BETTER MARKETS

– WHITEPAPER –

COST-BENEFIT ANALYSIS IN CONSUMER AND INVESTOR PROTECTION REGULATION: AN OVERVIEW AND UPDATE

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Introduction

For decades, the financial services industry has fought tenaciously to nullify or weaken regulation by forcing agencies to engage in an exhaustive and quantitative cost-benefit analysis for each rule they promulgate. Repeated efforts to impose cost-benefit analysis have surfaced over the years in Congress and in the executive branch, and the courts have entertained countless legal challenges to rules based largely on claims that agencies have failed to do an adequate job of assessing the economic impact of their rules. In addition, dedicated academics have long examined the feasibility, drawbacks, and benefits of cost-benefit analysis, revealing strongly held and sometimes intensely divided views on the subject. In our comment letters, amicus briefs, and special reports, Better Markets has staunchly opposed this tactic in the industry's war on regulation.[1]

Cost-benefit analysis in regulation remains an issue of intense interest in all three branches of government. For example, on July 29, 2020, we participated in a symposium hosted by the Consumer Financial Protection Bureau ("CFPB"), which was organized to examine the use of cost-benefit analysis in consumer financial protection regulation."[2] And recently, the Federal Deposit Insurance Corporation ("FDIC") sought public comment on a possible framework for analyzing the effects of regulatory actions, which focuses in large measure on evaluating costs and benefits.[3]

As a new administration prepares to assume leadership of the regulatory agencies, including the financial regulators, the time is right to revisit these important issues and to set forth the principles that should govern the economic impact analysis of regulatory actions. Accordingly, in this White Paper—

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[1] For example, in 2012, we issued a report examining and exposing the largely successful attempt to foist more stringent cost-benefit analysis requirements upon the Securities and Exchange Commission ("SEC"), even though the securities laws include no such mandate. *See, e.g.,* BETTER MARKETS, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC (July 30, 2012), *available at* https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf; *see also* Brief Amicus Curiae of Better Markets, Inc. in Support of Respondent at 15-25, N.Y.S.E v. SEC, No. 19-1042 (D.C. Cir. Aug. 1, 2019), https://bettermarkets.com/resources/court-filing-sec-attempts-protect-investors-and-market-integrity-exposing-exchange-pricing;

[2] CFPB Symposium: Cost-Benefit Analysis in Consumer Financial Protection Regulation (July 29, 2020), https://www.consumerfinance.gov/about-us/events/archive-past-events/cfpb-symposium-cost-benefit-analysis-consumer-financial-protection-regulation/.

[3] Better Markets, Comment Letter to the FDIC on Request for Information on a Framework for Analyzing the Effects of Regulatory Actions (Jan. 28, 2020), *available at* https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_FDIC_Request_for_Information_on_a_Framework_for_Analyzing_the_Effects_of_FDIC_Regulatory_Actions_%28RIN_3064-ZA13%29.pdf.

- We summarize the reasons why quantitative cost-benefit analysis in financial regulation is unreliable, biased, and counterproductive;
- We review the use of cost-benefit analysis as a weapon, primarily in the courts but also in the form of proposed legislation and executive orders;
- We highlight issues of special concern surrounding the application of cost-benefit analysis at the SEC and the CFPB;
- We offer some general principles that should guide the use of cost-benefit analysis at all federal regulatory agencies; and
- In an appendix, we briefly canvass the academic literature on cost-benefit analysis.

Summary

Requiring agencies to conduct quantitative cost-benefit analysis in their rulemaking process does more harm than good. Quantitative cost-benefit analysis is an inherently appealing notion at first blush, but in reality, it is inaccurate and biased; costly and burdensome; and often divorced from the type of economic analysis that Congress actually intended the agency to conduct under its organic statute. It actually represents a dangerous threat to the strong financial regulations that are necessary to protect the stability of our financial system, prevent another crisis, and contain the fraud and abuse that continue to victimize investors and consumers every day.

It also rests on the false premise, routinely advanced by the regulated industry, that regulation threatens to impose crushing burdens, ultimately harming consumers by eliminating supposedly valuable "choices" in the financial marketplace. In fact, these claims have consistently proven to be false throughout the history of financial regulation. We have not seen credible evidence that the drawbacks of exhaustive or quantitative cost-benefit analysis as applied to financial regulation are outweighed by any benefits it may have. In short, in this arena at least, cost-benefit analysis has not been shown to satisfy its own test.

The relentless fight by the industry to impose cost-benefit analysis on regulators has been waged in all three branches of government. In the courts, many important rules have been vacated on economic analysis grounds and those precedents have infected the rulemaking process more broadly. Some recent decisions reflect a welcome return to core principles, including, for example, the general rule that agencies are not required to perform quantitative cost-benefit analysis unless Congress has clearly and expressly said so—something Congress has generally not done with respect to the financial regulators, including the SEC and the CFPB. While the Supreme Court's decision in *Michigan v. EPA*[4] suggests an affinity for cost-benefit analysis that will continue to influence lower courts in ways that undermine attempts by agencies to promulgate strong rules that protect the public interest, it is not the last word on the subject.

On the Hill, attempts to impose exhaustive cost-benefit analysis requirements on all regulatory agencies have continued since the passage of the Dodd-Frank Act. So far, fortunately, they have largely failed. And in the administration, while President Trump has issued numerous executive orders and memoranda aimed at tearing down valuable financial regulations, the basic limiting principle articulated in prior executive orders on cost-benefit analysis (including notably E.O. 12866) remains intact: The independent regulatory agencies are not subject to the cost-benefit analysis requirements set forth in those orders. Unfortunately, some independent agencies, such

[4] *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

as the SEC and the CFPB, have nevertheless committed to engaging in cost-benefit analysis or a close facsimile. Although the trend among academics is hardly uniform, numerous prominent thinkers continue to argue persuasively that cost-benefit analysis cannot reasonably be applied to financial regulation.

We are especially concerned about the drawbacks of cost-benefit analysis as applied at the SEC and the CFPB. As the leading federal agencies responsible for investor and consumer protection, respectively, they have an enormous impact on the financial lives of virtually all Americans. The SEC has slowly and steadily been weighed down by industry's relentless strategy—pursued largely in the courts—to shackle the agency's rulemaking process with the restraints imposed by cost-benefit analysis.

As to the CFPB, it has served for much of its short history as an extraordinarily effective champion of consumer protection. Unfortunately, under the current administration, the agency has strayed from its foundational mission, in both rulemaking and enforcement.[5] To the extent that the CFPB embraces ever-more exhaustive and quantitative cost-benefit analysis, notwithstanding its limited duty under the law, its ability to effectively protect consumers from fraud and abuse will be further compromised. That may gratify payday lenders, student loan servicers, mortgage companies, and other financial institutions that often prey on consumers, but it will hurt millions of everyday Americans who rely on the CFPB to protect them.

These concerns are reinforced by the CFPB's recently finalized rule that rescinded the underwriting requirements for payday lenders. Those requirements prohibited firms from making a payday loan without first determining that the consumer had the ability to repay the loan. They were designed to help prevent desperate borrowers from becoming trapped in endless cycles of debt and incurring mountains of fees and interest. And they were based on years of research and analysis, as set forth in the rulemaking record. The rollback rule, issued in July of this year, was based largely on a deeply flawed and selective economic analysis, along with an embarrassing solicitude for the welfare of the payday lenders. It stands as a stunning example of an agency betraying its core mission and catering to the regulated industry through the application of cost-benefit analysis.[6]

Perhaps someday economists and social scientists will develop a methodology for cost-benefit analysis that is truly accurate, fair, efficient, and capable of effectively protecting the public interest without favoring the regulated industry. Many accomplished and dedicated academics are focused on the task. Needless to say, Better Markets is not optimistic about the odds of finding such a holy grail of cost-benefit analysis.

In any case, one thing is clear: Just as we'll know that arbitration is a truly fair and effective means of redress when the industry stops forcing it down consumers' throats in fine print agreements, we'll know that a genuinely fair and reliable approach to cost-benefit analysis has arrived when the financial services industry and its allies in the White House, on the Hill, and at times even within the regulatory agencies stop insisting that exhaustive cost-benefit analysis should be mandated for every rulemaking. Until that clamor ends, we can assume that cost-benefit analysis favors the de-regulatory agenda of the industry.

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[5] *See* Comment Letter from Better Markets to the CPPB on its Taskforce on Federal Consumer Financial Law (July 1, 2020), *available at* https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_CFPB_Request_for_Information_to_Assist_the_Taskforce_on_Federal_Consumer_Financial_Law.pdf.

[6] *See* Comment Letter from Better Markets to the CFPB on Payday, Vehicle Title, and Certain High-Cost Installment Loans (May 15, 2019), *available at* https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20CFPB%20Payday%20Underwriting%20Rescission%205-15-2019_0.pdf.

In the meantime, agencies should observe a number of core principles with respect to cost-benefit analysis. These are necessary to preserve, to the maximum extent possible, their ability to regulate financial services with the rigor that is necessary to protect investors and consumers from fraud and abuse in the financial markets. In Section X below, we list ten suggested agency guidelines, and foremost among them are (1) follow the law and engage in cost-benefit analysis only to the extent required by Congress; (2) expansively consider the benefits of financial regulation, including those that are direct and indirect, tangible and intangible, and derived from collections of rules as well as individual reforms; and (3) discount industry sky-is-falling predictions about the supposedly burdensome impact of rules and thoroughly vet their proffered data and studies.

