BETTER MARKETS

— FACT SHEET —

The FDIC Signals It Will Voluntarily Apply Cost-Benefit Analysis to Its Rules, a Move that Would Undermine Strong Financial Regulation

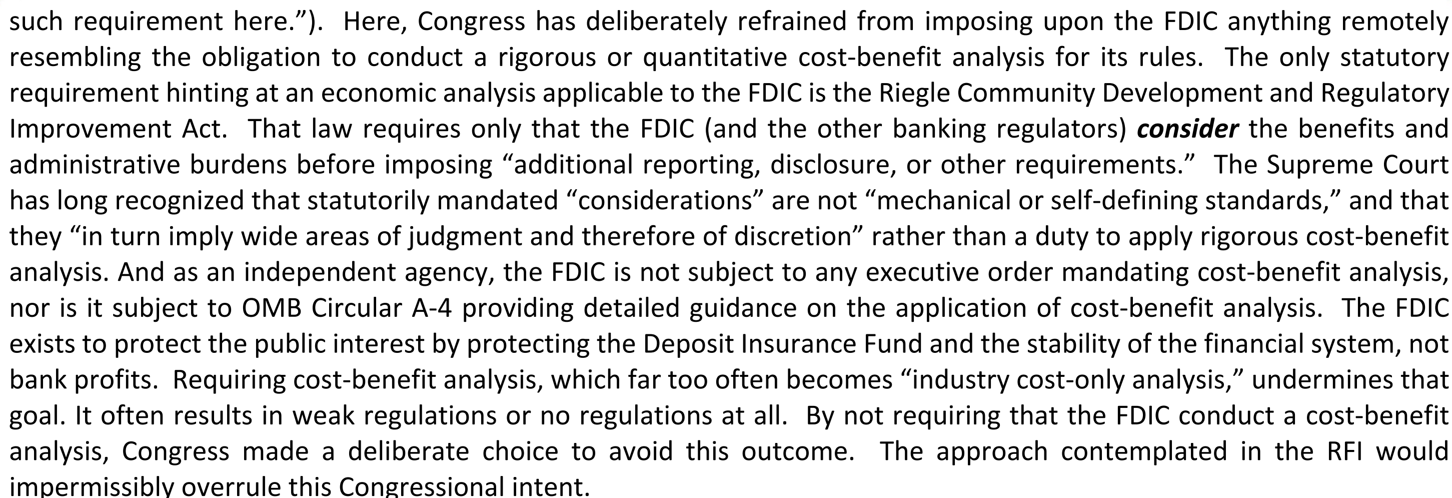
BACKGROUND. In November 2019, the Federal Deposit Insurance Corporation ("FDIC") issued a Request for Information ("RFI") seeking comment on various approaches it was considering for analyzing the effects of its rules and other regulatory actions. The primary focus of the RFI was on the possible application of a detailed, wide-ranging, and quantitative cost-benefit analysis ("CBA") to the FDIC's rulemaking process. On January 28, 2020, Better Markets filed a comment letter with the FDIC opposing the use of such a cost-benefit analysis by the FDIC.

SUMMARY. Better Markets argued that (1) the FDIC has failed to justify a sudden departure from its own long-standing regulatory approach, which has not incorporated cost-benefit analysis; (2) such a voluntary undertaking would conflict with Congress's decision ***not*** to subject the FDIC (or other banking regulators) to CBA requirements; and (3) the application of cost-benefit analysis will weaken the FDIC's rules in favor of banks, since notwithstanding its reassuring label, CBA favors the regulated industry, drains agency's resources, and increases litigation risk.

Key Points

The FDIC fails to justify the voluntary assumption of a duty to conduct cost-benefit analysis. The Release offers no concrete justification for the abrupt change in regulatory approach that the FDIC is contemplating. It fails to identify any shortcomings in the FDIC's current approach. Moreover, it 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. The Release thus raises more questions than it answers. At whose suggestion or behest did the FDIC decide to revisit its regulatory approach? Why now? And on what basis has the FDIC concluded that applying cost-benefit analysis will actually serve its statutory mandate or the public interest? In the absence of credible and well-supported answers to these questions, the inference arises that the FDIC is responding to the unending pressure from the banking industry, its trade associations, and 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 ultimately fruitless duty to conduct quantitative cost-benefit analysis.

