SPECIAL REPORT

The Trump Administration Seeks to Paralyze Agencies with Burdensome and Unworkable Cost-Benefit Analysis

This Effort Will Leave Americans More Vulnerable to Financial Predators, Rigged Markets, and Economic Crashes

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INTRODUCTION

The financial services industry has fought for decades to slow, dilute, and nullify important rules by insisting that agencies must undertake the impossible task of preparing a quantitative cost-benefit analysis to justify each of their regulations. Since its founding, Better Markets has opposed this campaign with reports showing that despite its superficial appeal, cost-benefit analysis as applied to financial regulation is an unworkable and inaccurate methodology, one that favors the regulated industry and imposes enormous and unjustifiable burdens on the agencies. Moreover, in the realm of financial regulation, it is not what Congress has actually required the agencies to do. It is, in short, a recipe for regulatory paralysis.

Over the years, industry's efforts have met with varying degrees of success in Congress, the executive branch, and the courts. However, the landscape has changed dramatically since the 2024 elections. Over just the past four months, we have seen a concerted effort by the President and many in Congress to impose heavy-handed cost-benefit analysis requirements on all agencies. In light of these developments, we are updating our last report on cost-benefit analysis, issued in March of 2023.

Why does it matter? Because those who extol the virtues of cost-benefit analysis as a regulatory tool are actually using it as a weapon—a Trojan House—to undermine the agencies that were established to protect Americans from a wide variety of threats to their health, safety, and economic well-being. It is being deployed in tandem with President Trump's other tactics aimed at decimating agency staff, slashing agency funding, rolling back rules, and abandoning enforcement actions. To the extent these attacks succeed, Americans will lose important regulatory protections and suffer real harm, some of it potentially catastrophic. Our financial markets will see an increase in fraud and abuse; investors and consumers will be victimized in ever greater numbers; and our entire financial system will be much more likely to suffer another financial crisis such as the 2008 crash, which exacted a $20 trillion toll on all Americans.[1]

OVERVIEW

The Trump Administration is dead set on eliminating or weakening the regulatory agencies that oversee our financial markets, and it is waging this war on multiple fronts.

First, the Administration has launched a frontal assault by slashing agency staff, cutting their budgets, and installing chairs who will faithfully rescind or scale back their regulatory and enforcement work. A prime example is the Administration's sweeping plan[2] to dismantle the Consumer Financial Protection Bureau ("CFPB"). This assault has neutralized one of the most effective consumer protection agencies in the history of financial regulation, one that has returned over $20 billion to millions of Americans spread across every state who have been victimized by the predatory behavior of banks and other financial firms.[3] The Securities

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[1] *See generally* Dennis M. Kelleher, Better Market Special Report: Trump's Deregulation of Wall Street Is Going to Economically Crush Main Street Americans (Jan. 31, 2025), https://bettermarkets.org/wp-content/uploads/2025/01/BetterMarkets_Trump_Deregulation_JAN2025.pdf; *see also* Better Markets, The Cost of the Crisis: $20 Trillion and Counting (July 2015), https://bettermarkets.org/wp-content/uploads/2021/07/Better-Markets-Cost-of-the-Crisis_1.pdf.

[2] *See National Treasury Employees Union v. Vaught*, Case No. 1:25-cv-00381-ABJ, 2025 WL 942772 (memorandum opinion in support of initial preliminary injunction issued Mar. 28, 2025, currently on appeal to the D.C. Circuit, detailing the Administration's efforts to shut down the CFPB).

[3] Rohit Chopra, *Opening Statement of Director Rohit Chopra Before the House Financial Services Committee* (June 13, 2024), https://www.consumerfinance.gov/about-us/newsroom/opening-statement-of-director-rohit-chopra-before-the-house-financial-services-committee/.

and Exchange Commission ("SEC") and the other financial regulators are also targeted for workforce reductions and leadership changes that will dramatically weaken protections for American investors and increase the likelihood of another severe financial crisis.[4]

Second, while this wrecking-ball attack on the agencies is attracting enormous attention, the Administration is ramping up other less-noticed strategies that also pose a fundamental threat to the financial regulators. Chief among them is mandating the use of quantitative cost-benefit analysis to put agencies in a regulatory straight jacket. The goal is to require all agencies—including the independent agencies—to catalogue and quantify all the costs and benefits of all proposed rules before finalizing them. It is a recipe for regulatory paralysis, since it is impossible to reliably quantify in dollars and cents the enormous benefits of regulation. Meanwhile, the industry can readily recite its projected compliance costs in exaggerated but seemingly precise dollar amounts to argue that a rule is unjustifiable. This strategy not only slows the rulemaking process and dilutes final rules but also sets the stage for judicial nullification of rules on cost-benefit grounds.

Cost-benefit analysis has a long history of use by the industry as a weapon to slow, dilute, and 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 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 rule. Throughout this campaign, they have exploited the intuitive yet deceptive appeal of cost-benefit analysis, which can be portrayed as a precise methodology that enables policymakers to fashion ideal regulatory solutions. It is, in reality, a false promise, because cost-benefit analysis as applied to financial regulation is unworkable, inaccurate, unfair, and extraordinarily burdensome. Yet over the years, allegations that an agency failed to conduct an adequate cost-benefit analysis became a staple of court challenges to financial regulations.

Through a long series of comment letters, *amicus* briefs, reports, and updates, Better Markets has staunchly opposed the industry's use of cost-benefit analysis as a weapon to impede or nullify the rules that protect investors and the integrity of our financial markets.[5] In recent years, we have seen some marked progress on this regulatory battlefront. For example, as discussed in Part Three below, the Biden Administration issued

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[4] *See supra* note 1.

[5] 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 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), https://www.bettermarkets.org/sites/default/files/Setting%20The%20Record%20Straight.pdf. On July 29, 2020, we highlighted the pitfalls of cost-benefit analysis at a symposium hosted by the CFPB that was organized to examine the use of cost-benefit analysis in consumer financial protection regulation. *See* CONSUMER FIN. PROT. BUREAU, 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/. In early 2020, we filed a comment letter with the Federal Deposit Insurance Corporation ("FDIC") on a possible framework for analyzing the effects of regulatory actions, focused in large measure on evaluating costs and benefits. *See Comment Letter to the FDIC on Request for Information on a Framework for Analyzing the Effects of Regulatory Actions*, BETTER MKTS. (Jan. 28, 2020), https://tinyurl.com/yqo9t4um. In December 2020, we issued another report on cost-benefit analysis, *Cost-Benefit Analysis in Consumer and Investor Protection Regulation: An Overview and Update,* BETTER MKTS. (Dec. 8, 2020), https://bettermarkets.org/sites/default/files/Better_Markets_WhitePaper_CBA_Consumer_Investor_Investor_Protection_Dec-2020.pdf. On March 23, 2023, we issued another Special Report, *The Ongoing Use and Abuse of Cost-Benefit Analysis in Financial Regulation*, https://bettermarkets.org/analysis/the-ongoing-use-and-abuse-of-cost-benefit-analysis-in-financial-regulation/. And on August 15, 2024, we filed an *amicus* brief in defense of the SEC's climate risk disclosure rule, refuting the challengers' arguments on cost-benefit analysis, https://bettermarkets.org/impact/court-should-uphold-secs-climate-risk-disclosure-rule-to-protect-investors-and-our-markets/.

executive orders that promoted a more flexible approach to cost-benefit analysis in the rulemaking process at the executive branch agencies, one that emphasized the benefits of regulation. In addition, as discussed in Part Two below, the courts began to recognize the very limited role that Congress intended cost-benefit analysis to play in financial regulation, especially at the independent agencies like the SEC and CFPB.

Now, however, the resurgence of cost-benefit analysis looms large. Within the first 100 days of his Administration, President Trump has already issued a number of executive orders that roll back the Biden Administration's progress and create onerous new obligations. *See infra* Part Three. Among them is the executive order issued on February 18, 2025, that purports to subject all independent agencies to the same level of review and control—including a duty to conduct exhaustive cost-benefit analysis—that applies to the executive branch agencies. *See* Exec. Order No. 14215, "Ensuring Accountability for All Agencies," 90 Fed. Reg. 10,447 (Feb. 24, 2025).

Facing a renewed campaign to require all agencies to perform the impossible task of supporting their rules with quantitative cost-benefit analysis, we update our prior reports on the use of cost-benefit analysis as a weapon against financial regulation. We highlight these core points:

I. Cost-benefits analysis in financial regulation is unreliable, biased in favor of industry, and counterproductive. It consumes huge agency resources and delays and dilutes the rulemaking process, all while delivering little benefit. And it rests on the myth that the financial services industry—which remains among the very wealthiest enterprises in history—is overburdened by the costs of regulation.

II. For years, the courts misinterpreted the securities laws and other financial statutes, requiring the SEC and other agencies to conduct cost-benefit analysis where no such statutory obligation exists. More recent court decisions have acknowledged that it is for Congress to decide what level of economic analysis independent agencies must conduct, and those cases make clear that quantitative cost-benefit analysis is not what Congress required the SEC and other agencies to perform.