Analysis

I. Cost-benefit analysis is an appealing and effective weapon for those in the industry who seek to delay, weaken, or strike down financial regulation.

Insisting on the application of rigid, quantitative cost-benefit analysis requirements to proposed financial regulations has proven to be an effective tactic that Wall Street and its allies use in their unremitting fight against financial reform. This tactic owes some of its success to the fact that "cost-benefit analysis" sounds like the type of exercise that no thoughtful person would oppose. The very phrase has an inherent appeal, as it connotes rigorous comparative scrutiny grounded in precise economic calculations. Indeed, opponents of financial reform have chosen this front on which to wage battle precisely because "cost-benefit analysis" sounds like such an eminently reasonable—indeed unassailable—instrument for developing sound regulatory policy.

In fact, the opposite is closer to the truth. The costs and benefits of proposed financial regulations are inherently resistant to accurate quantification and comparative evaluation. And the methodology is highly dependent on assumptions, speculation, and the exercise of broad discretion.

At best, quantitative cost-benefit analysis of financial regulation is imprecise, unreliable, and intrinsically biased against the public interest and in favor of leniency toward regulated industries. At worst, quantitative cost-benefit analysis is a Trojan Horse for Wall Street and its allies, used to wage war against regulation in the guise of advocating for objective economic analysis. It does not serve the public interest well.

II. Cost-benefit analysis is unreliable.

It yields inaccurate results. Cost-benefit analysis is inherently unreliable, as it depends on imprecise assumptions, predictions, and quantifications about a complex array of variables that are extremely difficult to make with accuracy. One of the most challenging variables in the exercise is trying to predict how the industry will react and adapt to a rule. That difficult assessment largely determines how costly a rule will prove to be for industry and how effective it will prove to be in conferring benefits on financial markets and investors. And many of the most important benefits of regulation defy accurate quantification, from the many frauds that never happened as a result of deterrence to the robust participation in the financial markets that comes from confidence in their integrity.

It rests on limited data. Compounding the problem, reliable data on which to base cost-benefit analysis is often accessible only to the regulated firms and not to the agency attempting to promulgate a rule. Moreover, when the regulated firms do decide to share their data with regulators, they often do so selectively, thus undermining the accuracy of any resulting analysis and skewing it in favor of the industry's perspective.

It favors industry. Cost-benefit analysis is inherently biased in favor of the regulated industry, since costs of compliance and other costs borne by the industry are generally much easier to quantify in dollar terms than the benefits of regulations, which have a comparatively larger non-monetary component. For example, a rule that aims to reduce fraud and manipulation in the securities markets promises cascading benefits, well beyond preventing just the monetary losses arising from fraud. These other benefits include financial losses avoided altogether and greater investor confidence leading to more robust financial markets, greater economic growth, and overall prosperity. In addition, preventing fraud and abuse confers incalculable benefits in terms of reducing the human anguish and hardship that comes with victimization and financial loss. Finally, the analysis can be skewed even further in favor of the industry when the benefits of a rule—such as reducing the availability of toxic financial products—is actually counted as an undesirable "cost" of regulation.

It focuses narrowly on individual rules. Cost-benefit analysis is myopically focused on the costs and benefits of individual rules, typically ignoring the need to assess the value of rules holistically, with each one serving as part of a collection of rules that work together in preventing extremely damaging and large-scale disruptions and failures in the financial markets. The financial crisis of 2008 will ultimately cost $20 trillion in lost economic productivity, not to mention the enormous human suffering it spawned.[7] Many financial regulations are instrumental in helping to prevent such crises, yet that aspect of their value is routinely ignored or underweighted.[8]

III. Cost-benefit analysis is burdensome and counterproductive.

It consumes vast agency resources. Cost-benefit analysis is extremely time-consuming and costly, draining off scarce agency resources and protracting the rule-making process. A prime example is the SEC's decision some years ago to vastly expand the pool of economists on staff, in an attempt to produce more accurate cost-benefit analysis, at considerable expense to the agency and the rulemaking process.

It often second-guesses Congress. Cost-benefit analysis can put an agency in the untenable position of second-guessing value judgments that Congress has already made, especially if the rulemaking process is mandatory, not discretionary.

It sets the stage for court challenges. Cost-benefit analysis makes rules more vulnerable to successful legal challenges in court. This is evident from the now-routine and often successful use of cost-benefit analysis as the basis on which to attack rules in court. Those court challenges not only threaten to invalidate important rules, they also further consume agency resources in the litigation process.

It tends to weaken rules. Finally, cost-benefit analysis is dilutive, since the threat of legal challenge induces regulators to compromise or weaken the provisions of a given rule, not because those alterations will better serve the public interest, but because they may make the rule less likely to draw a successful court challenge.

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[7] *See, e.g.,* BETTER MARKETS, THE COST OF THE CRISIS - $20 TRILLION AND COUNTING (July 2015), *available at* https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis-2.pdf.

[8] The Financial Stability Oversight Counsel ("FSOC") under the prior administration exemplified an appropriately holistic view of regulatory impact when it exercised its recommendation authority and pressed the SEC to adopt stronger reforms governing money market funds. Section 120 of the Dodd-Frank Act required the FSOC to consider the impact of the proposed recommendation on long-term economic growth. The FSOC did so in part by pointing out that because financial crises have such a profoundly damaging impact on economic activity and economic growth over an extended period, "reforms that even modestly reduce the probability or severity of a financial crisis would have considerable benefits in terms of greater expected economic activity and, therefore, higher expected economic growth." Proposed Recommendations Regarding Money Market Mutual Fund Reform, 77 Fed. Reg. 69,455; 69,481-82 (Nov. 19, 2012).

IV. Cost-benefit analysis rests on a false premise.

The superficial appeal of cost-benefit analysis is largely based on the false premise that regulation constantly threatens to overburden the financial services industry, stifle innovation, and even harm consumers by reducing their "choices" in financial products and services. In fact, history has shown time and time again that such overstated claims are false.

For example, a century ago, when securities regulation first emerged at the state level, Wall Street railed against it as an "unwarranted" and "revolutionary" attack upon legitimate businesses that would cause nothing but harm.[9] However, in the years following this early appearance of financial regulation, banks and their profits grew handsomely.[10] Subsequently, when the federal securities laws were adopted, Wall Street staunchly opposed them, claiming they would slow economic recovery by impeding the capital formation process and discouraging the issuance of new securities. In fact, in the years after the enactment of the federal securities laws, the nation's securities markets flourished. The same pattern has been repeated with each new effort to strengthen financial regulation, including deposit insurance, the Glass-Steagall Act, mutual fund reform, and the national market initiatives of the mid-1970s.[11]

In fact, strong regulation has repeatedly created the environment in which our financial markets and our economy can thrive. Illustrating the point, following passage of the Dodd-Frank Act ten years ago, and the issuance of hundreds of implementing regulations, the financial services sector has thrived, with banks seeing record revenues, profits, and bonuses while at the same time increasing capital levels and engaging in robust lending.[12] And those reforms have played a vital role in helping our financial system weather the economic turmoil sparked by the current pandemic. On the other hand, de-regulation has famously led to financial disaster, from the stock market crash of 1929 to the savings and loan crisis of the 1980s to the financial crisis of 2008.

V. Cost-benefit analysis often conflicts with an agency's statutory mandate.

Cost-benefit analysis is often contrary to the law because it is not what Congress has actually required or intended in an agency's organic statute. For decades, the guiding principle has been that Congress decides what level of economic analysis to require of an agency, and that duty can vary widely, including a prohibition against conducting cost-benefit analysis; a simple duty to consider various factors in the rulemaking process; or a duty to conduct a robust, quantitative cost-benefit analysis.

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[9] *See* Marcus Baram, The Bankers Who Cried Wolf: Wall Street's History of Hyperbole About Regulation, THE HUFFINGTON POST (Jun. 21, 2011, 6:56 PM), available at http://www.huffingtonpost.com/2011/06/21/wall-street-historyhyperbole-regulation_n_881775.html.

[10] Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 249 (2003) ("In the 5 years following adoption of a merit review statute [the most stringent type of blue-sky law statute], bank profits increased on average by nearly 5 percentage points . . .").

[11] Marcus Baram, supra; *see also* Nicholas Economides et al., *The Political Economy of Branching Restrictions and Deposit Insurance: A Model of Monopolistic Competition Among Small and Large Banks*, 39 J. L. & ECON. 667, 698 (1996) ("The American Bankers Association fights to the last-ditch deposit guarantee provisions of the Glass-Steagall Bill as unsound, unscientific, unjust and dangerous. Overwhelmingly, the opinion of experienced bankers is emphatically opposed to deposit guarantee which compels strong and well-managed banks to pay losses of the weak . . .The guarantee of bank deposits has been tried in a number of states and resulted invariably in confusion and disaster . . . and would drive the stronger banks from the Federal Reserve System.") (quoting Francis H. Sisson, president of the American Bankers Association).

