No. 12-31
October 2012

WORKING PAPER

ECONOMIC ANALYSIS BY FEDERAL FINANCIAL REGULATORS

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MERCATUS CENTER
George Mason University

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Abstract
The Federal financial regulators who are entrusted with implementing Dodd-Frank and other key financial regulatory initiatives do not routinely conduct economic analysis. This paper looks at the statutory obligations that Federal financial regulators face and the degree to which they use economic analysis in their decision-making. The paper also looks at quasi-governmental regulatory organizations, which—like their governmental counterparts—do not routinely conduct economic analysis.

JEL codes: K22; K23

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Acknowledgements
I gratefully acknowledge the research assistance of Robert Greene and Derek Thieme and the helpful comments of Ted Bolema, Richard Williams, Jerry Ellig, and J.W. Verret. All errors are my own.

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Release date: October 23, 2012

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Hester Peirce

The Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[1] gave U.S. financial regulators a long list of regulations to write. Despite the sweeping nature of the Dodd-Frank changes, Dodd-Frank does not generally require regulators to conduct economic analysis.[2] Further, most of the regulators charged with implementing Dodd-Frank are not subject to the standard regulatory analysis requirements for government rulemaking. Economic analysis can play a valuable role in assisting regulators in deciding whether and how to regulate, but very few financial regulators take advantage of this tool of their own volition.

This paper will describe just how little high-quality economic analysis the federal financial regulators charged with implementing Dodd-Frank and regulating the financial markets are doing.[3] Although each regulator has a unique approach to economic analysis, all of their approaches fall short of the standard to which executive agencies are held. More fundamentally, the federal financial regulators are depriving themselves of analysis essential to the proper exercise of their rulemaking functions.

Table 1: Federal Financial Regulators

Name	**Acronym**	**Status**	**Function**
Accounting Standard Setters (Financial Accounting Standards Board, Government Accounting Standards Board)	FASB and GASB	Private Standard Setter	Establish financial accounting and reporting standards.
Bureau of Consumer Financial Protection	CFPB	Independent Regulatory Agency	Regulates provision of consumer financial products and services.
Board of Governors of the	FRB	Independent	Regulates bank holding companies, savings and

[1] Pub. L. 111-203 (2010).

[2] In this paper, except where the context demands otherwise, the terms "economic analysis" and "regulatory analysis" are used interchangeably. The terms "cost-benefit analysis" and "benefit-cost analysis" are commonly used as substitutes for "economic analysis" and "regulatory analysis" but are generally avoided here because a thorough regulatory analysis entails much more than simply weighing the costs and benefits of a proposed regulation. Regulatory analysis entails looking at whether there is a market failure that should be addressed through regulation, different alternatives for solving the problem, and the costs and benefits of each alternative as compared to a common baseline.

[3] See table 1 for a list of the federal financial regulators discussed. Some agencies with rulemaking authority under Dodd-Frank are not included because their primary mission is not federal financial regulation. The Federal Insurance Office, a creation of Dodd-Frank, is also omitted; it does not have independent authority to issue regulations, although any determinations to preempt state insurance law are subject to the Administrative Procedure Act. The Financial Crimes Enforcement Network (FinCEN), which administers the Bank Secrecy Act, is also omitted. Because FinCEN is a bureau of the Department of Treasury, it is subject to the same economic analysis requirements as other executive agencies. The quality of FinCEN's analysis is worthy of consideration, but it is beyond the scope of this paper, because FinCEN's regulatory focus is antimoney laundering and terrorist financing. *See* Daniel J. Mitchell, *Fighting Terror and Defending Freedom: The Role of Cost-Benefit Analysis*, 25 PACE L. REV. 219 (2005) (looking at antimoney laundering and terrorist financing laws from a cost-benefit perspective).

Federal Reserve System		Regulatory Agency	loan holding companies, financial holding companies, state banks that are members of the Federal Reserve System, foreign banks' U.S operations, U.S. banks' foreign operations, designated systemically important nonbank financial companies, and designated systemically important financial market utilities.
Market utilities, such as stock and options exchanges, designated contract markets, clearing agencies, derivatives clearing organizations, swap execution facilities, trade data repositories. (New York Stock Exchange, Chicago Mercantile Exchange, The Options Clearing Corporation, The Depository Trust Company, etc.)	Various (NYSE, CME, OCC, DTC, etc.)	Quasi-Governmental Regulatory Organizations	Provide utility-like services to the financial markets. In that capacity, they are entrusted with certain regulatory responsibilities.
Commodity Futures Trading Commission	CFTC	Independent Regulatory Agency	Regulates the commodity-based futures markets and the bulk of the over-the-counter derivatives markets.
Federal Deposit Insurance Corporation	FDIC	Independent Regulatory Agency	Provides deposit insurance; serves as primary regulator of state banks that are not members of the Federal Reserve System and state-chartered thrifts and back-up regulator of non-FDIC-supervised insured depository institutions; resolves failed insured financial institutions and systemic financial companies.
Federal Housing Finance Agency	FHFA	Independent Regulatory Agency	Regulates Fannie Mae, Freddie Mac, and the Federal Home Loan Banks; conservator for Fannie Mae and Freddie Mac.
Financial Industry Regulatory Authority	FINRA	Quasi-Governmental Regulator	Regulates brokerage firms and individuals that sell securities to the public.
Financial Stability Oversight Council	FSOC	Executive Agency	Monitors stability of financial system; identifies systemically important financial entities.
Municipal Securities Rulemaking Board	MSRB	Quasi-Governmental Regulatory Organization	Regulates municipal securities dealers and municipal advisers.
National Credit Union Administration	NCUA	Independent Agency	Regulates federal credit unions and FDIC-insured state-chartered credit unions.
National Futures Association	NFA	Quasi-Governmental Regulatory Organization	Regulates futures market participants that deal with the public.
Office of the Comptroller of the Currency	OCC	Independent Regulatory Agency	Regulates national banks, federal savings associations (thrifts), and federal branches and agencies of foreign banks.
Office of Financial	OFR	Independent	Collects, standardizes, maintains, and

Research		Regulatory Agency	disseminates financial data.
Public Company Accounting Oversight Board	PCAOB	Quasi-Governmental Regulatory Organization	Regulates auditors of public companies and auditors of broker-dealers.
Securities and Exchange Commission	SEC	Independent Regulatory Agency	Regulates securities markets and market participants and reviews disclosures of public companies. Regulated entities include brokers, dealers, investment advisers, mutual funds, stock and options exchanges, credit rating agencies, PCAOB, FINRA, MSRB, SIPC, clearing agencies, transfer agents, and certain parts of the over-the-counter derivatives market.
Securities Investor Protection Corporation	SIPC	Quasi-Governmental Regulatory Organization	Intervenes to protect customer property at financially troubled brokerage firms.

Source: This table represents the author's summary of publicly available material.

The paper begins with an introduction that provides a brief overview of the regulatory analysis obligations of executive agencies. It then proceeds to describe the obligations applicable generally to independent regulatory agencies, which include most of the federal financial regulators. The paper then discusses, in turn, each agency's unique statutory obligations related to economic analysis and how each particular agency employs economic analysis. The paper also includes a discussion of economic analysis by the quasi-governmental regulators, which play an important role in federal financial regulation. They, too, fall short when it comes to regulatory analysis. The last section concludes with a call for greater emphasis on economic analysis in the promulgation of financial regulations.

I. Introduction

A. Executive Agencies' Obligations

For over 30 years, executive departments and agencies such as the Department of Transportation, the Food and Drug Administration, and the Environmental Protection Agency have been required to conduct economic analysis as part of their rulemaking process.[4] This requirement has been embodied in the Unfunded Mandates Reform Act of 1995 (UMRA)[5] and a

[4] For a helpful overview of regulatory analysis requirements, *see* Curtis W. Copeland, *Cost–Benefit and Other Analysis Requirements in the Rulemaking Process*, (Congressional Research Service 2011), available at http://www.fas.org/sgp/crs/misc/R41974.pdf.

[5] P.L. 104-4; 109 Stat. 48 *et seq*.; and 2 U.S.C. §602, 632, 653, 658-658(g), 1501-1504, 1511-1516, 1531-1538, 1551-1556, and 1571. UMRA, among other things, requires agencies (except independent regulatory agencies) to conduct a cost-benefit analysis and select the most cost-effective alternative for rules that will impose a federal mandate that results in direct costs to state and local governments or the private sector of $100 million or more. This paper does not separately discuss UMRA because analysis under the executive orders tends to satisfy UMRA. *See, e.g.*, Cass R. Sunstein, OIRA Administrator, Written Testimony before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform of the House Committee on Oversight

series of presidential executive orders, starting with Executive Order 12,291 issued by President Reagan in 1981.[6] The Office of Information and Regulatory Affairs (OIRA), which is part of the president's Office of Management and Budget (OMB), reviews the agencies' analyses.

The current requirements for executive agencies are embodied in President Clinton's Executive Order 12,866, which calls for executive branch agencies to take a number of common-sense steps in determining whether to regulate and, if so, how to do it.[7] An agency must first identify the problem it is trying to address and the significance of the problem. If an existing statute or regulation is the source of the problem, the agency should consider whether that regulation or statute could be modified to fix the problem. If a new regulation is the best solution, the agency must assess different ways of regulating and choose an option that is not overly prescriptive, achieves the intended benefits in the most cost-effective manner, and generates sufficient benefits to justify its costs.[8] OIRA has published a detailed document to guide agency economists through this analysis.[9]

In January 2011, in Executive Order 13,563, President Obama largely reaffirmed these established principles for regulatory analysis and process.[10] The order directs covered agencies to continue the following practices set forth in Executive Order 12,866:

(1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);

(2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;

(3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and

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and Government Reform (May 25, 2011) ("Insofar as UMRA is designed to require certain analyses of the effects of rules and to ensure that costs and burdens are reduced, the Act's goals evidently overlap with those of Executive Order 12866, which was issued in 1993 and has long governed the process of regulatory review"), available at: http://oversight.house.gov/wp-content/uploads/2012/01/5-25-11_Sunstein_Testimony.pdf.

[6] Exec. Order No. 12,291 (Feb. 19, 1981).

[7] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[8] For an in-depth discussion of the regulatory analysis requirements applicable to executive agencies, *see* Richard Williams and Jerry Ellig, *Regulatory Oversight: The Basics of Regulatory Impact Analysis* (Sept. 12, 2011), available at: http://mercatus.org/publication/regulatory-oversight. For a general description of the regulatory process, *see* Chapter 4 of Susan E. Dudley and Jerry Brito, *Regulation: A Primer* (2012), available at http://mercatus.org/sites/default/files/RegulatoryPrimer_DudleyBrito_0.pdf.

[9] OMB, Circular A-4 (Sept. 17, 2003), available at: http://www.whitehouse.gov/omb/circulars_a004_a-4.

[10] Exec. Order No. 13,563—Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011.

(5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.[11]

Executive Order 13,563 modifies Executive Order 12,866 by, among other things, permitting additional emphasis on elements of the analysis that are difficult or impossible to quantify, such as human dignity[12] and stressing the importance of public participation in the rulemaking process, including specifically through the Internet.[13] Executive agencies' regulatory analysis is far from perfect, and, indeed, usually falls short of the executive order requirements.[14] Nevertheless, the executive orders and related guidance provide a standard to which these agencies can be held.[15]

B. Independent Regulatory Agencies and the Executive Orders

The executive orders requiring economic analysis do not apply to the so-called "independent regulatory agencies," including most of the federal financial regulators.[16] The Office of the Comptroller of the Currency (OCC), which is part of the Department of Treasury and thus of the executive branch, used to be subject to the executive orders. Dodd-Frank added the OCC, along with the CFPB and the OFR, to the list of independent regulatory agencies, presumably with the expectation that these agencies would not be covered by the executive orders and their

[11] Exec. Order No. 13,563, at 3821.

[12] *Id*. at 3821 ("Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.").

[13] *Id*..

[14] *See* Jerry Ellig and John Morrall, *Assessing the Quality of Regulatory Analysis: A New Evaluation and Data Set for Policy Research* (Mercatus Working Paper 2010) (concluding, based on an assessment of all economically significant regulations proposed by executive-branch regulatory agencies in 2008 and 2009, that "the quality of regulatory analysis is generally low, varies widely, and did not change much with the change of administrations between 2008 and 2009"), available at http://mercatus.org/publication/assessing-quality-regulatory-analysis. *See also* Jerry Ellig and Sherzod Abdukadirov, *Regulatory Analysis and Regulatory Reform* (Mercatus on Policy No. 99 2011), available at http://mercatus.org/publication/regulatory-analysis-and-regulatory-reform.

[15] Unless otherwise indicated, the term "executive orders" will refer herein to Executive Orders 12,866 and 13,563.

[16] The executive orders specifically exclude "independent regulatory agencies" as defined in 44 U.S.C. § 3502 (part of the Paperwork Reduction Act) from the definition of "agency." *See* § 3(b) of Exec. Order 12,866. 44 U.S.C. § 3502(5) sets forth a list of "independent regulatory agencies" and allows for statutory additions to the list. Because UMRA, which directs agencies to "assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector" (2 U.S.C. § 1532) and to "identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule" (2 U.S.C. §1535), does not cover independent regulatory agencies, most federal financial regulators are not covered by this mandate either.

rulemakings would not be subject to OIRA review.[17] Arguably, a president could simply rewrite the executive orders to include independent regulatory agencies.[18]

President Obama took a step in this direction by urging independent regulatory agencies to comply with the executive order requirements.[19] In addition, the president's former top regulatory official, while emphasizing that the executive order "does not apply to independent agencies," encouraged such agencies "to give consideration to all of its provisions, consistent with their legal authority."[20] Although financial regulators have pledged compliance with the spirit of the orders,[21] according to the Government Accountability Office (GAO), they have not conducted economic analysis with any consistency, thoroughness, or rigor.[22] Moreover, to the extent that financial regulators perform regulatory analysis, the analysis is not subject to OIRA review, unless the regulator voluntarily submits it to OIRA for informal review.

C. Regulatory Analysis Obligations Applicable to Independent Regulatory Agencies

Federal financial regulators are generally subject to the Administrative Procedure Act (APA),[23] which imposes certain requirements for transparency, notice, and public participation

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[17] *See* Dodd-Frank §§ 315 and 1100D(a) (amending the definition of "independent regulatory agency" in 44 U.S.C. § 3502(5), to include the OCC, the CFPB, and the OFR).

[18] *See* Robert W. Hahn and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis* 37-43, (John M. Olin Law & Economics Working Paper No. 150 2002) (arguing that independent agencies' rules should—and legally could—be subject to OIRA review) and ; Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: Lessons from the SEC's Stalled Mutual Fund Reform Effort*, 12 STAN. J.L. BUS. & FIN. 1, 54-56 (2006) (discussing legality of bringing independent regulatory agencies under Executive Order 12,291).

