REGULATIONS AND RULEMAKING
Regulations generally start with an act of Congress and are the means by which statutes are implemented and specific requirements are established by executive branch agencies. More than 100 federal agencies issue more than 3,000 final rules each year on topics ranging from the timing of bridge openings to the amount of arsenic in drinking water. Estimates of the cost of federal regulations are in the hundreds of billions of dollars, and estimates of regulatory benefits are even higher.

The Congressional Review Act (CRA) requires agencies to submit their final rules to both houses of Congress and the Government Accountability Office (GAO) before the rules can take effect, and provides expedited procedures (primarily in the Senate) by which Congress can disapprove agencies’ final rules. Congress has also added provisions to agencies’ appropriations bills to prevent rulemaking in certain areas, to prevent certain proposed rules from being made final, and to prevent the implementation and enforcement of certain final rules.

In recent decades, a variety of reforms have been proposed or put in place by Congress or the President to improve the rulemaking or regulatory process, including (1) requirements that agencies use various forms of regulatory analysis (e.g., cost-benefit analysis or risk assessment) when developing certain regulations; (2) the establishment of offices or procedures within the Office of Management and Budget (OMB) or Congress for the review of agencies’ rules before or after their issuance; (3) the development of regulatory accounting statements reflecting the total costs and benefits of agencies’ rules; (4) reviews of agencies’ existing rules to determine whether they should be revised or eliminated because they are ineffective, inefficient, or inconsistent with congressional intent; (5) the implementation of an electronic commenting and docketing system for the federal government; and (6) reform efforts focusing specifically on such issues as paperwork burden, information quality, and the protection of small businesses and other small entities.
Cost-Benefit and Other Analysis Requirements in the Rulemaking Process

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Summary

Regulatory analytical requirements (e.g., cost-benefit and cost-effectiveness analysis) have been established incrementally during the last 40 to 50 years through a series of presidential and congressional initiatives. The current set of requirements includes Executive Order 12866 and OMB Circular A-4, the Regulatory Flexibility Act (RFA), and the Unfunded Mandates Reform Act (UMRA). These requirements vary in terms of the agencies and rules they cover, and the types of analyses that are required. The most extensive and broadly applicable of the requirements are in Executive Order 12866 and OMB Circular A-4, but they do not apply to independent regulatory agencies. The statutes that provide rulemaking authority to independent regulatory agencies often require them to “consider” regulatory costs and benefits, but do not specifically require cost-benefit analysis. An Office of Management and Budget report indicated that independent regulatory agencies did not estimate both costs and benefits for any of the major rules they issued in FY2010. Cabinet departments and other agencies estimated monetary costs and benefits for some, but not all, of their rules.

A number of bills have been introduced in the 112th Congress that would codify and expand the executive order’s requirements for cost-benefit analysis (S. 602, H.R. 1281, S. 1219, and H.R. 2204); apply the executive order’s principles to independent regulatory agencies (S. 358); require cost-benefit analysis for certain agencies’ rules (H.R. 1840, H.R. 2175, H.R. 2308, and S. 1292); or improve the implementation of the RFA and UMRA (S. 474, S. 1030, H.R. 527, S. 817, S. 1189, and H.R. 373). Enactment of some or all of these bills would add to the existing incrementally developed patchwork of analytical requirements, and some would significantly increase the number of rules for which analyses would be required.

Congress could decide to keep the existing analytical framework in place, or could enact one or more of these reform proposals. Another more comprehensive approach could be to consolidate all of the analytical requirements in one place, and perhaps expand those requirements to include more agencies or rules, or to require different types of analysis. To do so, or to simply cover independent regulatory agencies by the executive order, the President could arguably amend Executive Order 12866 and OMB Circular A-4, or Congress could enact legislation. Any such changes must be cognizant of the state of existing law in this area, and the resources and data required for agencies to carry out the analyses.

This report will not be updated.
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Introduction

A common concern voiced by proponents of regulatory reform in recent decades has been that the costs associated with certain regulations outweigh the benefits that the regulations are intended to provide. Another, and somewhat related, view is that more intelligent regulatory policies could achieve the same social goals (e.g., cleaner environment, safer workplaces) at less cost, or could achieve more ambitious goals at the same cost.\(^1\) To improve the quality and effectiveness of federal rules and minimize burden, regulatory reform proponents have frequently advocated greater use of a range of analytic tools during the rulemaking process, including cost-benefit analysis (sometimes referred to as benefit-cost analysis) and cost-effectiveness analysis.\(^2\)

Cost-benefit analysis, in this context, involves the systematic identification of all of the costs and benefits associated with a forthcoming regulation, including nonquantitative and indirect costs and benefits, and how those costs and benefits are distributed across different groups in society.\(^3\) A proposed regulatory requirement is judged to pass the “cost-benefit test” if the sum of its anticipated benefits outweighs, or otherwise justifies, the sum of its present and future costs in present value terms. Cost-effectiveness analysis seeks to determine how a given goal can be achieved at the least cost. In contrast to cost-benefit analysis, the concern in cost-effectiveness analysis is not with weighing the merits of the goal, but with identifying and comparing the costs of alternatives to reach that goal (e.g., in terms of dollars per life saved).

The prospective (also known as ex ante) estimates of benefits and costs that are done before rules are issued are necessarily uncertain and heavily dependent on numerous assumptions. Particularly difficult to quantify are long-term or uncertain effects of rules where subtle interactions between various factors are often not well understood or directly measurable. Cost-benefit analysis is particularly controversial when it seeks to rationalize inherent value trade-offs and to place a value on benefits not traded in the market (e.g., health or lives).\(^4\) Also, Congress has required cost-benefit analysis in some statutes (as discussed in detail later in this report), prohibited it in other statutes,\(^5\) and not precluded it in still other statutes.\(^6\) These issues notwithstanding, many

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\(^4\) See, for example, Lisa Heinzerling and Frank Ackerman, Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection (Washington: Georgetown University, 2002).


Cost-Benefit and Other Analysis Requirements in the Rulemaking Process

Economists believe that, when used carefully and with adequate data, cost-benefit analysis can be an effective tool in regulatory decision making.7

Although many federal agencies are currently required to prepare cost-benefit analyses and cost-effectiveness analyses for certain rules before they are published in the Federal Register, proposed legislation has been introduced in the 112th Congress to expand those requirements to more agencies and more types of rules, and to produce more detailed analyses. This report discusses those bills, but first describes the existing requirements for cost-benefit and other types of analysis in the federal rulemaking process. It also discusses options for changing the current set of analytical requirements. The report does not, however, attempt to address issues related to the quality of the analyses that agencies develop, or whether agencies use the results of cost-benefit analyses to guide decision making.8

Cross-Cutting Regulatory Analysis Requirements

The current set of regulatory analytical requirements has been established incrementally during the last 40 to 50 years through a series of presidential and congressional initiatives, including statutes, executive orders, circulars, and other documents. Those initiatives vary in terms of the agencies and rules they cover, and the types of analyses that are required. Most of the analytical requirements cover Cabinet departments and “independent agencies” such as the Environmental Protection Agency (EPA), but some also cover “independent regulatory agencies” such as the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the Nuclear Regulatory Commission (NRC).9

Presidential Initiatives

Each President within the past 40 years has required some form of regulatory analysis before agencies’ rules are published in the Federal Register. For example:

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9 As used in this report, the term “independent regulatory agencies” refers to the boards and commissions identified as such in the Paperwork Reduction Act (44 U.S.C. § 3502(5)), including the SEC, the FCC, the NRC, and the Federal Energy Regulatory Commission. The term “independent agencies” refers to other agencies that answer directly to the President, but are not part of Cabinet departments (e.g., EPA, the Social Security Administration, and the General Services Administration).
In 1971, President Nixon required agencies to develop a summary of their regulatory proposals, a description of the alternatives that they considered, and the costs of those alternatives.10

In 1974, President Ford required agencies to develop an “inflation impact statement” for each major proposed rule.11

In 1978, President Carter required agencies to prepare a regulatory analysis that examined the cost-effectiveness of the alternative regulatory approaches for major rules.12

Current broadly applicable cost-benefit analysis requirements in the rulemaking process are primarily traceable to President Reagan’s Executive Order 12291, which was issued in February 1981.13 Under that executive order, the “covered agencies” (Cabinet departments and independent agencies, but not independent regulatory agencies) were generally required to (1) refrain from taking regulatory action “unless the potential benefits to society for the regulation outweigh the potential costs to society,” (2) select regulatory objectives to maximize net benefits to society, and (3) select the regulatory alternative that involved the least net cost to society. The order also required covered agencies to prepare a “regulatory impact analysis” for each “major” rule, which was defined as any regulation likely to result in (among other things) an annual effect on the economy of $100 million. Those analyses were required to contain a description of the potential benefits and costs of the rule, a determination of the net benefits of the rule, a description of alternative approaches that could substantially achieve the regulatory goal at lower cost, and an explanation of why those approaches were not selected.

Executive Order 12866

Executive Order 12291 remained in place until September 1993, when President Clinton issued Executive Order 12866.14 The Clinton executive order, which is still in effect, revoked the Reagan order, but established analytical principles and requirements that are similar (although not identical) to those it replaced. For example, in its “Statement of Regulatory Philosophy” in Section 1(a), Executive Order 12866 states that the “covered agencies” (again, Cabinet departments and independent agencies, but not independent regulatory agencies)15 should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies

10 For more information on this initiative, see http://www.thecrc.com/ombpapers/20060130_nixon.html.
15 Section 3(b) of Executive Order 12866 states that “Agency,” unless otherwise indicated, means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).” Although the cost-benefit and rule submission requirements in the executive order do not apply to independent regulatory agencies, some parts do (e.g., Section 4(b) relating to the Unified Regulatory Agenda, and Section 4(c) relating to the Regulatory Plan).
should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

Section 1(b) of Executive Order 12866 delineates certain “Principles of Regulation” that covered agencies “should adhere to” (to the extent permitted by law and where applicable). For example, the agencies are told that they should:

- design their regulations “in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.”

- assess both the costs and the benefits of their intended regulations and, “recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”

- tailor their regulations “to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.”

The heart of the economic analysis requirements is in Section 6 of Executive Order 12866, which differentiates between “significant” and “economically significant” rules. “Significant” rules are defined as those that satisfy any of four conditions:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.

Rules fitting the first of these conditions are often referred to as “economically significant” or “major” regulatory actions.

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16 The requirement that agencies adopt regulations only if the benefits “justify” the costs was seen as a somewhat different threshold than the one in Executive Order 12291, which had required agencies to determine that regulatory benefits “outweigh” the costs.

17 Section 3(f) of Executive Order 12866.

18 The definition of an “economically significant” regulatory action is very similar to the definition of a “major rule” under the Congressional Review Act (5 U.S.C. § 804(2)): “(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.”
Section 6(a)(3)(B) of Executive Order 12866 states that, for each “significant” regulatory action, covered agencies are to provide to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) a general “assessment of the potential costs and benefits of the regulatory action.” However, Section 6(a)(3)(C) of the executive order states that, for each “economically significant” regulatory action, agencies are to also provide to OIRA (unless prohibited by law):

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

In emergency situations, or when an agency is required by law to act more quickly than normal review procedures allow, the rulemaking agency is required to comply with the order’s requirements “to the extent practicable.” Section 10 of Executive Order 12866 states that nothing in the order affects otherwise available judicial review, but goes on to say that the order “is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable by law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”

**OMB Circular A-4**

In January 1996, OIRA published a document that described “best practices” for preparing the economic analyses called for by the executive order. In essence, the best practices document said that the analysis should (1) clearly state the need for the proposed action (e.g., market failure) and make clear why federal regulation (as opposed to other methods such as state

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19 Section 3(a)(3)(D) of Executive Order 12866.

20 The Administrative Procedure Act (APA) provides that “final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.” 5 U.S.C. §§ 702, 704. Judicial review may be invoked under the APA if a plaintiff is “adversely affected or aggrieved” by any final agency action “within the meaning” of the statute at issue. 5 U.S.C. § 702. For more information, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Vanessa K. Burrows and Todd Garvey.

21 This “best practices” document was developed by an interagency group co-chaired by the Administrator of OIRA and a member of the Council of Economic Advisors. The document was revised and issued as guidance in 2000. To view a copy of the best practices document, see http://www.whitehouse.gov/omb/inforeg/riaguide.html.
regulation or subsidies) is the appropriate solution, (2) clearly show that the agency considered the most important alternative approaches, and (3) assess the incremental costs and benefits of the proposed action. The best-practices document also stated that cost-effectiveness analysis should be used where possible to evaluate alternatives.

In September 2003, OMB and the Council of Economic Advisors finalized OMB Circular A-4 on “Regulatory Analysis,” which refined and replaced the 1996 best practices document. The circular states that it was “designed to assist analysts in the regulatory agencies by defining good regulatory analysis ... and standardizing the way benefits and costs of Federal regulatory actions are measured and reported.” It also states that a “good regulatory analysis should include the following three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.”

- With regard to need, OMB Circular A-4 states that the agency should describe the statutory or judicial directives that authorize the action, and describe the problem that it intends to address. The underlying problem can involve a market failure (e.g., a monopoly that adversely affects consumers, or inadequate information about a product) or other social purposes (e.g., to combat discrimination). The statement of need should also consider other alternatives to federal regulation, including the option of state or local regulation.

- After determining that federal regulation is needed, OMB Circular A-4 requires the agency to consider a “reasonable number” of alternative regulatory approaches available within the statutory authority provided to the agency. For example, the circular says agencies should consider different compliance dates, enforcement methods, levels of stringency, requirements based on firm size or geographic region; performance standards instead of design standards, market approaches instead of direct controls; and informational measures instead of regulation.

- With regard to analytical approaches, the circular states that agencies should use both cost-benefit analysis and cost-effectiveness analysis. When all benefits and costs can be expressed in monetary units, cost-benefit analysis can clearly indicate which approach is most efficient in terms of net benefits. However, in many (and perhaps most) cases, agencies are not able to express all of the benefits or costs in monetary units. In such cases, OMB Circular A-4 states that cost-benefit analysis “is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs.” Analysts should therefore attempt to quantify

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23 Ibid., p. 1.

24 Ibid., p. 2.

25 For example, if Option A has expected costs of $100 million and expected benefits of $200 million, the net benefits are $100 million. If Option B has expected costs of $200 million, and expected benefits of $400 million, the net benefits are $200 million. In this scenario, Option B produces the largest net benefits.

26 OMB Circular A-4, p. 10.
benefits or costs as much as possible (e.g., tons of pollution avoided, or the
number of children who will not suffer discrimination), and “exercise
professional judgment” in determining whether non-quantified factors are
important enough to justify consideration of the regulation.

Although some contend that certain benefits cannot be monetized (e.g., deaths or illnesses
avoided), agencies have developed a variety of methods of doing so, often by determining the
number of “statistical lives” that the rules are expected to extend or save, and then multiplying
that number by an estimated “value of a statistical life” (VSL). OMB Circular A-4 notes that
academic studies have identified VSLs from $1 million to $10 million, but it does not recommend
that agencies use a particular VSL. In 2009, the Department of Transportation’s (DOT’s) VSL
was $6.0 million while the Environmental Protection Agency’s (EPA’s) VSL was nearly $7.9
million.

OMB Circular A-4 describes cost-effectiveness analysis as a way to “identify options that achieve
the most effective use of the resources available without requiring monetization of all of relevant
benefits or costs.” It allows analysts to compare a set of regulatory actions with the same
primary outcome. For example, the analysis may indicate that one option costing $100 million is
expected to save 50 lives (i.e., $2 million per life saved), while another option costing $200
million is expected to save 200 lives during the same period (i.e., $1 million per life saved).

The circular also discusses a variety of other economic analysis issues, including measuring costs
and benefits against a baseline (i.e., the way the world would look absent the proposed
regulation); discounting when benefits and costs do not occur within the same time period; and
how uncertainty should be treated (e.g., ranges, probability distributions, and estimates of
expected value). For particularly large rules with annual economic effects of $1 billion or more,
agencies are instructed to

present a formal quantitative analysis of the relevant uncertainties about benefits and costs.
In other words, you should try to provide some estimate of the probability distribution of
regulatory benefits and costs. In summarizing the probability distributions, you should
provide some estimates of the central tendency (e.g., mean and median) along with any other
information you think will be useful such as ranges, variances, specified low-end and high-
end percentile estimates, and other characteristics of the distribution.

Finally, OMB Circular A-4 provides guidance on the regulatory accounting statements that are
required under the Regulatory Right-to-Know Act, and summarizes analytical requirements in
other statutes and executive orders.

27 Lisa Heinzerling and Frank Ackerman, “Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection,”
Georgetown University, 2002.
28 For a summary of those efforts, see CRS Report R41140, How Agencies Monetize “Statistical Lives” Expected to Be
Saved By Regulations, by Curtis W. Copeland.
29 Ibid.
30 OMB Circular A-4, p. 11.
31 Ibid., p. 40.
sometimes known as the “Regulatory Right-to-Know Act,” put in place a permanent requirement for an OMB report on
regulatory costs and benefits. Specifically, it requires OMB to prepare and submit with the President’s budget an
“accounting statement and associated report” containing an estimate of the total costs and benefits (including
(continued...)
Supplemental Publications

On October 28, 2010, OMB published an agency checklist for the regulatory impact analyses required by Executive Order 12866 and OMB Circular A-4. It contains repeated references to provisions in the executive order and the circular, and states that nothing in the checklist “alters, adds to, or reformulates existing requirements in any way.” Among other things, the checklist asks whether the agency’s analysis (1) has a reasonably detailed description of the need for the regulatory action, (2) explains how the action will meet that need, (3) quantifies and monetizes the expected costs and benefits of the action to the extent feasible, (4) explains and supports a reasoned justification that the benefits of the regulatory action justify the costs, (5) assesses the potentially effective and reasonable alternatives to the action (including at least one alternative that is more stringent and less stringent), and (6) explains why the planned regulatory action is preferable to those alternatives.

On February 7, 2011, OMB published a document entitled Regulatory Impact Analysis: Frequently Asked Questions. Again, OMB said “nothing said here is meant to alter existing requirements in any way.” Among other things, OMB indicated that:

- A rule may be considered “economically significant” if it is expected to have $100 million in costs, benefits, or transfers in any one year, and rules that do not cross that threshold but could adversely affect a small sector of the economy and would threaten to create significant job loss would still be considered “economically significant.”

- Agencies’ regulatory impact analyses should be presented in plain language, and should include a clear executive summary of their central conclusions and an accounting statement with a table summarizing the expected costs, benefits, and transfers.

- When considering regulatory alternatives, agencies should begin by asking whether to regulate at all, and should consider deferring to regulation at the state or local level. If federal regulation is needed, agencies should consider analyzing at least three options: the preferred option, a more stringent option, and a less stringent one. Agencies should also generally include a sensitivity analysis showing how results can vary with changes in assumptions, data, and analytical approaches.

Executive Orders 13563 and 13579

Executive Order 13563, issued by President Obama in January 2011, reiterated many of the general principles of regulation in Executive Order 12866. For example, it says covered

(...continued)

quantifiable and nonquantifiable effects) of federal rules and paperwork, to the extent feasible, (1) in the aggregate, (2) by agency and agency program, and (3) by major rule. The accounting statement is also required to contain an analysis of the impacts of federal regulation on state, local, and tribal governments, small businesses, wages, and economic growth.

34 See http://www.whitehouse.gov/sites/default/files/omb/circulars/a004/a-4_FAQ.pdf for a copy of this document.
agencies (Cabinet departments and independent agencies) must (to the extent permitted by law): (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, (2) tailor regulations to impose the least burden on society, and (3) select regulatory approaches that maximize net benefits. It also directs agencies to “use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”

Section 6 of the executive order requires covered agencies to develop a plan under which they would periodically review their existing significant rules. Although the executive order does not apply to independent regulatory agencies, a February 2011 memorandum from the OIRA Administrator encouraged those agencies to “give consideration to all its provisions.”

In July 2011, President Obama issued Executive Order 13579, “Regulation and Independent Regulatory Agencies.” The executive order encouraged independent regulatory agencies to comply with some of the principles in Executive Order 13563 that were directed to Cabinet departments and independent agencies (e.g., public participation, integration and innovation, flexible approaches, and science), and said independent regulatory agencies “should” develop a plan for the periodic review of their rules. In a separate memorandum issued the same day as the executive order, the President said he was doing so with “full respect for the independence of your agencies.”

Executive Order 13579 does not, however, directly apply the cost-benefit principles in Executive Orders 12866 or 13563 to independent regulatory agencies, and does not require them to conduct any type of economic analysis before issuing their rules.

Analytical Requirements in Other Executive Orders

In addition to the broadly applicable analytical requirements in Executive Order 12866 and related guidance, several other executive orders have required covered agencies (Cabinet departments and independent agencies) to analyze their regulations for particular purposes. For example:

- Executive Order 13045 on “Protection of Children from Environmental Health Risks and Safety Risks,” issued in April 1997, requires each covered agency, “to the extent permitted by law and appropriate, and consistent with the agency’s mission,” to “address disproportionate risks to children that result from environmental health risks or safety risks.” For any substantive rulemaking action that “is likely to result in” an economically significant rule that concerns “an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children,” the agency must provide OIRA with “an evaluation of the environmental health or safety effects of the planned regulation on children,” as well as “an explanation of why the planned regulation is

preferable to other potentially and reasonably feasible alternatives considered by the agency.”

- Executive Order 13132 on “Federalism,” issued in August 1999, requires covered agencies to prepare a “federalism summary impact statement” whenever they issue a rule that has “significant federalism implications.” The assessment is to contain “a description of the extent of the agency’s prior consultation with State and local officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met.” The executive order says the consultation and impact statement requirements apply “to the extent practicable.”

- Executive Order 13211, issued in May 2001, requires covered agencies (to the extent permitted by law) to prepare and submit to OMB a “Statement of Energy Effects” for “significant energy actions.” The statement, which is to be published in the proposed rule and the final rule, is to include a detailed statement of “any adverse effects on energy supply, distribution, or use” for the action, and reasonable alternatives and their effects.

None of these executive orders apply to independent regulatory agencies, and all of them give federal agencies substantial discretion to define key terms (e.g., “disproportionately affect,” “significant federalism implications,” and “significant energy actions”) that determine the degree to which they cover agencies’ rules.

Congressional Initiatives

Congress has also required federal agencies to analyze the effect of certain rules before they are issued. Some of the requirements are potentially applicable to a range of agencies and regulations, while other requirements are focused on particular agencies or types of rules (e.g., those affecting the environment or small businesses). In addition to the cross-cutting requirements discussed below, there are many other requirements that are tied to particular agencies and statutes. For example, Section 1102(b) of the Social Security Act (42 U.S.C. §1302(b)) requires the Department of Health and Human Services to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals.

Unfunded Mandates Reform Act

The statutory provisions that most closely approximate the types of analysis required in Executive Order 12866 are in Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 40 Executive Order 13132, “Federalism,” 64 Federal Register 43255, August 10, 1999.

41 Executive Order 12612, the previous executive order on federalism, also gave federal agencies broad discretion to determine the applicability of its requirements. GAO examined the implementation of this order and concluded that its analytical requirements were rarely implemented. See U.S. General Accounting Office, Federalism: Previous Initiatives Have Had Little Effect on Agency Rulemaking, GAO/T-GGD-99-3, June 30, 1999.


43 42 U.S.C. § 1302. The department is not required to prepare the analysis if the final rule is issued without a prior notice of proposed rulemaking.
§§1532-1538). Before promulgating a rule containing a mandate that may result in the expenditure of $100 million or more in any one year by the private sector, or by state, local, and tribal governments in the aggregate, UMRA requires covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to prepare a written statement containing (among other things) a “qualitative and quantitative assessment of the anticipated costs and benefits ... as well as the effect of the Federal mandate on health, safety, and the natural environment.” The written statement is also generally required to include estimates of future compliance costs, and any disproportionate budgetary effects on particular regions, governments, or segments of the private sector, and estimates of effects on the national economy, including effects on job creation, productivity, full employment, and international competitiveness. OIRA has primary responsibility for monitoring agency compliance with Title II of UMRA, and publishes an annual report on the implementation of Title II. UMRA provides for limited judicial review of agency compliance with these analytical requirements. Specifically, Section 401(a)(2)(B) states that if an agency fails to prepare the written statement required in Section 202, “a court may compel the agency to prepare such written statement.”

As the Government Accountability Office (GAO, formerly the General Accounting Office) pointed out several times during the past 15 years, however, UMRA’s analytical requirements do not apply to most economically significant rules, give agencies substantial discretion regarding their implementation, and do not require agencies to do much more than is already required in Executive Order 12866. For example, the requirements in Section 202 of UMRA are not triggered if the agency issues a final rule without a previous notice of proposed rulemaking. (About half of all final rules do not have a prior proposed rule.) Also, UMRA does not apply unless there are “expenditures” of at least $100 million in a year (which may not be the same as “impact on the economy” or even “cost”), and does not apply to “voluntary” programs or conditions of federal financial assistance. Agencies do not have to estimate certain effects if they determine such estimates are not “reasonably feasible.” In February 1998, GAO reported that, because of the way the statute was written, Title II of UMRA had little effect on agencies’ rulemaking actions during its first two years of implementation. In May 2004, GAO again reported that UMRA’s written statement requirements did not apply to most major or economically significant final rules issued in 2001 and 2002, even though some of the rules “appeared to have potential financial impacts on affected nonfederal parties similar to those of the actions that were identified as containing mandates at or above the act’s thresholds.” In February 2011, GAO reiterated these conclusions, noting that there are at least 14 reasons why a rule would not be considered a “mandate” under UMRA.

49 Testimony of Denise M. Fantone, Director, Strategic Issues, U.S. Government Accountability Office, before the (continued...)
National Environmental Policy Act

Other statutory analytical requirements have been enacted with regard to particular issues or constituencies. For example, the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. §§4321-4347) requires federal agencies to include in every recommendation or report related to “major Federal actions significantly affecting the quality of the human environment” a detailed statement on the environmental impact of the proposed action. The environmental impact statement must delineate the direct, indirect, and cumulative effects of the proposed action. Agencies are also required to include in the statement (1) any adverse environmental effects that cannot be avoided should the proposal be implemented, (2) alternatives to the proposed action, (3) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and (4) any irreversible and irretrievable commitments of resources that would be involved if the proposed action should be implemented. As discussed in a separate CRS report, just about every word in the term “major Federal actions significantly affecting the quality of the human environment” has been disputed, scrutinized, and defined by the courts.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612) requires federal agencies to assess the impact of their forthcoming regulations on “small entities,” which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, Cabinet departments and independent agencies as well as independent regulatory agencies must prepare a “regulatory flexibility analysis” at the time proposed and certain final rules are issued. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

However, these analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a “significant economic impact on a substantial number of small entities.” The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion regarding when the act’s analytical requirements are initiated. Also, the RFA’s analytical requirements do not apply to final rules for which the agency does not publish a proposed rule, and some agencies do not consider an RFA analysis to be required if the rule is expected to have significant positive effects on small entities.

(...continued)


For more information, see CRS Report RL33152, The National Environmental Policy Act (NEPA): Background and Implementation, by Linda Luther.


See, for example, U.S. Department of Health and Human Services, “Patient Protection and Affordable Care Act; Establishment of Consumer Operated and Oriented Plan (CO-OP) Program,” 76 Federal Register 43237, July 20, 2011, (continued...)
The RFA initially did not permit judicial review of agencies’ actions under the act. However, amendments to the act in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA, 5 U.S.C. §601 note) permitted judicial review regarding, among other things, agencies’ regulatory flexibility analyses for final rules and any certifications that their rules will not have a significant impact on small entities. As a result, a small entity that is adversely affected or aggrieved by an agency’s determination that its final rule would not have a significant impact on small entities could seek judicial review of that determination within one year of the date of the final agency action. In granting relief, a court may remand the rule to the agency or defer enforcement against small entities. For more than 25 years, however, courts have ruled that agencies need not prepare regulatory flexibility analyses if the effects of a rule on an industry are indirect. Therefore, for example, if a federal agency is issuing a final rule establishing a health standard that is implemented by states or other entities, the federal agency issuing the rule need not prepare a regulatory flexibility analysis even if it is clear that the implementation ultimately will have significant effect on a substantial number of small entities.

GAO has examined the implementation of the RFA several times within the past 20 years, and a recurring theme in GAO’s reports is a lack of clarity in the act and a resulting variability in its implementation. For example, in 1991 GAO reported that each of the four federal agencies that it reviewed had a different interpretation of key RFA provisions. In 1994, GAO again reported that agencies’ compliance with the RFA varied widely from one agency to another and that agencies were interpreting the statute differently. In a 1999 report, GAO concluded that agencies had broad discretion to determine what the statute required. In a 2000 report, GAO said that EPA had certified more than 95% of its final rules issued in the late 1990s, and characterized EPA as having a “high threshold” for analysis (albeit within the discretion permitted in the statute). In all of these reports, GAO suggested that Congress consider clarifying the act’s requirements...

(...continued)

in which the department said that the Centers for Medicare and Medicaid Services interprets the RFA analysis requirement “as applying only to regulations with negative impacts.” However, the department said it routinely prepares a voluntary analysis when there are significant positive impacts.

53 See, for example, Mid-Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327, 343 (D.C. Cir. 1985).

54 For example, when EPA published a final rule establishing national ambient air quality standards (NAAQS) for particulate matter in October 2006, the agency certified the rule as not triggering the RFA “because NAAQS themselves impose no regulations on small entities.” In its cost-benefit analysis for the rule, EPA estimated the cost of installing controls to meet the health standard at $5.6 billion in 2020. See U.S. Environmental Protection Agency, “National Ambient Air Quality Standards for Particulate Matter; Final Rule,” 71 Federal Register 61144, 61217. (EPA made the same argument in other rules. See U.S. Environmental Protection Agency, “Primary National Ambient Air Quality Standard for Sulfur Dioxide,” 74 Federal Register 64810, at 64865, December 8, 2009; and “National Ambient Air Quality Standards for Carbon Monoxide,” 76 Federal Register 8158, at 8195, February 11, 2011.) In a similar case (American Trucking Associations, Inc. v. U.S. Environmental Protection Agency, 175 F.3d 1027 (D.C. Cir. 1999)), affirmed in part and reversed in part, Whitman v. American Trucking Associations, 532 U.S. 457 (2001), the U.S. Court of Appeals for the District of Columbia ruled that EPA had complied with the RFA because the states, not EPA, had the direct authority to impose requirements to control ozone and particulate matter consistent with EPA health standards.


and/or give the Small Business Administration (SBA) or some other entity the responsibility to develop criteria for whether and how agencies should conduct RFA analyses. In 2001, GAO testified that the promise of the RFA may never be realized until Congress or some other entity defines what a “significant economic impact” and a “substantial number of small entities” mean in a rulemaking setting. However, other observers have indicated that the definitions of these terms should remain flexible because of significant differences in each agency’s operating environment.

Paperwork Reduction Act

Other analytical requirements pertain to certain aspects of the rulemaking process, albeit not the rules themselves. The Paperwork Reduction Act (PRA) (44 U.S.C. §§3501-3520) was originally enacted in 1980, but was subsequently amended in 1986 and again in 1995. One of the purposes of the PRA is to minimize the paperwork burden for individuals, small businesses, and others resulting from the collection of information by or for the federal government. The act generally defines a “collection of information” as the obtaining or disclosure of facts or opinions by or for an agency (Cabinet departments and independent agencies as well as independent regulatory agencies) by 10 or more nonfederal persons. Many information collections, recordkeeping requirements, and third-party disclosures are contained in or are authorized by regulations as monitoring or enforcement tools. In fact, these paperwork requirements are the essence of many agencies’ regulatory provisions. The PRA requires agencies to justify any collection of information from the public by establishing the need and intended use of the information, estimating the burden that the collection will impose on respondents, and showing that the collection is the least burdensome way to gather the information.

The original PRA established OIRA to provide central agency leadership and oversight of government-wide efforts to reduce unnecessary paperwork burden and improve the management of information resources. Agencies must receive OIRA approval (signified by an OMB control number displayed on the information collection) for each collection request before it is implemented, and those approvals must be renewed at least every three years. Failure to obtain OIRA approval for an active collection, or the lapse of that approval, represents a violation of the act, and triggers the PRA’s public protection provision. Under that provision, no one can be penalized for failing to comply with a collection of information subject to the act if the collection does not display a valid OMB control number. OIRA can disapprove any collection of

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59 Section 612 of the RFA requires the SBA Chief Counsel for Advocacy to “monitor” agencies’ compliance with the RFA, but does not require SBA to issue binding rules defining key terms.


61 See, for example, page 17 of the SBA Office of Advocacy’s guidance on the implementation of the RFA, available at http://www.sba.gov/sites/default/files/rfaguide.pdf, which says “Significance should not be viewed in absolute terms....” For more information on the RFA, see CRS Report RL34355, The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms, by Curtis W. Copeland.

62 For example, Environmental Protection Agency’s Toxics Release Inventory (TRI) program is essentially a database created through collections of information imposed on businesses to inform the public about chemical hazards in their communities. TRI reports require businesses in certain industries to report the quantity of any of more than 600 chemicals entering each environmental medium on site, transfers of the chemical in wastes to off-site locations, on-site treatment methods and efficiency, and source reduction and recycling activities.

63 For an up-to-date inventory of OMB-approved information collections, see http://www.reginfo.gov/public/do/PRAMain.
information if it believes the collection is inconsistent with the requirements of the PRA. However, multi-headed independent regulatory agencies can, by majority vote of the leadership, void any OIRA disapproval of a proposed information collection.64

Coverage of Analytical Requirements Varies

As the above discussion indicates, the cross-cutting executive order and statutory analytical requirements vary substantially in terms of the types and amount of analysis required, and the agencies and rules that they cover:

- Executive Order 12866 and OMB Circular A-4 contain the most detailed requirements, and cover all rules with a $100 million annual “effect on the economy,” but the executive order and the circular do not apply to independent regulatory agencies.

- The Unfunded Mandates Reform Act contains analytical requirements that are somewhat similar to those in Executive Order 12866, but it applies to only a small percentage of the rules that are covered by the executive order because of substantial limitations in the scope of the act’s requirements (e.g., UMRA does not apply to independent regulatory agencies, or to rules that are conditions of financial assistance, rules issued without a notice of proposed rulemaking, or rules that do not require $100 million in “expenditures” in a year).

- The Regulatory Flexibility Act is broader than either the executive order or UMRA in that it covers independent regulatory agencies, but the RFA does not apply to rules issued without a notice of proposed rulemaking, or to rules that the agencies certify will not have a “significant economic impact on a substantial number of small entities.” Some agencies certify that more than 90% of their rules will not have that impact, and therefore are not required to do the analysis.

- The Paperwork Reduction Act covers independent regulatory agencies, but it only covers agencies’ collections of information, not the rules themselves.