III. In President's Trump's executive branch, cost-benefit analysis is being fully embraced. His executive orders and his nominees to head the financial regulators reflect a desire to require all agencies to conduct stringent, quantitative cost-benefit analyses to justify any new rules.

IV. To the extent that cost-benefit analysis is not firmly entrenched at all of the regulatory agencies through the Trump Administration's actions, the 119th Congress appears ready to accomplish that objective through legislation.

V. Many scholars continue to identify profound flaws in the application of cost-benefit analysis in financial regulation, building on years of academic criticism of the unworkable methodology.

PART ONE:
COST-BENEFIT ANALYSIS AND ITS DRAWBACKS

I. Cost-benefit analysis is unreliable, unduly burdensome, and counterproductive.

A. <u>Cost-benefit analysis is unreliable.</u>

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 estimate with accuracy. In addition, cost-benefit analysis cannot capture the many benefits of financial regulation, which defy quantification. Those invaluable benefits include the many frauds that were never perpetrated as a result of deterrence; the robust participation in the financial markets and the attendant economic prosperity that comes from confidence in their stability and integrity; and the cumulative benefits of multiple rules that together can prevent devastating financial crises. 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.

It rests on limited data. Compounding the problem, reliable data on which to base cost-benefit analysis is often unavailable or at best 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. 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 mischaracterized as an undesirable "cost" of regulation that reduces consumer "choice."

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 in the financial markets. The financial crisis of 2008 will ultimately cost over $20 trillion in lost economic productivity, not to mention the enormous human suffering it inflicted.[6] Many financial regulations are instrumental in helping to prevent such crises, yet that aspect of their collective value is routinely ignored or underweighted.[7]

B. Cost-benefit analysis is burdensome and counterproductive.

It consumes vast agency resources. Cost-benefit analysis is extremely time-consuming and costly, draining away scarce agency resources and protracting the rulemaking 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 sets the stage for court challenges. Cost-benefit analysis makes rules more vulnerable to successful legal challenges in court. This is evident from the frequent and often successful use of cost-benefit analysis

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[6] *See Cost of the Crisis*, *supra* note 1.

[7] The Financial Stability Oversight Counsel ("FSOC") under the Obama 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).

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.

II. Cost-benefit analysis rests on the baseless myth of over-regulation.

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.[8] However, in the years following this early appearance of financial regulation, banks and their profits grew handsomely.[9]

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; nor, of course, was the Dodd-Frank Act spared this exaggerated rhetoric.[10]

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 nearly fifteen years ago, and the issuance of hundreds of implementing regulations, the financial services sector has thrived, with banks increasing their revenues, profits, and bonuses while at the same time increasing capital levels and

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

[9] 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 . . . .").

[10] *See generally* Baram, *supra* note 8; *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); *Ten Reasons to Oppose Dodd-Frank*, NAT. REV. (July 6, 2010, 8:00 a.m.), https://www.nationalreview.com/2010/07/ten-reasons-oppose-dodd-frank-editors/ (warning of unfounded and unrealized "threats" posed to the financial system by Dodd-Frank); *Groups Oppose Any OCC-OTS Merger*, AM. BANKER (July 10, 2007), https://www.americanbanker.com/news/groups-oppose-any-occ-ots-merger ("The two trade groups said such a regulatory merger [off the OCC and OTS] would decrease competition and negatively affect charter choice. 'We believe any such plan would ultimately fail as it has in the past,' Earl McVicker, chairman of ABA, and Mark Macomber, chairman of ACB, said in the letter. 'We fear, however, that pursuit of such a plan could sidetrack more direct efforts that could improve our financial system.'").

engaging in robust lending.[11] And those reforms played a vital role in helping our financial system weather the economic turmoil sparked by the pandemic in 2020. More recently, regulatory guardrails helped prevent the recent cryptocurrency meltdown from infecting the entire banking system and likely triggering another financial disaster.[12] 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.

PART TWO:
THE COURTS

I. Cost-benefit analysis has been deployed as an effective weapon in the courts, as judges have often departed from what the law actually requires.

A bed-rock principle governing agency rulemaking is that Congress decides what level of economic analysis an agency must conduct. As the Supreme Court made clear over 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 explained that the duty to "consider" various economic factors in the rulemaking process—as it did in the securities laws—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] 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."[15] This is "especially true when the agency is called upon to weigh the economic impact of alternative policies."[16] In fact, "cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency."[17]

Unfortunately, over the past 20 years, the courts have often ignored these principles governing cost-benefit analysis. As discussed below, 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.[18] In reality, those opinions ignored or misread the actual text of the securities laws, the precedents 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."

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[11] *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), https://bettermarkets.org/sites/default/files/images/BetterMarkets_DoddFrankReport.pdf.

[12] Dennis M. Kelleher, *Fact Sheet: Setting the Record Straight on Crypto, FTX and Sam Bankman-Fried, and Financial Regulators*, BETTER MKTS. (Nov. 29, 2022), https://bettermarkets.org/wp-content/uploads/2022/11/Better_Markets_FTX_FactSheet.pdf.

[13] *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-12 & n.30 (1981).

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

[15] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 43 (1983).

[16] *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003).

[17] *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C.Cir.1983).

[18] *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005); *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

The *Chamber of Commerce, American Equity,* and *Business Roundtable* cases that invalidated SEC rules exemplify the courts' misapplication of the law. The 2005 *Chamber* case involved a challenge to the SEC's rule designed to promote better corporate governance in mutual funds.[19] The D.C. Circuit held that the narrow statutory duty simply to consider whether a rule will promote three specific factors—efficiency, competition, and capital formation ("ECCF")[20]—actually calls upon the SEC to conduct a much broader analysis and to "determine as best it can the economic implications of the rule."[21] 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. The court should have interpreted the SEC's ECCF mandate in a far more limited way,[22] but it chose to impose a cost-benefit analysis requirement that was untethered to the law and profoundly disruptive to the agency's rulemaking process.

In the years following *Chamber of Commerce*, the D.C. Circuit continued to strike down 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.[23]

The judicial disregard for the law and well-established principles of judicial deference to the expert judgment of regulators was on full display 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."[24] 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. 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.[25]

The repeated and successful legal challenges to SEC rules over the years not only nullified a number of important rules 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 some final rules. This shift in approach to economic analysis was embodied in a set of guidelines that the SEC willingly adopted

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

[20] Section 3(f) of the Exchange Act simply requires the SEC to "consider, in addition to the protection of investors, whether [its rule] will promote efficiency, competition, and capital formation." *See, e.g.*, 15 U.S.C. § 78c(f); s*ee also* 15 U.S.C. § 78w (a)(2) (setting forth duty under Exchange Act to avoid burdens on competition that are not necessary or appropriate).

[21] *See Chamber,* 412 F.3d at 143.

[22] *See* Nadelle Grossman, *The Sixth Commissioner,* 49 GA. L. REV. 693, 721 (2015) ("Several conclusions can be drawn from the above discussion. One is that the ECCF does not, by its language, call for a quantitative cost-benefit analysis. Second, Congress's intent behind the language is not clear. Consequently, the language of the ECCF mandate can be characterized as ambiguous.").

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

[24] *Business Roundtable v. SEC*, 647 F.3d 114, 1148 (D.C. Cir. 2011).

[25] *See* James D. Cox & 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), https://scholarship.law.duke.edu/faculty_scholarship/2529/.

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").[26] Those 2012 Guidelines largely adopted the principles set forth in various executive orders and in OMB circular A-4[27] 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 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, sometimes in testimony before Congressional critics—even as those leaders asked for more resources to help with the considerable burdens that the new economic analyses were imposing on the agency.[28] To this day, the SEC routinely conducts a version of cost-benefit analysis in its rulemakings although it remains to be seen how President Trump's recent executive orders will change this process.

The successful deployment of cost-benefit analysis as a weapon was not confined to disputes over SEC rules. Another successful attack appeared in MetLife's court challenge to its designation by the Financial Stability Oversight Counsel ("FSOC") for enhanced prudential regulation, given the risks MetLife posed to the broader financial system.[29] That challenge was predicated largely on the claim that the FSOC had failed to adequately analyze the costs and benefits of the designation—even though the applicable statutory provisions nowhere impose a duty to conduct cost-benefit analysis on the FSOC. In an unusually tortured decision, the federal district court sided with MetLife and vacated the designation, accepting MetLife's notion that FSOC was required, yet had failed, to assess the costs that designation would impose on MetLife.[30] That ruling lacked any plausible legal foundation, [31] 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.[32]

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[26] SEC. & EXCH. COMM'N, MEMORANDUM FROM THE DIVISION OF RISK, STRATEGY, AND FINANCIAL INNOVATION AND THE OFFICE OF GENERAL COUNSEL TO STAFF OF THE RULEWRITING DIVISIONS AND OFFICES, CURRENT GUIDANCE ON ECONOMIC ANALYSIS IN SEC RULEMAKINGS (Mar. 16, 2012) ("2012 Guidelines").

