally looked first to legislative cost-benefit analysis requirements contained in the statutes of the independent agencies, in particular, those of the SEC and CFTC.

Under the National Securities Markets Improvement Act of 1996,[3] Congress amended federal securities law "to promote efficiency and capital formation in the financial markets,"[4] requiring that "[w]henever . . . the [SEC] is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the [SEC] shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[5] The legislative history suggests—and the U.S. Court of Appeals for the District of Columbia Circuit (the "**D.C. Circuit**") has held—that the statutory language imposes an obligation on the SEC to weigh the costs and benefits of proposed regulation.[6] Similarly, the CFTC's governing statute, the Commodity Exchange Act,[7] requires that the CFTC "consider the costs and benefits" of its regulatory actions and enumerates specific criteria for the conducting of such analysis, including "considerations of protection of market participants and the public; considerations of the efficiency, competitiveness, and financial integrity of futures markets; considerations of price discovery; considerations of sound risk management practices; and other public interest considerations."[8]

On July 22, 2011, a panel of the D.C. Circuit vacated and remanded the SEC's rulemaking on shareholder proxy access in the leading case of *Business Roundtable v. SEC*.[9] As the court noted, this was not the first time that an SEC rule had been faulted for insufficient cost-benefit analysis. In 2005 and 2010, panels of the D.C. Circuit similarly rejected SEC rules dealing with mutual fund governance and SEC jurisdiction over fixed indexed annuities, respectively, in each case on cost-benefit analysis grounds.[10] In 2010, the SEC adopted Rule 14a-11[11] under the Securities Exchange Act of 1934,[12] requiring any reporting company, subject to certain conditions, "to include in its proxy statement and form of proxy the name of a person or persons nominated by a shareholder or group of shareholders for election to the board of directors and include in its proxy statement the disclosure about such nominee or nominees and the nominating shareholder or members of a nominating shareholder group."[13] Two dissenting SEC commissioners specifically faulted the adopting release for its inadequate and tendentious

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[3] National Securities Markets Improvement Act of 1996, Pub. L. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C.).
[4] *Id.*
[5] 15 U.S.C. § 77b.
[6] *See generally* Paul Rose & Christopher Walker, *The Importance of Cost-Benefit Analysis in Financial Regulation*, CTR. FOR CAPITAL MKTS. COMPETITIVENESS 24–33 (2013), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CBA-Report-3.10.13.pdf.
[7] Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. §§ 1-27f (2006)). The Commodity Exchange Act was amended in 2000 by the Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763.
[8] 7 U.S.C. § 19(a)(2).
[9] Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).
[10] Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005); Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010).
[11] 17 C.F.R. §§ 200.82a, 232.13, 240.13a-11 to .15d-11, 249.308.
[12] Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq.
[13] 17 C.F.R. § 240.14a-11.

economic analysis.[14] The Business Roundtable and Chamber of Commerce of the United States challenged the SEC in court, arguing, *inter alia*, that the agency had violated the Administrative Procedure Act in promulgating the rule, because it had neglected its statutory obligations to consider the effects of Rule 14a-11 on "efficiency, competition, and capital formation."[15] Judge Douglas Ginsburg, writing for a unanimous panel, agreed with petitioners, holding that the agency had "failed once again . . . adequately to assess the economic effects of a new rule"[16] and sharply rebuking the agency: "Here the [SEC] 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."[17] Clearly significant in the court's analysis was the context that the SEC had in two prior cases failed to meet its cost-benefit analysis requirements, in *American Equity Investment Life Insurance Company v. SEC*[18] and *Chamber of Commerce v. SEC*.[19]

The court found that the SEC's "prediction [that] directors might choose not to oppose shareholder nominees had no basis beyond mere speculation"[20]; that the agency "did nothing to estimate and quantify the costs it expected companies to occur[,] nor did it claim estimating those costs was not possible, for empirical evidence about expenditures in traditional proxy contests was readily available"[21]; and that the agency "relied upon insufficient empirical data" by favoring "two relatively unpersuasive studies" and "completely discount[ing]" other studies submitted by commenters that contradicted the SEC's desired outcome.[22] The court also agreed with petitioners that the SEC failed to assess costs at the margin, which the court characterized as "illogical and, in an economic analysis, unacceptable."[23] The SEC was found to have "duck[ed] serious evaluation" of the costs of Rule 14a-11 arising from use of the rule by special interest shareholders, such as union and government pension funds, and to have "arbitrarily ignored the effect of the final rule upon the total number of election contests," a key factor in determining whether or not the rule's claimed benefits would be realized.[24] In dicta, the court also indicated that the SEC's failure to address adequately the application of the rule to investment companies would be an independent basis for invalidation of the rule.[25]

Reaction to the *Business Roundtable* decision was swift. Some have criticized the D.C. Circuit for raising the procedural requirements of agency rulemakings beyond the capacity of the limited regulatory

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[14] *See* Troy A. Paredes, Comm'r, Sec. & Exch. Comm'n, Speech at Open Meeting to Adopt the Final Rule Regarding Facilitating Shareholder Director Nominations (Aug. 25, 2010); Kathleen L. Casey, Comm'r, Sec. & Exch. Comm'n, Speech at Open Meeting to Adopt Amendments Regarding Facilitating Shareholder Director Nominations (Aug. 25, 2010).
[15] 15 U.S.C. § 78c(f).
[16] Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).
[17] *Id*. at 1149.
[18] Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2009) (vacating SEC rule subjecting fixed indexed annuities to federal regulation for failure "to properly consider the effect of the rule upon efficiency, competition, and capital formation.").
[19] Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005) (holding that the SEC violated the Administrative Procedure Act by "failing adequately to consider the costs mutual funds would incur in order to comply with the conditions and by failing adequately to consider a proposed alternative" with respect to the SEC's regulation of mutual fund board member independence).
[20] Bus. Roundtable, 647 F.3d at 1150.
[21] *Id*.
[22] *Id*. at 1151.
[23] *Id*.
[24] *Id*. at 1153.
[25] *See id*. at 1154–1156.

resources available.[26] Others have argued that in invalidating the rule the court disregarded the will of Congress, which explicitly granted the SEC statutory authority to adopt a proxy access rule via Section 971 of the Dodd-Frank Act (although stopping short of mandating that the agency do so).[27] Some commentators were "struck by just how meticulous the [D.C.] Circuit panel expected the SEC to be in assessing the 'economic effects' of its rules" and speculated that the *Business Roundtable* decision might provide a roadmap for future rule challenges.[28]

Rather than appeal to the Supreme Court, the SEC responded to the D.C. Circuit's opinion by promulgating a set of cost-benefit analysis guidelines adopting the key holdings of the case (the "**Current Guidance**") and establishing "high-quality economic analysis [as] an essential part of SEC rulemaking,"[29] in effect conceding the thrust of Judge Ginsburg's analysis. The SEC has recognized the need to consider the overall economic impact of its rules, including both for rulemakings pursuant to Congressional mandates as well as the SEC's own discretionary rulemakings. The SEC has acknowledged that this approach will provide the most complete evaluation of a rule's economic effect, particularly because in many cases it is difficult to distinguish between mandatory and discretionary aspects of a rule. While results have been mixed, some recent SEC rulemakings—including the proposed rules on cross-border security-based swap activities[30] and money market fund reform[31]—have included dramatically improved cost-benefit analyses.