[12] *See* Better Markets, Special Report, *Ten Years of Dodd-Frank and Financial Reform; Obama's Successes, Trump's Rollbacks, and Future Challenges* (July 21, 2020), available at https://bettermarkets.com/sites/default/files/images/BetterMarkets_DoddFrankReport.pdf.

As the Supreme Court made clear 40 years ago, an agency's duty to conduct cost-benefit analysis is not to be inferred without a clear indication from Congress: "Congress uses specific language when intending that an agency engage in cost-benefit analysis."[13] The Supreme Court has also made clear that the duty to "consider" various economic factors in the rulemaking process entails wide agency discretion. As the Court explained, when statutorily mandated "considerations" are not "mechanical or self-defining standards," they "in turn imply wide areas of judgment and therefore of discretion."[14]

Unfortunately, these statutory mandates have increasingly lost their sway. This gap has grown over the years largely as a result of flawed court decisions. For example, some of the leading cases on cost-benefit analysis from the D.C. Circuit represent extreme examples of courts departing from the statutory language and legislative intent embodied in an agency's organic statute. The *Chamber of Commerce and Business Roundtable* cases that invalidated SEC rules exemplify this phenomenon. In addition, agencies such as the SEC have at times bent to industry lobbying and political pressure from anti-regulatory policymakers in the White House, on the Hill, and even within the agencies.

As discussed in the next section, the traditional canons governing cost-benefit analysis have resurfaced in some more recent court cases, although the Supreme Court's decision in *Michigan v. EPA* suggests an affinity for cost-benefit analysis that will continue to influence lower courts in ways that undermine attempts by agencies to promulgate strong rules.

VI. Cost-benefit analysis has been deployed as an effective weapon in the courts.

Cost-benefit analysis has a long history of use by the industry as a weapon to defeat regulation. In all branches of government—through court challenges, executive orders, and attempts to pass innumerable bills in Congress—the financial services industry has fought to entrench rigorous and quantitative cost-benefit analysis at all federal agencies so it can use the record of that analysis to upend rules in court if they are not satisfied with the agency's final product. Throughout this campaign, they have exploited the intuitive yet deceptive appeal of cost-benefit analysis, which can be portrayed as a sensible, reliable, and precise methodology that enables policymakers to fashion ideal regulatory solutions by objectively quantifying and weighing different options. Allegations that an agency failed to conduct an adequate cost-benefit analysis are now a staple of court challenges to financial regulations.

Decades ago, the United States Supreme Court and the lower federal courts established the basic principles governing judicial review of agency rulemaking under the Administrative Procedure Act. Those decisions repeatedly held that courts generally owe a high level of deference to agency expertise and judgment. And with respect to economic analysis, those precedents also held that courts must adhere to the actual requirements that Congress has imposed on an agency under its "organic statute," whether it be (1) detailed cost-benefit analysis; (2) something more limited, such as the duty merely to consider certain economic factors; or (3) in some cases, language prohibiting an agency from allowing the costs and benefits of regulation to influence the way an agency crafts its rules.

Unfortunately, from 2005 to 2011, the D.C. Circuit issued a series of opinions striking down several SEC rules based largely on what the court perceived as deficiencies in the SEC's economic analysis for each rule.[15] In reality, as discussed below, those opinions ignored or misread the actual text of the securities laws, the precedents

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[13] *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 30 (1981).

[14] *Sec'y of Agriculture v. Cent. Roig Refining Co.,* 338 U.S. 604, 611-12 (1950).

[15] *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

limiting the scope of an agency's duty simply to "consider" certain factors, and well-established principles of judicial deference to agency judgment. The court went so far as to impose a far-reaching duty on the SEC to determine the economic consequences of its rules, to quantify costs and benefits, and to assess whether a rule would confer a "net benefit."

These cases ushered in a new era at the SEC, prompting it to undertake increasingly extensive cost-benefit analyses in its rulemakings, even though the securities laws impose no such requirement. This approach has taken a toll on the SEC's rulemaking output. The agency has spent a huge portion of its budget expanding its pool of economists; the pace of its rulemaking has slowed; and some final rules appear to reflect the weaknesses born, at least in part, of concern that rules will be challenged in court.

Another successful deployment of cost-benefit analysis as a destructive weapon appeared several years ago in MetLife's court challenge to its designation by the Financial Stability Oversight Council ("FSOC") for enhanced prudential regulation. As discussed in further detail below, that challenge was predicated largely on the claim that the FSOC had failed to adequately analyze the costs and benefits of the designation. In an unusually tortured decision, the federal district court sided with MetLife and vacated the designation.[16] That ruling lacked any plausible legal foundation, but it nevertheless hobbled the ability of the FSOC to designate large nonbank financial institutions for enhanced prudential regulation in the future, thus exposing our financial system and economy to a greater risk of instability and, potentially, another financial crisis.

Within the last few years, panels of the D.C. Circuit, along with some district court judges, have signaled a welcome return to the basic canons of deference to agency judgment and fidelity to legislative text when deciding whether an agency rule should be upheld against an attack on its economic analysis. While the Supreme Court's decision in *Michigan v. EPA*[17] represents a significant move in the direction of cost-benefit analysis, the decision did not upend the core precedents and principles previously laid down. The decision was poorly reasoned, the outcome was closely tied to the statutory context of environmental law, and the opinion expressly reinforced the rule that quantitative cost-benefit analysis requires a clear directive from Congress, as well as the rule that the duty to "consider" economic factors is far different from cost-benefit analysis and vests wide discretion in the agency. It does not represent the end of this debate in the courts or elsewhere.

A. <u>Early cases in which courts used cost-benefit analysis to strike down rules.</u>

Starting in the early- to mid-2000s, financial trade organizations initiated an aggressive series of rule challenges in court under the Administrative Procedure Act and applicable "organic statutes." One of the most significant early wins came in a 2005 case where the Chamber of Commerce challenged the SEC's rule designed to promote better corporate governance in mutual funds.[18] The D.C. Circuit held that the narrow statutory duty to consider whether a rule will promote efficiency, competition, and capital formation actually calls upon the SEC to conduct a much broader analysis and to "determine as best it can the economic implications of the rule."[19] The court ruled that the SEC's failure to quantify and analyze the costs of the conditions it was imposing under the rule ran afoul of this obligation. In effect, the court read statutory language commanding an agency to consider a rule's potential effects on a limited number of discrete factors to mean that the agency was required to perform a broad cost-benefit analysis of the rule.

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[16] 177 F. Supp. 3d 219 (D.D.C. 2016).
[17] *Michigan v. EPA*, 135 S. Ct. 2699 (2015).
[18] *See Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005).
[19] *See id.* at 143.

In the years following *Chamber of Commerce*, the D.C. Circuit continued to strike down major financial rules, in some cases relying explicitly on the agency's alleged failure to conduct an adequate cost-benefit analysis. For example, in *American Equity*, the D.C. Circuit vacated an SEC rule providing that fixed indexed annuities were not exempt from securities regulation, concluding that the SEC's consideration of the effect of the proposed rule on efficiency, competition, and capital formation was insufficient.[20]

Challenges to financial regulatory authority and well-established principles of judicial deference to the expert judgment of regulators arguably reached their peak in the 2011 case of Business Roundtable v. SEC. The D.C. Circuit struck down a proposed rule requiring companies to provide information about, and the right to vote for, board nominees chosen by large shareholders rather than just those board nominees chosen by an incumbent board of directors. Although the SEC included a detailed cost-benefit analysis in its proposed rule, the D.C. Circuit nonetheless vacated the rule "for having failed once again . . . adequately to assess the economic effects of a new rule."[21]

The court explained that the SEC had "relied upon insufficient empirical data," and it took issue with—and supplanted—the SEC's judgments regarding various studies on the issues presented. The court faulted the SEC for relying "heavily upon two relatively unpersuasive studies" and, without explaining why the SEC's favored studies deserved less weight, found that the SEC had "not sufficiently supported its conclusion."[22] In effect, the court dismissed a lengthy economic analysis and detailed consideration of opposing studies simply as inadequate. And in so doing, the court substituted its own inexpert judgment for the expert analysis of the agency, in contravention of long-established principles of administrative law.[23]

In this series of decisions from the D.C. Circuit, the court misread the securities laws and contravened a rich vein of precedent on cost-benefit analysis, not to mention broader, black-letter principles of deference to administrative agencies. For example, as far back as 1950, the Supreme Court held that the duty to "consider" factors—just as the securities laws narrowly provide with respect to efficiency, competition, and capital formation—confers wide discretion on an agency: When statutorily mandated "considerations" are not "mechanical or self-defining standards," they "in turn imply wide areas of judgment and therefore of discretion."[24]

In addition, decades ago, the Supreme Court held that an agency's duty to conduct cost-benefit analysis is not to be inferred without a clear indication from Congress: "Congress uses specific language when intending that an agency engage in cost-benefit analysis."[25] And one of the basic canons of judicial review of agency rules is that "the scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of an agency."[26] This is "especially true when the agency is called upon to weigh the costs and benefits of alternative policies,"[27] and in fact, "cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency."[28] Fortunately, as explained below, some more recent decisions reflect a return to these principles.

