BETTER MARKETS

January 28, 2020

Robert E. Feldman
Executive Secretary
ATTN: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Request for Information on a Framework for Analyzing the Effects of FDIC Regulatory Actions; FDIC RIN 3064-ZA13

Dear Mr. Feldman:

Better Markets[1] appreciates the opportunity to comment on the request for information captioned above ("Request" or "Release"),[2] issued by the Federal Deposit Insurance Corporation ("FDIC"). According to the Release, the FDIC is seeking comment on "approaches it is considering to analyze the effects of its regulatory actions," and it further asserts that it is doing so "to improve the quality" of that analysis."[3]

Unfortunately, the Release clearly signals that the FDIC appears intent on adopting an unreliable, biased, legally unnecessary, and burdensome cost-benefit analysis framework for assessing the impact of its rules.[4] This represents the wrong regulatory approach for a host of reasons:

---

1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

2 84 Fed. Reg. 65,808 (Nov. 29, 2019).

3 Release at 65,808.

4 Release at 65,810-13.

1825 K Street, NW, Suite 1080, Washington, DC 20006 TELEPHONE (1) 202.618-6464 FAX (1) 202.618.6465 WEBSITE bettermarkets.com

- First and foremost, it threatens to undermine the safety and soundness of banks, endanger the deposit insurance fund ("DIF"), and increase financial instability;
- It lacks a valid justification;
- It conflicts with Congress's decision not to impose such a requirement on the FDIC; and
- It ignores the many reasons why the application of cost-benefit analysis to financial regulation undermines rather than enhances the quality and effectiveness of the rules that preserve a safe and sound banking system, protect the DIF, maintain financial stability, and protect Americans from fraud, abuse, and predatory behavior in the financial markets.

In reality, conducting cost-benefit analyses of FDIC rules **will not** "improve the quality of…analysis of regulatory actions." Instead, cost-benefit analysis often undermines the quality of rulemaking in a variety of ways:

- It is unreliable;
- It is inherently biased towards industry and against the public interest, in a way that can lead to catastrophic results;
- It frequently runs counter to congressional intent; and
- It drains agency resources, both in the labor-intensive preparation of the analysis and in the litigation over the analysis that inevitably ensues.

In short, the FDIC **should not** use a cost-benefit framework to analyze the impact of its regulations.[5]

---

[5] Better Markets has extensively analyzed the issues surrounding the application of cost-benefit analysis in financial regulation, issuing two extensive reports on the issue, and explaining the legal and policy implications of cost-benefit analysis to courts in amicus briefs and to agencies (including the FDIC) in a variety of comment letters. 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; UPDATE: RECENT TRENDS IN THE LAW GOVERNING COST-BENEFIT ANALYSIS BY THE SECURITIES AND EXCHANGE COMMISSION (Dec. 29, 2017), https://bettermarkets.com/resources/update-recent-trends-law-governing-cost-benefit-analysis-securities-and-exchange; 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; Brief Amicus Curiae of Better Markets, Inc. in Support of the Defendant-Appellant at 25, *MetLife, Inc. v. FSOC*, No. 16-5086 (D.C. Cir. June 23, 2016), https://bettermarkets.com/resources/better-markets-amicus-brief-metlife-v-fsoc; Brief of Better Markets, Inc. as Amicus Curiae in Support of Defendant FSOC, *MetLife, Inc. v. FSOC*, 177 F. Supp. 3d 219 (D.D.C. 2016) (15-cv-0045), https://bettermarkets.com/resources/better-markets-amicus-brief-case-metlife-v-fsoc; Better Markets, Inc., Comment Letter on Debt Collection Practices (Regulation F) at 12-13 (Sept. 18, 2019), https://bettermarkets.com/rulemaking/better-

INTRODUCTION AND SUMMARY OF COMMENTS

The Dodd-Frank Act, the most significant financial reform law enacted since the Great Depression, was necessitated by the calamitous financial crisis of 2008, the worst economic collapse since the Great Depression.[6] The 2008 financial crisis was itself the culmination of a decades-long period of financial deregulation, which saw the financial industry convince elected officials and regulators that financial protection rules were too numerous, burdensome and unnecessary. As a result, standards in mortgage underwriting sank to criminally low levels, the opaque securitization markets acted as a conveyor belt disseminating systemic risk throughout the world, and the unregulated swaps markets turbo-charged the collapse. Nearly everyone ignored the very real possibility of a devastating financial crisis as a result of the excessive risk-taking enabled by these deregulatory measures.