On June 6, 2013, the SEC's Inspector General released a report on cost-benefit analysis in response to a request by the chairmen of the House Committee on Oversight and Government Reform and Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs.[32] The congressmen had requested that the Inspector General "report on the degree to which the economic analyses supporting proposed and final [SEC] rules follow the principles and policies of the Current Guidance."[33] The Inspector General reported that the sampled SEC rules "followed the spirit and intent of the Current Guidance" and "specified the justification for the rule, considered alternatives, and integrated the economic analysis into the rulemaking process."[34] The Inspector General's report did, however, note certain areas for potential improvement, including the need to clarify the economic baselines against which proposed rules are measured. Moreover, of the twelve rules sampled by the Inspector General, only

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[26] *See*, *e.g.*, David Martin, *Implications of the Proxy Access Case*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Aug. 23, 2011, 9:15 AM), *available at* http://blogs.law.harvard.edu/corpgov/2011/08/23/implications-of-the-proxy-access-case (noting that the decision requires "substantial economic analysis that may be beyond the resources that the agency can reasonably expend on any one rulemaking").

[27] *See*, *e.g.*, Jill E. Fisch, *The Long Road Back:* Business Roundtable *and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 695, 697 (2013).

[28] Melinda Brunger et al., *DC Circuit Panel Vacates Proxy Access Rule*, ANDREWS KURTH LLP (July 28, 2011), *available at* http://www.andrewskurth.com/pressroom-publications-815.html.

[29] Memorandum from SEC Div. of Risk, Strategy & Fin. Innovation and Office of the Gen. Counsel to Staff of the Rulewriting Divs. and Offices on Current Guidance on Economic Analysis in SEC Rulemakings 1 (Mar. 16, 2012), *available at* http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

[30] Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30,967 (proposed May 23, 2013) (to be codified at 17 C.F.R. pt. 240, 242, 249).

[31] Money Market Fund Reform; Amendments to Form PF, 78 Fed. Reg. 36,833 (proposed June 19, 2013) (to be codified at 17 C.F.R. pts. 210, 230, 239, 270, 274, 279).

[32] Sec. & Exch. Comm'n Office of Inspector Gen., *Use of the Current Guidance on Economic Analysis in SEC Rulemakings* (June 6, 2013), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2013/518.pdf.

[33] *Id*. at i.

[34] *Id*. at ii.

one provided a quantified estimate of the benefits of the proposed regulatory action, and where the agency had determined that such quantification was impossible, the reasons for such determination were not always carefully elucidated.[35] The Inspector General offered six policy recommendations, including, *inter alia*, improvements to the agency's documentation of its cost-benefit procedures, style guides to improve the consistency of cost-benefit presentations in agency rules, and exploration of alternative estimation methodologies.

On June 25, 2013, in *Investment Company Institute v. CFTC*,[36] a panel of the D.C. Circuit distinguished the *Business Roundtable* opinion in upholding the CFTC's statutory cost-benefit analysis of its commodity pool operator rule, concluding that unlike the SEC in the *Business Roundtable* decision, the CFTC had adequately considered the *ex ante* regulatory baseline in promulgating the rule and had met its statutory obligations. The rules in question governed the registration of commodity pool operators, as well as other related regulatory issues, such as disclosure, recordkeeping, and reporting. Appellants had alleged that the CFTC's adoption of certain amendments to its commodity pool operator rules was invalid due to, among other reasons, inadequate cost-benefit analysis. Specifically, appellants had argued that the CFTC had ignored a separately existing SEC regulatory framework that could independently provide the CFTC's desired information on investment companies' engagement in derivatives markets without the need for new CFTC regulation. The court distinguished its *Business Roundtable* and *American Equity* decisions, holding that unlike the SEC in those prior cases, the CFTC had adequately demonstrated the marginal benefit of its additional regulations. The court also rejected the appellants complaint that the CFTC "failed to put a precise number on the benefit of data collection in preventing future financial crises," stating that "the law does not require agencies to measure the immeasurable" and holding that the CFTC's "discussion of unquantifiable benefits fulfills its statutory obligation to consider and evaluate potential costs and benefits."[37] While the court's holding might appear to limit the scope of the *Business Roundtable* decision, *Investment Company Institute* dealt with registration and reporting requirements rather than a fundamental substantive aspect of corporate governance, like the SEC's proxy access rule. It is possible that more substantive rules akin to the SEC's Rule 14a-11 would be subject to greater scrutiny. Furthermore, the court held that appellants had failed to show that the CFTC's "refusal to gather additional market data as suggested by commenters" was arbitrary and capricious, in part, because addressing the appellants' asserted lack of data was one of the objectives of the regulation in question.[38]

It is clear that, despite its progress, concerns remain with respect to the level and quality of the SEC's cost-benefit analysis. On July 2, 2013, Judge Bates of the U.S. District Court for the District of Columbia vacated and remanded an SEC rule that required disclosure of payments to foreign governments in connection with certain extractive industries.[39] Plaintiffs argued that local law in four key countries prohibited such disclosures and that, as a result, plaintiffs could be exposed to billions of dollars in losses if excluded from those markets. The SEC countered that a broad exemption would eviscerate the relevant Dodd-Frank Act requirement by allowing any affected country to pass a law barring disclosure but did not address narrower exemptions. Judge Bates vacated the rule on two grounds: (i) that the SEC had misread the statute as to the scope of public disclosure of the payment reports, and (ii) that a "fuller [cost-benefit] analysis was warranted" and that "a general statement about incentive problems with a broad version of the exemption does not satisfy the requirement of reasoned decision[-]making when, by the [SEC's] own estimates, billions of dollars are on the line."[40]

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[35] *Id*.
[36] *See* Inv. Co. Inst. v. U.S. Commodity Futures Trading Comm'n, No. 12-5413, at 12–13 (D.C. Cir. 2013).
[37] *Id*. at 15.
[38] *Id*. at 16.
[39] *See* Am. Petroleum Inst. v. SEC, 714 F.3d 1329 (D.C. Cir. 2013).
[40] *Id*. at 26.

On July 23, 2013, Judge Wilkins of the U.S. District Court for the District of Columbia rejected a challenge of the SEC's conflict minerals rule brought by the National Association of Manufacturers, the Chamber of Commerce of the United States, and the Business Roundtable.[41] The plaintiffs asserted a number of administrative and constitutional law theories, including that the SEC had failed to fulfill its statutory obligations (i) to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"[42] and (ii) "in making rules and regulations . . . [,] [to] consider among other matters the impact any such rule or regulation would have on competition," and "not [to] adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes [of the statute]."[43] Judge Wilkins's analysis of the statutory language focused on the word "consider," holding that the plain text of the statute mandates only that the SEC give *consideration* to a rule's economic effects and that "to suggest that the Exchange Act mandates that the SEC conduct some sort of broader, wide-ranging benefit analysis simply reads too much into this statutory language."[44] Judge Wilkins distinguished the essentially humanitarian context of the conflict minerals rule from the standard economic milieu of SEC regulations.[45] Judge Wilkins also distinguished earlier cases, including *Business Roundtable* and *American Equity*, as cases "involv[ing] rules or regulations that were proposed and adopted by the SEC of its own accord, with the [SEC] having independently perceived a problem within its purview and having exercised its own judgment to craft a rule or regulation aimed at that problem."[46] By contrast, the conflict minerals rule was adopted by the agency pursuant to the express will of Congress as reflected in the Dodd-Frank Act. Finally, Judge Wilkins held that the SEC adopted reasonable procedures in weighing the wide-ranging cost analyses submitted by commenters and that the agency did not arbitrarily reject cost analyses with which it disagreed substantively.[47]

The Committee believes that this case presents Congress with an additional reason to clarify the precise duties and standards to which all independent agencies should be subject. We therefore recommend that Congress issue consistent standards of cost-benefit analysis to which all independent financial regulatory agencies are unambiguously subject. Such standards should make clear that even in cases where, as in the conflict minerals decision, agency action is compelled by congressional mandate, cost-benefit analysis must still play a critical role in determining the most cost-effective of all regulatory alternatives, whether humanitarian, economic, or some other objective underlies the statute and rule in question. Where feasible, cost-benefit analyses should attempt to quantify the costs and benefits of proposed regulations, acknowledging that in some cases this may prove impossible.

