IMPROVING U.S. FINANCIAL REGULATION THROUGH OIRA REVIEW & ROBUST REGULATORY ANALYSIS STANDARDS

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ABSTRACT

The United States' financial services industry is regulated on the federal level almost entirely by independent regulatory agencies. As a result, major federal financial regulators are not subject to a number of regulatory best practices applicable to executive agencies, including (1) regulatory analysis standards set forth by executive orders and Office of Management and Budget (OMB) Circular A-4 and (2) the review of proposed regulatory actions by the Office of Information and Regulatory Affairs (OIRA). This article explores why and how insufficient regulatory analysis and a lack of OIRA review for federal financial markets rulemakings results in a regulatory process that is inadequately coordinated and thorough relative to that which exists at executive agencies. It then addresses concerns that robust regulatory analysis standards and OIRA review will unnecessarily slow the rulemaking process and are inappropriate for federal financial regulators, before concluding that Congress should statutorily require major federal financial regulators to conduct robust ex ante regulatory analyses for most proposed regulatory actions as part of the rulemaking process. Furthermore, these agencies' rulemakings should generally be subject to statutorily required OIRA review. Together, these process reforms would improve inter-agency coordination, mitigate regulatory capture, and heighten the quality of federal financial regulation.

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I. INTRODUCTION

By eliminating the Office of Thrift Supervision and reclassifying the Office of the Comptroller of the Currency's legal status, the Dodd-Frank Act[1] left the United States financial regulatory system almost entirely in the hands of "independent regulatory agencies."[2] Unlike executive agencies – such as the Environmental Protection Agency (EPA), Department of Health and Human Services (HHS), or Department of Transportation (DOT) – "independent" agencies, and thus most federal financial regulators,[3] are subject to neither Executive Orders 12,866 and 13,563 nor to Office of Management and Budget (OMB) Circular A-4,[4] which together establish a number of

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[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act [hereinafter Dodd-Frank Act], Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S.C.).

[2] *See id.* at §§ 313 & 315. For a broad overview of what constitutes an "independent regulatory agency," *see infra* note 9 and accompanying text. For an explanation of the impacts of Dodd-Frank on the U.S. financial regulatory environment and rulemaking at federal financial regulators, *see infra* note 11 and accompanying text. *See also* Hester Peirce, *Economic Analysis by Federal Financial Regulations*, 9 J. L. ECON. & POL'Y 569 (2013). Notably, although the Dodd-Frank Act created the CFPB as an "independent regulatory agency," an October 2016 ruling by the United States Court of Appeals for the District of Columbia Circuit calls into question whether the CFPB is indeed "independent." *See infra* note 11 and accompanying text.

[3] For an explanation of the "independent" designation and an explanation of how the Dodd-Frank Act broadened the list of federal financial regulators to which this designation applies, *see infra* notes 8-11 and accompanying text. Notably, some federal financial regulations are promulgated by other departments and agencies – an example of a non-major financial regulator that is not independent is the Financial Crimes Enforcement Network, which is housed within Treasury. *See* Peirce, *supra* note 2, at 569 n.3.

[4] *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), at § 3(b) (citing 44 U.S.C. § 3502, which lists "independent regulatory agencies," and defining agencies in such a way that the regulatory process set forth by the Executive Order are not applicable to "independent regulatory agencies"); Exec. Order No.

regulatory best practices, including the review of proposed regulatory actions by the Office of Information and Regulatory Affairs (OIRA), housed within OMB.[5]

This article examines the contrast between these best practices and the disparate regulatory frameworks followed by the major U.S. financial regulators.[6] I outline two significant shortcomings of regulatory processes at these agencies as compared to those at executive agencies: (1) worse coordination and (2) inadequate ex ante regulatory analysis. I then address concerns that cost-benefit analysis – a critical component of regulatory analysis[7] – is not appropriate for financial regulation, and establish that OIRA review of regulatory actions would heighten federal financial regulators' ability to coordinate rulemakings, improve final rule quality, reduce regulatory delays, and mitigate regulatory capture. The constraints of

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13,563, 76 Fed. Reg. 3,821 (2011), at § 7(a) (reaffirming the definition of agencies set forth in Executive Order 12,866, thereby also precluding this Executive Order from applying to "independent regulatory agencies"); *Circular A-4*, OFF. OF MGMT. & BUDGET 1 (2003) (providing "guidance to Federal agencies on the development of regulatory analysis as required under [Executive Order 12,866]").

[5] For an overview of these best practices, *see infra* notes 14-23.

[6] Throughout this article, the terms "major federal financial regulators" and "major U.S. financial regulators" refer to the eight following U.S. financial markets regulatory authorities: Board of Governors of the Federal Reserve System (Fed), Bureau of Consumer Financial Protection (CFPB), Commodity Futures Trading Commission (CFTC), Federal Deposit Insurance Corporation (FDIC), Federal Housing Finance Agency (FHFA), National Credit Union Administration (NCUA), Office of the Comptroller of the Currency (OCC), and Securities and Exchange Commission (SEC).

[7] Cost-benefit analysis refers to an ex ante analysis in which the costs and benefits (qualitative and quantitative) of a regulator's proposed policy are evaluated and weighed against each other. Regulatory analysis, also known as "economic analysis," entails (1) clearly identifying a market failure; (2) determining if regulation is an appropriate potential policy tool to address the identified market failure; (3) producing various policy alternatives to solve the problem; and (4) performing a cost-benefit analysis of each alternative policy solution being considered. *See* Peirce, *supra* note 2, at 569 n.2; OFF. OF MGMT. & BUDGET, *supra* note 4, at 2-3 (noting that the three elements of regulatory impact analysis are (1) "a statement of the need for the regulatory action," (2) "a clear identification of a range of regulatory approaches," and (3) "an estimate of benefits and costs").

varying strategies to achieve OIRA review of and more robust and streamlined regulatory analysis for these agencies' regulatory actions are explored. I then conclude with an endorsement of a particular strategy that will improve inter-agency coordination at federal financial regulators, mitigate regulatory capture at these agencies, and increase the quality of their final rules.

II. COMPARING REGULATORY PROCESSES: HOW ARE FINANCIAL REGULATORS UNIQUE?

Prior to the Dodd-Frank Act, most major federal financial regulators – the Board of Governors of the Federal Reserve System (Fed), Commodity Futures Trading Commission (CFTC), Federal Deposit Insurance Corporation (FDIC), Federal Housing Finance Agency (FHFA), National Credit Union Administration (NCUA), and Securities and Exchange Commission (SEC) – were independent regulatory agencies.[8] As the Administrative Conference of the United States (ACUS) explains, "'independent regulatory agencies' are those whose heads possess 'for cause' removal protection and that enjoy some degree of independence from the executive branch."[9] Two major federal financial regulators – the Office of Thrift Supervision (OTS) and the Office of the Comptroller of the Currency (OCC) – were housed within the Department of the Treasury (Treasury), and thus were not "independent."[10]

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[8] *See* Peirce, *supra* note 2 (containing an in-depth discussion of agency features impacting economic analysis requirements at federal financial regulators). Notably, as Peirce explains: "the 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." *See id.* at 593 n.106. Throughout this Article, the NCUA is considered an "independent regulatory agency."

[9] ADMIN. CONF. OF THE U.S., ADMIN. CONF. RECOMMENDATION 2013-2, 2 n.4 (June 13, 2013) (citing DAVID E. LEWIS & JENNIFER L. SELIN, ACUS SOURCEBOOK OF U. S. EXEC. AGENCIES 2013).

[10] *See* Peirce, *supra* note 2, at 592. *See also* Mark Jickling & Edward V. Murphy, *Who Regulates Whom? An Overview of U.S. Financial Supervision*, CRS REPORT FOR CONGRESS (2010), https://fas.org/sgp/crs/misc/R40249.pdf.

By eliminating the OTS, reclassifying the OCC as "independent," and establishing a new major federal financial regulator – the Bureau of Consumer Financial Protection (CFPB) – the Dodd-Frank Act resulted in a U.S. financial regulatory system with even more disparate and uncoordinated regulatory processes.[11] In the wake of voluminous Dodd-Frank Act rulemakings,[12] major federal financial regulators' regulatory processes have displayed significant shortcomings.[13] However, before examining why these existing processes are deficient, it is critical to contrast the rulemaking process at executive agencies like HHS and DOT with those at the major U.S. financial regulators.

A. The Process Lost by "Independent" Designation

Unlike executive agencies, "independent regulatory agencies" are not subject to President Barack Obama's Executive Order 13,563 (EO 13,563),[14] which reaffirms Executive Order 12,688

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[11] Dodd-Frank Act §§ 313 (eliminating OTS), 315 & 1011D(a) (amending 44 U.S.C. § 3502 to list the OCC and the CFPB as "independent regulatory agencies," respectively) (2010). *See* Peirce, *supra* note 2, at 590. Notably, the CFPB's status as an "independent regulatory agency" now appears to be invalid as a result of an October 2016 D.C. Circuit ruling. *See* PHH Corp., et al. v. CFPB, Case No. 15-1177, D.C. Cir. (Oct. 11, 2016); Letter from Chairman Jeb Hensarling to the Honorable Richard Cordray, Director, Bureau of Consumer Financial Protection, Oct. 19, 2016 (arguing that as a result of the *PHH Corp., et al. v. CFPB* ruling, the CFPB is no longer "independent," and instead, is an executive agency now subject to Executive Orders 12,866 and 13,563 and OMB Circular A-4).

[12] A recent textual analysis of the Code of Federal Regulations revealed that, between 2009 and 2014, the Dodd-Frank Act resulted in over 27,000 regulatory restrictions—"more new [regulatory] restrictions than all other laws passed during the Obama administration put together. . . ." *See* Patrick McLaughlin & Oliver Sherouse, *The Dodd-Frank Wall Street Reform and Consumer Protection Act May Be the Biggest Law Ever*, THE MERCATUS CTR. AT GEO. MASON UNIV. (2015), https://www.mercatus.org/publication/dodd-frank-wall-street-reform-and-consumer-protection-act-may-be-biggest-law-ever.

[13] For a broad overview of these shortcomings, *see* Peirce, *supra* note 2.

[14] *See* Exec. Order No. 12,866 & Exec. Order No. 13,563, *supra* note 4 and accompanying text.

(EO 12,866) issued by President Bill Clinton[15] and left unchanged throughout most of the George W. Bush Administration.[16] It requires executive agencies adhere to several rulemaking "principles," including:

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

[15] Exec. Order No. 12,866, *supra* note 4.

[16] Until January 2007, Executive Order 12,866 was left unchanged by President George W. Bush. For information on what President George W. Bush's 2007 shift entailed, *see* Robert Hahn & Robert E. Litan, *The President's New Executive Order on Regulation*, 4 ECONOMISTS' VOICE 1 (2007).