After the financial crisis devastated the nation, the financial industry was re-regulated in the Dodd-Frank Act, a comprehensive financial reform law. However, following the passage of Dodd-Frank, the financial industry, acting largely through its trade association representatives and numerous other allies, turned to preventing effective implementation of the law by the agencies responsible for writing the necessary rules. One of the industry's primary tools has been insisting that virtually every rule implementing the Dodd-Frank Act be subjected to exhaustive cost-benefit analysis—regardless of what the law actually requires and in the face of compelling evidence that (despite its reasonable-sounding name) cost-benefit analysis is little more than a cudgel used by the regulated industry to defeat regulation. This has led to a deterioration in the quantity of rulemaking at the financial regulatory agencies, particularly at the SEC, where cost-benefit analysis has been needlessly and baselessly injected into the rulemaking process even though—and, indeed, in spite of—Congress's decision not to impose such a duty.

Notwithstanding this history, the Release clearly indicates that the FDIC is preparing to embark on this same misguided path, contrary to Congressional intent and good public policy. Its approach is fatally flawed as a matter of process and substance:

(1) The Release offers no concrete justification for this abrupt change in direction, and provides no empirical data, studies, or other evidence to show, on objective grounds, that the FDIC's contemplated approach is actually an appropriate, necessary, or beneficial regulatory methodology;

markets-comment-letter-cfpb-abusive-debt-collection-practices; Better Markets Comment Letter on Resolution Plans Required (Living Wills) at 12 (June 21, 2019), https://bettermarkets.com/rulemaking/better-markets-comment-letter-frs-fdic-resolution-plans-required-living-wills; Better Markets Comment Letter on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies at 5-6, 14-19 (May 24, 2019), https://bettermarkets.com/rulemaking/better-markets-comment-letter-fsoc-authority-require-supervision-and-regulation-certain.

6 BETTER MARKETS, THE COST OF THE CRISIS: $20 TRILLION AND COUNTING (July 2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

(2) The Release fails to reconcile its contemplated approach with the reality that Congress specifically chose not to impose upon the FDIC a duty to conduct cost-benefit analysis, a decision which should be respected. Like the other financial regulatory agencies, the FDIC is an independent regulatory agency that is generally not required to conduct a cost-benefit analysis. The FDIC's primary duty when conducting a rulemaking is merely to **consider** the burdens of certain types of rules on certain entities, a requirement that falls far short of the rigorous cost-benefit analysis contemplated by the Release.

(3) The Release fails to undertake any evaluation of any of the acknowledged and material deficiencies in cost-benefit analysis, as applied in the realm of financial regulation. In reality:

A. **Cost-Benefit Analysis Gives a False Impression of Precision and Objectivity:** Cost-benefit analyses are superficially attractive, because they give the impression of providing a precise, objective answer to a complex problem. But in fact, cost-benefit analyses are unreliable, especially in financial regulation, because the analysis relies far too much on imprecise predictions and assumptions that are difficult, if not impossible, to make with any degree of accuracy or confidence.

B. **Cost-Benefit Analysis Is Inherently Biased Towards the Industry:** The very nature of cost-benefit analysis means it is biased towards industry—the costs of regulation are typically concrete and easy to quantify, while the benefits are often diffuse and difficult to quantify or predict. As a result, cost-benefit analysis will often lead to the incorrect conclusion that the benefits of strong regulation are outweighed by the costs, but that is simply the result of bias, not objective fact. This bias can have catastrophic consequences—one need look no further than the 2008 financial crisis.

C. **Conducting Cost-Benefit Analysis Drains Agency Resources:** Attempting to conduct a cost-benefit analysis for a rule is expensive and time consuming. Doing so also invites litigation, causing the agency to expend even more of their limited resources defending the rule. And if a court invalidates the rule because it determines that the cost-benefit analysis was not done to its satisfaction, all of those resources are wasted.

I. THE RELEASE FAILS TO EXPLAIN WHY IT IS CONSIDERING SIGNIFICANT CHANGES IN ITS RULEMAKING METHODOLOGY, AND IT OFFERS NO SUPPORT FOR ITS CLAIM THAT ECONOMIC ANALYSIS PROMOTES GOOD POLICY.