On May 9, 2012, the CFTC signed a voluntary memorandum of understanding with the Office of Information and Regulatory Affairs ("**OIRA**") within the White House Office of Management and Budget ("**OMB**"), pursuant to which OIRA staff is permitted to provide "technical assistance" to the agency in promulgating Dodd-Frank Act rules. The incidence of quantitative analysis performed by the CFTC has increased since OIRA began providing technical support, and the length, detail, and quality of the analysis have improved to a degree.

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[41] Nat'l Assoc. of Mfrs., et al. v. SEC, No. 13-cv-635 (RLW) (D.D.C. July 23, 2013), *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2013cv0635-37.
[42] 15 U.S.C. § 78c(f).
[43] 15 U.S.C. § 78w(a)(2).
[44] Nat'l Assoc. of Mfrs., et al. v. SEC, No. 13-cv-635 (RLW), at 19 (D.D.C. July 23, 2013), *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2013cv0635-37.
[45] *Id*.
[46] *Id*. at 21.
[47] *Id*. at 27.

CFTC	Prior to May 9, 2012		After May 9, 2012	
	Number	**Percentage**	**Number**	**Percentage**
No Cost-Benefit Analysis	1	2.6%	0	0.0%
Non-Quantitative	24	63.2%	7	30.4%
Quantitative	13	34.2%	16	69.6%
Total	38	100.0%	23	100.0%

Despite the marked improvements to certain rulemakings in the wake of the *Business Roundtable* decision, data assembled by the Committee reveal that the SEC and CFTC still often fall short of conducting meaningful cost-benefit analysis of new regulations. Between July 22, 2011 (the date of the *Business Roundtable* decision) and August 29, 2013, 37.3% of proposed or final rules of the SEC and CFTC included either no cost-benefit analysis or only non-quantitative analysis:

	Number of Rules (post-July 22, 2011)	**Percentage**
No Cost-Benefit Analysis	1	1.3%
Non-Quantitative	27	36.0%
Quantitative	47	62.7%
Total	75	100.0%

Overall, through August 29, 2013, the SEC and CFTC issued 117 proposed or final rules under the Dodd-Frank Act, yet 45.3% have included either no cost-benefit analysis or only "soft" non-quantitative analysis.

	Number of Rules	**Percentage**
No Cost-Benefit Analysis	1	0.9%
Non-Quantitative	52	44.4%
Quantitative	64	54.7%
Total	117	100.0%

Note that the standard used to calculate these figures significantly overstates the degree of analysis performed by the agencies. Some rules categorized as quantitative include only a perfunctory "paperclip counting" analysis under the Paperwork Reduction Act.[48] Indeed, many of these rulemakings display the same myopia as the SEC's rule implementing Section 404 of the Sarbanes-Oxley Act of 2002 ("**SOX 404**"),[49] where the agency famously estimated annual costs of implementation per company at "$91,000."[50] The agency's estimate is now known to have been off by a factor of 48.[51] Even where such firm-specific estimates are accurate, a far more useful cost-benefit analysis would provide a "macro" view of the world pre- and post-implementation of a proposed rule. For example, rather than attempt to estimate the costs of SOX 404 on individual companies, a more complete analysis would have focused on the proposed rule's competitive effects for public capital markets, including the extent to which SOX 404

[48] 44 U.S.C. § 2501-3521.

[49] Sarbanes-Oxley Act of 2002 § 404, 15 U.S.C. § 7262.

[50] Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, 69 Fed. Reg. 9,722 (Mar. 1, 2004).

[51] *Sarbanes-Oxley 404: Will the SEC's and PCAOB's New Standards Lower Compliance Costs for Small Companies?: Hearing Before the H. Comm. on Small Bus.*, 110th Cong. (2007) (statement of Hal S. Scott, Dir. of Comm. on Capital Mkts. Regulation).

would drive companies to private markets or deter foreign companies from tapping U.S. capital markets at all. Other rules categorized as non-quantitative in the above tables contain only a recitation of the agency's statutory requirements.

Fed, FDIC, & OCC

The federal banking agencies—namely, the Fed, the FDIC, and the OCC—are subject to lesser statutory requirements than either the SEC or the CFTC, and the statutory focus is on weighing regulatory benefits against "administrative burdens" rather than the expected economic effects of new regulation.[52] In 2011, Republican members of the Senate Committee on Banking, Housing, and Urban Affairs requested information on the use of economic analysis in connection with specific Fed rulemakings.[53] Elise M. Ennis, the Acting Inspector General of the Fed, reviewed the various authorizing statutes to which the Fed is subject, concluding that "[a] number of key statutes related to the [Fed's] regulatory authority, including the Federal Reserve Act and the Bank Holding Company Act of 1956, . . . do not require economic analysis as part of the agency's rulemaking activities."[54] The response indicates that while the requirements of Executive Orders 12,866 and 13,563 do not apply to the Fed as an independent agency, "the [Fed] conducts its rulemaking activities in a manner that is generally consistent with the philosophy and principles outlined in the Executive orders,"[55] although not with OMB's Circular A-4 (see below). The approach of the FDIC and OCC has been similar.

The effect of these agencies' statutes on the amount and quality of cost-benefit analysis in banking regulation is dramatic. As the agency-by-agency data in **Appendix A** show, through August 29, 2013, the three banking agencies have conducted either *no cost-benefit analysis* or *only qualitative analysis* on 73.2%, 67.9%, and 56.3% of proposed and final rules, respectively.

Cost-Benefit Analysis: A Bipartisan Initiative

As President Barack Obama noted in a 2012 executive order, rigorous quantitative analysis of the effects of proposed regulation is necessary in order to "reduce unjustified regulatory burdens and costs."[56] Indeed, cost-benefit analysis is a commonsense approach to regulatory reform that has garnered the support of both Republican and Democratic administrations in recent decades:

- *Reagan Administration*. In 1981, President Ronald Reagan issued Executive Order 12,291 (the "**Reagan Order**"), which required, *inter alia*, that "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society" and that "[a]mong alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen."[57] The Reagan Order further specified that executive agencies must prepare a

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[52] Riegle Community Development and Regulatory Improvement Act of 1994 § 302, 12 U.S.C. § 4802.
[53] Letter from Republican Members of U.S. Senate Comm. on Banking, Hous. & Urban Affairs to Inspectors Gen. of the Fed, SEC, CFTC, FDIC & Dep't of Treasury (May 4, 2011), *available at* http://www.nafcu.org/WorkArea/DownloadAsset.aspx?id=22369&libID=22387.
[54] Office of Inspector Gen., Bd. of Governors of the Fed. Reserve Sys., *Response to a Congressional Request Regarding the Economic Analysis Associated with Specified Rulemakings* 6 (2011), *available at* http://www.federalreserve.gov/oig/files/Congressional_Response_web.pdf.
[55] *Id.* at 9.
[56] Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 10, 2012).
[57] Exec. Order No. 12,291, § 2, 3 C.F.R. 127, 128 (1981).