> information upon which choices can be made by the public.[17]

To ensure that the principles endorsed in EOs 12,866 and 13,563 are adhered to, EO 13,563 reaffirms a robust and coordinated regulatory analysis and review process established by EO 12,866 and facilitated by OIRA [hereinafter "OIRA review"] that includes the following noteworthy components:

(1) OIRA (housed within OMB) evaluates planned regulatory actions "to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in [EO 12,866]" and do not conflict with other agencies' objectives;

(2) OIRA determines whether a planned regulatory action is "significant" (meaning it will likely "have an annual effect on the economy of $100 million or more," result in serious adverse distributional or non-market (such as public health) impacts, "raise novel legal or policy issues," "create a serious inconsistency or otherwise interfere[s] with an action taken or planned by another agency," and/or "materially alter the budgetary impact" of various government programs (such as loan programs) or the "rights and obligations" of these programs' recipients;

(3) to determine which planned regulatory actions are "significant," each agency "provide[s] OIRA, at such times and in the manner specified by the Administrator of OIRA," with a list of both "significant" and other planned regulatory actions, and "within 10 working days of receipt of the list" OIRA may notify the agency if it deems additional planned regulatory actions are "significant;"

(4) for "significant" planned regulatory actions, agencies must provide OIRA with draft text, a "reasonably detailed description" justifying the need for the regulatory action and setting forth how it "will meet that need," and "[a]n

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[17] Exec. Order No. 13,563, *supra* note 4, at 3821. This list is taken from Peirce, *supra* note 2, at 572.

assessment of the potential costs and benefits of the regulatory action";

(5) for "significant" planned regulatory actions likely to "[h]ave an annual effect of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities" [hereinafter "economically significant"] the issuing agency must provide OIRA with an "an assessment, including the underlying analysis" of anticipated costs ("such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets, … health, safety, and the natural environment") and benefits ("such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias") for the planned regulatory approach (quantifying costs and benefits "to the extent feasible"), as well as "costs and benefits of potentially effective and reasonably feasible alternatives" considered by the agency [hereinafter "Regulatory Impact Analysis" or "RIA"];

(6) upon the submission to OIRA of draft rule text and an accompanying draft RIA for a "significant" draft notice of proposed rulemaking or draft final rule, OIRA has ninety calendar days (or in some cases forty-five days) to review these materials to determine whether or not the regulatory action will create inter-agency conflict and its consistency with law, the aforementioned regulatory analysis principles set forth in EO 12,866, other principles set forth in EO 12,866, and the President's priorities; OIRA must approve the action, reject it (in which case the OIRA Administrator "shall provide the issuing agency a written explanation for such return"), or get a one-time thirty calendar day extension, or instead,

the agency can withdraw it or request a one-time thirty calendar day extension.[18]

During its review period, OIRA may solicit the comments from various White House offices and "relevant" regulatory agencies, as these offices and agencies "have information and expertise, and the rulemaking agency should benefit from their perspective before finalizing or even proposing rules," and works with agencies to ensure critical issues in proposed rules are "clearly and explicitly identified for public comment" and that final rules "adequately address[]" comments received.[19] Additionally, OIRA personnel may raise issues regarding the agency's determination of a rulemaking's anticipated costs and benefits or help resolve inter-agency disagreements (escalating issues within the White House and/or at executive agencies as necessary), and once a rule is proposed, OIRA maintains an "open-door policy" through which it does not instigate meetings or take positions on a draft rule, but instead, focuses on obtaining information that can be used to improve rule quality.[20]

Executive agencies must also adhere to OMB Circular A-4,[21] which sets forth principles to guide the development of RIAs required by EOs 12,866 and 13,563 for "economically significant" rulemakings: "The motivation is to (1) learn if the benefits of an action are likely to justify the costs or (2) discover

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[18] *See* Exec. Order No.12,866, *supra* note 4. For a thorough explanation of the OIRA review process used to help develop this list, *see* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013). The term "Regulatory Impact Analysis" comes from, OFF. OF MGMT. & BUDGET, REGULATORY IMPACT ANALYSIS: A PRIMER 1 (Aug. 2011) ("providing a primer to assist agencies in developing regulatory impact analyses (RIAs), as required for economically significant rules by Executive Order 13563, Executive Order 12866, and OMB Circular A-4"). For more information on OMB Circular A-4, *see infra* notes 21-23 and accompanying text.

[19] Sunstein, *supra* note 18, at 1841, 1855. It is worth noting that, "there is no consensus on whether and how to proceed during the ninety-day period" during which OIRA is reviewing a proposed rule. *Id.* at 1848.

[20] *Id.* at 1856-57, 1860.

[21] OFF. OF MGMT. & BUDGET, *supra* note 4. *See* MAEVE P. CAREY, COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS 16 (2014); OFF. OF MGMT. & BUDGET, *supra* note 18.

which of various possible alternatives would be the most cost-effective."[22] It also requires "regulatory analysis," and explains that "A good regulatory analysis should include the following three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis."[23]

Because OMB Circular A-4 only applies to executive agencies,[24] major federal financial regulators are largely not required to adhere to the inter-agency standards and methodological approaches to conduct regulatory analysis it sets forth.[25] Certainly, the Administrative Procedure Act (APA), the Paperwork Reduction Act (PRA), the Regulatory Flexibility Act (RFA), and the Congressional Review Act (CRA), all govern aspects of the rulemaking process for independent regulatory

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[22] OFF. OF MGMT. & BUDGET, *supra* note 4. *See* Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 171-73 (2014) ("Circular A-4 . . . is the formal, binding guidance document that governs the analysis of regulatory impacts. . . .").

[23] OFF. OF MGMT. & BUDGET, *supra* note 4.

[24] *See* CAREY, *supra* note 21, at 16.

[25] *See* CURTIS W. COPELAND, ECONOMIC ANALYSIS AND INDEPENDENT REGULATORY AGENCIES 4 (2013) ("Agency-specific economic analysis requirements vary significantly with some independent regulatory agencies. . . ."). Although not required to adhere to OMB Circular A-4, officials at the CFTC, Fed, FDIC, NCUA, and SEC have, however, told the GAO, "that their agencies follow OMB's guidance in spirit or principle." U.S. GOV'T ACCOUNTABILITY OFF., DODD-FRANK ACT REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSIS AND COORDINATION 12 (2011) (cited in Peirce, *supra* note 2, at 57 n.22) [hereinafter GAO, Nov. 2011]. Also, because of the October 2016 *PHH Corp., et al. v. CFPB* ruling, the CFPB is arguably now required to adhere to OMB Circular A-4. *See* Letter from Chairman Jeb Hensarling to the Honorable Richard Cordray, Director, Bureau of Consumer Financial Protection, *supra* note 11.

agencies as well as Executive agencies,[26] but none of these laws expressly require comprehensive regulatory analysis.[27]

B. The Regulatory Process at Major Federal Financial Regulators

Instead, regulatory processes at major federal financial regulators lack adequate coordination and are driven by a combination of statutes and internal guidance documents. Federal banking regulators – the OCC, FDIC, and Fed – must "consider" the potential "administrative burdens" and benefits of regulatory actions, according to the Riegle Community Development and Regulatory Improvement Act.[28] The FDIC's rulemaking is also guided by an internal "Statement of Policy" to "generally address the spirit" of EO 12,866, EO 13,563, and OMB Circular A-4, while the Fed's Office of the Inspector General reports that the Fed conducts rulemaking "in a manner that is generally consistent with the philosophy and principles outlined in [EOs 12,866 and 13,563]," yet explicitly states OMB Circular A-4 is not followed.[29] The OCC has internal guidance in place to follow EO 12,866 principles.[30]

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[26] This list of statutes was obtained from Peirce, *supra* note 2, at 575-77 & tbl. 2 (citing 5 U.S.C. §§ 551-59; 44 U.S.C. §§ 3501-3521; 5 U.S.C. §§ 601-612 & 5 U.S.C. §§ 801-808).

[27] *See id.* at 576 ("None of these statutes provides for comprehensive, ex ante economic analysis by the financial regulators.").

[28] *See* CAREY, *supra* note 21, at 20 (citing 12 U.S.C. §§ 1813 & 4802(a)).

[29] *See* Peirce, *supra* note 2, at 594-95 (citing the FDIC's Statement of Policy on the Development and Review of Regulations, 63 Fed. Reg. 25,157, 25,158 (May 7, 1998)); CAREY, *supra* note 21, at 17 (citing BD. OF GOVERNORS OF THE FED. RESERVE SYS., OFF. OF INSPECTOR GEN., RESPONSE TO A CONGRESSIONAL REQUEST REGARDING THE ECONOMIC ANALYSIS ASSOCIATED WITH SPECIFIC RULEMAKINGS 9, 19 (2011), http://oig.federalreserve.gov/reports/Congressional_Response_economic_analysis_2011web.pdf) (citing OFF. OF THE INSPECTOR GEN., FED. DEPOSIT INSURANCE CORP., EVALUATION OF THE FDIC'S ECONOMIC ANALYSIS OF THREE RULEMAKINGS TO IMPLEMENT PROVISIONS OF THE DODD-FRANK ACT, 1 (2011)).

[30] *See id.* at 20-21 (citing OFF. OF THE INSPECTOR GEN., DEP. OF THE TREAS., DODD-FRANK ACT: CONGRESSIONAL REQUEST FOR INFORMATION REGARDING ECONOMIC ANALYSIS BY OCC (2011)).

Unlike major banking regulators' regulatory processes, the SEC's process is guided by multiple acts of Congress, in addition to the APA, PRA, RFA, and CRA.[31] The National Securities Market Improvement Act of 1996 (NSMIA) amended the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940, to require that the SEC, when "engaged in rulemaking . . . consider or determine whether an action is necessary or appropriate in the public interest . . . [and] consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[32] The SEC is also required by the Securities Exchange Act of 1934, when "making rules and regulations," to (1) "consider . . . the impact any such rule or regulation would have on competition[,]" (2) "not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Securities Exchange Act of 1934];" and, (3) provide a "statement of basis and purpose" on the rule's purpose and justification why "any burden on competition imposed by such rule or regulation is necessary or appropriate. . . ."[33] While the SEC must "consider" costs and benefits, in 2012, the SEC's Division of Risk, Strategy, and Financial Innovation and Office of the General Council jointly stated that: "No statute expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities. . . ."[34] Yet, "legislative history indicates that Congress intended to require cost-benefit analysis" by passing the NSMIA, according to

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[31] *See* COPELAND, *supra* note 25.

[32] *See* Donna M. Nagy, *The Costs of Mandatory Cost-Benefit Analysis in SEC Rulemaking*, 57 ARIZ. L. REV. 129, 133-34 (2015) (citing 15 U.S.C. §§ 77b(b), 78c(f), 80a-2(c) (2012)).

[33] *See id.* (citing 15 U.S.C. § 78w(a)(2)).

[34] *See* CAREY, *supra* note 21, at 17 (citing OFF. OF THE INSPECTOR GEN., U.S. SEC. AND EX. COMM'N, REPORT OF REVIEW OF ECONOMIC ANALYSES PERFORMED BY THE SECURITIES AND EXCHANGE COMMISSION IN CONNECTION WITH DODD-FRANK RULEMAKINGS (2011)). *See also* Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n, Testimony Concerning Economic Analysis in SEC Rulemaking (Apr. 17, 2012), https://www.sec.gov/News/Testimony/Detail/Testimony/1365171489400.

research produced by the U.S. Chamber of Commerce.[35] Notably, courts can assess, and have struck down, SEC rules based on whether costs and benefits have been appropriately considered.[36]

Similarly, the Commodity Exchange Act requires the CFTC to "consider" costs and benefits in its rulemakings, particularly as they apply to a rule's impact on: (1) "market participants and the public;" (2) "efficiency, competitiveness, and financial integrity of futures markets;" (3) the effectiveness of pricing; (4) risk; and (5) other public concerns.[37] Internal CFTC guidance urges the Agency to apply the principles set forth in EO 13,563 when making these considerations.[38]

The CFPB is required by the Dodd-Frank Act to consider the "potential costs and benefits to consumers," as well as impacts to small businesses, impacts to rural areas, and other distributive effects, of its rulemakings.[39] It must produce an initial regulatory flexibility analysis, which describes (1) "any projected increase in the cost of credit for small entities;" (2) "any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any increase in the cost of credit for small entities;" and (3) "advice and recommendations of representatives of small of small entities relating to issues associated with the project increases or alternatives[,]" to accompany each notice of

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35 PAUL ROSE & CHRISTOPHER WALKER, U.S. CHAMBER OF COMMERCE CTR. FOR CAPITAL MKTS. COMPETITIVENESS, THE IMPORTANCE OF COST-BENEFIT ANALYSIS IN FINANCIAL REGULATION 6 (2013) (cited by Nagy, *supra* note 32, at 133 n.1).