Table 1 below summarizes this information, showing that the requirement with most extensive analytical requirements and broad coverage (Executive Order 12866) does not apply to independent regulatory agencies, and the requirements that do apply to independent regulatory agencies (the RFA and the PRA) are more limited in the types of analysis required.

<table>
<thead>
<tr>
<th>Analytical Requirement</th>
<th>Cabinet Departments and Independent Agencies</th>
<th>Independent Regulatory Agencies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extensive Analytical Requirements and Broad Rule Coverage</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Executive Order 12866 and OMB Circular A-4</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

Analytical Requirements Applicable to Selected Independent Regulatory Agencies

Although independent regulatory agencies are not covered by the analytical requirements in Executive Order 12866 and OMB Circular A-4, that lack of coverage may be ameliorated if the individual statutes that provide rulemaking authority to these agencies require cost-benefit or other types of economic analysis. This section of the report examines the analytical requirements in the underlying statutes for selected independent regulatory agencies.

Economic Analysis and Banking Agencies

Because of concerns regarding the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010), on May 4, 2011, the 10 Republican Senators on the Senate Committee on Banking, Housing, and Urban Affairs jointly requested that the offices of the inspectors general (OIGs) for five independent regulatory agencies in the banking area provide them with information about the economic analysis requirements applicable to rulemaking in those agencies.65 The five agencies were the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC). The five OIGs provided written responses to the Senators in June 2011, and those responses are summarized below.

Board of Governors of the Federal Reserve System

The OIG for the Board of Governors of the Federal Reserve System said that statutes related to the board’s rulemaking authority, including the Federal Reserve Act and the Bank Holding Company Act of 1956, “generally do not require economic analysis as part of the agency’s rulemaking activities.”66 The OIG noted the applicability of the PRA and the RFA to the Board’s

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65 See http://crapo.senate.gov/documents/RepublicanBankingCommitteeDoddFrankLetter.pdf for a copy of this letter. The letter also asked the OIGs to describe internal policies and procedures governing economic analyses of proposed rules, the degree to which agency staff understand and follow applicable requirements, the qualifications of the staff who conduct the analyses, and other aspects of those analyses.

66 Office of the Inspector General, Board of Governors of the Federal Reserve System, “Response to a Congressional (continued...)

Source: CRS.
rulemaking, but said they only require “narrowly tailored evaluations of the rulemaking’s paperwork burden and effect on small entities, respectively.”

**Securities and Exchange Commission**

The SEC OIG report identified several statutory provisions that require the commission to analyze the impact of its rules. For example, the report noted that the National Securities Market Improvement Act (15 U.S.C. §77b(b)) requires the SEC to consider whether an action “will promote efficiency, competition, and capital formation” whenever it is “engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest.” Also, Section 23(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. §78w(a)(2)) states that:

> The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this chapter, the reasons for the Commission’s or the Secretary’s determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this chapter.

The OIG noted that the RFA and the PRA apply to SEC rulemaking, and that Executive Order 12866 and OMB Circular A-4 do not apply. Nevertheless, the OIG said that “SEC Chairmen have made a commitment to Congress that the SEC will conduct cost-benefit or economic analyses in connection with its rulemaking activities,” and said that “the Commission’s current rulemaking procedures are closely aligned with the requirements” of the executive order and the circular.

The OIG also noted that the SEC’s website states that “we take into account benefits and costs in our rulemakings [and] assess alternative regulatory approaches,” and that the SEC chairman stated during a congressional hearing in March 2011 that the SEC does conduct cost-benefit analyses.

However, the OIG also pointed out that another SEC commissioner stated in a May 2011 speech that the “Commission has not engaged in a cost-benefit analysis of the rulemakings that were

(...continued)


67 Ibid., p. 7.


69 In support of this statement, the OIG noted that SEC Office of General Counsel officials quoted former SEC Chairman Arthur Levitt, who said there was an expectation that the SEC would perform cost-benefit analyses as part of the rulemaking process. See OIG/SEC, p. 4.

70 OIG/SEC, p. 4.

71 Ibid., p. 5, citing testimony by SEC Chairman Mary Shapiro before the Subcommittee on Financial Services and General Government, House Committee on Appropriations, March 15, 2011.
essentially dictated by the law." She reportedly went on to say that “By limiting our cost-benefit analysis to those measures over which the Commission has full discretion, we fail to consider all the costs and benefits that will result from a particular regulatory action.”

**Federal Deposit Insurance Corporation**

The FDIC OIG report noted the applicability of the RFA and the PRA, and said that the “Small Business Regulatory Enforcement Fairness Act also requires the FDIC to conduct cost-benefit analyses of final rules.” However, that act only requires agencies to submit a cost-benefit analysis to the Government Accountability Office if the agency has prepared one for the final rule at issue. The report noted that FDIC is not covered by Executive Orders 12866 and 13563 or OMB Circular A-4, but said the agency had issued a *Statement of Policy on the Development and Review of FDIC Regulations and Policies* that “generally addresses the spirit of, and principles found in, the two executive orders and OMB guidance.”

In terms of agency-specific requirements, the FDIC OIG report identified Section 302 of the Riegle Community Development and Regulatory Improvement Act (12 U.S.C. §4802(a)), which states:

In 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 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.

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72 Ibid., pp. 5-6, citing a speech by Commissioner Kathleen Casey at an SEC open meeting regarding rules for Nationally Recognized Statistical Rating Organizations held on May 18, 2011.

73 In a somewhat related development, on July 22, 2011, the U.S. Court of Appeals for the District of Columbia vacated an SEC final rule on proxy access, saying the Commission acted arbitrarily and capriciously for having failed to assess the economic implications of a rule adequately. *Business Roundtable v. SEC*, D.C. Cir., No 10-1305, July 22, 2010. In particular, the Court said (on p. 7 of the opinion) that the SEC had “inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.” Citing an earlier case (*Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005)), the Court said that the agency has a “statutory obligation to determine as best it can the economic implications of the rule.” Some observers believe that this case has “elevated the importance of economic analysis in rulemaking to implement” the Dodd-Frank Act. See, for example, Yin Wilczek, “D.C. Circuit’s Proxy Access Ruling Raises Importance of Economic Review, Panel Says,” *BNA Daily Report for Executives*, August 2, 2011, p. EE-4; and David S. Hilzenrath, “Wall Street Finds Relief in Court from SEC Rules,” *Washington Post*, August 12, 2011, p. A-10.


75 Specifically, the portion of SBREFA known as the Congressional Review Act states that rulemaking agencies must submit to GAO, and make available to each house of Congress, “a complete copy of the cost-benefit analysis of the rule, if any” (5 U.S.C. 801(a)(1)(b)(ii)).

76 OIG/FDIC, p. 1 of the Executive Summary.
Commodity Futures Trading Commission

The June 2011 CFTC OIG report noted that Section 15(a) of the Commodity Exchange Act (7 U.S.C. §19(a)) requires the agency to consider costs and benefits before issuing certain regulations. Specifically, Section 15(a) states the following:

Before promulgating a regulation under this chapter ... , the Commission shall consider the costs and benefits of the action of the Commission. The costs and benefits of the proposed Commission action shall be evaluated in light of - (A) considerations of protection of market participants and the public; (B) considerations of the efficiency, competitiveness, and financial integrity of futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations.

In light of this requirement, in September 2010, the CFTC Office of General Counsel and Office of Chief Economist created a template for a uniform cost-benefit analysis methodology to be used in Dodd-Frank Act proposed rules. That template stated, in part, that Section 15(a) “does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission ‘consider’ the costs and benefits of its actions.” It went on to say that CFTC “could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.”

In May 2011, the same two offices developed “Staff Guidance on Cost-Benefit Considerations for Final Rulemakings under the Dodd-Frank Act.” In that guidance, CFTC staff were told to “consider costs and benefits in the Final Rulemakings utilizing the principles set forth in Executive Order 13563 in a manner that is reasonably feasible and appropriate, and consistent with the underlying statutory mandate [in Section 15(a) of the Commodity Exchange Act].” Rulemaking teams were allowed to “choose ... quantitative analysis to respond to comments received.” The guidance goes on to say that additional analysis is primarily needed when the comments raise specific concerns about costs and benefits, and that “[q]uantitative benefits need not always be greater than costs because there may be a statutory mandate or policy rationale behind the rule.”


78 Subsection (a)(3) states that these requirements do not apply to “(A) An order that initiates, is part of, or is the result of an adjudicatory or investigative process of the Commission. (B) An emergency action. (C) A finding of fact regarding compliance with a requirement of the Commission.”

79 OIG/CFTC, Exhibit 1.
80 OIG/CFTC, p. 3.
81 Ibid., Exhibit 2.
82 Ibid., Exhibit 2, p. 3.
83 Ibid., Exhibit 2, pp. 6-7.
Comptroller of the Currency

Section 315 of the Dodd-Frank Act amended the PRA (44 U.S.C. §3502(5)) to designate OCC as an independent regulatory agency. Previously, OCC had been part of the Department of the Treasury, and therefore was subject to Executive Order 12866 and OMB Circular A-4, as well as the Unfunded Mandates Reform Act. As an independent regulatory agency, however, OCC is not subject to those requirements.

After discussing the applicability of analytical requirements in the RFA and the PRA, the OCC OIG report noted requirements in the Riegle Community Development and Regulatory Improvement Act (“Riegle Act,” 12 U.S.C. §4802(a)), which states:

In 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 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.

The term “Federal banking agencies” is defined in Section 4801 of the Riegle Act (12 U.S.C. §1813) as the “Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.” Therefore, although its OIG did not mention it, the Board of Governors of the Federal Reserve System also appears to be covered by this requirement.

Summary of the OIG Reports

Although the OIG reports identified statutory cost-benefit requirements that are applicable to all five of the independent regulatory agencies, those requirements are not as directive or as detailed as those in Executive Order 12866 or OMB Circular A-4. The statutory requirements often only require the agencies to “consider” costs and benefits, but do not specifically require the agencies to conduct a detailed analysis or to demonstrate that the benefits of their rules exceed or justify the costs. For example:

- The National Securities Market Improvement Act requires the SEC to “consider” whether an action “will promote efficiency, competition, and capital formation,” and the Securities Exchange Act of 1934 requires the agency to “consider” the impact that a rule would have on competition.
- The Riegle Act requires the FDIC, the OCC, and the Board of Governors of the Federal Reserve System to “consider ... any administrative burdens that such regulations would place on depository institutions ... [and] the benefits of such regulations.”
- The Commodities Exchange Act requires CFTC to “consider the costs and benefits of the action of the Commission.”

That lack of specificity notwithstanding, however, it is unclear how these agencies will be able to “consider” regulatory costs and benefits if they do not perform some type of systematic economic analysis of their proposed regulations. In the previously mentioned July 2011 decision by the U.S. Court of Appeals for the District of Columbia involving an SEC rule, the court said that the agency has a “statutory obligation to determine as best it can the economic implications of the rule.”

**Consumer Financial Protection Bureau**

Although not included in the 10 Senators’ May 4 letter to the OIGs, the Bureau of Consumer Financial Protection (often referred to as the Consumer Financial Protection Bureau, or CFPB) within the Federal Reserve System is also expected to issue Dodd-Frank Act regulations that will be of interest to financial institutions, the public, and Congress. CFPB was created by Title X of the Dodd-Frank Act, which consolidated many federal consumer protection responsibilities into the bureau. The act transferred supervisory and enforcement authority over a number of consumer financial products and services to the bureau on July 21, 2011. Title X and Title XIV of the act contain numerous provisions that require or permit the CFPB to issue regulations implementing the statute’s provisions.

Section 1022(b)(2)(A) of the Dodd-Frank Act (12 U.S.C. §5512) establishes certain “standards of rulemaking” for CFPB. Specifically, it states that

> the Bureau shall consider—(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons, as described in section 1026, and the impact on consumers in rural areas.

Therefore, CFPB, like the other banking agencies, appears to be required to “consider” costs and benefits before issuing its rules, but is not specifically required to prepare detailed cost-benefit analyses to accomplish that goal.

**Consumer Product Safety Commission**

On July 7, 2011, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce held a hearing at which several independent regulatory agencies testified about their response to the issuance of Executive Order 13563. One of the agencies represented at the hearing was the Consumer Product Safety Commission (CPSC). CPSC Commissioner Robert S. Adler testified that the commission has been required since 1981 amendments to the Consumer Product Safety Act to “conduct an extensive cost-benefit analysis when we promulgate safety rules.” He said these provisions “easily match, if not surpass, in their stringency and scope the

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cost-benefit provisions of the various executive orders on cost-benefit analysis recommended by the Office of Management and Budget. Specifically, he noted:

- 15 U.S.C. Section 2058(f)(1), which says “Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to - (A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce; (B) the approximate number of consumer products, or types or classes thereof, subject to such rule; (C) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and (D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.”

- 15 U.S.C. Section 2058(f)(2), which says “The Commission shall not promulgate a consumer product safety rule unless it has prepared, on the basis of the findings of the Commission under paragraph (1) and on other information before the Commission, a final regulatory analysis of the rule containing the following information: (A) A description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs. (B) A description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen. (C) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues. The Commission shall publish its final regulatory analysis with the rule.”

- 15 U.S.C. Section 2058(3), which says “The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule) - (A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product; (B) that the promulgation of the rule is in the public interest; (C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product; (D) in the case of a rule which relates to a risk of injury with respect to which persons who would be subject to such rule have adopted and implemented a voluntary consumer product safety standard, that - (i) compliance with such voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or (ii) it is unlikely that there will be substantial compliance with such voluntary consumer product safety standard; (E) that the benefits expected from the rule bear a reasonable relationship to its costs; and (F) that the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated.”

88 Ibid., pp. 2-3.
Commissioner Adler also noted, however, that the agency has issued only nine mandatory safety rules in the last 30 years, “opting instead to work with the voluntary standards sector and to negotiate individual Corrective Action Plans for the recall of specific hazardous products.”89 He also said that certain labeling requirements do not require the same level of regulatory analysis as other types of safety rules.

Another perspective was offered by CPSC Commissioner Anne M. Northup, who said that most of the regulations mandated by the Consumer Product Safety Improvement Act of 2008 (CPSIA) are not required to be issued pursuant to the above-mentioned provisions that require cost-benefit analysis, and that the commission “has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA.”90 She also said that such an analysis would reveal that many of the regulations that the act required to be issued “cannot be justified.”

### Implementation of Cost-Benefit Requirements

As noted previously in this report, Executive Order 12866 requires covered agencies to prepare cost-benefit analyses only if their rules are expected to be “economically significant” or “major” (e.g., are expected to have a $100 million annual effect on the economy). A February 2011 CRS report examined 100 rules issued during calendar year 2010 that OIRA and the agencies considered to be “major,” and concluded that 37 of the rules appeared to be major because they involved annual transfers of $100 million in funds from one party to another party, most commonly the transfer of federal funds to the recipients of those funds (e.g., grants, food stamps, Medicare or Medicaid funds, special pay for members of the military, and crop payments).91 Ten other rules appeared to be major because they were expected to prompt $100 million or more in annual consumer spending, or because they were establishing fees for the reimbursement of particular federal functions (e.g., issuance of passports and oversight of the nuclear power industry). Thirty-nine rules appeared to be major because they were expected to result in at least $100 million in annual compliance costs, regulatory benefits, or both. In 20 of those 39 rules, estimated annual costs and benefits were both expected to exceed $100 million. In 14 of the 20 rules, the agencies’ lowest estimates of regulatory benefits were larger than the highest estimated compliance costs. In only one rule were the lowest costs greater than the highest benefits, and the agency indicated that this result was caused by the lack of discretion provided in the underlying statute.92

### OMB Annual Reports on Costs and Benefits

OMB’s annual reports on the costs and benefits of regulations also indicate the extent to which federal agencies are estimating the costs and benefits of their rules.93 In the 2011 report, reflecting

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89 Ibid., p. 1.
91 CRS Report R41651, REINS Act: Number and Types of “Major Rules” in Recent Years, by Curtis W. Copeland and Maeve P. Carey. The definitions of “economically significant” and “major” are almost identical.
92 Other rules appeared to be considered major because of increased costs or prices (albeit less than $100 million per year), or for multiple reasons.
93 In 2001, Section 624 of the Treasury and General Government Appropriations Act, 2001, (31 U.S.C. § 1105 note), sometimes known as the “Regulatory Right-to-Know Act,” put in place a permanent requirement for an OMB report on regulatory costs and benefits. Specifically, it requires OMB to prepare and submit with the President’s budget an (continued...)
rules issued during FY2010, OMB reported that Cabinet departments and independent agencies issued a total of 66 “major” final rules.\footnote{Office of Management and Budget, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, June 2011, available at http://www.whitehouse.gov/sites/default/files/omb/infereg/2011_cb/2011_cba_report.pdf.} For 18 of the rules, the issuing agencies quantified and monetized both benefits and costs, with annual costs estimated to be between $6.5 billion and $12.5 billion, and annual benefits estimated at between $18.8 billion and $86.1 billion. For 10 other rules, the agencies monetized only costs or benefits, but not both. For 32 rules, the agencies monetized only the transfer amounts. For six rules, the agencies did not quantify or monetize benefits or costs.

The OMB report also indicated that independent regulatory agencies issued 17 major final rules during FY2010. The agencies did not estimate both costs and benefits for any of the 17 rules. The SEC monetized costs for six of its nine rules, and in one joint rule issued by the Federal Reserve System and the Federal Trade Commission, the agencies assessed only costs. The Federal Reserve System issued five other rules, but did not provide monetized estimates of benefits for costs in any of them. OMB said that even when these agencies did cost-benefit analyses, it did “not know whether the rigor of the analyses conducted by these agencies is similar to that of the analyses performed by agencies subject to OMB review.”\footnote{Ibid., p. 31.} OMB went on say the following:

We emphasize that for the purposes of informing the public and obtaining full accounting, it would be desirable to obtain better information on the benefits and costs of the rules issued by independent regulatory agencies. The absence of such information is a continued obstacle to transparency, and it might also have adverse effects on public policy.\footnote{Ibid.}

\section*{Previous OMB Reports}

Previous OMB reports evidenced the same patterns of analysis. For example:

- In the 2010 report (reflecting rules issued during FY2009), OMB reported that Cabinet departments and independent agencies issued 66 major final rules, and that they quantified and monetized both benefits and costs for 16 of the rules (with costs estimated to be between $3.7 billion and $9.5 billion, and benefits estimated at between $8.6 billion and $28.9 billion). Independent regulatory agencies issued 13 major final rules, and monetized both costs and benefits for one of the rules (issued by the SEC). In five other rules (three issued by the SEC and two issued by the NRC), the agencies monetized only costs. The Federal Reserve System did not provide information on benefits or costs for any of its three rules.\footnote{See http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf for a copy of this report.}
In the 2009 report (reflecting rules issued during FY2008), OMB reported that Cabinet departments and independent agencies issued 42 major final rules, and that they quantified and monetized both benefits and costs for 13 of the rules (with costs estimated to be between $7.9 billion and $9.2 billion, and benefits estimated at between $8.6 billion and $39.4 billion). Independent regulatory agencies issued 11 major final rules, and monetized both costs and benefits for one of the rules (issued by the NRC). In two other rules (one each by the NRC and the Federal Energy Regulatory Commission), the agencies monetized only costs. The FCC did not provide information on costs or benefits for any of its four rules.98

Appendix C of the 2011 OMB report provided information on the number of major rules issued by independent regulatory agencies during the 10-year period from October 1, 2000, through September 30, 2010. That information, shown in Table 2 below, indicates that less than 40% of the major rules had “some” information on either benefits or costs.

<table>
<thead>
<tr>
<th>Agency</th>
<th>Major Rules Issued</th>
<th>Major Rules with Some Benefit or Cost Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Product Safety Commission</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Federal Communications Commission</td>
<td>19</td>
<td>1</td>
</tr>
<tr>
<td>Federal Energy Regulatory Commission</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Federal Reserve System</td>
<td>12</td>
<td>3</td>
</tr>
<tr>
<td>Federal Trade Commission</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>National Credit Union</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Administration</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nuclear Regulatory Commission</td>
<td>12</td>
<td>2</td>
</tr>
<tr>
<td>Pension Benefit Guaranty Corporation</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Securities and Exchange Commission</td>
<td>45</td>
<td>9</td>
</tr>
<tr>
<td>Total</td>
<td>46</td>
<td>18</td>
</tr>
</tbody>
</table>

Source: OMB’s 2011 report on costs and benefits, Appendix C.

Preliminary Conclusions

The CRS and OMB reports suggest several broad conclusions about the current state of regulatory analysis. First, many of the rules for which agencies are required to prepare cost-

benefit analyses are “major” for reasons unrelated to regulatory compliance costs. Therefore, although economic analyses of these rules may be appropriate for transparency or other reasons, it may be unlikely that the analyses will result in significantly reduced compliance costs or increased regulatory benefits. Second, Cabinet departments and independent agencies like EPA are more likely to prepare cost-benefit analyses that produce monetized estimates of costs and benefits than independent regulatory agencies. However, not all rules issued by Cabinet departments and independent agencies contained such estimates. When monetary estimates of costs and benefits are available, estimated benefits are generally higher than estimated costs. Finally, some independent regulatory agencies (e.g., the SEC and the NRC) appear to be more likely to estimate at least the costs of their regulations than other independent regulatory agencies (e.g., the FCC and the Federal Reserve System).

Resources for the Future Conference

On April 7, 2011, Resources for the Future (RFF) held a conference entitled “Can Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Agencies?” Some of the presenters at the conference discussed the degree to which certain independent regulatory agencies conducted economic analyses of their rules. For example:

- Professor Howard Beales, III of George Washington University said that the Federal Trade Commission (FTC) pays substantial attention to the efficiency implications of its enforcement cases, and that additional regulatory analysis of its rules is not needed because of existing procedural controls. He noted that FTC rulemaking is more elaborate than rulemaking in most other agencies, and that the statutory mandate to determine that certain practices are unfair or deceptive essentially amounts to a cost-benefit test.

- Professor Thomas Hazlett of George Mason University Law School said that the analyses in recent FCC rules has been inadequate, and suggested establishing an organization within the agency to improve the role of economic analysis.

- Alice Rivlin of the Brookings Institution said that the Federal Reserve System should do more economic analyses of some of its rules, and that the analyses could be improved by establishing standards for analysis and review by a respected authority.

- James Overdahl of National Economic Research Associates said that the SEC issues many major rules with little economic analysis of their effects, and that economic analysis should be a higher priority at the agency.

The conference summary prepared by Arthur Fraas and Randall Lutter of RFF (both of whom formerly worked at OIRA) stated that the participants “generally agreed that the current level of analysis at most [independent regulatory agencies] is inadequate and that additional steps should

99 See http://www.rff.org/events/pages/can-greater-use-of-economic-analysis-improve-regulatory-policy-at-independent-regulatory-agencies.aspx for more information about this conference. Resources for the Future describes itself as “a nonprofit and nonpartisan organization that conducts independent research—rooted primarily in economics and other social sciences—on environmental, energy, natural resource and environmental health issues.”

100 See http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regression_Beales.pdf for a copy of his presentation.
be taken to establish better economic analysis of [independent regulatory agencies’] regulations."\(^{101}\)

### Regulatory Reform Legislation in the 112th Congress

A number of bills have been introduced in the 112th Congress that would codify, expand, or otherwise modify existing requirements for cost-benefit or other types of regulatory impact analysis. Some of the bills would expand the principles and requirements in Executive Order 12866 to all agencies or rules, some would require cost-benefit analysis by certain agencies, and other bills would modify the analytical requirements in the RFA or UMRA.

### Expanding the Requirements for Cost-Benefit Analysis

#### S. 602: the Clearing Unnecessary Regulatory Burdens (CURB) Act

S. 602, introduced by Senator Susan Collins on March 16, 2011, would, if enacted, codify and expand some of the cost-benefit analysis requirements that are currently in Executive Order 12866. Specifically, the bill would generally require all agencies (including independent regulatory agencies) to submit cost-benefit analyses to OIRA for their “significant regulatory actions.”\(^{102}\) A “significant regulatory action” is defined in the bill as it currently is defined in Executive Order 12866—an action that is likely to result in a regulation that may

(A) have an annual effect on the economy of $100,000,000 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(B) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(C) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(D) raise novel legal or policy issues arising out of legal mandates and the priorities, principles, and provisions of this section.

The bill would require agencies to quantify regulatory benefits and costs “to the extent feasible,” and to assess the costs and benefits “potentially effective and reasonably feasible alternatives to the planned significant regulatory action.”

\(^{101}\) See http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_Summary.pdf for a copy of this summary.

\(^{102}\) Section 2(a)(2) of S. 602 defines an “agency” as having the same meaning as Section 3502(1) of title 44, United States Code. That provision defines an agency as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include - (A) the Government Accountability Office; (B) Federal Election Commission; (C) the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or (D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities.”
Analysis

S. 602 would expand the analytical requirements in Executive Order 12866 in two ways. First, the bill would include independent regulatory agencies like the SEC and the FCC, which are not currently covered by the analytical requirements in the executive order, and which are not currently required to submit their rules and analyses for review to OIRA. Requiring independent regulatory agencies to submit cost-benefit analyses for their significant rules to OIRA could put them more under the control of the President than ever before—perhaps in direct contravention of the statutes that created them in the first place. Notably, however, S. 602 does not require the agencies to submit their significant rules to OIRA—only the underlying cost-benefit analyses. If the bill is enacted, the President and OMB could arguably amend current procedures under Executive Order 12866 and require the independent regulatory agencies to submit their rules. On the other hand, S. 602 states that the cost-benefit analyses must be submitted “at such times specified by the Administrator.” Theoretically, therefore, the OIRA Administrator could use this authority to limit the effect of this requirement (e.g., requiring agencies to submit the analyses after the rules have been published and taken effect).

Second, even among agencies that are already covered by Executive Order 12866, S. 602 would greatly expand the number of rules subject to cost-benefit analysis. Currently, these agencies are required to prepare cost-benefit analyses only for “economically significant” rules that are submitted to OIRA (an average of about 100 regulatory actions per year during the past 10 years). S. 602 expands this requirement to all “significant” rules (about 650 regulatory actions per year). With the expansion of OIRA reviews to independent regulatory agencies and all significant regulatory actions, it is unclear whether current OIRA staffing would be sufficient to analyze and comment on all of these cost-benefit analyses.103

H.R. 1281, the Restoring Economic Certainty Act of 2011

H.R. 1281, introduced by Representative Reid J. Ribble on March 31, 2011, would generally prohibit all federal agencies from taking rulemaking actions (with certain exceptions) during the two-year period starting 30 days after the date of enactment. At that 30-day point, each agency must begin preparing an economic impact statement for any rule that was “proposed but not promulgated” before the start of the moratorium period. The statement must be certified by the Director of OMB, and contain a detailed estimate of the rule’s annual costs and benefits, including the anticipated net impact on employment. Within 12 months of the start of the moratorium period, agencies must submit the economic impact statements relating to “all such pending rulemaking actions” to the “appropriate” congressional committees. After the two-year moratorium, agencies must include the statements in their rulemaking actions.

Analysis

It is unclear what the terms “proposed but not promulgated” and “all such pending rulemaking actions” mean, so the scope and effect of the bill’s analytical requirements are unclear. Nevertheless, because the bill would generally prohibit agencies from taking any rulemaking action for two years, it appears that the analytical requirements would only apply to the

103 OIRA currently has about 50 staff members, of which about 30 do regulatory reviews and reviews of about 3,000 agency information collection requests per year.
exceptions to the moratorium during the two-year period (e.g., military and foreign affairs rules, and rules that repeal an existing rule). After the moratorium, the bill would require agencies to include an economic impact statement in each rule, including the hundreds of non-controversial administrative rules that agencies issue each year (e.g., temporary safety zones and traffic separation schedules).

S. 1219 and H.R. 2204, the Employment Impact Act of 2011

On June 16, 2001, Senator John Barrasso and Representative Lee Terry introduced S. 1219 and H.R. 2204, respectively, which would require all federal agencies to “include in every recommendation or report on proposals for legislation and other major Federal actions with potentially significant effects on jobs and job opportunities, a jobs impact statement.” The statement is to include (among other things) an assessment of the jobs that would be lost, gained, or sent overseas as a result of the proposed action; any adverse effect on jobs and job opportunities which could not be avoided; alternatives to the proposed action that could avoid negative impacts on jobs and job opportunities; and the relationship between any local short-term impacts on jobs and the maintenance and enhancements of long-term productivity and environmental values. Agencies are instructed to “take into account the cumulative impact on jobs and job opportunities of concurrently pending proposals affecting a particular industry or sector of the economy, and shall not make a finding of no significant impact solely on the basis of examining the impacts of a single proposal in isolation from other pending proposals.”

Analysis

Although some of the existing economic analysis requirements include effects on employment, S. 1219 and H.R. 2204 are more specific in terms of the types of analyses required. However, the bills do not define the term “major Federal actions with potentially significant effects on jobs and job opportunities,” so it is not clear how many actions will trigger the requirement for a jobs impact statement. In similar situations (e.g., the Regulatory Flexibility Act), agencies have been given broad discretion to define such terms, and as a result, the agencies often certified that their actions did not trigger the analysis. To the extent that agencies conclude that their actions have the specified effects, some aspects of the analysis may be difficult to perform (e.g., identifying “the relationship between any local short-term impacts on jobs and the maintenance and enhancements of long-term productivity and environmental values,” and determining the “cumulative impact on jobs and job opportunities of concurrently pending proposals affecting a particular industry or sector of the economy”).

104 For example, UMRA written statements are required to include estimates of effects on job creation, productivity, full employment, and international competitiveness. Section 6(a)(3)(C)(ii) of Executive Order 12866 states that the analysis is to include “any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness)....”
Applying the Executive Orders’ Principles to Independent Regulatory Agencies

S. 358: the Regulatory Responsibility for Our Economy Act of 2011

S. 358, introduced by Senator Pat Roberts on February 15, 2011, would, if enacted, put into statute many of the broad regulatory principles enunciated in Executive Orders 12866 and 13563 (e.g., that federal agencies must adopt regulations only upon a reasoned determination that the benefits justify the costs to the extent permitted by law, tailor regulations to accomplish regulatory objectives while imposing the least burden on society, select regulatory approaches that maximize net benefits, and allow for public participation). The bill defines a covered “agency” to include independent regulatory agencies, and exempts certain types of regulations from these requirements (e.g., rules that pertain to military or foreign affairs functions, and that are limited to agency organization, management, or personnel matters).

Analysis

Senator Roberts said the bill would “strengthen and codify President Obama’s Executive Order from January 18 (Executive Order 13563),” and would ensure that provisions in the executive order would be implemented. He also said that the legislation would improve on the executive order by including independent regulatory agencies. However, some of the standards in both the executive order and the proposed legislation may conflict with each other. For example, a regulatory option that imposes the “least burden on society” may not be the option that will “maximize net benefits.” Also, even if S. 358 is enacted, significant regulations issued by independent regulatory agencies would not be reviewed by OIRA under the procedures currently in Section 6 of Executive Order 12866, so their regulations would not be independently analyzed for consistency with these legislative standards. Those agencies’ rules could, however, be made subject to review by OIRA by statute, or by the President amending Executive Order 12866.

Requiring Cost-Benefit Analysis for Certain Agencies’ Rules

H.R. 1840, CFTC and Cost-Benefit Analysis

H.R. 1840, introduced by Representative Michael K. Conaway on May 11, 2011, would amend Section 15(a) of the Commodity Exchange Act (7 U.S.C. §19(a)) to require CFTC to assess the quantitative and qualitative costs and benefits of upcoming regulations and to adopt a rule “only on a reasoned determination that the benefits of the intended regulation justify the costs of the intended regulation.” In making that determination, CFTC is required to evaluate a variety of factors, including the protection of market participants and the public, and whether, in choosing among alternative regulatory approaches, those approaches maximize net benefits.


106 For example, one regulatory option could have estimated costs of $50 million and benefits of $100 million, yielding net benefits of $50 million. Another regulatory option could have estimated costs of $100 million and benefits $200 million, yielding net benefits of $100 million. The first option would impose the least burden, while the second option would produce the largest net benefits.
Analysis

When H.R. 1840 was introduced, Representative Conaway said “Just as President Obama’s Executive Order directed government agencies to evaluate the cost of regulations on jobs and the economy, this bipartisan legislation will ensure the CFTC conducts a comprehensive qualitative and quantitative analysis of their proposed regulations.” As noted previously, Section 15(a) of the Commodity Exchange Act currently only requires CFTC to “consider” the costs and benefits of its rules before they are issued. H.R. 1840 appears to require CFTC to assess regulatory costs and benefits for all of its rules, not just those that are “economically significant” or “significant.” Also, although the bill states that the cost-benefit assessments are to be done “through the Office of the Chief Economist,” it does not assign oversight responsibilities to anyone outside of the commission (e.g., to OIRA).

H.R. 2175, the Regulatory Balance Act

H.R. 2175, introduced by Representative Stephen Fincher on June 14, 2011, would require the Department of Agriculture (USDA), EPA, and the Food and Drug Administration (FDA) to “perform the cost-benefit analysis described in section 6(a)(3)” of Executive Order 12866 for “any proposed regulation that is determined to be a significant regulatory action” under the executive order. The analysis would have to be submitted to “the Congress” before the rule could take effect.

Analysis

Section 6(a)(3) of Executive Order 12866 contains two types of requirements for cost-benefit analysis. For rules considered “significant” under Section 3(f) of the order, Section 6(a)(3)(B)(ii) requires covered agencies to provide to OIRA a general “assessment of the potential costs and benefits of the regulatory action.” However, for rules considered “economically significant” under Section 3(f)(1) (e.g., those expected to have a $100 million annual impact on the economy), Section 6(a)(3)(C) requires a more detailed analysis, including the “costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulatory action.” Because H.R. 2175 only specifies “Section 6(a)(3),” it is not clear which of these types of analyses is required.

The identified agencies are already required to conduct Section 6(a)(3)(B)(ii) analyses for significant rule. However, if the bill requires those agencies to conduct Section 6(a)(3)(C) analyses for all “significant” rules, then the number of cost-benefit analyses could increase substantially. For example, during calendar year 2010, OIRA reviewed 21 “economically significant rules” from EPA, and a total of 93 rules that were considered “significant.”

H.R. 2308, the SEC Regulatory Accountability Act

H.R. 2308, introduced by Representative Scott Garrett on June 23, 2011, would amend Section 23 of Securities Exchange Act of 1934 (15 U.S.C. 78w) and require the SEC to conduct a cost-

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benefit analysis before promulgating a regulation or issuing an order under applicable securities
laws. Specifically, the bill states that the SEC shall:

(A) clearly identify the nature of the problem that the proposed regulation is designed to
dress, as well as assess the significance of that problem, to enable assessment of whether
any new regulation is warranted; (B) utilize the Office of the Chief Economist to assess the
costs and benefits, both qualitative and quantitative, of the intended regulation or order and
propose or adopt a regulation or order only on a reasoned determination that the benefits of
the intended regulation or order justify the costs of the intended regulation or order; and (C)
ensure that any regulation or order is accessible, consistent, written in plain language, and
easy to understand and shall measure, and seek to improve, the actual results of regulatory
requirements.