[19] Exec. Order 13,579, 76 Fed. Reg. 41,587 (July 14, 2011). The federal financial regulators are not alone among the independent regulatory agencies in performing little regulatory analysis. *See* Arthur Fraas and Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions*. 63 ADMIN. L. REV. 213, 216 (2011) (concluding, "based on [an] admittedly quick and limited survey . . . that the analysis conducted by the [independent regulatory commissions] is generally the minimum required by statute.") (omitting footnote citing the Nuclear Regulatory Commission as an exception).

[20] Memorandum from Cass R Sunstein, OIRA administrator, for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies re Executive Order 13563, "Improving Regulation and Regulatory Review" (Feb. 2, 2011), available at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.

[21] *See, e.g.,* U.S. GOV'T ACCOUNTABILITY OFFICE, DODD-FRANK ACT REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSIS AND COORDINATION 12 (2011), available at http://www.gao.gov/assets/590/586210.pdf. [hereinafter GAO REPORT] ("Although federal financial regulatory agencies are not required to follow E.O. 12866 or OMB Circular A-4, CFTC, Federal Reserve Board, FDIC, NCUA, OCC, and SEC officials have said that their agencies follow OMB's guidance in spirit or principle. CFPB officials also said that the Bureau expects to follow the spirit of OMB's guidance").

[22] *See id.* at 14 ("Although most of the federal financial regulators told us that they tried to follow Circular A-4 in principle or spirit, their policies and procedures did not fully reflect OMB guidance on regulatory analysis."). *See also* Letter from the Committee on Capital Markets Regulation to Chairman Tim Johnson, Ranking Member Richard Shelby, Chairman Spencer Bacchus, and Ranking Member Barney Frank (Mar. 7, 2012) (review of 192 Dodd-Frank rules revealed that 57 contained no cost-benefit analysis and 85 contained entirely qualitative analyses), available at http://capmktsreg.org/2012/03/lack-of-cost-benefit-analysis-in-dodd-frank-rulemaking.

[23] 5 U.S.C. §§ 551-559. The quasi-governmental regulators discussed in Section II.K below are not subject to the APA.

in the rulemaking process. The APA requires, among other things, that a reviewing court "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[24] The improper use or failure to use rigorous analysis could result in a court's determination that an agency has acted arbitrarily and capriciously or abused its discretion.[25]

In addition to their responsibilities under the APA, financial regulators are subject to certain targeted, statutory regulatory analysis requirements (*See* table 2). The relevant statutes include: (1) the Paperwork Reduction Act,[26] which requires agencies to estimate the magnitude of, and obtain OMB approval for, "collections of information" from the public;[27] (2) the Regulatory Flexibility Act,[28] which requires agencies to analyze, if a substantial number of small entities will be affected, how regulations will affect small entities and whether there are alternatives; (3) the Congressional Review Act,[29] which requires agencies to submit rules, together with any cost-benefit analysis performed, to Congress for potential disapproval and delays the effective date of major rules, that is, those that will have an annual impact of $100 million or more on the economy; result in a major increase in costs or prices; or adversely affect competition, employment, investment, productivity, innovation, or international competitiveness (federal financial regulations are surprisingly rarely deemed "major rules");[30] (4) the Riegle Community Development and Regulatory Improvement Act,[31] which requires the federal banking agencies to look at the benefits and administrative burdens new rules would impose on banks and their customers; and (5) the Economic Growth and Regulatory Paperwork Reduction Act, which requires the banking agencies to review, through a notice-and-comment process all of their regulations every 10 years for the purpose of eliminating regulations that unduly burden banks.[32] None of these statutes provides for comprehensive, ex ante economic analysis by the financial regulators.

[24] 5 U.S.C. § 706(2)(A).
[25] *See, e.g.*, Chamber of Commerce v. SEC, 412 F.3d 133, 144-45 (D.C. Cir. 2005) (holding that the SEC's failure to consider a reasonable alternative was a violation of the APA).
[26] 44 U.S.C. §§ 3501-3521.
[27] The financial regulators and other independent regulatory agencies that are governed by boards or commissions can override a denial of approval. See 44 U.S.C. § 3507(f).
[28] 5 U.S.C. §§ 601-612.
[29] 5 U.S.C. §§ 801-808.
[30] As Fraas and Lutter observed, "without doing at least rudimentary economic analysis, it would seem difficult for an [independent regulatory commission] to determine whether a rule is major". Fraas and Lutter, *supra* note 19, at 221.
[31] *See* Section 302 of the Act [12 U.S.C. § 4802(a)].
[32] *See* Section 222 of the Act [12 U.S.C. § 3311]. The report from the first review was submitted to Congress July 31, 2007. Federal Financial Institutions Examination Council, Joint Report to Congress, July 31, 2007, Economic Growth and Regulatory Paperwork Reduction Act, 72 Fed. Reg. 62,036 (Nov. 1, 2007), available at http://www.gpo.gov/fdsys/pkg/FR-2007-11-01/pdf/07-5385.pdf .

TABLE 2: Relevant Statutes of General Applicability to Federal Financial Regulators[33]

Statute	**Purpose**
Administrative Procedure Act	Establishes procedures for agency rulemaking, including allowing for public participation in rulemaking.
Paperwork Reduction Act	Requires agencies to analyze and get approval from the Office of Information and Regulatory Affairs for paperwork burdens imposed by their regulations.
Regulatory Flexibility Act	Requires agencies to analyze, if a substantial number of small entities will be affected, how regulations will affect small entities and whether there are alternatives that achieve the desired goals and are better for small entities.
Congressional Review Act	Requires agencies to submit a rule, together with a statement of whether it is major and any cost-benefit analysis, to Congress and the GAO before it can take effect. Enables Congress to overturn rules.
Riegle Community Development and Regulatory Improvement Act	Directs banking regulators, in setting effective date and administrative compliance requirements for new regulations that impose additional requirements on banks, to consider both the benefits and the administrative burdens on banks, including small banks, and their customers.
Economic Growth and Regulatory Paperwork Reduction Act	Requires banking agencies to review their rules every 10 years.

Source: This table represents the author's summary of publicly available material.

In addition to the requirements in the broadly applicable statutes noted, several federal financial regulators have agency-specific economic analysis requirements built into their organic statutes. As will be discussed, regardless of the existence and nature of their statutory obligations the federal financial regulators generally have not embraced regulatory analysis.

II. Economic Analysis Obligations and Efforts by the Federal Financial Regulators

This section describes the obligations of each federal financial regulator with regard to economic analysis and analyzes the approach each regulator takes to fulfilling these obligations. The discussion is based, in part, on recent reports prepared by the GAO[34] and the inspectors general of a number of the federal financial regulators.[35] These reports generally described

[33] These statutes are not applicable to the quasi-governmental regulatory organizations discussed in Section II.K below.
[34] *See* GAO REPORT, *supra* note 21.
[35] The inspectors general for a number of the federal financial regulators prepared reports in response to congressional requests regarding economic analysis. *See* Office of Inspector General, CFTC, *An Investigation Regarding Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act* (Apr. 15, 2011) [hereinafter *CFTC IG Report I*], available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_041511.pdf; Office of Inspector General, CFTC, *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)

approaches to economic analysis that lack the rigor, purpose, and public transparency required of an analysis performed under the executive orders. As the discussion illustrates, the statutory obligations and approaches taken by the different regulators are not uniform.

The regulators are discussed in the approximate descending order of the stringency of the economic analysis obligations they face in rulemaking. The regulator-by-regulator look demonstrates, however, that none of the regulators is conducting economic analysis of the quality envisioned in the executive orders. There is thus ample room for improvement in the rulemaking conducted by all of the federal financial regulators.

A. Financial Stability Oversight Council

The Financial Stability Oversight Council (FSOC), the new systemic risk monitoring body created by Dodd-Frank, is made up of the heads of the other federal financial regulators, representatives of state regulators, and an insurance expert. FSOC, which is housed within the Department of Treasury, is not an independent regulatory agency and therefore is subject to the requirements of the executive orders. Nevertheless, FSOC has not conducted economic analysis for the final rules it has adopted.[36]

With respect to the two key rules FSOC has finalized, FSOC took the position, based on the following justification, that it need not conduct a cost-benefit analysis despite the fact that the rule was a "significant regulatory action":

[hereinafter *CFTC IG Report II*], available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf; Office of Inspector General, Department of the Treasury, *Dodd-Frank Act: Congressional Request for Information Regarding Economic Analysis by OCC* (OIG-CA-11-006 June 13, 2011) [hereinafter *OCC IG Report*], available at http://www.treasury.gov/about/organizational-structure/ig/Documents/OIG-CA-11-006.pdf; Office of the Inspector General, FDIC, *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) [hereinafter *FDIC IG Report*], available at http://fdicig.gov/reports11/11-003EV.pdf; Office of Inspector General, Board of Governors of the Federal Reserve System*, Response to a Congressional Request Regarding the Economic Analysis Associated with Specific Rulemakings* (June 13, 2011) [hereinafter *FRB IG Report*], available at http://www.federalreserve.gov/oig/files/Congressional_Response_web.pdf; Office of Inspector General, SEC, *Report of Review of Economic Analyses Performed by the Securities and Exchange Commission in Connection with Dodd-Frank Rulemakings* (June 13, 2011) [hereinafter *SEC IG Report I*], available at http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_13_11.pdf; Office of Inspector General, SEC, *Follow-up Review of Cost-Benefit Analyses in Selected SEC Dodd-Frank Act Rulemakings* (Jan. 27, 2012) [hereinafter *SEC IG Report II*], available at http://www.sec-oig.gov/Reports/AuditsInspections/2012/Rpt%20499_FollowUpReviewofD-F_CostBenefitAnalyses_508.pdf. It should be noted that the inspector general reports were prepared in response to congressional requests, which directed the inspectors general to concentrate their reviews on a specific set of regulations. The reports, which vary in detail and length, also include some more general information about the agencies' use of economic analysis.

[36] FSOC does not have explicit authority to adopt rules other than "such rules as may be necessary for the conduct of the business of the Council." Dodd-Frank Section 111(e)(2). FSOC has taken the position, however, that it "has the inherent authority to promulgate interpretive rules and interpretive guidance." Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637, 21,647 (Apr. 11, 2012).

> Several commenters suggested that the Council should, or is required to, conduct a cost-benefit analysis, such as a review of the impact of the rule on the economy and on different sectors of the financial services industry. These commenters argued that a cost-benefit analysis would enhance transparency and ensure that costs are minimized, and may be required under Executive Orders 12866 and 13563. In addition, commenters questioned the determination that this rule is not economically significant under section 3(f) of Executive Order 12866. That section defines "significant regulatory action" to include a regulatory action (which may include a proposed rule of agency procedure or practice) that is likely to result in a rule that may raise certain novel legal or policy issues. Based on this determination, which is made by the Office of Management and Budget, the Council is not required to conduct a cost-benefit analysis in connection with this rulemaking.[37]

Executive Order 12,866, however, does not wholly exempt agencies from conducting and making available to the public regulatory analyses for regulations that are not deemed economically significant but are nevertheless significant regulatory actions.[38]

Executive Order 13,563 emphasizes interagency cooperation in rulemaking to ensure that industries are not overburdened with regulatory obligations.[39] There is not an established process for achieving such coordination among financial regulators.[40] FSOC, which is charged with "facilitat[ing] information sharing and coordination among member agencies,"[41] is well-

[37] FSOC, Final Rule and Interpretive Guidance, Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 FR 21637, 21651 (Apr. 11, 2012). FSOC also took the position that the rule was procedural. *Id*. *See also* FSOC, Second notice of Proposed Rulemaking and Proposed Interpretive Guidance, Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 76 FR 64264 (Oct. 18, 2011) ("This rule has been designated a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866."); FSOC, Final Rule, Authority to Designate Financial Market Utilities as Systemically Important, 76 FR 44763, 44773 (Jul 27, 2011) (not including a cost-benefit discussion, but purporting to satisfy its obligations under Executive Order 12866 through OMB's review of the rule).
[38] Under Executive Order 12,866, a full analysis of benefits, costs, and alternatives is required only for a "significant regulatory action" that may "[h]ave 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 government communities." 58 Fed. Reg. 51,738 (1993). However, for all significant regulatory actions, agencies must prepare "a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need" and "[a]n assessment of the potential costs and benefits of the regulatory action" and make it available to the public. *Id*. at 51,741.
[39] Executive Order 13,563, *supra* note 10, at 3822 ("Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization."). *See also* Memorandum from Cass R. Sunstein, OIRA administrator for Heads of Executive Departments and Agencies, re Cumulative Effects of Regulations (Mar. 20, 2012) (calling for "[c]oordination of timing, content, and requirements of multiple rulemakings that are contemplated for a particular industry or sector, so as to increase net benefits").
[40] *See, e.g.*, *OCC OIG Report*, *supra* note 35, at 2 (noting that "there was no formal process in place that provides for coordination on economic analyses between OCC and the other federal banking agencies").
[41] Dodd-Frank § 112(a)(2)(E).

positioned to fill this void. To date, however, FSOC has not taken the lead, and there has been little analysis of the aggregate effect of Dodd-Frank rulemaking. The regulators have argued that looking at cumulative impact would be impossible at this stage.[42] Indeed, the manner and timing of regulatory actions have complicated attempts to analyze the effects of the rules individually as well as in the aggregate.[43] Although difficult, there is precedent for looking broadly at the costs and benefits of a package of related financial markets reforms.[44]

B. Securities and Exchange Commission

The Securities and Exchange Commission (SEC) is charged with protecting investors in the nation's securities markets; maintaining fair, orderly, and efficient markets; and facilitating capital formation. The principal securities laws require the SEC to perform economic analysis with respect to many of its rules. The SEC, however, has struggled to implement its statutory mandate.

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[42] *See, e.g.*, GAO REPORT, *supra* note 21, at 35 ("In light of its statutory requirements, FSOC plans to assess the future impact of significant Dodd-Frank regulations, including those that may not have systemic risk implications. . . . However, they also noted that was too early for such a review because most of the Dodd-Frank Act rules were not in effect"); *FRB OIG Report*, *supra* note 35, at 21 ("Senior Board officials noted, however, that estimating the cumulative burden of imposing Dodd-Frank Act mandated rules on the broader economy is not possible at this time since few Dodd-Frank Act provisions have taken effect"); OCC OIG Report, *supra* note 35, at 12 ("OCC believes that it is effectively impossible to assess the cumulative impact [of all Dodd-Frank rulemakings] at this time because no final rules have been adopted"). GAO recommended that FSOC tell OFR to start collecting the information necessary for an assessment of the effects of Dodd-Frank. GAO REPORT, *supra* note 21, at 40.