"Regulatory Impact Analysis" in connection with any "major rules"[58] and submit the analysis to the Director of the OMB for review along with all proposed and final rules. During OMB's review of a proposed rule, an agency was required to refrain from publishing a notice of proposed rulemaking, and publication of a final rule was prohibited "until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file."[59] Regulatory Impact Analyses, while not themselves directly reviewable in court, were required to be included in the administrative record. Critically, however, the Reagan Order *excluded* independent agencies from its scope. Although the Department of Justice and various scholars have generally agreed that the presidency retains the constitutional authority to require OIRA review of independent agencies,[60] the Reagan Administration and all subsequent presidential administrations have adopted this exclusion out of deference to Congress and the unique political status of the independent agencies.

- *Clinton Administration*. In 1993, President William Clinton issued Executive Order 12,866 (the "**Clinton Order**"), firmly establishing the bipartisan credentials of cost-benefit analysis. The Clinton Order's "regulatory philosophy" reaffirmed the importance of assessing "all costs and benefits of available regulatory alternatives, including the alternative of not regulating."[61] Like the Reagan Order, the Clinton Order assigned to OMB—and specifically to OIRA—responsibility for ensuring that "regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency."[62] The OIRA review procedures established by President Clinton's order were limited to "significant regulatory actions"[63]—a broader category than the Reagan order's "major rules"—and were focused on assessing agencies' cost-benefit analysis methodology. Consistent with the Reagan Administration's approach, the Clinton Order exempted independent agencies from the scope of OIRA review.

- *Obama Administration*. On January 21, 2011, three decades after President Reagan first laid the foundations of regulatory cost-benefit analysis, President Obama issued his own Executive Order 13,563 (the "**First Obama Order**"), described as "supplemental to and

[58] The Reagan Order defines "major rule" to mean "any regulation that is likely to result in: (1) An annual effect on the economy of $100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) 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 or export markets." *Id.* § 1(b), 3 C.F.R. at 127–28.
[59] *Id.* § 3(f)(2), 3 C.F.R. at 130.
[60] *See* Rose & Walker, *supra* note 6, at 4, 6; *see also* PETER M. SHANE & HAROLD H. BRUFF, THE LAW OF PRESIDENTIAL POWER 355–56 (1988).
[61] Exec. Order No. 12,866, §1(a), 3 C.F.R. 638, 639 (1993).
[62] *Id.* § 2(b), 3 C.F.R. at 640.
[63] "Significant regulatory action" is defined by the order as "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 this Executive order." *Id.* § 3(f), 3 C.F.R. at 641–42.

> reaffirm[ing] the principles, structures, and definitions governing contemporary regulatory review that were established [by President Clinton's 1993 order]."[64] The First Obama Order is a clear and unambiguous statement of the centrality of cost-benefit analysis in the regulatory process: "[Our regulatory system] must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. . . . It must measure, and seek to improve, the actual results of regulatory requirements."[65] The order calls for "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome."[66] Later in 2011, President Obama issued a further Executive Order 13,579 (the "**Second Obama Order**"), stating that "[i]ndependent regulatory agencies, no less than executive agencies, should promote [the cost-benefit objectives of Executive Order 13,563],"[67] although the order stopped short of mandating compliance.

As the above summary illustrates, the Reagan, Clinton, and Obama presidencies, joined by the two Bush Administrations,[68] have pursued strikingly consistent approaches to regulatory cost-benefit analysis. The Committee would encourage Congress and President Obama to take the next logical step and extend, in general, the commonsense requirements that already apply to executive agencies to the independent financial regulatory agencies.

OIRA Review

Recent presidents have been unified in their reliance on OMB and OIRA to review proposed and final rules of executive agencies from a cost-benefit perspective.

OIRA was established in 1980 by the passage of the Paperwork Reduction Act[69] and is a subsidiary office of OMB. Its staff of experts includes both political appointees and civil servants, and, pursuant to President Clinton's Executive Order 12,866, is tasked with the review of draft regulations proposed by the executive agencies. OIRA is headed by an Administrator nominated by the President and confirmed by the Senate and employs approximately 40 professional staff,[70] with an annual budget that is typically less than $10 million.[71] OMB and OIRA review of cost-benefit analysis is premised on extensive

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[64] Exec. Order No. 13,563, § 1(b), 3 C.F.R. 215, 215 (2011).
[65] *Id.* § 1(a), 3 C.F.R. at 215.
[66] *Id.* § 6, 3 C.F.R. at 217.
[67] Exec. Order No. 13,579, § 1(b), 3 C.F.R. 256, 257 (2011).
[68] President George W. Bush issued two separate orders amending President Clinton's Executive Order 12,866, which otherwise remained in effect for both terms of the Bush Administration. *See* Exec. Order No. 13,258, 67 Fed. Reg. 9,385 (Feb. 26, 2002) (eliminating formal vice-presidential role in review of agency regulations); Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 18, 2007) (expanding scope of Executive Order 12,866 to include agency "guidance documents"). President Obama revoked the two Bush orders on January 30, 2009, restoring the original text of Executive Order 12,866 for the interim period prior to the promulgation of Executive Order 13,563. *See* Exec. Order No. 13,497, 74 Fed. Reg. 6,113 (Jan. 30, 2009).
[69] 44 U.S.C. §§ 3501–3521 (2006 & Supp. IV 2010).
[70] *The Office of Information and Regulatory Affairs—Federal Regulations and Regulatory Reform Under the Obama Administration: Hearing Before the Subcomm. on Courts, Commercial & Admin. L. of the H. Comm. on the Judiciary*, 112th Cong. 6 (2012) (statement of Sally Katzen, Visiting Prof. of Law, N.Y.U. Sch. of Law), *available at* http://judiciary.house.gov/hearings/Hearings%202012/Katzen03212012.pdf.
[71] Jerry Brito & Veronique de Rugy, *A Solution to the Midnight Regulation Outburst*, MERCATUS ON POL'Y at 2 (Mercatus Ctr., George Mason Univ., Nov. 2008), *available at* http://mercatus.org/sites/default/files/publication/MOP32_RSP_Web_Solution_to_Midnight_Regs_Outburst.pdf.

guidance provided to executive agencies in Circular A-4,[72] released by the Bush Administration in 2003 as a refinement of earlier "best practices" guidance issued in 1996 by the Clinton Administration.[73] The circular emphasizes the quantification of costs and benefits in monetary terms, where possible, and identifies three "basic elements" of regulatory analysis, including "(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."[74]

Incorporating OIRA review into the regulatory process has been beneficial to the executive agencies, and extending its purview to include the independent agencies would be a natural extension of its authority. According to Cass R. Sunstein, a former OIRA Administrator under President Obama, "OIRA is largely in the business of helping to identify and aggregate views and perspectives of a wide range of sources both inside and outside the federal government."[75] Executive agencies have benefited from OIRA's aggregation of "specialized information held by diverse people (usually career officials) within the executive branch."[76] Although the Committee does not support binding independent agencies to comply with OIRA's findings, in the Committee's view, coordination and information sharing are of equally critical importance to the interagency process among the several independent financial regulators, who, for example, must collaborate on a range of issues ranging from the Volcker rule to the cross-border application of the Dodd-Frank Act's swaps provisions. It is important that OIRA's involvement not become another predicate for initiating court proceedings and further delaying the regulatory process. Thus, consistent with a leading bipartisan legislative proposal,[77] the Committee supports incorporating the written exchanges between OIRA and the agencies in the administrative record but believes that direct judicial review of an agency's compliance with OIRA's assessment would be inappropriate.