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[20] *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 168 (D.C. Cir. 2010).
[21] *Business Roundtable v. SEC*, 647 F.3d at 1148 (D.C. Cir. 2011).
[22] *Id.* at 1151.
[23] *See* James D. Cox and Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 Tex. L. Rev. 1811 (2012), *available at* https://scholarship.law.duke.edu/faculty_scholarship/2529/.
[24] *Sec'y of Agriculture v. Cent. Roig Refining Co.,* 338 U.S. 604, 611-12 (1950).
[25] *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 30 (1981).
[26] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).
[27] *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003).
[28] *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C.Cir.1983).

B. The judicial movement away from strict cost-benefit analysis.

In two important cases since the Business Roundtable decision, the D.C. Circuit has upheld financial regulations of the Commodity Futures Trading Commission ("CFTC") and the SEC against challenges from the Investment Company Institute and the National Association of Manufacturers that were predicated largely on allegedly deficient cost-benefit analyses.[29]

In *Investment Company Institute v. CFTC*,[30] the D.C. Circuit upheld the CFTC's economic analysis for its rule requiring SEC-registered investment companies engaged in significant derivatives trading to also register as commodity pool operators. The court acknowledged that the relevant statutory standard does not require rigorous, quantitative analysis: "Where Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement clear in the agency's statute, but it imposed no such requirement [in the Commodity Exchange Act]."[31] The court further found that the agency had been faithful to the text of the Commodity Exchange Act, which requires only that the CFTC "consider" costs and benefits in light of certain factors. Summing up, the court added that "the law does not require agencies to measure the immeasurable."

In *Nat'l Ass'n of Mfrs. v. SEC*,[32] the D.C. Circuit upheld the SEC's economic analysis for its rule requiring public companies to track the origin of, and disclose information about, the "conflicts minerals" they use. The court again wrote that the statutory test does not mandate rigorous, quantitative analysis: "An agency is not required to measure the immeasurable, and need not conduct a rigorous, quantitative economic analysis unless the statute explicitly directs it to do so." The court identified two additional reasons why agencies like the CFTC and the SEC cannot be expected to perform cost-benefit analysis: It forces them to make an "apples-to-bricks" comparison whenever intangible benefits—such as peace and security—cannot be framed in terms of dollars and cents, and it forces them to second-guess the judgments that Congress has already made about the costs and benefits of regulation.[33]

C. Three recent cases.

Three more recent decisions, one from the Supreme Court, one from the D.C. Circuit, and one from the D.C. district court, show that the judicial approach to cost-benefit analysis remains unpredictable. None of those decisions alter the recent and positive holdings from the D.C. Circuit in ICI and NAM, to the effect that agencies are not under an obligation to conduct quantitative cost-benefit analysis unless Congress clearly imposes that requirement. Nor do they alter the other core principle established 50 years ago that the duty to "consider" statutorily enumerated factors vests broad discretion in the agency as to how to evaluate those factors and what weight to give them. Clearly, though, the Supreme Court's ruling in the Michigan case has already inspired at least one federal district court judge to take an extreme position in the MetLife case. And Lindeen signifies something of a middle ground in the jurisprudence surrounding cost-benefit analysis at the SEC, still embracing the idea that the agency must go beyond the statutory language and consider costs and benefits but also holding that it may do so without an empirically-based, quantitative analysis.

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[29] *Inv. Co. Inst. v. CFTC*, 891 F. Supp. 2d 162, 202 (D.D.C. 2012), *as amended* (Jan. 2, 2013), *aff'd sub nom. Inv. Co. Inst. v. CFTC, 720 F. 3d 370 (D.C. Cir. 2013); Nat'l Ass'n of Mfrs. v SEC, 748 F. 3d 359 (D.C. Cir. 2014).*
[30] *Inv. Co. Inst. v. CFTC*, 720 F. 3d 370 (D.C. Cir. 2013).
[31] *Id.* at 379.
[32] 748 F. 3d at 370.
[33] 748 F. 3d at 369-70.

1. *Michigan v. EPA*

In *Michigan*, the Supreme Court reached the expansive conclusion that the EPA was required to consider costs when determining whether regulation of power plant emissions was "appropriate and necessary" under the Clean Air Act (42 U.S.C. § 7412(n)(1)(A) (2012)).[34] The Court also seemed to call for something akin to a "net benefit" test by observing that "[n]o regulation is 'appropriate' if it does significantly more harm than good." The legal analysis underlying Justice Scalia's opinion was weak, based largely on his own intuitive sense about what the term "appropriate" must mean—even though "cost" has no place in the definition of the term—and without citation to legal authority for his core holding.

While the case may portend an expansion in the Supreme Court's views about regulatory cost-benefit analysis, it is also limited in certain respects. The holding was highly contextual, the Court observing that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass costs."[35] A number of factors led to the Court's decision. For example, the EPA was operating in the context of numerous environmental statutory provisions and mandated studies that were heavily focused on cost assessments. In addition, the EPA was dealing with a specific mandate to determine whether to regulate at all, a point that figured prominently in the Court's decision: "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate."[36] In contrast, the SEC is typically wrestling with how to regulate, not whether it should do so in the first instance. Finally, even Justice Scalia recognized that the EPA's duty to "consider" cost did not require a "formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value," as he declared that it would be "up to" the EPA to decide how to account for cost."[37]

2. *MetLife v. FSOC*

The holding in *Michigan* has inspired at least one district court judge to go to extraordinary lengths to impose a cost-benefit analysis duty where the applicable statute plainly does not require one.[38] In December of 2014, after almost two years of careful analysis, the FSOC exercised its authority under Section 113 of the Dodd-Frank Act to designate the massive global insurance company MetLife as a systemically important nonbank financial company, which would subject it to enhanced supervision by the Federal Reserve. The purpose of the designation was to mitigate the risk that MetLife could cause or contribute to another devastating financial crisis like the one that engulfed the nation in 2008.

MetLife challenged the FSOC's designation in the D.C. federal district court, and on March 30, 2016, Judge Rosemary Collyer rescinded it, concluding that the FSOC's designation was arbitrary and capricious, in part because the FSOC failed to consider the cost of designation to MetLife.[39]

In so doing, Judge Collyer misinterpreted both the Dodd-Frank Act and the Supreme Court's decision in *Michigan v. EPA*. The court acknowledged that the Dodd-Frank Act nowhere expressly required the FSOC to conduct a cost-benefit analysis, and it further acknowledged that Congress clearly had imposed that requirement on agencies in other contexts. In reality, Section 113 of DFA requires the FSOC only to "consider" 10 listed factors when designating nonbank financial companies, and none of them includes any reference to the cost or benefits

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[34] *Michigan v. EPA*, 135 S. Ct. 2699 (2015).
[35] *Id.* at 2707.
[36] *Id.* (emphasis added).
[37] *Michigan v. EPA,* 135 S. Ct. at 2711.
[38] *See MetLife, Inc. v. FSOC*, 177 F. Supp. 3d 219 (D.D.C. 2016).
[39] *See* Better Markets, *Fact Sheet on the MetLife v. FSOC Decision* (Apr. 15, 2016), *available at* https://bettermarkets.com/sites/default/files/MetLife%20Decision%20Fact%20Sheet%204-15-16%20Final.pdf.

of designation. The last catchall factor simply grants the FSOC broad discretion to consider "any other risk-related factors that the Council deems appropriate."[40]

The court side-stepped all of these facts, however, with a tortured chain of reasoning based primarily on the Supreme Court's holding in *Michigan*. Keying off that decision, the district court in MetLife reached the implausible conclusion that the FSOC's purely discretionary statutory authority to consider other "risk-related factors that the [FSOC] deems appropriate" actually required it to consider the cost of designation to MetLife. To reach that illogical result, the court was left to reason that cost is a "risk-related factor" insofar as the costs of regulation imposed on an institution could make it more likely to experience financial distress in the first instance—a determination that the FSOC is not actually required to make at any point in the designation process.

The district court thus committed numerous errors in its decision, including these:

- It stretched the Supreme Court's holding in *Michigan* far beyond its narrow boundaries;
- It ignored the D.C. Circuit's holdings in *ICI* and *NAM*;
- It dismissed the plain meaning and intent of the last catchall factor in Section 113 ("other risk-related factors") (emphasis added), which has nothing to do with costs and benefits, either on its face or in context;
- It ignored the purely discretionary nature of the FSOC's authority to consider any other risk-related factors it "deems appropriate" (emphasis added); and
- It rested on the erroneous premise (of the court's own making elsewhere in its opinion) that the FSOC must assess the likelihood that an institution might someday experience financial distress—a proposition that finds no support in the law.