[43] For example, the CFTC and SEC did not define the market participants and financial products that would fall within the new regulatory regime for derivatives until mid-2012, well after many of the substantive derivatives market requirements had been proposed and, in some cases, adopted. Without knowing the scope of the derivatives market, it was difficult to assess the impact of the substantive rules as they were being developed. For example, when the banking agencies were developing rules related to margin on derivatives transactions, they did not know "the population of dealers and major participants to which the proposed rules would apply [because it was] subject to definitions that are presently being developed by the CFTC and SEC through rulemakings." FDIC IG Report, *supra* note 35, at 15.

[44] Efforts by the United Kingdom's Financial Services Authority (FSA) to assess the aggregate costs and benefits of the Markets in Financial Instruments Directive (MiFID) are instructive. MiFID was a major European initiative to update and integrate the financial services regulatory system. In addition to analyzing the effects of individual pieces of the legislation, the FSA looked at the changes in the aggregate:

> In the case of a wide-ranging directive like MiFID, it is useful to step back and consider the bigger picture, which is the aim of this paper. In broad terms, we attempt to identify the overall costs of MiFID implementation for firms, and set them alongside an attempt to quantify the benefits of MiFID for the UK. This is understandably a challenging task (and more challenging than a typical CBA), and there are certain important caveats attached to this exercise.

FSA, *The Overall Impact of MiFID* (Nov. 2006), at 2, available at http://www.fsa.gov.uk/pubs/international/mifid_impact.pdf. More recently, the FSA commissioned a comprehensive study of the costs and benefits of Solvency II, a major European insurance regulatory reform initiative. Ernst & Young LLP, *Solvency II Cost-Benefit Analysis* (June 2011), at 1 (summarizing "key findings of the completion of a cost benefit analysis of introducing Solvency II in the UK insurance industry," an analysis "completed in line with the FSA's statutory objectives of assessing the expected market and consumer impact of major regulatory changes"), available at http://www.fsa.gov.uk/pubs/other/ey-solvencyii-cba.pdf.

The SEC, unlike most other federal financial regulators, has an established practice of including a cost-benefit analysis section in its rulemakings.[45] Historically, the agency's lawyers have been primarily responsible for drafting these analyses with varying degrees of assistance from the agency's economists. The quality of the SEC's economic analysis and the SEC's adherence to its statutory analysis requirements has been questioned by SEC commissioners,[46] the SEC's inspector general,[47] the GAO,[48] Congress,[49] commentators,[50] and courts in a number of successful challenges to its rulemakings in recent years.[51]

The SEC faces more statutory requirements with respect to economic analysis than most of the other federal financial regulators. Whenever the SEC has to consider whether a rulemaking is consistent with the public interest, the agency must "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." [52] Separately, Section 23(a)(2) of the Securities Exchange Act of 1934 ("Exchange

[45] *See SEC IG Report II*, *supra* note 35, at v ("SEC Chairmen previously committed to Congress that the SEC would conduct cost-benefit or economic analyses in connection with its rulemaking activities, and it has consistently performed such analyses in its rulemakings").
[46] *See, e.g.*, Kathleen L. Casey, commissioner, SEC, Statement at Open Meeting: Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants (June 29, 2011) ("I believe the general decision to avoid serious analysis of the total costs of the rulemaking is shortsighted and actually impairs the Commission's ability to assess the merits of the rules we may propose and ultimately adopt. It is imperative that we get a more complete understanding of the total costs, and total benefits, of the entire regulatory regime we are creating. Only if we understand the total burden, whether that burden is statutorily imposed or not, can we make sound decisions on the marginal costs and benefits of rules as we consider them"), available at http://www.sec.gov/news/speech/2011/spch062911klc.htm; Troy A. Paredes, commissioner, SEC, Speech before the 2011 Investment Adviser Compliance Conference (Mar. 10, 2011) ("data and rigorous economic analysis must be much more central to decision making at the SEC than has been the case. Not only does empirical analysis allow the Commission to leverage its expertise, but data and economics often reveal insights—many of which are counterintuitive—that we might not have appreciated otherwise and that allow us to challenge, in fruitful ways, our presuppositions and inclinations. With good data and sound economics, we are able to make better, more informed choices in discharging our regulatory duties"), available at: http://www.sec.gov/news/speech/2011/spch031011tap.htm.
[47] *See generally SEC IG Report I*, *supra* note 35 and *SEC IG Report II*, *supra* note 35.
[48] *See generally* GAO REPORT, *supra* note 21.
[49] *See, e.g.*, *The SEC's Aversion to Cost-Benefit Analysis: Hearing before the Subcomm. on TARP, Financial Services, and Bailout of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (Apr. 17, 2012) [hereinafter *House SEC Hearing*], available at http://oversight.house.gov/hearing/the-secs-aversion-to-cost-benefit-analysis.
[50] *See, e.g.*, Sherwin, *supra* note 18 (critiquing the quality of the SEC's economic analysis). *See also* David S. Ruder, Balancing Investor Protection with Capital Formation Needs after the SEC Chamber of Commerce Case, 26 Pace L. Rev. 39, 71 (2005) ("given the comment by the District of Columbia Court of Appeals that the Commission must determine the 'economic implications' of its rule making, the SEC in the future will be well served in its rule making to demonstrate economic effects through quantitative and statistical analysis of costs and benefits and impacts on capital formation").
[51] *See* Business Roundtable and Chamber of Commerce v. SEC, 647 F.3d 1144 (D.C. Cir. 2011); American Equity Inv. Life Ins. Co. v. SEC, 572 F.3d 923 (D.C. Cir. 2009); Chamber of Commerce v. SEC, 443 F.3d 890 (D.C. Cir. 2006); Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005).
[52] Section 2(b) of the Securities Act of 1933 [15 U.S.C. 77b]; Section 3(f) of the Securities Exchange Act of 1934 [15 U.S.C. § 78c(f)]; and Section 2(c) of the Investment Company Act of 1940 [15 U.S.C. § 80a-2(c)]. This requirement was added to these statutes by the National Securities Market Improvement Act of 1996. The Gramm-

Act") requires rulemakings under that act to include a "determination that any burden on competition imposed by such rule or regulation is necessary or appropriate."[53] In addition, a number of discrete statutory provisions require the SEC to consider economic effects of rules adopted pursuant to those provisions.[54]

Whether these statutory provisions constitute a mandate to perform economic analysis is a matter of some dispute. The SEC's chairman argues that the agency is not under an obligation to conduct cost-benefit analysis but has long done so as a matter of good regulatory practice.[55] Other commentators are of the view that Congress made a deliberate decision not to require the SEC to perform cost-benefit analysis.[56]

Legislative history suggests, however, that when Congress adopted the requirement with respect to the consideration of the promotion of efficiency, competition, and capital formation, it anticipated that the SEC generally would conduct meaningful analysis in fulfillment of that requirement. The Committee on Commerce report accompanying the House version of the National Securities Markets Improvement Act of 1996 explained that "[i]n considering efficiency, competition, and capital formation, the Commission shall analyze the potential costs and benefits of any rulemaking initiative, including whenever practicable, specific analysis of such costs and benefits. The Committee expects that the Commission will engage in rigorous analysis pursuant to this section."[57]

Leach-Bliley Act of 1999 added the language to the Investment Advisers Act of 1940. *See* Section 202(c) [15 U.S.C. § 80b-2].

[53] 15 U.S.C. § 78w(a)(2).

[54] *See, e.g.*, Securities Exchange Act § 6(k)(1) [15 U.S.C. § 78F(k)(1)] ("To the extent necessary or appropriate in the public interest, to promote fair competition, and consistent with the promotion of market efficiency, innovation, and expansion of investment opportunities, the protection of investors, and the maintenance of fair and orderly markets, the Commission and the Commodity Futures Trading Commission shall jointly issue such rules, regulations, or orders as are necessary and appropriate to permit the offer and sale of a security futures product traded on or subject to the rules of a foreign board of trade to United States persons"); Securities Exchange Act § 15(n)(2) [15 U.S.C. § 78o(n)(2)] ("In developing any rules under [the prior paragraph relating to disclosures by broker-dealers to retail investors], the Commission shall consider whether the rules will promote investor protection, efficiency, competition, and capital formation").

[55] *See, e.g.*, House SEC Hearing, *supra* note 49 (prepared testimony of Mary L. Schapiro, chairman, SEC) ("No statute expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities, but—since at least the early 1980s—the Commission has considered potential costs and benefits in its rulemaking as a matter of good regulatory practice"), available at http://www.sec.gov/news/testimony/2012/ts041712mls.htm#P30_7886.

[56] *See, e.g.*, Dennis Kelleher, *et al.*, *Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC: A Report from Better Markets, Inc.* (Jul. 30, 2012), at 19 ("The plain fact is that the Securities Laws do not include any language requiring the SEC to conduct cost-benefit analysis when it promulgates rules"). Kelleher lays out an extensive case against cost-benefit analysis, based on his interpretation of legislative history and his concerns about the harmful implications that cost-benefit analysis could have for financial reform efforts. Kelleher's analysis, however, seems premised on a misunderstanding of the purposes and methods of economic analysis and the nature of its role in agency rulemaking. Properly conducted economic analysis would assist the SEC in effectively meeting its statutory objectives rather than derail it from doing so.

[57] H.R. REP. NO. 104-622, at 39 (1996). The report went on to suggest that such an analysis would have to be provided to Congress under the Congressional Review Act (CRA). *Id*. The CRA requires that an agency provide to

In 1999, when Congress added the requirement to consider efficiency, competition, and capital formation to the Investment Advisers Act, it "note[d] that the SEC's record in implementing [the statutory mandate in the context of the Securities Exchange Act] has failed to meet the Congressional intent."[58] The report went on to direct the SEC to "improve in this area."[59] This assessment of the SEC's failure to meet congressional intent suggests that Congress intended the SEC to perform more than the cursory analysis it was performing at the time.

The United States Court of Appeals for the District of Columbia Circuit is of the view that the SEC's organic statutes impose on it a "statutory obligation to determine as best it can the economic implications of the rule it has proposed."[60] The court interprets this statutory obligation as requiring the SEC to engage in thorough, logical, well-supported economic analysis.[61]

Chastened by the increasing scrutiny it has faced with respect to economic analysis, the SEC has revisited its approach. Recent changes in the SEC's organizational structure and relevant internal staff guidelines may show an increased willingness to employ meaningful economic analysis in SEC rulemaking. After a brief period during which the SEC's economists reported to an attorney rather than to a chief economist, Chairman Schapiro altered the organizational structure at the SEC so that the chief economist reports directly to the chairman and serves as the Director of the Division of Risk, Strategy, and Financial Innovation (RiskFin), the division in which most of the agency's economists work. This change should help give the SEC's economists a stronger voice in the agency's rulemaking and other matters.

In addition to the structural changes, new staff guidance was issued jointly by the RiskFin and the Office of General Counsel in March 2012.[62] The guidance acknowledged that

> [h]igh-quality economic analysis is an essential part of SEC rulemaking. It ensures that decisions to propose and adopt rules are informed by the best available information about a rule's likely economic consequences, and allows the Commission to meaningfully

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Congress, along with the rule that it is submitting for congressional review, "a complete copy of the cost-benefit analysis of the rule, if any." 5 U.S.C. § 801(a)(1)(B)(i). By implication, the committee considered the analysis performed with respect to efficiency, competition, and capital formation to be or include a cost-benefit analysis.

[58] CONF. REP. No. 106-434 at 165 (1999).

[59] *Id*.

[60] Chamber of Commerce v. SEC, 412 F. 3d 133, 143. (D.C. Cir. 2005).

[61] *See* Business Roundtable and Chamber of Commerce v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (holding that SEC had violated the APA by engaging in economic analysis that failed "adequately to assess the economic effects of a new rule"). *See also* American Equity Inv. Life Ins. Co. v. SEC, 572 F.3d 923, 933 and 935 (D.C. Cir. 2009) (failure to "disclose a reasoned basis for its conclusion that [the rule] would increase competition" was arbitrary and capricious, "failure to analyze the efficiency of the existing state law regime renders arbitrary and capricious the SEC's judgment that applying federal securities law would increase efficiency," and "the SEC's flawed efficiency analysis also renders its capital formation analysis arbitrary and capricious").

[62] Memorandum from the SEC's Division of Risk, Strategy, and Financial Innovation and the Office of General Counsel to the Staff of the Rulemaking Divisions and Offices (Mar. 16, 2012) [hereinafter SEC Staff Memo], available at http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

compare the proposed action with reasonable alternatives, including the alternative of not adopting a rule.[63]

The staff guidance, with reference to the executive orders and the accompanying OIRA guidance, sets forth a fairly robust set of principles for economic analysis. From a procedural standpoint, the guidance envisions the economists as being better integrated into the rulemaking teams and economic analysis being better incorporated into the policy decision-making process and rulemaking notices.[64] From a substantive standpoint, the guidance describes the key components that should be included in the economic analysis accompanying every SEC rulemaking, namely a statement of need, identification of a baseline against which to measure the effects of the regulation, identification of reasonable alternatives, and an evaluation of the costs and benefits of the proposed regulation and the alternatives.[65]

In some ways, however, the staff guidance still falls short of the executive orders; it is intended only to "draw on principles set forth in those orders" [66] rather than simply to wholly endorse those orders as the standard for the SEC to employ in its economic analysis. Past efforts to improve the SEC's economic analysis have not been successful.[67] Whether the new staff guidance will be more successful at effecting fundamental change in the SEC rulemaking process remains to be seen.[68]

C. Commodity Futures Trading Commission

The Commodity Futures Trading Commission (CFTC) regulates the futures markets and, with new authority under Dodd-Frank, is the primary regulator of the over-the-counter derivatives (swaps) market. The CFTC has a statutory requirement to consider the costs and

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[63] *Id*. at 1.
[64] *Id*. at 15-17.
[65] *Id*. at 4-15.
[66] *Id*. at 4.
[67] The SEC's Office of Inspector General conducted a review of SEC rulemaking in 2002. Office of Inspector General, SEC, *Rulemaking Process* (Audit No. 347 July 12, 2002), available at http://www.sec.gov/about/oig/audit/347fin.htm#P45_7907. The inspector general reported that "According to Commission officials, the cost-benefit analysis section of a rule is becoming increasingly significant and they intend to more consistently follow the best practice principles in Executive Order 12866." *Id*. Consistent with that objective, the inspector general recommended improvements to the SEC's cost-benefit analysis.
[68] For suggestions on how the SEC can further demonstrate a commitment to meaningful economic analysis, *see* Henry G. Manne, *Economics and Financial Regulation: Will the SEC's New Embrace of Cost-Benefit Analysis Be a Watershed Moment?* REGULATION (Summer 2012), at 21, 25 (pointing out some potentially problematic sections of the memorandum, and arguing that it "will not overcome the inhibiting effects of 80 years of a different intellectual culture at the SEC, but it will be a start"); House SEC hearing, *supra* note 49 (prepared testimony of J. W. Verret) (offering eight recommendations "as a test of the SEC's resolve to make economic analysis a real constraint on SEC rulemaking and a limit on the pressures it may face to politicize its activities and undermine its investor protection mission"), available at http://mercatus.org/sites/default/files/Measuring-Cost-Benefits-New-Rules.pdf.