The Gold Standard of Cost-Benefit Analysis: Examples from Home and Abroad

Few would disagree with the application of cost-benefit analysis in principle: doing more good than harm is an obvious underpinning of the regulatory process. It is often asserted, however, that quantifying the expected benefits of a regulation is impossible and that meeting the high standard demanded by both the last five presidential administrations and the D.C. Circuit is fundamentally unachievable. The record shows, however, that rigorous cost-benefit analysis is not only feasible but has been successfully employed by regulators both in the United States and abroad. Indeed, financial regulations are, as a general matter, uniquely suited to the application of quantitative techniques, as compared to regulatory regimes that primarily affect human health and welfare, the environment, *etc*.

The universe of rules for which rigorous analysis is warranted is relatively limited. According to OMB's 2013 draft annual report to Congress,[78] independent regulatory agencies promulgated 21

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[72] Office of Mgmt. & Budget, Exec. Office of the President, *Circular A-4, Regulatory Analysis* (2003), *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4 [hereinafter "OMB Circular A-4"].
[73] Office of Mgmt. & Budget, Exec. Office of the President, *Economic Analysis of Federal Regulations Under Executive Order 12,866* (1996), *available at* http://www.whitehouse.gov/omb/inforeg_riaguide.
[74] OMB Circular A-4, *supra* note 72.
[75] Cass R. Sunstein, *The Office of Informational and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013).
[76] *Id.* at 1841.
[77] Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong.
[78] Although OMB and OIRA do not review independent agency rules pursuant to the Clinton Order or First Obama Order, OMB's practice is to include a separate evaluation of independent agency rulemakings in its annual report to Congress, based "solely on data provided by these agencies to the Government Accountability Office . . . under the Congressional Review Act." Office of Mgmt. & Budget, Exec. Office of the President, *2013 Draft Report to*

"major"[79] final rules in fiscal 2012, of which 10 were issued by the CFTC, three jointly by the CFTC and the SEC, and four by the SEC alone.[80] By contrast, the executive agencies together issued only 47 "major" rules, of which 22 were classified as "transfer" rules dealing with the transfer of income.[81] According to OMB's own count, 16 of the 21 independent agency rules contained "some" cost-benefit analysis, of which only six included "monetized" (*i.e.*, quantified) analysis of costs.[82] None of the rules surveyed by OMB included quantification of benefits.[83] OMB concluded that "for the purposes of informing the public and obtaining a full accounting, it would be highly desirable to obtain better information on the benefits and costs of the rules issued 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."[84] As discussed further in our recommendations below, the Committee would favor narrowing the universe of rules as to which agencies must produce robust cost-benefit analysis even further, so as to conserve agency resources for application only to the most economically significant rules.

United States

A candidate for the "gold standard" of cost-benefit analysis in the United States may be found in the SEC's recently proposed rule regarding the cross-border application of Title VII of the Dodd-Frank Act. The cost-benefit analysis section of the rule exceeds 200 pages and focuses on estimating the quantitative impact of each key aspect of the proposed rule, rather than simply assess firm-specific compliance costs.[85] For example, the rule includes a separate analysis of the application of each substantive Title VII requirement on each class of foreign entity and foreign swaps transaction. The SEC identifies a pre-regulation economic baseline in order to estimate the costs and benefits of its proposed rule and assesses the costs and benefits of alternative rules that were considered but not adopted. The analysis also features a clear explanation of why the proposed rule was preferred over other alternatives. By contrast, the CFTC's "interpretive guidance" on cross-border issues under its jurisdiction contained no cost-benefit analysis whatsoever.

The SEC has also had success in designing and implementing pilot studies to perform real-world experiments on contemplated regulatory measures. A prominent example of such a pilot study is detailed in a 2007 paper summarizing the results of a pilot program that examined the efficacy of short sale price restrictions.[86] The Committee would encourage the independent agencies to pursue further such pilot studies where appropriate, drawing upon the expertise of third parties in the private sector and academia.

Cost-benefit analysis in the United States turns on the quality of the information to which regulators have access in formulating new rules. As Craig M. Lewis, Chief Economist and Director of the

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Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act (2013), at 8, *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf [hereinafter OMB 2013 Draft Report to Congress].

[79] *See supra* note 58.

[80] OMB 2013 Draft Report to Congress, *supra* note 78, at 4.

[81] *Id.* at 3.

[82] *Id.* at 30.

[83] *Id.*

[84] *Id.*

[85] *See* Cross-Border Security-Based Swap Activities, Exchange Act Release No. 34-69490 (May 1, 2013), *available at* http://www.sec.gov/rules/proposed/2013/34-69490.pdf.

[86] Sec. & Exch. Comm'n Office of Economic Analysis, *Economic Analysis of the Short Sale Price Restrictions Under the Regulation SHO Pilot* (Feb. 6, 2007), *available at* http://www.sec.gov/news/studies/2007/regshopilot020607.pdf.

SEC's Division of Risk, Strategy, and Financial Innovation, has stated, "quantifying benefits and costs can be one of the most challenging aspects of economic analysis. It is not always easy for the [SEC] to collect helpful data, as constraints, including those related to the Paperwork Reduction Act, limit how and when the [SEC] can collect certain information."[87] While Mr. Lewis notes that the public at large has an opportunity to supply such information through the comment process,[88] the Committee would support appropriate legislative amendments to the Paperwork Reduction Act so that agencies may actively collect key data on which to premise enhanced cost-benefit analyses.

The SEC and CFTC have consistently argued that they lack sufficient human resources to conduct the degree of cost-benefit analysis required in order to implement the Dodd-Frank Act. In testimony before the Senate on June 25, 2013, SEC Chairman Mary Jo White specifically requested a "roughly 45 percent increase in the size of [the Division of Economic and Risk Analysis," which she described as an "essential function."[89] According to Chairman White, the additional resources would "be used primarily for additional financial economists to perform economic analyses and research in support of the [SEC's] activities, including those undertaken in connection with the Dodd-Frank Act and JOBS Act."[90] In light of the relatively small sums involved compared to the considerable savings to the U.S. economy from a robust system of regulatory cost-benefit analysis, the Committee favors congressional action to devote the necessary resources to the independent agencies to enhance economic analysis functions.