[27] Circular A–4, Regulatory Analysis, 68 Fed. Reg. 58,633 (Oct. 9, 2003); *see also Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC*, BETTER MKTS. (July 30, 2012), https://www.bettermarkets.org/sites/default/files/Setting%20The%20Record%20Straight.pdf.

[28] Edward Wyatt, *At House Hearing, Schapiro Says Cost Analyses Are Slowing S.E.C.'s Work*, N.Y. TIMES (Apr. 25, 2012), https://archive.nytimes.com/dealbook.nytimes.com/2012/04/25/at-house-hearing-schapiro-says-cost-analyses-are-slowing-s-e-c-s-work/ ("At an oversight hearing for the agency, its chairwoman, Mary L. Schapiro, said that the increased analyses that Republicans had been pushing had slowed down progress toward new rules. 'We firmly believe that cost-benefit analyses are very important,' Ms. Schapiro said. 'One reason we need more resources is that we're hiring many more economists' to perform the studies.").

[29] *See Fact Sheet on the MetLife v. FSOC Decision*, BETTER MKTS. (Apr. 15, 2016), https://bettermarkets.org/wp-content/uploads/2021/07/MetLife-Decision-Fact-Sheet-4-15-16-Final.pdf.

[30] *MetLife, Inc. v. FSOC*, 177 F. Supp. 3d 219 (D.D.C. 2016).

[31] The court in *MetLife* based its decision largely on a misreading of the Supreme Court's decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), and it thus departed from the more reasonable interpretations of *Michigan* adopted by other courts. For example, in *Nicopure Labs, LLC v. FDA*, 266 F. Supp. 3d 360 (D.D.C. July 21, 2017), the court rejected claims that the FDA's decision to regulate e-cigarettes as tobacco products was arbitrary and capricious 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.

[32] These and other significant errors by the district court cried out for reversal on appeal. Extensive appellate briefing on the merits followed, including numerous *amicus* briefs from Better Markets and others arrayed on both sides of the

II. The courts have begun to more faithfully apply the standards Congress has established for agencies with respect to economic analysis.

Over the past decade, courts have increasingly recognized the limited nature of an agency's duty to conduct cost-benefit analysis absent clear direction from Congress. That trend has continued in recent decisions, although with sometimes mixed results.

For example, 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.[33]

In *Investment Company Institute v. CFTC*,[34] 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]."[35] 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*,[36] 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 "conflict 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

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important issues presented. However, the case lay dormant through the 2016 election, and beginning in April 2017, the first 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. Ultimately, the FSOC joined with MetLife in a motion requesting the appeal be dismissed, which the D.C. Circuit granted in January of 2018. *See Amicus* Brief of Better Markets, Inc., *Metlife, Inc., v. Financial Stability Oversight Council*, No. 16-5086 (D.C. Cir., June 23, 2016), https://tinyurl.com/ytcbdlfb. 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, Inc., *Metlife, Inc. v. Financial Stability Oversight Council*, No. 15-cv-45 (D.D.C., May 22, 2015), https://tinyurl.com/ynw3ejg5.

[33] *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).

[34] 720 F.3d 370 (D.C. Cir. 2013).

[35] *Id.* at 379. Dodd-Frank Act Section 1022(b)(2)(A), 12 U.S.C. § 5512(b)(2), only requires the CFPB to *consider* "the potential benefits and costs of a regulation" to both "consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets"; and "the impact on consumers in rural areas."

[36] 748 F.3d 359, 370 (D.C. Cir. 2014).

framed in terms of dollars and cents, and it also forces them to second-guess the judgments that Congress has already made about the costs and benefits of regulation.[37]

III. The most recent cases reflect a mixture of holdings on cost-benefit analysis.

More recent judicial decisions are decidedly mixed with respect to industry attacks on agencies' economic analysis of their rules. They reflect a more accurate formulation of the law, which generally requires the independent agencies like the SEC to conduct a very limited and qualitative economic analysis in support of rules. But they also at times misapply those legal principles in striking ways. Unfortunately, the Supreme Court's 2024 decision in *Loper Bright* is likely to give federal judges more leeway to read an agency's organic statute, including the provisions governing economic analysis, in ways that align more with the judges' ideological preferences than with what the law actually says.[38]

1. ***Chamber of Commerce of United States v. SEC*, 85 F.4th 760 (5th Cir. 2023) — The court correctly framed the law on cost-benefit analysis but then misapplied it to strike down the SEC's stock repurchase rule.**

Background. In this case, the Chamber of Commerce sought to nullify the SEC's stock repurchase rule, a rule adopted to strengthen disclosures for the benefit of investors by requiring companies to provide more detailed information about their share repurchases and the reasons for those repurchases. As we explained in our comment letter, the rule was designed to help investors understand whether buybacks are a maneuver intended to line the pockets of corporate insiders by increasing executive compensation or a decision that is in the best interest of the company, its shareholders, and its employees.[39]

The Chamber of Commerce and its allies challenged the rule in the Fifth Circuit, claiming that it violated the First Amendment by impermissibly compelling speech; that it was arbitrary and capricious in numerous respects; and that it did not provide the public with a meaningful opportunity to comment.

The Fifth Circuit's Ruling. On October 31, 2023, the Fifth Circuit panel issued its decision with decidedly mixed results. The court rightly rejected claims that the rule violated the First Amendment limits on compelled disclosure, as we urged in our *amicus* brief.[40] It also correctly held that the SEC had offered a sufficient public comment period. As to cost-benefit analysis, the court correctly noted that, as a general matter, the SEC need not conduct a quantitative economic analysis:

> We agree with the SEC that, as a general matter, it is not required to undertake a quantitative analysis to determine a proposed rule's economic implications. The relevant statutory provisions providing the SEC with rulemaking authority do not stipulate such a requirement—they merely command the SEC to "consider . . . whether the action will promote efficiency,

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[37] 748 F.3d at 369-70; Grossman, *supra* note 22 at 729-30 (citing Conflict Minerals, 77 Fed. Reg. 56,274, 56,333-34 (Sept. 12, 2012); 15 U.S.C. § 78m(p)(1)(A) (2012)) ("While the SEC seems to increasingly favor a quantitative approach to this analysis, much of its analysis remains qualitative. For example, in its recently adopted conflict minerals rule, the SEC noted that it was 'unable to readily quantify with any precision' the social benefits of its rule, which was required by Dodd-Frank."); *see also NASDAQ Stock Market LLC v. SEC*, 34 F.4th 1105, 1111 (D.C. Cir. 2022) (observing that "[a]n agency's duty to consider economic impacts does not necessarily require a precise cost-benefit analysis").

[38] *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244 (2024) (abolishing the duty of federal courts under *Chevron* to defer to an agency's reasonable interpretation of the statute it administers).

[39] *Comment Letter to the SEC on Share Repurchase Disclosure Modernization*, BETTER MKTS (Apr. 1, 2022), https://tinyurl.com/ymdkp69y.

[40] *Amicus* Brief of Better Markets, Inc., *Chamber of Commerce v. SEC,* No. 23-60255 (5th Cir., Aug. 16, 2023), https://tinyurl.com/ytrklov8.

> competition, and capital formation." 15 U.S.C. §§ 78c(f), 80a-2(c). Per the text, the agency is only told to "consider," and that term—shorn of modifiers or limiters—does not restrict the universe of otherwise permissible methods by which the SEC can analyze the economic implications of a proposed rule.
>
> Nor do the statutorily stipulated objects of consideration lend any support to petitioners' position. A rigorous quantitative cost-benefit analysis is one way—but not the only way—to determine whether a proposed rule "promote[s] efficiency, competition, and capital formation." *Id*. Accordingly, there is no textual basis to conclude that the SEC must analyze economic impacts using quantitative methods whenever it is feasible.

Chamber of Commerce, 85 F.4th at 773.

The Fifth Circuit nevertheless proceeded to render these general principles meaningless by holding that the SEC had acted arbitrarily and capriciously in two respects. First, the court faulted the SEC for failing adequately to respond to commenters who had supposedly flagged data with which the SEC *could have* quantified the economic impact of the rule. Second, the court ruled that the SEC had failed to substantiate the rule's benefits and costs even in qualitative terms. Specifically, it ruled that the SEC had failed to show that improperly motivated buybacks were a significant problem or that the rule would actually promote more accurate share price discovery. The Court thus acknowledged the statutory provision that imposes no cost-benefit analysis obligation on the SEC but then effectively imposed that same duty on the SEC via the arbitrary and capricious standard of review.

<u>Upshot.</u> This case properly recognized that "it is within the [SEC's] discretion to determine the mode of analysis that most allows it to determine as best it can the economic implications of the rule it has proposed," *id*. at 774, and it thus reflects a positive trend among courts in accurately framing the SEC's limited statutory duty to conduct economic analysis. *Id*. at 774. However, the court in effect negated this holding by finding that because commenters had highlighted data sources that would have enabled the SEC to quantify costs and benefits, the SEC had acted arbitrarily and capriciously by not adequately taking those comments into account. The court thus imposed a duty to conduct quantified cost-benefit analysis not under the terms of the securities laws but under the APA, presumably whenever commenters claim to provide useable quantitative data on the economic impact of a rule.