benefits of its rules, but has not conducted the type of thorough economic analyses required by the executive orders.[69]

The CFTC's principal governing statute requires the agency to evaluate the costs and benefits of a proposed rule "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."[70] The statute also directs the CFTC to "endeavor to take the least anticompetitive means of achieving [its] objectives."[71]

The CFTC, focusing on the fact that the statute requires only consideration of the enumerated factors, has taken a narrow view of the statutory economic analysis mandate. Typically, the CFTC's Dodd-Frank rulemakings use the statutory mandate as the baseline, which means only costs due to the CFTC's use of discretion in implementing that mandate are taken into account.[72] A staff memorandum regarding compliance with the requirement stated that the CFTC has the discretion to weigh the statutory factors in any way it wishes and to proceed with a rule regardless of its costs.[73] A subsequent staff memorandum reiterated these points, but

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[69] *See, e.g.*, Letter from Scott O'Malia, CFTC commissioner, to the Hon. Jeffrey Zients, acting OMB director (Feb. 23, 2012) at 1, 4 ("It is my concern that the Commission's cost-benefit analysis has failed to comply with the standards for regulatory review outlined in OMB Circular A-4, Executive Order 12866, and President Obama's Executive Orders 13,563 and 13,579. . . . President Obama was very clear in his two Executive Orders that he expected the highest standards of analysis to validate the necessity of government rulemaking to ensure we don't impose undue and unfounded economic burdens on market participants and the public as a whole. I don't believe the Commission's rulemakings comply with this directive or OMB Circular A-4"), available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/omalialetter022312.pdf; Jill Sommers, CFTC commissioner, Remarks before the Institute of International Bankers, Annual Washington Conference (Mar. 7, 2011) ("Clearly, when it comes to cost-benefit analyses, the Commission is merely complying with the absolute minimum. That is not in keeping with the spirit of the President's recent Executive Order on 'Improving Regulation and Regulatory Review.' We owe the American public more than the absolute minimum. As we add layer upon layer of rules, regulations, restrictions and new duties, we should be attempting to quantify the costs of what we are proposing. And we should most certainly attempt to determine whether the costs outweigh the benefits. The public deserves this information and deserves the opportunity to comment on our analysis"), available at http://www.cftc.gov/PressRoom/SpeechesTestimony/opasommers-13.

[70] Section 15(a)(2) of the Commodity Exchange Act [7 U.S.C. § 19(a)(2)].

[71] Section 15(b) of the Commodity Exchange Act [7 U.S.C. § 19(b)].

[72] *See, e.g.*, Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants; Final Rule, 77 Fed. Reg. 20,128, 20,167 (Apr. 3, 2012) ("To the extent that these new regulations reflect the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those resulting from Congress's statutory mandates in the Dodd-Frank Act. However, to the extent that the new regulations reflect the Commission's own determinations regarding implementation of the Dodd-Frank Act's provisions, such Commission determinations may result in other costs and benefits. It is these other costs and benefits resulting from the Commission's own determinations pursuant to and in accordance with the Dodd-Frank Act that the Commission considers with respect to the section 15(a) factors").

[73] *CFTC IG Report I*, *supra* note 35, at exhibit 1, Memorandum from Dan M. Berkovitz, general counsel, CFTC, and Jim Moser, acting chief economist, CFTC, to Rulemaking Teams re Guidance and Template for Presenting Cost-Benefit Analyses for Commission Rulemakings (Sept. 29, 2010), at 1. The memorandum further states that "the costs typically may be presented by describing a counterfactual—what the Commission expects will happen if

directed CFTC rule writers to "utiliz[e] the principles set forth in Executive Order 13,563 in a manner that is reasonably feasible and appropriate, and consistent with the underlying statutory mandate."[74] The memorandum appeared to be designed in part to ensure that the CFTC's final rules would withstand legal challenges.[75]

The second staff memorandum came in the wake of the first of two reviews conducted by the CFTC's inspector general of the agency's economic analysis. In the first report, the inspector general looked at four Dodd-Frank rules and concluded that "the Commission generally adopted a 'one size fits all' approach to section 15(a) compliance without giving significant regard to the deliberations addressing idiosyncratic cost and benefit issues that were shaping each rule."[76] The inspector general further observed that the CFTC viewed its obligations under section15(a) through a legal compliance lens, rather than through an economic lens.[77] The inspector general's second report looked at another four rules and found the analyses for three of the four lacking, but expressed optimism that progress was being made at the CFTC toward more sound economic analysis.[78]

CFTC commissioner O'Malia subsequently questioned the CFTC's progress and urged a renewed effort by the agency to conduct thorough regulatory analysis.[79] In May, the CFTC

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the rule is not adopted, with reference to previous or anticipated events." *Id*. at 2. This directive has at times resulted in discussion of the rule's benefits in both the costs and the benefits sections of CFTC cost-benefit analyses.

[74] CFTC IG Report II, *supra* note 35, at Exhibit 2, Memorandum from Dan M. Berkovitz, general counsel, CFTC, and Andrei Kirilenko, chief economist, CFTC, to Rulemaking Teams re Staff Guidance on Cost-Benefit Considerations for Final Rulemakings under the Dodd-Frank Act (May 13, 2011), at 3.

[75] Indeed, as this memorandum appears to have anticipated, the CFTC's compliance with section 15(a) is being tested in court. *See* Brief for the Petitioner, International Swaps and Derivatives Association and Securities Industry and Financial Markets Association v. CFTC (D.D.C. Dec. 2, 2011) (including allegations of cost-benefit related violations of the Commodity Exchange Act and the APA), available at http://www.sifma.org/issues/item.aspx?id=8589936641.

[76] CFTC IG Report I, *supra* note 35, at 21.

[77] *Id.* at 22 ("it is clear that the Commission staff viewed section 15(a) compliance to constitute a legal issue more than an economic one, and the views of the Office of General Counsel therefore trumped those expressed by the Office of Chief Economist, at least for the four rules we reviewed. We do not believe this approach enhanced the economic analysis performed under section 15(a) for the four rules"). The danger of this legal check-the-box approach is that the CFTC will lose the insights that economists can bring to the analysis. A disclosure requirement, for example, might very successfully satisfy a statutory mandate, but, in the process, could have the unintended consequence of driving firms out of business. By failing to take into account economic insights about how behavior will change as a result of particular regulatory actions, the CFTC deprives itself and others of knowledge about the effects of their regulations.

[78] *See* CFTC IG Report II, *supra* note 35.

[79] Scott O'Malia, commissioner, CFTC, Almost Certainly MSU (Making Stuff Up), Remarks at the Eighth Annual Energy Trading Conference, Bauer College Global Energy Management Institute, University of Houston (Mar. 23, 2012) ("The Commission must do a better job in consulting with the public as it develops sweeping economic reform. It must develop consistent baselines based on the status quo, include regulatory and policy alternatives and fulsome discussion as to the ultimate choices, and provide publicly available, reproducible quantitative analysis. We should wholeheartedly accept OMB's guidance when available, seek technical guidance as needed, and constantly explore 'what is working, and what isn't.' We can begin by ensuring that our rules are informed, evidence-based and data-driven. Simply stated; no MSU.") (citing Cass Sunstein, *A Regulatory System for the Twenty-First Century*, Nov. 30, 2011, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/speeches/a-regulatory-

entered into an agreement with OIRA, pursuant to which an OIRA staff member will provide technical assistance with respect to economic analysis to the CFTC.[80] At a recent CFTC rulemaking meeting, Commissioner O'Malia expressed a belief that the CFTC, with the help of OIRA, was improving its approach to regulatory analysis:

> these rules are the first to benefit from our recently signed memorandum of understanding with the Office of Information and Regulatory Affairs within the Office of Management and Budget ("OMB") providing for technical assistance with regard to the Commission's cost-benefit analyses. I want to emphasize that these two final rules and proposal have benefited both from OMB's technical assistance and from the Commission's commitment to putting forth rules that utilize appropriate baselines, include replicable quantitative analysis (when possible), and reflect the consideration of a range of policy alternatives. I look forward to the continuing coordination between OMB and the Commission to further improving our cost benefit analysis.[81]

As with the SEC's overhaul of its approach to economic analysis, the long-term results of the CFTC's new commitment to conduct more thorough economic analysis remain to be seen.

D. Bureau of Consumer Financial Protection

The Bureau of Consumer Financial Protection (CFPB)[82] was created by Dodd-Frank to regulate the provision of consumer financial products and services. Under Dodd-Frank, the CFPB is an independent regulatory agency exempt from the executive orders.[83] Nevertheless, Dodd-Frank required the CFPB to undertake some economic analysis. The CFPB, in fulfilling this mandate, has not employed the type of analysis required by the executive orders.

In prescribing a rule, the CFPB is required to consider benefits and costs to consumers and firms, "including the potential reduction in access by consumers to consumer financial products or services resulting from such rule," the impact on small banks and credit unions, and

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system-for-the-twenty-first_century-11-30-2011.pdf), available at http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-12.

[80] Gary Gensler, chairman, CFTC, Statement at Open Commission Meeting for Consideration of Rules Implementing the Dodd-Frank Act (May 10, 2012) ("I'm pleased that we've also arranged for a staff member from the Office of Information and Regulatory Affairs to supplement the excellent work of the CFTC staff with technical assistance, particularly with respect to the consideration of costs and benefits"), available at http://www.cftc.gov/PressRoom/SpeechesTestimony/genslerstatement051012.

[81] Scott O'Malia, commissioner, CFTC, Opening Statement at the Twenty-Eighth Commission Meeting to Consider: (1) Two Final Rules Providing an Exemption from the Clearing Requirement for End-Users and Further Defining Certain Product Definitions under Title VII of the Dodd-Frank Act; and (2) One Proposed Rule Providing Relief for Certain Cooperatives from the Clearing Requirement (July 10, 2012), available at http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071012.

[82] The Bureau of Consumer Financial Protection is typically referred to as the CFPB, rather than the BCFP. For purposes of clarity, the standard convention is employed herein.

[83] Dodd-Frank § 1100D(a) (adding the CFPB to the list of independent regulatory agencies in in 44 U.S.C. § 3502[5]).

the effect on rural consumers.[84] The CFPB is also required to conduct five-year reviews of its significant rules.[85] Although the statutory mandate does not explicitly require the CFPB to follow the executive orders or to rely on the analysis it performs, the SEC's experience with legal challenges based upon its statutory analysis mandate should be instructive to the CFPB.

In fulfilling its statutory mandate thus far, the CFPB has not chosen to embrace regulatory analysis as a way of better assessing the need for, alternatives to, and economic implications of its rules. Instead, the CFPB's approach has exhibited deficiencies that impair its usefulness as a rulemaking tool. For example, the CFPB has relied on speculative benefits;[86] underestimated compliance costs;[87] minimized noncompliance costs, including the costs to consumers of reduced access to financial products and services;[88] and deferred quantitative analysis.[89]

The CFPB is one of three agencies (and the only federal financial regulator) required to set up panels under the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA).[90] The SBREFA panel process is intended to ensure that agencies hear and consider the views of small entities about regulations that will affect them and look at alternatives before rules are proposed. To date, the CFPB has convened three SBREFA panels.[91] Based on these

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[84] Dodd-Frank § 1022(b)(2)(A).
[85] Dodd-Frank § 1022(d).
[86] For example, in a recent proposal, the CFPB, lacked quantitative data, but included hypothetical savings:

> [S]imple hypothetical calculations demonstrate that, because the mortgage market is so large, even very small effects on improving consumers' ability to make informed decisions or small effects on prices from greater shopping would lead to large savings for consumers. For example, if the new disclosures only affect ten percent of consumers, and only lower their interest rates by .125% (1/8 of a percentage point, the smallest typical unit of price difference in the mortgage market), this would lead to an annual savings of $1,250,000,000 for mortgage borrowers if all mortgages were originated with the proposed disclosures and total outstanding mortgage balances were to remain at their current level of roughly $10 trillion.

CFPB, Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), Proposed Rule, 77 Fed. Reg. 51,115, 51,270 (Aug. 23, 2012).
[87] *See, e.g.*, CFPB, Defining Larger Participants in the Consumer Reporting Market, Final Rule, 77 Fed. Reg. 42,873, 42,894 (July 20, 2012) (providing a "rough estimate" of a cost of $12,000 per small firm subject to examination based on an expectation that such an examination would last four weeks, but this estimate only includes the cost of the time of the staff directly charged with preparing for the examination and does not take into account other costs associated with hosting a month-long examination by CFPB staff).
[88] *See, e.g.*, CFPB, High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), Proposed Rule, 77 Fed. Reg. 49,089, 49,131-49,138 (Aug. 15, 2012) (downplaying possibility that restricting or prohibiting loan terms such as prepayment penalties and balloon payments could have negative implications for the cost and availability of credit).
[89] *See, e.g.*, CFPB, Defining Larger Participants of the Consumer Reporting Market, Final Rule, 77 Fed. Reg. 42,873, 42,892 (July 20, 2012) ("The Proposal requested information to support the analysis of benefits, costs, and impacts, but commenters did not provide, or identify sources for, relevant data. Over time, the Bureau expects to develop information related to these topics through its supervisory activities") (omitting footnote referring to comments that apparently were not taken into account because they provided data "without explanation").
[90] Dodd-Frank § 100G (amending 5 U.S.C. § 609(d)).
[91] The panels focus only on small providers of financial products and services, not on the individuals and small entities indirectly affected by the CFPB's regulatory actions; but the CFPB, in its discretion, can consult small entities beyond those directly affected. *See* Richard Cordray, director, CFPB, written testimony, Hearing before the

panels, the CFPB has come under criticism for the manner in which it is approaching its SBREFA responsibilities, including its failure to allow adequate time for small entities to consider proposals and formulate responses.[92]

It remains to be seen whether, as the CFPB matures, it will embrace a more rigorous approach to fulfilling its statutory economic analysis and SBREFA obligations.[93]

E. Office of the Comptroller of the Currency

The OCC, an independent bureau within the Department of the Treasury, is the regulator charged with overseeing national banks and federal savings associations (thrifts). Dodd-Frank, in addition to transferring authority for thrifts from the Office of Thrift Supervision to the OCC, effectively changed the OCC's obligations with respect to regulatory analysis by adding the OCC to the list of independent regulatory agencies, which have traditionally been exempt from the executive orders.[94]

According to a June 2011 report by the Treasury's Office of Inspector General, the "OCC has processes in place to ensure the rigor and consistency of economic analysis performed in connection with rulemaking [which] were developed and in place prior to passage of the Dodd-Frank Act when the OCC was still subject to EO 12866" and the other executive agency

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House Committee on Small Business (Aug. 1, 2012) ("By law, the representatives must be selected from businesses that are likely to be directly subject to the requirements of the rule. In part because of this requirement, the Bureau has been convening a number of other roundtables at roughly the same time that it convenes the small business review panels in order to obtain feedback from a broader range of stakeholders"), available at http://www.consumerfinance.gov/speeches/written-testimony-of-richard-cordray-before-the-house-committee-on-small-business.