A basic omission from the Release is any explanation of what prompted the FDIC to re-evaluate its approach to analyzing the effects of its regulatory actions. The Release acknowledges that its "intention to improve the quality of its analysis of regulatory actions is **not** in response to any specific statutory mandate."[7] Beyond that, it simply claims that "the FDIC has had a longstanding commitment to improving the quality of its regulations and policies."[8] Elsewhere, the Release indicates that although the FDIC, as an independent agency, is not required to follow OMB's guidance with regard to regulatory analysis, it nevertheless "views OMB Circular A-4 as a useful set of general principles regarding regulatory analysis."[9] Yet the OMB circular—which as the Release notes, has no application to the FDIC—was issued decades ago, and the Release omits any explanation as to why the circular has suddenly captured the FDIC's attention.

Moreover, the Release fails to identify the perceived shortcomings in the FDIC's current approach to rulemaking. Even more significantly, the Release offers no concrete, credible evidence that applying more detailed economic analysis—specifically cost-benefit analysis—in the rulemaking process will lead to better policy outcomes or improve the effectiveness of the FDIC's rules. In essence, the FDIC has simply assumed that its contemplated approach is desirable, without offering any authoritative, empirical, or rational basis for that assumption.

The Release thus raises more questions than it answers. At whose suggestion or behest did the FDIC decide to revisit its regulatory approach? And why now? And on what basis has the FDIC concluded that its contemplated change in analytical approach to rulemaking will actually serve its statutory mandate and/or the public interest?

In the absence of substantial and meritorious answers to these questions, one might draw the conclusion that the FDIC is responding to the unending importuning of the banking industry, its trade associations, or other allies, who have for decades pushed Congress, the regulatory agencies, and the courts to undermine and impede effective regulation by saddling the agencies with an onerous, time-consuming, and unauthorized duty to conduct quantitative cost-benefit analysis. This is unacceptable.

II. THE FDIC IS NOT REQUIRED TO CONDUCT A COST-BENEFIT ANALYSIS OF ITS RULES, AND SUBJECTING ITSELF TO SUCH A REQUIREMENT WOULD CONFLICT WITH CONGRESSIONAL INTENT.

The most fundamental threshold question in this context is whether and to what extent Congress has required or authorized an agency to conduct any analysis of the economic impact of its rules. With respect to the FDIC (and the other banking regulators), Congress made the decision not to impose that requirement, yet the Release signals a clear departure from that Congressional intent.

Whether or not an agency must conduct cost-benefit or economic impact analysis in its rulemakings, and the exact nature of that analysis, is determined by what Congress has actually

7 Release at 65,809 (emphasis added).
8 *Id.* at 65,808.
9 *Id.* at 65,809.

required in the agency's organic statute. The Supreme Court has declared that an agency's duty to conduct cost-benefit analysis is not to be inferred lightly or without a clear indication from Congress.[10] Sometimes Congress insists on a rigorous cost-benefit analysis;[11] sometimes it requires an agency simply to consider certain economic factors;[12] sometimes it does not impose any cost-benefit or economic impact analysis obligation whatsoever on an agency;[13] and sometimes it even prohibits such an analysis under certain circumstances.[14]

In two recent decisions, the D.C. Circuit has reaffirmed this principle and applied it in rejecting industry challenges to agency rules. For example, in *Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F. 3d 370 (D.C. Cir. 2013), the court made clear that "[w]here Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement clear in the agency's statute, but it imposed no such requirement here."[15]

Here, Congress has deliberately refrained from imposing upon the FDIC anything remotely resembling the obligation to conduct a rigorous or quantitative cost-benefit analysis for its rules. As an independent agency, it is not subject to any executive order mandating a cost-benefit analysis, nor is it subject to OMB Circular A-4. The only statutory requirement hinting at an economic analysis duty applicable to the FDIC is the Riegle Community Development and Regulatory Improvement Act.[16] That requires only that the FDIC (and the other banking regulators) **consider** the benefits and administrative burdens before imposing "additional reporting, disclosure, or other requirements."[17] The Supreme Court has long recognized that statutorily mandated "considerations" are not "mechanical or self-defining standards," and that they "in turn imply wide areas of judgment and therefore of discretion."[18]

---

[10] *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 30 (1981) ("Congress uses specific language when intending that an agency engage in cost-benefit analysis.").

[11] *See, e.g.*, 2 U.S.C. § 1532(a) (requiring the agency to "prepare a written statement containing . . . a qualitative and quantitative assessment of the anticipated costs and benefits," including "the costs and benefits to State, local, and tribal governments or the private sector" and "estimates by the agency of the [action's] effect on the national economy").