2. *Nasdaq Stock Mkt. LLC v. SEC*, 34 F.4th 1105 (D.C. Cir. 2022) — The court correctly framed the law and correctly applied it to uphold the SEC's market data reforms.

<u>Background.</u> In this case, securities exchanges that sell their own proprietary market data challenged the SEC's new market data infrastructure rule. That rule (i) updated the definition of "core data" to include more detailed trading information and (ii) adopted a more competitive model to encourage the emergence of new sources for trading data. In adopting the rule, the SEC sought to modernize the national market system for the benefit of investors. Technological advances have allowed the exchanges to profit by selling proprietary data feeds with more detailed and rapidly accessible information than the data generally available to investors via the Securities Information Processor of "SIP." The SEC sought to reduce this informational asymmetry by compelling the exchanges to distribute their data to competing data consolidators, for a fee.

Petitioners challenged the rule as arbitrary and capricious and contrary to the goals and policies of the Securities Exchange Act. They argued that (i) the rule would exacerbate, not reduce, information asymmetries in the data market by creating a multi-tiered system to replace a two-tier system; and (ii) the rule rested on speculation that enough participants with distinctive products and fees would enter the market to make data access more competitive, thus rendering the rule arbitrary and capricious.

<u>The D.C. Circuit's Ruling.</u> On May 24, 2022, the D.C. Circuit upheld the rule, holding that it promoted the SEC's stated goals, that it was grounded in the record, and that the SEC "acted well within its authority when it evaluated the Rule's anticipated benefits against the possibility of harm to petitioners' respective bottom lines. This court declines to re-weigh the technically complex tradeoffs the [SEC] carefully considered." *Nasdaq Stock Mkt. LLC v. SEC*, 34 F.4th 1105, 1114 (D.C. Cir. 2022) (cleaned up).

In particular, the court rejected petitioners' claim that the rule would increase market stratification, holding that the rule reasonably addressed the dearth of options for investors with widely divergent data needs in the existing marketplace. With regard to petitioners' claim that there would not be enough new market participants to achieve the intended competitive benefits, the court held that, "when an agency's decision is primarily predictive the court requires only that the agency acknowledge factual uncertainties and identify the considerations it found persuasive." *Id*. at 1110 (cleaned up).

On the issue of cost-benefit analysis, the court correctly observed that the SEC is only required under the law to consider, *in addition* to the "the protection of investors," "whether the action will promote efficiency, competition, and capital formation." The court further explained that:

> An agency's duty to consider economic impacts does not necessarily require a precise cost-benefit analysis, *see Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir. 2012); this court has recognized that the Commission "need not . . . base its every action upon empirical data," *Chamber of Commerce v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005), and may reasonably conduct "a general analysis based on informed conjecture," *id*. (quoting *Melcher v. FCC*, 134 F.3d 1143, 1158 (D.C. Cir. 1998)).

Nasdaq Stock Mkt. LLC, 34 F.4th at 1111. The court concluded that the Commission considered each of the economic factors and all of the petitioners' concerns and "reasonably determined, based on the information available to it, that the Rule was warranted." More specifically, the court rejected petitioners' argument that the SEC "duck[ed] serious evaluation of the costs." It explained that this claim fallaciously equated overall competition with the petitioners' own competitive position. *Id*. at 1112-13. The court also held that the SEC had no obligation to "quantify each individual exchange's anticipated revenue decreases under the Rule" because the SEC "need not 'base its every action upon empirical data.'" *Id*. at 1113.

<u>Upshot.</u> This case reflects an accurate formulation of the SEC's legal obligation to assess the economic impact of its rules, as well as a correct application of that standard. It also reflects an appropriate judicial reluctance to second-guess the complex decisions the SEC is often required to make.

3. ***Alliance for Fair Board Recruitment v. SEC*, 85 F.4th 226 (5th Cir. 2023) — The court correctly framed the law on economic analysis and correctly applied it to uphold an exchange's important board diversity disclosure rule.**

<u>Background.</u> In this case, pro-corporate interest groups challenged the SEC's approval of the NASDAQ's board diversity disclosure rule. The rule (i) required listed companies to disclose information about their board members including gender, racial characteristics, and LGBTQ+ status that had been self-reported; (ii) required each NASDAQ-listed company that did not have at least two "diverse" board members to explain why they did not; and (iii) gave certain companies one year of complimentary access to a board recruiting service, offering a network of board-ready diverse candidates for companies to identify and evaluate. The rule provided major benefits to investors who want access to board diversity information in determining which investments to make and how to vote proxies. The rule also provided beneficial access to well-qualified, diverse board candidates for companies seeking to increase their board diversity.

On August 6, 2021, in accordance with the procedures and standards set forth in the Exchange Act, the SEC approved the proposed rule changes, noting that the rule was consistent with the Exchange Act and that it would "establish a disclosure-based framework for NASDAQ-listed companies that would contribute to investors' investment and voting decisions." *Alliance for Fair Board Recruitment*, 85 F.4th at 238. The Alliance for Fair Board Recruitment ("AFBR") and the National Center for Public Policy Research ("NCPPR") challenged the rule on multiple constitutional and statutory grounds. With respect to economic analysis, they claimed that the SEC had failed to adequately consider the costs for firms that lacked board diversity and had failed to show "that the asserted benefits of the diversity rule outweigh the costs."

The Fifth Circuit's Ruling. On October 12, 2023, the Fifth Circuit upheld the SEC's approval of the rule against all of the challengers' claims. For example, the court held that the rules of the NASDAQ, a private self-regulatory organization, are not attributable to the government and are therefore not subject to Constitutional scrutiny. Furthermore, in agreement with Better Markets' *amicus* brief, the court held that the Approval Order did not exceed the SEC's authority under the Exchange Act.[41] The court also held that the rule did not regulate corporate governance in derogation of state authority; that the rule did not trigger the major questions doctrine; that the rule was not arbitrary and capricious; and that the rule's different requirements for foreign and domestic issuers were reasonable.

With respect to economic analysis, the court rejected the petitioners' claim that the SEC had failed to adequately consider the costs for firms and had failed to show that the asserted benefits of the diversity rule outweigh the costs. *Id*. at 262-63. The court explained that the lead petitioner "misunderstands what the Exchange Act requires" of the SEC in terms of a cost-benefit analysis. The court focused on the SEC's narrow duty to avoid potentially unnecessary burdens on competition:

> The SEC must consider whether proposed rules "impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]." 15 U.S.C. § 78f(b)(8) (emphasis added). So the SEC must analyze burdens on competition, and then decide whether those burdens are "necessary or appropriate" to further the purposes of the Exchange Act. *Id*. These purposes include implementing a philosophy of full disclosure in the securities industry, *see*, *e.g.*, *Affiliated Ute Citizens*, 406 U.S. at 151, 92 S. Ct. at 1456, and relatedly, maintaining fair and orderly markets, *see NASDAQ OMX Grp*., 770 F.3d at 1021. Moreover, in fulfilling its duty under § 78f(b)(8), the SEC need not "measure the immeasurable." *Lindeen v. SEC*, 825 F.3d 646, 658 (D.C. Cir. 2016) (citation omitted). We must "be mindful of the many problems inherent in considering costs and uphold a reasonable effort made by the [SEC]." *Huawei Techs*., 2 F.4th at 452 (cleaned up). In deciding whether "any burden on competition" imposed by a rule is "necessary or appropriate" to further the purposes of the Exchange Act, 15 U.S.C. § 78f(b)(8), the SEC's "discussion of unquantifiable benefits" is sufficient so long as the SEC articulates "a satisfactory explanation" for its analysis, "including a rational connection between the facts found and the choice made," *Lindeen*, 825 F.3d at 658 (cleaned up); see *Huawei Techs*., 2 F.4th at 454 (holding that the agency "was not required to support its analysis with hard data where it reasonably relied on difficult-to-quantify, intangible benefits").

The court determined that in this case, the SEC had adequately considered the rule's potential burdens on competition and its countervailing benefits.

Upshot. The panel's decision appropriately recognized the broad discretion the SEC has in weighing intangible, unquantifiable benefits as part of the SEC's limited duty to conduct economic analysis. However,

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[41] *Amicus* Brief of Better Markets, Inc., *Alliance for Fair Board Recruitment v. SEC,* No. 21-60626 (5th Cir., May 6, 2024), https://tinyurl.com/ypwmjske.

in a 9-8 *en Banc* decision, the full Fifth Circuit would later hold that the SEC did not have authority to approve the Rule because it was "far removed" from the purposes of the Exchange Act of 1934. *Alliance for Fair Board Recruitment v. SEC*, 125 F.4th 159 (5th Cir. 2024). The full court's decision, and its resort to the extraordinary process of en banc review, confirmed the intensity of the Fifth Circuit's ideological animus against the regulatory agencies such as the SEC.