[92] *See, e.g.*, American Bankers Association, Statement for the Record, Hearing before the House Committee on Small Business (Aug. 1, 2012) (citing, in addition to failing to allow for inadequate time, the following flaws in the SBREFA process: failure of panels to serve as advocates for small entities and failure to seek cost data from third-party service providers), available at http://www.aba.com/Issues/Testimonies/Documents/08012012FINALABAStatementfortheRecord-SBREFASmBiz.pdf. *See also* Letter from various small business organizations to Richard Cordray, CFPB director (Jan. 24, 2012), at 2 (urging CFPB to convene SBREFA panels early enough in the process to elicit "meaningful recommendations" from small entities), available at: http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab092906.pdf.

[93] The CFPB could signal its commitment to meaningful economic analysis by granting the personnel responsible for the analysis independence from the rule writers. *See* Mark A. Calabria, Testimony before the Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs of the House Committee on Oversight and Government Reform United States House of Representatives (July 24, 2012) ("Part of the problem is the CFPB's structure where the Research area, which conducts cost-benefit analysis, is under the same Associate Director responsible for the rule-making. The cost-benefit analysis will not be independent of the rule-making process under such circumstances. I would urge the CFPB to establish an independent economics/research function that reports directly to the Director. As we have repeatedly seen with other agencies, the cost-benefit analysis has simply been an after-the-fact box-checking exercise, rather than a serious attempt to inform the rule-making process"), available at http://www.cato.org/publications/congressional-testimony/credit-crunch-is-cfpb-restricting-consumer-access-credit.

[94] *See* Dodd-Frank § 315 (amending 44 U.S.C. § 3502(5)).

mandates.[95] Under these established agency practices, among other things, the OCC's Policy Analysis Division prepared an economic analysis memorandum for each rulemaking that contained an assessment of the proposal and reasonable alternatives, including disclosure of the quantitative and qualitative methods and assumptions used in the assessment.[96]

The OCC appears to be slowly changing its practices in light of its new exemption from the executive orders. The GAO reported that at the end of 2011 the OCC was "revising its rulemaking policies and procedures to reflect this change."[97] The OCC informed the GAO that the new procedures will continue to refer to OMB's economic analysis guidance.[98] It is likely, however, that embracing its new status as an independent regulatory agency, OCC will cut back on its economic analysis.[99] The OCC has not included economic analyses in the proposed or final rules it has issued in 2012, with the exception of the rule described below, in which the regulatory analysis was part of the UMRA analysis.

Although the OCC's designation under Dodd-Frank as an independent regulatory agency exempts it from UMRA, the OCC has continued to comply with UMRA.[100] Accordingly, OCC's recent final rule on risk-based capital contained an UMRA analysis, which included a regulatory impact analysis that looked at the need for regulatory action, alternatives, and costs and benefits of the final rule.[101] The OCC might continue to conduct regulatory impact analyses for significant rulemakings, but its regulatory impact analyses will not be reviewed by OIRA.[102]

F. National Credit Union Administration

The National Credit Union Administration (NCUA) is charged with overseeing federal credit unions and managing the National Credit Union Share Insurance Fund. NCUA, based on

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[95] *OCC IG Report*, *supra* note 35, at 3.
[96] *See id.* at 5.
[97] GAO REPORT, *supra* note 21, at n. 25.
[98] *See id.* at Appendix X, Letter from John Walsh, Acting Comptroller of the Currency, to A. Nicole Clowers, GAO Director of Financial Markets and Community Development (Oct. 24, 2011).
[99] According to an OCC official interviewed by the OCC inspector general, the "OCC does not perform any discretionary economic analysis." *OCC IG Report*, *supra* note 35, at 6. It is not clear whether the OCC will perform discretionary analysis now that it is no longer subject to the executive order mandates.
[100] The OCC may have concluded that its designation by Dodd-Frank as an "independent regulatory agency" is for limited purposes and does not serve to exempt it from UMRA. Dodd-Frank designated the OCC as an independent regulatory agency by adding it to the list of agencies so identified in 44 U.S.C. § 3502(5), but UMRA does not explicitly refer to that statutory section in its exclusion of independent regulatory agencies. 2 U.S.C. § 658(1).
[101] OCC, FRS, FDIC, Joint Final Rule: Risk-Based Capital Guidelines: Market Risk, 77 Fed. Reg. 53,059 (Aug. 30, 2012).
[102] For a discussion of the limitations of UMRA as compared to the executive orders, *see* Susan Dudley, *What To Do About Unfunded Mandates?*, THE DAILY CALLER (Feb. 17, 2011), available at http://dailycaller.com/2011/02/17/what-to-do-about-unfunded-mandates.

its claimed status as an independent regulatory agency, does not comply with the executive orders on economic analysis.[103]

NCUA's chairman has asserted that "NCUA already meets or exceeds the key principles of the Executive Order" on rulemaking by independent regulatory agencies.[104] The GAO found, however, that stated commitments to the broad principles of the executive orders notwithstanding, NCUA, along with other federal financial regulators making such claims, would produce better analysis by more fully following OMB's Circular A-4.[105]

NCUA's rulemakings do not generally include a self-standing economic analysis. One of NCUA's board members explained that NCUA is committed to regularly reviewing regulations already on the books, but it would be costly to conduct regulatory analysis for every rule:

> I believe, however, that we cannot write a report about every regulation we review. Doing so would be too burdensome and not particularly fruitful. But at the same time, we are pleased to review any regulation—not just ones slated for review—that enough credit unions call to our attention as having out-lived its usefulness. And we welcome suggestions compatible with safety and soundness. . . . I also do not believe we should write a report on the cost-benefit analysis of every regulation NCUA proposes. Doing so would be too burdensome, or necessitate hiring additional employees. In any event, the intended benefits are generally obvious in the regulations we propose, and, indeed, many comments point out potential costs—we need not duplicate those efforts. Like credit unions themselves, we at NCUA need to run as tight and as focused an agency as we can.[106]

Although NCUA's commitment to retrospective review of regulations is important, NCUA also would be well-served by conducting prepromulgation regulatory analysis to better understand the need for, alternatives to, and implications of its rules before they take effect.

G. Federal Deposit Insurance Corporation

The Federal Deposit Insurance Corporation (FDIC) administers the federal deposit insurance program, regulates banks, and manages receiverships of failed financial institutions. The FDIC is an independent regulatory agency and does not have unique statutory requirements to conduct economic analysis.

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[103] NCUA is an independent agency, but it also routinely states in its rulemakings that it is "an independent regulatory agency as defined in 44 U.S.C. 3502(5)." NCUA is not, however, one of the agencies expressly listed in that statute.

[104] Letter from Debbie Matz, NCUA chairman, to Cass R. Sunstein, OIRA administrator, re Executive Order 13579, Regulation and Independent Regulatory Agencies (Nov. 7, 2011), at 1, available at http://www.ncua.gov/News/Documents/NW20111110EO-13579.pdf.

[105] GAO REPORT, *supra* note 21, at 14-15.

[106] Michael E. Fryzel, board member, NCUA, Remarks at the National Association of State Credit Unions Summit (Sept. 17, 2011), available at http://www.ncua.gov/News/Pages/SP20100916FryzelNASCUS.aspx.

In 1998, the FDIC issued a public Statement of Policy on the Development and Review of Regulations, in which it pledged, before issuing a new rule, to consider whether it is needed, "to minimize to the extent practicable the burdens which such issuance imposes on the banking industry and the public," and to give special consideration to the anticipated effect on small institutions.[107] In addition, the Statement provides that "Prior to issuance, the potential benefits associated with the regulation or statement of policy are weighed against the potential costs."[108] The FDIC also stated its intent to periodically review its rules.[109] In response to Executive Order 13,579, the FDIC is revisiting its Statement of Policy, among other things, to "determine how it should be revised to incorporate additional principles regarding cost-benefit analysis, and otherwise to serve the purpose of reducing regulatory burden."[110]

The FDIC contends that it "continually focuses on the potential costs and benefits of the rules that it adopts" and that "the FDIC's longstanding policy [is] to ensure that the rules it adopts are the least burdensome to achieve [its] goals."[111] However, the FDIC also has taken the position that its ability to conduct regulatory analysis is severely limited:

> We note that the FDIC faces certain challenges in conducting cost-benefit analysis of its rules. Applicable statutes often limit the FDIC's flexibility and may constrain consideration of alternative approaches. In certain situations, additional cost-benefit analysis may require the FDIC (or other agencies) to seek additional, sometimes proprietary financial data from our regulated institutions, which may increase regulatory burden and delay implementation of statutory requirements. In addition, . . . the difficulty of reliably estimating costs of regulations to the financial services industry and the nation has long been recognized and the benefits of regulation generally are regarded as even more difficult to measure.[112]

The difficulties that the FDIC cites are not unique to financial regulators.[113] Moreover, an entity like the FDIC has a particular interest in doing economic analysis, namely protection of the deposit insurance fund.[114]

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[107] 63 Fed. Reg. 25,157, 25,158 (May 7, 1998).
[108] *Id*. at 25,158.
[109] *Id*.
[110] *See* FDIC's Plans to Review Existing Regulations for Continued Effectiveness (Apr. 27, 2012), available at http://www.fdic.gov/regulations/laws/plans/index.html.
[111] *Id*.
[112] GAO REPORT, *supra* note 21, at Appendix VII, Letter from Michael H. Krimminger, General Counsel, FDIC, to Nicole Clowers, GAO Director of Financial Markets and Community Investment (Oct. 27, 2011), at 2 (footnote omitted).
[113] *See, e.g.*, Kenneth J. Arrow, *et al*., *Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation*, SCIENCE (Apr. 12, 1996), at 222 (acknowledging the limitations of benefit-cost analysis with respect to environmental, health, and safety regulation, but arguing that "it can provide an exceptionally useful framework for consistently organizing disparate information, and, in this way, it can, greatly improve the process and, hence, the outcome of policy analysis").

The FDIC's inspector general, in its review of economic analysis at the FDIC, found that "the FDIC policies and practices generally address the spirit of, and principles found in" the executive orders and OMB Circular A-4.[115] The GAO found, however, that, as at federal financial regulators with similar aspirational policies, these broad principles were not reflected in more granular guidance comparable to OMB Circular A-4.[116] Because the FDIC does not routinely publish regulatory analyses when it issues its proposed and adopted rules, it is difficult to assess the quality of the agency's analysis.[117] The FDIC's inspector general found that, in practice, the FDIC does not follow a standard approach to analyzing the costs and benefits of its rules; instead the staff charged with each rule decides the nature and amount of analysis to perform.[118] Moreover, subject-matter experts, who are not necessarily economists, perform and review the economic analysis.[119]

The FDIC's current efforts to rethink its approach to regulatory analysis are much needed to match FDIC practice with its stated belief that "cost-benefit analysis [is] an important component of the rule-making process" and its stated claim that it "seeks to undertake such analysis with rigor and transparency."[120]

H. Federal Housing Finance Agency

The Federal Housing Finance Agency (FHFA), created in 2008, is the regulator and conservator of Fannie Mae and Freddie Mac and the regulator of the Federal Home Loan Banks. When the FHFA was formed, it was designated as an independent regulatory agency.[121] Consequently, along with other independent regulatory agencies, the executive orders, as currently drafted, do not currently apply to it.

FHFA's role as conservator of Fannie Mae and Freddie Mac, however, gives the FHFA a unique reason for considering the economic consequence of its regulations with respect to those

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[114] Indeed, the inspector general reported that FDIC officials "expressed that it was a duty of the FDIC as an insurer and a safety and soundness regulator to ensure that the Corporation carefully considered how all aspects of particular rules individually and collectively affected the banks it ensures, the financial industry, and the broader economy." FDIC IG Report, *supra* note 35, at 8.
[115] *Id*. at 3.
[116] GAO REPORT, *supra* note 21, at 14-15.
[117] As OMB explained: "A good regulatory analysis is designed to inform the public and other parts of the Government (as well as the agency conducting the analysis) of the effects of alternative actions. Regulatory analysis sometimes will show that a proposed action is misguided, but it can also demonstrate that well-conceived actions are reasonable and justified." Circular A-4, *supra* note 9, at 2.
[118] FDIC IG Report, *supra* note 35, at 9. Based on the descriptions of the analyses contained in the inspector general's report, the analysis for each of the three rules reviewed seemed primarily aimed at answering discrete questions, such as which entities would be covered by the rule, or considering factors specifically identified by the authorizing statute, rather than looking more broadly at the need for regulation, alternatives, and the relative costs and benefits of different approaches. *Id*. at 10-17.
[119] *Id*. at 10.
[120] Krimminger Letter, *supra* note 112, at 1.
[121] *See* Housing and Economic Recovery Act of 2008 § 1216(e) (amending 44 U.S.C. § 3502(5)).

entities.[122] Although FHFA's notices of rulemaking do not contain regulatory analysis of the nature laid out in the executive orders, FHFA has shown a willingness to conduct economic analysis in other contexts that easily could be applied to rulemaking.[123]

I. Board of Governors of the Federal Reserve System

The Board of Governors of the Federal Reserve System (FRB) is responsible for, among other things, overseeing financial holding companies, certain banks, and systemically important nonbanks. The FRB is generally not subject to regulatory analysis requirements in its authorizing statutes.[124] The FRB has a rulemaking policy statement in place that calls for some analysis to accompany most rulemakings,[125] but the FRB does not appear to follow this policy very closely.