In its brief on appeal to the D.C. Circuit, the FSOC itself appropriately stressed the flawed logic in reading the 10 factors (especially the catchall factor) in Section 113 as even suggesting a nexus to cost-benefit analysis, as well as the peril in second-guessing Congressional judgments about the benefits of regulation:

> In any event, the interpretation of "risk-related factor" adopted by the district court is untenable. The cost of complying with regulation bears no resemblance to any of the ten statutory factors that guide a designation decision. Those factors reflect Congress's determination that designation is proper when a financial company's material financial distress could threaten the stability of the U.S. financial system. Keenly aware of the costs of inadequate regulation, Congress determined that the benefits outweigh the potential cost of regulations that are designed to improve the safety and soundness of the designated company as well as the stability of the financial system.[41]

These and other significant errors by the district court cried out for appellate reversal. Extensive appellate briefing on the merits followed, including numerous amicus briefs from Better Markets and others arrayed on both sides of the important issues presented.[42] However, the case lay dormant through the 2016 election, and

[40] 12 U.S.C. § 5323(a)(2) (2012).
[41] Brief of Appellant at 54, *MetLife, Inc. v. FSOC*, No. 16-5086 (D.C. Cir., June 16, 2016).
[42] *See* Amicus Brief of Better Markets (June 23, 2016), *available at* https://bettermarkets.com/resources/better-markets-amicus-brief-metlife-v-fsoc. Better Markets also filed an amicus brief on the merits in the district court, an unusual step but a necessary and appropriate one given the historic importance of the issues presented. *See* Amicus Brief of Better Markets

beginning in April 2017, the Trump administration embarked on what appeared to be a carefully choreographed plan, presumably in coordination with MetLife and its attorneys, to derail the appeal and prevent it from ever being decided on the merits by the D.C. Circuit. President Trump issued a memorandum on April 21, 2017 directing the Treasury Secretary to review the FSOC's designation process and provide a report within 180 days. The factors that the memorandum directed the Secretary to consider echoed the district court's opinion and the arguments MetLife advanced in its briefs. The D.C. Circuit held the case in abeyance pending release of the report. When the report was released, paving the way for the appeal to go forward, MetLife argued in a supplemental briefing that the report supported MetLife's arguments, and the FSOC, rather than opposing MetLife's brief, joined with MetLife in a motion requesting the appeal be dismissed, which the D.C. Circuit granted in January of 2018.

As a result, the district court's flawed opinion stands as a lasting interpretation requiring the FSOC to conduct a cost-benefit analysis before exercising its designation authority. The FSOC's ability to protect our economy from future crises has been severely damaged and the likelihood of future taxpayer bailouts and financial crashes will rise. Moreover, the proponents of cost-benefit analysis notched a significant victory, further entrenching cost-benefit analysis as a weapon against important regulations and agency actions that serve the public interest.[43]

3. *Lindeen v. SEC*

The D.C. Circuit's opinion in *Lindeen v. Sec. & Exh. Comm'n*,[44] represents something of a mixed result with respect to the cost-benefit analysis requirements applicable to the SEC. The petitioners in that case challenged the SEC's "Reg A+" regulation establishing a new exemption from securities registration for offerings up to $50 million and preempting state registration and qualification requirements through the definition of "qualified purchaser." The court upheld the regulation, in part on economic analysis grounds. On the one hand, it embraced the 2005 holding in *Chamber* to the effect that the SEC must "determine as best it can the economic implications of the rule."[45] On the other hand, it made very clear that a relatively general qualitative consideration of costs and benefits, without any empirical data to support it, could suffice. Reciting from NAM, the court observed that "We do not require the Commission 'to measure the immeasurable' and we do not require it to 'conduct a rigorous, quantitative economic analysis unless the statute explicitly directs it to do so.'"[46]

D. The persistent American Equity problem.

A recurrent and important problem facing the SEC and other agencies in the area of cost-benefit analysis deserves special mention. An agency can unnecessarily raise the bar on itself in judicial review if it attempts more economic analysis than the law requires. In American Equity, the D.C. Circuit found that where an agency conducts

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in the District Court, filed May 22, 2015, *available at* https://bettermarkets.com/resources/better-markets-amicus-brief-case-metlife-v-fsoc.

[43] Fortunately, at least one other district court judge has recently read *Michigan* far more narrowly. *See Nicopure Labs, LLC v. FDA*, 266 F. Supp. 3d 360 (D.D.C. July 21, 2017). In *Nicopure*, the court rejected claims that the FDA's decision to regulate e-cigarettes as tobacco products was arbitrary and capricious, in part on cost-benefit grounds. The court (1) distinguished the specific language in the Clean Air Act on which the Supreme Court relied in *Michigan*; (2) correctly read *Michigan* as conferring broad discretion on an agency when it is "considering" cost as a factor; and (3) reiterated the principle that courts must not review an agency's economic analysis de novo but must instead afford it an especially high degree of deference. Id. at 401-08.

[44] 825 F. 3d 646 (D.C. Cir. 2016).

[45] *Id.* at 657.

[46] *Id.* (quoting *Nat'l Ass'n of Mfrs*., 748 F.3d at 369 (emphasis added)); cf. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes.").

an analysis in adopting a final rule without any suggestion that such an analysis was not required, the court will evaluate the propriety of the agency's analysis as performed.[47] This principle continues to survive. For example, in 2012, the D.C. Circuit held that where the EPA undertook a cost-benefit analysis that was not required by statute, the court would nevertheless consider that analysis in reviewing the agency's rule.[48] The same principle was recognized more recently in the district court's decision in *NAM*:

> Nevertheless, insofar as the Commission considered itself subject to the requirements of Section 3(f), along with those under Section 23(a)(2) (see Def.'s Brief at 29), the Court need not conclusively decide this issue. Since the SEC conducted an analysis under Section 3(f) in adopting the Final Rule without any suggestion that such an analysis was not required, the Court evaluates the propriety of the Commission's analysis as performed, including its compliance with 15 U.S.C. § 78c(f). *Am. Equity*, 613 F.3d at 177 ("[T]he SEC must defend its analysis before the court upon the basis it employed in adopting that analysis."). However, this should not be taken as a ruling that such an analysis was actually required in connection with this particular rulemaking.[49]

This principle continues to have significant implications for federal agencies. To the extent the agency voluntarily undertakes more extensive cost-benefit analysis than the law requires, it unnecessarily exposes itself to a heightened risk that its rules will be invalidated for failing to meet a standard that does not actually apply.

VII. Innumerable legislative proposals have been advanced to impose more onerous cost-benefit analysis requirements on agencies, particularly the independent agencies.

After the Dodd-Frank Act was signed into law in July of 2010, a steady stream of legislative proposals emerged that would impose burdensome new cost-benefit analysis requirements on the SEC and other independent agencies. They undoubtedly drew inspiration in large measure from the successful attacks on the SEC rules in the D.C. Circuit during the preceding decade. And the timing of these bills was hardly coincidental, coming on the heels of the Dodd-Frank Act, which required financial regulatory agencies to produce hundreds of new rules. Included among those proposals were these, which is not an exhaustive list:

- Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2011;[50]
- SEC Regulatory Accountability Act (2012);[51]
- SEC Regulatory Accountability Act (2013) (re-proposed);[52]
- Independent Agency Regulatory Analysis Act (2013);[53]
- Regulatory Sunset and Review Act of 2013;[54] and
- Unfunded Mandates Information and Transparency Act of 2014.[55]

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47 *See Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 168 (D.C. Cir. 2010).
48 *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039-1040 (D.C. Cir. 2012).
49 *Nat'l Ass'n of Mfrs. v. SEC*, 956 F. Supp. 2d 43, 58 n.15 (D.D.C. 2013).
50 H.R. 214, 112th Cong. (2011).
51 S. 3468, 112th Cong. (2012).
52 H.R. 1062, 113th Cong. (2013).
53 S. 1173 113th Cong. (2013).
54 H.R. 309, 113th Cong. (2013).
55 H.R. 899, 113th Cong. (2014).

For example, the SEC Regulatory Accountability Act would require the agency to conduct a searching, quantitative cost-benefit analysis for every new rule. It would also mandate that the SEC identify every "available alternative" to a proposed agency action.[56] Given that "available alternatives" to any proposed action abound, this requirement would impose a crushing analytical burden on the agency.[57] The Act also would require several other new assessments of the effects of a rule on liquidity, investor choice, "market participants," state and local governments, and small businesses—all of which effectively command the SEC to consider the costs of regulation without a corresponding analysis of the benefits.[58] Further, any questions concerning the SEC's compliance with these new analytical requirements would render new rules more vulnerable to legal challenge.

An even more draconian set of cost-benefit analysis burdens was proposed in the CHOICE Act 2.0, which passed the House in 2017.[59] Just a sampling of its provisions includes these requirements in the rulemaking process:

- an extraordinarily long list of newly required analytical steps, such as an identification of the need for the rule; an explanation as to why state, local, or tribal governments should not handle the problem; an analysis of the adverse impact on regulated entities, all market participants, and the economy; a quantitative and qualitative assessment of all anticipated costs and benefits of the rule; an evaluation of the costs to state, local, or tribal governments; an identification of available alternatives to the regulation; an explanation of how the burden of regulation will be distributed among market participants; an assessment of the extent to which the regulation is inconsistent, incompatible, or duplicative with existing regulations; a description of any studies, surveys, or other data relied upon in preparing the analysis; and a prediction of changes in market structure, infrastructure, and the behavior of market participants in response to the rule;[60]

- retrospective review of all rules within one year and every five years thereafter, followed by mandatory reports on ways to simplify rules;[61]

- expanded opportunities for challenging rules in court by any affected person;[62]

- congressional approval for all major rules;[63] and

- de novo judicial review of all questions of law raised in a rule challenge, thus eliminating the long-standing *Chevron* doctrine that requires courts to defer to agency judgments where they are interpreting a statutory provision with some degree of ambiguity.[64]

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[56] *Id.* at § 2.
[57] *Id.*
[58] *Id.*
[59] H.R. 10, 115th Cong. (2017).
[60] *Id.* at § 312.
[61] *Id.* at § 315.
[62] I*d.* at § 317.
[63] *Id.* at § 332.
[64] *Id.* at § 341.