Applying CBA to its rules would conflict with Congress's clear intent. The Release fails to account for the fact that Congress specifically chose ***not*** to impose upon the FDIC a duty to conduct cost-benefit analysis. 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 required in the agency's organic statute. As explained in our comment letter, 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. Sometimes Congress insists on a rigorous cost-benefit analysis; sometimes it requires an agency simply to consider certain economic factors; sometimes it does not impose any cost-benefit or economic impact analysis obligation whatsoever on an agency; and sometimes it even prohibits such an analysis. In recent decisions, the D.C. Circuit has reaffirmed this principle and applied it in rejecting industry challenges to agency rules. *See, e.g., Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F. 3d 370 (D.C. Cir. 2013) ("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 here.”). 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. The only statutory requirement hinting at an economic analysis applicable to the FDIC is the Riegle Community Development and Regulatory Improvement Act. That law requires only that the FDIC (and the other banking regulators) ***consider*** the benefits and administrative burdens before imposing “additional reporting, disclosure, or other requirements.” 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” rather than a duty to apply rigorous cost-benefit analysis. And as an independent agency, the FDIC is not subject to any executive order mandating cost-benefit analysis, nor is it subject to OMB Circular A-4 providing detailed guidance on the application of cost-benefit analysis. The FDIC exists to protect the public interest by protecting the Deposit Insurance Fund and the stability of the financial system, not bank profits. Requiring cost-benefit analysis, which far too often becomes “industry cost-only analysis,” undermines that goal. It often results in weak regulations or no regulations at all. 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 RFI would impermissibly overrule this Congressional intent.

The Release fails to account for the deficiencies in cost-benefit analysis

Cost-benefit analysis is unreliable. Cost-benefit analysis is superficially attractive, as most people believe it provides precise, objective solutions to complex problems. But in fact, cost-benefit analysis is unreliable as applied to financial regulation. Because the necessary data are often unavailable, cost-benefit analysis typically relies on imprecise assumptions or estimates. It also requires predictions about future human or market behavior that are difficult, if not impossible, to make with any degree of accuracy or confidence.

Cost-benefit analysis is inherently biased towards the industry. The very nature of cost-benefit analysis makes it biased towards industry. The costs of regulation, such as compliance costs or lost profits, are typically concrete and easy to quantify; in contrast, the benefits are often diffuse, intangible, and difficult to quantify. In addition, cost-benefit analysis generally fails to consider the important contribution that a single rule can make to a larger set of rules designed to achieve enormously important objectives, such as financial stability and the avoidance of financial crises. As a result, cost-benefit analysis will often lead to the erroneous conclusion that the costs of a rule outweigh its benefits, and that an agency should therefore weaken its rule or abandon it altogether. This bias can have catastrophic consequences—one need look no further than the 2008 financial crisis.

Conducting cost-benefit analysis drains agency resources and increases litigation risk. Attempting to conduct a cost-benefit analysis for a rule is expensive and time-consuming. Doing so saps an agency’s resources, delays the process, and invites litigation, often causing the agency to expend even more time and resources defending the rule in court. And the heightened risk of judicial review applies whenever an agency undertakes a cost-benefit analysis for its rules, regardless of whether it was required to do so under the law. If the FDIC ultimately decides to embrace cost-benefit analysis in its rulemaking process, it will face all of these burdens and risks, without the benefit of reliable economic analyses. The public interest will suffer.

Better Markets is a public interest 501(c)(3) non-profit based in Washington, DC that advocates for greater transparency, accountability, and oversight in the domestic and global capital and commodity markets, to protect the American Dream of homes, jobs, savings, education, a secure retirement, and a rising standard of living.

Better Markets fights for the economic security, opportunity, and prosperity of the American people by working to enact financial reform, to prevent another financial crash and the diversion of trillions of taxpayer dollars to bailing out the financial system.

By being a counterweight to Wall Street’s biggest financial firms through the policymaking and rulemaking process, Better Markets is supporting pragmatic rules and a strong banking and financial system that enables stability, growth, and broad-based prosperity. Better Markets also fights to refocus finance on the real economy, empower the buyside, and protect investors and consumers.

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