36 For a list of cases, *see* Peirce, *supra* note 2, at 582 n.55 (citing, inter alia, Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011)).

37 *See id.* at 587 (citing 7 U.S.C. § 19(a)(2) (2006)); CAREY, *supra* note 21, at 19 (citing 7 U.S.C. § 19(a)).

38 *See* Peirce, *supra* note 2, at 587 (citing Memorandum from Dan M. Berkovitz, General Counsel, and Andrei Kirilenko, Chief Economist, to Rulemaking Teams, Staff Guidance on Cost-Benefit Considerations for Final Rulemakings under the Dodd-Frank Act, May 13, 2011, available as Exhibit 2 in the June 2011 CFTC OIG REPORT, http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf).

39 *See* CAREY, *supra* note 21, at 21 (citing 12 U.S.C. § 5512).

proposed rulemaking.[40] Neither the FHFA, nor the NCUA, are required by statute to consider costs and benefits, and neither have done so in their accompanying analyses.[41]

III. SHORTCOMINGS OF THE REGULATORY PROCESS AT MAJOR U.S. FINANCIAL REGULATORS

Hundreds of pages long, the Dodd-Frank Act has already resulted in tens of thousands of pages of dense regulatory text, and may produce more regulatory restrictions than any U.S. law ever passed.[42] Its rulemakings have tested the efficacy of disparate regulatory processes at major federal financial regulators and in doing so have brought about serious concerns regarding their effectiveness. The major shortcomings of existing regulatory processes at these agencies – as compared with the processes established by EOs 12,866 and 13,653, as well as OMB Circular A-4 – are discussed below, and establish the justifications for the policy reforms endorsed in section V.

A. Worse Inter-Agency Coordination at Major U.S. Financial Regulators

As the U.S. Governmental Accountability Office (GAO) reported in February 2016, the regulatory authority of "independent" federal financial regulators is "complex, with responsibilities fragmented among multiple agencies that have overlapping authorities."[43] For example, the Fed, FDIC, and

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[40] *See* Peirce, *supra* note 2, at 590 n.87 (citing Dodd-Frank Act §1100G)). *See also* BD. OF GOVERNORS OF THE FED. RESERVE SYS., OFF. OF INSPECTOR GEN., THE CFPB COMPLIES WITH SECTION 1100G OF THE DODD-FRANK ACT, BUT OPPORTUNITIES EXIST FOR THE CFPB TO ENHANCE ITS PROCESS 1-2 (2014).

[41] *See* Peirce, *supra* note 2, at 593-94, 597.

[42] *See* McLaughlin & Sherouse, *supra* note 12.

[43] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-175, COMPLEX AND FRAGMENTED STRUCTURE COULD BE STREAMLINED TO IMPROVE EFFECTIVENESS 86 (2016) [hereinafter GAO, Feb. 2016].

OCC share safety and soundness oversight over banks.[44] Effective regulatory coordination between major federal financial regulators is impeded due to this fragmented regulatory environment, particularly in the wake of sizable inter-agency rulemakings required by the Dodd-Frank Act.[45]

Granted, the Financial Stability Oversight Council (FSOC) – the multi-regulator council created by the Act – is responsible for fostering inter-agency coordination,[46] but as a 2013 GAO report found, it "lacks a comprehensive, systematic approach" to do so.[47] More recently, the GAO reviewed fifty-four major Dodd-Frank Act rulemakings and reported that evidence of inter-agency coordination did not exist for one-third of these rules.[48] Professors Jody Freeman and Jim Rossi note that despite FSOC's creation, "information sharing and coordination remain significant challenges to the effective operation of the fragmented [financial regulatory] regime."[49]

On the other hand, as discussed in section II, OIRA actively resolves disagreement between executive agencies.[50] It has the authority "to request that agencies consider how coordination might reduce regulatory costs and thus make coordination a relevant consideration when reviewing agency cost-benefit analyses."[51] Former OIRA Administrator Susan Dudley notes that OIRA employs a "cross-cutting perspective" to "minimize[]

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[44] *See id.* at 12.

[45] *See id.*

[46] Dodd-Frank Act § 112(a)(2)(E) & (M).

[47] U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-873T, FINANCIAL STABILITY OVERSIGHT COUNCIL: STATUS OF EFFORTS TO IMPROVE TRANSPARENCY, ACCOUNTABILITY, AND COLLABORATION 1 (2014) [hereinafter GAO, Sep. 2014].

[48] U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-81, DODD-FRANK REGULATIONS: REGULATORS' ANALYTICAL AND COORDINATION EFFORTS 29 (2014) [hereinafter GAO, Dec. 2014].

[49] Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1148 (2012).

[50] *See supra* note 22 and accompanying text.

[51] Freeman & Rossi, *supra* note 49 at 1180.

conflict and duplication among agencies. . . . "[52] As an example, the Obama Administration leveraged OIRA's effectiveness at facilitating inter-agency agreement to produce its agency-wide social cost of carbon (SCC) for RIAs.[53] Granted, the process resulted in a flawed SCC,[54] but this instance illustrates OIRA's capacity to "harmoniz[e] inconsistent values used by different agencies," as Freeman and Rossi explain.[55] OIRA alleviated SCC methodology disagreements that had existed between the DOT and EPA (the latter of which is clearly a more environmentally-focused agency, while the former is tasked with "ensuring a fast, safe, efficient, accessible and convenient transportation system. . . ").[56]

No similar process exists to balance the competing objectives of the major federal financial regulators. Some memoranda of understanding exist to facilitate joint rulemaking,[57] but no streamlined regulatory analysis methodology exists across these agencies. Also, although the CFTC and SEC were required to coordinate with one another, the GAO found that insufficient coordination has resulted in swaps regulations that have confused market participants.[58] This likely generated negative economic consequences and unnecessarily high compliance

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[52] Susan Dudley, *Lessons Learned, Challenges Ahead*, 32 REGULATION 6, 8 (2009).

[53] *See* Freeman & Rossi, *supra* note 49, at 1198-99; Sunstein, *supra* note 22, at 171-72 (2014) (detailing the OIRA administrator's role in facilitating the inter-agency working group on SCC).

[54] *See* Ted Gayer & W. Kip Viscusi, *Overriding Consumer Preferences with Energy Regulations*, 43 J. REGULATORY ECON. 248 (2013).

[55] Freeman & Rossi, *supra* note 49, at 1199.

[56] *See id.*, at 1199 n.303. *See also* Sunstein, *supra* note 22, at 171-73. For the DOT's mission statement, *see*, U.S. DEP'T OF TRANS., About Us, Mission, http://www.dot.gov/mission/about-us.

[57] *See* GAO, Feb. 2016, *supra note* 43, at 37, 44 (highlighting post-Dodd-Frank Act memoranda of understanding between major federal financial regulators).

[58] GAO, Dec. 2014, *supra* note 48, at 37-41.

costs.[59] Executive agencies' capacity to issue joint rulemakings, on the other hand, is inherently strengthened by OMB Circular A-4, which again, helps standardize the approach by which executive agencies conduct regulatory analysis across executive agencies.[60]

Additionally, although many Dodd-Frank Act rules require extensive international coordination, U.S. financial regulators' coordination with foreign financial markets regulatory authorities remains inadequate.[61] As an example, for one major risk-based capital rulemaking, the GAO found that "banking regulators did not meet with any international regulators."[62] Disagreements between the CFTC and the European Union's derivatives markets regulator impeded rulemaking coordination surrounding the establishment of central clearinghouses for certain derivatives trades.[63] Yet for executive agencies, OIRA helps facilitate international regulatory coordination.[64] OIRA supports efforts to streamline regulations with Mexico and Canada, for example, and works with the U.S. Trade Representative to improve international regulatory coordination, which OIRA Administrator Howard Shelanski

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[59] *See id.* at 37, 40-41 (documenting concerns that differing rules would heighten compliance costs and result in "inefficiencies for market participants").

[60] *See* Sunstein, *supra* note 22, at 172-73 (suggesting that the standardized methods of analysis set forth by OMB Circular A-4 enabled inter-agency disagreements regarding SCC to be mitigated and solved).

[61] *See* GAO, Feb. 2016, *supra note* 43, at 57-60; U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-101, DODD-FRANK ACT: AGENCIES' EFFORTS TO ANALYZE AND COORDINATE THEIR RULES 28-29 (2012).

[62] *Id.* at 29.

[63] *See* Andrew Ackerman et al., *U.S., Europe Hit Impasse Over Rules on Derivatives*, WALL ST. J., Sept. 25, 2014, 3:10 PM, http://www.wsj.com/articles/u-s-europe-hit-impasse-over-rules-on-derivatives-1411672215.

[64] Testimony of Howard Shelanski Administrator for the Office of Information and Regulatory Affairs, before the Subcommittees on Health Care, Benefits and Administrative Rules and on Government Operations, House Committee on Oversight and Government Reform 3 (Mar. 3, 2015), http://docs.house.gov/meetings/GO/GO27/20150303/103107/HHRG-114-GO27-Wstate-ShelanskiH-20150303.pdf.

recently remarked is an "increasingly important part of [OIRA's] agenda going forward."[65]

B. Inadequate Regulatory Analysis

While some major federal financial regulators agree to adhere to the principles of OMB Circular A-4 and/or EOs 12,866 and 13,563, they largely appear not to do so in practice, as explained below. Notably, ex ante cost-benefit analysis – again, a core component of regulatory analysis – is insufficient at major federal financial regulators. Before examining the comparative shortcomings of the regulatory analyses at major federal financial regulators, however, it is necessary to establish why transparently conducted cost-benefit analysis is a critical component of a robust regulatory analysis, and how it improves the quality of federal regulations.

1. Transparent Cost-Benefit Analyses Improves Rulemaking

Executive agencies expend substantial time and resources to conduct regulatory analyses for "economically significant" rulemakings in accordance with EOs 12,866 and 13,563 and OMB Circular A-4.[66] Some academics argue that cost-benefit analysis can unnecessarily slow down the rulemaking process.[67] Others raise ethical objections, noting that certain costs (such as human lives) are inappropriate to dollarize.[68] Another objection

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[65] *Id.* at 3-4.

[66] For example, the EPA's recent Draft Tier 3 Motor Vehicle Emission and Fuel Standards RIA is contained in over five-hundred pages. EPA-420-D-13-002, DRAFT REGULATORY IMPACT ANALYSIS: TIER 3 MOTOR VEHICLE EMISSION AND FUEL STANDARDS (2013).