That FRB's policy, which dates back to 1979, takes its lead from a Carter-era executive order on rulemaking.[126] That executive order required, among other things, that agencies prepare and make available to the public a regulatory analysis that:

> contain[s] a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the

[122] As conservator, the FHFA may take actions appropriate "to put [Fannie Mae and Freddie Mac] in a sound and solvent condition" and "preserve and conserve [their] assets and property."12 U.S.C. § 4617(b)(2)(D).
[123] For example, the FHFA conducted an analysis of allowing Fannie Mae and Freddie Mac to engage in principal reduction. The analysis included an assessment of the root problem, a model-based economic analysis with underlying assumptions disclosed, and an analysis of potential alternatives. Letter from Edward J. DeMarco, acting director, FHFA, to Tim Johnson and Richard C. Shelby, chairman and ranking member, Senate Committee on Banking, Housing and Urban Affairs (July 31, 2012), at 1 ("In conducting this analysis, FHFA took into consideration current loss mitigation tools; costs and benefits of using principal forgiveness including the economic benefit or costs to the Enterprises as well as to taxpayers; the impact on borrower behavior; direct and indirect implementation costs; and, the overall impact on the mortgage market"), available at http://www.fhfa.gov/webfiles/24112/PF_LettertoCong73112.pdf. *See also* FHFA, Review of Options Available for Underwater Borrowers and Principal Forgiveness available at (July 31, 2012), http://www.fhfa.gov/webfiles/24108/PF_FHFApaper73112.pdf. Because the analysis and the model and assumptions used in it were transparent as principles of good regulatory analysis demand, the Department of the Treasury was able to respond with a counter-interpretation of the analysis and its policy implications. Letter from Timothy F. Geithner, secretary, Department of the Treasury, to Edward J. DeMarco, acting director, FHFA (July 31, 2012) (transmitting memorandum arguing that, if performed differently, the analysis would support principal reduction), available at http://www.treasury.gov/connect/blog/Documents/letter.to.demarco.pdf.
[124] *See* FRB IG Report, *supra* note 35, at 6 ("A number of key statutes related to the Board's regulatory authority, including the Federal Reserve Act and the Bank Holding Company Act of 1956, provide the Board with rulemaking authority to perform the duties, functions, or services specified in these statutes. These statutes generally do not require economic analysis as part of the agency's rulemaking activities").
[125] Board of Governors of the Federal Reserve System, Statement of Policy Regarding Expanded Rulemaking Procedures, 44 Fed. Reg. 3957 (1979) [hereinafter FRB Policy Statement]. The FRB's general counsel pointed to this statement of policy as the FRB's current "regulatory policies." *See* GAO REPORT, *supra* note 21, at Appendix VIII, Letter from Scott G. Alvarez, general counsel, FRB, and James M. Lyon, senior advisor to the Board for Regulatory Reform Implementation, FRB, to A. Nicole Clowers, GAO director, Financial Markets and Community Investment (Oct. 24, 2011), at 1.
[126] *See* FRB Policy Statement, *supra* note 125, at 3957.

economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others.[127]

Broadly consistent with the approach set forth in that executive order, the policy statement directs FRB staff, "[b]efore presenting any proposals regarding a regulation to the Board for formal action [to] prepare a regulatory analysis," "which, at a minimum . . . will discuss the need for and purposes of the regulation, set forth the various options available, discuss, where appropriate, their possible economic implications, evaluate their compliance, recordkeeping and reporting burdens, and recommend the best course of action based on the alternatives."[128] If "considerable information is available, a correspondingly more exhaustive regulatory analysis will be expected."[129] The policy statement also requires the regulatory analysis to be publicly available.[130] Moreover, in order to facilitate public involvement in rulemaking, the policy statement requires that meetings to consider rules are to be public.[131] Deviations from the approach to rulemaking laid out in the policy statement "may be appropriate" under certain circumstances, including when "[t]he regulation must be adopted within a statutory deadline."[132]

The FRB routinely departs from key aspects of the policy statement.[133] The inspector general's report found generally that the FRB does some economic analysis, but the amount and nature of economic analysis is dictated by specific statutory mandates and whatever more the FRB decides, in its discretion, to do.[134] This somewhat haphazard approach to economic analysis is not consistent with the policy statement's goal of producing a comprehensive regulatory analysis with certain minimum elements for every rule. The policy statement reflects an expectation that rules will be proposed and adopted at public meetings,[135] but the FRB rarely holds public meetings to consider its rules.[136] Moreover, the policy statement promises that notices will "inform the public that copies of the regulatory analysis are available through the Freedom of Information Act,"[137] but the FRB does not offer the regulatory analysis to the public.[138] The FRB does not necessarily produce a written analysis for internal, let alone

[127] Exec. Order 12,044, 44 Fed. Reg. 12,661 (Mar. 24, 1978).
[128] FRB Policy Statement, *supra* note 125, at 3958.
[129] *Id*.
[130] *Id*. If there are material changes to the regulatory analysis in connection with the rule adoption, the revised analysis must be made available to the public. *Id*.
[131] *Id*.
[132] *Id*.
[133] None of the rule-writers with whom the FRB inspector general spoke seemed to be aware of the policy statement. FRB IG Report, *supra* note 35, at 9.
[134] *Id*. at 15 ("Documentation we reviewed indicated that the Board conducts the quantitative economic analysis necessary to satisfy statutory requirements, including 'consideration' requirements. On a discretionary basis, the Board also conducts the quantitative economic analysis it deems necessary to support the rulemaking").
[135] FRB Policy Statement, *supra* note 125, at 3958.
[136] The FRB has only held three open meetings in the last three years, according to a search of Sunshine Act Notices.
[137] FRB Policy Statement, *supra* note 125, at 3958.
[138] The FRB includes a section in its rulemaking notices called "Regulatory Analysis," but this section includes only Paperwork Reduction Act and Regulatory Flexibility Act analyses, which do not serve the same purpose as the analysis outlined in the policy statement.

external, purposes, as was illustrated by the inspector general's recommendation "that the [FRB] consider establishing documentation standards for rulemaking economic analysis to help ensure reproducibility on an internal basis."[139]

The FRB has cited the difficulty of cost-benefit analysis mandates in connection with federal financial regulation, which is focused "above all else . . . on the safety and soundness of specific financial institutions."[140] The FRB's concerns for safety and soundness make thorough economic analysis all the more important as a tool for understanding the implications of its rules on the institutions it regulates.[141]

J. Office of Financial Research

The Office of Financial Research (OFR) is a new agency, created by Dodd-Frank within—but independent of—the Department of the Treasury. It is charged with collecting, standardizing, maintaining, and disseminating financial data, conducting research, and developing tools for monitoring systemic risk. Dodd-Frank had the effect of exempting the OFR from the executive order requirements for economic analysis by adding it to the list of independent regulatory agencies.[142]

The agency has rulemaking authority, but to date the OFR has not issued any regulations.[143] The OFR, however, issued a statement of policy with respect to legal entity identifiers (LEIs), one of the agency's core initiatives.[144] The goal of this project is to have a unique identifier for every legal entity that engages in a financial transaction. The OFR is taking active part in a cross-border effort with other regulators and industry to develop a universal LEI system. Once that system is finalized, the OFR "plans to issue a regulation mandating the use of such a standard for data reported to the Office."[145] The OFR's plans simply to codify the work of a private initiative

[139] FRB IG Report, *supra* note 35, at 20.
[140] *See* Alvarez Letter, *supra* note 125, at 1 (explaining that "Federal financial regulation, above all else, is focused on the safety and soundness of specific financial institutions and therefore, as the report notes, conducting benefit-cost analysis on financial regulations is inherently difficult").
[141] *See supra* note 114.
[142] *See* Dodd-Frank § 1100D (amending 44 U.S.C. § 3502(5)).
[143] The Department of Treasury issued an interim rule to establish postemployment restrictions for employees of the Office of Financial Research. Supplemental Standards for Ethical Conduct for Employees of the Department of Treasury, 76 Fed. Reg. 60,707 (Sept. 30, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-09-30/pdf/2011-25105.pdf. As an agency management and personnel rule, it is not covered by the APA requirements. 5 U.S.C. 553(a)(2). As Dodd-Frank directed it to do, Treasury has issued a rule to implement the Office of Financial Research support fee. This rule, which establishes a fee paid by financial companies to support the OFR and FSOC, would have an annual effect on the economy of $100 million or more and thus was accompanied by a regulatory impact assessment. Department of the Treasury, Final Rule and Interim Final Rule: Assessment of Fees on Large Bank Holding Companies and Nonbank Financial Companies Supervised by the Federal Reserve Board to Cover the Expenses of the Financial Research Fund, 77 Fed. Reg. 29,884, 29,891 (May 21, 2012).
[144] OFR, Statement of Policy with Request for Comment: Statement on Legal Entity Identification for Financial Contracts, 75 Fed. Reg. 74,146 (Nov. 30, 2010).
[145] *Id*. at 74,147. *See also* OFR, Frequently Asked Questions: Global Legal Entity Identifier (LEI) (Aug. 2012), at 2 ("The OFR has worked with other U.S. regulators to embed the concept of the LEI into rulemakings, and will

not being conducted pursuant to APA requirements for transparency and public participation raises some concerns about the OFR's commitment to regulatory process.[146]

K. Quasi-Governmental Regulatory Organizations

Federal financial regulators rely heavily on quasi-governmental regulatory organizations (QGROs), typically referred to as self-regulatory organizations (SROs), to complement their rulemaking and examination efforts.[147] The CFTC and SEC are most reliant on QGROs. QGROs vary in their statutory bases, forms of governance, and degree to which they are overseen by one or more federal financial regulators. Most exert considerable control within their areas of delegated authority. QGROs often serve as the frontline regulators, directly regulating the firms and individuals that deal with the public. The rules adopted by QGROs are of critical importance to the firms they regulate, customers of those firms, and the structure of our financial markets.

QGROs are likely to get more powerful as the federal financial regulators juggle their new Dodd-Frank responsibilities. For example, Dodd-Frank directed the SEC to study "the extent to which having Congress authorize the Commission to designate one or more self-regulatory organizations to augment the Commission's efforts in overseeing investment advisers would improve the frequency of examinations of investment advisers."[148] Similarly, the CFTC has begun delegating additional functions to the National Futures Association (NFA).[149]

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continue to do so. These mandatory reporting uses of the LEI will facilitate the rapid deployment of the LEI when the global system becomes available."), available at http://www.treasury.gov/initiatives/wsr/ofr/Documents/LEI_FAQs_August2012_FINAL.pdf.

[146] A commenter responding to the OFR's policy statement raised a question about the legality of the OFR's planned LEI approach. Comment of Allan I. Mendelowitz, The Committee to Establish the National Institute of Finance (Jan. 31, 2011), at 3-4("establishing a separate 'governance structure' for a not-for-profit that establishes and assigns legal entity identifiers amounts, it would seem, to a relinquishment of the OFR's authority. . . . The standards, including legal entity identifiers, are to be established by the OFR by way of a rulemaking procedure").

[147] The term SRO is, except where demanded by the context, avoided herein out of a concern that the term is somewhat misleading. Although not government agencies, these regulators exercise many of the same types of powers as government regulators. The use of the term "quasi-governmental regulatory organization" reflects the fact that these entities play a substantial role in shaping the financial marketplace. The rules and standards they adopt and punishments they mete out can have substantial effects on the individuals and entities over which the QGROs have authority.

[148] Dodd-Frank § 914(a)(2)(B). Although this study requirement related to the examination function, it is reasonable to expect that a designated QGRO would also have some rulemaking authority. Indeed, SEC commissioner Walter favors an SRO model for investment advisers, because, in addition to alleviating the SEC's examination responsibilities, it would add "to the Commission's set of tools an ability to promulgate ethical and business conduct standards that would further protect investors." Elisse Walter, commissioner, SEC, Statement on Study Enhancing Investment Adviser Examinations (Required by Section 914 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act) (Jan. 2011), at 7, available at http://www.sec.gov/news/speech/2011/spch011911ebw.pdf.

[149] *See, e.g.*, *Oversight of the Dodd-Frank Implementation: A Progress Report by the Regulators at the Half-Year Mark*: *Hearing Before the Sen. Comm. on Banking, Housing, and Urban Affairs*, 112th Congress (Feb. 17, 2011), at 15 (statement of Gary Gensler, chairman, CFTC) ("We are also working hand-in-glove with the self-regulatory organization, the NFA, to see what can they pick up, can they pick up registration and examination functions and so forth"), available at http://www.gpo.gov/fdsys/pkg/CHRG-112shrg65718/pdf/CHRG-112shrg65718.pdf. The recent problems at Peregrine Financial, for which the NFA was the primary regulator, may affect the debate about the

Despite the increasingly important role that QGROs play in setting the ground rules for the financial markets, they generally are not directly subject to economic analysis requirements, the APA, or other statutes governing rulemaking processes.[150] An in-depth look at the practices of each QGRO is beyond the scope of this paper,[151] but some of the key QGROs and their economic analysis practices are discussed briefly.

1. Public Company Accounting Oversight Board

The Public Company Accounting Oversight Board (PCAOB) was created by the Sarbanes-Oxley Act in response to the notorious audit failures at Enron and WorldCom to oversee firms that audit public companies. Every accounting firm that audits public companies is required to register with the PCAOB and is subject to the auditing standards and other rules promulgated by the PCAOB.[152] The PCAOB is a nonprofit corporation governed by a five-member board. As originally designed, the PCAOB was found to be unconstitutional for lack of accountability to the president.[153] The Supreme Court struck the offending provision of the Sarbanes-Oxley Act, and thus preserved the PCAOB.[154]

The PCAOB generally has not conducted formal economic analysis as a part of the standard-setting process. The SEC is required to approve a PCAOB rule, "if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary or appropriate in the public interest or for the protection of investors."[155] The SEC, however, has not conditioned its approval on the PCAOB's performance of a regulatory analysis.[156]

The PCAOB is currently under pressure from within and from outside to begin conducting regulatory analysis. Recently, for example, Jay Hanson, a member of the PCAOB,

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proper role for QGROs, although FINRA's role as regulator of the Madoff and Stanford firms does not seem to have affected the debate.

[150] Others have noted the need for QGROs to be subject to the same standards as governmental regulators. *See, e.g.*, U.S. Chamber of Commerce, *U.S. Capital Markets Competitiveness: The Unfinished Agenda* (2011), at 24 ("When the authority to set policy standards and assess fees is delegated, in fact or in effect, then concomitant responsibilities must also be assumed, including the obligation to abide by certain minimum administrative procedures, to conduct and make decisions based on sound cost-benefit analysis, to operate in a transparent manner, and to provide aggrieved parties due process"), available at http://www.uschamber.com/sites/default/files/reports/1107_UnfinishedAgenda_WEB.pdf.

[151] Omitted from this discussion, for example, are entities like the Securities Investor Protection Corporation, exchanges, data repositories, and clearinghouses, all of which have regulatory obligations.

[152] Dodd-Frank expanded the PCAOB's reach to include auditors of broker and dealers. Dodd-Frank § 982.

[153] Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138, 3164 (2010) ("While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way").

[154] *Id*.

[155] Sarbanes-Oxley Act § 107(b)(3).