4. ***PayPal, Inc. v. CFPB*, 512 F. Supp. 3d 1 (D.D.C. 2020); *PayPal, Inc. v. CFPB*, 58 F. 4th 1273 (D.C. Cir. 2023); *PayPal, Inc. v. CFPB*, 728 F. Supp. 3d 31 (D.D.C. 2024) — The court incorrectly framed, and misapplied, the economic analysis requirements applicable to the CFPB, striking down a valuable consumer disclosure rule.**

Background. In this case, PayPal, Inc. ("PayPal") sought to invalidate a CFPB rule requiring financial institution to disclose the seven most common fees associated with prepaid products, in a specified tabular format. Prepaid products are financial products that permit a consumer to load funds onto the product for later use in making purchases or engaging in other transactions. These disclosures are invaluable to consumers attempting to determine the true cost of the services provided by reloadable financial products.

The Dodd-Frank Act created the CFPB in part for the purpose of increasing transparency in consumer financial products and it gave the CFPB authority to adopt rules "to ensure that the features of any consumer financial product or service . . . are fully, accurately, and effectively disclosed to consumers" so that consumers can "understand the costs, benefits, and risks associated with the product or service." 12 U.S.C. § 5532.

PayPal initially filed suit in December 2019, claiming that the rule was invalid under the APA and the First Amendment. The D.C. district court held that the rule exceeded the CFPB's statutory authority. *See PayPal, Inc. v. CFPB*, 512 F. Supp. 3d 1 (D.D.C. 2020) ("PayPal I"). The D.C. Circuit reversed and remanded. *See PayPal, Inc. v. CFPB*, 58 F.4th 1273 (D.D. Cir. 2023) ("PayPal II"). On remand, PayPal argued that the rule was arbitrary and capricious as applied to digital wallets and that the CFPB failed to perform a reasoned cost-benefit analysis before extending the rule to digital wallet products.

The District Court's Ruling. The U.S. District Court for the District of Columbia ruled in favor of PayPal, holding that (i) the CFPB lacked a rational justification for subjecting digital wallets such as PayPal to the rule's short-form disclosure requirement; and (ii) that the CFPB failed to perform a reasoned cost-benefit analysis before extending the rule to digital wallet products. *See PayPal, Inc. v. CFPB*, 728 F. Supp. 3d 31 (D.D.C. 2024) ("PayPal III").

On the issue of cost-benefit analysis, the court held that the CFPB's cost-benefit analysis, as mandated by the Dodd-Frank Act, was deficient because the "CFPB gave almost no consideration *at all* to 'the potential benefits and costs' of applying the short-form disclosure mandate specifically to digital wallets." *Id*. at 43 (emphasis in original). Thus, the court concluded that the rule was arbitrary and capricious despite the fact that the CFPB had "concluded that the short-form disclosure would make it easier for consumers to find, understand, and compare information about different products while being inexpensive for providers to implement." *Id*. at 37. In so ruling the court noted that:

> The CFPB's refusal to take these digital wallet concerns seriously—in addition to its failure to "[c]onsider[ ] asserted differences between" products, "quantify any benefits" to digital wallet consumers, and provide a "qualitative analysis" of the real (not imaginary) harms faced by digital wallet consumers and providers alike—defied its cost-benefit obligations under the Dodd-Frank Act and APA.

Id. at 45. The court emphasized that the CFPB had failed to provide "a thoughtful quantitative and qualitative weighing of the Rule's costs and benefits with respect to digital wallets."

Upshot. The district court incorrectly framed and misapplied the economic analysis requirement applicable to the CFPB. Similar to the securities laws, that provision only requires the CFPB to "consider" various factors, including "the potential benefits and costs to consumers and [financial institutions]." 12 U.S.C. § 5512. The Supreme Court held decades ago that the duty to consider factors affords agencies wide discretion and certainly does not require a quantified cost-benefit analysis. The district court ignored that authority. In May 2025, the CFPB filed a joint motion seeking to dismiss its appeal in the D.C. Circuit, and the case is now closed.

5. ***Texas Bankers Ass'n v. CFPB*, No. 7:23-CV-144, 2024 WL 3939598 (S.D. Tex. Aug. 26, 2024) — The court correctly frames and applies the CFPB's limited duty to consider costs and benefits, upholding an important anti-discrimination rule.**

Background. In this case, which is currently on appeal to the Fifth Circuit, various banking associations challenged a CFPB rule amending the rules implementing the Equal Credit Opportunity Act ("ECOA"). That law protects individuals and businesses against discrimination in accessing credit. In an effort to combat discrimination in the small business arena, the CFPB's rule added a number of data points that financial institutions would be required to compile regarding small businesses.

In addition to challenging the constitutionality of the CFPB and its funding source—a claim eventually rejected by the Supreme Court[42]—the plaintiffs claimed that (i) the CFPB promulgated the rule in excess of its statutory authority; (ii) the rule was arbitrary and capricious for failing to consider and respond to significant comments raised by interested parties; and (iii) the rule was arbitrary and capricious because the CFPB's cost-benefit analysis was flawed.

The District Court's Ruling. On August 26, 2024, the U.S. District Court for the Southern District of Texas upheld the rule. The court first rejected plaintiffs' claim that the rule exceeded the CFPB's statutory authority as "all over the place." *Texas Bankers Ass'n v. CFPB*, No. 7:23-CV-44, 2024 WL 3939598, at *6 (S.D. Tex. Aug. 26, 2024). The court then rejected plaintiffs' argument that the rule was arbitrary and capricious for failing to consider and respond to significant comments raised by interested parties, noting that plaintiffs' "argument is convoluted and relies on a series of inferences which clash with the substance of the statutory text." *Id*. at *7.

Finally, the court rejected plaintiffs' argument that the rule was arbitrary and capricious based on the CFPB's cost-benefit analysis:

> These cases elucidate a straightforward proposition that has seemingly evaded Plaintiffs' understanding—that an agency does not fail to "consider" a concern or suggestion simply because it reached a different conclusion. The Bureau considered the various costs in detail, engaged with the various concerns, data, and methodologies, and ultimately based its determinations on plausible justifications. The Court therefore finds that the agency has reasonably considered the costs of the relevant portions of the Final Rule, i.e., the nine additional data points at issue.

Id. at *12. The court also upheld the agency's analysis under the broader APA duty to consider all relevant factors, make rational connections, and explain its action:

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[42] *CFPB v. Cmty. Fin. Services Ass'n of Am.*, 144 S. Ct. 1474 (2024).

> In sum the Bureau has satisfied its obligation to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (internal quotation marks omitted). While a "serious flaw" can render a rule unreasonable, courts afford agencies "considerable discretion" in conducting complex cost-benefit analyses which "epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency." *Huawei*, 2 F.4th at 452 (quoting *Charter Commc'ns*, 460 F.3d at 42.) Here, the administrative record is voluminous and its breakdown of the [CFPB]'s decision making is comprehensive; moreover, the agency has reasonably assessed the effects of the Final Rule, including its anticipated costs versus benefits. The Court therefore "do[es] not find the agency's action outside the realm of reasonableness," *id*. at 456, and the [CFPB] will prevail on Plaintiffs' arbitrary-and-capricious claims.

Id. at *14.

Upshot. This case provides an excellent example of a district court looking past the industry's attempts at obfuscation, focusing on an agency's actual statutory duties in promulgating rules, and affording an agency "considerable discretion" in undertaking the analysis. In addition, the court correctly differentiated between an agency's failure to perform a proper statutory analysis, which would lead to a rule's invalidation, and an agency's simply reaching a conclusion that the industry dislikes.[43]

6. ***Chamber of Com. of United States v. SEC*, 670 F. Supp. 3d 537 (M.D. Tenn. 2023); *Chamber of Com. of United States v. SEC*, 115 F.4th 740 (6th Cir. 2024) — The court correctly frames and applies the SEC's limited duty on economic analysis to uphold beneficial changes to the agency's proxy advice rule.**

Background. In this case, industry organizations sought to nullify the SEC's amendments to the rule governing proxy voting advice businesses ("PVABs"), or proxy advisory firms. PVABs help institutional investors—who face the tremendous burden of understanding and voting on thousands of shareholder proposals at thousands of shareholder meetings—by managing their proxy voting activities through the voting recommendations that they sell to those investors.

On July 13, 2022, the SEC adopted revisions to its proxy advice rules. They eliminated the notice-and-awareness requirement. That provision required PVABs to make their advice available to registered companies at the same time the advice was delivered to the PVABs' clients and to provide clients with a mechanism by which they would become aware of any response by the company.

Plaintiffs filed suit alleging that the 2022 recission failed to meet the procedural and substantive demands of the APA because (i) it only allowed 31 days for comment on the 2022 Recission; (ii) the SEC's explanation for the 2022 recission was arbitrary and capricious; and (iii) it failed to analyze the rule's economic consequences. On cross motions for summary judgment, the United States District Court for the Middle District of Tennessee granted judgment in favor of the SEC and plaintiffs appealed to the Sixth Circuit.

The Sixth Circuit's ruling. On September 10, 2024, the Sixth Circuit issued a 2-1 decision affirming the district court's granting of summary judgment in favor of the SEC and rejecting all of the challengers' claims.