[12] *See* 7 U.S.C. § 19 (requiring the CFTC to "consider the costs and benefits of the action").

[13] *E.g. Owner-Operator Indep. Drivers Ass'n, Inc. v. United States Dep't of Transportation*, 840 F.3d 879, 891 (7th Cir. 2016) (holding agency was not required to conduct any cost-benefit analysis for challenged rule under applicable statute, observing "Congress knows how to require rule-makers to follow cost-benefit analyses when it wants").

[14] *See City of Portland, Oregon v. E.P.A.*, 507 F.3d 706, 711 (D.C. Cir. 2007) (Safe Drinking Water Act "**prohibits** [EPA] from choosing less stringent treatment techniques for Cryptosporidium based on **cost-benefit** analysis").

[15] *Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F. 3d 370, 379 (D.C. Cir. 2013); *see also Nat'l Ass'n of Mfrs. v Sec. & Exch. Comm'n.*, 748 F. 3d 359, 369 (D.C. Cir. 2014).

[16] 12 U.S.C. § 4802.

[17] *Id.*

[18] *Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611- 12 (1950) ("Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these three factors

The FDIC must recognize that Congress made an explicit and deliberate choice when it decided not to mandate quantitative cost-benefit analyses for FDIC rules. The FDIC exists to protect the public interest by protecting the DIF and the stability of the financial system, not bank profits. Requiring cost-benefit analysis, which, as explained below, far too often becomes "industry cost-only analysis," undermines that goal. It often results in weak regulations or no regulations at all, even where strong regulations would benefit the public interest.[19] By not requiring that the FDIC conduct a cost-benefit analysis, Congress made a deliberate choice to avoid this outcome. The approach contemplated in the Release would impermissibly overrule this Congressional intent.

III. COST-BENEFIT ANALYSIS IS A FATALLY FLAWED APPROACH TO ASSESSING THE IMPACT OF RULES

A. A Cost-Benefit Analysis Gives the False and Dangerous Appearance of Precise Objectivity

Utilizing a cost-benefit analysis to assess the impact of regulations gives the false appearance of objectivity. This is why insisting on cost-benefit analysis in rulemaking has been such an effective, oft-deployed tactic by Wall Street and its allies. The very phrase "cost-benefit analysis" has a superficial appeal, connoting as it does a rigorous, precise exercise that, at the end, leads to an inexorably correct regulatory outcome. The superficial, idealized vision of cost-benefit analysis in rulemaking is that you simply add up the costs and benefits of various alternatives (including no regulation), and whichever has the greatest net benefit is the alternative the agency should choose.

However, this is a flawed and overly simplistic view of how cost-benefit analysis actually works, especially in financial regulation. Often, the data necessary to even attempt a credible cost-benefit analysis does not exist, or it lies exclusively in the hands of the regulated industry, which is then shared, if at all, only reluctantly and/or selectively with regulators. Therefore, attempting to quantify the costs and benefits of a particular regulation involves imprecise assumptions. In addition, it involves imprecise predictions, what one commentator has referred to as "number-laden guesswork."[20] Any attempt to predict the impact of a particular financial regulation involves guessing at the behaviors of various groups of individuals in the dynamic, ever-changing landscape

should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative share in his computation.").

19 The courts have also established the rule that, notwithstanding the absence of any requirement to conduct a cost-benefit analysis, if an agency does voluntarily undertake it, a court will vacate the rule if it finds that cost-benefit analysis flawed. *Am. Equity Inv. Life Ins. Co. v. S.E.C.*, 613 F.3d 166, 168 (D.C. Cir. 2010). Thus, by routinely conducting costly, flawed cost-benefit analyses not required by statute, the FDIC would be unnecessarily endangering its rulemakings.

20 John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 999 (2015)..

of the financial services industry and the larger economy. Furthermore, it must account for second-, third-, and fourth-order effects.

The degree of difficulty involved in making any of these assessments ranges from "extraordinarily difficult" to "impossible." For example, in the Release the FDIC identifies the stakeholder and policy perspectives to be considered in the analysis of rules, and one of these is the effect "on bank safety and soundness and public confidence." How does one assess the probable impact of a rule on public confidence? How will that be quantified, or even conveyed in a useful manner? And is an increase in public confidence necessarily even a "benefit"? For example, it might be reasonable to predict that a rule making it easier for banks to pass stress tests will increase public confidence in the banking system, at least in the short term, but that confidence may in fact be unfounded and costly, when real economic stress hits and it becomes apparent that banks are dangerously undercapitalized. Think, for example, of the difficulty of determining the "public confidence" in a rule proposal in 2005 versus the state of "public confidence" as Lehman Brothers crashed in September 2008 or thereafter.