It also says that the commission “may” also take certain actions in making a reasoned
determination of the costs and benefits of a potential regulation (e.g., consider the impact on
capital formation, and determine whether, in choosing among alternative regulatory approaches,
those approaches maximize net benefits).

Analysis

Representative Garrett said that the bill “would simply require the SEC to abide by President
Obama’s executive order [Executive Order 13563].” However, H.R. 2308 would appear to
require the SEC to conduct cost-benefit analyses for all rules and orders, not just those that are
economically significant (as is currently required in Executive Orders 12866 and 13563). Also,
the SEC chairman has said that the agency already conducts cost-benefit analyses for its rules,
and would comply with the executive order’s requirements. The SEC OIG’s June 2011 report
indicated that the commission’s current rulemaking procedures were already “closely aligned”
with the requirements relevant executive orders and OMB circulars. Therefore, some have
questioned whether the bill would require SEC to do more than what is already being done. On
the other hand, the D.C. Court of Appeals decision in July 2011 suggests that the SEC may need
to improve their analyses of the costs and benefits of proposed rules.

S. 1292, the Employment Protection Act of 2011

S. 1292, introduced by Senator Pat Toomey on June 29, 2011, would require EPA to “analyze the
impact on employment levels and economic activity,” “disaggregated by state,” before
“promulgating any regulation or other requirement, issuing any policy statement, guidance
document, or endangerment finding, implementing any new or substantially altered program, or
denying any permit.” Each analysis is required to include “a description of estimated job losses
and decreased economic activity due to the denial of a permit, including any permit denied under
the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).” GAO would be required to
report annually to the Senate Committee on Environment and Public Works and the House

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110 OIG/SEC, p. 4.
111 Yin Wilczek, “Garrett Introduces Bill to Require SEC to Consider Costs, Benefits of Rulemaking,” BNA Daily
Committee on Transportation and Infrastructure on the “economic models” that EPA used to carry out this requirement.

**Analysis**

Executive Order 12866 already requires EPA (and other covered agencies) to report on the costs of its “economically significant” regulations, including “any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness).” UMRA requires EPA to identify in its written statements “any disproportionate budgetary effects on particular regions, governments, or segments of the private sector, and estimates of effects on the national economy, including effects on job creation, productivity, full employment, and international competitiveness.” S. 1292 would greatly expand these requirements to cover all EPA regulations (not just those that are “economically significant” or subject to UMRA), as well as many other types of documents (i.e., guidance, endangerment findings, and permitting decisions). According to GAO’s database, in calendar year 2010, EPA issued a total of 446 final rules, of which 433 were considered “routine” actions (e.g., approval of state implementation plans, exemptions to pesticide tolerances). EPA was required to conduct cost-benefit analyses on only 10 of 446 rules that were considered “economically significant” or “major” rules (e.g., rules with a $100 million annual effect on the economy). S. 1292 would require EPA to conduct analyses on all 446 rules, plus any other policy statements, guidance documents, endangerment findings, or permit denials. Also, some aspects of this bill are unclear (e.g., whether “promulgating a regulation” includes proposed rules or just final rules, and what constitutes a “substantially altered” program).

**Improving the Implementation of the RFA and UMRA**

Several bills have been introduced in the 112th Congress to improve the nature and scope of analyses required by the Regulatory Flexibility Act and the Unfunded Mandates Reform Act. For example:

- Both S. 474, introduced by Senator Olympia Snowe on March 3, 2011, and S. 1030, introduced by Senator Snowe on May 19, 2011, would amend the RFA and require the agencies’ regulatory flexibility analyses to include indirect effects of their rules, include more detailed analyses, and cover significant guidance documents.

- H.R. 527, introduced by Representative Lamar Smith on February 8, 2011, would also require more detailed RFA analyses and consideration of indirect effects, but would also cover rules that are issued without a prior notice of proposed rulemaking and require the SBA Office of Advocacy to issue rules governing RFA compliance (which could include a definition of a “significant economic impact on a substantial number of small entities”).

- Both S. 817, introduced by Senator Rob Portman on April 14, 2011, and S. 1189, introduced by Senator Portman on June 14, 2011, would, if enacted, change the definition of an “agency” to include independent regulatory agencies. S. 1189 would go further, however, by defining “cost” to include indirect effects.

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Cost-Benefit and Other Analysis Requirements in the Rulemaking Process

requiring more detailed analysis, and eliminating several of the analytical exclusions (e.g., rules without a prior notice of proposed rulemaking, and rules that do not require $100 million in “expenditures).

• H.R. 373, introduced by Representative Virginia Foxx on January 20, 2011, would change the definition of an “agency” in UMRA to include independent regulatory agencies, expanding the act’s coverage to include “reasonably foreseeable indirect costs,” and cover rules that are currently not covered (e.g., rules without a prior notice of proposed rulemaking, and rules that are not “mandates”).

Analysis

While these bills may, if enacted, broaden the coverage of the RFA and UMRA, and require the agencies to include elements in their analyses that are not currently considered, they may not improve all aspects of the acts’ administration, and may not result in more analyses. For example, none of the RFA bills explicitly requires that the term “significant economic impact on a substantial number of small entities” be defined, which could result in agencies to continue to certify that their rules do not require analysis. Also, although S. 1189 and H.R. 373 could make UMRA applicable to more rules, and could require more detailed analysis, UMRA still would not require agencies to do much more than is currently required in Executive Order 12866 and OMB Circular A-4.

Concluding Observations

As the preceding discussion indicates, many federal agencies are already required to conduct cost-benefit and other types of analysis before they issue certain proposed or final rules. These requirements have been added incrementally by various statutes and executive orders during the past 40 to 50 years, and sometimes require agencies to perform the same general types of analyses. For example, virtually all of the elements of the written statements that agencies are required to prepare pursuant to UMRA were already required by Executive Order 12866 (e.g., quantitative and qualitative estimates of costs and benefits, effects on the national economy, consideration of a range of alternatives, selection of the alternative that is least costly, most cost-effective, or least burdensome, or an explanation of why that alternative was not selected). The drafters of UMRA appear to have recognized the overlap, stating in Section 202(c) of the statute (2 U.S.C. §1534) that an agency may prepare the written statement “in conjunction with or as part of any other statement or analysis.” Section 605(a) of the RFA (5 U.S.C. §605(a)) contains the same type of statement.

Also, many of the current requirements have substantial exclusions and exceptions, or give federal agencies substantial discretion to decide whether an analysis is required. For example, the RFA’s analytical requirements do not apply to rules that are issued without a prior notice of proposed rulemaking, and agencies can avoid regulatory flexibility analyses if they certify that their rules do not have a “significant” economic impact on a “substantial” number of small entities. UMRA does not apply to independent regulatory agencies, and contains more than a dozen other ways that “economically significant” rules would not be covered by its requirements. Executive orders on children, federalism, and energy permit agencies to escape coverage of their analytical requirements if they conclude the effects of their rules will not have “disproportionate” effects on children, will not have “significant federalism implications,” or do not involve
“significant energy actions.” Executive Order 12866 and OMB Circular A-4 contain some of the most inclusive and far-reaching analytical requirements, but they do not apply to independent regulatory agencies, or to rules that are not “economically significant.”

Proposed legislation in the 112th Congress would, if enacted, add to the existing patchwork of analytical requirements, expand the reach of the existing requirements, and/or close existing “loopholes.” For example, S. 602 would codify and expand the requirements in Executive Order 12866 to cover independent regulatory agencies, and to cover rules that are “significant” (not just those that are “economically significant”). As a result, agencies would have to do cost-benefit analyses for hundreds of additional rules each year, but the independent regulatory agencies would not have to submit the underlying rules to OIRA. H.R. 2175 may also expand cost-benefit analysis to “significant” rules, but only at USDA, EPA, and FDA. H.R. 2308 would require cost-benefit analysis for all rules issued by the SEC, regardless of their level of significance. S. 474 and S. 1030 would expand the RFA to significant guidance documents, and would require more detailed and extensive analysis. S. 1189 would expand UMRA to independent regulatory agencies, and cover many rules that were previously excluded.

Other bills would require agencies to prepare cost-benefit analyses for all of their rules, regardless of their size or degree of controversy. Doing so could delay hundreds of non-significant, administrative rules that industry and the public would often like to see in place (e.g., traffic separation schedules and temporary safety zones). Also, the newly required analyses could prove costly for the agencies to implement, and may produce little or no improvement in the rules themselves. Arguably, therefore, a universal cost-benefit analysis requirement might not pass a cost-benefit test.

**Congressional Options**

Congress could decide that none of the proposed legislative changes merit enactment, and thereby keep the existing analytical framework in place. Alternatively, Congress could decide to enact one or more of these bills, perhaps resulting in more analyses being performed, more detailed analyses, or both. However, even if most of the pending legislation is enacted, many significant rules may continue to be issued without certain types of analysis. For example, none of the bills would define the term “significant economic impact on a substantial number of small entities,” or specifically require an agency to do so. As a result, agencies would likely continue to have broad discretion to determine which rules do not require an RFA analysis. Other bills would not substantially change the nature or number of regulatory analyses that certain agencies would perform. Finally, enacting the bills would add to the existing, incrementally developed combination of statutes, executive orders, and OMB circulars that covers some agencies and rules but not others, and can be confusing to the agencies and the public.

Another, more comprehensive approach could be to consolidate all of the analytical requirements in one place, and perhaps expand those requirements to include more agencies or more rules, or to require different types of analysis for the rules that are covered. Since Executive Order 12866 and OMB Circular A-4 currently contain the most detailed and inclusive analytical requirements, perhaps the easiest way to accomplish that goal would be to add elements to the executive order.

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114 H.R. 527 would require SBA’s Office of Advocacy to issue rules governing RFA compliance, but does not specifically require that the rules define the term “significant economic impact on a substantial number of small entities.”
and circular and ensure that certain agencies and types of economic effects are included (e.g., effects on small entities, or state, local, or tribal governments). The President could arguably make most of these changes by amending the executive order and the circular without congressional action. In 2011, OMB said obtaining better information on the costs and benefits of independent regulatory agencies’ rules was “desirable,” and described the absence of such information as an “obstacle to transparency” that may be having “adverse effects on public policy.” For more than 20 years, the Administrative Conference of the United States and the American Bar Association have recommended that independent regulatory agencies’ rules be reviewed by OIRA.

However, expanding the executive order’s cost-benefit analysis requirements to independent regulatory agencies, and requiring those agencies to submit their covered rules and analyses to OIRA for review, may trigger resistance by those in Congress and elsewhere who believe these agencies should remain more independent of presidential influence than Cabinet departments or agencies like EPA. Sally Katzen, OIRA Administrator for five years during the Clinton Administration, favors expansion of the executive order’s requirements to independent regulatory agencies, and has suggested that a “sense of the Congress” resolution indicating that such a course would be desirable “would go a long way to ameliorate any concerns in that regard.”

Another option would be amend the executive order to require independent regulatory agencies to prepare cost-benefit analyses, but not require them to submit their rules to OIRA for review. If Congress was to establish a “congressional office of regulatory analysis” as is contemplated in H.R. 214 (introduced by Representative Don Young on January 7, 2011), then perhaps the rules and analyses could be submitted there. Or, to maintain a measure of independence, the independent regulatory agencies could be required to submit their rules and analyses to OIRA, but the agencies could be given the same type of authority they have with regard to PRA

115 Commenters at an April 2011 Resources for the Future conference stated that both President Reagan and President Clinton obtained legal opinions from the Office of Legal Counsel at the Department of Justice stating that Executive Orders 12291 and 12866 could cover independent regulatory agencies. However, the decision not to cover them was reportedly a political, not a legal, determination. See http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_ Regulation_KatzenRemarks.pdf, pp. 2-3.


120 Other options include GAO or the Congressional Budget Office, although those agencies would likely require additional resources to take on this responsibility.
submissions—to override any objections from OIRA by a majority vote of the agency’s leadership.\textsuperscript{121}

**Codification of Executive Order’s Requirements**

Alternatively, Congress could decide to enact legislation codifying and expanding the executive order’s requirements to cover independent regulatory agencies, and requiring different types of analyses. Supporters of this approach include Susan Dudley, OIRA Administrator for two years during the George W. Bush Administration, who has said codification could (1) signal congressional support for cost-benefit analysis principles, (2) apply the requirements to independent regulatory agencies, and (3) make compliance with the requirements judicially reviewable.\textsuperscript{122} She also said that legislation could emphasize certain types of analyses that have been found lacking (e.g., effects on employment or indirect effects). Support has also come from Professor Peter L. Strauss of Columbia Law School, who testified in February 2011 that codifying in one statute the analytic requirements in Executive Order 12866 and elsewhere, and “framing them to permit needed regulation to proceed efficiently, would in my judgment be a highly desirable step.”\textsuperscript{123}

Other observers, however, have opposed codification of the cost-benefit analysis requirements in Executive Order 12866. For example, Sally Katzen has said that (1) the executive order’s requirements have been successfully implemented for more than 30 years (as evidenced by the fact that OMB’s reports regularly show that the costs of rules exceed the benefits); (2) even if the executive orders were not working well, there is no evidence that putting the requirements in statutes would make them work better; (3) the executive orders permit Presidents to emphasize different things during their administrations, which would be lost if the requirements were put in statute; and (4) codification of cost-benefit analysis requirements “would be amending a host of previously enacted statutes that either are silent on the role of costs in the formulation of regulations or do not permit the consideration of such factors.”\textsuperscript{124}

Another option to cover all or some of the independent regulatory agencies by the requirements of Executive Order 12866 would be for Congress to amend the statutory definition of an “independent regulatory agency” that is referenced in the executive order. Executive Order 12866 defines an “agency” as (unless otherwise indicated) “any authority of the United States that is an ‘agency’ under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).” That definition (which is actually in 44 U.S.C. 3502(5)) lists the agencies considered to be independent regulatory agencies (e.g., CFTC, SEC, FCC, and the NRC), and also says it includes “any other similar agency designated by statute as a Federal independent regulatory agency or commission.” Congress could amend this provision,

\textsuperscript{121} See 44 U.S.C. 3507(f).


stating that, for purposes of Executive Order 12866, all or certain of these agencies would be covered by the analytical and/or rule submission requirements in the executive order. This approach would not, however, prohibit the President or any future President from amending or revoking the executive order.

**Contextual Considerations**

Whether done by presidential or congressional action, any effort to consolidate or reform the analytical requirements in rulemaking should be cognizant of the state of existing law in this area. Congress has required cost-benefit analysis in some statutes, prohibited it in other statutes, and not precluded it in still other statutes. Both Executive Orders 12866 and 13563 contain the phrase “to the extent permitted by law” when referencing the principles of rulemaking and the analytical requirements, confirming that agencies must adhere to the requirements contained in their authorizing statutes, and may only apply the principles and procedures of the executive orders if the statutes permit them to do so. Should Congress decide to enact legislation superseding existing law, it should do so in full recognition of the likely consequences.

Presidential and congressional requirements for cost-benefit analysis should also recognize that data availability may be an implementation issue, and that additional resources may be necessary for the agencies conducting these analyses. In some cases, the data that agencies need to estimate the costs and benefits of their rules may not exist, or may only be available from regulated entities. Although there is no “typical” cost-benefit analysis (just as there is no “typical” rule), the cost of conducting many individual regulatory analyses has been in the hundreds of thousands of dollars. If more agencies are required to prepare more detailed analyses for more rules, it is unclear how the agencies will be able to do so without more resources.

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125 The scope of any such amendment would likely need to be confined to Executive Order 12866 to avoid affecting other statutes and executive orders that reference the statutory definition of an independent regulatory agency.


128 See, for example, Arthur Levitt, Jr., “Don’t Gut the S.E.C.,” New York Times, August 7, 2011, p. A19, who noted that when he was chairman of the SEC, the data needed to do a cost-benefit analysis was only available from large auditing firms, who would not provide the data. See also U.S. Government Accounting Office, Federal Water Requirements: Challenges to Estimating the Cost Impact on Local Communities, GAO-06-151R (December 1, 2005), which reported that local communities often lack the institutional knowledge or historical records on treatment technologies and, as a result, may not be able to provide cost information.

129 A 1997 study by the Congressional Budget Office concluded that the median cost of 85 analyses conducted between 1990 and 1996 was $270,000, but some of the analyses cost more than $1 million. See Congressional Budget Office, Regulatory Impact Analysis: Costs at Selected Agencies and Implications for the Legislative Process, March 1997, available at http://www.cbo.gov/fpd/docs/40xx/doc4015/1997doc04-Entire.pdf. See also U.S. General Accounting Office, EPA’s Costs of Preparing Regulatory Impact Analyses, GAO/RCED-97-15R (December 6, 1996), which reported that 27 EPA analyses cost about $13 million, or an average of about $480,000 each. The cost of the individual studies ranged from $46,000 to $3.8 million.

130 After the July 22, 2011 decision regarding the SEC’s proxy access rule, the Committee on Capital Markets Regulation (described on its website as an independent and nonpartisan 501(c)(3) research organization dedicated to improving the regulation of U.S. capital markets) released a statement saying, in part, that the SEC and other commissions “will not be able to do the necessary cost-benefit analysis without adequate funding,” and went on to say that “we support such funding.” See http://www.capmktsreg.org/pdfs/2011.07.27%20Proxy%20Access%20statement.pdf.
be controversial and are unlikely to be improved as a result of the analysis, that type of requirement itself may not pass a cost-benefit test.

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The Federal Rulemaking Process: An Overview

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Summary

Federal regulation, like taxing and spending, is one of the basic tools of government used to implement public policy. Although not as frequently examined as congressional or presidential policy making, the process of developing and framing rules is viewed by some as central to the definition and implementation of public policy in the United States. Regulations generally start with an act of Congress, and are the means by which statutes are implemented and specific requirements are established. The terms “rule” or “regulation” are often used interchangeably in discussions of the federal regulatory process. The Administrative Procedure Act of 1946 defines a rule as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” The procedures that federal agencies are required to follow in writing regulations is called the rulemaking process, and are the subject of this report.

During the past 60 to 65 years, Congress and various Presidents have developed an elaborate set of procedures and requirements to guide the federal rulemaking process, often with the implicit or explicit goal of reducing the amount of regulatory burden placed on the public. Statutory rulemaking requirements applicable to a wide range of agencies include the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Information Quality Act. These and other cross-cutting rulemaking requirements often require some type of analysis on the part of the rulemaking agency before issuing a covered rule, but also often give agencies substantial discretion regarding whether the requirements are applicable. Other statutorily-based rulemaking requirements are contained in agency- or program-specific laws, which provide varying levels of discretion regarding the substance of agencies’ rules and may impose (or exclude) additional analytical or procedural requirements. The most important of the current set of presidential rulemaking requirements are in Executive Order 12866, which establishes presidential review of covered agencies’ rulemaking within the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA). The executive order requires covered agencies to submit their significant rules to OIRA for review before they become final, and requires those rules to meet certain minimal standards. Other executive orders and presidential directives delineate other specific rulemaking requirements incumbent on covered agencies. However, these requirements also often provide substantial discretion to agencies regarding whether, and if so how, they are applied.

The purpose of this report is to provide Congress with an overview of the federal rulemaking process and a brief discussion of the major laws and executive orders that prescribe the procedures agencies are to apply when promulgating regulations. This report will be updated when new requirements are put in place or when the requirements in this report change.
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Introduction

Federal regulation, like taxing and spending, is one of the basic tools of government used to implement public policy. In fact, the development and framing of a rule has been described as “the climactic act of the policy making process.”\(^1\) Another observer described the rulemaking process as “absolutely central to the definition and implementation of public policy in the United States,” and said that “no significant attempt to alter the direction of a public program can succeed without effective management of the rulemaking process.”\(^2\) Regulations generally start with an act of Congress, and are the means by which statutes are implemented and specific requirements are established. Federal agencies usually issue more than 3,000 final rules each year on topics ranging from the timing of bridge openings to the permissible levels of arsenic and other contaminants in drinking water. The costs and benefits associated with all federal regulations have been a subject of great controversy, with the costs estimated in the hundreds of billions of dollars and the benefits estimates even higher. The costs federal regulations impose on regulated entities to accomplish policy goals are not reflected in the federal budget process, and some view these off-budget regulatory costs as greater than all federal domestic discretionary spending. Estimates of the benefits of federal regulations are even higher.

The terms “rule” or “regulation” are often used interchangeably in discussions of the federal regulatory process. The Administrative Procedure Act (APA) of 1946 defines a rule as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”\(^3\) The process by which federal agencies develop, amend, or repeal rules is called “rulemaking,” and is the subject of this report.

**Figure 1** illustrates in a general manner the process that most federal agencies are generally required to follow in writing or revising a significant rule. However, we should be quick to point out that some aspects of **Figure 1** do not apply to all rulemaking. For example, as discussed later in this report, an agency may, in certain circumstances, issue a final rule without issuing a notice of proposed rulemaking, thereby skipping several steps depicted in the figure. On the other hand, some rules may be published for public comment more than once. Also, independent regulatory agencies\(^4\) are not required to submit their rules to the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA) for review, and no agency is required to do so for rules that are not “significant.”

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\(^3\) 5 U.S.C. §551 (4).

\(^4\) As used in this report, the term “independent regulatory agencies” refers to the boards and commissions identified as such in the Paperwork Reduction Act (44 U.S.C. §3502(5)), including the Federal Communications Commission, the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, and the Securities and Exchange Commission. The term “independent agencies” refers to other agencies that answer directly to the President, but are not part of Cabinet departments.
The Office of Management and Budget’s (OMB) office of Information and Regulatory Affairs (OIRA) reviews only significant rules, and does not review any rules submitted by independent regulatory agencies.

Note at the top of Figure 1 that the rulemaking process begins when Congress passes a statute either requiring or authorizing an agency to write and issue certain types of regulations. An initiating event (e.g., a recommendation from an outside body or a catastrophic accident) can prompt either legislation or regulation (where regulatory action has already been authorized). For example, in response to lethal chemical releases by plants in Bhopal, India, and West Virginia, Congress enacted section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. §§ 11001-11050, 11023). The act required the owners and operators of certain types of facilities to report the amounts of various toxic chemicals that the facilities release to the environment above certain thresholds, and requires the Environmental Protection Agency (EPA) to make this information available to the public. EPA subsequently issued detailed regulations.
implementing these requirements and, using the authority provided to it through the statute, has required reporting for more than 300 toxic substances in addition to those delineated in the law.

As this example illustrates, the authority to regulate rests with Congress, and is delegated, through law, to an agency. The statutory basis for a regulation can vary greatly in terms of its specificity, from (1) very broad grants of authority that state only the general intent of the legislation and leave agencies with a great deal of discretion as to how that intent should be implemented, to (2) very specific requirements delineating exactly what regulatory agencies should do and how they should take action. Note also in Figure 1 the roles that Congress and the courts can play at the end of the rulemaking process, which may result in a rule being returned to an earlier point in the process or being vacated by the reviewing body. Congress may also play a role at other stages in the process through its oversight and appropriations responsibilities.

Implicit within the steps depicted in Figure 1 is an elaborate set of procedures and requirements that Congress and various Presidents have developed during the past 75 years to guide the federal rulemaking process. Some of these rulemaking requirements apply to virtually all federal agencies, some apply only to certain types of agencies, and others are agency-specific.

Collectively, these rulemaking provisions are voluminous and require a wide range of procedural, consultative, and analytical actions on the part of rulemaking agencies. Some observers contend that the requirements have resulted in the “ossification” of the rulemaking process, causing agencies to take years to develop final rules. For example, the National Advisory Committee on Occupational Safety and Health noted that it takes the Occupational Safety and Health Administration (OSHA) within the Department of Labor an average of 10 years to develop and promulgate a health or safety standard. On the other hand, while these congressional and presidential rulemaking requirements are numerous, it is not clear whether they or some other factors (e.g., lack of data, congressionally imposed delays, court challenges, etc.) are the primary cause of the long time-frames that are sometimes required to develop and publish final rules.

Statutory Rulemaking Requirements

Statutory rulemaking requirements can be generally categorized into two groups—those that are specific to an individual agency or program and those that are more cross-cutting in nature, and therefore applicable to a wider range of agencies or programs. Agency- or program-specific rulemaking requirements may be in authorizing or appropriating statutes, and can have a significant or even determinative effect on an agency’s rules and rulemaking procedures. As noted previously, these statutes sometimes specifically delineate what the agency’s rules should require. For example, the Employee Retirement Income Security Act (29 U.S.C. § 1001 et seq.) gives the Pension Benefit Guaranty Corporation no discretion in drafting rules that establish minimum pension insurance premium rates, specifying to the dollar what those rates should be. Also, for a

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[7] For example, 29 U.S.C. §1306(a)(3)(A) states that the annual premium rate payable in the case of a single-employer plan for basic benefits is “an amount equal to the sum of $19 plus the additional premium (if any) determined under subparagraph (E) for each individual who is a participant in such plan during the plan year.”
number of years the Department of Transportation (DOT) concluded that it had no discretion in setting the average fuel economy standards for light trucks, and was required to keep the standard at 20.7 miles per gallon.\textsuperscript{8} Agency-specific statutes may also impose specific procedural requirements on their rulemaking processes (e.g., the conduct of public hearings, the publication of a notice of proposed rulemaking by a particular date, or the coordination of rulemaking with another agency).

In other cases, though, the statutes give rulemaking agencies substantial discretion in how rules are developed and what they require. For example, the Agricultural Adjustment Act provides a broad grant of rulemaking authority to the Secretary of Agriculture, stating only that agricultural marketing should be “orderly” but providing little guidance regarding which crops should have marketing orders or how to apportion the market among growers.\textsuperscript{9} More recently the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148) contained a number of provisions giving federal agencies broad authority to issue “such regulations as may be necessary” to carry out certain requirements in the law.\textsuperscript{10}

Agency rulemaking is also often significantly influenced by court decisions interpreting these agency- or program-specific statutory requirements. For example, in 1980 the Supreme Court ruled that, before promulgating new health standards, OSHA must demonstrate that the particular chemical to be regulated poses a “significant risk” under workplace conditions permitted by current regulations.\textsuperscript{11} The court also said that OSHA must demonstrate that the new limit OSHA proposes will substantially reduce that risk. This decision effectively requires OSHA to evaluate the risks associated with exposure to a chemical and to determine that these risks are “significant” before issuing a regulatory standard. Other court decisions have required OSHA rulemaking to demonstrate the technical and economic feasibility of its requirements.\textsuperscript{12} Still other decisions have required agencies to permit meaningful public participation in rulemaking and to fully explain what they considered and why they did and did not take particular actions.\textsuperscript{13}

The following discussion of statutory rulemaking requirements focuses solely on the cross-cutting requirements that are applicable to more than one agency. The discussion provides descriptions of some of the major rulemaking-related statutes and is not intended to be a catalogue of all such requirements. Some of these rulemaking requirements have been in place for more than 70 years, but most have been implemented within the past 30 years. Some of these statutory requirements apply to Cabinet departments and independent agencies; others apply to those agencies as well as the independent regulatory agencies.

\textsuperscript{8} DOT’s 1998 appropriations act stated that “(n)one of the funds in this Act shall be available to prepare, propose, or promulgate any regulations ... in any model year that differs from the standards promulgated for such automobiles prior to the enactment of this section.”


\textsuperscript{10} For more information on PPACA rulemaking provisions, see CRS Report R41180, \textit{Rulemaking Requirements and Authorities in the Patient Protection and Affordable Care Act (PPACA)}, by Curtis W. Copeland.


\textsuperscript{13} See, for example, \textit{Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co.}, 463 U.S. 29 (1983). The Supreme Court said the agency “must examine the relevant data and articulate a satisfactory explanation of its action, including a ‘rational connection between the facts found and the choice made.’”
Federal Register Act

With the surge of New Deal legislation enacted in the 1930s, Congress made federal agencies responsible for issuing detailed regulations on a variety of complex social and economic issues. However, no central regulatory publication system existed, so there was no efficient way for citizens to know about regulations that affected them. Therefore, Congress enacted the Federal Register Act, which became law in July 1935 (44 U.S.C. Chapter 15). The act established a uniform system for handling agency regulations by requiring (1) the filing of documents with the Office of the Federal Register, (2) the placement of documents on public inspection, (3) publication of the documents in the Federal Register, and (4) (after a 1937 amendment) permanent codification of rules in the Code of Federal Regulations. Publication of a rule in the Federal Register provides official notice of its existence and contents. Other documents that are generally published in the Federal Register include presidential proclamations and executive orders, notices, and documents that the President or Congress require to be published.

Regulations for carrying out the Federal Register Act deal with, among other things, the format and distribution of the Federal Register and how documents are prepared, transmitted, and processed. The Office of the Federal Register is responsible for printing and distributing the Federal Register, and the Office has published a guide and a drafting handbook explaining how Federal Register documents are to be prepared. The Federal Register is published each business day, and is now available electronically.

Administrative Procedure Act

The most long-standing and broadly applicable federal rulemaking requirements are in the Administrative Procedure Act (APA) of 1946 (5 U.S.C. § 551 et seq.). The APA was written to bring regularity and predictability to agency decisionmaking, and provides for both formal and informal rulemaking. Formal rulemaking is used in ratemaking proceedings and in certain other cases when rules are required by statute to be made “on the record” after an opportunity for a trial-type agency hearing. However, few statutes require such on-the-record hearings. Informal rulemaking, also known as “notice and comment” rulemaking, is used much more frequently, and is the focus of this section.

In informal rulemaking, the APA generally requires that agencies (Cabinet departments and independent agencies as well as independent regulatory agencies) publish a notice of proposed rulemaking (NPRM) in the Federal Register. The notice must contain (1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a

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16 For more on formal and other types of rulemaking, as well as information on judicial review, see CRS Report R41546, A Brief Overview of Rulemaking and Judicial Review, by Vanessa K. Burrows and Todd Garvey.
17 Some agencies begin the rulemaking process by publishing an “advance notice of proposed rulemaking in which the agency notifies the public that it is considering an area for rulemaking and often requests comments on the appropriate scope or topics of the rule. The APA does not require the use of advance notices, but some other statutes require it for particular types of rules. Similarly, agencies may issue a “supplemental notice of proposed rulemaking” after an NPRM is issued if they wish to obtain public comment on new factual proposals before issuing a final rule.
description of the subjects and issues involved. After giving “interested persons” an opportunity to comment on the proposed rule, and after considering the public comments, the agency may then publish the final rule, incorporating a general statement of its basis and purpose. Although the APA does not specify the length of this public comment period, agencies commonly allow at least 30 days.\(^1\) Public comments as well as other supporting materials (e.g., hearing records or agency regulatory studies but generally not internal memoranda) are placed in a rulemaking “docket” which must be available for public inspection. Finally, the APA states that the final rule cannot become effective until at least 30 days after its publication unless (1) the rule grants or recognizes an exemption or relieves a restriction, (2) the rule is an interpretative rule or a statement of policy, or (3) the agency determines that the rule should take effect sooner for good cause, and publishes that determination with the rule.

The final rule cannot adopt a provision if the NPRM did not clearly provide notice to the public that the agency was considering adopting it. If challenged in court under the APA, an agency rulemaking can be held unlawful or set aside if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”\(^1\) The court can also “compel agency action unlawfully withheld or unreasonably delayed.” Amendment or revocation of an existing rule generally requires the responsible agency to issue a new rule through the APA process.

Exceptions to the APA Notice Requirement

Although the APA generally requires agencies to publish NPRMs before promulgating a final rule, the act provides exceptions to this requirement. For example, the APA states that the notice and comment procedures generally do not apply when an agency finds, for “good cause,” that those procedures are “impracticable, unnecessary, or contrary to the public interest.” When agencies use the good cause exception, the act requires that they explicitly say so and provide a rationale for the exception’s use when the rule is published in the Federal Register. The APA also provides explicit exceptions to the NPRM requirement for certain categories of regulatory actions, such as rules dealing with military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts. Further, the APA says that the NPRM requirements do not apply to interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice.\(^2\) However, these rules do have to be published in the Federal Register.

The legislative history of the APA makes it clear that Congress did not believe that the act’s good cause exception to the notice and comment requirements should be an “escape clause.” According to the Senate committee’s report accompanying the APA, a “true and supported or supportable finding of necessity or emergency must be made and published” when the agency uses the good

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\(^1\) Executive Order 12866, discussed in detail later in this report, suggests that agencies allow the public at least 60 days to comment for “significant” rules.

\(^2\) The APA judicial review provisions are codified at 5 U.S.C 701-706. For more information on the APA and judicial review, see CRS Report R41546, A Brief Overview of Rulemaking and Judicial Review, by Vanessa K. Burrows and Todd Garvey.

\(^2\) In addition to the APA exceptions, Congress sometimes includes specific exemptions from notice and comment procedures in other statutes. For example, section 161(d) under title I of the Federal Agriculture Improvement and Reform Act of 1996 (P.L. 104-127, 110 Stat. 934-935) instructed the Secretary of Agriculture and the Commodity Credit Corporation to issue regulations not later than 90 days after the date of enactment of the title, without regard to the notice and comment provisions of the APA.
cause exception.\textsuperscript{21} The legislative history also indicates that Congress envisioned agencies using the notice and comment procedures even in some cases in which the APA’s exceptions applied.