[156] The PCAOB generally includes in its filings with the SEC a boilerplate statement, with minimal accompanying analysis, that "[t]he Board does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act." *See, e.g.*, Public Company Accounting Oversight Board; Notice of Filing of Proposed Temporary Rule for an Interim Program of Inspection Related to Audits of Brokers and Dealers, 76 Fed. Reg. 40,961, 40,962 (July 12, 2011).

stated, "We also have a significant task in front of us to evaluate how to incorporate more robust economic analysis in our standard-setting process more generally, including how we begin with a clear articulation of each problem, how we prioritize the problem, and how we assess possible solutions."[157]

Earlier this year, SEC commissioner Troy Paredes called on the PCAOB to conduct cost-benefit analysis:

> the PCAOB also needs to engage in rigorous cost-benefit analysis of its rules, including its auditing standards. We need to be assured that the potential consequences—both for better and for worse—of a PCAOB rule have been thoroughly evaluated and considered in a balanced way. Otherwise, for example, how can we determine on a reasoned basis whether a PCAOB proposal advances the public interest? Whether a PCAOB rule advances the public interest depends on its practical impacts. Cost-benefit analysis allows us to better anticipate and assess these impacts so that a well-reasoned judgment can be made. Put differently, without such a rigorous analysis, there is a greater risk that a proposed standard or other PCAOB rule could do more harm than good, in which case an alternative approach would be preferable.[158]

The PCAOB is currently considering whether to propose a standard calling for mandatory audit firm rotation.[159] Because of concerns that this standard could impose unwarranted costs on public companies, there have been calls for analysis of costs and benefits in connection with any such proposal, including from former board member Daniel Goelzer.[160]

Congress weighed in by including a provision in the recently passed Jumpstart Our Business Startups Act (JOBS Act) that would prohibit the application of a mandatory audit firm rotation standard to audits of emerging growth companies.[161] Moreover, future PCAOB rules would not apply to emerging company audits "unless the Commission determines that the application of such additional requirements is necessary or appropriate in the public interest,

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[157] Jay D. Hanson, board member, PCAOB, Statement on Auditing Standard Related to Communications with Audit Committees (Aug. 15, 2012), available at http://pcaobus.org/News/Speech/Pages/08152012_HansonStatement.aspx.
[158] Troy Paredes, commissioner, SEC, Remarks at AICPA Spring Meeting (May 17, 2012), available at http://www.sec.gov/news/speech/2012/spch051712tap.htm. Others have echoed Commissioner Paredes' concerns. *See, e.g.*, of Tom Quaadman, vice president, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, Prepared Testimony before the Subcommittee on Capital Markets and Government Sponsored Enterprises of the House Committee on Financial Services (Mar. 28, 2012), at 9 (calling for cost-benefit analysis by the PCAOB), available at http://financialservices.house.gov/uploadedfiles/hhrg-112-ba-wstate-tquaadman-20120328.pdf.
[159] PCAOB, Concept Release on Auditor Independence and Audit Firm Rotation, PCAOB Release No. 2011-006 (Aug. 16, 2011), available at http://pcaobus.org/Rules/Rulemaking/Docket037/Release_2011-006.pdf.
[160] Daniel L. Goelzer, board member, PCAOB, Statement Regarding Concept Release on Auditor Independence and Audit Firm Rotation (Aug. 16, 2011) ("the Board should not impose the expense and burden associated with rotation on companies that raise capital in our markets unless the evidence is clear that the benefits will out-weigh the costs"), available at http://pcaobus.org/News/Speech/Pages/08162011_GoelzerStatement.aspx.
[161] JOBS Act § 104 (amending § 103(a)(3) of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7213(a)(3)].

after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation."[162]

That congressional mandate might also serve to remind the SEC of its broader need for regulatory analysis in connection with its approval of PCAOB rulemakings.

2. Financial Accounting Standards Board

The Financial Accounting Standards Board (FASB) is the private organization that sets financial accounting standards. Although the FASB is not a direct regulator, the SEC has recognized its standards as authoritative. As a consequence, compliance with FASB standards is mandatory for public companies in the United States.[163] Thus, the FASB plays an extremely important role in U.S. capital markets.

When the SEC designated the FASB as accounting standard setter, the SEC stated its expectation that the FASB would "[c]ontinue to be objective in its decision-making and to weigh carefully the views of its constituents and the expected benefits and perceived costs of each standard."[164] The FASB's own "Guiding Principles" include a commitment to some level of regulatory analysis, but it falls short of a mandate to conduct rigorous economic analysis: "While reliable quantitative cost-benefit calculations are seldom possible, the FASB strives to determine that a proposed standard will fill a significant need and that the perceived costs it imposes, compared with possible alternatives, are justified in relation to the overall expected benefits."[165] A FASB concepts statement also addresses the need to conduct some analysis of costs and benefits:

> In applying the cost constraint, the Board assesses whether the benefits of reporting particular information are likely to justify the costs incurred to provide and use that information. When applying the cost constraint in developing a proposed financial reporting standard, the Board seeks information from providers of financial information, users, auditors, academics, and others about the expected nature and quantity of the benefits and costs of that standard. In most situations, assessments are based on a combination of quantitative and qualitative information.[166]

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[162] *Id*.
[163] *See* Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, 68 Fed. Reg. 23,333, 23,333 (May 1, 2003) ("FASB's financial accounting and reporting standards are recognized as 'generally accepted' for purposes of the federal securities laws. As a result, registrants are required to continue to comply with those standards in preparing financial statements filed with the Commission, unless the Commission directs otherwise"), available at http://www.sec.gov/rules/policy/33-8221.htm.
[164] *Id*. at 23,335.
[165] FASB, Rules of Procedure (Jan. 1, 2012) at 4 (Guiding Principle 3), available at http://www.fasb.org/cs/ContentServer?site=FASB&c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176159620523.
[166] FASB, Statement of Financial Accounting Concepts No. 8 (Sept. 2010), at 22 (Qualitative Characteristic 38), available at http://www.fasb.org/cs/BlobServer?blobkey=id&blobwhere=1175822892635&blobheader=application%2Fpdf&blo

In a recent speech, the FASB's chairman elaborated on the practical implications of these guidelines:

> We issue standards if the improvements in the quality of the reporting are expected to justify the costs of preparing and using the information. . . . From my perspective, the entire FASB process is one big cost-benefit analysis. That is, every step of our due process procedures is an effort to gather information about the benefits of a potential change in accounting; namely, to identify the most faithful way to present information about a transaction or economic condition so that investors and other users of financial statements can make well-informed decisions.[167]

The chairman's speech portrays a much less formal and rigorous form of analysis than that required by the executive orders.

The FASB has been called on to employ "more rigorous cost-benefit analysis."[168] Improved regulatory analysis, although perhaps presenting unique challenges in the context of accounting standard setting,[169] could help the FASB maintain its independence as a standard setter.[170]

3. Financial Industry Regulatory Authority

The Financial Industry Regulatory Authority (FINRA)[171] regulates securities brokers. A corporation governed by a board made up of a majority of independent and member directors,

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bcol=urldata&blobtable=MungoBlobs. *See also id.* at 31 (Basis for Conclusion 3.47) ("Cost is a pervasive constraint that standard setters, as well as providers and users of financial information, should keep in mind when considering the benefits of a possible new financial reporting requirement. Cost is not a qualitative characteristic of information. It is a characteristic of the process used to provide the information").

167 Leslie F. Seidman, chairman, FASB, Remarks at Compliance Week Annual Conference (June 4, 2012), at 8, available at http://www.fasb.org/cs/ContentServer?site=FASB&c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176160082895.

168 *See, e.g.*, KPMG and Financial Executives Research Foundation, *Disclosure Overload and Complexity: Hidden in Plain Sight* (2011), at 40 ("the FASB should consider any new disclosure requirements from the context of the overall current disclosure environment rather than considering disclosure from the perspective of each individual topic as it is addressed in standards setting. This macro disclosure consideration, together with more rigorous cost-benefit analysis and field testing of disclosures should be considered prospectively and retrospectively"), available at http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/disclosure-overload-complexity.pdf.

169 *See* Katherine Schipper, *How Can We Measure the Costs and Benefits of Changes in Financial Reporting Standards?* 40 ACCOUNTING AND BUSINESS RESEARCH 309 (2010) (discussing cost-benefit analysis in the context of accounting standards and how it differs from cost-benefit methods used elsewhere).

170 *See* Financial Reporting Policy Committee, American Accounting Association, *Accounting Standard Setting for Private Companies: Response to the Financial Accounting Foundation's Plan to Establish the Private Company Standards Improvement Council* (Jan. 14, 2012), at 18 ("We recommend that the FAF and the FASB consider workable models to evaluate the costs and benefits of every new standard. We recognize that this will take time, and caution against assuming this would be limited to a few areas; the problem appears pervasive. Yet a well-conceived CBA framework would create a less politicized standard setting process") (footnote omitted), available at http://www.accountingfoundation.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175823597699&blobheader=application%2Fpdf.

FINRA describes itself as "the largest independent regulator of securities firms doing business with the public in the United States."[172] FINRA, oversees approximately 4,500 firms and 630,000 individual registered securities representatives.[173] FINRA is the only national securities association registered with the SEC.[174] Accordingly, broker-dealers firms and individuals involved in selling securities to the public must be members of FINRA[175] and thus are subject to its rules, examinations, and enforcement authority.

FINRA maintains a lengthy rulebook.[176] QGROs, including FINRA, are required to submit their rules to the SEC for approval. FINRA typically publishes its proposed rules for comment before submitting them to the SEC. Before approving a FINRA rule,[177] the SEC again publishes it for public comment. The SEC must approve a rule if it is consistent with the Securities Exchange Act and relevant regulations.[178] In approval notices for many FINRA and other QGRO rulemakings, the SEC states, without any accompanying analysis, "In approving the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation."[179] FINRA also generally includes a statement, without analysis, to the effect that its rule proposal does not "impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Securities Exchange Act.[180]

The SEC could reasonably demand that FINRA provide a regulatory analysis in connection with rule proposals to serve as a basis for the SEC's approval. Doing so would be consistent with the changes the SEC has pledged to make in its approach to economic analysis for its own rules.

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[171] FINRA is the successor organization to the National Association of Securities Dealers (NASD) and the New York Stock Exchange's regulatory body.
[172] FINRA, YEAR IN REVIEW AND ANNUAL FINANCIAL REPORT, at 8 (2011). FINRA also performs other regulatory functions, including providing market surveillance services to exchanges and maintaining a database of financial service providers.
[173] *Id*.
[174] FINRA is registered as a national securities association under § 15A of the Securities Exchange Act of 1934 [15 U.S.C. § 78o-3].
[175] *See* Exchange Act § 15(b)(8) [15 U.S.C. § 78o(b)(8)].
[176] Under the Exchange Act, FINRA is required to have rules that are:

> designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Exchange Act § 15A(b)(6) [15 U.S.C. § 78o-3(b)(6)]. FINRA has the power to examine firms for compliance with those rules and the securities laws and impose sanctions, including fines and industry bars. Exchange Act § 15A(b)(7) [15 U.S.C. §78o-3(b)(7)]. FINRA also enforces the rules of the Municipal Securities Rulemaking Board. FINRA's enforcement decisions can be appealed to the SEC and then to federal court.
[177] Many of the functions with respect to the rules of FINRA and other QGROs are handled by SEC staff under authority delegated from the commission.
[178] *See* Exchange Act § 19(b)(2)(C) [15 U.S.C. § 78s(b)(2)(C)].
[179] In connection with this statement, the SEC cites 15 U.S.C. § 78c(f), which is the same provision upon which the SEC's economic analysis obligations are based in connection with its own rules. It would seem, then, that the SEC should also be conducting economic analysis in connection with FINRA rules.
[180] Exchange Act § 15A(b)(9) [15 U.S.C. §78o-3(b)(9)].

In addition to this generally applicable statutory approval standard, the SEC has the power to impose economic analysis obligations on FINRA and other QGROs in connection with particular delegated regulatory actions.[181]

4. National Futures Association

The NFA is the counterpart to FINRA for the futures industry. The NFA, which is governed by a board composed of directors representing industry and the public, oversees approximately 4,200 firms and 55,000 individuals.[182] Membership in the NFA is mandatory for anyone engaged with the public in futures transactions, including futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity pool operators, and commodity trading advisors.[183] Dodd-Frank rulemaking added swap dealers and major swap participants to the NFA's regulatory purview.

The NFA is a registered futures association with the CFTC.[184] The Commodity Exchange Act requires the NFA to file rulemaking proposals with the CFTC and directs the CFTC to approve those changes if they are consistent with the statutory requirements for registered futures association rules and do not otherwise violate the Commodity Exchange Act or implementing regulations.[185]

Neither the NFA, in crafting its rules, nor the CFTC, in reviewing those rules, appears to employ economic analysis.[186] When the CFTC acts with respect to an NFA rulemaking

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[181] For example, the SEC required FINRA and the other QGROs charged with the joint development of a consolidated audit trail to include in their plan "[t]he detailed estimated costs for creating, implementing, and maintaining the consolidated audit trail" and "[a]n analysis of the impact on competition, efficiency and capital formation of creating, implementing, and maintaining of the national market plan." 17 CFR § 242.613(a)(1)(vii) and (viii). *See also* SEC, SEC Approves New Rule Requiring Consolidated Audit Trail to Monitor and Analyze Trading Activity, Press Release No. 2012-134 (July 11, 2012), available at http://www.sec.gov/news/press/2012/2012-134.htm.

[182] *See* NFA, NFA's Role in the Futures Industry, available at http://www.nfa.futures.org/NFA-about-nfa/index.HTML. The NFA also provides regulatory services to other QGROs, such as designated contract markets.

[183] See NFA Bylaw 1101 ("No Member may carry an account, accept an order or handle a transaction in commodity futures contracts for or on behalf of any non-Member of NFA, or suspended Member, that is required to be registered with the Commission as an FCM, IB, CPO, CTA or LTM, and that is acting in respect to the account, order or transaction for a customer, a commodity pool or participant therein, a client of a commodity trading advisor, or any other person"), available at http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=BYLAW%201101&Section=3.

[184] *See generally* Commodity Exchange Act § 17 [7 U.S.C. § 21]. The SEC also exercises some oversight over the NFA.

[185] *See* Commodity Exchange Act § 17(j) [7 U.S.C. § 21(j)].

[186] The NFA rulemaking process is less transparent than that of the other QGROs, which makes it difficult to determine which factors were considered in the underlying rulemaking analysis. The NFA has been criticized more generally for its lack of transparency. *See* Letter from Angela Canterbury, Director of Public Policy, and Michael Smallberg, investigator, Project on Government Oversight, to Debbie Stabenow, chairman, Senate Committee on Agriculture, Nutrition, and Forestry, *et al.* (July 23, 2012), at 3 ("As a private organization, NFA does not have to comply with federal laws and regulations designed to make government agencies more transparent, ethical, and accountable"), available at http://www.pogoarchives.org/m/fo/nfa-letter-20120723.pdf.

proposal,[187] it is bound by the same requirement to consider the costs and benefits that applies to the adoption of its own rules.[188] The CFTC, in connection with its review of NFA rules, could reasonably demand that the NFA provide a regulatory analysis in connection with each rule filing.