[67] *See, e.g.,* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J. 822, 888 (2015) (noting that cost-benefit analysis for financial regulators will produce "regulatory delay" and that, on the other hand, the "current benefits" of conducting analyses at these agencies "remain low"); Michael A. Livermore, *Cause or Cure? Cost-Benefit Analysis and Regulatory Gridlock*, 17 N.Y.U. ENVT'L L. J. 107 (2008).

[68] *See, e.g.,* Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, AEI J. ON GOVT. & SOC'Y REGULATION 33 (1981).

is that cost-benefit analysis acts as a tool to promote political agendas.[69] So, is cost-benefit analysis a worthwhile component of regulatory analysis and the rulemaking process in the face of these and other critiques?

It absolutely is. Certainly, disagreement exists regarding how costs and benefits should be discounted,[70] and many regulatory benefits are difficult to quantify:[71] for example, impacts on "human dignity."[72] Cost-benefit analysis is useful, however, because it helps inform decision-making processes, "not because it is an exact science."[73] It can, should, and is performed with consideration of difficult-to-quantify benefits.[74] For example, the DOJ's recent regulation regarding prison rape indicates that non-quantifiable, morally based concerns can and

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[69] *See* Melissa J. Lutrell, *The Social Cost of Inertia: How Cost-Benefit Incoherence Threatens to Derail U.S. Climate Action* 25 DUKE ENVT'L L. & POL'Y FOR. 131, 142 (2014) ("[M]ethodologies now enshrined in A-4 date back to the Reagan era, when the preferred methodologies of overtly anti-regulatory interests were promoted by OMB and imposed to varying degrees on agencies for the express purpose of slowing them down.") (citation omitted).

[70] *See, e.g.*, Cass R. Sunstein, *On Not Revisiting Official Discount Rates: Institutional Inertia and the Social Cost of Carbon*, 104 AMER. ECON. REV. 547 (2014); Martin L. Weitzman, *Why the Far-Distant Future Should Be Discounted at Its Lowest Possible Rate*, 36 J. ENVTL. ECON. & MGMT. 201 (1998), http://eml.berkeley.edu//~saez/
course131/weitzman98.pdf.

[71] *See* Shi-Ling Hsu & John Loomis, *A Defense of Cost-Benefit Analysis for Natural Resource Policy*, 32 ENVTL. L. REP. 10,239, 10,244 (2002); Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369 (2014).

[72] *See* Sunstein, *supra* note 70 (explaining that while comparative understandings of values are ascertainable, determining values for many benefits and costs is difficult, if not impossible).

[73] Hsu & Loomis, *supra* note 71, at 10,244 (defending the suitability for cost-benefit analysis in environmental regulation, a situation in which benefits are extraordinarily difficult to quantify).

[74] *See id.* Indeed, OMB Circular A-4 suggests that the "value of a statistical life" (VSL) ranges from $1 million to $10 million. Cost-benefit analyses for rulemakings with the potential to lower the likelihood of a terrorist event may rely upon the VSL metric. *See* LISA A. ROBINSON, VALUING MORTALITY RISK REDUCTIONS IN HOMELAND SECURITY REGULATORY ANALYSES 18 (2008).

do trump quantifiable costs in modern-day cost-benefit analysis.[75]

Cost-benefit analysis should be thought of as a "decision procedure, not a moral standard."[76] In fact, attempting to quantify the seemingly unquantifiable – such as human lives or environmental benefits – is essential, albeit unsavory, for effective regulation.[77] As James DeLong, a former research director of ACUS accurately noted, "any value system one adopts is more likely to be promoted if one knows something about the consequences of the choices to be made."[78] Also, while regulatory analyses produced by executive agencies are oftentimes insufficient, this is a result of required processes not being followed by agencies, and not indicative of a flaw with the standards for robust regulatory analysis set forth by EOs 12,866 and 13,563 and OMB Circular A-4.[79] Yet despite shortcomings surrounding the frequency with which robust regulatory analyses are performed for "economically significant"

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[75] *See* Sunstein, *supra* note 18, at 1866.

[76] Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L. J. 165, 167 (1999).

[77] *See* ROBINSON, *supra* note 74 (highlighting the importance of assigning monetary value to human lives when conducting cost-benefit analyses for certain Department of Homeland Security rulemakings). *See also* Kelman, *supra* note 68, at 39-40, *Replies to Steve Kelman from James V. DeLong* (providing a rebuttal to Kelman's opposition to the use of cost-benefit analysis by FTC officials)

> ([A]s Kelman argues, there is something repugnant about assigning dollar values to lives. But the alternative can be to sacrifice lives needlessly by failing to carry out the calculations that would have revealed the means for saving them. It should be kept in mind that the avoidance of cost-benefit analysis has its own cost, which can be gauged in lives as well as in dollars.).

[78] James V. DeLong, *Defending Cost-Benefit Analysis: Replies to Steven Kelman*, 5 REGULATION 39 (1981).

[79] *See* Jerry Ellig & James Broughel, *How Well Do Federal Agencies Use Regulatory Impact Analysis?* MERCATUS CTR. AT GEO. MASON UNIV. (2013), http://mercatus.org/publication/how-well-do-federal-agencies-use-regulatory-impact-analysis.

rulemakings by executive agencies,[80] for forty-one percent of the one-hundred eight "economically significant," prescriptive rulemakings that OIRA reviewed between 2008 and 2012, RIAs clearly impacted the design of the final rule.[81] Granted, in half of these instances, only a "minor decision" was affected, although RIAs may substantially impact regulatory decisions much more regularly – executive agencies may simply fail to clearly document how in final rules and RIAs.[82]

The public policy benefits of regulatory analyses that carefully examine costs and benefits are compounded by transparency. EOs 12,866 and 13,563 help bring about a public notice-and-comment period that checks against concerns that the subjective nature of regulatory analysis is prone to manipulation to advance political agendas.[83] According to former CFTC Commissioner Scott O'Malia, such dialogue and disclosure acts as a check against poor regulatory justifications.[84] In fact, a major benefit of transparently conducted regulatory analysis is that the process shows the public, industry, government officials, and interested stakeholders, the data, assumptions, uncertainties, and

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[80] During fiscal years 2008 through 2010, twenty-seven percent of final rules promulgated by executive agencies contained monetized benefits and costs. Richard Williams, *Comparison of Final Rules with Monetized Benefits and Costs*, MERCATUS CTR. AT GEO. MASON UNIV. fig.1 (Apr. 23, 2012), http://mercatus.org/publication/comparison-final-rules-monetized-benefits-and-costs.

[81] *See* Jerry Ellig & Sherzod Abdukadirov, *Regulatory Analysis and Regulatory Reform: An Update*, MERCATUS CTR. AT GEO. MASON UNIV. (Jan. 27, 2015), http://mercatus.org/publication/regulatory-analysis-and-regulatory-reform-update.

[82] *Id.* at 3.

[83] Exec. Order No. 13,563, *supra* note 4, at § 2(b); Exec. Order No. 12,866, *supra* note 4, at § 6(a). *See* Daniel H. Cole, *Law, Politics, and Cost-Benefit Analysis*, 64 AL. L. REV. 56, 82-88 (2012) ("[T]he transparency of formal [cost-benefit analysis] allows for exposure and correction of manipulations and flaws.").

[84] Scott D. O'Malia, CFTC Comm'r, Opening Statement Regarding Open Meeting on One Final Rule and One Proposed Rule (Feb. 23, 2012), http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement022312.

consequences regulators considered when deliberating.[85] As a result, stakeholders can critique regulatory analyses, helping agencies refine their assumptions, and thus improve rulemakings.[86]

In other words, transparent regulatory analyses that clearly consider, and when possible, quantify costs and benefits, enable the public to both aid regulators in understanding the shortcomings of their methodologies, while also filling in data gaps to enable more precise estimate of benefits and costs.[87] As professor John Cohcrane of University of Chicago explains: "Cost-benefit analysis forces parties to disclose, and open to scrutiny, the causal mechanisms by which they think regulations operate, to good or ill."[88] Requiring regulators to balance the costs and benefits of a number of regulatory approaches is a much more responsible and effective method of generating intended policy outcomes than "intuitive balancing" by agency experts, which is non-rigorous, or "feasibility analysis," which entails making decisions on hard-to-define criteria, such as "excessive job loss." [89] Deferring to regulators' purportedly expert judgment risks insulating regulators from critical opinions and ideas.[90] In any case, it is easier for regulators to be experts if they have access to as much information as possible – something that a transparent regulatory analysis process

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[85] *See* Cole, *supra* note 83, at 69-70; Cass R. Sunstein, *Cost-Benefit Analysis and the Knowledge Problem* 6-7 (Mossavar-Rahmani Ctr. for Bus. & Gov't, Harvard Kennedy Sch., Harvard Univ., Working Paper No. RPP-2015-03, 2015), http://www.ksg.harvard.edu/index.php/content/download/74034/1678745/version/1/file/RPP_2015_03_Sunstein.pdf; Eric A. Posner & E. Glen Weyl, *Benefit-Cost Paradigms in Financial Regulation* 8 (Univ. of Chicago, Coase-Sandor Inst. for Law & Econ., Working Paper No. 660, 2013).

[86] *See id.* at 8-9; Sunstein, *supra* note 85, at 9 ("If the agency has inaccurately assessed costs and benefits, public participation can and often will supply a corrective.").

[87] *See supra* notes 84-86 and accompanying text.

[88] *See* John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. LEGAL STUD. S63, S67 (2014).

[89] Posner & Weyl, *supra* note 85, at 8.

[90] For more on this phenomenon, called "tunnel vision," *see infra* note 125 and accompanying text.

through which an agency's cost-benefit analysis is improved by stakeholder feedback helps them achieve.[91]

2. Regulatory Analyses at Major U.S. Financial Regulators Are Insufficient

Because federal financial regulators are largely not subject to OMB Circular A-4 or EOs 12,866 and 13,563, their regulatory analyses are far less robust than those at executive agencies and often fail to clearly include transparent cost-benefit analysis. For example, OMB reported that two major CFTC swaps clearing rules contained no monetized benefits or costs, despite being major rulemakings; similarly, a 2013 Fed supervision rule for systemically important financial institutions – another major rulemaking – contained insufficient information on costs and benefits.[92]

That major rulemakings are oftentimes promulgated by major U.S. financial regulators without robust, transparent regulatory analyses is not a recent development; this shortcoming is a systematic consequence of the regulatory process shortcomings outlined in section II. Capital requirement rules – which are critically important regulations in the banking sector – have historically been promulgated with little consideration for compliance cost and risk reduction.[93] Professor Eric Posner of the University of Chicago Law School and professor E. Glen Weyl of Yale University note that the FDIC's 1985 capital rule "did not estimate the compliance costs for banks, or the benefits for the economy from the reduction of bank risk."[94]

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[91] *See* Sunstein, *supra* note 85, at 6.