Any agency subject to these impossibly burdensome requirements would be virtually unable to promulgate new rules, and any rules that did emerge from an agency would be easy targets for successful challenges in court. That of course, is the anti-regulatory intent behind these and similar statutory provisions. Fortunately, to date, these suffocating new rulemaking requirements have not emerged from Congress.

VIII. Executive orders also govern the duty to conduct cost-benefit analysis.

The executive branch agencies have been required to conduct cost-benefit analysis for years, pursuant to a series of executive orders that date back to the Reagan administration.[65] These orders require executive branch agencies to quantify costs and benefits; tailor regulations to impose the least burden on society; base decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation; and adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. However, those orders expressly exclude the independent regulatory agencies.

President Trump issued a spate of executive orders and memoranda that impose draconian new anti-regulatory obligations on agencies or call for studies that will serve as the basis for the expected repeal of important regulatory protections. Some of them incorporate costs and benefits as the subject of mandated studies or as factors that must be weighed in new and particularly onerous ways. They include the following:

- Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (requiring the repeal of two regulations for every new regulation that is promulgated and that any cost to the industry be balanced by the repeal of other regulations, regardless of the benefits of the new or rescinded rules);

- Executive Office of the President, Presidential Memorandum for the Secretary of Labor on the Fiduciary Rule (Feb. 3, 2017) (requiring the Labor Secretary to examine the fiduciary duty rule to determine if it may adversely affect the ability of Americans to gain access to advice);

- Core Principles for Regulating the United States Financial System, Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 3, 2017) (requiring the Treasury Secretary to review all financial regulations);

- Enforcing the Regulatory Reform Agenda, Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017) (requiring agencies to appoint Regulatory Reform Officers and Task Forces to oversee implementation of regulatory reform initiatives);

- Executive Office of the President, Presidential Memorandum for the Secretary of the Treasury on the Orderly Liquidation Authority (Apr. 21, 2017) (requiring the Treasury Secretary to review the orderly liquidation authority); and

- Executive Office of the President, Presidential Memorandum for the Secretary of the Treasury on the Financial Stability Oversight Council (Apr. 21, 2017) (requiring the Treasury Secretary to review the FSOC designation process).

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[65] *See,* e.g., Exec. Order No. 12,866, 58 Fed. Reg. 517735 (Sept. 30, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

So far, however, none of those orders purport to impose cost-benefit analysis obligations on the independent agencies.

IX. **<u>The use of cost-benefit analysis at the SEC and the CFPB raises special concerns.</u>**

A. The SEC

The repeated and successful legal challenges to SEC rules over the years not only nullified a number of important regulations but also had a chilling effect on SEC rulemaking. They prompted the SEC to invest vastly more resources in economic analysis, slowing the pace of regulation and diluting the strength of final rules. This shift in approach to economic analysis was embodied in a set of guidelines that the SEC adopted in 2012, which addressed the heightened level of economic analysis that all rule-writing teams within the agency would be expected to follow ("2012 Guidelines").[66]

The 2012 Guidelines largely adopted the principles set forth in various executive orders and in OMB circular A-4[67] on the application of cost-benefit analysis at the executive branch agencies, including the quantification of costs and benefits "to the extent possible." Those principles require a far more exhaustive and quantitative cost-benefit analysis than Congress ever intended when it simply required the SEC to "consider" the impact of its rules on three discrete factors: efficiency, competition, and capital formation. This embrace of cost-benefit analysis at the SEC was accompanied by SEC leaders publicly voicing their commitment to the principles of cost-benefit analysis, often in testimony before Congressional critics.[68] To this day, the 2012 Guidelines remain in place and the SEC routinely conducts a version of cost-benefit analysis in its rulemakings.

Nevertheless, this trend at the SEC has also been marked by some caveats and cautions about the feasibility and wisdom of attempting cost-benefit analysis. For example, in response to criticisms from the Inspector General ("IG") regarding the SEC's economic analysis of its rules, the Division heads have explained that "it can be quite difficult to estimate reliably the costs—and even more so, the benefits—of financial regulations," especially since "much of the data needed for detailed quantification of costs is possessed by private industry participants and can be difficult to obtain."[69]

Moreover, the SEC has in the past—appropriately and in accordance with its statute— actually disavowed some principles of cost-benefit analysis. For example, the Compliance Handbook, states that:

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[66] Memorandum from the Division of Risk, Strategy, and Financial Innovation and the Office of General Counsel, SEC, to Staff of the Rulewriting Divisions and Offices, SEC, *Current Guidance on Economic Analysis in SEC Rulemakings* (Mar. 16, 2012) ("2012 Guidelines").

[67] Circular A–4, Regulatory Analysis, 68 Fed. Reg. 58,633 (Oct. 9, 2003).

[68] The 2012 Guidelines and many other issues surrounding cost-benefit analysis at the SEC are explored in depth in Better Markets 2012 report. *See* BETTER MARKETS, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC (July 30, 2012), https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf.

[69] *See* Office of the Inspector Gen., U.S. Sec. & Exch. Comm'n, Follow-up Review of Cost-Benefit Analysis in Selected SEC Dodd-Frank Act Rulemakings 6 (Jan. 27, 2012) ("Follow-up IG Report"), Appendix VI, at 3 & n.2 (Memorandum from Mark Cahn, General Counsel; Robert Cook, Director of Division of Trading and Markets; Meredith Cross, Director of Division of Corporate Finance; Craig Lewis, Director of Division of Risk, Strategy, and Financial Innovation; & Eileen Rominger, Director of Division of Investment Management, SEC, to H. David Kotz, Inspector General, Management's Response to the *Office of Inspector General's Draft Report*, *Follow-Up Review of Cost-Benefit Analyses in Selected SEC Dodd-Frank Rulemakings*, Report No. 499, dated January 13, 2012 (Jan. 25, 2012)).

There is no requirement that the SEC weigh the costs against the benefits, or conclude that the benefits outweigh the costs.[70]

In addition, the Office of General Counsel has adhered to the view that the nondiscretionary component of rulemaking is not the appropriate subject of any type of cost-benefit assessment:

> The Commission engages in economic analyses to inform its exercise of discretion in crafting rulemaking . . . Where the Commission has no discretion, the release should say so. Because the Commission is making no policy choices, there are no choices to analyze or explain.[71]

In its response to the IG report, the Division Directors also explained that:

> [W]here Congress has clearly expressed its will, we do not believe the Commission should undertake lightly an exercise that may be seen as second-guessing the wisdom of Congressional action.[72]

These cautionary notes are important reminders about the limits of cost-benefit analysis. And as reflected in the principles set forth in Section X below, they represent at least some limits on attempts to impose onerous, unreliable, and unrealistic demands that agencies conduct a cost-benefit analysis for each of their rules.

B. The CFPB

The potential application of cost-benefit analysis at the CFPB also raises concerns. The agency has served for much of its history as an extraordinarily effective champion of consumer protection. Unfortunately, under the current administration, the agency has strayed from its foundational mission, in both rulemaking and enforcement.[73] To the extent that the CFPB embraces ever-more exhaustive and quantitative cost-benefit analysis, notwithstanding its limited duty under the law, its ability to effectively protect consumers from fraud and abuse will be further compromised. That may gratify payday lenders, student loan servicers, mortgage companies, and other financial institutions that often prey on consumers, but it will harm millions of everyday Americans who rely on the CFPB to protect them.

The CFPB's core duty under Section 1022 of the Dodd-Frank Act is to "consider" the "potential benefits and costs" to consumers and covered persons from a rule, as well as the potential reduction in consumer access to financial products and services and the impact on covered persons.[74] In accordance with Supreme Court precedent, that imposes no duty to quantify or net costs and benefits.

While the Bureau appropriately recognizes that it is not required to tabulate costs and benefits, net them against each other, or find that benefits exceed costs, it nevertheless has adopted a more aggressive approach

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[70] Follow-Up IG Report, at 9.

[71] Follow-Up IG Report, at 10 & n.32 (citing Memorandum from David M. Becker, General Counsel, *Thoughts About Best Practices in Drafting Economic Analysis Sections of Releases for Dodd-Frank Related Rulemakings* (Privileged and Confidential) (Sept. 27, 2010)).

[72] Follow-Up IG Report, Appendix VI, at 3.

[73] *See* Comment Letter from Better Markets to the CPPB on its Taskforce on Federal Consumer Financial Law (July 1, 2020), *available at* https://bettermarkets.com/sites/default/files/Better_Markets_Comment_Letter_on_CFPB_Request_for_Information_to_Assist_the_Taskforce_on_Federal_Consumer_Financial_Law.pdf.

[74] 12 U.S.C. § 5512(b)(2).

to cost-benefit analysis, adopting the methodologies actually intended for the executive branch agencies set forth in executive orders and OIRA guidance, including the quantification of costs and benefits.