A federal agency’s invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review. After having reviewed the totality of circumstances, the courts can and sometimes do determine that an agency’s reliance on the good cause exception was not authorized under the APA.\textsuperscript{22} The case law has generally reinforced the view that the good cause exception should be “narrowly construed.”\textsuperscript{23}

Two procedures for noncontroversial and expedited rulemaking were designed not to involve NPRMs. “Direct final” rulemaking involves agency publication of a rule in the \textit{Federal Register} with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (e.g., 30 days). However, if an adverse comment is filed, the direct final rule is withdrawn and the agency may publish the rule as a proposed rule under normal NPRM procedures. Direct final rulemaking can be viewed as a particular application of the APA’s good cause exception in which agencies claim NPRMs are “unnecessary.”\textsuperscript{24} Both Vice President Albert Gore’s National Performance Review and the Administrative Conference of the United States encouraged agencies to use direct final rulemaking for noncontroversial rules.\textsuperscript{25}

The Administrative Conference also endorsed the use of what is known as “interim final” rulemaking, in which an agency issues a final rule without an NPRM that is generally effective immediately, but with a post-promulgation opportunity for the public to comment. If the public comments persuade the agency that changes are needed in the interim final rule, the agency may revise the rule by publishing a final rule reflecting those changes. Interim final rulemaking can be viewed as another particular application of the good cause exception in the APA, but with the addition of a comment period after the rule has become effective.\textsuperscript{26}

Congress sometimes requires agencies to use interim final rulemaking, and may also specify the length of the comment period. For example, Subsection (b)(2) of Section 1104 of the Patient Protection and Affordable Care Act amended Section 1173 of the Social Security Act (at 42 U.S.C. § 1320d-2) and states, in part, that the Secretary “shall promulgate an interim final rule

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\item \textsuperscript{21} Senate Committee on the Judiciary, “Administrative Procedure Act: Legislative History,” Senate Document 248, 79th Congress, 2nd Session (1946).
\item \textsuperscript{23} See American Federation of Government Employees, AFL-CIO \textit{v. Block}, 655 F.2d 1153, 1156 (D.C. Cir 1981); and \textit{Mobay Chemical Corp. v. Gorsuch}, (682 F.2d 419, 426 (3rd Cir.), cert. denied, 459 U.S. 988 (1982). In another case (\textit{Action on Smoking and Health v. CAB}, 713 F.2d 795, 800 [D.C. Cir 1983]), the court said that allowing broad use of the good cause exception would “carve the heart out of the statute.”
\item \textsuperscript{24} For more, see Ronald M. Levin, “More on Direct Final Rulemaking: Streamlining, Not Corner Cutting,” \textit{Administrative Law Review}, 51 (summer 1999), pp. 757-766.
\item \textsuperscript{25} See Office of the Vice President, \textit{Improving Regulatory Systems: Accompanying Report of the National Performance Review} (Washington: Sept. 1993). The Administrative Conference was established by statute as an independent agency to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.
\item \textsuperscript{26} For more, see Michael Asimow, “Interim Final Rules: Making Haste Slowly,” \textit{Administrative Law Review}, 51 (summer 1999), pp. 703-755.
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applying any standard or operating rule recommended by the National Committee on Vital and Health Statistics,” and “shall accept and consider public comments on any interim final rule published under this subparagraph for 60 days after the date of such publication.”

In August 1998, the General Accounting Office reported that about half of the 4,658 final regulatory actions published in the Federal Register during 1997 were published without NPRMs.27 Seven agencies accounted for about 70% of both the final actions and the actions without NPRMs. Most of the actions without NPRMs appeared to involve administrative or technical issues with limited applicability. However, 11 of the 61 final rules published during 1997 that were “major” (e.g., having a $100 million impact on the economy) did not have NPRMs. The agencies most commonly cited the APA’s good cause exception as their justification for not publishing NPRMs, frequently noting the time-sensitive nature of the actions being taken. The agencies also frequently used the categorical exceptions permitted in the APA (e.g., actions involving agencies’ management or personnel). In some cases GAO concluded that the agencies’ explanations for why NPRMs were not used were not clear or understandable, with the agencies sometimes making broad assertions that an NPRM would delay the issuance of rules that were, in some general sense, in the public interest. For example, in one case the agency said that soliciting public comments on the rule was “contrary to the public interest” because the rule authorized a “new and creative method of financing the development of public housing.”28

National Environmental Policy Act

The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. §§ 4321-4347) was the first statute to require an “impact statement” as a way to ensure that federal agencies give special consideration to certain issues during the rulemaking process. NEPA requires all federal agencies to include in every recommendation or report related to “major Federal actions significantly affecting the quality of the human environment” a detailed statement on the environmental impact of the proposed action. Initially, though, agencies make a threshold determination (known as an “environmental assessment”) as to whether the rule or other action represents a significant impact on the environment. If not, the agency issues a “finding of no significant impact.” If the agency concludes that there is a significant impact, the agency then prepares a full “environmental impact statement” describing the likely effects of the rule.

According to the act and its implementing regulations developed by the Council on Environmental Quality, the environmental impact statement must delineate the direct, indirect, and cumulative effects of the proposed action.29 Agencies are also required to include in the statement (1) any adverse environmental effects that cannot be avoided should the proposal be implemented, (2) alternatives to the proposed action, (3) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and (4) any irreversible and irretrievable commitments of resources that would be involved if the proposed action should be implemented. Before developing any such environmental impact statement, NEPA requires the responsible federal official to consult with and obtain comments of

29 NEPA regulations are codified at 40 CFR Parts 1500-1508.
The Federal Rulemaking Process: An Overview

any federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. Agencies must make copies of the statement and the comments and views of appropriate federal, state, and local agencies available to the President, the Council on Environmental Quality, and to the public. The adequacy of an agency’s environmental impact statement is subject to judicial review.

In April 2002, the Chairman of the Council on Environmental Quality established a task force composed of federal agency employees to review NEPA implementation practices and procedures. In September 2003, the task force issued a report containing more than 50 recommendations to expedite the NEPA review process. Among other things, the task force recommended that new guidance be developed setting standards for the documentation needed to support a determination that a rule would not have significant environmental effects. Also, several pieces of legislation have been enacted since 2008 in an effort to streamline the NEPA process.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. §§ 3501-3520) was originally enacted in 1980, but was subsequently amended in 1986 and again in 1995. One of the purposes of the PRA is to minimize the paperwork burden for individuals, small businesses, and others resulting from the collection of information by or for the federal government. The act generally defines a “collection of information” as the obtaining or disclosure of facts or opinions by or for an agency by 10 or more nonfederal persons. Many information collections, recordkeeping requirements, and third-party disclosures are contained in or are authorized by regulations as monitoring or enforcement tools. In fact, these paperwork requirements are the essence of many agencies’ regulatory provisions. The PRA requires agencies to justify any collection of information from the public by establishing the need and intended use of the information, estimating the burden that the collection will impose on respondents, and showing that the collection is the least burdensome way to gather the information.

The original PRA established the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to provide central agency leadership and oversight of government-wide efforts to reduce unnecessary paperwork burden and improve the management of information resources. Agencies must receive OIRA approval (signified by an OMB control number displayed on the information collection) for each collection request before it is implemented, and those approvals must be renewed at least every three years. Failure to obtain OIRA approval for an active collection, or the lapse of that approval, represents a violation of the act, and triggers the PRA’s public protection provision. Under that provision, no one can be penalized for failing to comply with a collection of information subject to the act if the collection

31 For more information this legislation and on NEPA, see CRS Report RL33152, The National Environmental Policy Act (NEPA): Background and Implementation, by Linda Luther.
32 For example, EPA’s Toxics Release Inventory (TRI) program is essentially a database created through collections of information imposed on businesses to inform the public about chemical hazards in their communities. TRI reports require businesses in certain industries to report the quantity of any of more than 600 chemicals entering each environmental medium on site, transfers of the chemical in wastes to off-site locations, on-site treatment methods and efficiency, and source reduction and recycling activities.
The Federal Rulemaking Process: An Overview

The PRA clearance process is described in the act and implementing regulations. For new collections, no later than the publication of the NPRM, the issuing agency must submit the proposed rule and any background information to OIRA. At the same time the agency is required to publish a notice in the Federal Register stating that OIRA’s approval is being sought, thereby providing the public with an opportunity to comment on the proposed collection. For any collection of information that is not contained in a proposed rule, OIRA staff have up to 60 days under the statute to review the proposed collection and ensure, among other things, that the collection is statutorily authorized and necessary, and that the agency’s paperwork burden estimate (most commonly measured in terms of “burden hours”) is reasonable. At the end of the process the agency is notified of the disposition of the review. OIRA data indicates that the office takes action on between 3,000 and 5,000 information collection requests (new approvals, renewals, or revisions) each year.

The 1995 PRA reaffirmed the principles in the original act and gave significant new responsibilities to OIRA and executive branch agencies. For example, the act currently requires OIRA to “oversee the use of information resources to improve the efficiency and effectiveness of governmental operations to serve agency missions.” The PRA also requires federal agencies to establish a process, independent of program responsibility, to evaluate proposed collections of information, manage information resources to reduce information collection burdens on the public, and ensure that the public has timely and equitable access to information products and services.

The coverage of the PRA is extremely broad, including actions by both Cabinet departments and independent agencies as well as independent regulatory agencies, and covering virtually any type of collection of information that these agencies “conduct or sponsor.” As a result of the 1995 amendments to the act, the PRA’s clearance requirements clearly cover collections of information “requiring the disclosure to third parties or the public,” effectively overturning the Supreme Court’s 1990 decision in Dole v. United Steelworkers of America (494 U.S. 26).

One of the key features of the PRA of 1995 was the requirement that OIRA, in consultation with the agency heads, set annual government-wide goals for the reduction of information collection burdens by at least 10% in fiscal years 1996 and 1997, and by at least 5% in each of the succeeding four fiscal years. The act also required OIRA to establish agency burden reduction goals each year representing “the maximum practicable opportunity in each agency.” At the end

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33 For an up-to-date inventory of OMB-approved information collections, see http://www.reginfo.gov/public/do/PRAMain.
34 Independent regulatory agencies can, by majority vote, void any OIRA disapproval of a proposed collection of information.
35 An agency’s annual paperwork burden-hour estimate is a function of (1) the frequency of the information collection, (2) the estimated number of respondents, and (3) amount of time that the agency estimates it takes each respondent to complete the collection. For example, if an agency estimates that an information collection conducted twice each year will take each of the estimated 10,000 respondents 10 hours to complete each time, the total annual burden hour estimate for the collection is 200,000 burden hours (2 times 10,000 times 10).
36 The act’s definition of an agency excludes only the General Accounting Office, the Federal Election Commission, the governments of the District of Columbia, U.S. territories and possessions, and government-owned contractor-operated facilities.
of FY1995 (just before the PRA of 1995 took effect) federal agencies estimated that their information collections imposed about 7 billion burden hours on the public. Therefore, if all federal agencies had been able to meet each of the government-wide goals, by September 30, 2001, the burden-hour estimate would have decreased about 35% to about 4.6 billion hours. However, this reduction did not occur. In fact, as of September 30, 2002, the government-wide burden estimate stood at more than 8.2 billion hours—a 17% increase since the PRA of 1995 took effect. Nearly half of that increase occurred during FY2002 alone, and about 70% occurred during fiscal years 2001 and 2002. The agencies contend that they are often unable to reduce paperwork requirements without changes in the underlying statutes that require the information to be collected. As of February 2011, there were more than 9,000 active agency information collections, with a total burden-hour estimate of nearly 9.9 billion hours.

### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§ 601-612), requires federal agencies to assess the impact of their forthcoming regulations on “small entities,” which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, Cabinet departments and independent agencies as well as independent regulatory agencies must prepare a regulatory flexibility analysis at the time proposed and certain final rules are issued. The analysis for a proposed rule is referred to as an “initial regulatory flexibility analysis” (IRFA) and the analysis for a final rule is referred to as a “final regulatory flexibility analysis.” The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

However, these analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a “significant economic impact on a substantial number of small entities.” The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion regarding when the act’s analytical requirements are initiated. Also, the RFA’s analytical requirements do not apply to final rules for which the agency does not publish a proposed rule.

The RFA initially did not permit judicial review of agencies’ actions under the act. However, amendments to the act in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) (110 Stat. 857, 5 U.S.C. § 601 note) permitted judicial review regarding, among other things, agencies’ regulatory flexibility analyses for final rules and any certifications that

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37 OMB is required to report to Congress on the implementation of the PRA, and does so through an annual “information collection budget.” For the 2010 report, see http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/icb_2010.pdf.


40 Many agencies are apparently aware of this limitation; GAO estimated that in more than 500 final rules published in 1997 the agencies specifically stated that the RFA was not applicable or that a regulatory flexibility analysis was not required because the action was not preceded by an NPRM. See GAO/GGD-98-126, p. 31.
their rules will not have a significant impact on small entities. As a result, a small entity that is adversely affected or aggrieved by an agency’s determination that its final rule would not have a significant impact on small entities could seek judicial review of that determination within one year of the date of the final agency action. In granting relief, a court may remand the rule to the agency or defer enforcement against small entities. The addition of judicial review in 1996 is generally viewed as a significant strengthening of the RFA, and is believed to have improved agencies’ compliance with the act.41

The RFA also contains several other notable provisions. For example, section 602 requires each federal agency to publish a “regulatory flexibility agenda” in the Federal Register each October and April listing regulations that the agency expects to propose or promulgate which are likely to have a significant economic impact on a substantial number of small entities.42 Section 610 of the act requires agencies to review those rules that have or will have a significant impact within 10 years of their promulgation to determine whether they should be continued without change or should be amended or rescinded to minimize their impact on small entities. Section 612 of the RFA requires the Chief Counsel of the Small Business Administration’s (SBA) Office of Advocacy to monitor and report at least annually on agencies’ compliance with the act. SBA’s primary method of monitoring agencies’ compliance is to review and comment on proposed regulations when they are published for notice and comment in the Federal Register. However, the statute also specifically authorizes the Chief Counsel to appear as amicus curiae (i.e., “friend of the court”) in any court action to review a rule.

The RFA also requires agencies to ensure that small entities have an opportunity to participate in the rulemaking process, and the 1996 amendments to the act in SBREFA put in place special requirements for proposed rules issued by the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). The Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203) required the new Consumer Financial Protection Bureau (CFPB) to also hold such panels. EPA, OSHA, and CFPB are required to convene “advocacy review panels” before publishing a regulatory flexibility analysis for a proposed rule. Specifically, the agency issuing the regulation must notify the SBA Chief Counsel for Advocacy and provide information on the draft rule’s potential impacts on small entities and the type of small entities that might be affected. The Chief Counsel then must identify representatives of affected small entities within 15 days of the notification. The review panel must consist of full-time federal employees from the rulemaking agency, the Office of Management and Budget, and SBA’s Chief Counsel for Advocacy. During the panel process, the panel must collect the advice and recommendations of representatives of affected small entities about the potential impact of the draft rule. The panel must report on the comments received and on the panel’s recommendations no later than 60 days after the panel is convened, and the panel’s report must be made public as part of the rulemaking record.43 The agency may or may not adopt the panel’s recommendations.


42 This requirement, as well as a similar requirement in Executive Order 12866, is generally met via entries in the Unified Agenda of Federal Regulatory and Deregulatory Actions. The Unified Agenda is published twice each year in the Federal Register by the Regulatory Information Service Center, and provides uniform reporting of data on regulatory activities under development throughout the federal government.

43 For an examination of the first five advocacy review panels were implemented, see U.S. General Accounting Office, Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements, GAO/GGD-98-36, March 18, 1996.
GAO has examined the implementation of the RFA several times within the past 10 to 15 years, and a recurring theme in GAO’s reports is a lack of clarity in the act and a resulting variability in the act’s implementation. For example, in 1991 GAO reported that each of the four federal agencies that it reviewed had a different interpretation of key RFA provisions. In 1994 GAO again reported that agencies’ compliance with the RFA varied widely from one agency to another and that agencies were interpreting the statute differently. In a 1999 report on the implementation of section 610 of the RFA and in a 2000 report on the implementation of the RFA at the Environmental Protection Agency (EPA), GAO concluded that agencies had broad discretion to determine what the statute required. In all of these reports, GAO suggested that Congress consider clarifying the act’s requirements and/or give SBA or some other entity the responsibility to develop criteria for whether and how agencies should conduct RFA analyses. In 2001, GAO testified that the promise of the RFA may never be realized until Congress or some other entity defines what a “significant economic impact” and a “substantial number of small entities” mean in a rulemaking setting. However, other observers have indicated that the definitions of these terms should remain flexible because of significant differences in each agency’s operating environment.

Periodically, legislation is introduced to amend the RFA. For example, in the 112th Congress, H.R. 527, the Regulatory Flexibility Improvements Act of 2011, would (among other things) clarify and expand the rules covered by the act, and require the SBA Chief Counsel for Advocacy to “issue rules governing agency compliance with this chapter.”

Small Business Regulatory Enforcement Fairness Act

As noted in the previous section of this report, certain provisions in SBREFA amended the RFA to permit judicial review and to permit small entities to participate in EPA and OSHA rulemaking before a proposed rule with a significant impact on small entities is published. Other provisions in SBREFA did not amend the RFA, but imposed new rulemaking-related requirements on federal agencies.

For example, section 212 of SBREFA requires agencies to develop one or more compliance guides for each final rule or group of related final rules for which the agency is required to prepare a regulatory flexibility analysis. Specifically, section 212 requires the guides to (1) be published, (2) be designated as “small entity compliance guides,” and (3) explain the actions a small entity is required to take to comply with an associated final rule. However, the discretion inherent in the RFA regarding when a regulatory flexibility analysis is required also applies to whether compliance guides must be developed. Section 212 gives agencies broad discretion in

other areas as well. For example, it says agencies “may” prepare separate guides covering groups
or classes of similarly affected small entities, and “may” cooperate with associations of small
entities to develop and distribute the guides. Agencies are given “sole discretion” in the use of
plain language in the guides. The statute does not indicate when the guides must be developed or
how they must be “published.” In December 2001, GAO reported that section 212 of SBREFA
did not appear to have had much of an impact on agencies’ rulemaking activities, and its
implementation varied across and sometimes within agencies.49 Using the discretion that the
section provided, GAO said “an agency could legally exclude all of its rules from coverage by the
statute, designate a previously published document as its small entity compliance guide, or
develop and publish a guide with no input from small entities years after the covered rule takes
effect.” GAO recommended several changes it felt were needed to strengthen and clarify the
requirements in section 212.50

Section 213 of SBREFA required federal agencies regulating the activities of small entities to
establish a program for responding to inquiries concerning compliance with applicable statutes
and regulations. The section also says that in any civil or administrative action against a small
entity, such guidance “may be considered as evidence of the reasonableness or appropriateness of
any proposed fines, penalties or damages sought against such small entity.”

Section 222 of SBREFA amended the Small Business Act (15 U.S.C. § 631 et seq.) to require the
SBA Administrator to designate a “Small Business and Agriculture Regulatory Enforcement
Ombudsman,” who was directed to work with each agency to ensure that small business concerns
have an opportunity to comment on agencies’ enforcement actions. The ombudsman was directed
to annually evaluate and report on each agency’s enforcement activities, including a rating of the
“responsiveness to small business” of each agency’s regional and program offices. Section 222
also required the Administrator to establish a “Small Business Regulatory Fairness Board” in
each SBA regional office to report to and advise the ombudsman on “excessive enforcement
actions of agencies against small business concerns.

Section 223 of SBREFA requires agencies to provide small entities with some form of relief from
civil monetary penalties. Specifically, subsection 223(a) of the act required federal agencies
regulating the activities of small entities to establish a policy or program by end of March 1997
for the reduction and, under appropriate circumstances, the waiver of civil penalties by small
entities. In February 2001, GAO reported on the implementation of section 223 and concluded
that all of the agencies’ penalty reduction and waiver policies were within the broad discretion
afforded by the statute.51 However, GAO also reported that some of the policies covered only a
portion of the agencies’ enforcement actions involving small entities, and some treated small
entities no differently than large entities. The agencies’ policies also differed in terms of how key
terms such as “small entity” and “penalty reduction” were defined, and most were developed
before SBREFA took effect. GAO suggested several changes to the statute to strengthen agencies’
penalty relief policies and make them more consistent. For example, GAO suggested amending
the act to require agencies to maintain data on the number of enforcement actions involving small

49 U.S. General Accounting Office, Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on
50 In 2007, Congress enacted some changes to these requirements. See P.L. 110-28, Title VI, Subtitle B, sec. 7005.
Among other things, agencies must prepare compliance guides for any rule for which it must prepare a final regulatory
flexibility analysis, and must post the guides on their websites.
51 U.S. General Accounting Office, Regulatory Reform: Implementation of Selected Agencies’ Civil Penalty Relief
entities and the amount of penalty relief provided. This recommendation was later implemented with the passage of the Small Business Paperwork Relief Act of 2002 (P.L. 107-198, 116 Stat. 729), which required (among other things) that agencies develop and report such information to selected congressional committees.

**Congressional Review Act**

The statutory provision commonly known as the Congressional Review Act (CRA) (5 U.S.C. §§ 801-808) was included as part of SBREFA as enacted in March 1996, and established expedited procedures by which Congress may disapprove agencies’ rules by enacting a joint resolution of disapproval. Under the CRA, before any final rule can become effective it must be filed with each House of Congress and GAO. The act also requires federal agencies to submit to GAO and make available to each House of Congress a copy of any cost-benefit analysis prepared for the rule and a report on the agency’s actions related to the RFA and any other relevant act or executive order. The definition of a “rule” under the CRA is very broad, and the act applies to rules issued by Cabinet departments and independent agencies as well as independent regulatory agencies.

If OIRA considers the issuing agency’s rule to be “major” (e.g., has a $100 million effect on the economy), the agency generally must delay the rule’s effective date by 60 days after the date of publication in the Federal Register or submission to Congress and GAO, whichever is later. Within 15 calendar days of receiving a major rule, GAO is required to provide Congress with a report on the rule assessing the issuing agency’s compliance with the procedural steps required by the various acts and executive orders applicable to the rulemaking process. Although the CRA establishes these special requirements for major rules, the CRA procedures for disapproving regulations apply to all rules, whether or not they are declared to be major.

Within 60 days after Congress receives an agency’s rule, excluding periods when Congress is in recess or adjournment, a Member of Congress can introduce a resolution of disapproval that, if adopted by both Houses and enacted into law, can nullify the rule, even if it has already gone into effect. Congressional disapproval under the CRA also prevents the agency from proposing to issue a “substantially similar” rule without subsequent statutory authorization, but this provision is not intended to vitiate altogether the agency’s power to establish regulations in the area in question.

The CRA provides that Senate action on a disapproval resolution under the act must occur within 60 days of session after the regulation is submitted, and makes available during that period an expedited procedure intended to ensure that the Senate can take up and vote on the measure before the period expires. The act establishes no such expedited procedure for the House. If Congress adjourns less than 60 days of session after a rule is submitted, a new 60 day period for disapproval under the act begins on the 15th legislative day of the next session. If a disapproval resolution is rejected by either House of Congress, the rule can take effect immediately (or as provided by other governing law or rule).

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52 For a detailed discussion of CRA procedures, see CRS Report RL31160, Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act, by Richard S. Beth.

53 Nevertheless, some rules have not been submitted. See CRS Report R40997, Congressional Review Act: Rules Not Submitted to GAO and Congress, by Curtis W. Copeland.

54 To view these reports, see http://www.gao.gov/decisions/majrule/majrule.php.
Federal agencies have submitted more than 50,000 rules to GAO (and presumably, Congress) since the CRA took effect in March 1996, including more than 1,000 major rules. However, only one rule had been overturned through CRA's procedures—OSHA's ergonomics standard in March 2001 (P.L. 107-5). Many reasons have been suggested for why the CRA has not been used more often, but chief among them may be the fact that, if the President vetoes a resolution of disapproval (which is likely if the underlying rule is developed during his administration), then enactment of the resolution would require approval of a two-thirds majority in both houses of Congress. The rejection of the ergonomics rule was the result of a specific set of circumstances created by a transition in party control of the presidency. The majority party in both houses of Congress was the same as the party of the incoming President (George W. Bush). When the new Congress convened in 2001 and adopted a resolution disapproving the rule published under the outgoing President (William J. Clinton), the incoming President did not veto the resolution. Congress may be most able to use the CRA to disapprove rules in similar, transition-related circumstances.

Congress can also stop agency rulemaking or regulatory enforcement through provisions added to agency appropriations legislation. There appear to be four types of such appropriations provisions: (1) restrictions on the finalization of particular proposed rules, (2) restrictions on regulatory activity within certain areas, (3) implementation or enforcement restrictions, and (4) conditional restrictions (e.g., preventing implementation of a rule until certain actions are taken). Some of these kinds of provisions have been included in appropriations bills for many years in a row. The reasons behind these restrictions vary, with some appearing to be based on economic considerations, some requiring or preventing the implementation of rules issued at the end of a presidential administration, and some included for various other reasons. Such provisions are generally applicable only for the period of time and the agencies covered by the relevant appropriations bill, but (depending on how they are worded) can be more broadly applicable. Also, to the extent that agencies have independent sources of funding (e.g., user fees) or implement their regulations through state or local governments, some of the limitations may not be as restrictive as they seem.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) of 1995 was enacted in an effort to reduce the costs associated with federal imposition of responsibilities, duties, and regulations upon state, local, and tribal governments and the private sector without providing the funding appropriate to the costs imposed by those responsibilities. Title I of UMRA established new procedures designed to ensure that Congress fully considers the potential effects of unfunded federal


56 See, for example, Susan E. Dudley, “Reversing Midnight Regulations,” Regulation, vol. 24 (Spring 2001), p. 9, who noted that the “veto threat is diminished [after a transition], since the president whose administration issued the regulations is no longer in office.” For a discussion of which rules may be carried over and disapproved after a transition, see CRS Report RL34633, Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress, by Curtis W. Copeland and Richard S. Beth.

57 For more information, see CRS Report RL34354, Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions, by Curtis W. Copeland.
mandates before imposing them in legislation. Among other things, the procedures call for the Congressional Budget Office to provide statements to authorizing committees about whether reported bills contain mandates and, if so, the cost of those mandates.\footnote{For an overview of UMRA, see CRS Report R40957, \textit{Unfunded Mandates Reform Act: History, Impact, and Issues}, by Robert Jay Dilger and Richard S. Beth.}

Title II of UMRA (2 U.S.C. §§ 1532-1538) contains requirements imposed on covered federal agencies during the rulemaking process. Specifically, the act requires Cabinet departments and independent agencies (but not independent regulatory agencies) to, among other things:

- prepare a written statement containing specific descriptions and estimates for any proposed rule or any final rule for which a proposed rule was published that includes any federal mandate that may result in the expenditure of $100 million or more in any year by state, local, or tribal governments, in the aggregate, or the private sector. One of the items required in the written statement is a qualitative and quantitative assessment of the anticipated costs and benefits of the mandate (Section 202);
- identify and consider a reasonable number of regulatory alternatives and select the least costly, most cost-effective, or least burdensome alternative (or explain why that alternative was not selected) for each rule for which a written statement is prepared (Section 205);
- develop a plan in which agencies provide notice of regulatory requirements to potentially affected small governments (Section 203); and
- develop an effective process to permit elected officers of state, local, and tribal governments (or their designees) to provide input in the development of regulatory proposals containing significant intergovernmental mandates (Section 204).

OIRA has primary responsibility for monitoring agency compliance with title II of UMRA, and issued guidance in March 1995 on the implementation of the title that generally repeated the requirements of the statute. OIRA also publishes an annual report on the implementation of title II.\footnote{In recent years, OIRA’s annual report on UMRA has been combined with its report on the costs and benefits of federal regulations. See, for example, Office of Management and Budget, Office of Information and Regulatory Affairs, \textit{2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities}, available at http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf.}

In February 1998, GAO reported that, because of the way the statute was written, title II of UMRA had little effect on agencies’ rulemaking actions during its first two years of implementation.\footnote{U.S. General Accounting Office, \textit{Unfunded Mandates: Reform Act Has Had Little Effect on Agencies’ Rulemaking Actions}, GAO/GGD-98-30, Feb. 4, 1998.} First, many of the act’s requirements did not appear to apply to most of the “economically significant” rules (e.g., rules with a $100 million impact on the economy) that were promulgated during this period. For example, if a final rule did not have an associated NPRM or imposed a mandate as a condition of federal financial assistance, the written statement requirement in section 202 of UMRA does not apply. Second, UMRA does not require agencies to take the actions specified if the agencies determine that they are duplicative of other actions or
that accurate estimates of the effect of their rules are not feasible. Third, even when UMRA is triggered, it often requires agencies to take actions that are identical or similar to actions that they were already required to take. For example, UMRA’s requirements in sections 202 and 205 for the conduct of cost-benefit analysis and identification of regulatory alternatives are similar to the requirements that were already in place under Executive Order 12866, which was issued more than a year before UMRA was enacted. (See below for a discussion of Executive Order 12866.) The consultation requirements in section 204 are traceable to the notice and comment requirements in the APA, and are almost identical to the requirements in Executive Order 12875, which was issued more than a year before UMRA.

In May 2004, GAO again reported that UMRA’s written statement requirements did not apply to most major or economically significant final rules issued in 2001 and 2002 (only 9 of 122).61 However, GAO also said that some of the rules not triggering UMRA’s requirements “appeared to have potential financial impacts on affected nonfederal parties similar to those of the actions that were identified as containing mandates at or above the act’s thresholds.” In March 2005, GAO reported that parties from various sectors (businesses, public interest groups, academia, and others) most commonly cited UMRA’s numerous definitions, exclusions, and exceptions as problematic and in need of improvement.62 In February 2011, GAO reiterated these conclusions, noting that there are 14 reasons why a rule would not be considered a “mandate” under UMRA.63

Information Quality Act

Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, generally known as the “Data Quality Act” or the “Information Quality Act” (IQA) amended the Paperwork Reduction Act and directed OMB to issue government-wide guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.”64 The IQA also instructed agencies (both Cabinet departments and independent agencies as well as independent regulatory agencies) to issue their own guidelines not more than one year after the issuance of OMB’s government-wide guidelines, and to establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency. Finally, the act required agencies to report periodically to the Director of OMB on the number and nature of complaints received and how such complaints were handled by the agency. The first agency reports were due by January 1, 2004.

In response to a separate congressional requirement, in April 2004, OMB provided Congress with a report on the implementation of the IQA during FY2003.65 The report said that agencies

65 For a copy of this report, see http://www.whitehouse.gov/omb/inforeg/fy03_info_quality_rpt.pdf.
received only about 35 substantive correction requests during the year, and said it was “premature to make broad statements about both the impact of the correction request process and the overall responsiveness of the agencies.” Many other correction requests listed in the report were on minor issues or involved matters that had been dealt with before the IQA was enacted. OMB indicated that the correction requests came from all segments of society, and said there was no evidence that the IQA had affected the pace of rulemaking. However, OMB Watch (a public interest group) said OMB’s report was “seriously flawed” in that it understated the number of correction requests and did not disclose that nearly three-quarters of the requests were from industry.  

The IQA builds upon existing agency responsibilities to assure the quality of information collected, used, or disseminated to the public. Proponents of the act contend that the law and the OMB and agency guidelines will improve the quality of agency science and regulation, and force agencies to regulate based on the best science available. Some of these proponents also maintain that the act will help agencies defend their regulations against lawsuits and reduce the number of lawsuits filed. They also point out that in any requests for correction of information, the IQA places the burden of proof on the affected parties making the request; they must demonstrate that a specific dissemination does not meet the standards of either the OMB guidelines or the agency-specific guidelines. However, opponents of the act and the guidelines contend the IQA may have a chilling effect on agency distribution and use of scientific information. These opponents foresee a flood of information quality challenges, correction requests, and court suits on a wide range of scientific issues, which may tie up agency resources and significantly delay health, safety, and environmental regulations. Opponents have also noted that since “quality” is a subjective term and some regulations are based on “best available data,” regulations could be arbitrarily rejected under this new law.

A major test of the IQA concerned whether agencies’ denials of information correction requests are subject to judicial review. In March 2006, the U.S. Court of Appeals for the Fourth Circuit ruled that the act does not permit judicial review. Two district courts had previously reached a similar conclusion, and the Department of Justice had issued a brief stating that the IQA does not permit judicial review.

Peer Review

In a development closely related to the issue of information quality, in September 2003, OMB published a proposed bulletin on “Peer Review and Information Quality” that would have, if

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66 For a copy of this report, see http://www.ombwatch.org/infor/dataqualityreport.pdf.
67 Salt Institute; Chamber of Commerce of the United States of America v. Michael O. Leavitt, Secretary of Health and Human Services, No. 05-1097, Mar. 6, 2006.
68 In re: Operation of the Missouri River Sys. Litig., No. 03-MD-1555 at 49 (D. Minn. June 21, 2004) (order granting motions for summary judgment); and Salt Institute and the Chamber of Commerce of the United States of America v. Tommy G. Thompson, Secretary, U.S. Department of Health and Human Services, Civil Action No. 04-359, Nov. 15, 2004. In the Salt Institute case, the court ruled that there is no private right of action under the IQA, saying that the “language in the IQA reflects Congress’s intent that any challenges to the quality of information disseminated by federal agencies should take place in administrative proceedings before federal agencies and not the courts.” The court also said that judicial review under the APA was not available because the agency’s actions did not constitute a “final agency action,” and because the agency decisions were within the discretion provided to the agency by law.
69 For more information on the IQA, see CRS Report RL32532, The Information Quality Act: OMB’s Guidance and Initial Implementation, by Curtis W. Copeland.
made final, provided a standardized process by which all significant regulatory information would be peer reviewed. The authorities that OMB cited for this action were the IQA, the Paperwork Reduction Act, and Executive Order 12866. “Regulatory information” was defined in the bulletin as any scientific or technical study that “might” be used by federal, state, local, or international regulatory bodies.

Specifically, the bulletin proposed requiring each federal agency (each executive agency and independent regulatory agency) to take three actions: (1) have all “significant regulatory information” that it intends to disseminate peer reviewed (with information defined as “significant” if OMB determines that it will have a clear and substantial impact on important public policies or private sector decisions); (2) have “especially significant regulatory information” subject to the above requirements peer reviewed according to even higher standards (with information deemed “especially significant” if, among other things, it supports a regulatory action with a $100 million or more impact on the economy or “is relevant to an Administration policy priority”); and (3) provide OMB at least once each year with information about upcoming significant regulatory disseminations and the agency’s plans for conducting peer reviews. The proposed bulletin also said agencies that are likely to disseminate “significant” or “especially significant” regulatory information must supplement or amend their information quality guidelines to incorporate the requirements of the proposed peer review bulletin for “significant” and “especially significant” information. The proposed bulletin indicated that OMB could waive the requirements for peer review if an agency made “a compelling case” that a waiver is necessary (e.g., an imminent health hazard or homeland security threat). OMB received 187 comments from the public and other agencies on its proposed peer review bulletin, with some supporting its issuance in final and others calling for its withdrawal and reconsideration. On April 15, 2004, OMB published a revised bulletin, and again asked the public for comments.

On December 15, 2004, OMB published a final version of the peer review bulletin on its website. The final bulletin was published in the Federal Register on January 14, 2005. OMB said this version reflects “minor revisions” made in response to more than 50 comments from the public on the revised bulletin. For example, the final bulletin requires agencies to disclose the names of peer reviewers to the public and adds an annual reporting requirement to allow OMB to track how agencies are using the bulletin. However, agencies are still afforded substantial discretion to determine when and what type of peer review is required. OMB also retains substantial discretion in certain areas.

OMB and supporters of the peer review bulletin indicate that peer review standards across the government are currently inconsistent, and that more consistent use of peer review can increase the technical quality and credibility of regulatory science. They also assert that peer review can

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71 For a copy of the revised peer review bulletin, see http://www.whitehouse.gov/omb/inforeg/peer_review041404.pdf. For a summary of the public and agency comments provided regarding the first bulletin, see http://www.whitehouse.gov/omb/inforeg/peer_review_comment.pdf. Copies of the comments can be viewed at http://www.whitehouse.gov/omb/inforeg/2003iq/iq_list.html.