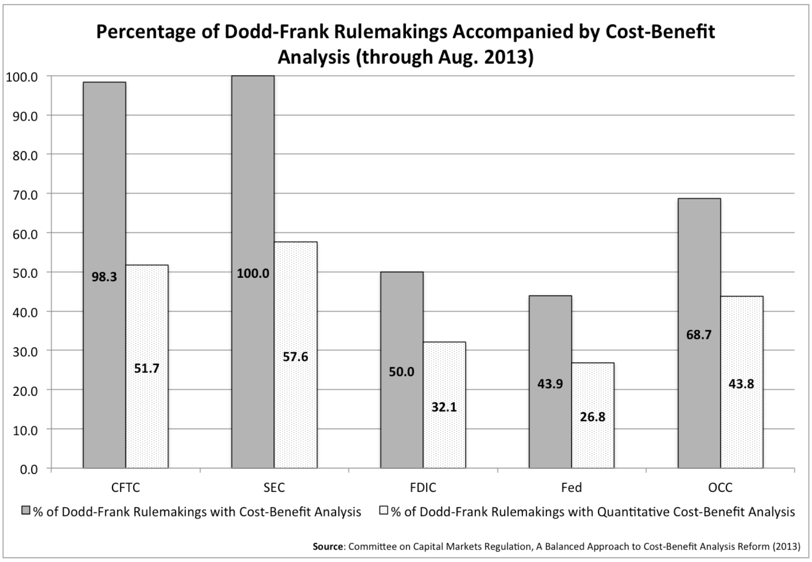
[92] OFF. OF MGMT. & BUDGET, 2014 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 34-35 (2014), https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf.

[93] Prasad Krishnamurthy, *Rules, Standards, and Complexity in Capital Regulation*, 43 J. LEG. STUD. S273, S278-S282 (2014); Posner & Weyl, *supra* note 85, at 5.

[94] *Id.*

The Dodd-Frank Act highlights the insufficiency of regulatory analyses at major federal financial regulators. While some of these agencies claim to adhere to the spirit of OMB Circular-A4, in the wake of Dodd-Frank Act rulemakings, they have done so inconsistently.[95] Between the Act's passage in 2010 and 2013, fewer than half of Dodd-Frank Act regulations were accompanied by a regulatory analysis that included quantified benefits and costs, as Figure 1 below illustrates.[96]

Figure 1



95 GAO, Nov. 2011, *supra* note 25, at 12 (listing federal financial regulators that "follow OMB's guidance in spirit"); GAO, Dec. 2014, *supra* note 48, at 17 (finding that, in a review of 15 major rulemakings, "the extent to which regulators addressed the key elements in OMB's Circular A-4 varied").

96 Data displayed in "Figure 1" obtained from COMM. ON CAP. MKTS. REGULATION, A BALANCED APPROACH TO COST-BENEFIT ANALYSIS REFORM 20 (2013).

IV. ROBUST REGULATORY ANALYSIS & OIRA REVIEW WILL IMPROVE U.S. FINANCIAL REGULATION

It is clear that the two principles that dominate executive agencies' regulatory processes – (1) regulatory analysis standards that foster transparency and incorporate cost-benefit analysis and (2) OIRA review – bring about both better-coordinated and better-constructed rulemakings. This section illustrates why these principles are well suited to alleviate the comparative lack of regulatory analysis and deficient inter-agency coordination at major U.S. financial regulators, and highlights other benefits they can bring about at these agencies.

A. Transparent and Robust Regulatory Analysis Requirements Are Appropriate and Necessary for Financial Markets Rulemakings

Given the data-driven, quantitative nature of financial markets, major federal financial regulators do not intuitively seem to face the ethical and methodological issues surrounding the quantification of costs and benefits for environmental or public health regulations.[97] Some, however, argue that cost-benefit analysis is inappropriate for financial regulations. For example, John Coates of Harvard Law School states that because financial markets are interconnected with so many other aspects of the economy, the impacts of a substantial financial markets rulemakings on welfare "are too large and complex" to predict.[98] The "ripple effects" of financials market regulation, he notes, impede "reliable predictions of net effects."[99] Coates claims that "until quantified [cost-benefit analysis of financial regulation] can produce more reliable and

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[97] *See* Posner & Weyl, *supra* note 85, at 1.

[98] Coates, *supra* note 67, at 1000.

[99] *Id.*

precise estimates, it is in fact not a true alternative to expert judgment."[100]

Yet many costs and benefits for financial regulations can, in fact, be quantified.[101] As Posner and Weyl note: "[F]inancial markets generate a vast amount of data, and because most of the relevant valuations are monetary in nature, financial regulations are ideal for [cost-benefit analysis]—much more suitable than regulations of the environment and health and safety."[102] Robust regulatory analysis of financial markets rulemakings is indeed possible; for example, the RIA of a recent housing finance regulation promulgated by the Department of Housing and Urban Development included an effective assessment of the underlying problem the rule intended to solve and sufficiently quantified costs and benefits.[103] Similarly, financial markets regulatory authorities in the United Kingdom and the European Union have successfully conducted regulatory analyses for a number of complex financial regulations that include the robust monetization of economic costs and benefits, not just of compliance costs.[104]

These examples illustrate that estimates of difficult-to-assess benefits associated with financial markets rulemakings can indeed be calculated. Yet how exactly does a policymaker monetize the value of particularly broad benefits such as the

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[100] *See* John C. Coates IV, *Towards Better Cost-Benefit Analysis: An Essay on Regulatory Management*, 78 L. & CONTEMP. PROBS. 1, 2 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2471682.

[101] Posner & Weyl, *supra* note 85, at 1.

[102] Eric A. Posner & E. Glen Weyl, *Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms*, YALE L. J. FORUM 246, 247 (2015).

[103] *See* Jerry Ellig & Vera Soliman, *Is Regulatory Impact Analysis of Financial Regulations Possible? in* RETHINKING FINANCIAL REGULATION: ENHANCING STABILITY AND PROTECTING CONSUMERS (Hester Peirce & Ben Klutsey eds., The Mercatus Ctr. at Geo. Mason Univ.) (forthcoming 2016) (citing to the March 2008 RIA for the Department of Housing and Urban Development's "Real Estate Settlement Procedures Act (RESPA): Simplification and Improvement of the Process of Obtaining Home Mortgages and Reducing Consumer Costs" rulemaking).

[104] For an overview of some regulatory analysis processes at UK and EU financial regulators, *see* COMM. ON CAP. MKTS. REGULATION, *supra* note 95, at 15-17.

reduced likelihood of a financial crisis? Perhaps it is quite simple for policymakers to understand and quantify projected outcomes but difficult to assign probabilities to these events occurring.[105] As Posner and Weyl note, however, there are tools by which policymakers can and should assign probabilities and values to abstract benefits: Just as "value of a statistical life" is used by public health regulators to effectively make difficult policy judgments, the concept of "cost of a statistical crisis" – "a parameter for translating [] a reduced probability of a crisis into a dollar value" – can and should be used when regulating financial markets.[106]

Of course, quantifying abstract benefits will oftentimes result in imprecise figures; Coates is not necessarily wrong to refer to British and Basel Committee cost-benefit analyses of Basel III capital rules as "guesstimated."[107] Yet, as explained in section III, flawed estimations are not reason to dismiss the process of attempting to quantify costs and benefits as a helpful tool in guiding policy-makers' judgments. "Guesstimation" is far superior to the complete lack of an attempt to quantify costs and benefits of financial regulations, and enables heightened transparency of regulatory judgments. For example, Professor Prasad Krishnamurthy of Berkeley Law argues that while pre-crisis U.S. capital rule risk weights for residential properties enhanced systemic risk in exchange for promoting home ownership, ex ante cost-benefit analysis of these risk weights would have required regulators to transparently justify this trade-off.[108]

Regulatory analysis is still highly useful at financial regulators even if benefits and costs cannot be quantified. Former OIRA Administrator Cass Sunstein notes that "the aspiration to full analysis of costs and benefits is that the aspiration can itself encourage agencies to acquire

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[105] *See* Sunstein, *supra* note 22, at 168-69.

[106] Eric A. Posner & E. Glen Weyl, *Benefit-Cost Analysis for Financial Regulation,* 103 AM. ECON. REV. 393, 393-94 (2013), http://ssrn.com/abstract=2188990 [http://perma.cc/TUN5-KBNQ]. For more information on the "value of a statistical life" concept, *see* ROBINSON, *supra* note 74.

[107] Coates, *supra* note 67, at 959-60.

[108] Krishnamurthy, *supra* note 93, at S286.

important information." [109] Increased usage of regulatory analysis at federal financial regulators would help prevent the shortcomings of excessive reliance on "expert judgment" by "forcing experts to quantify and defend their assumptions."[110] Also, as OMB reported in 2014, "an absence of information on costs and benefits can lead to inferior decisions."[111] So while resource capacity constraints may currently impede major federal financial regulators' ability conduct robust cost-benefit analyses, it is hardly reason to dismiss the need for regulatory analysis at federal financial regulators.[112]

B. OIRA Review Will Improve U.S. Financial Regulation

As explained in section III, the other critical regulatory best practice set forth by EOs 12,866 and 13,563 besides robust, transparent regulatory analyses, is OIRA review of regulatory actions. Applying this review process to rulemakings by major federal financial regulators would reduce unnecessary delays in the regulatory process by overcoming the coordination obstacles that stem from a highly balkanized financial regulatory landscape. OIRA review also offers to heighten final rule quality of "economically significant" regulations and alleviate concerns of regulatory capture at major U.S. financial regulators.

1. Reduce Regulatory Delays

By mid-2016 – six years after the Dodd-Frank Act's passage – just 274 of the Act's 390 rulemaking requirements were

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[109] Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 YALE L.J. F. 263, 268-69 (2015), http://www.yalelawjournal.org/pdf/SunsteinPDF_4nf1d4ar.pdf.

[110] Posner & Weyl, *supra* note 102, at 257-58 ("If experts are allowed to make judgments without having to justify those judgments and make explicit their assumptions, it becomes more difficult both for the public to understand and challenge the reasoning and for future experts, attempting to learn from the past, to make the best decisions going forward.").

[111] OFF. OF MGMT. & BUDGET, OFF., *supra* note 92, at 33.

[112] *See* Posner & Weyl, *supra* note 102, at 261-62.

fulfilled, according to Davis Polk.[113] In 2013, the GAO found that a major source of Dodd-Frank Act rulemaking delays is poor inter-agency coordination.[114] Recent statements by officials at U.S. financial regulators suggest that inter-agency conflict indeed slows down rulemaking.[115] The regulatory process surrounding the Volcker Rule was emblematic of poor inter-agency coordination at federal financial regulators; inter-agency coordination occurred ad hoc, the process faced bipartisan criticism for inefficiencies,[116] and rulemaking was held back due to an inability to quell inter-agency conflicts in mission.[117]

Enabling OIRA review of major federal financial regulators' rulemakings would improve inter-agency coordination and reduce unnecessary regulatory delays. As explained in section III, former OIRA Administrator Susan Dudley notes that OIRA review "minimize[s] conflict" between regulators during the rulemaking process.[118] It also offers to streamline regulatory analysis methodologies (such as discount factors) used at federal

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[113] DAVIS POLK, DODD-FRANK PROGRESS REPORT: SIX-YEAR ANNIVERSARY REPORT (2016).

[114] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-195, FINANCIAL REGULATORY REFORM: REGULATORS HAVE FACED CHALLENGES FINALIZING KEY REFORMS AND UNADDRESSED AREAS POSE POTENTIAL RISKS 25 (2013), http://www.gao.gov/assets/660/651401.pdf ("Regulators' progress in implementing the act's reforms also has been delayed because of the need to coordinate with other domestic and foreign regulators").

