CENTER FOR CAPITAL MARKETS COMPETITIVENESS

TOM QUAADMAN
SENIOR VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5540
tquaadman@uschamber.com

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The Honorable Janet Yellen
Chair
Board of Governors of the
Federal Reserve System
20th St. and Constitution Ave., NW
Washington, DC 20551

The Honorable Thomas Curry
Comptroller of the Currency
Office of the Comptroller of the
Currency
400 7th Street SW
Washington, DC 20219

The Honorable Martin J. Gruenberg
Chairman, Board of Directors
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

RE: Incentive-Based Compensation Arrangements; 12 CFR Part 42 Docket No. OCC-2011-0001 RIN 1557-AD39; 12 CFR Part 236 Docket No. R-1536 RIN 7100 AE- 50; 12 CFR Part 372 RIN 3064-AD86; 12 CFR Part 1232 RIN 2590-AA42; 12 CFR Parts 741 and 751 RIN 3133-AE48; 17 CFR Parts 303, 240, and 275 Release No. 34-77776; IA-4383; File no. S7-07-16 RIN 3235-AL06

Dear Chair Yellen, Chairman Gruenberg, and Comptroller Curry:

The U.S. Chamber of Commerce (the "Chamber") is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to advocate for policies to promote efficient capital markets, including strong corporate governance policies.

While the CCMC will file substantive comment letters on the re-proposed Incentive-Based Compensation Arrangements rule (the "Re-proposal"), we believe it is necessary to point out certain deficiencies that hamper the ability of stakeholders to fully comprehend the Re-proposal and provide fully informed comments on it to the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation (collectively, the

"Federal Banking Agencies") . Conspicuously absent from the Re-proposal is an analysis by the Federal Banking Agencies of the burdens and costs of the proposed regulation, which is required by statute.[1] Accordingly, the CCMC respectfully requests that the Federal Banking Agencies fulfill their respective legal obligations and publish such analysis when the Re-proposal is published in the Federal Register. This will allow stakeholders and the general public to have a full and fair opportunity to review the Re-proposal and to submit thoughtful, thorough comments to the Federal Banking Agencies and all of the agencies involved in this rulemaking.

Discussion

Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") requires the Federal Banking Agencies, the Securities and Exchange Commission ("SEC"), the National Credit Union Administration, and the Federal Housing Finance Authority to "jointly prescribe" regulations on incentive based compensation arrangements for financial services firms. A proposal issued in 2011 was never finalized. These six agencies recently re-proposed a rule to implement Section 956 of the Dodd-Frank Act.

An economic analysis of the costs and benefits of a proposed regulation on those affected by it is a critical tool in a regulator's tool box.[2] Cost-benefit analysis provides discipline to rulemaking so that rules are narrowly tailored to the problem they are designed to address. It also encourages the consideration of less costly alternative approaches. Financial regulators should welcome the public's cooperation in such analysis to guarantee they consider a diversity of data and viewpoints germane to a specific rulemaking before it is finalized and implemented across a market.

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[1] This is not the first time the CCMC has written to the Federal Banking Agencies asking for this kind of economic analysis. *See, e.g.*, Letter from Tom Quaadman, CCMC, to the Federal Banking Agencies and others, Feb. 25, 2014, http://www.centerforcapitalmarkets.com/wp-content/uploads/2014/03/2014-2.25-Riegle-Act-Risk-Retention-Rule-Final.pdf.

[2] *See* Paul Rose and Christopher J. Walker, The Importance of Cost-Benefit Analysis in Financial Regulation, U.S. Chamber of Commerce (2013).

But an agency's failure to undertake economic analysis is more than a missed opportunity. The lack of adherence to express congressional instructions to consider certain costs and benefits is itself a violation of the Administrative Procedure Act, and it increases the possibility that the resulting rule will arbitrary and capricious.[3] For example, in 1996, Congress amended the Securities Exchange Act to require the SEC to consider a proposed rule's economic impact on efficiency, competition, and capital formation, in addition to its preexisting duty to consider the impact on investor protection.[4] In the years that followed, the SEC failed to take that mandate seriously, often claiming in a perfunctory way that it had "considered" the costs and benefits of a proposed rule and thus satisfied the statute even though it did not publish its analysis. It was not until a series of decisions by the United States Court of Appeals for the District of Columbia that the SEC began to undertake and publish its economic analysis when it proposes a rule.[5] Today, the public now has over 100 pages of economic analysis from the SEC in connection with the Re-proposal.

In stark contrast, we currently have zero pages of economic analysis concerning the Re-proposal from the Federal Banking Agencies despite the clear language of the Riegle Community Development and Regulatory Improvement Act of 1994 (the "Riegle Act"). Like the SEC, the Federal Banking Agencies are *required* to consider the costs and benefits of their proposed rules, albeit with respect to different metrics. Section 302 of the Riegle Act provides:

> [i]n determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking

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[3] *See* 5 U.S.C. § 706(2).