United Kingdom

The experience of the United Kingdom's financial regulatory authorities is also instructive. British law has required cost-benefit analysis for all rulemakings since 2000.[91] Although the United Kingdom's financial regulatory system was substantially restructured in the wake of the financial crisis, the new agencies remain subject to a cost-benefit analysis requirement.[92] The Financial Services Act of 2012 requires the relevant agencies to estimate the costs and benefits of a regulation, where practicable, and, if impracticable, to include a qualitative assessment of costs and benefits and an explanation as to why they are unable to prepare a quantitative estimate.[93] Notably, the United Kingdom's Financial Policy Committee is subject to an additional requirement to conduct an *ex post* assessment of whether agencies' rulemakings have achieved their policy goals.[94]

The United Kingdom's financial regulatory agencies focus their economic analyses on the economic effects of rules[95] rather than on administrative burdens or "counting paperclips," as has often

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[87] Craig M. Lewis, Chief Economist and Director, Division of Risk, Strategy, and Financial Innovation, Sec. & Exch. Comm'n, Speech at the Pennsylvania Association of Public Employee Retirement Systems Annual Spring Forum (May 23, 2013).
[88] *Id.*
[89] *Testimony on SEC Budget, Hearing Before the Subcommittee on Fin. Services and Gen. Government, Committee on Appropriations, U.S. Senate,* Jun. 25, 2013 (statement of Mary Jo White, Chairman, Sec. & Exch. Comm.), *available at* http://www.sec.gov/News/Testimony/Detail/Testimony/1365171606059#.UeiISVO5bQI.
[90] *Id.*
[91] Financial Services and Markets Act, 2000, ch. 8, § 155 (U.K.).
[92] Financial Services Act, 2012, ch. 21, §§ 9S(3), 138J, 138I (U.K.).
[93] *Id.* §§ 138J, 138I.
[94] *Id.* § 9W(4)(b).
[95] *See, e.g.*, *A Guide to Market Failure Analysis and High Level Cost Benefit* Analysis, FIN. SERVS. AUTH. (Nov. 2006), *available at* http://www.fsa.gov.uk/static/pubs/other/mfa_guide.pdf; Sebastián de-Ramon et al., *Measuring the Impact of Prudential Policy on the Macroeconomy: A Practical Application to Basel III and Other Responses to*

been the case in the United States under the comparatively vague SEC and CFTC standards. British regulators have made public extensive policy guidelines setting forth their methodology for estimating the economic impact of a rule and how an assessment of the costs and benefits should inform the regulatory process.[96] British authorities also rely upon assistance from third parties in developing their methodologies, particularly with regard to estimating benefits, which can be more challenging than estimating costs.[97] Thanks to this focus on methodology, the United Kingdom's financial regulatory agencies' cost-benefit analyses are consistently comprehensive. For example, the cost-benefit analysis that accompanied recently proposed mortgage market reforms was 131 pages long, including precise quantitative estimates of the costs and benefits of the proposed reforms compared to a pre-regulatory baseline and an analysis of other alternatives considered.[98] The cost-benefit analysis for Basel II is similarly comprehensive.[99] Notably, the Financial Services Authority received assistance from PriceWaterhouseCoopers in conducting the analysis.

Like OIRA, the United Kingdom's Better Regulation Executive (the "**BRE**") is an agency consisting primarily of economists tasked with reviewing cost-benefit analyses conducted by other agencies. However, the BRE's mandate extends to rules promulgated by financial regulatory agencies. Through close collaboration with the primary regulators, the BRE facilitates and improves these agencies' cost-benefit analyses. Specifically, the BRE ensures that the costs and benefits of various regulatory alternatives are considered, that the methodology for an economic impact analysis is reasonable, and that the costs and benefits are adequately disclosed to the public.[100]

European Union

Since 2002, the European Commission (the "**EC**") has been required to conduct impact assessments as part of its decision making process for all major policy initiatives and legislative proposals.[101] In so doing, the EC adheres to its Impact Assessment Guidelines (the "**EC Guidelines**"), which are revised on a regular basis. The EC Guidelines require the EC to conduct an impact assessment that focuses on identifying and estimating the economic, competitive, social, and environmental costs and benefits of alternative policy options.[102] The EC must act on the basis of the best data available, and the

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the Financial Crisis, FIN. SERVS. AUTH. (May 2012), *available at* http://www.fsa.gov.uk/static/pubs/occpapers/op42.pdf.

[96] *See Practical Cost-Benefit Analysis for Financial Regulators: Version 1.1*, FIN. SERVS. AUTH. CENT. POL'Y (June 2000), *available at* http://www.fsa.gov.uk/static/pubs/other/cba.pdf; Isaac Alfon & Peter Andrews, *Cost-Benefit Analysis in Financial Regulation: How To Do It and How It Adds Value*, FIN. SERVS. AUTH. (Sept. 1999), *available at* http://fsa.gov.uk/static/pubs/occpapers/op03.pdf; David Llewellyn, *The Economic Rationale for Financial Regulation*, FIN. SERVS. AUTH. (Apr. 1999), *available at* http://www.fsa.gov.uk/static/pubs/occpapers/op01.pdf.

[97] Report, *A Framework for Assessing the Benefits of Financial Regulation*, OXERA (Sept. 2006), *available at* http://www.fsa.gov.uk/static/pubs/other/oxera_framework.pdf.

[98] Consultation Paper, *CP11/31 Mortgage Market Review: Proposed Package of Reforms*, FIN. SERVS. AUTH. (Dec. 2011), *available at* http://www.fsa.gov.uk/library/policy/cp/2011/11_31.shtml.

[99] Consultation Paper, *CP06/3 Strengthening Capital Standards 2*, FIN. SERVS. AUTH. (Feb. 2006), *available at* http://www.fsa.gov.uk/library/policy/cp/2006/06_03.shtml.

[100] *See IA Toolkit: How To Do an Impact Assessment*, HM GOV'T (Aug. 2011), *available at* http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31608/11-1112-impact-assessment-toolkit.pdf; *Reducing the Impact of Regulation on Business*, HM GOV'T (last visited May 30, 2013), *available at* http://www.gov.uk/government/policies/reducing-the-impact-of-regulation-on-business.

[101] *See* Communication from the Commission on Impact Assessment (May 6, 2002), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0276:EN:HTML.

[102] European Commission, *Impact Assessment Guidelines* (Jan. 15, 2009), *available at* http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm.

EC Guidelines encourage regulators to consult with external experts.[103] Additionally, as part of the EC's guidance on smart regulation, impact assessments should quantify benefits and costs whenever possible.[104] The EC is also required to consult with stakeholders and dedicate resources that are commensurate with the likely impact of the policy proposal.[105] The Organisation for Economic Co-operation and Development has deemed the EC impact assessment process to be "first class."[106] The EC also conducts an *ex post* assessment of legislation in order to improve the quality of policymaking and reduce unnecessary costs.[107]

The EC's impact assessments are reviewed by the Impact Assessment Board (the "**IAB**"). Much like OIRA, the IAB assesses the quality of impact assessments and provides support to improve the analysis.[108] Since its inception in 2006, it has produced over 400 publicly available opinions on the quality of E.U. legislation.[109] However, unlike OIRA, the IAB must provide a positive opinion on the quality of the impact assessment in order for an E.U. directive to proceed through the legislative process.[110] Additionally, the IAB regularly requires the EC to submit a revised version of its impact assessment. For example, two particular points of criticism from the IAB are that the impact assessments have not adequately addressed the considerations of different stakeholders' views and that they do not sufficiently consider the likely impact of alternative legislation.[111]

Committee Proposal for a Balanced Approach to Cost-Benefit Analysis Reform

Legislators on both sides of the political aisle have proposed to strengthen the cost-benefit analysis standards and procedures of the independent financial agencies.[112] Many of these proposals would represent significant improvements to the haphazard and ill-defined approaches currently adopted by the various agencies. A representative selection of such proposals is summarized in **Appendix B**.