74 In a Sept. 20, 2001, memorandum to the President’s Management Council, the OIRA Administrator previously (continued...)
protect science-based regulations from political criticism and litigation. Opponents view the bulletin as an effort to inject political considerations into the world of science and to use the uncertainty that inevitably surrounds science as an excuse to delay new rules that could cost regulated entities millions or even billions of dollars. They also expressed concerns regarding the need for the bulletin and OMB’s authority to issue it.\textsuperscript{75}

**Other Statutory Provisions Related to Rulemaking**

Other statutory provisions have been enacted over the years that, while generally not imposing new rulemaking requirements per se, can affect the rulemaking process.

**Federal Advisory Committee Act**

Several statutes either require or permit the use of advisory committees in the federal rulemaking process. An advisory committee may be composed of experts in the regulatory field involved, representatives of the interest groups affected by the rule, and related federal or state agencies, and may help set the agency’s rulemaking agenda or may simply serve as a sounding board for agency ideas. The enactment of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C. App. II) established requirements to ensure that agencies using advisory committees receive impartial and relevant expertise. Specifically, FACA requires that the advice provided by advisory committees be objective and accessible to the public. With certain exceptions, each advisory committee meeting is presumptively open to the public. Adequate advance notice of the meetings must be published in the *Federal Register*, and all papers, records, and minutes of the meetings must generally be made available to the public. FACA also requires that the advisory committees be fairly balanced in regard to the points of view of affected interests and the functions performed. The act defines an advisory committee as any committee or similar group (1) established or used to obtain advice or recommendation for one or more federal agencies or the President and (2) that is not composed wholly of full-time federal officers or employees.\textsuperscript{76}

**Trade Agreements Act**

The Trade Agreements Act of 1979 (19 U.S.C. §§ 2531-2533) prohibits agencies from setting regulatory standards that create “unnecessary obstacles to foreign commerce” of the United States. The act specifically states that legitimate domestic objectives such as safety or health are not considered unnecessary obstacles. The statute also requires, where appropriate, the use of performance standards rather than design standards and the consideration of international standards as the basis of domestic standards.

\textsuperscript{75} For more information, see CRS Report RL32680, *Peer Review: OMB’s Proposed, Revised, and Final Bulletins*, by Curtis W. Copeland and Eric A. Fischer.

\textsuperscript{76} For more information, see CRS Report R40520, *Federal Advisory Committees: An Overview*, by Wendy R. Ginsberg.
Negotiated Rulemaking Act

The Negotiated Rulemaking Act of 1990 (5 U.S.C. §§ 561-570a), as amended and permanently authorized in 1996 (110 Stat. 3870), seeks to overcome what some observers describe as an adversarial relationship between agencies and affected interest groups that often accompanies agency rulemaking. The concept of negotiated rulemaking (sometimes referred to as regulatory negotiation or “reg-neg”) emerged in the 1980s as a supplement to the traditional procedure for developing regulations. Negotiated rulemaking does not replace procedures necessary under the APA. Instead, the act encourages (but does not require) agencies to consider convening a negotiated rulemaking committee before developing and issuing a proposed regulation under the APA. The committee, composed of representatives of the agency and the various interest groups that would be affected by the proposed regulation, addresses areas of concern in the hope that it can reach agreement on the contents of a proposed regulation. The agency can, if it agrees, then issue the agreement as a proposed rule, and eventually a final rule under existing APA requirements. The expectation is that any rule drafted through negotiated rulemaking would be easier to implement and less likely to be the subject of subsequent litigation. However, any proposal agreed to by the negotiated rulemaking committee is not binding on the agency or other parties.

The major provisions of the act require that (1) a negotiated rulemaking committee consist of at least one member of the agency and no more than 25 members, unless the head of the agency determines that more are needed; (2) the agency select an impartial “facilitator” to chair meetings, subject to the approval of the committee by consensus; (3) an agreement on any negotiated rulemaking must be unanimous, unless the negotiated rulemaking committee agrees to other conditions; and (4) the head of an agency, when deciding whether to establish a negotiated rulemaking committee, assure that (a) there are a limited number of identifiable interests that will be significantly affected by the rule; (b) there is a reasonable chance that a committee can be convened with a balanced representation of interested parties willing to negotiate in good faith; and (c) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time.

An agency may pay reasonable travel and per diem expenses, and reasonable compensation to negotiating committee members under certain conditions. The agency must comply with FACA in establishing and administering the committee. Agency procedural actions related to establishing, assisting, or terminating the committee are not subject to judicial review, but any judicial review available regarding the rule resulting from negotiated rulemaking is unaffected. Although the use of negotiated rulemaking was expected to improve rulemaking timeliness and reduce litigation, one examination of agencies’ efforts in this area indicated that those expectations were not being fulfilled. However, another study indicated that negotiated rulemaking can improve participants’ perception of the final rule and of the overall rulemaking process.

77 For a complete discussion of negotiated rulemaking, see Administrative Conference of the United States, Negotiated Rulemaking Sourcebook (Sept. 1995).
Although the Negotiated Rulemaking Act gives agencies substantial discretion as to whether the approach should be employed in rulemaking, Congress has sometimes mandated its use by rulemaking agencies and established specific procedures and time frames to follow. For example, Section 5602 of the Patient Protection and Affordable Care Act requires the Secretary of Health and Human Services to use negotiated rulemaking to establish a “comprehensive methodology and criteria for designation of ... (A) medically underserved populations in accordance with section 330(b)(3) of the Public Health Service Act (42 U.S.C. § 254b(b)(3)),” and “(B) health professions shortage areas under section 332 of the Public Health Service Act (42 U.S.C. § 254e).”

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. § 272 note), adopted in March 1996, generally requires federal agencies to “use technical standards that are developed or adopted by voluntary consensus standards bodies” to carry out policy objectives unless doing so is “inconsistent with applicable law or otherwise impractical.” Agencies are also required to consult with and (if in the public interest and compatible with agency missions, authority, priorities, and resources) participate with voluntary, private sector, consensus bodies. This provision essentially codified policies already in existence in OMB Circular A-119, and also established reporting requirements and authorized the National Institute of Standards and Technology (NIST) within the Department of Commerce to coordinate agencies’ conformity assessment activities. According to NIST, federal agencies use consensus standards in hundreds of federal procurement or regulatory programs (e.g., requiring certification from Underwriters Laboratories that a product is safe or requiring individuals in certain professions meet specific educational or competency standards).

Regulatory Right-to-Know Act

Section 624 of the Treasury and General Government Appropriations Act, 2001 (31 U.S.C. § 1105 note), sometimes referred to as the “Regulatory Right-to-Know Act,” requires OMB to prepare and submit with the budget an “accounting statement and associated report” containing an estimate of the total costs and benefits (including quantifiable and nonquantifiable effects) of federal rules and paperwork, to the extent feasible, (1) in the aggregate, (2) by agency and agency program, and (3) by major rule. The accounting statement is also to contain an analysis of impacts of federal regulation on state, local, and tribal governments, small businesses, wages, and economic growth. The statute requires an accounting statement and report for calendar year 2002 “and each year thereafter.” To prepare the report, OMB relies heavily on agencies’ estimates of costs and benefits for individual rules published during the previous 10 years. However, if an agency quantified but did not monetize its estimates, OMB monetizes them using “standard”

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80 For more information, see CRS Report RL32452, Negotiated Rulemaking, by Curtis W. Copeland.
82 The accounting statement requirement had been included in appropriations bills for several previous years on a year-to-year basis.
assumptions. In its reports, OMB attempts to capture the agencies’ nonquantified benefits and costs in “other information” columns, but OMB’s monetized estimates exclude these effects.  

Government Paperwork Elimination Act

In 1998, Congress enacted the Government Paperwork Elimination Act (GPEA) (44 U.S.C. § 3504 note), which required that by October 21, 2003, federal agencies provide the public, when practicable, with the option of submitting, maintaining, and disclosing information electronically, instead of on paper. GPEA makes OMB responsible for ensuring that federal agencies meet the act’s implementation deadline. Although GPEA does not specifically mention rulemaking, both OMB and rulemaking agencies have indicated that its requirements have provided an impetus for developing information technology-based approaches to rulemaking that involves information collection and, more generally, to regulatory management.

E-Government Act

The E-Government Act of 2002 (44 U.S.C.A. § 3601 note) was designed to enhance the management and promotion of electronic government services and processes, and contains requirements affecting the rulemaking process. Specifically, section 206 of the act requires agencies, to the extent practicable, to:

- ensure that a publicly accessible website includes all information about that agency that is required to be published in the Federal Register,
- accept public comments on proposed rules “by electronic means,” and
- ensure that a publicly accessible federal website contains “electronic dockets” for proposed rules containing all comments submitted on the rules as well as “other materials that by agency rule or practice are included in the rulemaking docket under (the APA), whether or not submitted electronically.”

The E-Government Act also requires agencies to conduct a “privacy impact assessment” before initiating a new collection of information that uses information technology and contains individually identifying information. In addition, the act established an Office of Electronic Government within OMB, headed by an Administrator appointed by the President. It requires the Administrator of that office to work with the Administrator of OIRA in establishing the strategic direction of the e-government program, and to oversee its implementation.

In January 2003, the Bush Administration launched the “Regulations.gov” website—the first module of its own “e-rulemaking” initiative that would accomplish many of the objectives of the E-Government Act. The website permits the public to identify proposed rules that are open for comment government-wide, and permits the public to comment electronically on those rules. The second module of the e-rulemaking initiative is intended to create one or more electronic dockets for proposed and final rules. The Environmental Protection Agency (EPA) is the lead agency for the e-rulemaking initiative.

83 See http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/ for a compilation of these reports.
E-rulemaking has been described as a way to increase democratic legitimacy, improve regulatory policy decisions, decrease administrative costs, and increase regulatory compliance. However, the implementation of e-rulemaking in the federal government has been controversial. Although the migration of agencies into the government-wide docket was originally planned for 2004, that migration was not completed until 2008. Congress has objected to how e-rulemaking and several other e-government projects have been funded (through appropriations transfers or reimbursements to the projects’ “managing partner” agencies), and has voiced other concerns about the overall management and appropriateness of the initiatives. Questions have also been raised regarding the e-rulemaking initiative’s centralized structure, its costs (more than $53 million spent through FY2008) and expected financial benefits, the functionality of some of the applications being used, and its effect on public participation in the rulemaking process.

The reasons why the federal e-rulemaking initiative had such a difficult first five years are many, but one appears to be the lack of direct, consistent funding. From FY2003 through FY2007, Congress appropriated less than $20 million to the E-Government Fund for all e-government projects—much less than the $345 million authorized in the E-Government Act for that period. Congress has also required approval by the Appropriations Committees before any transfers or reimbursements of appropriations are made. Although some have suggested that better communication is needed between Congress and the executive branch, the conflicts may reflect basic differences of opinion between the two branches regarding control of federal operations and how the branches should interact. A long-term issue is whether e-rulemaking should continue to be housed in EPA.\(^85\)

**Small Business Paperwork Relief Act**

In June 2002, Congress enacted and the President signed the Small Business Paperwork Relief Act of 2002 (P.L. 107-198). The act amended the Paperwork Reduction Act to, among other things, require each agency to establish a single point of contact to act as a liaison for small business concerns with regard to information collection and paperwork issues. It also directed agencies to make a special effort to reduce information collection burdens for small businesses with fewer than 25 employees. OMB was directed to publish in the *Federal Register* and make available on the Internet an annual list of the compliance assistance resources available to small businesses.\(^86\) The act also required agencies to report to Congress on the amount of penalty relief provided to small businesses, and established a task force to study the feasibility of streamlining information collection requirements on small businesses.

**Executive Orders and Directives**

During the past 20 years, each President has issued executive orders and/or presidential directives designed to guide the federal rulemaking process, often with the goal of reducing regulatory burden. Although independent regulatory agencies are generally not covered by these requirements, they are often encouraged to follow them. By far the most important of the current

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86 These lists of compliance assistance resources are available on the OMB website at http://www.whitehouse.gov/omb/inforeg/infolist.html#sbpra and on the SBA website at http://www.sba.gov/ombudsman/compliance/complianceassist.html.
executive rulemaking requirements is Executive Order 12866, which describes both the principles and the process by which presidential regulatory review currently takes place.

Executive Order 12866

Centralized review of agencies’ regulations within the Executive Office of the President has been part of the federal rulemaking process for more than 30 years. Although each of his three predecessors had some type of review process, the most significant development in the evolution of presidential review of rulemaking occurred in 1981, when President Reagan issued Executive Order 12291. The executive order established a set of general requirements for rulemaking, and required federal agencies (other than independent regulatory agencies) to send a copy of each draft proposed and final rule to OMB before publication in the Federal Register. It also required covered agencies to prepare a regulatory impact analysis for each “major” rule (e.g., those with a $100 million impact on the economy). As a result of this order, OIRA's responsibilities were greatly expanded from paperwork reviews to examinations of the substance of covered agencies rules—between 2,000 and 3,000 reviews per year. In 1985, President Reagan expanded OIRA's influence further by issuing Executive Order 12498, which required covered agencies (all except independent regulatory agencies) to submit a regulatory plan to OMB for review each year that covered all of their significant regulatory actions underway or planned.

On September 30, 1993, President Clinton issued Executive Order 12866, which revoked Executive Orders 12291 and 12498 and established a new process for OIRA review of rules. Like its predecessors, the new executive order limited OIRA's reviews to proposed and final rules published by agencies other than independent regulatory agencies. However, it also limited OIRA reviews to actions identified by the rulemaking agency or OIRA as “significant” regulatory actions, defined as those that were “economically significant” (e.g., those with a $100 million impact on the economy) or that (1) were inconsistent or interfered with an action taken or planned by another agency; (2) materially altered the budgetary impact of entitlements, grants, user fees, or loan programs; or (3) raised novel legal or policy issues. As a result, the number of rules that OIRA reviewed dropped from between 2,000 and 3,000 per year to between 500 and 700 per year.

Executive Order 12866 also differs from its predecessors in other respects. For example, the order requires that OIRA generally complete its reviews of proposed and final rules within 90 calendar days. It also requires both rulemaking agencies and OIRA to disclose certain information about how the regulatory reviews were conducted. For example, agencies are to identify for the public (1) the substantive changes made to rules between the draft submitted to OIRA for review and the action subsequently announced, and (2) changes made at the suggestion or recommendation of OIRA. OIRA is required to, among other things, provide agencies with a copy of all communications between OIRA personnel and parties outside of the executive branch, and to maintain a public log of all regulatory actions under review and of all of the documents provided to the agencies.

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88 Although issued on September 30, 1993, the executive order was not printed in the Federal Register until several days later. See The President, “Executive Order 12866—Regulatory Planning and Review,” Federal Register, vol. 58, no. 190 (Oct. 4, 1993).

89 For a current list of regulations under OIRA review or reviews completed within the past 30 days, see http://www.whitehouse.gov/omb/infereg/regpol-regs_under12866.html.
For each significant draft rule, the executive order requires the issuing agency to provide to OIRA the text of the draft rule, a description of why the rule is needed, and a general assessment of the rule’s costs and benefits. For draft rules that are “economically significant,” the executive order requires a detailed cost-benefit analysis, including an assessment of the costs and benefits of “potentially effective and reasonably feasible alternatives to the planned regulation.” One of the “principles of regulation” in the order is that agencies shall “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” The order also says that when setting regulatory priorities, “each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.” The executive order’s “regulatory philosophy” states that unless a statute requires another regulatory approach, “in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits.”

During the formal Executive Order 12866 review process, OIRA analyzes the draft rule in light of the principles of the executive order and discusses the rule with staff and officials at the rulemaking agency. OIRA may also discuss the draft rule with other agencies with whom interagency coordination will be necessary, and may meet or otherwise communicate with interested stakeholders outside of the federal government. At the end of the review OIRA either concludes that the draft rule is consistent with the principles of the executive order (the majority of the cases) or returns the rule to the agency “for further consideration.” In some cases agencies withdraw their draft rules during OIRA’s review. If the draft is a proposed rule, the agency may then publish an NPRM. If the draft is a final rule, the agency may then publish a final rule and allow the rule to take effect. OIRA staff also sometimes review draft rules informally before their formal submission under the executive order—particularly when there is a statutory or legal deadline or when a rule has a large impact on society.

OIRA’s formal review process has not changed substantially since Executive Order 12866 was issued in 1993. However, GAO reported in September 2003 that there had been several changes in OIRA policies and practices since the current OIRA Administrator (Dr. John Graham) took office in July 2001, including (1) increased use of public letters explaining why OIRA returned rules to agencies for their consideration and suggesting regulatory action, (2) increased emphasis on cost-benefit analysis and peer review of agencies’ rules, (3) stricter adherence to the 90-day time limit for OIRA review, (4) improvements in the transparency of the OIRA review process, and (5) an increase in the size and skills of OIRA’s staff. Underlying many of these changes is a shift in how OIRA administrators view the office’s role in the rulemaking process—from “counselor” to the agencies to regulatory “gatekeeper.” GAO also concluded that, certain changes

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90 In January 1996, OIRA published a document that described “best practices” for preparing the economic analyses called for by the executive order. This document was revised and issued as guidance in 2000. In September 2003, OMB and the Council of Economic Advisors finalized new guidance for agencies on regulatory analysis, refining and replacing the 1996 “best practices” document. For a copy of this guidance, see http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.

91 OIRA has indicated that it will try and accommodate any request for a meeting with parties outside of the federal government. OIRA discloses these contacts on its website at http://www.whitehouse.gov/omb/oira/meetings.html. A representative from the agency issuing the rule must be invited to any such meeting.

92 Executive Order 13258 reassigned certain responsibilities from the Vice President to the President’s chief of staff, but otherwise did not change the OIRA review process. See The President, “Executive Order 13258—Amending Executive Order 12866 on Regulatory Planning and Review,” Federal Register, vol. 67, no. 40, Feb. 28, 2002, p. 9385.

notwithstanding, the OIRA review process was still not very transparent to the public, and recommended several changes in OIRA's disclosure policies.

GAO and others have also examined agencies' analyses of economically significant rules under the executive order. For example, in 1998 GAO reported that some of the 20 economic analyses that it examined from five agencies did not incorporate all of the best practices set forth in OMB's guidance. Five of the analyses did not discuss alternatives to the proposed regulatory action and, in many cases, it was not clear why the agencies used certain assumptions. Also, five of the analyses did not discuss uncertainty associated with the agencies' estimates of benefits and/or costs or document the agencies' reasons for not doing so.

Executive Order 12866 also includes several other notable requirements. For example, section 5 of the order requires agencies to periodically review their existing significant regulations to determine whether they should be modified or eliminated. In March 1995, President Clinton reemphasized this requirement by directing each agency to conduct a page-by-page review of all existing regulations. In June 1995, the President announced that 16,000 pages had been eliminated from the Code of Federal Regulations. GAO reported on this review effort in October 1997, noting that the page elimination totals that four agencies reported did not take into account pages that had been added while the eliminations took place. GAO also reported that about half of the actions taken appeared to have no effect on the burden felt by regulated entities, would have little effect, or could increase regulatory burden.

**Executive Order 13422**

On January 18, 2007, President George W. Bush issued Executive Order 13422, making the most significant amendments to Executive Order 12866 since it was published. The changes made by this new executive order were controversial, characterized by some as a “power grab” by the White House that undermines public protections and lessens congressional authority and by others as “a paragon of common sense and good government.” The most important changes made by Executive Order 13422 fell into five general categories: (1) a requirement that agencies identify in writing the specific market failure or problem that warrants a new regulation, (2) a requirement that each agency head designate a presidential appointee within the agency as a “regulatory policy officer” who can control upcoming rulemaking activity in that agency, (3) a requirement that agencies provide their best estimates of the cumulative regulatory costs and benefits of rules they expect to publish in the coming year, (4) an expansion of OIRA review to include significant guidance documents, and (5) a provision permitting agencies to consider whether to use more formal rulemaking procedures in certain cases.

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97 On the same day that E.O. 13422 was issued, OMB also issued a “Final Bulletin for Agency Good Guidance Practices” that mirrored, in many respects, the provisions in this section of the executive order. Unlike the order, however, the bulletin requires agencies to include certain standard elements in their significant guidance documents, to list those documents on the agencies’ websites, and to publish a notice in the Federal Register soliciting public (continued...
In the first half of 2007, two House subcommittees held three oversight hearings on the order. A provision was added to the appropriations measure funding OMB for FY2008 that would have prevented the implementation of the executive order, but the measure was eliminated from the final version of the legislation. On January 30, 2009, President Barack Obama issued Executive Order 13497, which (among other things) revoked Executive Order 13422.99 As a result, Executive Order 12866 was returned to the form when it was issued in September 1993.

**Executive Order 13563**

On January 18, 2011, President Obama issued Executive Order 13563 on “Improving Regulation and Regulatory Review.”100 Section 1(b) of the new order states that “This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993.” Although similar to the 1993 order in many respects, Executive Order 13563 contains some new provisions. For example, Section 2(b) of the order states that agencies should generally provide “timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.”

Perhaps most notably, Section 6(b) of the new order requires agencies to initiate retrospective reviews of their existing rules. Specifically, it states,

> Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.

Section 5(a) of Executive Order 12866 had previously required agencies to submit a plan for retrospective reviews to OIRA, so this provision appears to require agencies to update those plans. On February 2, 2011, the OIRA Administrator issued guidance to federal agencies on the implementation of the executive order, including these retrospective reviews.101

(...continued)


98 For more information, see CRS Report RL33862, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, by Curtis W. Copeland.


Other Executive Orders and Directives

Agencies other than independent regulatory agencies must also be aware of an array of other rulemaking requirements contained in executive orders and presidential directives. For example:

- Executive Order 13132 on “Federalism” requires covered federal agencies to “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.”\(^{102}\) The order defines “federalism implications” as “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Federal agencies are prohibited from promulgating any regulation with unfunded federalism implications unless they have (1) consulted with state and local officials early in the development of the proposed rule, and (2) prepared a “federalism summary impact statement” consisting of a description of the prior consultation with state and local officials, a summary of their concerns and the agency’s position regarding the need to issue the rule, and a statement of the extent to which the officials’ concerns have been met. The order gives agencies substantial discretion regarding its implementation. For example, it does not define what type of regulatory action constitutes “substantial direct effects,” and says the consultation and impact statement requirements apply “to the extent practicable.”\(^{103}\)

- Executive Order 12630 on constitutionally protected property rights says each agency “shall be guided by” certain principles when formulating or implementing policies that have “takings” implications.\(^{104}\) For example, the order says that private property should be taken only for “real and substantial threats,” and “be no greater than is necessary.”\(^{105}\)

- Executive Order 12889 on the North American Free Trade Agreement generally requires agencies subject to the APA to provide at least a 75-day comment period for any “proposed Federal technical regulation or any Federal sanitary or phytosanitary measure of general application.”\(^{106}\)

- Executive Order 12898 on environmental justice says (among other things) that each agency must develop a strategy that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income households.


\(^{103}\) Executive Order 12612, the previous executive order on federalism, also gave federal agencies broad discretion to determine the applicability of its requirements. GAO examined the implementation of this order and concluded that its analytical requirements were rarely implemented. See U.S. General Accounting Office, Federalism: Previous Initiatives Have Had Little Effect on Agency Rulemaking, GAO/T-GGD-99-3, June 30, 1999.


\(^{105}\) For an analysis of how this executive order has been implemented, see U.S. General Accounting Office, Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use, GAO-03-1015, Sept. 19, 2003.

populations.\textsuperscript{107} It also says that environmental human health research should include diverse segments of the population in epidemiological and clinical studies, and that agencies should identify rules that should be revised to meet the objectives of the order.

- Executive Order 12988 on civil justice reform generally requires agencies reviewing existing and new regulations to ensure that they comply with specific requirements (e.g., “eliminate drafting errors and ambiguity” and “provide a clear legal standard for affected conduct”) to improve regulatory drafting in order to minimize litigation.\textsuperscript{108} Agencies formulating proposed regulations are directed to “make every reasonable effort” to ensure that they, among other things, specify in clear language any preemptive or retroactive effects, and the effect on existing law.

- Executive Order 13045 on protection of children from environmental health risks and safety risks says that for any substantive rulemaking action that is likely to result in an economically significant rule that concerns an environmental health risk or safety risk that may disproportionately affect children, the agency must provide OIRA with (1) an evaluation of the environmental or safety effects on children and (2) an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives.\textsuperscript{109}

- Executive Order 13175 on consultation and coordination with Indian tribal governments generally prohibits agencies from promulgating any regulation not required by law that has tribal implications and imposes substantial direct costs on tribal governments unless the necessary funds are provided or the agency consults with tribal officials and provides a “tribal summary impact statement” describing those consultations.\textsuperscript{110} Similar consultation and impact statement requirements apply to rules that preempt tribal laws.

- Executive Order 13211 on energy impacts requires agencies (to the extent permitted by law) to prepare and submit to OMB a “statement of energy effects” for significant energy actions.\textsuperscript{111} The statement, published in the NPRM and the final rule, is to include a detailed statement of “any adverse effects on energy supply, distribution, or use” for the action and reasonable alternatives and their effects.

- Executive Order 13272 on small entities generally requires federal agencies to issue (by February 2003) written procedures and policies to ensure proper consideration during the rulemaking process of the impacts of their draft rules on small entities.\textsuperscript{112} The order also requires agencies to notify the SBA Chief


\textsuperscript{110} Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 Federal Register 67249, Nov. 9, 2000.


\textsuperscript{112} Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 Federal Register (continued...
Counsel for Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities, and to give “every appropriate consideration” to any comments the Chief Counsel provides.

In addition to executive orders, presidential memoranda or directives can also affect the rulemaking process. For example:

- a March 4, 1995, presidential memorandum directed federal agencies to (among other things) focus their regulatory programs on results, not process, and expand their use of negotiated rulemaking.
- an April 21, 1995, memorandum directed agencies to waive or reduce penalties in certain circumstances, and to reduce the frequency of reports the public is required to provide to the government.
- a June 1, 1998, presidential directive required agencies to use plain language in proposed and final rulemaking documents.

**Conclusion**

During the past 60 to 65 years, Congress and various Presidents have made numerous attempts to add structure, economy, efficiency, accountability, and greater public access and transparency to the regulatory process. In this regard, Congress has enacted laws such as the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and the Unfunded Mandates Reform Act that require some type of procedure, review, and/or analysis of draft rules by the rulemaking agencies themselves or by outside parties. Presidential rulemaking requirements have often focused on coordination of agencies’ regulatory efforts with the President’s priorities and attempts to improve the quality of regulations through cost-benefit analysis, risk assessment analysis, and the consideration of specific factors in the rulemaking process (e.g., environmental justice, children, and property rights). Underlying many of these congressional and presidential requirements is an attempt to ensure that certain interests or issues are considered during the rulemaking process and/or to minimize the burden associated with federal regulations.

However, these rulemaking requirements impose burdens of their own on rulemaking agencies, and clearly are a factor (although it is unclear whether they are the most important factor) in the length of time it takes agencies to issue rules. Federal agencies must be aware of the cross-cutting and the program-specific statutory and executive requirements underlying their regulations and must craft rules that are consistent with those requirements—or run the risk of having their rules returned to them by OIRA or rejected by Congress or the courts. Several of these statutes and orders indicate that their requirements may be integrated with or satisfied by the requirements in other statutes or orders. For example, the Regulatory Flexibility Act states that federal agencies can develop their regulatory agendas and perform their regulatory flexibility analyses “in conjunction with or as a part of any other agenda or analysis required by any other law.” Some observers believe that integration and consolidation of all these requirements could improve the rulemaking process. In 1993 the Administrative Conference of the United States noted that the

(...continued)
simple requirements in the Administrative Procedure Act for informal rulemaking had been “overlaid with an increasing number of constraints,” including those imposed by Congress, Presidents, and the courts. The Administrative Conference recommended a “coordinated framework of proposals aimed at promoting efficient and effective rulemaking.” Since then, the number of rulemaking requirements has increased.

On the other hand, many of these statutory and executive order provisions provide the agencies substantial discretion regarding when and how the rulemaking requirements are to be applied. For example, because the Regulatory Flexibility Act does not define the term “significant impact on a substantial number of small entities,” agencies have a great deal of latitude to determine when a regulatory flexibility analysis is required. Similarly, Executive Order 13132 does not define the term “significant federalism implications,” so agencies have substantial discretion in deciding whether the analytical requirements of the order have been triggered. Other rulemaking requirements are written in such a way that they actually apply to only a small number of rules. For example, title II of the Unfunded Mandates Reform Act does not apply to any rules published by independent regulatory agencies or any rules for which an agency determines there is “good cause” not to publish a notice of proposed rulemaking. Other rules are exempt from UMRA if they are conditions of federal financial assistance or enforce constitutional rights.

The discretion and exceptions built into these rulemaking statutes and orders diminish their impact, and allow agencies knowledgeable of their provisions to avoid many of the analyses and procedures they seem to require. For example, on hundreds of occasions, agencies have stated in the preambles to their rules that because they believed there was “good cause” not to issue a notice of proposed rulemaking, the requirements of the RFA and/or UMRA do not apply. Agencies also have standard language that they insert into preambles certifying that their rules do not require regulatory flexibility analyses or UMRA written statements. And if agencies are not required to prepare regulatory flexibility analyses for their proposed rules, they are also exempt from the SBREFA requirements to prepare small entity compliance guides and (in the case of OSHA, EPA, and CFPB) to convene advocacy review panels.

Because of the inevitability of regulation and its associated burden, efforts to either tighten existing requirements or impose new ones are likely to continue. A clear understanding of the existing requirements and how they have been implemented may inform any such future efforts.

For Additional Information


In addition, information regarding a variety of regulatory issues is available at the following websites:

Center for Progressive Regulation
http://www.progressiveregulation.org
Center for Regulatory Effectiveness  
http://www.thecre.com

Competitive Enterprise Institute  
http://www.cei.org

Government Accountability Office (GAO, formerly the General Accounting Office)  
http://www.gao.gov

Government Printing Office (GPO)  
http://www.gpoaccess.gov/nara/index.html

Office of Management and Budget  
http://www.whitehouse.gov/omb

OMB Watch  
http://www.ombwatch.org

Regulations.gov  
http://www.regulations.gov

Regulatory Information Service Center  
http://www.reginfo.gov

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The Congressional Review Act and Possible Consolidation into a Single Measure of Resolutions Disapproving Regulations

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January 26, 2009
Summary

The Congressional Review Act (CRA) establishes expedited procedures for Congress to disapprove regulations issued by Federal agencies. Disapproval under these procedures requires enactment of a joint resolution that has a specified text and is submitted within 60 days (excluding recesses) after Congress receives the regulation. For these disapproval resolutions, the act provides expedited procedures for Senate consideration and to clear the measure for Presidential action. If the resolution becomes law, the rule not only becomes of no force and effect, but is treated as if it had never taken effect, and the issuing agency may issue no “substantially similar” rule without subsequent authorization by law.

If vetoed, a disapproval resolution can become law only if Congress overrides the veto. For regulations submitted 60 or fewer session days before a sine die adjournment, however, the CRA provides a further 60-day period for submitting disapproval regulations, starting on the 15th session day of the next session. Interest has arisen in using the CRA in this way in the 111th Congress to disapprove regulations issued late in the Bush Administration. Using the CRA in this way for numerous regulations, however, could consume large amounts of floor time. The question has accordingly been raised whether the CRA permits multiple disapproval resolutions to be “bundled,” or consolidated into a single measure.

Congress could always overturn regulations through a consolidated measure under its general legislative powers. Even if such a consolidated measure was submitted during the required time period, however, it would not have the text required by the CRA, which permits the statement only of a single disapproval. If enacted, as a result, it would not have the special effects for which the act provides. A consolidated measure, nevertheless, could include provisions specifying that the component disapproval provisions have the same effects as if they were separate disapproval resolutions enacted pursuant to the CRA.

Any consolidated measure also would not be eligible for the expedited procedures provided in the CRA. In the Senate, as a result, its approval might be possible only by constructing it to include provisions that could attract sufficient support to invoke cloture. If the Senate could dispose of some disapprovals in this way, moreover, it might be able to deal with others through individual disapproval resolutions under the expedited procedure, especially by persistent use of its provisions for limiting debate by majority vote. In the House, a special rule could limit debate and amendment of a consolidated measure. Alternatively, a single special rule might provide for limited and consolidated debate on a group of individual disapproval resolutions. House rules protecting the motion to recommit would require final action on each resolution to be separate.

If each chamber agreed to some disapprovals in a consolidated measure and others in separate resolutions under the CRA, the two chambers would have to resolve differences between the consolidated measures under their general rules. Either chamber might also provide for routine passage, when received, of any separate disapproval resolution of the other that corresponded to a provision in its own consolidated measure. The House might provide for this treatment of Senate disapproval resolutions, through a provision in its special rule for considering its consolidated measure, more easily than could the Senate for those of the House. No update of this report is planned.
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Disapproval of Regulations Under the Congressional Review Act

The Congressional Review Act ("CRA" or the act) establishes a statutory procedure by which Congress can disapprove a regulation issued as a final rule by a federal agency. Disapproval under this procedure requires the enactment into law of a joint resolution, the text of which is specified by section 802(a) of the act (a "disapproval resolution"). In order to fall under the provisions of the act, this disapproval resolution must have the specified text, and also must be submitted in each chamber within a specified time period after the rule itself is transmitted to Congress. For a joint resolution that meets these requirements, the act makes available, for a specified period after the rule is transmitted and published in the Federal Register, an expedited procedure for its consideration in the Senate. This statutory procedure expedites action by making consideration of the disapproval resolution privileged, limiting debate, and prohibiting amendment. (Except in relation to final action to clear the measure for presentation to the President, the CRA presumes that the House will act on a disapproval resolution under its generally applicable rules.)

If a disapproval resolution under the CRA is enacted into law, the disapproved rule becomes of no force and effect; even if it has already taken effect, the CRA specifies that it is to be treated as though it had never taken effect. In addition, if a rule is disapproved under the CRA, the issuing agency may not reissue the same or a substantially similar rule without subsequent statutory authorization from Congress.

Under most circumstances, congressional disapproval under the CRA is difficult because the President is likely to veto any disapproval of a rule issued by his own administration, and in that case the disapproval can become law only if both houses can override the veto. This obstacle, however, may be mitigated in cases in which the disapproval resolution is presented, not to the President under whom the rule was issued, but to his successor, perhaps especially one of a different political party. The CRA potentially facilitates action in such situations by explicitly establishing procedures for a new Congress to disapprove rules issued near the end of the preceding Congress.

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2 The CRA establishes a broadly encompassing definition of what counts as a "rule" for its purposes and requires that all covered rules be transmitted to Congress when issued. This requirement and its implications are considered in CRS Report RL30116, Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade, by Morton Rosenberg.

3 Detail about these statutory timelines and procedures appears in archived CRS Report RL31160, Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act, by Richard S. Beth.

4 For discussion of the implications of these provisions, see CRS Report RL30116, Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade, by Morton Rosenberg.