[4] 15 U.S.C. § 77b(b) ("Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."); *accord* 15 U.S.C. § 78c(f) (same); 15 U.S.C. § 80a-2(c) (same); 15 U.S.C. § 80b-2(c) (same).

[5] *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (chastising the SEC "for having failed once again—as it did most recently in *American Equity Investment* . . . and before that in *Chamber of Commerce*—adequately to assess the economic effects of a new rule"); *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005).

> agency shall consider, consistent with the principles of safety and soundness and the public interest: (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of such regulations.[6]

This statute is designed to enforce the commonsense principle that the benefits of a proposed regulation should outweigh the administrative and compliance burdens the Federal Banking Agencies place upon insured depository institutions. The requirement to perform and allow public comment on a cost-benefit analysis is not optional. Congress very expressly mandated it.

Nevertheless, the analysis the Riegle Act requires is completely missing from the Re-proposal. The text of Section D of Part V simply states, "[t]he Federal Banking Agencies note that comment on [matters covered by the Riegle Act] has been solicited" in other sections of the text.[7] Those sections, however, are lacking in any analysis on the administrative burdens that the proposal would place on depository institutions or the benefits of the proposal.[8] What expenses will firms covered by the proposed rule incur in changing their incentive-based compensation arrangements? How will customers of depository institutions be affected? What are the benefits of this rule and how do regulators assess them in light of regulations promulgated over the last five years pursuant to the Dodd-Frank Act?[9] What alternative were considered?

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[6] 12 U.S.C. § 4802.

[7] Proposed Rule on Incentive-based Compensation Arrangements 351, https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160516a1.pdf.

[8] *See id.* at 55-59, 149-61.

[9] We note that the Dodd-Frank Act is replete with provisions that are each designed to reduce systemic risk. We would assume that the analysis accompanying each successive regulation would take into account the regulatory work that has preceded it. In this case, for example, we question the marginal benefit of the proposal on reducing systemic risk when regulators have already issued rules concerning a firm's capital reserves, liquidity management, ability to resolve quickly without posing a material threat to the financial system, and other similar regulations. At a minimum, commenters are entitled to understand how the Federal Banking Agencies analyzed how this proposal will work in conjunction with other regulations.

As the line of D.C. Court of Appeals cases involving the SEC demonstrates, it is not enough for an agency simply to punt the responsibility for undertaking cost-benefit analysis to the public during the comment period. Quite the opposite, an agency must "apprise itself—and hence the public and Congress—of the economic consequences of a proposed regulation *before* it decides whether to adopt the measure."[10] Commenters are entitled to see an agency's analysis at the time a rule is proposed, to critique its data and methods, and to present new data and analysis. Presumably, the Federal Banking Agencies put a great deal of thought and analysis into these questions over the five years since they first proposed an incentive-based compensation rule, but they have declined to share it. The Federal Banking Agencies seriously risk running afoul of the Riegle Act's strict requirement for cost-benefit analysis if the Re-proposal is placed in the Federal Register in its current form.

Moreover, the failure to perform economic analysis would also run counter to President Obama's Executive Order 13579, which requires that "to the extent permitted by law, independent regulatory agencies should comply with" the provisions of Executive Order 13563.[11] That order directs covered agencies to propose or adopt a regulation "only upon a reasoned determination that its benefits justify its costs."[12] At least one of the Federal Banking Agencies, the Board of Governors of the Federal Reserve System, has committed itself to undertaking such an analysis.[13] But despite this public commitment, the Federal Reserve's version of the Re-proposal contains no such cost-benefit analysis. Neither does the Re-proposal contain any explanation for why the Federal Banking Agencies appear to be disregarding this Administration's openness and transparency directives.

Whether by statute or executive order, the rulemaking process is designed to invite and take account of public input, but the public cannot provide meaningful input when regulators do not publish their data and analysis. Understanding the costs

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[10] *Chamber of Commerce v. SEC*, 412 F.3d at 144 (emphasis added).
[11] *See* Exec. Order No. 13,579, 76 Fed. Reg. 41585 (July 14, 2011).
[12] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).
[13] Letter from Chairman Ben Bernanke to Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Nov. 8, 2011 (stating that the Board of Governors of the Federal Reserve System "continues to believe that [its] regulatory efforts should be designed to minimize regulatory burden consistent with the effective implementation of [its] statutory responsibilities").

and benefits that regulators considered in relation to the Re-proposal and the burdens they believe it will impose is critical to the public's ability to respond to it. We trust that the Federal Banking Agencies will take their legal obligations under the Riegle Act and public commitments to undertake cost-benefit analysis seriously and include a robust economic analysis with the Re-proposal when it is formally placed in the Federal Register. We look forward to reviewing such analysis and offering substantive, thoughtful comments for your consideration.

Sincerely,

Tom Quaadman

cc: The Honorable Mary Jo White, Chair, SEC
The Honorable Mel Watt, Director, FHFA
The Honorable Rick Metsger, Chairman of the Board, NCUA