[115] *See* Joe Mont, *Is a Regulator Rift Causing Dodd-Frank Delays?* COMPLIANCE WK. (June 26, 2012), https://www.complianceweek.com/news/news-article/is-a-rift-among-regulators-causing-dodd-frank-delays#.V9CABpMrLoA.

[116] *See* Cheyenne Hopkins & Jesse Hamilton, *Lawmakers Criticize Regulators' Coordination on Volcker Rule*, BLOOMBERG (Feb. 5, 2014, 3:05 PM), http://www.bloomberg.com/news/articles/2014-02-05/lawmakers-criticize-regulators-coordination-on-volcker-rule.

[117] *See* Scott Patterson & Deborah Solomon, *Volcker Rule to Curb Bank Trading Proves Hard to Write*, WALL ST. J. (Sept. 10, 2013, 7:55 PM), http://www.wsj.com/articles/SB10001424127887323838204579000623890621830.

[118] Dudley, *supra* note 52, at 8.

financial regulators during the rulemaking process.[119] This in turn would further reduce regulatory delays.

On the other hand, some warn that OIRA review itself brings about delays, and point to the length of reviews during the H.W. Bush and Reagan Administrations.[120] Yet given the serious consequences of many rulemakings and the uncertainty surrounding regulatory impacts, delays are not inherently a bad thing.[121] Getting a rule right that will impact financial markets for decades is extremely important and well worth an extra month or two of delay.

Furthermore, between 1980 and 2016, the number of federal regulatory agency employees increased from 146,000 to 280,000, while OIRA's staff decreased from seventy-seven employees to thirty-eight employees between 1981 and 2013.[122] One must assess the OIRA review process in light of this growing imbalance.[123] Increased funding and staff would surely improve operational efficiency and therefore likely increase the speed with which review takes place.[124]

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[119] Eric A. Posner & E. Glen Weyl, *The Case for Cost-Benefit of Financial Regulations*, REGULATION 30, 31-32 (2013), https://object.cato.org/sites/cato.org/files/serials/files/regulation/2014/1/regulation-v36n4-2.pdf ("OIRA has ensured that regulators use common valuations – like the valuation of a statistical life – and discount factors").

[120] *See, e.g.*, Amit Narang, PUB. CITIZEN'S CONGRESS WATCH, *The Perils of OIRA Regulatory Review: Reforms Needed to Address Rampant Delays and Secrecy* (2013) ("OIRA under the Reagan and George H.W. Bush Administrations routinely kept rules under review for long periods of time") (citations omitted).

[121] *See* Stuart Shapiro & John Morrall, *Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis?* 48 ADMIN. & SOC'Y 367 (2016) (arguing that regulatory review time should be increased in lieu of increased staffing in order to afford OIRA personnel the time necessary to conduct thorough analyses).

[122] Testimony of Richard Williams, Director, Program on Regulatory Studies, Mercatus Center at George Mason University, before the Subcommittee on Government Operations, House Committee on Oversight and Government Reform (Mar. 15, 2016).

[123] *See id.*

[124] *See id.*; Shapiro & Morrall, *supra* note 121.

2. Improve Regulatory Analysis and Final Rule Quality

OIRA review of proposed financial markets rulemakings would not only reduce delays brought about by poor inter-agency coordination between major U.S. financial regulators, but it would also improve rule quality. The review process offers to curb federal financial regulators' tendency toward "tunnel vision," meaning agencies do not consider a full range of costs and benefits and may "exaggerate the benefits of proposed rulemakings."[125] For example, in their discussion of a recent CFPB analysis surrounding the merger of two federal mortgage disclosures, professors Omri Ben-Shahar of the University of Chicago and Carl Schneider of the University of Michigan highlight the often-overlooked costs associated with the full range of federal and non-federal disclosures facing a borrower at the time of a mortgage transaction and note that while regulators "recognize that too much information within a disclosure is pointless, they do not recognize that too much information across disclosures is also harmful."[126]

OIRA review could check assumptions made by financial regulators during the rulemaking process by aggregating information across agencies and collecting stakeholder feedback to inform unbiased reviews of proposed "economically significant" regulatory actions for which OIRA reviews accompanying RIAs.[127] Many executive agencies significantly modify "economically significant" rulemakings in response to OIRA review.[128] Similarly, there is evidence that CFTC

[125] Omri Ben-Shahar & Carl E. Schneider, *The Futility of Cost Benefit Analysis in Financial Disclosure Regulation*, 15-16 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 680, 2014). *See also* John D. Graham & James Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 HARV. J. L. & PUB. POL'Y 30, 35 (2014) (noting that OIRA serves as an "institutional check on the 'tunnel vision' at agencies") (citing STEPHEN BEYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 10-21 (1993)).

[126] *See* Ben-Shahar & Schneider, *supra* note 125.

[127] *See* Sunstein, *supra* note 18, at 1856-63 (highlighting how OIRA review serves this function during executive agencies' rulemaking process).

[128] *See* COPELAND, *supra* note 25, at 16 (citing U.S. GOV'T ACCOUNTABILITY OFF., RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS (2003)).

rulemaking quality has improved somewhat since its May 2012 memorandum with OIRA through which OIRA staff may provide "technical assistance" as the CFTC develops Dodd-Frank Act regulations.[129] The CFTC has begun to quantify more benefits and costs, and the overall "length, detail, and quality" of its analyses have improved.[130] Furthermore, former OIRA officials Stuart Shapiro and John Morrall recently found that lengthier OIRA reviews of RIAs are correlated with improved RIA quality,[131] and a 2013 study by economists Jerry Ellig and Rosemarie Fike of the Mercatus Center at George Mason University similarly concludes that OIRA review is associated with improved regulatory analysis quality.[132]

More broadly, OIRA plays the critical role of gathering information through stakeholder engagement and, in doing so, helps solve the "knowledge problem" – meaning in the regulatory context that an adequate understanding of the costs and benefits of a proposed regulation can only be achieved through the collection of knowledge dispersed throughout society and across multiple stakeholders – faced by regulators.[133] OIRA acts as an "information aggregator" of "decentralized knowledge" from the public and across government, and works to ensure that information is applied to improve regulatory actions.[134] As Cass Sunstein explains: "Federal officials, most of them nonpolitical, know a great deal,

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[129] *See Memorandum of Understanding,* OFF. OF INFO. & REGULATORY AFFAIRS & U.S. COMMODITIES FUTURES TRADING COMM'N (2012), http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/oira_cftc_mou_2012.pdf [http://perma.cc/XEK4-MGYK]; COMM. ON CAP. MKTS. REGULATION, *supra* note 95, at 8-9.

[130] *Id.* at 8.

[131] *See* Shapiro & Morrall, *supra* note 121.

[132] *See* Jerry Ellig & Rosemarie Fike, *Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis* (Mercatus Ctr. at Geo. Mason Univ., Working Paper No. 13-13, 2013).

[133] *See* Sunstein, *supra* note 85 (citing Friedrich A. Hayek, *The Use of Knowledge in Society* 35 AMER. ECON. REV. 519 (1945)). For more on OIRA's role in gathering information critical to the rulemaking process, *see supra* notes 19 & 127 and accompanying text.

[134] *See* Sunstein, *supra* note 18, at 1874-75.

and the OIRA process helps to ensure that what they know is incorporated in agency rulemakings."[135] This information is "indispensable," and OIRA ensures that it is carefully considered.[136]

3. Mitigate Regulatory Capture

OIRA review of proposed regulatory actions also serves as an effective tool to mitigate regulatory capture while preserving productive interactions with industry. As professor John Cochrane of the University of Chicago notes, "wide discretion [at regulators] invites capture."[137] Critically, however, the OIRA review process provides "a dispassionate and analytical 'second opinion' on agency actions," as President Obama stated in 2009; George W. Bush-appointed former OIRA Administrator Susan Dudley recently echoed this sentiment.[138] A transparent rulemaking process in which anticipated regulatory costs and benefits are checked by a third party (like OIRA) makes regulatory processes much less susceptible to capture.[139]

Concerns that OIRA's "open-door policy" enables concentrated, well-organized, and well-funded interests to more aptly engage OIRA are overstated: Research by law professors Michael Livermore of the University of Virginia and Richard Revesz of New York University finds that "industry has not

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[135] *Id.*

[136] *Id.*

[137] John Cochrane, *Cost-Benefit Analysis as a Framework for Financial Regulation*, NAT'L BUREAU ECON. RES. 17 (Feb. 16, 2014), http://dx.doi.org/10.2139/ssrn.2425885 (noting that "wide discretion invites capture," but arguing that cost-benefit analysis would not check against capture).

[138] Dudley, *supra* note 52, at 8 (citing White House, Office of the Press Secretary, *Memorandum for the Heads of Executive Departments and Agencies,* Apr. 23, 2009, https://www.whitehouse.gov/the_press_office/ Presidential-Memorandum-Regarding-Regulatory-Review).

[139] *See* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 97 (Daniel Carpenter & David A. Moss eds., 2014).

dominated the petition process."[140] Furthermore, OIRA is generally led by those "who have based their careers on scholarship and general expertise on the regulatory system[,]" and consequently, are not prone to regulatory capture.[141] Because OIRA is involved in so many regulatory arenas, its susceptibility to capture is further diminished.[142] As professors Livermore and Revesz explain, "OIRA's generalist nature, coordination function, use of cost–benefit analysis, and tradition of independent leadership all help promote an anticapture role."[143] UConn School of Law professor James Kwak suggests OIRA review could be effective at mitigating the risk of industry capture at financial regulators because it would serve as "an external check on the information and analysis used to justify agency actions."[144]

V. ACHIEVING ROBUST REGULATORY ANALYSES AND OIRA REVIEW AT MAJOR FEDERAL FINANCIAL REGULATORS

Sections II and III illustrate that when compared to the rulemaking process at executive agencies guided by EOs 12,866 and 13,563 and OMB Circular A-4, processes at major federal financial regulators result in insufficient regulatory analyses and inter-agency coordination. Section IV explains why robust regulatory analyses and OIRA review could help mitigate these shortcomings. But how can these critical regulatory best practices be implemented at federal financial regulators?

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[140] Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1388 (2013). For former OIRA Administrator Cass Sunstein's perspective on OIRA's "open-door policy," *see supra* note 20 and accompanying text.

[141] Livermore & Revesz, *supra* note 140, at 1376.

[142] *Id.*

[143] *Id.* at 1390.

[144] *See* Kwak, *supra* note 139, at 97.

A. Through Presidential Action

It can be argued that the President lacks the authority to subject independent regulatory agencies to EOs 12,866 and 13,563 and thus OIRA review.[145] On the other hand, legal scholars, the American Bar Association, and the Office of Legal Counsel under both Presidents Reagan and Clinton agree that the President has the authority to extend these executive orders to independent regulatory agencies and thus subject them OIRA review.[146] By this principle, the best practices by which agencies conduct regulatory analyses set forth in OMB Circular A-4 could be applied to "independent" federal financial regulators, as it does not appear the power has been explicitly restricted.[147] As a 2012 Congressional Research Service (CRS) report concludes, however, "there may be lingering questions as to whether the President has the legal authority to extend requirements of [EO 12,866] to the [independent regulatory agencies]. . . ."[148]

Even if the President does in fact have the legal authority to expand EOs 12,866 and 13,563 to cover "independent" federal financial regulators, it is disputable how compliance with the principles set forth in these orders would reasonably be enforced, given that the heads of these agencies and their staff

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[145] For an overview of these legal arguments, *see* VIVIAN S. CHU & DANIEL T. SHEDD, CONG. RES. SERV. REPORT FOR CONGRESS, 7-5700, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES 15 (2012), https://www.fas.org/sgp/crs/misc/R42720.pdf.