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[43] Plaintiffs have appealed to the Fifth Circuit, and on February 7, 2025, the Fifth Circuit entered a stay in that action per the CFPB's request under new Bureau leadership. *Texas Bankers Ass'n v. CFPB*, No. 24-40705, 2025 WL 429913, at *1 (5th Cir. Feb. 7, 2025).

On the issue of cost-benefit analysis, the Sixth Circuit first correctly recited the SEC's limited duty to consider whether the rule would promote efficiency, competition, and capital formation. *Id*. at 753. It then held that

> Relying on its prior analysis, the Commission reasonably explained how the benefits of rescinding the Notice-and-Awareness Conditions would affect efficiency and competition in the market. That reasonable explanation was sufficient for purposes of the Exchange Act . . . .

115 F.4th at 753.

The court also upheld the SEC's consideration of costs and benefits, observing that the SEC had "adequately estimated the benefits of rescinding the Notice-and-Awareness Conditions." *Id*. at 753. The court further held that the SEC had also adequately assessed the costs of the rule. And it explained that quantification was unnecessary:

> However, the SEC's qualitative analysis of costs was sufficient because the potential costs that the plaintiffs identify are not easily quantified. *See Lindeen*, 825 F.3d at 658 (noting that Commission was not required to "conduct a rigorous, quantitative economic analysis of every potential cost and benefit" to satisfy Exchange Act requirements (quotation omitted)).

Id. at 754.

Upshot. This case reflects the viewpoint of another court, here the Sixth Circuit, that accurately frames and applies the SEC's limited statutory duty to conduct economic analysis.

PART THREE: EXECUTIVE ORDERS

I. Prior administrations have taken dramatically different approaches to the regulatory framework.

The executive branch agencies have been required to conduct a form of cost-benefit analysis for their rules pursuant to a series of executive orders that date back to the Reagan Administration. The cornerstone of that framework is E.O. 12,866, signed by President Clinton in 1993.[44] However, that order and subsequent variants have consistently and expressly excluded the independent regulatory agencies, including the SEC and the other financial regulatory agencies.

During his first term beginning in 2017, President Trump issued a series of executive orders and memoranda that imposed draconian new anti-regulatory obligations on agencies or called for studies that would serve as the basis for the expected repeal of important regulatory protections. Some of those proclamations incorporated costs and benefits as the subject of mandated studies or as factors that must be weighed in new and particularly onerous ways. For example, the "Reducing Regulation and Controlling Regulatory Costs" executive order[45] required the repeal of two regulations for every new regulation that was promulgated. It further provided that any cost to the industry be balanced by the repeal of other regulations, regardless of the benefits of the new or rescinded rules. Fortunately, however, none of those orders purported to impose cost-benefit analysis obligations on the independent agencies.

[44] *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); *see also* Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

[45] Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017).

The Biden Administration took a very different approach to regulation in general and cost-benefit analysis in particular. President Biden revoked a number of President Trump's de-regulatory orders and also articulated a fundamentally different and more positive view of the value of regulation.[46] For example, on January 20, 2021, President Biden issued a memorandum titled "Modernizing Regulatory Review"[47] that embraced regulation as a force for improving the lives of the American people. It called for modernizing regulatory review of executive branch rules, not to burden and constrict regulation but to help ensure that regulation could address an array of important societal challenges, from economic downturns to climate change. He specifically highlighted the need to promote policies that "fully account[] for regulatory benefits that are difficult or impossible to quantify" and that do not "have harmful anti-regulator or deregulatory effects." And the basic limiting principle articulated in prior executive orders on cost-benefit analysis (including notably Exec. Order No. 12,866 dating back to 1993) remained intact: The independent regulatory agencies were not subject to the cost-benefit analysis requirements set forth in those orders.[48]

The Biden Administration also made landmark and positive changes to the guidance governing the application of cost-benefit analysis by the executive branch agencies. It substantially revised Circular No. A-4, originally issued in 2003. The amended version called for a new approach to regulatory cost-benefit analysis that more fully accounted for the long-term, distributional, and global effects of regulation.[49] In other words, revised Circular No. A-4 called on regulatory agencies to value costs and benefits differently based on who was absorbing those costs and benefits—an appropriate approach from the standpoint of everyday Americans who feel the effects of an extra dollar in costs or benefits more acutely than financial firms and wealthy individuals. The new circular represented a marked improvement to guidance to the executive branch agencies on the development of regulatory analysis. But, as noted below, revised Circular No. A-4 was short-lived under the Trump Administration.

Finally, under the Biden Administration, the Financial Stability Oversight Council revised its guidance governing the Council's authority to designate systemically important nonbank financial institutions for prudential supervision. The new guidance squarely rejected prior guidance issued under the first Trump Administration, which required the application of cost-benefit analysis in the designation process:

> In particular, the 2019 Interpretive Guidance stated that before considering a nonbank financial company for potential designation under section 113 of the Dodd-Frank Act, the Council would exhaust all available alternatives by prioritizing an ''activities-based approach,'' *perform a cost-benefit analysis*, and assess a company's likelihood of material financial distress. As explained below, the Council has determined that these steps are not legally required, are not useful or appropriate, and would unduly hamper the Council's ability to use the statutory designation authority in relevant circumstances.[50]

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[46] *See* Exec. Order No. 14,992, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7,049 (Jan. 21, 2021).

[47] Memorandum for the Heads of Executive Departments and Agencies, *Modernizing Regulatory Review*, (Jan. 20, 2021), https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/.

[48] *See generally* CONG. RSCH. SERV., COST-BENEFIT ANALYSIS IN FEDERAL AGENCY RULEMAKING (Mar. 8, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12058.

[49] *See* Circular No. A-4, THE WHITE HOUSE (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf. Although finalized on November 9, 2023, revised Circular No. A-4 did not become effective until March 1, 2024, for proposed rules, interim final rules, and direct final rules.

[50] Financial Stability Oversight Council, Guidance on Nonbank Financial Company Determinations, 88 Fed. Reg. 80,110-11 (Nov. 17, 2023).

II. The current Administration has dramatically escalated its attack on regulation and its effort to impose cost-benefit analysis requirements.

The second Trump Administration, just four months old, has already taken a sledge hammer to the framework governing agency rulemaking. For example, on February 18, 2025, President Trump issued an executive order that dramatically expanded the White House's review and oversight of the independent regulatory agencies, including their rulemaking process.[51] It declares that "it shall be the policy of the executive branch to ensure Presidential supervision and control of the entire executive branch. Moreover, all executive departments and agencies, *including so-called independent agencies*, shall submit for review all proposed and final significant regulatory actions to the Office of Information and Regulatory Affairs ("OIRA") within the Executive Office of the President before publication in the Federal Register." *See* Section 1. It also explicitly makes the independent agencies subject to Executive Order 12,866, thereby requiring them to prepare a cost-benefit analysis for each of their rules. *See* Section 2(b) (definitions); Section 3 (a) (amending Executive Order 12,866). President Trump's February 18 order furthermore asserts authority to adjust the "apportionments" of the independent agencies. See Section 5. And it provides that the President and the Attorney General's opinions on questions of law are controlling on all agency employees in the conduct of their official duties. *See* Section 7.

The Trump Administration has also issued executive orders that repeal some of President Biden's reforms to the rulemaking process and create new anti-regulatory requirements. On his first day in office, President Trump signed Executive Order No. 14,148, titled "Initial Rescissions of Harmful Executive Orders and Actions."[52] Among other things, that wide ranging order repealed President Biden's Executive Order No. 14,094, titled "Modernizing Regulatory Review," the basis for revised Circular No. A-4.[53] And on January 31, 2025, President Trump summarily repealed the Biden Administration's improvements to Circular No. A-4 when he signed Executive Order No. 14,192, titled "Unleashing Prosperity Through Deregulation."[54] That Executive Order "revoke[d] OMB Circular No. A-4 of November 9, 2023 (Regulatory Analysis), and all accompanying appendices, guidelines, and documents." Exec. Order No. 14,192, § 6(b). Executive Order No. 14,192 also "reinstate[d] the prior version of Circular A-4, issued on September 17, 2003." *Id*. Finally, Executive Order No. 14,192 also issued the absurd mandate that "for each new regulation issued, at least 10 prior regulations be identified for elimination." *Id*. at § 1.

These draconian changes in the regulatory infrastructure for federal agencies should come as no surprise given the recent confirmation of Russell Vought, widely considered an "architect" of Project 2025, as White House OMB Director.[55] As Mr. Vought said in a 2023 speech, "[w]e want the bureaucrats to be traumatically affected. . . [w]hen they wake up in the morning, we want them to not want to go to work because they are increasingly viewed as the villains." *Id*. And Project 2025 makes clear that revised Circular A-4 was doomed from the beginning in a Trump Administration:

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[51] Exec. Order No. 14, 215, *Ensuring Accountability for all Agencies*, 90 Fed. Reg. 10,447 (Feb. 24, 2025).

[52] 90 Fed. Reg. 8,237 (Jan. 28, 2025).