5 These are conditions that prevailed in the only successful use of the CRA disapproval procedure up through the end of the 110th Congress. In 2001, the incoming 107th Congress passed, and incoming President George W. Bush signed, S.J.Res. 6 (P.L. 107-5), disapproving a rule on workplace ergonomics issued by the preceding Clinton Administration. See CRS Report RL30116, Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade, by Morton Rosenberg.
This report briefly describes the CRA provisions for disapproval of rules issued in a preceding Congress and considers their implications for congressional action at the beginning of a new presidential administration. In particular, however, it considers to what extent, and by what means, it may be feasible for Congress to act, under these circumstances, to disapprove potentially large numbers of rules. The CRA makes such action more difficult by requiring that each resolution under the act may provide for the disapproval only of a single rule. This report discusses some procedural means by which this difficulty might be addressed.

Disapproval of Regulations Received by the Preceding Congress

To be eligible for action under the CRA, a disapproval resolution must be submitted within 60 days after Congress receives the rule in question, not counting days on which either house is in a recess for more than three days within a session (sometimes called the “initiation period”). The Senate may use the expedited procedure provided by the CRA to consider a disapproval resolution at any time during the 60 days on which the Senate actually meets in session following the receipt of the rule (or following its publication in the Federal Register, if so published after the rule is received). Except for this “action period” in the Senate, the CRA places no time limit on congressional action pursuant to the act. If a resolution is submitted during the required period, it could be enacted at any time within the same Congress, and would still have the effects specified by the act. If Senate consideration occurs when the expedited procedure is no longer available, however, the disapproval could be filibustered or amended in that chamber. If amended, it would no longer have the text required by the act, and so would not automatically have the additional effects specified by the act.

If a rule is received near the end of a Congress, Congress may adjourn sine die before the periods for initiation of the disapproval and for expedited Senate action are concluded. Under these conditions, opponents of the rule may find it impracticable to submit a disapproval resolution and secure action on it under the CRA during the abbreviated time remaining. The following Congress also might find use of the CRA to disapprove the rule unfeasible. Any previously submitted disapproval resolution (like every other legislative measure) would have died with the expiration of the previous Congress. The language of the CRA could be read as permitting the periods for submitting a disapproval resolution and for expedited Senate action thereon to extend into a new Congress, but even if this interpretation is accepted, the time remaining for action in...

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6 For a more detailed discussion of these procedures and their applicability, see CRS Report RL34633, Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress, by Curtis W. Copeland and Richard S. Beth.
7 Under this standard, the clock stops only when one House or both is out of session pursuant to a concurrent resolution providing for a recess. Days on which neither house is in recess, including weekends and periods of pro forma session, count toward the 60 days. A pro forma session is one held simply to satisfy the requirement that neither house recess for more than three days except pursuant to a concurrent resolution providing for a recess or adjournment. Detail on this standard, defined by the CRA as “days of continuous session,” appears in CRS Report RL31160, Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act, by Richard S. Beth. The application of this standard in relation to the 110th and 111th Congress is discussed in CRS Report RL34633, Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress, by Curtis W. Copeland and Richard S. Beth.
8 For this purpose, any day on which the Senate meets, including meetings in pro forma session, counts toward the 60 days on which the Senate does not meet. Excluded from the count are not only recesses of the Senate pursuant to concurrent resolution, but also weekends when the Senate does not meet, as well as days between pro forma sessions.
9 Neither of the pertinent provisions of the act explicitly specifies that all days of the periods in question must occur within the same session of Congress. The period for submitting a resolution pauses only for “days either House of Congress is adjourned for more than 3 days during a session of Congress,” which could be read as implying that it does not pause, but continues, during adjournments between sessions. 5 U.S.C. 802(a). The authorization for expedited (continued...)
the new Congress might also be too short to make feasible the use of the act to disapprove the rule.

The CRA provides for these situations by establishing that, for any rule transmitted near the end of a session, statutory periods for submitting disapproval resolutions and for Senate action thereon begin anew in the following session. This provision applies to any rule transmitted on or after either the 60th day of session in the Senate, or the 60th legislative day in the House, before the *sine die* adjournment of a session. For any rule transmitted during this “carryover period” in either chamber, the act makes available, in the following session, a new period of 60 days (not counting recesses) for submitting disapproval resolutions in each chamber, and a new period of 60 days of session for Senate action on the resolution. These new periods begin, for each chamber, on the 15th day of session in that chamber after the new session convenes.11

### Disapproval of Multiple Regulations in a Party Transition

At the start of new Presidential and congressional terms, especially during transitions in party control when the incoming Congress and President are of a party different from that of the outgoing President, the likelihood may be especially great for congressional interest in disapproving rules that were issued during the “carryover period” in the final session of the previous Congress. Once the 110th Congress reached its final *sine die* adjournment, it became possible to ascertain that rules transmitted after May 15, 2008 (the 60th legislative day before the *sine die* adjournment of the House), will be subject to disapproval under the CRA in the early months of the 111th Congress. Many rules published by the Bush Administration after that date have been spoken of as potential candidates for such action.12

The possibility of congressional action to disapprove a potentially large number of these rules raises the prospect that consideration of the respective disapproval resolutions could occupy a

(...continued)

Senate action applies until “the expiration of the 60 session days commencing with the applicable submission or publication date” of the rule, without specifying the session of Congress during which those days of session must occur. 5 U.S.C. 802(e)(1).

10 These considerations also apply, with appropriate modifications, to the disapproval of rules received by Congress near the close of a session of Congress other than the last, and the “carryover provisions” of the CRA apply to disapproval action in a subsequent session of the same Congress. This report, however, focuses on the operation and implications of the carryover provisions only in circumstances when the constitutional term of one Congress expires and that of another commences.

11 Like the period for Senate action already described, only those days on which the respective chamber actually meets, including *pro forma* sessions, count toward the completion of the 60-day “carryover period” in the preceding session and of the 15-day period in the new session. Discussion of the application of this “carryover period” appears in CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by Curtis W. Copeland and Richard S. Beth.

The constitutional term of a new Congress begins on January 3 of each odd-numbered year (although its first session may convene on a later date, pursuant to a law enacted in the previous Congress), and the constitutional term of a President begins on January 20 of each quadrennium. As a result, the delay of 15 days of session before action under the CRA can begin in a new Congress makes it almost inevitable that any such action will occur, or at least will conclude, in the administration of the new President. It is not clear whether this consequence of the procedural scheme is intentional.

12 For the ascertainment of the date and for examples of rules subject to subsequent disapproval, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by Curtis W. Copeland and Richard S. Beth.
large portion of the early agenda of Congress. The expedited procedure established for the Senate by the CRA permits the Senate to take up a disapproval resolution by a non-debatable motion, limits debate on the disapproval resolution itself to 10 hours, and allows a simple majority to reduce this time by a non-debatable motion. Even if this motion is persistently applied, nevertheless, significant time in the consideration of a series of disapproval resolutions might be consumed, not only in debate, but also by roll call votes (on such questions as proceeding to consider the measure and reducing the time for debate, as well as on adoption of the resolution). In the House, similarly, although the time for consideration of any measure always either is limited, or can be limited by majority vote (for example, by adoption of a special rule), significant time might also be consumed not only in debate, but also in roll call votes (such as on ordering the previous question on each special rule and adoption of each special rule itself, as well as on adoption of each disapproval resolution). Although these conditions would not normally present a severe obstacle to consideration of any single disapproval resolution, they might collectively render impracticable the consideration of any significant number of them.

Measures to Disapprove Multiple Regulations

One suggested means of overcoming these difficulties has been to consolidate, or “bundle,” a group of disapprovals into a single joint resolution (or bill) that could be considered and disposed of by each house, as a unit, in a single proceeding. Consolidated consideration and voting on a single measure could readily enable either chamber to address an entire list of rules in substantially less time than might be consumed by a series of separate resolutions disapproving the same rules.

A related approach might be to include provisions disapproving regulations in a measure with the principal purpose of addressing other issues, such as a bill reauthorizing activities of the agency issuing the regulations. This approach might be used with particular facility in the Senate, where no general rule requires amendments to address the same subject as the underlying legislation. For example, a provision disapproving a regulation might be inserted in a bill carrying appropriations for the implementing agency, if the chamber in which the measure was being considered was willing to waive its rule against including provisions changing permanent law in an appropriations bill (“legislation in an appropriations bill”). Finally, the implementation of a regulation could be forestalled by including in a bill carrying appropriations for the implementing agency a prohibition against the expenditure of any funds in the bill for the purpose, known as a limitation, as long as the provision did not prescribe new duties or authorities for the agency. In general, however, a limitation is treated as a legislative provision unless its effect is limited to the funds in the bill. Because this type of action would not disapprove or repeal the regulation, preventing its implementation by this means would require a similar limitation to be included again in each subsequent bill appropriating funds for the agency.

Enactment of a measure disapproving a regulation in any of these forms could undoubtedly prevent the regulation from taking effect (or remaining in effect), inasmuch as Congress, in general, always retains the ability to override regulations by action under its general legislative powers. The text prescribed by section 802(a) of the act for a disapproval resolution includes a directive that “such rule shall have no force or effect.” If each provision disapproving a regulation

13 House Rule XXI clauses 2(b) and 2(c); Senate Rule XVI paragraphs 2 and 4.
that was included in a measure followed this prescribed text, the quoted phrase would no doubt suffice to vitiate the effectiveness of the respective rule.

Section 802(a) of the CRA, however, specifies that, for purposes of its congressional disapproval procedure:

the term ‘joint resolution’ means only a joint resolution introduced in the period beginning on the date when [Congress receives the rule, as described earlier] and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: ‘That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect.’ (The blank spaces being appropriately filled in).

This provision sets three conditions that a measure must meet to be covered by the act: it must take the form of a joint resolution, it must be submitted within the required time period, and it must have the specified text. Any broader measure that included provisions disapproving regulations, including a consolidated measure consisting solely of such provisions, would not meet the third part of this requirement even if it was a joint resolution and was submitted during the required period. Even if each section of the measure conformed to the text prescribed by section 802(a), the text of the measure as a whole would fail to match that required for a disapproval resolution. Accordingly, the measure would presumably be held not to qualify as a “joint resolution” described by section 802(a).

On these grounds, a consolidated measure consisting of the text of several disapproval resolutions (or any broader measure including such disapproval provisions) would presumably be ineligible for consideration in the Senate under the expedited procedure established by the CRA for a covered disapproval resolution. Enactment of the measure, in addition, presumably would not bring about the statutory consequences the CRA makes automatic for a covered disapproval resolution. If the disapproval provisions in the measure included only the text prescribed by the act, the explicit language of those provisions would presumably suffice to take out of effect the regulations identified therein. Without the inclusion of additional specific language, however, enactment of these provisions presumably would not take the regulations out of effect retroactively, nor would it disable the issuing agency from re-submitting a substantially similar rule, as the CRA prescribes for disapproval resolutions enacted pursuant to its provisions.

**Possible Form of and Proceedings on Consolidated Measures**

**Framing and Effect**

Although it appears that a joint resolution “bundling” several disapproval provisions into a single measure could not have standing as a disapproval resolution under the CRA, it may be possible to frame such a measure in a form that would allow it to accomplish effects similar to those intended by the CRA with respect to multiple rules.

Inasmuch as the consolidated measure would presumably not fall under the CRA in the first place, the drafting of the individual sections would not have to conform to the requirements of section 802(a). Instead, each section could include language specifying that the rule being
disapproved not only cease to have force and effect, but also (where appropriate) be treated as if it had never taken effect. Language could also be included directing that the respective issuing agency be precluded from issuing a substantially similar regulation in the absence of subsequent statutory authority.

Alternatively, each section disapproving a rule could be couched in terms conforming to section 802(b), and the measure could include additional provisions specifying that each section disapproving a rule was to have force and effect as if enacted as a separate disapproval resolution under the CRA. A provision of this sort would presumably suffice to permit the measure to achieve the desired effects even if it were introduced outside the period prescribed by section 802(b).

In addition, given that a consolidated measure would in any case not be subject to consideration under the CRA, its use might also give Congress more latitude in framing its individual provisions. For example, the text required by the CRA permits disapproval under the act only of a single regulation in its entirety. Acting outside the requirements of the CRA, Congress could provide for the disapproval only of the specific parts of a proposed regulation to which it objected, or could include language replacing or otherwise modifying certain provisions of the regulation. Further, inasmuch as consideration of a consolidated joint resolution of disapproval would not be covered by the CRA to begin with, either chamber could consider and adopt amendments to the measure without incurring any additional consequences for violating CRA requirements. As long as the measure still contained provisions specifying that the effects of the disapproval provisions were to include retroactive vitiation and prohibition on proposing a similar rule, its lack of the form required by the CRA would not prevent its enactment from having the same effects as provided by the CRA.

### Consideration

A consolidated measure that lacked the form prescribed by the CRA also would not be eligible for consideration under the terms provided by the CRA, including the statutory expedited procedures for Senate consideration and the automatic procedures to facilitate clearance for Presidential action. In contrast to the considerations described in the preceding section, this difficulty could not be overcome by including appropriate provisions in the consolidated measure (unless, of course, the measure were to be converted into the form required by the statute in the first place). Otherwise, the measure could be considered as provided by the statute only if the chambers separately took action to provide that consideration occur under procedures corresponding to those of the statute. The Senate might be able to achieve this result only by unanimous consent; the House might do so by adopting a special rule.

### Consideration in the Senate

In the Senate, a consolidated disapproval measure would presumably suffer from ineligibility for consideration under the statutory expedited procedure, by reason of its failure to satisfy the requirements of section 802(a). Presumably, as a result, the Senate would have to choose between considering either (1) a consolidated measure under its regular procedures or (2) a series of individual disapproval resolutions, each under the expedited procedures of the CRA (or, perhaps, both). Although the Senate could determine to consider a specific consolidated measure under limitations on debate and amendment comparable to those of the CRA, it could do so only by unanimous consent. To the extent that components of the measure might be highly controversial,
this consent would likely prove unobtainable. On the other hand, inasmuch as a consolidated measure would, in any case, be ineligible for the expedited procedure of the act, the 60-day period during which the act makes that procedure available would be no constraint on the timing of Senate action thereon.

If a consolidated measure were considered under the general rules of the Senate, it would be subject to amendment, including amendments that were non-germane or otherwise inconsistent with the objectives of the CRA. In addition, if the consolidated measure were considered under the general rules, opponents might attempt to prevent action by extended debate on the measure or on a motion to proceed to its consideration, or by other parliamentary means. In that case the Senate might be able to reach a vote on passage only if cloture could be invoked. Under these conditions, action on a consolidated measure might become feasible if its components could be compiled in such a way as to attract sufficient support to permit cloture to be invoked on the package. Composing such a package might require omitting disapproval proposals for certain rules on which Senators might place high importance. Supporters of the package might also have to protect it by securing the rejection of any amendments that would make cloture harder to obtain. Assuming sufficient support to invoke cloture, nevertheless, action on the consolidated measure might permit the Senate to dispose, in a relatively limited time, of a significant number of disapproval proposals.

It might then become practicable for the Senate also to disapprove at least a limited number of additional rules by means of separate disapproval resolutions. These resolutions could be stated and submitted in a way that met the requirements of section 802(a), so that each would be eligible for consideration under the statutory expedited procedure, including the non-debatable motion to proceed, the prohibition on amendment, the limit on debate, and the possibility of reducing that time limit by majority vote on a non-debatable motion. Persistent use of this latter motion, in particular, might enable consideration of a significant number of individual resolutions. Careful consideration would no doubt still be required about how many resolutions could feasibly be considered in this way, and which ones might be best worth taking up.

**Consideration in the House**

In the House, where the CRA prescribes no expedited procedure, the general rules of the chamber might be used in such a way as to facilitate action to disapprove a large number of rules. Two circumstances might make such action easier here than in the Senate. First, the general rules of the House always entail limits on debate and amendment or permit their imposition by a voting majority. Second, inasmuch as the CRA provides no expedited procedure for the House anyway, the House would lose no procedural advantage by considering a consolidated measure that failed to comport with the requirements of section 802(a).

One approach might be for the House to consider a consolidated measure that comprised sections each of which disapproved a rule in the terms required by section 802(a), and that also contained language providing that each disapproval section would have the same effects as if separately enacted under the CRA. Even if the disapproval provisions did not conform to the requirements of section 802(a), it still might be possible to provide that each section had the effect of a CRA disapproval resolution. In its consideration of such a vehicle, the House might preserve the intent of the statutory mechanism by adopting a special rule that prohibited amendment to the text of any section, but permitted amendments that would only strike a section, or that would only add a section reflecting the text required for a disapproval resolution. This way of proceeding would
preserve the ability of the House to make individual decisions on which regulations to disapprove.

An alternative approach would be for the House to consider a single special rule providing for consideration of a series of separate disapproval resolutions with a strict time limit and a prohibition against amendment for each. The special rule might even provide for a single consolidated period of debate on all the covered disapproval resolutions, although a separate vote on adoption of each resolution would presumably be required, so as to preserve the opportunity for a motion to recommit required by House rules. In this way, the House would still retain the opportunity to reject any individual disapproval resolution. It might still be possible, as well, to provide that additional resolutions meeting the requirements of section 802(a) could be considered if offered from the floor during consideration of the series of resolutions.

Coordinating Bicameral Action

For individual disapproval resolutions under the CRA, section 802(f) of the CRA provides that if one chamber considers a disapproval resolution when it has already received a companion from the other, then the final vote in the receiving chamber occurs on the companion measure. For this reason, in any case in which both houses, pursuant to the CRA, pass individual resolutions disapproving the same rule, no problem need arise at the stage of bicameral agreement.

If either chamber initially acts on a consolidated disapproval resolution, however, difficulties might arise in the other chamber. Even if the other chamber also acts initially on an identical consolidated measure, the statutory mechanism for automatic clearance of a single measure for Presidential action would not be available. In both chambers, however, it is common in such cases to follow passage of its own measure with agreement, often by unanimous consent or other routine means, to the identical measure already received from the other.

If the consolidated measures initially adopted in two chambers differ in content, on the other hand, the chamber acting second will normally pass the received measure only after amending it with the text of its own measure. Although this action often also occurs routinely, the subsequent clearance of a final measure for presentation to the President in these cases requires action to resolve differences between the two versions, either by conference or through an exchange of amendments. This action would have to take place under the general rules of both houses, and could result in delay or deadlock.

A third possibility is that the chamber acting second might take up, from the outset, the consolidated measure received from the other. In this case, however, insufficient support may exist in the second chamber to adopt the package in the same form as passed the first. The receiving chamber may prove able to adopt the measure received only with amendments, in which case action to resolve differences between the two versions would become necessary.

These difficulties might be most notable for the Senate in dealing with a consolidated measure received from the House, for any successful disposition of the House measure might require marshalling the support of a supermajority to invoke cloture. For this reason, if action through a consolidated measure is contemplated, House consideration of a measure originating in the

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14 Clause 6(c)(2) of House Rule XIII.
Senate might prove more practicable. The House might more readily be able at least to pass a version of the Senate measure that could become the basis for a resolution of differences.

Additional complications could arise if certain regulations are disapproved by one chamber in a consolidated measure and by the other in separate resolutions under the CRA. Such situations might most readily be resolved through action by the chamber that adopted the consolidated measure. This chamber might be able to provide that, upon passage of its own measure, if any disapproval resolution already received from the other corresponds to a provision of the consolidated measure, it be deemed to have passed the received resolution, or that it be in order immediately to consider and pass that resolution without debate. The same chamber might also provide that any disapproval resolution subsequently received, and corresponding to a provision of the consolidated measure, be deemed passed by the receiving chamber when received.

If both chambers entered such an order, it could ensure the completion of congressional action on any disapproval resolution adopted by one chamber for a rule disapproved by the other in a consolidated measure. It might then be possible to resolve the status of any disapprovals included in both consolidated measures through ordinary processes of resolving differences between the two measures.

In the House, it might be possible to provide for these proceedings through the terms of a special rule for considering the consolidated measure, but in the Senate unanimous consent would presumably be required. In addition, if the House transmitted numerous separate disapproval resolutions to the Senate, the Senate might have more difficulty than the House in limiting the time required for action sufficiently to enable it to act on all the measures received. For these reasons, action by the House on individual disapproval resolutions of the Senate might be found easier than action by the Senate on disapproval resolutions of the House. It might accordingly become important for advocates of disapprovals to consider to what extent initial action by the Senate on individual disapproval resolutions under the expedited procedure would carry the greatest promise of success.

In principle, a chamber that initially acted to disapprove rules in a consolidated measure might also facilitate action in the other chamber by directing that each component of the consolidated measure be engrossed as a separate joint resolution of disapproval before being transmitted to the other. If each of these separately engrossed joint resolutions had the text required by section 802(a) and originated during the period required by that section, it might be possible for it to be regarded as satisfying the requirements for a disapproval resolution under the CRA, so that it could be eligible for the expedited procedure in the Senate, automatic clearance for presentation to the President, and the additional effects of enactment prescribed by the statute.

In either chamber, however, it appears that separate engrossment of provisions in this way might be feasible only by unanimous consent. In the House, a special rule providing for separate engrossment would apparently be out of order as precluding a proper motion to recommit with respect to each of the separately engrossed measures. The same objection would evidently apply against another form of special rule that might have been taken as a means to an equivalent result, a “self-executing” rule providing that its own adoption would also adopt an entire group of separate disapproval resolutions.
Congressional Review Act: Rules Not Submitted to GAO and Congress

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Summary

The Congressional Review Act (CRA; 5 U.S.C. §§801-808) was enacted to improve congressional authority over agency rulemaking, and requires federal agencies to submit all of their final rules to both houses of Congress and the Government Accountability Office (GAO) before they can take effect. GAO periodically compares the list of rules that are submitted to it with the rules that are published in the Federal Register to determine whether any covered rules have not been submitted.

Between 1999 and 2009, GAO sent the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget at least five letters listing more than 1,000 substantive final rules that GAO said it had not received. In each of those letters, GAO encouraged OIRA to use the information to ensure that the agencies complied with the CRA. The May 2009 letter listed 101 substantive rules that were published during FY2008 that GAO said had not been submitted. The missing rules were issued by different agencies, including the Departments of Agriculture, Commerce, Transportation, and Homeland Security. The topics covered by these rules varied, and included chemical facility anti-terrorism standards, designation of critical habitats for endangered species, the administration of direct farm loan programs, oil and gas lease operations, and changes to workplace drug and alcohol programs. As of October 2009, 99 of the 101 rules had still not been submitted to GAO and to both houses of Congress. OIRA sent an e-mail to federal agencies in November 2009 telling them to contact GAO regarding these missing rules. Although agencies began sending rules to GAO shortly thereafter, as of July 2010, 49 of the 101 missing rules still had not been submitted to GAO.

On January 19, 2010, GAO sent OIRA a letter listing 31 substantive rules that were published during FY2009 that had not been submitted to GAO. OIRA subsequently sent another e-mail to the agencies reminding them of their CRA responsibilities and said it planned to provide GAO with a list of agency contacts. As of July 2010, all but 3 of the 31 missing rules had been submitted.

H.R. 2247, which was passed by the House of Representatives on June 16, 2009, and is currently before the Senate Committee on Homeland Security, would amend the CRA and eliminate the requirement that federal agencies submit their rules to Congress before they can take effect. The rules would still have to be submitted to GAO, and GAO would be required to submit to each house of Congress a weekly report containing a list of the rules received.

Congress may conclude that enactment of this legislation will improve agencies’ ability and willingness to submit their covered rules, or that this is an administrative issue that should be resolved between GAO, OIRA, and the rulemaking agencies. Alternatively, Congress could require OIRA or GAO to take additional actions to ensure compliance with the CRA’s reporting requirements. Congress could also require GAO to provide a copy of its CRA compliance reports to Congress, publish the reports in the Federal Register, or publish the list of missing rules on its website.

This report will be updated to reflect subsequent legislative or other developments.
Congressional Review Act: Rules Not Submitted to GAO and Congress

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Introduction

On November 20, 2007, the Department of Homeland Security (DHS) published a final rule entitled “Appendix to Chemical Facility Anti-Terrorism Standards.” Publication of this rule marked a significant step in a multi-year policy process that began in the wake of the terrorist attacks of September 11, 2001. Section 550 of the Department of Homeland Security Appropriations Act of 2007 (P.L. 109-295, October 4, 2006) required the Secretary of DHS to issue final regulations establishing “risk-based performance standards for security of chemical facilities” by April 2007. In December 2006, DHS issued an advance notice of proposed rulemaking, which sought comment on a range of issues. On April 9, 2007, DHS issued an interim final rule that required covered chemical facilities to prepare “security vulnerability assessments” and “site security plans” that satisfy the new risk-based performance standards. The interim final rule went into effect on June 8, 2007, except for an appendix containing a tentative list of “chemicals of interest” (COIs). DHS took comments from the public on the list, and published the November 2007 rule making the list final. The final rule also, among other things, (1) adjusted the “screening threshold quantities” (STQs) for certain COIs; (2) defined the specific security issue or issues implicated by each COI, (3) established different STQs for COIs based upon the security issue presented, and (4) added provisions that instructed facilities on how to calculate the quantities of COIs that they have in their possession. DHS said that the changes in the appendix “will assist the Department in more precisely identifying facilities that may be designated as high risk, while reducing the burden on facilities that possess chemicals in smaller amounts.”

The rule was published with an effective date of November 20, 2007, and has been implemented since that date. However, DHS did not comply with a statutory provision commonly known as the Congressional Review Act (CRA; 5 U.S.C. §§801-808), which requires each federal agency to send its covered final rules to the Comptroller General at the Government Accountability Office (GAO) and to both houses of Congress “[b]efore [such rules] can take effect.” As of

2 For detailed information on this issue, see CRS Report R40695, Chemical Facility Security: Reauthorization, Policy Issues, and Options for Congress, by Dana A. Shea.
6 For example, in an October 1, 2009, statement for the record provided to the Subcommittee on Energy and Environment, House Committee on Energy and Commerce, Rand Beers, Under Secretary for the National Protection and Programs Directorate said (pp. 4-5) “In May, the Department issued approximately 140 final tiering determination letters to the highest risk (Tier 1) facilities, confirming their high-risk status and initiating their 120-day time frame for submitting [a Site Security Plan, SSP]. In June and July, we notified approximately 826 facilities of their status as final Tier 2 facilities and the associated due dates for their SSPs. Most recently, on August 31, 2009, we notified approximately 137 facilities of their status as either a final Tier 1, 2, or 3 facility and the associated due dates for their respective SSPs. Following preliminary authorization of the SSPs, the Department expects to begin performing inspections in the first quarter of FY 2010, starting with the Tier 1-designated facilities.” To view a copy of this testimony, see http://energycommerce.house.gov/Press_111/20091001/beers_testimony.pdf.
7 5 USC §801(a)(1)(A).
November 20, 2009—two years after the rule was published—neither GAO nor Congress had received the rule.

This report discusses the CRA requirement that federal agencies send their final rules to GAO and Congress before they can take effect, and notes that agencies have not done so more than 1,000 times in recent years. It also discusses the legislative history of the act regarding CRA rule submission, describes current legislation related to this issue, and presents other options that Congress could consider.

**Background**

The CRA was included as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA; Title II of P.L. 104-121, 5 U.S.C. §601 note), which was signed into law on March 29, 1996. The act established expedited legislative procedures (primarily in the Senate) by which Congress may disapprove agencies’ final rules by enacting a joint resolution of disapproval. The enactment of the CRA was an attempt to reestablish a measure of congressional authority over rulemaking. As Senator Don Nickles, one of the sponsors of the legislation, said shortly after the CRA was enacted,

As more and more of Congress’ legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments. In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.\(^8\)

As the first step in the congressional disapproval process, the CRA generally requires federal agencies to submit their covered final rules to both houses of Congress and GAO before they can take effect. Specifically, the first sentence of the CRA (Section 801(a)(1)(A)) states that,

\[\text{Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.}\]  

\(^9\)

The CRA delays the effective dates of “major rules” even further—until 60 days after the date that the rules are published in the *Federal Register* or submitted to Congress, whichever is later.\(^10\)

The CRA defines a “major rule” as

any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an

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annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

The CRA also states that all non-major rules “shall take effect as otherwise provided by law after submission to Congress under paragraph (1).” However, Section 808 states that,

Notwithstanding section 801—(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or (2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Federal agency promulgating the rule determines.

The “good cause” language in the second category of rules refers to an exception to the notice and comment rulemaking requirement in the Administrative Procedure Act (APA), which allows agencies to publish final rules without previously seeking comments from the public on an earlier proposed rule. Interim final and direct final rules are considered particular applications of the APA’s good cause exception.

The issue of whether a court may prevent an agency from enforcing a covered rule that was not reported to Congress has not been resolved conclusively.

Covered Rules

Section 804(3) of the CRA generally defines a covered “rule” by referring to the definition in Section 551 of the APA, which says that a rule is:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or

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12 See 5 U.S.C. §553(b)(3)(B). When agencies use the good cause exception, the act requires that they explicitly say so and provide a rationale for the exception’s use when the rule is published in the Federal Register. A federal agency’s invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review.
13 Direct final rulemaking involves agency publication of a rule in the Federal Register with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (e.g., 30 days). However, if an adverse comment is filed, the direct final rule is withdrawn and the agency may publish the rule as a proposed rule under normal notice and comment procedures. In interim final rulemaking, an agency issues a final rule without a prior notice of proposed rulemaking that is generally effective immediately, but with a post-promulgation opportunity for the public to comment. If the public comments persuade the agency that changes are needed in the interim final rule, the agency may revise the rule by publishing a final rule reflecting those changes.
14 For an analysis of the legal uncertainty adhering to an agency’s failure to report a covered rule to Congress, see CRS Report RL30116, Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade, by Morton Rosenberg, pp. 28-34.
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prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.\textsuperscript{15}

The CRA does, however, exclude certain types of rules from its coverage:

(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.\textsuperscript{16}

These limits notwithstanding, the scope of the CRA is extremely broad, including rules that are exempt from notice-and-comment rulemaking procedures (e.g., interpretive rules, statements of policy, and rules that are considered “proprietary” or that fall under the “military” or “foreign affairs” exemptions in the APA).\textsuperscript{17} As noted in an earlier CRS report,

The legislative history of the CRA emphasizes that by adoption of the Section 551(4) definition of rule, the review process would not be limited only to coverage of rules required to comply with the notice and comment provisions of the APA or any other statutorily required variations of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: “The committee’s intent in these subsections is ... to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties.”\textsuperscript{18}

Legislative History of the Rule Submission Requirement

The limited contemporaneous legislative history of the CRA suggests that the drafters of the legislation intended that virtually all covered final rules be submitted to Congress before they could take effect. A key sponsor of the legislation, Representative David McIntosh, explained during the floor debate on the bill that would become the CRA (H.R. 3136 in the 104\textsuperscript{th} Congress) that “Under Section 8(a)(1)(A), covered rules may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress.”\textsuperscript{19} The same day, Senator Don Nickles, another sponsor of the bill, said that “Upon issuing a final rule, a Federal agency must send to Congress and GAO a report containing a copy of the rule.”\textsuperscript{20}

\begin{thebibliography}{99}
\bibitem{footnote15} 5 U.S.C. §551(4).
\end{thebibliography}
Post-Enactment Joint Statement

Shortly after the CRA was enacted, the principal Senate and House sponsors of the bill published a joint statement in the Congressional Record providing a detailed explanation of the CRA’s provisions and its legislative history. Senator Nickles explained that, because the legislation did not go through the committee process, virtually “no other expression of its legislative history exists.” He went on to say that “[t]his joint statement is intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act’s terms.”21 (The Justice Department has suggested that such post-enactment legislative history should not carry any weight.22 Similarly, the Supreme Court has said that “less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment.”23 On the other hand, the Supreme Court has also described post-enactment statements by legislative sponsors as an “authoritative guide to the statute’s construction.”24)

With regard to the rule submission requirement in the CRA, the sponsors’ joint statement said that “any covered rule not submitted to Congress and the Comptroller General will remain ineffective until it is submitted pursuant to subsection 801(a)(1)(A).”25 The only exception to this requirement was in Section 808 of the act, which says that certain rules (i.e., rules related to hunting, fishing, and camping, and for which the agency invokes the “good cause” exception to notice and comment) can take effect when the promulgating agency determines. The joint statement said that even these rules must be submitted to GAO and Congress “as soon as practicable after promulgation,” and the congressional review period would not begin until they are submitted.

Section 805 of the CRA states that “No determination, finding, action, or omission under this chapter shall be subject to judicial review.” The joint statement said that this provision meant that “the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter.” The joint statement went on to say that “The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).”26

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23 Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102 (1980). In this case, the “subsequent legislative history” was a conference report for legislation that was being considered after the enactment of an earlier statute.
26 Ibid, at S3686.
OMB Guidance on the Rule Submission Requirements

In 1998, as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, Congress directed the Office of Management and Budget (OMB) to issue guidance on certain requirements in the CRA, including the requirements in Section 801(a)(1) regarding the submission of rules. On January 12, 1999, the Director of OMB issued a memorandum to the heads of federal departments and agencies on “Submission of Rules under the Congressional Review Act” in which he noted that the CRA requires agencies to submit each new final rule to both houses of Congress and to GAO “before the rule can take effect.” The memorandum also included a form that OMB and GAO developed to facilitate the submission of agency rules.

On March 30, 1999, the OMB Director issued another memorandum to the heads of federal departments and agencies on “Guidance for Implementing the Congressional Review Act.” In that guidance, OMB said that “In order for a rule to take effect, you must submit a report to each House of Congress and GAO containing the following: a copy of the rule; a concise general statement related to the rule, including whether the rule is a ‘major rule;’ and the proposed effective date of the rule.” According to OMB, this guidance is still in effect.

Also included in the March 1999 OMB guidance was a modified version of the rule submission form previously provided to the agencies. Among other things, the current version of the form asks agencies to identify the priority level of each rule—that is, whether it is (1) “economically significant,” “significant,” or “substantive”; or is (2) “routine and frequent” or “informational/administrative” in nature. The form also asks agencies to identify whether or not each rule is a “major rule” as that term is defined in the CRA. When agencies submit rules to GAO, GAO enters them into a publicly available database that it maintains on its website. As of September 30, 2009, GAO said it had received a total of 52,708 final rules since the CRA was enacted, of which 865 were considered “major” rules.