Moreover, the assumptions that must be made in attempting to conduct a quantitative cost-benefit analysis by necessity end up reflecting value judgments. For example, the industry, and far too often regulators, often portray regulations that might reduce access to credit as necessarily bad for that reason. But it is not a given that decreased access to credit is a cost, or that increased access to credit is a benefit—one need only look as far as the financial crisis: It was fueled by excessive access to credit by high-risk and non-creditworthy borrowers. Thus, entering increased access to credit on one side or the other of the ledger is a value judgment rather than an objective, let alone quantifiable, decision.

The upshot is that if the FDIC conducts a cost-benefit analysis of a particular proposal and concludes that the costs of the proposal outweigh the benefits, that conclusion will likely have an unearned veneer of precision and objectivity. In fact, that conclusion will have been informed by a variety of assumptions, predictions, value judgments, industry biases, and even totally erroneous conclusions. That is no basis on which to develop rules that will effectively and reliably promote financial stability or reign in unlawful conduct at financial institutions.

B. <u>Cost-Benefit Analysis is Inherently Biased Towards Industry</u>

The costs of strong regulations will typically be primarily borne by the regulated industry, a discrete set of entities, and will usually be easier to quantify (or distort) in concrete and certain dollar terms. They are typically portrayed by industry as an increase in compliance costs, loss of business and/or profit-making opportunities, or all of the above.[21] Meanwhile, the benefits of

---

[21] That the costs of regulation for regulated entities can be expressed in concrete, quantifiable terms does not mean that regulators should take the industry at its word about the costs of regulation. The financial industry has a lengthy history of claiming that regulation would impose ruinous costs and immeasurable harms that never come to pass. Marcus Baram, *The Bankers Who Cried Wolf: Wall Street's History Of Hyperbole About Regulation*, HUFFPOST (June 21, 2011),

regulation are diffuse, benefiting the public at large rather than a specific set of firms, and difficult to express in concrete, definite terms.

This follows for a variety of reasons. First, the benefits of regulations to the public typically have a significant non-monetary component. This is the case even with regulations that are intended to have a concrete, monetary benefit: for example, a rule that aims to reduce fraud and manipulation in the securities markets promises cascading benefits, well beyond preventing the monetary losses arising from fraud. These other benefits include 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 that comes with victimization and financial loss.

Another problem with assessing the benefits of strong banking regulation is that those rules are often intended to prevent financial crises, yet it is nearly impossible to predict the likelihood of a financial crisis, or to capture all of its massive costs.[22] Compounding this problem are known cognitive biases which tend to cause people to underestimate the risk of low-probability, catastrophic events.[23] Finally, cost-benefit analysis is myopically focused on the costs and benefits of individual rules. Again, the costs of a single rule to the regulated industry are relatively easy to identify in isolation, but considering the benefits of a rule in isolation ignores the need to assess the value of rules holistically, 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. Many financial regulations are instrumental in helping to prevent catastrophic crises, yet that aspect of their value is routinely ignored or underweighted.

All of the issues that give rise to the inherent bias of cost-benefit analysis towards industry, and the potentially catastrophic effects of that bias, are illustrated by the 2008 financial crisis. For decades, the financial industry argued forcefully for deregulation, principally on the basis that existing regulations were too costly for banks and other financial companies.[24] These arguments found a receptive audience in Congress, which passed deregulatory legislation such as the Gramm-

---

https://www.huffingtonpost.com/2011/06/21/wall-street-history-hyperboleregulation_n_881775.html. Compounding this problem is that 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.

22 John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 960-969 (2015).

23 J.F. Rizzi, *Behavioral Bias of the Financial Crisis*, 18 J. APPLIED FIN. 1, 1108) ("The major catastrophic risks lurk in the fat tails of the remaining 5%. We tend to underestimate these improbable risks due to behavioral biases.").

24 Brooksley Born, *Foreword: Deregulation: A Major Cause of the Financial Crisis*, 5 Harv. L. & Pol'y. Rev. 231, 232 ("the financial sector devoted enormous resources to its effort to convince federal policy makers of the need for deregulation.").