The CFPB's own recently finalized rule rescinding the 2017 underwriting requirements for payday lenders illustrates some of the profound problems with cost-benefit analysis.[75] That rulemaking stands as a stunning example of an agency betraying its core mission and catering to the regulated industry, justified largely through a distorted cost-benefit analysis. The rule is indefensible on multiple levels, including the harmful impact it will have on countless desperate consumers who will become trapped in the endless cycles of debt and fee payments so profitable for the industry. But its approach to cost-benefit analysis is especially striking.

The original rule, issued in 2017,[76] resulted from an extraordinarily thorough rulemaking process, involving five years of work and analysis, field hearings, new research by the CFPB, a review of innumerable academic studies, and the consideration of over a million comment letters. The rule made it an unfair and abusive practice to extend payday and vehicle title loans without determining that consumers have the ability to repay the loans according to their terms.

In July 2020, the CFPB rescinded that requirement on a number of grounds, none of which were persuasive. Among them was the contention that the CFPB had previously undervalued the benefits of payday loans to consumers and to competition. Moreover, in the Section 1022 analysis, the release perversely identified the primary benefits of rescinding the underwriting requirements as increasing or preserving access to payday loans for consumers, as well as ensuring robust revenues, loan volumes, and storefronts for the payday lending industry. The CFPB's reasoning here was flawed on at least two levels. First, the notion that "access" to payday lending products—renown for the harm they can cause—confers a benefit upon consumers is not only counterintuitive but also belied by a mountain of evidence in the original rulemaking record. Second, the CFPB reversed its priorities, giving predominant weight to the welfare of the payday lending industry rather than consumers and the broader public interest—those it is statutorily charged with protecting.

A number of conclusions follow. If the original cost-benefit analysis in the 2017 rule was indeed wrong, after such an exceptionally thorough rulemaking process spanning five years, then the methodology of cost-benefit analysis must be hopelessly unwieldy and unreliable. If, on the other hand, the original rulemaking was sound, then we know that even the best cost-benefit analysis has little value, as it can always be upended, second-guessed, or manipulated by agency leadership to change the outcome—this time as an accommodation to a notoriously abusive regulated industry.

X. <u>A number of core principles should guide economic analysis at the financial regulators.</u>

Ultimately, ending the campaign to unduly encumber the regulatory process through quantitative cost-benefit analysis will require a number of policy changes: Persuading Congress to clarify and limit the scope of economic analysis that agencies must conduct; installing leaders at the regulatory agencies who actually believe in strong regulation in the public interest; and seating judges who are not ideologically infatuated with cost-benefit analysis. In the meantime, agencies, as well as all policymakers, can and should heed some basic principles or guidelines in their approach to economic analysis in the rulemaking process:

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[75] CFPB, Payday, Vehicle Title, and Certain High-Cost Installment Loans, Final Rule, RIN 3170-AA80 (July 7, 2020); *see also* Comment Letter of Better Markets to CFPB on the Proposed Rescission of the Underwriting Requirements (May 15, 2019), available at https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20CFPB%20Payday%20Underwriting%20Rescission%205-15-2019_0.pdf.

[76] CFPB, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472 (Nov. 17, 2017).

1. Follow the law and what Congress has actually required of the agency in its organic statute.

2. Do not undertake more cost-benefit analysis than is necessary, as the D.C. Circuit has repeatedly held that if an agency undertakes a cost-benefit analysis even though it is not required to do so, the court will still evaluate the adequacy of that analysis and strike the rule down if it falls short in the court's eyes.[77]

3. Where the mandate is to "consider" costs and benefits or other factors, as it is at the SEC and the CFPB, the agency need not undertake quantitative cost-benefit analysis.

4. If a rule is mandatory, highlight the significance of this fact and point out that Congress has already made judgments about the costs and benefits of the rulemaking.

5. If required to conduct quantitative cost-benefit analysis, put the quantitative cost figures in context. For example, compare industry compliance costs with the industry's revenues, profits, and pay scales.

6. Highlight and give due weight to all of the benefits of regulation, direct and indirect and tangible and intangible. Include the role of the rule in preventing the human suffering that comes with financial fraud and financial loss; maintaining a stable financial system that is less prone to crises that can impose enormous societal costs in the trillions of dollars; and bolstering the integrity of our markets and the confidence that helps them thrive.

7. Evaluate the benefits of a rule as a component of a larger framework that confers larger benefits. This is especially important when it comes to prudential regulation focused on the stability of institutions and markets, since preventing a financial crash through regulation can confer almost incalculably large benefits upon all segments and industries in society. But it is also true of consumer regulation, in part because widespread abuses can lay the foundation for a devastating market crisis, just as mortgage-lending fraud and abuse provided the fodder for the 2008 crisis.

8. Closely scrutinize, test, and discount sky-is-falling claims from the regulated industry that restrictions on profitable activities, or the imposition of compliance costs, will overburden the industry and ultimately hurt consumers by depriving them of choices in financial products and services.

9. Discount industry-sponsored studies related to the economic impact of a rule, and before relying on supposedly independent research, determine and disclose who requested, sponsored, and funded those studies.

10. Recognize that even where a regulatory prohibition or affirmative requirement might in fact narrow certain choices in the financial marketplace, the impact on investors is still likely to be beneficial, as toxic and abusive products and services almost invariably inflict harm on consumers. Moreover, exceedingly few consumers have the knowledge or sophistication to navigate such choices or knowingly and intentionally assume their risks. This is not paternalistic; rather, it reflects the well-established principle that everyone in society benefits when guardrails are established for industry, from food safety, environmental protection, and seatbelt use to financial regulation that prevents fraud, abuse, and reckless financial conduct.

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[77] *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 168 (D.C. Cir. 2010).

- APPENDIX -

Academic Literature on Cost-Benefit Analysis

Academic views on cost-benefit analysis span a broad range of attitudes, some supportive of the methodology and some highly critical. Despite disagreement over whether, when, and how cost-benefit analysis should be used in the regulatory process, experts generally at least recognize that cost-benefit analysis struggles with the challenge of quantifying many benefits, especially the broader and non-monetary advantages that regulation confers on society. A comprehensive review of the scholarship on regulatory cost-benefit analysis is beyond the scope of this update, but a sampling of articles warrants mention.

Several years ago, Harvard University professor John Coates undertook a close examination of six rules (including the SEC's mutual fund governance reforms and cross-border swaps proposals), focusing on the details of how quantitative cost-benefit analysis requirements would work in practice if applied to these rules.[78] He concluded that cost-benefit analysis of such rules "can be no more than guesstimates," as they contain "the same contestable, assumption-sensitive macroeconomic. . . modeling used to make monetary policy, which even cost-benefit analysis advocates would exempt from cost-benefit analysis laws."[79]

Columbia Law School Professor Jeffrey Gordo argues that the system in the financial sector that generates costs and benefits "is 'constructed' by financial regulation itself and by the subsequent processes of adaptation and regulatory arbitrage."[80] He concludes that new rules change the system "beyond our calculative powers."[81] Gordon contrasts these human-designed frameworks with "natural" systems (e.g., the natural environment and environmental regulation) where there are certain fixed costs and benefits that do not change in response to regulation.[82] Gordon believes that instead of weighing costs and benefits, financial regulation must be designed pragmatically and grounded in analysis of the tradeoffs in normative values inherent in different regulatory approaches.[83]

Even advocates of quantitative cost-benefit analysis like Professor John Cochrane of the University of Chicago have expressed doubts about whether the social costs and benefits of financial regulations are ultimately susceptible to reliable and precise quantification.[84] Likewise, Professor Richard Revesz at the New York University School of Law, who supports cost-benefit analysis as a regulatory tool, argues that regulators have not properly executed cost-benefit analysis in the past and that institutional changes at regulatory agencies would have to be made before it could be used effectively.[85] And Professor Cass Sunstein at Harvard Law School acknowledged in a recent paper that "[v]alues such as dignity, equity, and fairness might be relevant, and they might prove difficult or impossible to quantify."[86]

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[78] John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 886 (2015).
[79] *Id.* at 887.
[80] Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. S351 (2014).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. LEGAL STUD. S63, S69 (2014).
[85] Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE J. on Reg. 545, 548 (2017).
[86] Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 40 (2017).

Finally, Professor Robert Bartlett at the University of California at Berkeley argues in a recent paper that "uneven" application of formal cost-benefit analysis requirements in financial regulatory agencies demands the adoption of a "single cost-benefit analysis paradigm that requires interagency coordination and avoids judicial review."[87] According to Bartlett, such an approach would have the best chance of providing meaningful and transparent analysis of rulemaking while avoiding regulatory paralysis.

Set forth below is a list of some academic articles addressing a variety of issues surrounding cost-benefit analysis at regulatory agencies, along with a short synopsis describing the thrust of each article.

Cost-Benefit Analysis and Judicial Review

1. James D. Cox and Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEXAS L. REV. 1811 (2012), *available at* https://scholarship.law.duke.edu/faculty_scholarship/2529/. Examining the use of judicial review in Business Roundtable v. SEC and arguing that the level of close judicial scrutiny and minimal deference applied in the case was inconsistent with congressional intent.