[53] While "old" Circular No. A-4 was originally issued in response to President Clinton's 1993 Executive Order No. 12,866, "new" Circular No A-4 was largely a response to President Biden's January 20, 2021, memorandum reforming regulation. *See* Memorandum for the Heads of Executive Departments and Agencies, Modernizing Regulatory Review (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/. That memorandum was the basis for Executive Order No. 14,094, Modernizing Regulatory Review (Apr. 6, 2023), https://www.federalregister.gov/documents/2023/04/11/2023-07760/modernizing-regulatory-review and ultimately resulted in the issuance of revised Circular No. A-4.

[54] 90 Fed. Reg. 9,065 (Feb. 6, 2025).

[55] Alan Rapaport, *Senate Confirms Russell Vought as Office of Management and Budget Director*, NY TIMES (Feb. 6, 2025), https://www.nytimes.com/2025/02/06/us/politics/russell-vought-omb-senate-vote.html.

> If the current Administration proceeds with its declared intent to modify aspects of EO 12866 or review OMB Circular A-4, the related document that provides the foundation for cost-benefit analysis, the next President should immediately begin to undo those changes and develop a rigorous, data-driven approach that will result in the least burdensome rules possible.

Russ Vought, *Project 2025*, Section 1: Taking the Reins of Government, Subsection 2, Executive Office of the President of the United States, p. 49.

In the area of banks and nonbank financial institutions, the current Trump Administration has not yet restored guidance from the first Trump Administration that would require FSOC to conduct a cost-benefit analysis before designating a systemically important nonbank for prudential supervision. However, it is only reasonable to expect such a move, given the wave of de-regulatory steps the Trump Administration has already taken, including its praise for cost-benefit analysis.

With respect to bank regulation more generally, the views of Michele Bowman, President Trump's nominee to serve as Vice Chair for Supervision of the Board of Governors of the Federal Reserve System, are especially troubling. In testimony before Congress in April 2025, she made the astonishing revelation that although "the Fed is not required to apply cost-benefit analysis . . . . if I'm confirmed, I intend to strictly comply with cost-benefit analysis."[56]

Such an embrace of cost-benefit analysis, divorced from what the law actually requires, will inevitably undermine the public interest. As Better Markets explained in its fact sheet,

> The fact that Governor Bowman clearly stated that she plans to implement cost-benefit analysis, even though it is not required, is a dangerous statement, as it always will favor the industry. Moreover, this is not the path toward achieving a higher bar for Fed decision-making. Quite the opposite, it is stacking the deck in favor of the industry that will lobby relentlessly to inflate its anticipated cost, relative to the public interest.[57]

Similarly, newly confirmed SEC Chair Paul Atkins touted his own commitment to "robust cost-benefit analysis when considering new regulations" during is recent testimony before the House Appropriations Subcommittee on Financial Services and General Government.[58]

It should be clear that all of these de-regulatory steps, predicated on misguided notions about cost-benefit analysis, will hurt every American who counts on the regulatory agencies to protect them from financial predators, rigged financial markets, and financial crashes like the one in 2008 that nearly destroyed the economy. Far from securing "America's economic prosperity and national security and *the highest possible*

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[56] *Nomination Hearing Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, 119th Cong. 1:40:03-21 (Apr. 10, 2025) (testimony of Michelle Bowman, Vice Chairman for Supervision Designate), https://www.banking.senate.gov/hearings/04/03/2025/nomination-hearing.

[57] Shayna Olesiuk, Director of Banking Policy, *Fact Sheet: Michelle Bowman's Testimony to Be the Fed's Vice Chair for Regulation and Supervision Should Be Disqualifying* (Apr. 29, 2025), https://tinyurl.com/ysyt46sx.

[58] *Oversight Hearing of the U.S. Securities and Exchange Commission, Before the Subcomm. on Financial Services and General Government of the H. Comm. on Approps.*, 119th Congress 1 (May 20, 2025) (written statement of Paul S. Atkins, Chairman, U.S. Securities and Exchange Commission), https://docs.house.gov/meetings/AP/AP23/20250520/118265/HHRG-119-AP23-Wstate-AtkinsP-20250520.pdf.

quality of life for each citizen,"[59] President Trump's recent wave of executive actions represents a terrible setback for the regulatory protections that have made the U.S. financial markets the most robust and trusted in the world.

PART FOUR:
THE HILL

I. 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's rules in the D.C. Circuit. And the timing of these bills was carefully calculated, as they came on the heels of the Dodd-Frank Act, which required financial regulatory agencies to produce hundreds of new rules.

The CHOICE Act 2.0, which passed the House in 2017,[60] exemplifies one of the most draconian measures designed to hobble the financial regulators, including the independent agencies. It included these measures, clearly designed to make rulemaking virtually impossible:

- 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 would 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;[61]

- retrospective review of all rules within one year and every five years thereafter, followed by mandatory reports on ways to simplify rules;[62]

- expanded opportunities for challenging rules in court by any affected person;[63] and

[59] Executive Order No. 14,192, § 1 (emphasis added).

[60] H.R. 10, 115th Cong. (2017).

[61] *Id*. at § 312.

[62] *Id*. at § 315.

[63] *Id*. at § 317.

- congressional approval for all major rules; [64]

Fortunately, neither the CHOICE Act 2.0 nor the many similar bills aimed at undermining regulation were actually passed.

II. The legislative threat continues.

Nevertheless, there are clear signs that Congress, now with the Trump Administration's imprimatur, still intends to legislatively impose cost-benefit analysis on the SEC and other financial regulators. For example, on January 15, 2025, Senator Tim Scott (R-N.C.), the newly installed chair of the Senate Banking Committee, announced the Committee's priorities for the 119th Congress, and among them was promoting "legislative proposals that enshrine cost-benefit analyses into law."[65]

In addition, the substance of a bill advanced by Senator Scott during the last Congress, the "Empowering Main Street Americans Act," may well be re-introduced during the current Congress. As the fact sheet makes clear,[66] in the misleading guise of helping small businesses and investors, the bill would actually relax key safeguards in the securities markets that protect investors. It would also expose a much larger class of individual investors to the most risky and opaque private offerings by "expanding the definition of who can qualify as an accredited investor." And along with these dangerous de-regulatory measures, the tail end of the fact sheet explains that the bill would also increase oversight of the SEC and "statutorily require the SEC to perform thorough rulemaking cost-benefit analysis."

Similar legislative measures can be expected in the House. For example, on September 26, 2023, the Republican members of the House Financial Services Committee, led by then-chair Rep. Patrick McHenry, issued a letter to SEC Chair Gary Gensler criticizing the agency for its failure to conduct thorough economic analysis or consider stakeholder feedback.[67] The letter faults the SEC for allegedly insufficient "staff research and analysis, including cost-benefit analysis." It goes further and even calls upon the SEC to "[c]onduct a comprehensive cost-benefit analysis of the aggregate impact of rules." The current chair of the House Financial Services Committee, Rep. French Hill, co-signed the letter, indicating his support for these de-regulatory measures.

Some members of Congress also want to shackle other agencies, including CFPB, with the duty to perform more exhaustive cost-benefit analyses of their rules. For example, at a hearing just last December, Senator Tillis repeatedly pressed then-CFPB chair Rohit Chopra on the cost-benefit analysis the agency conducted for

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[64] *Id.* at § 332.

[65] Press Release, U.S. Senate Committee on Banking, Housing, and Urban Affairs, *Scott Announces Banking Committee Priorities for the 119th Congress* (Jan. 15, 2025), https://www.banking.senate.gov/newsroom/majority/scott-announces-banking-committee-priorities-for-the-119th-congress#:~:text=Under%20Chairman%20Scott%2C%20the%20committee,climb%20the%20ladder%20of%20success.

[66] Press Release, U.S. Senate Committee on Banking, Housing, and Urban Affairs, *Scott Announces Capital Markets Reform Framework* (Nov. 02, 2023), https://www.banking.senate.gov/newsroom/minority/scott-announces-capital-markets-reform-framework.

[67] Letter from U.S. Representative Patrick McHenry to SEC Chair Gary Gensler (Sept. 26, 2023), https://tinyurl.com/yogotr7y.

its rules, suggesting that the analyses should represent a full-blown, quantitative, accounting-style workup—something Congress deliberately refrained from requiring the CFPB to prepare in the rulemaking process.[68]

The legislative push in that direction is underway. A bill introduced in the House in March 2025 would impose a sweeping new set of requirements on the CFPB's rulemaking process, focused predominantly on cost-benefit analysis. *See* H.R. 2331, Transparency in CFPB Cost-Benefit Analysis Act (Mar. 25, 2025). It would require "a quantitative and qualitative assessment of all anticipated direct and indirect costs and benefits of the proposed regulation," as well as a similar analysis for every alternative approach to the proposed rule, which the CFPB must identify. And while the bill details the different types of costs that must be taken into account, it requires no comparable analysis of the many types of benefits that the proposed rule would confer. Another bill introduced in the House in February 2025 would limit the CFPB's authority to address unfair, deceptive, and abusive acts or practices through its rules and would require that any "final rule issued by the Bureau relating to abusive, unfair, or deceptive acts or practices shall include a cost-benefit analysis. *See* H.R. 1652, Rectifying Undefined Descriptions of Abusive Acts and Practices Act (Feb. 27, 2025).