Leach-Bliley Act. That law ended the separation of investment and commercial banking and helped create the "too big to fail" problem by allowing significant consolidation in the banking industry.[25] The Commodity Futures Modernization Act excluded swaps from regulation, allowing them to act as a financial crisis accelerant, turning a downturn in the housing market into a conflagration that nearly brought down the global economy. Not only Congress but regulatory agencies as well were also lured by the arguments for deregulation, convinced that regulatory protections were "unduly burdensome."[26]

Of course, few regulators or policymakers contemplating these deregulatory measures in the runup to the crisis actually seriously considered the possibility that they would be important links in the chain of events that would lead to a $20 trillion crisis.[27] Essentially, the costs of regulation, in terms of compliance and legal costs and reduced profits, were treated as concrete and certain, while the possibility of a financial crisis was treated as so remote as to be irrelevant to the regulatory approach.[28] Indeed, in its report to Congress on July 15, 2008, issued **after** the collapse of Bear Stearns and just two months before the collapse of Lehman Brothers that would trigger the financial crisis in earnest, the Federal Reserve failed to predict the significant economic contraction that was, in fact, imminent.[29]

If the FDIC utilizes cost-benefit analysis as the basis for regulatory action or inaction, it will augur a return to the pre-crisis mindset of unwarranted focus on costs to the industry, while ignoring entirely the possibility of crisis that strong banking and financial regulations are intended to prevent.

C. Conducting a Cost-Benefit Analysis is Often Contrary to Congressional Intent

Applying cost-benefit analysis to FDIC's rulemaking process conflicts with Congressional intent in at least two respects. Where Congress has expressly directed the FDIC to promulgate a particular rule, conducting a cost-benefit analysis that is inherently biased in favor of industry clearly defies Congressional intent.

---

25 Abdullah Mamun, et al., *The Wealth and Risk Effects of the Gramm-Leach-Bliley Act (GLBA) on the US Banking Industry*, 32 J. BUS. FIN. & ACCT. 351, 355-56 ("The GLBA allows large banks to expand further to enhance their 'too big to fail' guarantee.").

26 Brooksley Born, *Foreword: Deregulation: A Major Cause of the Financial Crisis*, 5 HARV. L. & POL'Y. REV. 231, 241.

27 BETTER MARKETS, THE COST OF THE CRISIS: $20 TRILLION AND COUNTING (July 2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis_1.pdf.

28 Rajendra Chitale, *Seven Triggers of the U.S. Financial Crisis*, 43 ECON. & POL. WEEKLY 20, 24 (Nov. 1, 2008) (identifying difficulty assessing "low probability events" as a contributing cause of the crisis and noting that in "tranquil times, low probability events are treated by most participants and observes as being impossible.").

29 BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, MONETARY POLICY REPORT TO CONGRESS 42 (July 15, 2008), https://www.federalreserve.gov/monetarypolicy/files/20080715_mprfullreport.pdf.

When Congress directs the agency to promulgate a regulation, it has already made a judgment that the industry should bear the costs of that regulatory burden for the protection of the public interest. If the FDIC allows that rulemaking be shaped by a flawed cost-benefit analysis that favors industry, it is improperly substituting its judgment for that of Congress. And as discussed above, applying the cost-benefit methodology in the FDIC rulemaking process conflicts with Congress's decision **not** to impose that obligation on the agency.

D. Conducting Cost-Benefit Analysis Drains, and Ultimately Wastes, Agency Resources

Another problem with endeavoring to conduct cost-benefit analysis is that such analysis, in addition to being inaccurate and biased, 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 analyses, at great expense to the agency. And the drain on agency resources does not stop with the cost of conducting the cost-benefit analysis itself. A cost-benefit analysis makes rules more vulnerable to successful legal challenge in court, further consuming agency resources in the litigation process and, if the rule is invalidated, rendering the expenditure of those resources a waste.

CONCLUSION

We hope you find these comments helpful.

Sincerely,

Dennis M. Kelleher
President & CEO

Stephen W. Hall
Legal Director & Securities Specialist

Jason R. Grimes
Senior Counsel

Better Markets, Inc.
1825 K Street, NW

Suite 1080
Washington, DC 20006
(20) 618-6464

dkelleher@bettermarkets.com
shall@bettermarkets.com
jgrimes@bettermarkets.com
www.bettermarkets.com