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30 E-mail from Steven D. Aitken, Deputy General Counsel, OMB, November 9, 2009, available from the author.
32 Executive Order 12866 defines a “significant” regulatory action as any such action “that is likely to result in a rule that may: Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.” “Economically significant” rules meet the first of these four criteria. “Substantive” rules are defined in the Unified Agenda of Federal Regulatory and Deregulatory Actions as rules that are not “significant,” but also not routine and frequent or informational in nature.
33 The GAO rules database can be accessed at http://www.gao.gov/fedrules/.
34 E-mail from Sabrina Streagle, GAO Office of the General Counsel, October 6, 2009. GAO’s database indicates that GAO had received a total of 46,992 rules as of September 30, 2009, but GAO said that about 5,700 rules were received before the database was established.
GAO Opinion on the CRA and the Effective Date of a Rule

GAO has said on numerous occasions that covered rules cannot take effect until the rules are submitted to it and to both houses of Congress, and GAO has provided Congress with at least nine legal opinions regarding whether certain agency actions constitute covered rules. Although GAO has not provided Congress with a legal opinion regarding whether a particular missing non-major rule could take effect, the agency has provided at least one legal opinion regarding when a major rule can take effect. On January 18, 2002, the Centers for Medicare and Medicaid Services within the Department of Health and Human Services (HHS) published a final rule in the Federal Register entitled “Medicaid Program; Modification of the Medicaid Upper Payment Limit for Non-State Government-Owned or Operated Hospitals,” which was scheduled to take effect on March 19, 2002. However, the House of Representatives did not receive the rule until February 14, 2002, and the Senate did not receive the rule until March 15, 2002. Because the rule was considered a major rule, the CRA says it could not take effect for 60 days from the date of publication in the Federal Register or receipt of the rule by Congress, whichever is later. Therefore, by setting the effective date for March 19, 2002, the rule did not have the required 60-day delay in its effective date. In an April 5, 2002, letter to Senator Edward Kennedy, GAO said,

While section 801(a)(3)(A) uses the phrase “receipt of the rule by Congress” in beginning the computation of the 60-day delay provision, section 801(a)(1)(A) requires that “Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of Congress and the Comptroller General a report ….”

Section 801(a)(1)(A) makes clear that compliance with the requirements of the CRA necessitates submission of a rule to both Houses of Congress. Therefore, in this instance, the start of the 60-day delay period would have been March 15, 2002, the date of receipt by the Senate. Accordingly, we find that the Medicaid rule should not be effective under the provisions of the CRA until May 14, 2002.

Early GAO Reviews Determined That Some Covered Rules Were Not Being Submitted

Although it was not required to do so, in 1997, GAO conducted a review to determine whether all of the rules that were published in the Federal Register from October 1, 1996, to July 31, 1997, were submitted to GAO and Congress.

35 For a synopsis of these cases, see CRS Report RL30116, Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade, by Morton Rosenberg, pp. 22-23.


38 This letter is available at http://www.gao.gov/decisions/other/289880.htm.

39 GAO’s only responsibility in the CRA (other than to receive rules that agencies are required to submit to it) is to write a report on each “major” rule within 15 calendar days of the date that it is submitted. 5 U.S.C §801(a)(2)(A).
1997, had been submitted to Congress and GAO.\textsuperscript{40} GAO ultimately concluded that 279 covered rules published during this 10-month period had not been submitted, and in November 1997 provided a list of these rules to the Office of Information and Regulatory Affairs (OIRA) within OMB.\textsuperscript{41} GAO said that OIRA distributed this list to the affected agencies and told them to contact GAO if they had any questions.

In February 1998, because many of the rules remained unfiled, GAO said that it followed up with each agency that still had missing rules. In March 1998 testimony before the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform and Oversight, GAO said that 264 of the 279 rules had been submitted. GAO also said the following:

We do not know if OIRA ever followed up with the agencies to ensure compliance with the filing requirement; we do know that OIRA never contacted GAO to determine if all rules were submitted as required.... In our view, OIRA should have played a more proactive role in ensuring that agencies were both aware of the CRA filing requirements and were complying with them.\textsuperscript{42}

Some rulemaking agencies took what GAO characterized as “immediate and corrective action” in response to this review.\textsuperscript{43} For example, on January 7, 1998, the Environmental Protection Agency (EPA) published nine final rules in the \textit{Federal Register} changing the effective dates of rules that had not been submitted in accordance with the requirements in Section 801(a)(1)(A) of the CRA. In each of the rules, EPA noted that the CRA precludes a rule from taking effect until it is submitted to GAO and each house of Congress, and said that EPA had inadvertently failed to do so with regard to the subject rules. Although each of the rules had a designated effective date, EPA said “by operation of law, the rule did not take effect” on that date. After EPA discovered what it characterized as “its error,” the agency submitted the rules as required and amended the effective dates “consistent with the provisions of the CRA.”\textsuperscript{44}

GAO conducted a second review of agencies’ compliance with the CRA in June 1998, and reported that 66 covered rules published during the five-month period from August 1, 1997, to December 31, 1997, had not been submitted.\textsuperscript{45} GAO submitted the list of rules to OIRA, and

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\textsuperscript{41} GAO initially concluded that 498 rules had not been submitted, but later concluded that 182 were not covered rules (e.g., because they were rules of particular applicability or agency management) and that 37 rules had, in fact, been submitted. OIRA was created by the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), and currently is responsible for reviewing the substance of hundreds of regulations each year pursuant to Executive Order 12866. For more information, see CRS Report RL32397, \textit{Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs}, by Curtis W. Copeland.
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\textsuperscript{43} Ibid.
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\textsuperscript{44} See, for example, U.S. Environmental Protection agency, “Technical Amendments to Benzidine-Based Chemical Substances; Significant New Uses of Certain Chemical Substances: Correction of Effective Date Under Congressional Review Act (CRA),” 63 \textit{Federal Register} 673, January 7, 1998. Corrections of effective dates for eight other rules were on pages 682-691 of the same edition of the \textit{Federal Register}.
\end{flushright}

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\textsuperscript{45} U.S. General Accounting Office, \textit{Congressional Review Act: Update on Implementation and Coordination}, GAO/T-OGC-98-55, June 17, 1998, p. 3. GAO initially said that 115 rules had not been submitted, but later concluded that 25 were not covered rules and 24 had already been submitted.
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OIRA reportedly agreed to follow up with the agencies—which caused GAO to note that OIRA appeared to have “become more involved” in the correction effort.

In December 1998, GAO published a notice in the Federal Register identifying “rules published by Federal agencies in the Federal Register that were not received by [GAO] prior to the announced effective dates.” The notice included all final and interim final rules covered by the CRA that were issued between October 1, 1996, and December 31, 1997. GAO reported that more than 300 non-major rules published during this period were not submitted to GAO prior to their effective dates. The Departments of Agriculture and Transportation, and the Federal Emergency Management Agency, issued about 60% of the rules that had not been submitted. By the date of GAO’s Federal Register notice (nearly one year after the end of the time period covered by the review), GAO said that it had received all of the rules.

**GAO Repeatedly Notified OIRA That All Rules Were Not Being Submitted**

GAO has continued to compare its list of rules that agencies submit to the Comptroller General with the list of rules that are published in the Federal Register to determine whether any covered rules had not been submitted. However, GAO has not published a notice in the Federal Register delineating those missing rules since 1998. Instead, GAO periodically sent letters to OIRA regarding the substantive rules that it had not received. See the following examples:

- On September 21, 1999, GAO sent a letter to the deputy administrator of OIRA identifying 31 substantive regulations that were published in the Federal Register during calendar year 1998 that “have not been filed with us and, presumably, have also not been filed with the Congress.”
- On July 3, 2003, GAO sent a similar letter to the deputy administrator of OIRA identifying 322 substantive regulations that were published during calendar years 2001 and 2002 but had not been filed with GAO.
- On March 21, 2005, GAO sent another letter to the deputy administrator of OIRA identifying 460 substantive regulations that were published during calendar years 2003 and 2004 but were not filed with GAO.

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47 The Department of Agriculture rules were primarily issued by the Federal Crop Insurance Corporation. The Department of Transportation rules were primarily issued by the Federal Aviation Administration. The Federal Emergency Management Agency’s rules primarily involved flood elevation determinations.

48 GAO said that continuing to publish the notices in the Federal Register was “not cost effective.” E-mail from Shirley Jones, Assistant General Counsel, Government Accountability Office, November 13, 2009, available from the author.

49 GAO said that the lists of rules that it provided to OIRA were “substantive” in that they did not include items such as technical amendments to regulations that are printed in the Federal Register.

50 Letter from Kathleen E. Wannisky, Associate General Counsel for Operations, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, September 21, 1999, available from the author.

51 Letter from Kathleen E. Wannisky, Managing Associate General Counsel, GAO, to Donald R. Arbuckle, Deputy Administrator, OIRA, July 3, 2003, available from the author.
On May 27, 2008, GAO sent another letter to the administrator of OIRA identifying 116 substantive regulations that were published during fiscal year (FY) 2007 but “have not been submitted to us as required by Section 801(a)(1)(A).”

In each of these letters, GAO noted the rule submission requirement in Section 801(a)(1)(A) of the CRA, and said “We trust that your office will use this information to ensure that executive agencies fully comply with [CRA] requirements by filing regulations with both the Congress and GAO.” GAO officials said that OIRA did not respond to GAO with regard to any of these letters, and GAO and OIRA officials said they were not aware of any effort by OIRA to contact federal agencies regarding the missing rules during the time periods covered by these letters.

**GAO’s May 2009 Letter to OIRA**

On May 26, 2009, GAO notified the acting administrator of OIRA that “a number of regulations have not been submitted to us as required by section 801(a)(1)(A) [of the CRA].” Enclosed with the letter was a list of 101 substantive rules that were published in the *Federal Register* during FY2008 (i.e., October 1, 2007, through September 30, 2008) and that had not been submitted to GAO. Copies of that letter and the enclosed list of rules are provided as Figure A-1 and Figure A-2 in an Appendix at the end of this report. Taken together, the five GAO-OIRA letters covered seven one-year periods between 1998 and 2008, and listed 1,030 substantive rules that were published in the *Federal Register* were not submitted to GAO—an average of nearly 150 rules per year.

GAO said it did not send copies of any of these letters to congressional committees responsible for oversight of the CRA, the administrative offices within each house of Congress that typically receives rules from the agencies (i.e., the House Parliamentarian and the Secretary of the Senate), or anyone else in Congress. GAO officials noted that it was not statutorily required to notify Congress about this issue, but said GAO did mention that it had identified missing rules as part of congressional testimony regarding the CRA in recent years.
Agencies and Issues

As indicated in Table 1 below, the missing rules from FY2008 were issued by many different federal departments and agencies. However, the Departments of Agriculture, Commerce, Defense, Homeland Security, and Transportation, as well as the General Services Administration, each had more than five missing rules.

Table 1. Number of Substantive Final Rules Not Received by GAO, FY2008

<table>
<thead>
<tr>
<th>Department/Agency</th>
<th>Number of Rules Not Received</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Agriculture (USDA)</td>
<td>20</td>
</tr>
<tr>
<td>Department of Commerce (DOC)</td>
<td>8</td>
</tr>
<tr>
<td>Department of Defense (DOD)</td>
<td>7</td>
</tr>
<tr>
<td>Department of Health and Human Services (HHS)</td>
<td>3</td>
</tr>
<tr>
<td>Department of Homeland Security (DHS)</td>
<td>7</td>
</tr>
<tr>
<td>Department of Housing and Urban Development (HUD)</td>
<td>1</td>
</tr>
<tr>
<td>Department of the Interior (DOI)</td>
<td>3</td>
</tr>
<tr>
<td>Department of State (DOS)</td>
<td>4</td>
</tr>
<tr>
<td>Department of Transportation (DOT)</td>
<td>12</td>
</tr>
<tr>
<td>Department of the Treasury</td>
<td>5</td>
</tr>
<tr>
<td>Department of Veterans Affairs (DVA)</td>
<td>1</td>
</tr>
<tr>
<td>Executive Office of the President (EOP)</td>
<td>2</td>
</tr>
<tr>
<td>General Services Administration (GSA)</td>
<td>9</td>
</tr>
<tr>
<td>Peace Corps</td>
<td>2</td>
</tr>
<tr>
<td>Pension Benefit Guarantee Corporation</td>
<td>2</td>
</tr>
<tr>
<td>Small Business Administration</td>
<td>3</td>
</tr>
<tr>
<td>Other agencies (one rule each)</td>
<td>12</td>
</tr>
<tr>
<td>Total</td>
<td>101</td>
</tr>
</tbody>
</table>

Source: Letter from GAO to OIRA, May 24, 2009 (see Figures A-1 and A-2 in the Appendix to this report).

The subjects covered by the 101 missing rules from FY2008 were also varied. In addition to the previously mentioned November 2007 DHS rule on chemical facility security, the missing rules included the following:

- An October 2007 rule that was issued by the Food and Nutrition Service within USDA on “Procurement Requirements for the National School Lunch, School

(...continued)

Federal Register the previous year that have not been filed with our Office.” U.S. Government Accountability Office, Congressional Review Act, GAO-08-268T, November 6, 2007, p. 3. See also U.S. Government Accountability Office, Federal Rulemaking: Perspectives on 10 Years of Congressional Review Act Implementation, GAO-06-601T, March 30, 2006, p. 4, in which GAO said that “roughly 200 nonmajor rules per year [are] not filed with our office.”
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Breakfast and Special Milk Programs.”59 According to the rule summary, it makes “changes in a school food authority’s responsibilities for proper procurement procedures and contracts, limits a school food authority’s use of nonprofit school food service account funds to costs resulting from proper procurements and contracts, and clarifies a State agency’s responsibility to review and approve school food authority procurement procedures and contracts.”60

• An October 2007 rule that was issued by the Fish and Wildlife Service within DOI on “Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Guaj[oaacute]n (Eleutherodactylus cooki).”61 According to the rule summary, it designates critical habitat for the guajón (a rock frog endemic to Puerto Rico) under the Endangered Species Act of 1973, as amended.

• A November 2007 rule that was issued by the Farm Service Agency (FSA) within USDA on “Regulatory Streamlining of the Farm Service Agency’s Direct Farm Loan Programs.”62 According to the rule summary, it “simplifies and clarifies FSA’s direct loan regulations; implements the recommendations of the USDA Civil Rights Action Team; meets the objectives of the Paperwork Reduction Act of 1995; and separates FSA’s direct Farm Loan Programs regulations from the Rural Development mission area’s loan program regulations.”63

• A December 2007 rule that was issued by the Equal Employment Opportunity Commission (EEOC) on “Age Discrimination in Employment Act: Retiree Health Benefits.”64 According to the rule summary, it allows employers to “create, adopt, and maintain a wide range of retiree health plan designs, such as Medicare bridge plans and Medicare wrap-around plans, without violating the Age Discrimination in Employment Act of 1967 (ADEA). To address concerns that the ADEA may be construed to create an incentive for employers to eliminate or reduce retiree health benefits, EEOC is creating a narrow exemption from the prohibitions of the ADEA for the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program.”65

• A December 2007 rule that was issued by the Office of Thrift Supervision (OTS) within the Department of the Treasury on “Permissible Activities of Savings and Loan Holding Companies.”66 One of the stated purposes of the rule is to “expand

60 Ibid., p. 61479.
63 Ibid., p. 63242.
65 Ibid., p. 72938.
the permissible activities of savings and loan holding companies (SLHCs) to the full extent permitted under the Home Owners’ Loan Act (HOLA).” The rule also amended the agency’s existing requirements “to conform the regulation to the statute that it is intended to implement, and to set forth standards that OTS will use to evaluate applications submitted pursuant to the statutory application requirement.”

- A February 2008 rule that was issued by the National Oceanic and Atmospheric Administration (NOAA) within DOC on “Endangered and Threatened Species: Final Threatened Listing Determination, Final Protective Regulations, and Final Designation of Critical Habitat for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon.” According to the rule summary, it was a “final determination to list the Oregon Coast coho salmon (Oncorhynchus kisutch) evolutionarily significant unit (ESU) as a threatened species under the Endangered Species Act (ESA).” The agency said it was “also issuing final protective regulations and a final critical habitat designation for the Oregon Coast coho ESU.”

- A February 2008 rule that was issued by the Bureau of Land Management (BLM) within DOI on “Oil and Gas Leasing: National Petroleum Reserve – Alaska” (NPR-A). According to the summary, the rule “amends the administrative procedures for the efficient transfer, consolidation, segregation, suspension, and unitization of Federal leases in the NPR-A. The rule also changes the way the BLM processes lease renewals, lease extensions, lease expirations, lease agreements, exploration incentives, lease consolidations, and termination of administration for conveyed lands in the NPR-A. Finally, the rule makes the NPR-A regulation on additional bonding consistent with the regulations that apply outside of the NPR-A.”

- An April 2008 rule issued by NOAA’s National Marine Fisheries Service on “Endangered and Threatened Species: Designation of Critical Habitat for North Pacific Right Whale.” According to the rule summary, the “North Pacific right whale was recently listed as a separate, endangered species, and because this was a newly listed entity, we were required to designate critical habitat for it.”

- A June 2008 rule that was issued by the Office of the Secretary within DHS on “Procedures for Transportation Workplace Drug and Alcohol Testing

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69 Ibid, p. 7816.
71 Ibid., p. 6430.
73 Ibid., p. 19000.
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Programs.” According to the summary, the rule amends certain provisions of its drug and alcohol testing procedures to “change instructions to collectors, laboratories, medical review officers, and employers regarding adulterated, substituted, diluted, and invalid urine specimen results. These changes are intended to create consistency with specimen validity requirements established by the U.S. Department of Health and Human Services and to clarify and integrate some measures taken in two of our own Interim Final Rules. This Final Rule makes specimen validity testing mandatory within the regulated transportation industries.”

- A July 2008 rule that was issued by the Transportation Security Administration within DHS on “False Statements Regarding Security Background Checks.” According to the rule summary, it codifies statutory provisions that “prohibit public transportation agencies, railroad carriers, and their respective contractors and subcontractors from knowingly misrepresenting Federal guidance or regulations concerning security background checks for certain individuals.”

- A September 2008 rule issued by the National Highway Traffic Safety Administration (NHTSA) within DOT on “Nonconforming Vehicles Decided to be Eligible for Importation.” According to the rule summary, it “revises the list of vehicles not originally manufactured to conform to the Federal motor vehicle safety standards (FMVSS) that NHTSA has decided to be eligible for importation.”

Submission of Missing Rules After GAO’s May 2009 Letter

CRS examined the GAO rules database on October 26, 2009, which indicated that GAO received 5 of the 101 missing rules after the date of the May 26, 2009, letter to OIRA:

- A May 2008 DHS rule establishing a security zone around any vessel being escorted by one or more Coast Guard, State, or local law enforcement assets within the Captain of the Port Zone Jacksonville, Florida, which GAO received on June 5, 2009.

- A June 2008 DOT rule clarifying the qualifications of individuals who certify by signature the extended operations (ETOPS) pre-departure service check for ETOPS flights operated by air carriers and in commuter and on-demand passenger carrying operations, which GAO received on June 5, 2009.

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75 Ibid., p. 35961.
77 Ibid., p. 44665.
79 Ibid., p. 56741.
81 U.S. Department of Transportation, Federal Aviation Administration, “Extended operations (ETOPS) of Multi-(continued...)
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- A July 2008 Federal Trade Commission rule describing biodiesel and biomass-based diesel automotive fuel labeling requirements, which GAO received on October 4, 2009.82

- An August 2008 DOT rule amending certain rating definitions and type certification standards for rotorcraft turbine engines, which GAO received on June 5, 2009.83

- A September 2008 rule issued by the Department of the Treasury on “Risk Based Capital Guidelines,” which GAO received on July 5, 2009.

The other 96 rules that were published during FY2008 that GAO said that it had not received were still not listed in the GAO database as of October 26, 2009.

Congress Did Not Receive Most of the FY2008 Missing Rules

CRS also examined the House and Senate executive communication databases on October 26, 2009, which indicated that 80 of the 101 rules that GAO identified in its May 2009 letter to OIRA had not been received by the House of Representatives, and 81 had not been received by the Senate.84 Even though 20 of the 101 rules on GAO’s list of missing rules had been submitted to Congress, the CRA says they cannot take effect until they are submitted to GAO as well.

Of the five rules that were submitted to GAO after the May 2009 letter to OIRA, three of the rules had not been submitted to either House of Congress as of October 26, 2009.85 Therefore, 99 of the 101 rules that were identified in GAO’s May 2009 letter to OIRA had not been submitted in all three locations (i.e., both houses of Congress and GAO).

OIRA’s Actions in November 2009 and Agencies’ Response

On October 20, 2009, CRS provided the deputy administrator of OIRA with a copy of GAO’s May 2009 letter and enclosure listing the 101 missing rules, and asked whether OIRA had taken any action in response to that letter. OIRA officials initially told CRS that it had no record of having received the May 2009 letter from GAO.86 Subsequently, however, on November 12,

(...continued)

85 The two rules that were submitted to the House and the Senate were (1) the May 2008 DHS rule establishing a security zone around any vessel being escorted by one or more Coast Guard, State, or local law enforcement assets within the Captain of the Port Zone Jacksonville, Florida (received by the House of Representatives on May 29, 2008, and by the Senate on February 9, 2009); and (2) the September 2008 rule issued by the Department of the Treasury on “Risk Based Capital Guidelines” (received in the House of Representatives on June 26, 2009, and in the Senate on April 16, 2009).
86 Telephone conversation with OIRA and OMB officials, November 6, 2009. However, GAO officials subsequently told CRS that GAO had evidence that OIRA had received the list of missing rules by at least June 2009.
2009, the deputy administrator of OIRA sent an e-mail to federal agencies saying that it “had come to my attention that your agency may not have submitted final rules to Congress and to [GAO] as required by the Congressional Review Act.” He urged the agencies to “contact the GAO to determine which rules they have not yet received from your agency.” (The deputy administrator did not, however, provide the agencies with a list of the missing rules, either overall or for their agency.) He also noted in the e-mail that “agencies must submit all final rules to Congress before they can take effect,” and provided the agencies with a copy of OMB’s 1999 guidance on the CRA.

The following week, representatives from GAO’s Office of the General Counsel told CRS that federal agencies had begun submitting some of the missing rules listed in the May 2009 letter.87 As of November 20, 2009, GAO said it had been contacted by eight agencies regarding possible missing rules (including one agency with no rules on the May 2009 list), and that three agencies had subsequently submitted six of the missing rules—three from the Small Business Administration, and one rule each from the Nuclear Regulatory Commission, the Securities and Exchange Commission, and DVA.88

On December 21, 2009, CRS searched GAO’s database and determined that 18 of the missing rules listed in the May 2009 letter had been received at GAO between November 23, 2009, and December 17, 2009. Of these rules, five were submitted by DOT, and three each were submitted by HHS and the Small Business Administration.

On July 15, 2010, CRS again searched GAO’s database and determined that 49 of the 101 rules listed in the May 2009 letter to OIRA still had not been submitted to GAO.

**GAO’s January 2010 Letter to OIRA**

On January 19, 2010, GAO sent a letter to the OIRA administrator identifying 31 substantive regulations that were published during FY2009 and that had not been submitted to GAO.89 In the letter, GAO said “we appreciate recent efforts made by your office to encourage executive agencies to comply with the requirements of 5 U.S.C. § 801(a)(1)(A), and would be pleased to discuss ways in which we can work together to ensure that agencies comply fully with CRA requirements by submitting rules both to Congress and to GAO.” GAO also reportedly sent separate letters to each of the agencies that had missing rules, along with a listing of the rules that had not been received from each agency. GAO said it did so to avoid having to respond to subsequent inquiries from the agencies about what rules were missing.90

The list of rules enclosed with the letter indicated that 14 of the 31 missing rules had been issued by USDA, including 4 rules each from the department’s Commodity Credit Corporation and

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87 GAO said it was not aware that OIRA had previously urged agencies to contact GAO regarding their missing rules. Telephone conversation with Shirley Jones, Assistant General Counsel, Government Accountability Office, November 18, 2009.

88 The SEC and DVA had copies of the coversheets that were submitted with the report, bearing a date stamp indicating they had previously submitted. Therefore, the database was corrected to reflect the earlier date.


90 Telephone conversation with Sabrina Streagle, GAO’s Office of the General Counsel, February 24, 2010.
Forest Service. Seven other missing rules had been issued by SBA; however, the agency reportedly contended that it had previously submitted the rules, and later submitted other copies to GAO.91 Other departments and agencies with rules on the GAO list included DOT (three rules); and DOC, DOE, HUD, DOL, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Social Security Administration (one rule each).

Although the CRA requires agencies to submit all of their covered rules to GAO and Congress before they can take effect, GAO said that the list of 31 missing rules included only “substantive” regulations, and “does not include items such as technical amendments to regulations previously published in the Federal Register.” Several of the missing rules were considered “significant” under Executive Order 12866 (a priority category higher than “substantive”),92 and therefore had been reviewed by OIRA before being published in the Federal Register.93 These rules included the following:

- A December 2008 rule issued by the USDA Commodity Credit Corporation that extended the Milk Income Loss Contract (MILC) Program from October 1, 2007, through September 30, 2012.94 USDA said that the rule also adjusted the milk price support program regulations to specify that support purchases will only be made from manufacturers and not from third parties such as brokers. Expenditures under the program for the authorized period were estimated at between $300 million and $400 million.

- A December 2008 SBA rule on the “lender oversight program” that (among other things) codified the agency’s process of risk-based oversight, including “accounting and reporting requirements; off-site reviews/monitoring; on-site reviews and examinations; and capital adequacy requirements.”95

Other missing rules appeared substantive in nature, even though they were not considered “significant” under the executive order. One such rule, issued by the Animal and Plant Health and Inspection Service within USDA in October 2008, amended and republished the “list of select agents and toxins that have the potential to pose a severe threat to animal or plant health, or to animal or plant products.”96 The action was required by the Agricultural Bioterrorism Protection Act of 2002 (P.L. 107-188).

91 Ibid.

92 In the Unified Agenda of Federal Regulatory and Deregulatory Actions, rules are placed into one of five priority categories. From highest to lowest, those categories are: (1) economically significant (which is essentially the same as “major” under the CRA); (2) other significant; (3) substantive, nonsignificant; (4) routine and frequent; and (5) informational or administrative.

93 The President, Executive Order 12866, “Regulatory Planning and Review,” 58 Federal Register 51735, October 4, 1993. Section 3(f) of the order defines a “significant” rule as one that may “(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.”


Responses to GAO’s Letter

On March 15, 2010, a representative from GAO’s office of the general counsel said that OIRA had not responded to GAO’s January 2010 letter to the OIRA administrator. She also said that GAO was unaware of any actions by OIRA to contact agencies regarding the missing rules. However, OIRA officials said that after receiving GAO’s January 2010 letter, the deputy administrator of OIRA sent another e-mail to federal agencies that reminded them of their obligation to submit their rules to GAO and Congress, and provided another copy of OMB’s 1999 guidance on the CRA. They also said that OIRA planned to send similar e-mails twice each year to agency regulatory officials, and planned to give GAO a list of those agency officials so that GAO could resolve any concerns about unsubmitted rules more quickly. Finally, OIRA officials said that they planned to raise the issue of compliance with the CRA at meetings of the Regulatory Working Group.

As of July 23, 2010, 28 of the 31 rules listed as missing in GAO’s January 2010 letter had been submitted to GAO. Most of the rules were submitted during February 2010, but some were not submitted until March 2010. The three remaining rules that had not been submitted were the following:

- A December 2008 rule issued by the USDA’s Rural Utilities Service that established a “unified guaranteed loan platform for the enhanced delivery of four existing Rural Development guaranteed loan programs — Community Facility; Water and Waste Disposal; Business and Industry; and Renewable Energy Systems and Energy Efficiency Improvement Projects.” The rule also incorporated provisions “that will enable the Agency to better manage the risk associated with making and servicing guaranteed loans and that will reduce the cost of operating the guaranteed loan programs.” This rule was considered “significant” under Executive Order 12866 and was reviewed by OIRA.

- A September 2009 rule issued by HUD on the department’s Home Equity Conversion Mortgage (HECM) program. Among other things, the rule established “testing standards to qualify individuals as HECM counselors eligible to provide HECM counseling to prospective HECM borrowers.” According to the department, HECM counseling enables elderly homeowners to make more informed decisions when considering mortgage options and whether to pursue a HECM loan.

(…continued)

October 16, 2008.

97 E-mail from Sabrina Streagle, Office of the General Counsel, GAO, March 15, 2010.


99 The Regulatory Working Group was established by Section 4(d) of Executive Order 12866, and is composed in part of representatives from each agency that the OIRA administrator determines to have “significant regulatory responsibility.”


101 Ibid.

• A November 2008 rule issued by the Veterans Employment and Training Service within DOL that (among other things) revised the requirement that federal contractors track and annually report the number of employees in their workforces who are veterans covered under the law.¹⁰³

Related Legislation in the 111th Congress

On June 16, 2009, the House of Representatives passed H.R. 2247, the “Congressional Review Act Improvement Act,” which would amend the CRA and eliminate the requirement that federal agencies submit their covered rules and related reports to both Houses of Congress before such rules can take effect. On June 17, 2009, the bill was referred to the Senate Committee on Homeland Security and Governmental Affairs. If H.R. 2247 is enacted, covered rules and reports would still have to be submitted to GAO, and GAO would be required to submit to each House a weekly report containing a list of the rules received, including a notation identifying each major rule. The Speaker of the House of Representatives would be required to publish the GAO report in the Congressional Record. The House of Representatives passed identical legislation during the 110th Congress (H.R. 5593), but the Senate did not act on the bill before the end of the 110th Congress.

According to the report on H.R. 2247 by the House Committee on the Judiciary, the bill “would reduce reporting requirements for agencies that submit information to the legislative branch under the Congressional Review Act (CRA).”¹⁰⁴ Currently, agencies “must often resort to hand-delivering the required materials by courier to the House and Senate, in order to comply with the CRA and the standards regarding communications transmitted to Congress. Materials are frequently returned to the promulgating agency for failure to comply with the CRA or these other congressional requirements, delaying implementation of the rule.”¹⁰⁵

OIRA officials said that the Obama Administration had not taken a position on H.R. 2247.¹⁰⁶ A representative from GAO’s Office of the General Counsel said that GAO also had not taken a position on the legislation, but was prepared to carry out its requirements should it become law.¹⁰⁷ It is possible that elimination of the requirement that agencies submit their rules and related reports to the House and the Senate could increase the ability and willingness of agencies to submit their rules to GAO, either electronically or otherwise.¹⁰⁸ However, the data from FY2008

¹⁰⁵ Ibid., p. 3.
¹⁰⁸ GAO has said that has been able to receive CRA-covered rules and reports electronically since 1999, but that most agencies do not do so because they must submit paper copies to the House and the Senate. See U.S. Government Accountability Office, Congressional Review Act, GAO-08-268, November 6, 2007, p. 3. Also, in its May 27, 2008, letter to the Administrator of OIRA, GAO noted that Congress was considering amendments to the CRA that would eliminate the requirement that agencies submit rules to the Senate and the House of Representatives (H.R. 5593, 110th Congress), and said if the bill was enacted into law, “we would welcome the opportunity to work with your office and federal agencies to implement the law and make greater use of electronic submission of rules to our Office.” Letter from Robert J. Cramer, Associate General Counsel, GAO, to Susan E. Dudley, Administrator, OIRA, May 27, 2008, (continued...)
indicated that fewer rules were submitted to GAO than to either the House or the Senate. Therefore, enactment of H.R. 2247 could have little effect on agencies’ compliance with the CRA’s reporting requirements.

Analysis

Agency regulations generally start with an act of Congress, and are the means by which statutes are implemented and specific requirements are established. Therefore, Congress has a vested interest in overseeing the regulations that agencies issue pursuant to those statutes. Because congressional authority over agency rulemaking was believed to have waned in recent decades (while presidential authority over rulemaking had increased), the CRA was enacted in an attempt to reclaim a measure of congressional control. Although Congress can learn about the issuance of agency rules in many ways, the requirement in Section 801(a)(1)(A) of the CRA that agencies submit all of their final rules to GAO and Congress before they can take effect helps to ensure that Congress will have an opportunity to review, and possibly disapprove of, agency rules.

Notwithstanding this requirement, GAO said that it (and presumably Congress) did not receive more than 1,000 final rules between 1999 and 2008. CRS discovered that GAO did not receive 21 significant rules that were issued during FY2009, and GAO reported in January 2010 that it did not receive 31 substantive rules during this period. It is possible that some of these rules were submitted by the rulemaking agencies, and were missing because of a problem on the receiving end at GAO or Congress. However, because about two-thirds of the rules were not received by GAO or either house of Congress, it seems more likely that the agencies did not submit them as required by the CRA.

The CRA says that a Member of Congress can introduce a joint resolution of disapproval regarding a rule “beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress.” Therefore, by not submitting these rules to Congress, the rulemaking agencies have arguably prevented Congress from using the expedited disapproval authority that it granted itself with the enactment of the CRA. The fact that Congress has used the CRA to disapprove only one rule since the legislation was enacted does not lessen agencies’ responsibilities to submit their rules in accordance with the act’s requirements.

Despite the reporting requirements contained in the CRA, it appears that agencies have implemented some, if not all, of these rules. Some of the rules have not been submitted for years. For example, of the 31 missing rules that GAO identified in its 1999 letter to OIRA, 24 were not listed in the GAO database in November 2009—more than 10 years after they were published and scheduled to go into effect. Of the seven rules that were later submitted, some were not received

(...continued)

available from the author.


111 In 2001, Congress disapproved a rule on ergonomics in the workplace. See U.S. Department of Labor, Occupational Safety and Health Administration, “Ergonomics Program,” 65 Federal Register 68261, November 14, 2000. Although the CRA has been used to disapprove only one rule, it may have other, less direct or discernable effects (e.g., keeping Congress informed about agency rulemaking and preventing the publication of rules that may be disapproved).
at GAO until years after they were published and scheduled to go into effect. More recently, of the 101 rules that GAO listed as missing in its May 2009 letter to OIRA, 49 of them had not been submitted to GAO 14 months later in July 2010.

Some of the missing rules were interim final or direct final rules, or were final rules in which the agencies specifically invoked the “good cause” exception to the notice and comment requirements in the APA. Section 808 of the CRA states that agencies can make their rules effective “at such time as the Federal agency promulgating the rule determines” when the agency invokes the good cause exception. Therefore, in these cases, the agencies would appear to be able to put the rules into effect even though they had not been submitted to GAO and Congress. However, as noted earlier in this report, the post-enactment legislative history of the CRA states that even these rules must be submitted to GAO and Congress “as soon as practicable after promulgation” to permit the congressional review period to begin.

The CRA currently gives both GAO and OIRA limited roles in the rule submission process. OIRA is required to determine which rules are “major,” and GAO is to write a report on each major rule within 15 calendar days. GAO has voluntarily taken on the task of determining which Federal Register rules it has not received, and has periodically notified OIRA of these missing rules. However, OIRA has not responded directly to GAO regarding most of these letters. Also, GAO has not sent Congress copies of its letters to OIRA, or otherwise informed Congress about the scope of this issue, and has not published a notice in the Federal Register regarding this issue since 1998.

Congressional Options

Congress may conclude that agencies’ failure to submit all of their covered rules to GAO and Congress is an administrative issue that should be resolved by GAO and OIRA, or by GAO and the individual rulemaking agencies. Congress may also conclude that enactment of H.R. 2247 (allowing agencies to submit their rules only to GAO, perhaps electronically) will improve agencies’ willingness or ability to submit all of their covered rules, and that no other action is needed. Also, the number of missing rules declined in FY2009 when compared to the number missing in FY2008 (31 versus 101, respectively), and federal agencies appear more willing to submit their missing rules when notified by GAO.