2. Case Comment, *D.C. Circuit Finds SEC Proxy Access Rule Arbitrary and Capricious for Inadequate Economic Analysis: Business Roundtable v. SEC*, 125 HARV. L. REV. 1088 (2012), *available at* https://harvardlawreview.org/wp-content/uploads/pdfs/vol125_business_roundtable_v_SEC.pdf. Reviewing the *Business Roundtable* decision, summarizing the details of the case, demonstrating that the court made numerous errors in its decision, and concluding that the D.C. Circuit's hard line approach to economic review is inappropriate.

3. Anthony W. Mongone, *Business Roundtable: A New Level of Judicial Scrutiny and its Implications in a Post-Dodd-Frank World*, 2012 COLUM. BUS. L. REV. 746 (2012), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/colb2012&div=22&id=&page= (Paywalled).

4. Bruce Kraus and Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 2 (2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139010. Analyzing the case law that led to the implementation of CBA at the SEC, arguing that the current jurisprudence governing cost-benefit analysis in rulemakings is unworkable, and urging the SEC to assert its right to decide the boundary between economic analysis and policy choice.

5. Michael E. Murphy, *The SEC and the District of Columbia Circuit: The Emergency of a Distinct Standard of Judicial Review*, 7 VA. L. & BUS. REV. 125 (2012), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/valbr7&div=9&id=&page= (Paywalled). Analyzing the trilogy of D.C. Circuit decisions that established a higher standard for the SEC in its rulemaking process, "a steeper, more uncertain, and possibly impassable route to secure judicial approval of rulemaking."

6. Rachel Benedicta, *Judicial Review of SEC Rules: Managing the Costs of Cost-Benefit Analysis*, 97 MINN. L. REV. 278 (2012), available at https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1338&context=mlr. Exploring the development of the current standard for SEC rule review and

[87] Robert P. Bartlett III, *The Institutional Framework for Cost-Benefit Analysis in Financial Regulation: A Tale of Four Paradigms?*, 43 J. OF L. STUDIES S379 (2014).

arguing that in order to limit the administrative burdens arising from cost-benefit analysis, Congress must specifically define the required scope of SEC economic analysis.

7. J. Robert Brown, Jr., *Shareholder Access and Uneconomic Economic Analysis: Business Roundtable v. SEC*, DENV. U. L. REV. ONLINE 88 (2011), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917451. Reviewing the errors and unsubstantiated assumptions in the Business Roundtable decision.

8. Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 695 (2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164423. Describing the constraints facing SEC rulemaking in light of the APA, the Sunshine Act, and the Business Roundtable decision and concluding that either reduced transparency regulations or increased Congressional involvement in the rulemaking process, rather than more rigorous economic analysis, will be required to craft effective regulations in light of these constraints.

9. Jonathan S. Masur and Eric A. Posner, *Cost Benefit Analysis and The Judicial Role*, 85 U. CHIC. L. REV. 935 (2018), *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6093&context=uclrev. Mounting a defense of the heavily criticized decisions in Business Roundtable v. SEC and Corrosion Proof Fittings v. EPA, contending that the courts were right in invalidating the agencies' weak cost-benefit analyses.

Cost-Benefit Analysis in Financial Regulation

10. Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: Lessons from the SEC's Stalled Mutual Fund Reform Effort*, 12 STANF. J.L. BUS. & FIN. 1 (2006), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=975160. A paper published before the widespread implementation of cost-benefit analysis in financial regulation examining how and why cost-benefit analysis principles developed in other fields of regulation can be applied to financial regulation.

11. Paul Rose & Christopher Walker, *The Importance of Cost-Benefit Analysis in Financial Regulation*, CENTER FOR CAPITAL MARKETS COMPETITIVENESS, U.S. CHAMBER OF COMMERCE (2013), *available at* https://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/CBA-Report-3.10.131.pdf. Reviewing the history of cost-benefit analysis and the legal foundation for requiring independent agencies to perform it and arguing in favor of broadening mandatory cost-benefit analysis requirements in financial regulation rulemakings.

12. Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. 351 (2014), *available at* https://www.journals.uchicago.edu/doi/abs/10.1086/678332. Criticizing cost-benefit analysis as inherently unreliable in financial regulation and arguing that instead of weighing of costs and benefits, financial regulators must necessarily weigh a series of trade-offs of normatively derived values.

13. Robert P. Bartlett III, *The Institutional Framework for Cost-Benefit Analysis in Financial Regulation: A Tale of Four Paradigms?*, 43 J. LEGAL STUD. 379 (2014), *available at* https://www.jstor.org/stable/10.1086/677325?seq=1. Arguing that the financial regulators should adopt a uniform cost-benefit analysis standard that is not subject to judicial review in order to maximize transparency and accountability in the rulemaking process while avoiding regulatory paralysis.

14. John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. LEGAL STUD. 63 (2014), *available at* https://pdfs.semanticscholar.org/c4ff/37203e2ccd13aa6f164465471ab61750d8f7.pdf. Outlining the unique challenges in creating effective cost-benefit analysis in financial regulation and calling for a more broadly applied but more flexible cost-benefit analysis framework to improve regulatory efficiency.

15. John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015), *available at* https://www.yalelawjournal.org/pdf/a.882.Coates.1011_owe353wf.pdf. Demonstrating on the basis of several past rulemakings as case studies that because of unsolved econometric problems, robust and accurate cost-benefit analysis remains impossible in financial regulation.

16. John C. Coates IV, *The Volcker Rule as Structural Law: Implications for Cost–Benefit Analysis and Administrative Law*, 10 CAP. MKTS. L.J. 4 (2015), *available at* https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id2639332.pdf. Demonstrating that a reliable, precise, and quantified cost-benefit analysis could not be conducted for the Volcker rule as it would require regulators to anticipate private market behavior without relevant data.

17. Donna M. Nagy, *The Costs of Mandatory Cost-Benefit Analysis in SEC Rulemaking*, 57 ARIZ. L. REV. (2015), *available at* https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=3163&context=facpub. Quantifying the financial costs incurred by the SEC as a result of engaging in cost-benefit analysis.

18. Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE J. ON REG. 545 (2017), *available at* https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1503&context=yjreg. Arguing that cost-benefit analysis for financial regulation remains impractical not because of empirical difficulties but because the independent agencies are poorly suited to performing high quality quantitative analysis, and that the FSOC could perform a coordinating role that would help overcome this challenge.

<u>Other Challenges in the Use of Cost-Benefit Analysis</u>

19. Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001), *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2750&context=journal_articles. Exploring how Congress and the President use mandatory cost-benefit analysis as a means to control regulatory agencies and presenting a political model for behavior.

20. Robert W. Hahn and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002), *available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3276&context=penn_law_review. A pre-Business Roundtable paper arguing for more extensive cost-benefit analysis in agency rulemakings and outlining an executive order which could improve the quality and frequency of cost-benefit analysis in the rulemaking process.

21. Richard W. Hahn and Patrick M. Dudley, *How well does the US government do benefit-cost analysis?* 1 REV. ENVTL. ECON. & POL'Y 2 (2007), *available at* http://www.appstate.edu/~white-headjc/eco3660/hahn_dudley.pdf. Attempting to establish a quantitative framework for assessing the quality of agency cost-benefit analysis.

22. Eric A. Posner and Glenn Weyl, *Benefit-Cost Paradigms in Financial Regulation*, COASE-SANDOR WORKING PAPER SERIES IN LAW AND ECONOMICS (2014), *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1647&context=law_and_economics. Providing a framework for quantifying the benefits of financial regulation and arguing that quality cost-benefit analysis should be feasible in financial regulation.

23. Eric A. Posner and Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA L. REV. 1809 (2017), *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13508&context=journal_articles. Arguing that agencies must take into account and monetize moral losses and gains from regulation, and that the best way to do so is through a construct that asks how much consumers would be willing to pay to achieve certain moral gains or avoid moral losses.

24. Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL L. REV. 1 (2017), *available at* https://harvardelr.com/wp-content/uploads/sites/12/2015/10/Sunstein.pdf. Arguing that agencies can be considered arbitrary and capricious when they fail to conduct a cost-benefit analysis unless they present a valid justification for not doing so.

25. Howell E. Jackson and Paul Rothstein, *The Analysis of Benefits in Consumer Protection Regulations*, 9 HARV. BUS. L. REV. 197 (2019), *available at* https://www.hblr.org/wp-content/uploads/sites/18/2020/01/HLB201-3.pdf. Providing a detailed overview of the use of cost-benefit analysis in 72 separate consumer finance rulemakings, 20 of which the authors consider exemplary for their depth, breadth, and quality.

<u>Historical Reviews of CBA Implementation</u>

26. Don Bradford Hardin, Jr, *Why Cost Benefit Analysis? A Question (and Some Answers) about the Legal Academy*, 59 ALA. L. REV. (2008), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1085853. A literature review tracking the development of cost-benefit analysis and the associated scholarship from its inception until 2008.

27. Daniel A. Farber*, Regulatory Review in Anti-Regulatory Times*, 94 CHI-KENT L. REV. 383 (2019), *available at https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=4252&context=cklawreview.* Exploring how the use of cost-benefit analysis under the Trump administration has varied from historical usage.

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