5. Municipal Securities Rulemaking Board

The Municipal Securities Rulemaking Board (MSRB) writes rules for municipal securities dealers and, because of new powers granted it by Dodd-Frank, for municipal advisers.[189] The MSRB is a nongovernmental corporation created by the Securities Acts Amendments of 1975. It is currently governed by 11 public representative directors and 10 industry directors. Municipal securities dealers and municipal advisers must register with the MSRB and must comply with MSRB rules.

The MSRB does not conduct economic analyses in connection with its rulemakings. In a nod to the statutory prohibition on imposing any undue "burden on competition,"[190] MSRB notices, like other QGRO rule filings, typically include a perfunctory statement with respect to competition with little or no accompanying analysis. The process by which MSRB rules are published for comment and approved by the SEC is similar to the process described above for FINRA's rules.[191] As with other QGRO rulemakings, in approving MSRB rules, the SEC generally states, with little or no analysis, that it has considered the rule's effect on efficiency, competition, and capital formation.

Two SEC commissioners, in a lengthy statement of dissent from a recent MSRB rule approval, took issue with this approach. They explained that the analysis by the MSRB and the SEC in connection with that rulemaking fell short of statutory approval standards, which require:

> a thorough evaluation of the potential impacts of the proposed rule change, including in comparison to alternative regulatory approaches. Unsupported assertions that the hoped-

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[187] The NFA's rules can take effect without CFTC approval, but CFTC has the option to review NFA rules. *See* Commodity Exchange Act § 17(j) [7 U.S.C. § 21(j)].

[188] *See id*. ("The Commission shall approve such rules if such rules are determined by the Commission to be consistent with the requirements of this section and not otherwise in violation of this Act or the regulations issued pursuant to this Act, and the Commission shall disapprove, after appropriate notice and opportunity for hearing, any such rule which the Commission determines at any time to be inconsistent with the requirements of this section or in violation of this Act or the regulations issued pursuant to this Act.").

[189] Specifically, the MSRB is charged with writing

> rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Exchange Act § 15B(b)(2) [15 U.S.C. § 78o-4(b)(2)]. The MSRB does not have enforcement authority; the SEC, the banking regulators, and FINRA enforce the MSRB's rules.

[190] Exchange Act § 15B(b)(2)(C) [15 U.S.C. § 78o-4(b)(2)(C)].

[191] For a discussion of MSRB's rulemaking process, *see* the following discussion on MSRB's website: http://www.msrb.org/About-MSRB/Programs/Market-Regulation.aspx.

> for benefits will materialize, that the costs will be warranted, and that the statutory standard is met are inadequate to justify a rule change. If there is any question as to the rigor of an SRO's analysis, then it is all the more paramount that the Commission not defer to the SRO's claims, conclusions, and judgments. The Commission has a fundamental oversight role with respect to SROs, and undue deference to an SRO in the SRO rulemaking process undercuts the basic structure of that regulatory relationship.
>
> As measured against this benchmark, the consideration by the MSRB and the Commission of the MSRB's proposed Rule G-17 guidance does not constitute a sufficiently reasoned basis upon which to conclude that the statutory standard required for approval has been met. The arguments set forth in favor of the rulemaking rely too much on conclusory statements and assumptions rather than on rigorous analysis of the real-life consequences that could arise, whether for better or for worse, as underwriters and issuers adapt to the new interpretive guidance.[192]

The dearth of analysis highlighted by the commissioners is not unique to that particular rulemaking. Absent a change in QGRO practices, similar objections are likely to be raised with respect to future rules of the MSRB and other QGROs.

III. Conclusion

The financial regulators charged with implementing Dodd-Frank and overseeing U.S. financial markets are subject to relatively few explicit, statutory requirements to conduct economic analysis in connection with their rulemakings. Regardless of their legal obligations, all of the regulators should strive, as a matter of good rulemaking practice, to conduct economic analysis of contemplated regulatory actions. Economic analysis can assist regulators in making the difficult decisions about whether and how to regulate.

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

Economic analysis is not standard practice at QGROs either. By avoiding economic analysis, they, along with other federal financial regulators, are depriving themselves of an important tool

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[192] Daniel M. Gallagher and Troy A. Paredes, commissioners, SEC, Statement Regarding Commission Approval of MSRB Rule G-17 Interpretive Notice (May 14, 2012), available at http://www.sec.gov/news/speech/2012/spch051412dmgtap.htm.

in the rulemaking process. The SEC and CFTC, in fulfillment of their oversight responsibilities, could demand economic analyses from the QGROs, but have generally not done so. If Congress bolsters the federal financial regulators' obligations to conduct economic analysis, the regulators—in an effort to avoid these obligations—could try to delegate additional responsibilities to QGROs.[193] Thus, it may be wise to consider explicitly imposing companion requirements to conduct thorough economic analysis on QGROs in order to prevent regulators from evading their obligations.

The federal financial regulators' failure to embrace economic analysis as a tool for regular and systematic use in their rulemaking may be reflective of a belief economic analysis is either inappropriate or impossible in the context of financial regulation. Similar questions about the utility and feasibility of economic analysis have been asked and answered in the affirmative in other substantive areas.[194] Despite its inherent limitations, economic analysis is a useful tool for financial regulators.[195] In fact, the financial regulators, with their economic expertise and access to substantial financial markets research, might find it easier than other regulators to conduct economic analysis. The FRB and the regional Federal Reserve banks have traditionally generated a lot of research about the financial markets. The OFR, which is charged with "performing applied research and essential long-term research,"[196] is likely to be another fruitful source of financial markets research. Isaac Alfon and Peter Andrews employ the following helpful analogy to explain how economic analysis can help regulators do their job better:

> These days it is hard to imagine that the many doctors who lived before Hippocrates tended to treat the symptoms of disease rather than the cause. It now seems rather obvious that it is better to find out why a patient's right foot is extremely painful and to treat the cause rather than to impose the costs that would follow from simply cutting off the foot. Moreover, a failure to treat the cause might well mean that the left foot soon becomes extremely painful. . . . Regulation too can address the symptoms or the cause of a problem. For example, an outright product ban or the creation of large barriers to the sale of a product might solve a particular consumer ill, albeit at the cost of reduced consumer choice. Nevertheless, failure to

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193 SEC commissioner Walter alluded to the benefits that can be achieved by accomplishing regulatory tasks through an SRO, rather than through a governmental regulator. As she put it, an advantage of the SRO model is "increasing speed and efficiency through SRO processes that are more expedited than those used by the government." Walter Statement, *supra* note 148, at 7.

194 *See, e.g.*, Arrow, et al., *supra* note 113. Financial regulators in the United States can draw on the experiences of financial regulators elsewhere who have used economic analysis in their rulemaking efforts. The United Kingdom's FSA has given a lot of consideration to how economic analysis can be done with respect to financial regulation. *See, e.g.*, Isaac Alfon and Peter Andrews, Financial Services Authority, *Cost-Benefit Analysis in Financial Regulation: How To Do It and How It Adds Value*, FINANCIAL SERVICES AUTHORITY OCCASIONAL PAPER SERIES NO. 3 (Sept. 1999), available at http://www.fsa.gov.uk/pubs/policy/p24.pdf; John Howell & Co., *FSA N2+2 Review Cost Benefit Analysis—Cultural Issues* (Oct. 2004) (looking at how the FSA can improve the effectiveness of its cost-benefit analysis), available at http://www.fsa.gov.uk/pubs/other/howell_report.pdf.

195 *See, e, g.*, Sherwin, *supra* note 18, at 58-59 (arguing that although "not a panacea," cost-benefit analysis "holds tremendous promise for improving the quality of financial regulation").

196 Dodd-Frank § 153(a)(3).

> address the cause of that ill, which might be information or incentive problems, is likely to mean that a new product or service will soon create a similar detriment for consumers. Applying economic analysis to financial regulation is the only way of getting to the bottom of these issues. In particular, cost-benefit analysis (CBA) is a practical and rigorous means of identifying, targeting and checking the impacts of regulatory measures on the underlying causes of the ills with which regulators need to deal, those causes being the market failures that in turn may justify regulatory intervention.[197]

Although nascent, efforts by regulators like the SEC and the CFTC to revisit their past approaches to economic analysis and rethink their statutory mandates may be instructive for other financial regulators.

Of their own volition and without regard to whether they have a statutory obligation to do so, all federal financial regulators ought to take advantage of the valuable economic analysis tools other, nonfinancial regulators employ. Regulators will find it well worth the effort it takes to gain an understanding about what the real problems are and how different solutions to those problems will affect financial institutions, their customers, and the economy as a whole. This is especially true for federal financial regulators who have responsibility for monitoring the safety and soundness of particular institutions or the financial system as a whole. Employing regulatory analysis will assist the regulators in making better decisions and explaining why they made them.

A clear statutory mandate for regulators to conduct thorough and well-documented economic analysis could assist the federal financial regulators in improving their regulatory analysis practices by providing concrete guideposts for that analysis. The president, Congress, and the public would benefit from knowing—in connection with Dodd-Frank rulemakings specifically and financial regulation more generally—what problems regulators are trying to solve and what alternatives they are considering and understanding the costs that society will bear and benefits society will enjoy as a result of regulatory actions.

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[197] See Alfon & Peters, supra note 194, at 4 (footnote omitted).

Appendix: Summary of Regulator's Use of Economic Analysis

Regulator	Regulator's Use of Economic Analysis
CFPB	• Independent regulatory agency, so not subject to Executive Orders or OIRA review. • Statutorily required to consider in its rulemaking (i) "potential benefits and costs to consumers" and firms, including "potential reduction of access by consumers to consumer financial products and services" and (ii) effects on rural consumers and small banks and credit unions [Dodd-Frank § 1022(b)(2)(A]. • Only Federal financial regulator required by the Small Business Regulatory Enforcement and Fairness Act of 1996 to set up panels in which small entities can express how regulations will affect them. • Has not chosen to implement its statutory requirements by embracing regulatory analysis, but has relied on speculative benefits, underestimated compliance costs, minimized noncompliance costs, and deferred quantitative analysis when considering the economic ramifications of its rules.
CFTC	• Independent regulatory agency, so not subject to Executive Orders or OIRA review. • Statutorily required to "endeavor to take the least anticompetitive means of achieving" objectives. [Commodity Exchange Act § 15(b)]. • Statutorily required to evaluate costs and benefits of a proposed rule, considering factors including the safety of the public and market participants, efficiency, competitiveness, financial integrity, and sound risk management. [CEA § 15(a)(2)]. • Has taken a very narrow view of its statutory economic analysis mandate but recent legal challenges based, in part, on economic analysis, may change its approach. • Entered into agreement in May 2012 with OIRA for technical assistance with respect to economic analysis, which could result in a changed approach.
FDIC	• Independent regulatory agency, so not subject to Executive Orders or OIRA review. • No unique statutory requirements to conduct economic analysis. • Has pledged to consider if rules will minimize burdens on the industry and public, how small firms will be affected, and if potential benefits outweigh potential costs. • Takes the position that its ability to conduct regulatory analysis is limited, and does not routinely publish economic analyses or follow a standard approach to analysis. • Is currently revising its Statement of Policy in response to executive order.
FHFA	• Independent regulatory agency, so not subject to Executive Orders or OIRA review. • No unique statutory requirements to conduct economic analysis. • Has not conducted thorough economic analysis in connection with its rulemakings. • Has conducted economic analysis in other contexts; should apply this to rulemaking.
Fed	• Independent regulatory agency, so not subject to Executive Orders or OIRA review. • No unique statutory requirements to conduct economic analysis. • Has a policy statement that calls for some analysis to accompany most rulemakings, but amount and nature of analysis varies per staff discretion and it is not made public.
FSOC	• Executive agency and is, therefore, subject to Executive Orders and OIRA review. • Has not conducted economic analysis for the final rules it has adopted and has taken the legally questionable position that it is not required to conduct a cost-benefit analysis when an action is not a significant regulatory action. • Has not used its Dodd-Frank regulatory coordination authority to facilitate interagency cooperation to ensure industries are not overburdened with regulation.
NCUA	• Independent agency; although not included in statutory list of as independent regulatory agencies, it views itself as an independent regulatory agency not subject to Executive Orders or OIRA review.

	• No unique statutory requirements to conduct economic analysis. • Does not generally perform economic analysis in connection with its rulemaking.
OCC	• Became an independent regulatory agency under Dodd-Frank, so no longer subject to Executive Orders or OIRA review. • No unique statutory requirements to conduct economic analysis. • Changing its rulemaking analysis in response to Dodd-Frank status change. • Continues to perform regulatory analysis under the Unfunded Mandates Reform Act.
OFR	• Independent regulatory agency, so not subject to Executive Orders or OIRA review. • No unique statutory requirements to conduct economic analysis. • The OFR has rulemaking authority, has not yet adopted any regulations, but early indications are that it will not employ economic analysis.
SEC	• Independent regulatory agency, so not subject to Executive Orders or OIRA review. • Statutory requirement to consider "efficiency, competition, and capital formation" in connection with many rulemakings. [Securities Act § 2(b), Exchange Act § 3(f); Investment Company Act § 2(c); Investment Advisers Act § 202(c)]. • Additional statutory requirements to consider economic effects of rules, including requirement to consider necessity and appropriateness of burdens on competition. • Has a practice of including a cost-benefit analysis section in its rulemakings. • Has had a number of rules rejected by courts based on inadequate cost-benefit analysis, which has led to new staff guidance and structural changes at agency that could improve the quality of analysis.
FASB	• Private standard setter, so not subject to Executive Orders or OIRA review. • FASB's "Guiding Principles" include a commitment to some level of regulatory analysis, but it falls short of its mandate to conduct rigorous economic analysis. • Does not routinely conduct economic analysis as part of standard setting.
FINRA	• Quasi-governmental regulator, so not subject to Executive Orders or OIRA review. • No direct statutory requirements to conduct economic analysis, but should be subject indirectly to same standards as govern SEC rules. • Does not submit economic analysis with its rule filings with SEC.
MSRB	• Quasi-governmental regulator, so not subject to Executive Orders or OIRA review. • No direct statutory requirements to conduct economic analysis, but should be subject indirectly to same standards as govern SEC rules. • Does not submit economic analysis with its rule filings with SEC.
NFA	• Quasi-governmental regulator, so not subject to Executive Orders or OIRA review. • No direct statutory requirements to conduct economic analysis, but should be subject indirectly to same standards as govern CFTC rules. • Appears not to submit economic analysis with its rule filings with CFTC.
PCAOB	• Quasi-governmental regulator, so not subject to Executive Orders or OIRA review. • No direct statutory requirements to conduct economic analysis, but should be subject indirectly to same standards as govern SEC rules. • Does not submit economic analysis with its rule filings with SEC.