[146] *See* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 203 (1986); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 837 (2013); Letter from H. Russell Frisby, Chair, Section of Admin. L. & Reg. Prac., A.B.A. to Mabel Echols, Records Management Specialist OIRA (Mar. 16, 2009), www.reginfo.gov/public/jsp/EO/fedRegReview/ABANET_comments.pdf.

[147] For example, President Reagan's Office of Legal Counsel concluded that agency "independence" was not "pertinent to supervision of rulemaking." *See* CHU & SHEDD, *supra* note 144, at 13 (citing Memorandum to David Stockman, Director of OMB, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel 7 (Feb. 12, 1981)).

[148] CHU & SHEDD, *supra* note 145, at 12.

for the most part do not serve at the pleasure of the President.[149] The CRS report also notes that, "It is . . . plausible that an ["independent"] agency could disregard an OIRA request to defer rulemaking or to reassess a proposed rule for lack of adequate CBA."[150]

A presidential expansion of executive orders to independent regulatory agencies seems to neither guarantee that binding OIRA review of major federal financial regulators' rulemakings – a critical and beneficial element of executive agencies' regulatory processes – would take place, nor ensure that the robust regulatory analysis process (including cost-benefit analysis) set forth by EOs 12,866 and 13,563 and OMB Circular A-4 would be upheld. Thus, this strategy could fail to effectively streamline the varied and inadequate regulatory processes at federal financial regulators and improve these agencies' regulatory coordination.

B. Through Congressional Action

Instead, Congress could require by statute that all major federal financial regulators be subject to robust regulatory analysis requirements and OIRA review, but two key questions remain. First, should Congress simply endorse Presidential authority to require that "independent" federal financial regulators adhere to the regulatory process set forth by EOs 12,866 and 13,563 and OMB Circular A-4,[151] or should it instead pass in statute robust regulatory analysis principles to which

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[149] *See id.* at 15-20 (explaining constraints surrounding potential options for presidential recourse against independent agency non-compliance). Notably, according to the October 2016 *PHH Corp., et al. v. CFPB* ruling, the Director of the CFPB appears to indeed serve at the pleasure of the President. *See* PHH Corp., et al. v. CFPB, Case No. 15-1177, D.C. Cir. (Oct. 11, 2016); Hensarling, *supra* note 11. The CFPB, however, "respectfully disagrees with the Court's decision." *See* Andrew M. Harris, *CFPB Survives Legal Attack as Court Trims Director's Power*, BLOOMBERG, Oct. 11, 2016, http://www.bloomberg.com/news/articles/2016-10-11/consumer-finance-bureau-suffers-setback-as-phh-wins-ruling-iu5krh65.

[150] CHU & SHEDD, *supra* note 145, at 16.

[151] For an example of such legislation, *see* Independent Agency Regulatory Analysis Act of 2015, S. 1607, 114th Cong. (2015).

agencies must adhere?[152] Second, should regulatory analyses by major federal financial regulators be subject to binding or non-binding OIRA review?

1. Statutory Regulatory Analysis Requirements are Beneficial

Recent legislation introduced in the U.S. Senate by Senators Rob Portman, Mark Warner, and Susan Collins, would "affirm the authority of the President to require independent regulatory agencies to comply with regulatory analysis requirements applicable to executive agencies."[153] In other words, this legislation would expand the regulatory process standards – including robust regulatory analysis and OIRA review – associated with EOs 12,866 and 13,563 to "independent" federal financial regulators to the "extent permitted by law."[154]

Because this legislation simply "affirm[s]" the President's authority to expand the regulatory requirements for executive agencies set forth in EOs 12,866 and 13,563,[155] it is not clear whether the aforementioned legal issues surrounding the enforceability of regulatory process requirements contained in these executive orders would be resolved. For example, this legislation does not seem to clearly address disagreements surrounding the extent of the President's power over independent regulatory agency staff.[156] So while this is an improvement upon the status quo, the Portman-Warner-Collins proposal appears to leave a back door through which financial regulators could avoid robust regulatory analysis requirements.

Alternatively, Congress could pass a statute that sets forth rulemaking process requirements for major federal financial regulators that mirror those set forth in EOs 12,866 and 13,563

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[152] For an example of such legislation, *see* Financial CHOICE Act, H.R. 5983, 114th Cong. (2016) §§ 611-612 [hereinafter Financial CHOICE Act].

[153] Independent Agency Regulatory Analysis Act of 2015, *supra* note 151.

[154] *Id.*

[155] *Id.*

[156] *See supra* notes 148-150 and accompanying text.

and OMB Circular A-4.[157] This approach would be similar to existing statutes requiring the SEC and CFTC to "consider" certain costs and benefits,[158] but would entail more stringent procedural criteria and require each federal financial regulator to conduct robust regulatory analyses for most major financial markets rulemakings.[159] An example of such an approach is Subtitle A of Title VI of House Committee on Financial Services Chairman Jeb Hensarling's Financial CHOICE Act of 2016,[160] which requires that major federal financial regulators conduct rigorous regulatory analyses for most rulemakings, with notable and necessary exceptions such as rules related to emergency actions, personnel matters, and monetary policy operations and tools.[161] These analyses would be statutorily required to present the need for a particular regulation, as well as a "quantitative and qualitative assessment of all anticipated direct and indirect costs and benefits of the regulation. . ." that takes into account compliance costs and net effects on economic activity.[162] Agencies could be required by statute to "identif[y] and assess[]" all reasonable alternatives to regulation, "including modification of an existing regulation or statute"[163]

Statutorily requiring robust regulatory analysis be conducted at financial regulators as part of the rulemaking process brings about two key advantages: It (1) increases the likelihood that robust regulatory analysis processes are followed by agencies,[164]

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[157] *See* Abby McCloskey & Hester Peirce, AMER. ENTER. INST., *Holding Financial Regulators Accountable: A Case for Economic Analysis*, (2014), http://www.aei.org/publication/holding-financial-regulators-accountable-a-case-for-economic-analysis/.

[158] *See supra* notes 31-36 and accompanying text.

[159] *See* McCloskey & Peirce, *supra* note 157.

[160] Financial CHOICE Act, *supra* note 152, at §§ 611-621.

[161] *See id.* at §§ 611-612.

[162] *Id.* at § 612.

[163] *Id.*

[164] *See* McCloskey & Peirce, *supra* note 157 ("A stronger statutory requirement would include specific elements to provide agencies with a clear road map of the type of analysis that they are required to perform. Such

and (2) addresses with more certainty any legal issues surrounding how "independent" agency compliance with the regulatory principles set forth in EOs 12,866 and 13,563 and OMB Circular A-4 would be enforced.[165]

Statutory regulatory analysis requirements do also open the door to more stringent judicial review of these analyses.[166] As it stands, the APA enables judicial review of an agency rulemaking based upon a number of criteria, most notably whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[167] Because these criteria are quite vague, and major federal financial regulators' existing statutory requirements to consider costs and benefits are either weak or non-existent, the judicial review process of these agencies' regulatory analyses today results in inconsistent and unclear outcomes.[168]

More broadly, judicial review of regulatory analyses (which would be brought about by a statutory regulatory analysis requirement) brings about a "tradeoff between decision costs and error costs[]. . . " as Posner and Weyl note.[169] They find the tradeoff to be "indeterminate,"[170] but Coates disagrees, arguing that judicial review would be essentially useless at detecting

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specificity also would facilitate public comment, peer review, congressional oversight, and judicial review of the agencies' analyses.").

[165] *See* CHU & SHEDD, *supra* note 145, at 21-23 (suggesting that the codification of OIRA review and cost-benefit analysis could result in "more legal challenges to agency rules").

[166] *See* McCloskey & Peirce, *supra* note 157 ("A statutory requirement would ensure that the public would be able to comment on the analysis and that it would be subject to judicial review.").

[167] *See* Caroline Cecot & Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575 (2015) (citing 5. U.S.C. § 706(2)(A) (2014)).

[168] *See* Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation* 18-22 (New York Univ. Pub. L. & Legal Theory Working Papers, Paper No. 554, 2016); Reeve Bull & Jerry Ellig, Judicial Review of Regulatory Impact Analysis: A "Plug and Play Proposal" (Feb. 2016) (unpublished manuscript) (on file with authors).

[169] *See* Posner & Weyl, *supra* note 102, at 261.

[170] *Id.*

when regulators abuse cost and benefit estimates to justify intended regulatory actions.[171] Judicial review, however, need not be technical – it can simply check to ensure whether the appropriate steps required for an RIA and its accompanying regulatory analysis are conducted.[172] For example, it could simply entail asking whether an agency "has complied with [] statutorily mandated procedural elements," such as considering alternative regulatory approaches.[173]

Also, to check against judicial biases and improve consistency in judicial review outcomes, Congress could amend the APA, or pass a separate law to set forth clearer standards for judicial review of regulatory analyses that ensure technical regulatory analysis steps are followed by agencies.[174] Indeed, the Financial CHOICE Act allows "a person that is adversely affected or aggrieved by [a financial regulation] . . . to bring an action in the United States Court of Appeals for the District Columbia Circuit for judicial review" of a federal financial regulator's compliance with the regulatory process requirements established in the Act.[175]

Broadly, judicial review of regulatory analyses stands to improve the quality of final rulemakings. For starters, judicial review restrains the ability of regulators to abuse regulatory analysis to advance political or industry objectives in lieu of substantive justification for a policy.[176] Additionally, in its

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171 *See* Coates, *supra* note 67. Coates notes that cost-benefit analysis can act as "defensive camouflage" and that because cost-benefit analysis of federal financial markets rulemakings "can be no more than 'guesstimated,' it is thus "not a true alternative to expert judgment – it is simply judgment in (numerical) disguise." *See id.* at 1008. Because of this, Coates argues, "for the near future, at least, judicial review of quantified CBA [cost-benefit analysis] of financial regulation is not likely to generate benefits that exceed its costs." *Id.* at 1011.

172 *See* McCloskey & Peirce, *supra* note 157.

173 *See id.*

174 *See* Bull & Ellig, *supra* note 168.

175 Financial CHOICE Act, *supra* note 152, at § 617.

176 *See* Posner & Weyl, *supra* note 102, at 261

> (If courts do not enforce CBA of financial regulations, then financial regulators may continue to issue regulations that fail cost-benefit tests. These regulations may be excessively strict

review of economic analyses accompanying Dodd-Frank Act rulemakings, the Committee on Capital Markets Regulation found that after *Business Roundtable v. SEC* – a case in which a SEC rulemaking was deemed invalid due to insufficient consideration of costs and benefits – agency assessments of costs and benefits improved.[177] Similarly, economists Kip Viscusi and Caroline Cecot found that judicial review oftentimes promotes "high-quality and transparent" cost-benefit analyses.[178]

Besides judicial review, another concern surrounding statutory regulatory analysis requirements is that these standards may significantly slow the regulatory process at federal financial regulators given staff inexperience conducting these analyses.[179] Increasing agency capacity to conduct regulatory analyses, however, can alleviate this concern.[180] Additionally, to preserve resources, robust regulatory analysis requirements could only be required for "economically significant" rulemakings, as is the case for executive agencies.[181]

> or excessively lax, depending on the configuration of ideology, interest group influence, and technical sophistication that happens to influence a regulator at any given time.).