PART FIVE: THE ACADEMIC LITERATURE ON COST-BENEFIT ANALYSIS

I. Scholarly studies have shown that cost-benefit analysis is unworkable in financial regulation.

The trend among scholars who are experts in cost-benefit analysis is not uniform, but prominent thinkers continue to argue persuasively that cost-benefit analysis cannot reasonably be applied to financial regulation. For example, 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 those rules.[69] 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."[70]

Columbia Law School Professor Jeffrey Gordon 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."[71] He concludes that new rules change the system "beyond our calculative powers."[72] 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).[73] 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

[68] Hearing, Senate Committee on Banking, Housing & Urban Affairs, *Consumer Protection: Protecting Workers' Money and Fighting for the Dignity of Work* (Dec. 11, 2024), https://www.youtube.com/watch?v=6UtkTQwKy2c&t=3150s.

[69] John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J. 882, 886 (2015).

[70] *Id.* at 887.

[71] Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. OF LEGAL STUD. S351 (2014).

[72] *Id.*

[73] *Id.*

inherent in different regulatory approaches.[74] We briefly canvassed these and other academic analyses in our 2023 report.[75]

II. Criticisms of cost-benefit analysis continue to be voiced by academics.

Below we collect a sample of more recent scholarly writings from the past two years that discuss a variety of issues surrounding cost-benefit analysis at regulatory agencies, along with a short synopsis describing the thrust of each article. Many of them see profound drawbacks in the application of cost-benefit analysis.

1. David Zaring, *The Corporatist Foundations of Financial Regulation*, 108 IOWA L. REV. 1303 (2023) (noting that the banking regulators are unique in their ability to disregard cost-benefit analysis, and for good reason), https://ilr.law.uiowa.edu/volume-108-issue-3-0/2023/03/corporatist-foundations-financial-regulation.

2. Cass R. Sunstein, *Welfare Now*, 72 DUKE L.J. 1643, 1652 (2023) (finding cost-benefit analysis "has serious flaws, in part because experienced well-being—defined as the level of well-being that people have when they are experiencing their lives—greatly matters—though it is not all that matters—and cost-benefit analysis is only a proxy for it. People's emotional states are central to an evaluation of welfare effects."), https://scholarship.law.duke.edu/dlj/vol72/iss8/1/.

3. Jeremy C. Kress and Jeffery Y. Zhang, *The Macroprudential Myth*, 112 GEORGETOWN L.J. 569, 621 (2024) (noting that "financial regulations are uniquely susceptible to cost-benefit challenges because quantifying the benefits of a crisis averted is nearly impossible, while cost projections are highly sensitive to discount rate assumptions"), https://repository.law.umich.edu/articles/3011/.

4. Jeffrey J. Rachlinski, *Nudges, Defaults, and the Problem of Constructed Preferences*, 72 DUKE L.J. 1731 (2023) (explaining how nudges influence preferences and why this makes neutral cost-benefit analysis impossible for regulators), https://scholarship.law.duke.edu/dlj/vol72/iss8/3/.

5. Mark Febrizio, Sarah Hay and Zhoudan (Zoey) Xie, *Comparing the Draft and Final Circular A-4*, REGULATORY STUDIES CENTER, GEORGE WASH. UNIV. (2023), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2023-11/insight_comparing_the_draft_and_final_circular_a4_final2.pdf; *see also* Sarah Hay & Zhoudan (Zoey) Xie, Circular A-4: A Comparison between the 2023 Draft and the 2003 Circular, REGULATORY STUDIES CENTER, GEORGE WASH. UNIV. (2023), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2023-06/a4_comparison_hay_xie_june2023_final.pdf.

6. Jonathan S. Gould, *Cost-Benefit Analysis in Polarized Times*, 75 ADMIN. L. REV. 695 (2023) (arguing that (i) both Republicans and Democrats have found value in cost-benefit analysis because for Republicans it allows them a way to "throw sand in the gears of agency operations" and for Democrats, some are of the view that cost-benefit analysis supports progressive rulemakings; and (ii) conducting cost-benefit analyses reduces legal risk because it shifts decision-making authority to the courts which determine how costs or benefits should be determined and how persuasive to consider the calculations of the government and respondents), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4692088; *see also* Jonathan S. Gould,

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[74] *Id.*

[75] *See supra* note 5.

Cost-Benefit Analysis in Polarized Times, YALE J. ON REGULATION BLOG ENTRY (2024), https://www.yalejreg.com/nc/cost-benefit-analysis-in-polarized-times-by-jonathan-s-gould/.

7. Caroline Cecot, *An Equity Blindspot: The Incidence of Regulatory Costs*, 14 J. OF BENEFIT-COST ANALYSIS 35 (2023) (noting that cost distribution cost-benefit blindness presents a missed opportunity for agencies to use the current equity-focused momentum to make real improvements for disadvantaged groups that could have long-lasting effects), https://www.cambridge.org/core/journals/journal-of-benefit-cost-analysis/article/an-equity-blindspot-the-incidence-of-regulatory-costs/086E4F89601E6BCD53E223CC851B5781.

8. Joel Seligman, *The Judicial Assault on the Administrative State*, 100 WASH. U.L. REV. 1687 (2023) (finding that after the demise of Chevron, cost-benefit analysis shifts decision making authority to the courts to calculate how costs and benefits should be determined), https://wustllawreview.org/2023/08/09/the-judicial-assault-on-the-administrative-state/.

9. Zhoudan (Zoey) Xie, Sarah Hay, Henry Hirsch, *Care to Comment? Topics Discussed in Revised Circular A-4 Public Comments*, REGULATORY STUDIES CENTER, THE GEORGE WASH. UNIV. (2023) (observing that the Office of Management and Budget's request for comments resulted in almost 4,500 comments, but only 185 unique submissions contained substantive analysis, with the rest associated with template based comment campaigns featuring heavy duplication, and noting that most commentators expressed the opinion that benefit-cost analysis is "an outdated and anti-public" mechanism that weights costs more heavily than unquantifiable benefits), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2023-07/commentary_on_a-4_comments_final2.pdf.

10. David Rosenfeld, *Stay in Your Lane! Law, Politics, and the SEC's Climate Disclosure Proposal*, 84 LA. L. REV. 1283, 1310 (2024) (discussing cost-benefit analysis as a hurdle in any SEC rule for non-material climate disclosures because "with no benefit on one side of the ledger, any cost will necessarily tip the scales"), https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=7009&context=lalrev.

11. Abe Eichner, *Agency Use of Indirect Benefits to Justify Regulation*, 122 MICH. L. REV. 1687 (2024) (arguing that—even without statutory authorization—agencies, and the Environmental Protection Agency in particular, should be able to consider indirect benefits when constructing their cost-benefit analysis since it furthers the administrative law values of rational decision making, transparency, and accountability), https://repository.law.umich.edu/mlr/vol122/iss8/4/.

12. Andrew T. Levin & Christina Parajon Skinner, *Central Bank Undersight: Assessing the Fed's Accountability to Congress*, 77 VAND. L. REV. 1769, 1774 (2024) (critiquing the Federal Reserve's lack of accountability, noting the lack of cost-benefit analysis in the Federal Reserve's reporting, and arguing that persistent congressional "undersight" could threaten the delicate balance between the Federal Reserve's independence and its public accountability), https://scholarship.law.vanderbilt.edu/vlr/vol77/iss6/3/.

13. Jack Lienke, *Justifying Redistributive Regulations*, 58 U. MICH. J.L. REFORM 139 (2024) (observing that when crafting regulations, agencies often ignore distributional consequences, but Congress often asks agencies to fill in the details of its transfer programs with regulations, i.e., "transfer rules," such as those setting eligibility criteria and benefit parameters for healthcare, housing, and nutritional assistance that could be used to give consideration to distributional consequences,

and providing a critique of revised Circular No. A-4 as "insufficient"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4934048.

14. Daniel Hemel, *Wealth, Schmealth, Welfare, and Schmelfare*, 60 WAKE FOREST L. REV 1103 (arguing that the traditional cost-benefit analysis framework focuses on "schmealth"—wealth minus the deadweight loss of redistribution—rather than actual wealth and introducing the concept of "schmelfare," a metric used in the Biden Administration's revised Circular A-4 that accounts for distributional benefits but ignores deadweight loss. The article identifies four potential standards for cost-benefit analysis—schmealth, wealth, schmelfare, and welfare—and evaluates them through meta-criteria such as accuracy in measuring welfare, decision-maker competence, policy stability, and analytical burden), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4755600.

15. Matthew R. Osucha, Note, *Presidential Oversight of Independent Agency Rulemaking: A Literature Review*, 100 NOTRE DAME L. REV. REFLECTION 111 (2025) (observing that extending Executive Order No. 12,866's cost-benefit provisions to independent regulatory agencies raises critical questions about the nature of presidential administration and the evolving role of the President in shaping regulatory policy, and providing an overview of the competing perspectives in the form of a literature review).

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