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[103] *Id.*

[104] Communication from the Comm'n to the European Parliament, the Council, the European Econ. & Social Comm. and the Comm. of the Regions, *Smart Regulation in the European Union* (Aug. 10, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0543:FIN:EN:HTML.

[105] *See* European Commission, *Impact Assessment* (Mar. 2, 2009), *available at* http://ec.europa.eu/governance/better_regulation/impact_en.htm.

[106] Communication from the Comm'n to the European Parliament, the Council, the European Econ. & Social Comm. and the Comm. of the Regions, *EU Regulatory Fitness* (Dec. 12, 2012), *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0746:FIN:EN:PDF; Organisation for Econ. Co-operation and Dev., *Sustainability in Impact Assessments — A review of Impact Assessment Systems in selected OECD Countries and the European Commission* (Feb. 21, 2012), *available at* http://www.oecd.org/gov/regulatory-policy/Sustainability%20in%20impact%20assessment%20SG-SD%282011%296-FINAL.pdf. European Parliament, Directorate-General for Internal Policies, *Comparative study on the purpose, scope and procedures of impact assessments carried out in the Member States of the EU* (2011), *available* at http://www.europarl.europa.eu/committees/en/JURI/ studiesdownload.html?languageDocument=EN&file=36288. Oliver Fritsch, Claudio M. Radaelli, Lorna Schrefler & Andrea Renda, *Regulatory Quality in the European Commission and the UK: Old questions and new findings* (CEPS Working Document No. 362, Jan. 2012), *available at* http://www.ceps.eu/book/regulatory-quality-european-commission-and-uk-old-questions-and-new-findings.

[107] *Smart Regulation in the European* Union, *supra* note 104.

[108] European Commission, *Impact Assessment Board Report for 2012*, *available at* http://ec.europa.eu/governance/impact/key_docs/docs/iab_report_2012_en_final.pdf.

[109] *Smart Regulation in the European Union*, *supra* note 104.

[110] *Id.*

[111] *Impact Assessment Board Report for 2012*, *supra* note 108.

[112] *See, e.g.*, Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong.; H.R. 1003, 113th Cong. (2013); SEC Regulatory Accountability Act, H.R. 1062, 113th Cong. (2013); Financial Regulatory Responsibility Act of 2013, S. 450, 113th Cong.

The Committee believes that the approach outlined below will maximize economic efficiency of our regulatory system, minimize procedural burdens on regulators, and help to insulate new rulemakings from judicial challenge:

- Congress should subject all independent financial regulatory agencies—the SEC, CFTC, Fed, FDIC, OCC, and CFPB—to **consistent cost-benefit standards** aligned with the principles set forth by the Clinton Order and the First Obama Order. Such standards should focus on both the macroeconomic effects of proposed and final rules (including rules whose effects are "deregulatory" in nature) as well as the firm- and industry-specific microeconomic effects. Where feasible—and only to the extent feasible—analyses should attempt to quantify the costs and benefits of proposed regulations. Such standards should apply exclusively to agency rulemaking and not to adjudications or other discretionary agency actions. Consistent with the objectives of the Jumpstart Our Business Startups Act, agency cost-benefit analyses should evaluate, where applicable, the disparate impact of new regulations on emerging growth companies. Analyses conducted in accordance with the standards should be subject to the same public notice and comment procedures applicable to agency rulemakings generally.

- In order to conserve scarce agency resources, cost-benefit analysis should **be performed only on the most economically significant rulemakings**. The Committee would therefore support appropriate congressional action to revise the SEC and CFTC's authorizing statutes in accordance with this limitation.

- As is already the case for executive agencies, Congress should **require that independent agencies submit all economically significant proposed and final rules—along with the supporting cost-benefit analysis—to OIRA** for a non-binding assessment of the agency's cost-benefit analysis. Such OIRA assessments should not be directly reviewable in court, nor should OIRA assessments be binding upon the independent agencies. OIRA's evaluation should be placed in the public rulemaking record.

- The Committee would encourage the independent agencies to **outsource cost-benefit studies to non-partisan experts**, where appropriate. We also support the use of tailored **pilot studies** where feasible.

- Congress should require that agencies engage in the **retrospective review of existing "major rules" at regular intervals**. Such "look-backs" would include a substantive review of existing regulations and would incorporate analysis of whether a given regulation remains justified from a cost-benefit perspective. To relieve agencies of excessive burdens, such regulatory review should be instituted on a prospective basis only.

- The Committee supports **modifying the scope of judicial review** in cases where OIRA has provided a positive assessment of an agency's cost-benefit analysis. Accordingly, the Committee urges congressional action to amend the Administrative Procedure Act's "arbitrary and capricious" and "substantial evidence" standards so as to raise the evidentiary burdens of petitioners challenging agency rules on cost-benefit grounds.

- The Committee agrees with the Administrative Conference of the United States that independent agencies and OIRA should "use whatever flexibilities exist within the Paperwork Reduction Act to expedite the collection of information needed in agencies' economic analyses."[113] The Committee supports appropriate **revisions to the Paperwork Reduction Act** to the extent that it currently restricts independent agencies from obtaining critical data from market participants for purposes of performing robust cost-benefit analyses or designing pilot programs.

- While cost-benefit analysis should be pursued as a key agency objective irrespective of funding levels, the Committee supports **increasing the budget and resources of the independent financial regulatory agencies and OIRA** in line with these expanded cost-benefit obligations. The contemplated additional expenditures to employ credentialed staff to perform cost-benefit analyses are relatively minor when compared to the considerable cost savings that would accrue to the U.S. economy from the economic analysis of administrative rulemakings.

- To the extent that any Dodd-Frank rule is, in the judgment of the proposing agency, potentially subject to a successful legal challenge, the Committee would encourage the agencies to **re-propose any such rule in accordance with these recommendations**.

[113] *Benefit-Cost Analysis at Independent Regulatory Agencies: Committee on Regulation—Draft Recommendation*, ADMIN. CONF. OF THE U.S., at 5 (Feb. 15, 2013), *available at* http://www.acus.gov/sites/default/files/documents/Indep%20Agency%20BCAs%20Draft%20Rec%20Final%202-15-2013.pdf.

Appendix A:
Dodd-Frank Cost-Benefit Analysis by Agency
(Data through August 29, 2013)

CFTC	**All Rules**		**Since July 22, 2011**	
	Number	**Percentage**	**Number**	**Percentage**
No Cost-Benefit Analysis	1	1.7%	1	2.1%
Non-Quantitative	27	46.6%	18	36.7%
Quantitative	30	51.7%	30	61.2%
Total	58	100.0%	49	100.0%

FDIC	**All Rules**		**Since July 22, 2011**	
	Number	**Percentage**	**Number**	**Percentage**
No Cost-Benefit Analysis	14	50.0%	9	60.0%
Non-Quantitative	5	17.9%	0	0.0%
Quantitative	9	32.1%	6	40.0%
Total	28	100.0%	15	100.0%

Federal Reserve	**All Rules**		**Since July 22, 2011**	
	Number	**Percentage**	**Number**	**Percentage**
No Cost-Benefit Analysis	23	56.1%	14	53.8%
Non-Quantitative	7	17.1%	3	11.5%
Quantitative	11	26.8%	9	34.6%
Total	41	100.0%	26	100.0%