[177] COMM. ON CAP. MKTS. REGULATION, *supra* note 95, at 9.

[178] Cecot & Viscusi, *supra* note 163, at 578 (noting that "there are many examples of courts promoting high-quality and transparent BCA" but that "[t]he stringency of judicial review, however, is not consistent").

[179] Posner & Weyl, *supra* note 102, at 261.

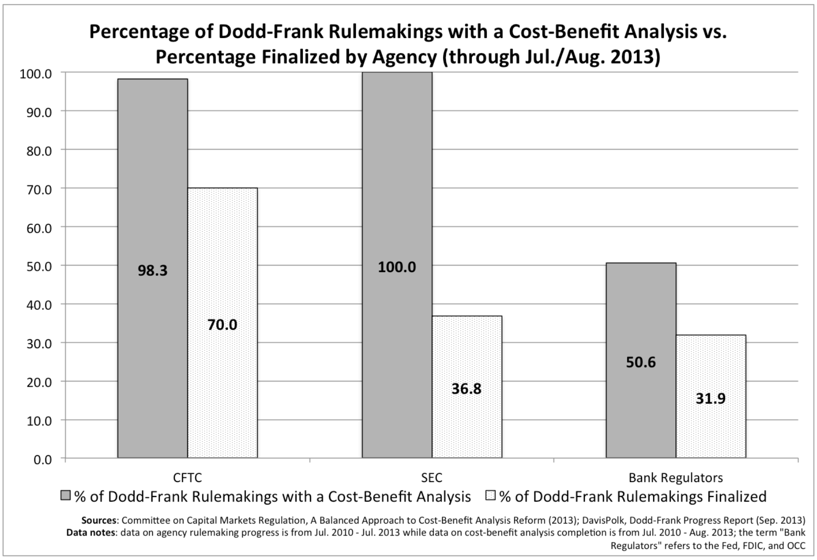
[180] *See id.* ("[U]rg[ing] the executive branch to exercise some leadership and begin a process of training financial regulators [to conduct cost-benefit analysis]"). Congress could also direct resources to ensure major U.S. financial regulators swiftly gain the capacity to conduct thorough regulatory analyses of proposed rulemakings.

[181] *See* COMM. ON CAP. MKTS. REGULATION, *supra* note 95, at 18. *But see* McCloskey & Peirce, *supra* note 157

> ([A statutory economic analysis mandate] should not be limited to economically significant regulations. If an agency deems a rule is too insignificant for economic analysis, then the notice of proposed rulemaking should explain both why the rule is not significant enough to merit an accompanying economic analysis and any assumptions underlying this assessment of the rule).

Yet concerns over the burdens of regulatory analyses on regulatory swiftness may be overstated. The SEC and CFTC – constrained by statutory requirements to "consider" benefits and costs – promulgated Dodd-Frank Act regulations at a swifter rate in the aftermath of the Act's passage despite also conducting more thorough analyses of costs and benefits than bank regulators, as Figure 2 illustrates.[182]

Figure 2



Notably, this discrepancy does not appear to be the result of fewer or less complex CFTC and SEC regulations. Dodd-Frank Act rulemakings published between 2010 and 2012 resulted in over 3,000 new regulatory restrictions in Title 17 (Commodity and Securities Exchanges) of the Code of Federal Regulations (CFR), versus approximately 2,300 in Title 12 (Banks and Banking) of the CFR (which includes NCUA and CFPB regulations, not included in Figure 2 above).[183] Also, between

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[182] Data from *id.* at 20 (listing rulemakings through Aug. 29, 2013) & DAVIS POLK, DODD-FRANK PROGRESS REPORT (Sep. 2013) (providing data as of July 15, 2013, although Davis Polk did not provide bank regulator-level data by agency, hence all bank regulator data being aggregated, while not being aggregated in Figure 1).

[183] Patrick A. McLaughlin & Robert Greene, *Dodd-Frank's Regulatory Surge: Quantifying its Regulatory Restrictions and Improving its Economic*

July 2010 and August 2013, there were 117 CFTC and SEC Dodd-Frank Act rulemakings (fifty-eight and fifty-nine, respectively) while bank regulators promulgated eighty-five Dodd-Frank Act rulemakings.[184]

2. OIRA Review Must Be Binding

Heightened regulatory analysis requirements – whether brought about by presidential action or statute – would not alone address the serious shortcomings of federal financial regulatory processes: OIRA review, for the reasons established in section IV, offers a critical means by which insufficient consideration of costs and benefits, delays brought about by poor regulatory coordination, and concerns surrounding regulatory capture can all be addressed.

As discussed, however, there may be serious legal limitations and complications with a unilateral presidential decision to expand OIRA review to "independent" agencies.[185] Out of a worry that binding OIRA review could jeopardize agency independence, the Portman-Warner-Collins bill offers to subject "independent" regulators to non-binding OIRA review.[186] While non-binding OIRA review may enable heightened engagement between major federal financial regulators and OIRA, and would certainly foster more transparency and thus more robust agency considerations of costs and benefits,[187] non-binding OIRA review is a substantially less desirable alternative to binding OIRA review.

Analyses, MERCATUS CTR. AT GEO. MASON UNIV., 1 (2014), http://mercatus.org/sites/default/files/McLaughlinGreene_QuantifyingDoddFrank_MOP_022614.pdf.

[184] COMM. ON CAP. MKTS. REGULATION, *supra* note 95, at 20.

[185] *See supra* notes 148-150 and accompanying text.

[186] *See* SEN. ROB PORTMAN, INDEPENDENT AGENCY REGULATORY REVIEW ACT OF 2013 3-4, http://www.portman.senate.gov/public/index.cfm/files/=serve?File_id=65ffffa3-8005-49c0-b162-c6f959d3249e (citing to a past version of the Portman-Warner-Collins bill); Independent Agency Regulatory Analysis Act of 2015, *supra* note 151.

[187] *See* COMM. ON CAP. MKTS. REGULATION, *supra* note 95, at 13.

Executive agencies' past attempts to skirt OIRA review[188] undermines the efficacy of allowing for non-binding review. Furthermore, as Posner and Weyl note, OIRA should be equipped to "return [] proposed rules to [federal financial markets] regulators if the [cost-benefit analysis] is not good enough."[189] Also, if OIRA review were a non-binding process, then agencies and stakeholders would have less incentive to actively engage with OIRA during the rulemaking process, thereby reducing the effectiveness of OIRA review at mitigating regulatory capture and aggregating critical information from stakeholders that improves rule quality.[190]

Instead, Congress should generally require binding OIRA review of major U.S. financial regulators' regulatory actions.[191] Binding review would motivate these regulators to take the OIRA review process as seriously as executive agencies do,[192] in

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[188] *See* Graham & Broughel, *supra* note 124.

[189] Posner & Weyl, *supra* note 102, at 261-62.

[190] It seems that agencies and especially stakeholders engage OIRA to influence the outcome of the final rule. *See* Livermore & Revesz, *supra* note 140. Stakeholders would likely be less inclined to do so if OIRA had no power to stop a rule from moving forward, and only limited ability to influence its design. Also, heightened discretion invites regulatory capture, as John Cochrane notes, so to the extent that non-binding review brings about increased discretion, its effectiveness at mitigating capture is reduced. *See* Cochrane, *supra* note 136, at 17 ("wide discretion invites capture").

[191] To protect monetary policy independence, certain Fed rulemakings should be excluded from OIRA review. For a list of Fed rulemaking types excluded from the regulatory analysis standards set forth by the Financial CHOICE Act, *see* Financial CHOICE Act, *supra* note 152, at § 611(4)(B)(v). A similar list of Fed rulemaking types should be excluded from OIRA review.

[192] *See* Ryan Bubb, *The OIRA Model for Institutionalizing CBA of Financial Regulation*, 72 L. & CONTEMP. PROBS. 47, 52-53 (2015). Former OIRA official and law professor Ryan Bubb notes that the "quasi-veto right" of an "external reviewer" improves regulatory analysis, explaining:

> A series of executive orders require executive agencies both to conduct CBA and to submit their significant rules and accompanying analysis to review by OIRA prior to publishing them in the Federal Register. Faced with an external reviewer that held a quasi-veto right over their most important regulations, the executive agencies invested in analytic capacity for generating sophisticated, quantitative CBA to guide policymaking.

turn enhancing OIRA's potential to improve inter-agency coordination, heighten rule quality, and check against regulatory capture – all benefits previously discussed. As former OIRA Administrator Cass Sunstein argues, as long as OIRA has the operational capacity to expand its immensely positive review process to federal financial regulators, then there is a "strong argument" that it should do so.[193] To improve the effectiveness of binding OIRA review of these agencies' proposed rulemakings, OIRA should be granted the resources to hire staff with the expertise and experience to adequately review the regulatory analyses of financial regulations.[194] According to former OIRA officials John Morrall and Stuart Shapiro, a sizable staff increase at OIRA will likely improve regulatory analysis quality, and at the least, heighten the efficiency with which rules are reviewed.[195]

VI. CONCLUSION

The regulatory process established by EO 12,866, EO 13,563, and OMB Circular A-4 is defined by two core features: (1) Robust regulatory analysis standards, and (2) OIRA review. These features improve regulatory quality, are appropriate for financial markets rulemakings, and if applied at major U.S. financial regulators, would result in a regulatory process far superior to that currently present. In particular, serious problems associated with the regulatory processes at these agencies – such as insufficient inter-agency coordination and an inadequate consideration of regulatory costs and benefits – would be mitigated by the adoption of strong, consistent regulatory analysis standards and OIRA review of most regulatory actions. But how can these desirable ends be achieved?

Id. at 50 (citation omitted).

[193] Sunstein, *supra* note 109, at 269.

[194] *See id.* ("OIRA's staff . . . does not now have a great deal of expertise on financial regulation in particular. It would be challenging for OIRA to review financial regulations without adding more personnel. . . .").

[195] Shapiro & Morrall, *supra* note 121.

Requiring by statute that major federal financial regulators conduct robust regulatory analyses for most rulemakings and that rulemakings generally be subject to binding OIRA review is a superior strategy to either a congressional or presidential expansion of the applicability of OMB Circular A-4 and EOs 12,866 and 13,563 to "independent" federal financial regulators. This determination stems from two points, outlined above: (1) This strategy would bypass tricky legal considerations that could weaken the extent to which "independent" federal financial regulators are compelled to adhere to these principles, and (2) judicial review stands to further improve regulatory analysis and mitigate regulatory capture. Furthermore, by making OIRA review of major federal financial regulators' rulemakings binding, Congress can ensure that stakeholders will seriously engage in the review process and the positive impacts of OIRA review – such as facilitating inter-agency communication and aggregating information to improve rulemaking quality – can be fully realized by these agencies when designing regulations.

In short, statutorily requiring that the rulemaking process at major federal financial regulators generally incorporate robust regulatory analysis standards and binding OIRA review for regulatory actions passes the cost-benefit test. These reforms, if implemented, would heighten regulatory quality, improve rulemaking efficiency, mitigate regulatory capture, and enhance inter-agency coordination across the U.S. financial regulatory system.