OCC	**All Rules**		**Since July 22, 2011**	
	Number	**Percentage**	**Number**	**Percentage**
No Cost-Benefit Analysis	5	31.3%	5	36.4%
Non-Quantitative	4	25.0%	0	0.0%
Quantitative	7	43.8%	6	63.6%
Total	16	100.0%	11	100.0%

SEC	**All Rules**		**Since July 22, 2011**	
	Number	**Percentage**	**Number**	**Percentage**
No Cost-Benefit Analysis	0	0.0%	0	0.0%
Non-Quantitative	25	42.4%	9	34.6%
Quantitative	34	57.6%	17	65.4%
Total	59	100.0%	26	100.0%

Appendix B:
Comparison of CCMR Recommendations and
Representative Legislative Proposals to Reform Agency Cost-Benefit Analysis

CCMR Recommendation	**Independent Agency Regulatory Analysis Act of 2013** (S. 1173, 113th Cong. (2013))	**Regulatory Sunset and Review Act** (H.R. 309, 113th Cong. (2013))	**Startup Act 3.0** (H.R. 714, 113th Cong. (2013) and S. 310, 113th Cong. (2013))	**Unfunded Mandates Information and Transparency Act** (H.R. 899, 113th Cong. (2013))	**Unnamed Bill Requiring CBA by the CFTC** (H.R. 1003, 113th Cong. (2013))	**SEC Regulatory Accountability Act** (H.R. 1062, 113th Cong. (2013))
Subject all independent financial regulatory agencies to consistent cost-benefit standards, focusing on both macro- and microeconomic effects. Quantify costs and benefits where feasible. Evaluate disparate impact on emerging growth companies.	Authorizes the President to require an "independent regulatory agency" to conduct cost-benefit analysis according to a common standard.	Directs all "agencies" to conduct cost-benefit analysis according to a common standard.	Directs all "federal agencies" to conduct cost-benefit analysis according to a common standard.	Directs all "federal agencies," excluding the Federal Reserve, its Open Market Committee, and the U.S. Postal Service, to conduct cost-benefit analysis according to a common standard.	This bill applies only to the Commodities Futures Trading Commission.	Applies to the SEC, PCAOB, MSRB, and any national securities association registered under 15 U.S.C. § 78o-3.
Perform cost-benefit analysis only on "economically significant" rulemakings.	Mandates review of rulemakings resulting in over $100 million impact or meeting a qualitative threshold for "major increases in cost" or "significant adverse effects" on the economy.	Mandates review of rulemakings resulting in over $100 million impact or meeting a qualitative threshold for "major increases in cost" or "significant adverse effects" on the economy.	Mandates review of rulemakings resulting in over $100 million impact or meeting a qualitative threshold for "major increases in cost" or "significant adverse effects" on the economy.	Any proposed regulation characterized as an "unfunded mandate" would trigger the "written statement" and cost-benefit analysis prerequisites set forth in Executive Order 12,866.	Applies to any rulemaking or order, regardless of the quantitative or qualitative effect on the economy.	Applies to any rulemaking or order, regardless of the quantitative or qualitative effect on the economy.

CCMR Recommendation	Independent Agency Regulatory Analysis Act of 2013	Regulatory Sunset and Review Act	Startup Act 3.0	Unfunded Mandates Information and Transparency Act	Unnamed Bill Requiring CBA by the CFTC	SEC Regulatory Accountability Act
Require that independent agencies submit all economically significant proposed and final rules to OIRA for a non-binding assessment. OIRA evaluation not directly reviewable in court.	Authorizes the President to direct independent federal agencies to submit to OIRA for a non-binding assessment: (1) any proposed "economically significant rule" either prior to publication or, at the discretion of the head of the agency, during the general public comment period; and (2) any final "economically significant rule," prior to publication.	Requires OIRA to give guidance to agencies and to review preliminary and final reports submitted by the agencies pursuant to this bill.	N/A	Delegates to OIRA the responsibility to provide meaningful guidance to and oversight of federal agencies' analysis of a rulemaking's costs and benefits, and to submit to Congress an Annual Statement detailing federal agencies' compliance with UMRA.	N/A (The Office of the Chief Economist is required to conduct the cost-benefit analysis under this bill.)	N/A (The Chief Economist of the SEC is required to supervise the post-adoption impact assessment of the rulemaking's costs, benefits, and intended and unintended consequences.)
Outsource cost-benefit analyses to non-partisan experts.	N/A	N/A	N/A	N/A	N/A	N/A

CCMR Recommendation	Independent Agency Regulatory Analysis Act of 2013	Regulatory Sunset and Review Act	Startup Act 3.0	Unfunded Mandates Information and Transparency Act	Unnamed Bill Requiring CBA by the CFTC	SEC Regulatory Accountability Act
Require, with respect to future rulemakings only, that agencies engage in the retrospective, substantive review of "major rules" at regular intervals.	N/A	Subsequently enacted rules must undergo analysis after three years or, under the discretion of the Administrator (or the head of federal bank regulatory agencies), seven years.	N/A	At the request of Congressional leaders, an agency must conduct a "retrospective analysis" of one of its existing Federal regulations, which includes a cost-benefit analysis that considers studies by private parties.	Applies only to future rules proposed by the CFTC. Does not contain a lookback provision for future proposed rules.	Not later than one year after the date of enactment of the Act, and every five years thereafter, the SEC shall reform its existing rules that it finds to be outmoded, ineffective, insufficient, or excessively burdensome.
Modify the scope of judicial review where OIRA has provided a positive assessment of an agency's cost-benefit analysis. Amend APA to raise the evidentiary burdens of petitioners challenging agency rules on cost-benefit grounds.	The compliance or noncompliance of an independent regulatory agency under this bill shall not be subject to judicial review. However, for purposes of judicial review, any assessment conducted by the agency or OIRA shall constitute part of the whole record of agency action.	Except to the extent that there is a direct conflict with the provisions of this bill, nothing in this bill is intended to affect the availability or standard of judicial review for agency regulatory action.	Any determinations made, or other actions taken, by an agency or independent regulatory agency pursuant to this bill's mandate to conduct cost benefit analysis of rulemakings shall not be subject to judicial review.	This bill amends the UMRA § 401(a), to expand judicial review to include agency noncompliance with, amongst other provisions, the cost-benefit analysis requirements inserted by the House bill.	N/A	N/A

CCMR Recommendation	Independent Agency Regulatory Analysis Act of 2013	Regulatory Sunset and Review Act	Startup Act 3.0	Unfunded Mandates Information and Transparency Act	Unnamed Bill Requiring CBA by the CFTC	SEC Regulatory Accountability Act
Revise Paperwork Reduction Act to the extent that it currently restricts agencies from obtaining critical data from market participants for purposes of performing robust cost-benefit analyses or designing pilot programs.	N/A	N/A	N/A	N/A	N/A	Any notice and comment associated with the rulemaking assessment plan proposed by the Chief Economist of the SEC pursuant to this bill's requirements will not be subject to the requirements of the Paperwork Reduction Act.
Increase the budget and resources of the independent financial regulatory agencies and OIRA.	N/A	N/A	N/A	N/A	N/A	N/A
To the extent that any Dodd-Frank rule is, in the judgment of the proposing agency, potentially subject to a successful legal challenge, the Committee would encourage the agencies to re-propose any such rule in accordance with these recommendations.	N/A	N/A	N/A	N/A	N/A	N/A

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