Should Congress want to take other actions to improve reporting of covered rules, it could (among other things) (1) require GAO to continue to compare the rules it receives with the rules that are published in the Federal Register, (2) require GAO to continue to report any missing rules to OIRA, and (3) require OIRA or GAO to take other action to encourage agencies to comply with the CRA's reporting requirements. For example, GAO has said in the past that it follows up with the agencies regarding any major rules that are missing. Congress could require GAO to contact the agencies for the missing non-major rules as well, or could require

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112 See, for example, U.S. Department of Health and Human Services, Food and Drug Administration, “Amendment to Examination and Investigation Sample Requirements,” 63 Federal Register 51297, September 25, 1998, which was not submitted to GAO until October 22, 2002.

113 5 U.S.C. §804 (2).


OIRA to contact the agencies. GAO and OIRA have each taken action in the past to contact individual agencies, and could be required to do so again.\textsuperscript{116} Both GAO and OIRA have, however, indicated to CRS that they currently have limited resources to take on additional responsibilities for CRA compliance enforcement.

OIRA played a somewhat similar role in improving agencies’ compliance with the Paperwork Reduction Act (PRA), which specifically requires OIRA to provide direction and oversee agencies’ information collection requests.\textsuperscript{117} In its annual reports to Congress on the implementation of the PRA in the late 1990’s and early 2000’s, OIRA reported that there were hundreds of violations of the act each year (i.e., agencies collecting information without OIRA approval, or collecting information after such approvals had expired). For example, OIRA reported that there were 872 violations of the PRA in FY1998, and 710 in FY1999. GAO included information on these violations in its annual testimonies on the implementation of the PRA.\textsuperscript{118} In 2001, OIRA began a concerted effort to drive down the number of violations, requiring agencies to establish procedures to ensure that information was not collected without OIRA authorization.\textsuperscript{119} By 2003, OIRA reported that there were only 18 PRA violations government-wide.\textsuperscript{120}

OIRA is described in Executive Order 12866 as “the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President’s regulatory priorities.”\textsuperscript{121} The executive order also says that the administrator of OIRA “shall provide meaningful guidance and oversight so that each agency’s regulatory actions are consistent with applicable law.”\textsuperscript{122} OIRA is also uniquely positioned both within OMB (with its budgetary influence) and within the federal rulemaking process (reviewing and commenting on rules just before they are published in the \textit{Federal Register}) to enable it to exert maximum influence on federal agencies. In 1998, Congress directed OIRA to issue guidance on the implementation of the CRA, and that guidance is still in effect. Therefore, OIRA could play an integral role in ensuring compliance with the CRA and implementation of the President’s and Congress’s regulatory priorities.

Also, GAO could be required to provide a copy of its CRA compliance reports to Congress, publish the reports in the \textit{Federal Register}, or publish the list of missing rules on its website. Providing the reports of missing rules to Congress would give Congress a clearer sense of how the CRA is being implemented, and could permit Congress to conduct oversight of agencies compliance with the act. Publishing the lists of missing rules in the \textit{Federal Register} or on GAO’s website could provide an incentive to the agencies to comply with the CRA.

\footnotesize{\textsuperscript{116} As noted earlier in this report, GAO said that it and OIRA contacted individual agencies regarding missing rules in 1998.}\n\footnotesize{\textsuperscript{117} 44 U.S.C. §3504(a)(1)(B).}\n\footnotesize{\textsuperscript{118} See, for example, U.S. General Accounting Office, \textit{Paperwork Reduction Act: Burden Increases at IRS and Other Agencies}, GAO/T-GGD-00-114, April 12, 2000.}\n\footnotesize{\textsuperscript{119} See http://www.whitehouse.gov/omb/assets/omb/inforeg/pra_memo111401.pdf.}\n\footnotesize{\textsuperscript{120} See http://www.whitehouse.gov/omb/assets/omb/inforeg/compliance_pra092704.pdf.}\n\footnotesize{\textsuperscript{121} The President, Executive Order 12866, “Regulatory Planning and Review,” 58 \textit{Federal Register} 51735, Section 2(b).}\n\footnotesize{\textsuperscript{122} Ibid., Section 6(b).}
Appendix. GAO Documents

Figure A-1. GAO’s May 2009 Letter to OIRA

May 26, 2009

Mr. Kevin F. Neyland
Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Dear Mr. Neyland,

The Congressional Review Act (CRA), 5 U.S.C. §§ 801-808, requires federal agencies to submit any rule covered by the CRA to each House of Congress and to the Government Accountability Office (GAO) before the rule can take effect. GAO has compared executive branch regulations published in the Federal Register from October 1, 2007, through September 30, 2008, with those submitted to GAO. We have discovered that a number of regulations have not been submitted to us as required by section 801(a)(1)(A).

I have enclosed a listing of published regulations that were not submitted to GAO, broken down by agency. The list covers the 2008 fiscal year, the period from October 1, 2007, through September 30, 2008. It includes only substantive regulations that have not been submitted; it does not include items such as technical amendments to regulations previously published in the Federal Register.

We will continue to monitor agency compliance with the CRA and will furnish you with additional information as it becomes available. We trust that your office will use this information to ensure that executive agencies comply fully with CRA requirements by submitting rules both to Congress and to GAO.

If you have any questions about this listing, or need additional information, please call Shirley Jones, Assistant General Counsel, at 202-512-8156.

Sincerely yours,

Robert J. Cramer
Managing Associate General Counsel

Enclosure

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Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs

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Summary

The Paperwork Reduction Act of 1980 created the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). Executive Order 12291, issued by President Reagan in 1981, gave OIRA the responsibility to review the substance of agencies’ regulatory actions before publication in the Federal Register. The office’s regulatory review role was initially highly controversial, and it has been criticized at different times as being both too active and too passive regarding agencies’ rules. Although OIRA has a number of specific statutory responsibilities (e.g., paperwork review and regulatory accounting), as a component of OMB it is part of the Executive Office of the President, and helps ensure that covered agencies’ rules reflect the President’s policies and priorities.

OIRA’s current regulatory review responsibilities are detailed in Executive Order 12866, which was issued by President Clinton in 1993. The office reviews significant draft rules from agencies (other than independent regulatory agencies) at both the proposed and final rulemaking stages, and also informally reviews certain rules before they are formally submitted. For rules that are “economically significant” (most commonly defined as those having a $100 million impact on the economy), OIRA also reviews the economic analyses. Since 1994, OIRA has reviewed between 500 and 700 significant proposed and final rules each year, and can clear the rules with or without changes, return the rules to the agencies for reconsideration, or encourage the agencies to withdraw them. The executive order also requires OIRA or the rulemaking agencies to disclose certain elements of the review process to the public, including the changes made at OIRA’s recommendation. A September 2003 report by the General Accounting Office indicated that OIRA had a significant effect on more than a third of the 85 rules in the study, but OIRA’s most common effect was to suggest changes to explanatory language in the preambles to the rules. At the start of the George W. Bush Administration, OIRA made a number of changes to its review process, including increased use of return letters, added emphasis on economic analysis to support the rules, and improvements in the transparency of the office’s review process. Overall, in contrast to the “counselor” role it played during the Clinton Administration, OIRA appeared to have returned to the “gatekeeper” role that it had during its first 12 years of existence. An April 2009 report by GAO again noted changes made to rules at OIRA’s suggestion.

Possible legislative issues involving OIRA include codification of the office’s review function and principles, increasing or decreasing the office’s funding and staffing, adding review of rules from independent regulatory agencies, and improvements in the transparency of OIRA’s review process. In January 2009, President Obama requested recommendations from the Director of OMB for possible changes to Executive Order 12866. In January 2011, President Obama issued Executive Order 13563, which reaffirmed many of the principles in Executive Order 12866, but did not change OIRA’s responsibilities.

Tables

Table 1. Most Rules That OIRA Reviewed Were Coded in Database as Changed or Not Changed

Contacts

Author Contact Information
The Office of Information and Regulatory Affairs (OIRA) is one of several statutory offices within the Office of Management and Budget (OMB), and can play a significant—if not determinative—role in the rulemaking process for most federal agencies. In addition to its many other responsibilities, OIRA currently reviews the substance of between 500 and 700 significant proposed and final rules each year before agencies publish them in the Federal Register, and can clear the rules with or without change, return them to the agencies for reconsideration, or encourage the agencies to withdraw the rules. Between 70 and 100 of the rules that OIRA reviews each year are each considered “economically significant” or “major” (e.g., have a $100 million impact on the economy). The office was created by Congress and has a number of specific statutory responsibilities, but also helps ensure that agencies’ rules reflect the President’s policies and priorities.

OIRA’s role in the federal rulemaking process has been highly controversial in all five of the presidential administrations in which it has been in existence, but some of the criticisms directed at the office have varied over time. In some administrations, OIRA has been accused of controlling the agenda of the rulemaking agencies too much, directing them to change substantive provisions in draft rules or even stopping proposed regulatory actions that it believes are poorly crafted or unnecessary. At other times, though, OIRA has been accused of not exerting enough authority over the agencies’ rules. Other, more persistent criticisms have focused on the lack of transparency of OIRA’s regulatory reviews to the public and the sometimes unseen influence that regulated entities and other nongovernmental organizations can have on agencies’ rules through those reviews.

This report describes how OIRA reviews covered agencies’ draft rules, OIRA’s effects on the rules, and changes in OIRA’s procedures and policies in recent years. Much of that discussion is drawn from a September 2003 report on OIRA by the General Accounting Office (GAO, now the Government Accountability Office). First, though, this report will provide a brief history of presidential regulatory review and describe how OIRA’s review process was established. Finally, the report describes several potential legislative issues regarding OIRA’s regulatory review authority.

The Establishment of Regulatory Review in OIRA

OIRA was created within OMB by Section 3503 of the Paperwork Reduction Act (PRA) of 1980 (44 U.S.C. Chapter 35). The PRA provided that OIRA would be headed by an administrator, and

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1 The other statutory offices, which are collectively referred to as the “management” side of OMB, are the Office of Federal Financial Management, the Office of Federal Procurement Policy, and the Office of Electronic Government and Information Technology. OMB’s resource management offices, which review agencies’ budget submissions, are sometimes collectively referred to as OMB’s “budget” side.

2 The Administrative Procedure Act of 1946 (5 U.S.C. 551 et seq.), generally requires agencies to publish a notice of proposed rulemaking in the Federal Register, permit the public to comment on the proposed rule, and then publish a final rule addressing the comments provided. For an overview of many of the statutes and executive orders governing federal rulemaking, see CRS Report RL32240, The Federal Rulemaking Process: An Overview, by Curtis W. Copeland.


4 For a discussion of the PRA, see CRS Report RL30590, Paperwork Reduction Act Reauthorization and Government Information Management Issues, by Harold C. Relyea.
designated the OIRA administrator as the “principal advisor to the Director on Federal information policy.” The act also said that the Director of OMB “shall delegate to the (OIRA) Administrator the authority to administer all functions under this chapter.” Specific areas of responsibility in the PRA that were assigned to the Director (and later delegated to OIRA) included information policy, information collection request clearance and paperwork control, statistical policy and coordination, records management, privacy, and automatic data processing and telecommunications. With regard to paperwork reduction, the act generally prohibited agencies from conducting or sponsoring a collection of information until they had submitted their proposed information collection requests to OIRA and the office had approved those requests. The PRA’s requirements cover rules issued by virtually all agencies, including Cabinet departments, independent agencies, and independent regulatory agencies and commissions.

Although the PRA gave OIRA substantive responsibilities in many areas, the bulk of the office’s day-to-day activities under the act were initially focused on reviewing and approving agencies’ proposed information collection requests. OIRA had 77 staff members when the PRA took effect in 1981, of which about half were involved in reviewing agencies’ information collection requests. That year, OIRA took nearly 5,000 paperwork review actions—approving new and revised collections, extending existing collections, and reinstating expired collections. The office’s paperwork clearance workload since then has generally been between 4,000 and 6,000 actions each year, although the number of OIRA staff overall and those reviewing proposed collections has declined substantially. Many federal regulations have an information collection component, but the PRA did not authorize OIRA to review or comment on the non-paperwork elements of those regulations, or on regulations without an information collection component.

OIRA and Reagan Executive Orders on Regulatory Review

In 1980, President Reagan was elected on a platform critical of government’s role in society in general and of federal regulations in particular. Shortly after taking office, he established a “Presidential Task Force on Regulatory Relief,” headed by Vice President George H. W. Bush and composed of Cabinet officers (although the bulk of the task force’s work was reportedly performed by OMB staff). The task force’s responsibilities included (1) monitoring the establishment of OMB’s responsibility to coordinate and review new rules, (2) the development of legislative changes to regulatory statutes, and (3) the revision of existing regulations. In

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5 The PRA was later amended in 1986 and again in 1995, and the list of OIRA’s duties changed somewhat. For example, the 1986 amendments sharpened the management focus of the act and changed “information policy” to “information resources management.” As discussed later in this report, the 1986 amendment also required the administrator of OIRA to be appointed by the President, subject to advice and consent of the Senate.

6 As used in this report, the term “independent regulatory agencies” refers to agencies established to be independent of the President, including the Federal Communications Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission. The term “independent agencies” refers to agencies that are independent of Cabinet departments but not independent regulatory agencies (e.g., the Environmental Protection Agency and the Office of Personnel Management).

7 For example, by 1989, OIRA’s overall staffing had declined to fewer than 60 employees, of whom OIRA estimated 35 were reviewing information collection requests. By 1997, OIRA staffing declined 48 employees, of whom 22 were reviewing paperwork requests. See U.S. General Accounting Office, Regulatory Management: Implementation of Selected OMB Responsibilities Under the Paperwork Reduction Act, GAO/GGD-98-120, July 9, 1998.

8 In some cases, though, the paperwork requirement may be the essence of the regulation. For example, EPA’s Toxics Release Inventory (TRI) program is essentially a database created through collections of information imposed on businesses in order to inform the public about chemical hazards in their communities.
In February 1981—less than one month after taking office—President Reagan issued Executive Order 12291 on “Federal Regulation,” which greatly increased both the scope and importance of OIRA’s responsibilities. Specifically, the executive order generally required covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to:

- refrain from taking regulatory action “unless the potential benefits to society for the regulation outweigh the potential costs to society,” select regulatory objectives to maximize net benefits to society, and select the regulatory alternative that involves the least net cost to society;

- prepare a “regulatory impact analysis” for each “major” rule, which was defined as any regulation likely to result in (among other things) an annual effect on the economy of $100 million. Those analyses were required to contain a description of the potential benefits and costs of the rule, a description of alternative approaches that could achieve the regulatory goal at lower cost (and why they weren’t selected), and a determination of the net benefits of the rule. The issuing agency was to make the initial determination of whether a rule was “major,” but the executive order gave OMB the authority to require a rule to be considered major; and

- send a copy of each draft proposed and final rule to OMB before publication in the Federal Register. The order authorized OMB to review “any preliminary or final regulatory impact analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order.” Non-major rules were required to be submitted to OMB at least 10 days before publication, but major rules had to be submitted as much as 60 days in advance.

Executive Order 12291 authorized the director of OMB to review any draft proposed or final rule or regulatory impact analysis “based on the requirements of this Order.” The executive order indicated that the review should be completed within 60 days, but allowed the director to extend that period whenever necessary. It also authorized the director to exempt classes of regulations from any or all of the order’s requirements, and generally required agencies to “refrain” from

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9 The task force was disbanded in August 1983 after issuing a final report.
12 The exemptions that OMB granted fell into four broad categories: (1) rules that were essentially nonregulatory in nature, (2) rules that delegated regulatory authority to the States, (3) rules that generally affected individual entities and that did not involve broader policy issues, and (4) rules for which a delay of even a few days could have imposed (continued...)
publishing any final rules until they had responded to OMB’s comments. The executive order made OMB’s authority to review agencies’ draft rules subject to the overall direction of the presidential task force on regulatory relief.13

Although the executive order did not specifically mention OIRA, shortly after its issuance the Reagan Administration decided to integrate OMB’s regulatory review responsibilities under the executive order with the responsibilities given to OMB (and ultimately to OIRA) by the PRA. As a result, OIRA’s responsibilities for substantive review of rules under the executive order were added to the office’s substantial responsibilities under the PRA. In 1981, OIRA reviewed the substance of nearly 2,800 rules under Executive Order 12291—in addition to the nearly 5,000 paperwork review actions it took that year.

In 1985, President Reagan extended OIRA’s influence over rulemaking even further by issuing Executive Order 12498, which required Cabinet department and independent agencies (but not independent regulatory agencies) to submit a “regulatory program” to OMB for review each year that covered all of their significant regulatory actions underway or planned.14 Previously, Executive Order 12291 required each of those agencies to publish semiannual “regulatory agendas” of proposed regulations that the agency “has issued or expects to issue,” and any existing rule that was under review.15 These agendas were required to contain a schedule for completing action on any major rule for which the agency had published a notice of proposed rulemaking. The new executive order went further, saying that, except in “unusual circumstances,” OMB could return any rule submitted for review under Executive Order 12291 to the issuing agency for “reconsideration” if it was not in the agency’s regulatory program for that year, or was “materially different” from what was described in the program.

In other words, OIRA could return a draft rule to an issuing agency if the office did not have advance notice of the rule’s submission, even if the rule was otherwise consistent with the requirements in Executive Order 12291.16 The regulatory agenda and program requirements in these executive orders also permitted OIRA to become aware of forthcoming agency actions well in advance of the submission of a draft proposed rule, thereby permitting the office to stop or alter an objectionable rule before the rulemaking process developed momentum. Although Reagan Administration officials compared this planning process to the process used to develop the President’s budget, critics noted that the budget process has a final step that the regulatory process lacks—review and approval by Congress.

(...continued)

substantial costs and that were unlikely to involve significant policy issues. OMB granted about 30 exemptions, most of which were established in 1981 or 1982.

13 Although the task force was chaired by Vice President Bush, the executive director was the administrator of OIRA. Other members included the Director of OMB, the Attorney General, and the Secretaries of Commerce, Labor, and the Treasury.


15 As discussed later in this report, President Carter first required the use of these agendas in 1978.

16 An OIRA representative said that although the office had this authority it never used it, noting that would have been difficult to defend the return of an agency’s rule for purely procedural reasons.
Comparison to Previous Regulatory Review Efforts

The establishment of this regulatory review function within OIRA was a significant development both in the office’s history and in the overall movement to reform the federal regulatory process. In another sense, though, Executive Orders 12291 and 12498 represented the continuation of presidential review of rules, not the start of such reviews. Some form of centralized review of agencies’ regulations within the Executive Office of the President has been part of the rulemaking process since the early 1970’s. For example:

- In 1971, President Nixon established a “Quality of Life Review” program in which executive departments and independent agencies submitted all “significant” draft proposed and final rules pertaining to “environmental quality, consumer protection, and occupational and public health and safety” to OMB, which then circulated them to other agencies for comment.\(^{17}\) In their submissions, agencies were to provide a summary of their proposals, including their principal objectives, the alternatives that they considered, and a comparison of the expected benefits and cost of those alternatives. Agencies were also required to submit a schedule showing estimated dates of proposed and final significant rules.

- In 1974, President Ford issued Executive Order 11821, which required agencies to prepare an “inflation impact statement” for each “major” proposed rule.\(^{18}\) The statement was a certification that the inflationary impact of the rule had been evaluated in accordance with criteria and procedures developed by OMB. The executive order directed OMB to develop criteria for the identification of major rules that may have a significant impact on inflation, but specified that the office must consider costs, effects on productivity, effects on competition, and effects on supplies of important products and services. Before a major rule was published in the *Federal Register*, the issuing agency was required to submit the associated impact statement to the Council on Wage and Price Stability (CWPS). CWPS would then either provide comments directly to the agency or participate in the regular rulemaking comment process.

- In 1978, President Carter issued Executive Order 12044, which (among other things) required agencies to publish semiannual agendas of any significant rules under development or review, and to prepare a regulatory analysis for at least all rules with a $100 million impact on the economy.\(^{19}\) The analysis was to contain a succinct statement of the problem, a description of the alternative approaches considered, and the “economic consequences” of those alternatives. OMB was instructed to “assure the effective implementation of this Order,” but was not given specific review responsibilities. President Carter also established (1) a “Regulatory Analysis Review Group” (RARG) to review the analyses prepared for certain major rules and to submit comments during the comment period, and

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\(^{17}\) This requirement was formally established through an October 1971 memorandum from then-OMB Director George Schultz. According to some observers, the requirements were routinely imposed only on the Environmental Protection Agency.

\(^{18}\) Executive Order 11821, “Inflation Impact Statements,” *39 Federal Register* 41501, Nov. 29, 1974. The order also required such statements for agency-proposed major legislation.

(2) a “Regulatory Council” to coordinate agencies’ actions to avoid conflicting requirements and duplication of effort.

In several ways, though, the analytical and review requirements in Executive Order 12291 were significantly different from these previous efforts. For example, the requirement in the new executive order that agencies choose the least costly approach to a particular regulatory objective went further than the requirement in President Carter’s Executive Order 12044, which simply required agencies to analyze and consider alternative regulatory approaches. Also, whereas the regulatory oversight functions were divided among many offices (OMB, CWPS, RARG, and the regulatory council) during the Carter Administration, Executive Order 12291 consolidated these functions within OIRA.20 Another major difference was the amount of influence that OIRA had compared to its predecessors. Under previous executive orders, CWPS and RARG had primarily an advisory role. In contrast, under Executive Order 12291, OIRA could overrule agency determinations regarding whether the rule was “major” (and therefore required a regulatory impact analysis), and could delay the regulation until the agency had adequately responded to its concerns (e.g., if it believed the agency had not considered all reasonable alternatives, that its analysis was not sound, or that it was contrary to administration policy). OIRA’s significant influence on rulemaking was underscored by its organizational position within OMB—the agency that reviews and approves the rulemaking agencies’ budget requests. Finally, and perhaps most importantly, the nature and transparency of the review process was significantly different under Executive Order 12291. Under the Carter Administration’s approach, RARG and CWPS prepared and filed comments on agencies’ regulatory proposals during the formal public comment period, after they were published in the Federal Register. In the case of RARG filings, a draft of the comments was circulated to all RARG members, and the comments and any dissents were placed on the public record at the close of the comment period. In contrast, OIRA’s reviews occurred before the rules were published for comment, and Executive Order 12291 did not require that OIRA’s comments on the draft rule be disclosed. This pre-publication review process made OIRA’s regulatory reviews under Executive Order 12291 qualitatively different than its predecessors.

Early Views Regarding OIRA Reviews

The expansion of OIRA’s authority in the rulemaking process via Executive Orders 12291 and 12498 was highly controversial. Although some believed that the authority did not go far enough (e.g., did not cover independent regulatory agencies), most of the concerns were that the expansion had gone too far. For example, a number of the concerns raised by Members of Congress, public interest groups, and others focused on whether OIRA’s role violated the constitutional separation of powers and the effect that OIRA’s review had on public participation and the timeliness of agencies’ rules.21 Some believed that OIRA’s new authority displaced the discretionary authority of agency decision makers in violation of congressional delegations of rulemaking authority, and that the President exceeded his authority in issuing the executive orders. Others indicated that OIRA did not have the technical expertise needed to instruct

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agencies about the content of their rules. Still other concerns focused on OIRA’s ability to carry out its many responsibilities. In 1983, GAO concluded that the expansion of OIRA’s responsibilities under Executive Order 12291 had adversely affected the office’s ability to carry out its PRA responsibilities, and recommended that Congress consider amending the act to prohibit OIRA from carrying out other responsibilities like regulatory review.22

Many of the early concerns about OIRA focused on the lack of transparency of the regulatory reviews, and specifically questioned whether OIRA had become a clandestine conduit for outside influence in the rulemaking process. Critics pointed out that in the first few months after the executive order was issued, OIRA met with representatives from dozens of businesses and associations seeking regulatory relief and returned dozens of rules to the agencies for reconsideration.23 In response to these concerns, the OMB Director issued a memorandum in June 1981 stating that any factual material provided to OIRA regarding proposed rules should also be sent to the relevant rulemaking agency. The memorandum did not, however, apply to information provided to OIRA orally, and did not require that OIRA’s meetings with outside parties be disclosed to the public.

OIRA’s role in the rulemaking process remained controversial for the next several years. In 1983, Congress was so dissatisfied with OIRA’s performance in the areas of regulatory and paperwork review that it permitted the office’s appropriation authority to expire (although the office’s statutory authority under the PRA was not affected and it continued to receive an appropriation via OMB).24 In 1985, five House committee chairmen filed a friend-of-the-court brief in a lawsuit brought against the Department of Labor regarding the department’s decision (reportedly at the behest of OMB) not to pursue a proposed standard concerning exposure to ethylene oxide, a sterilizing chemical widely used in hospitals and suspected of causing cancer. The chairmen claimed that OMB’s actions represented a usurpation of congressional authority.

Congress reauthorized OIRA in 1986, but only after making the administrator subject to Senate confirmation. By 1986, Congress began considering legislation to restrict OIRA’s regulatory review role and to block OIRA’s budget request. In an attempt to head off that legislation, in June 1986 the OIRA administrator issued a memorandum for the heads of departments and agencies subject to Executive Order 12291 describing new OIRA procedures to improve the transparency of the review process. For example, the memorandum said that only the administrator or the deputy administrator could communicate with outside parties regarding rules submitted for review, and that OIRA would make available to the public all written materials received from outside parties. OIRA also said that it would, upon written request after a rule had been published, make available all written correspondence between OIRA and the agency head regarding the draft submitted for review.25

In 1987 the National Academy of Public Administration published a report on presidential management of agency rulemaking that summarized the criticisms of the OIRA review process as

24 OIRA’s authorization for appropriation also expired in 2001, and (as of the date of this report) has not been reestablished.
well as the positions of its proponents. The report also described a number of issues in regulatory review and offered recommendations for improvement. For example, the report recommended that “regulatory management be accepted as an essential element of presidential management.” It also recommended that regulatory agencies “log, summarize, and include in the rulemaking record all communications from outside parties, OMB, or other executive or legislative branch officials concerning the merits of proposed regulations.”

In 1988, the Administrative Conference of the United States also examined the issue of presidential review of agency rulemaking and concluded that the reviews could improve coordination and resolve conflicts among agencies. The Administrative Conference also said, though, that presidential review “does not displace responsibilities placed in the agency by law nor authorize the use of factors not otherwise permitted by law.” The Conference recommended public disclosure of proposed and final agency rules submitted to OIRA under the executive order, communications from OMB relating to the substance of rules, and communications with outside parties, and also recommended that the reviews be completed in a “timely fashion.”

**OIRA and the George H. W. Bush Administration**

President George H. W. Bush continued the implementation of Executive Orders 12291 and 12498 during his administration, but external events significantly affected OIRA's operation and, more generally, the federal rulemaking process. In 1989, President Bush’s nominee to head OIRA was not confirmed. Later, in response to published accounts that the burden of regulation was once again increasing, President Bush established the President’s “Council on Competitiveness” (also known as the Competitiveness Council) to review regulations issued by agencies. Chaired by Vice President Quayle, the council oversaw and was supported by OIRA, and reviewed particular rules that it believed would have a significant impact on the economy or particular industries. According to OIRA representatives, the council signified continued White House-level interest in the regulatory arena, and also represented a continuation of the type of role played by the Presidential Task Force on Regulatory Relief during the Reagan Administration.

Many of the Competitiveness Council’s actions were highly controversial, with critics assailing both the effects of those actions (e.g., rolling back environmental or other requirements) and the secrecy in which the council acted. The council attempted to maintain strict secrecy regarding both its deliberations and those in the private sector with whom it communicated or consulted. Critics decried what they believed to be “backdoor rulemaking” by the Competitiveness Council, but the council continued its operations until the end of the Bush Administration in 1993.

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28 The National Academy of Public Administration and the American Bar Association have also recognized the potential value of presidential regulatory review. They also recommended reforms such as improved transparency and better communication between OIRA and agency staff.


Meanwhile, OIRA continued its operations under Executive Order 12291, reviewing between 2,100 and 2,500 rules each year from 1989 through 1992.

**Regulatory Review Under Executive Order 12866**

In September 1993, President Clinton issued Executive Order 12866 on “Regulatory Planning and Review,” which revoked Executive Orders 12291 and 12498 and abolished the Council on Competitiveness.\(^{31}\) Although different from its predecessors in many respects, Executive Order 12866 (which is still in effect) continued the general framework of presidential review of rulemaking. For example, it requires covered agencies (again, Cabinet departments and independent agencies but not independent regulatory agencies) to submit their proposed and final rules to OMB before publishing them in the *Federal Register*. The order also requires agencies to prepare cost-benefit analyses for their “economically significant” rules (essentially the same as “major” rules under Executive Order 12291). As discussed in detail below, however, Executive Order 12866 established a somewhat new regulatory philosophy and a new set of rulemaking principles, limited OIRA’s reviews to certain types of rules, and established transparency requirements that included but went beyond those that had been put in place by the administrator’s June 1986 memorandum. Section 2(b) of the order assigns responsibility for review of agency rulemaking to OMB, and specifically names OIRA as “the repository of expertise concerning regulatory issues.” The order also named the Vice President as principal advisor to the President on regulatory policy, planning, and review.\(^{32}\)

**Specific Provisions in the Executive Order**

In its statement of regulatory philosophy, Executive Order 12866 says, among other things, that agencies should assess all costs and benefits of available regulatory alternatives, including both quantitative and qualitative measures. It also provides that agencies should select regulatory approaches that maximize net benefits (unless a statute requires another approach). Where permissible and applicable, the order states that agencies should adhere to a set of principles when developing rules, including (1) consideration of the degree and nature of risk posed when setting regulatory priorities, (2) adoption of regulations only upon a “reasoned determination that the benefits of the intended regulation justify its costs,” and (3) tailoring regulations to impose the least burden on society needed to achieve the regulatory objectives. Some of the stated objectives of the order are “to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public.” According to OIRA representatives, the “primacy” of the agencies provision signaled a significant change in regulatory philosophy, vesting greater control of the rulemaking process with regulatory agencies and taking away authority from OIRA. Also, the requirement that the benefits of a regulation “justify” its costs was a noticeably lower threshold than the requirement in Executive Order 12291 that the benefits “outweigh” the costs.

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\(^{32}\) Executive Order 13258, issued in February 2002, amended Executive Order 12866 and reassigned all roles originally assigned to the Vice President to the President’s chief of staff. For a copy of this executive order, see http://www.whitehouse.gov/omb/inforeg/eo13258.pdf.
Section 6 of Executive Order 12866 established agency and OIRA responsibilities in the centralized review of regulations. In contrast to the broad scope of review under Executive Order 12291, the new order limited OIRA reviews to actions identified by the rulemaking agency or OIRA as “significant” regulatory actions, which are defined in section 2(f) of the order as the following:

“Any regulatory action that is likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive order.”

As Figure 1 shows, by focusing OIRA’s reviews on significant rules, the number of draft proposed and final rules that OIRA examined fell from between 2,000 and 3,000 per year under the Executive Order 12291 to between 500 and about 700 rules per year under Executive Order 12866.

**Figure 1. The Number of Rules That OIRA Reviewed Dropped Under Executive Order 12866, Issued in 1993**

![Graph showing the number of rules reviewed by OIRA](http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init)

Executive Order 12866 also differs from its predecessors in other respects. For example, the order generally requires that OIRA complete its review of proposed and final rules within 90 calendar
days, and requires both the agencies and OIRA to disclose certain information about how the regulatory reviews were conducted. Specifically, agencies are required to identify for the public (1) the substantive changes made to rules between the draft submitted to OIRA for review and the action subsequently announced and (2) changes made at the suggestion or recommendation of OIRA. OIRA is required to provide agencies with a copy of all written communications between OIRA personnel and parties outside of the executive branch, and a list of the dates and names of individuals involved in substantive oral communications. The order also instructs OIRA to maintain a public log of all regulatory actions under review and of all of the above-mentioned documents provided to the agencies.

**OIRA's Formal Review Process**

As Figure 2 shows, OIRA reviews agencies’ draft rules at both the proposed and final stages of rulemaking. In each phase, the review process starts when the rulemaking agency formally submits a regulatory review package to OIRA consisting of the rule, any supporting materials, and a transmittal form. The OIRA docket librarian then logs the receipt of the review package and forwards it to the appropriate desk officer. In some cases, agencies withdraw their rules from OIRA during the review period and the rules may or may not be subsequently resubmitted. At the end of the review period, OIRA either returns the draft rule to the agency “for reconsideration” or OIRA concludes that the rule is consistent with the executive order. OIRA codes the rule in its database as “consistent with change” if there had been any changes to the rule, regardless of the source or extent of the change. OIRA codes rules in its database as “consistent with no change” only if they are exactly the same at the end of the review period as the original submission. If the draft rule is a proposed rule and is judged by OIRA to be consistent with the executive order, the agency may then publish a notice of proposed rulemaking in the Federal Register, obtain comments during the specified comment period, review the comments received, and make any changes to the rule that it believes are necessary to respond to those comments. (Executive Order 12866 says that this comment period should, in most cases, be at least 60 days for significant rules reviewed by OIRA.) If the draft is a final rule, the agency may publish the rule after OIRA concludes its review and the rule will generally take effect either at that point or at some later date specified by the agency.

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33 Section 6(b)(2) of the executive order states that OIRA “shall waive review or notify the agency in writing of the results of its review,” generally within 90 calendar days after a draft rule has been submitted. Nevertheless, in some cases, OIRA does not complete its review within 90 days. For example, as of January 8, 2008, one Department of Commerce rule (on “Right Whale Ship Strike Reduction”) had been under review at OIRA for 322 days.


35 OIRA may also formally or informally review other rulemaking documents before proposed rules (e.g., advance notices of proposed rulemaking).
In most of the years since Executive Order 12866 was issued, more than 90% of the rules that OIRA reviewed were coded in the database as either “consistent with change” or “consistent without change.” (See Table 1.) Only a small percentage of rules were withdrawn, and even fewer were returned to the agencies. The proportion of rules coded as “changed” has varied somewhat over time, but the last several years of the Clinton Administration (1997 through 2000) were only somewhat lower than during most of the George W. Bush Administration (2002 through 2008). The data indicate that there were a relatively large number of rules that were withdrawn and returned in 2001 compared to other years. The withdrawn rules reflect actions taken at the start of the George W. Bush Administration pursuant to a memorandum issued by Assistant to the President and Chief of Staff Andrew H. Card, which generally directed Cabinet departments and independent agencies to (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the Federal Register, and (3) postpone for 60 days the effective date of rules that had been published but had not yet taken effect.36 (A somewhat similar effort was made at the start of the Obama Administration, reflected in the 10.4% of rules coded as withdrawn in 2009.) Also, as discussed in greater detail later in this report, OIRA returned a number of rules to the agencies for reconsideration shortly after a new administrator was appointed in 2001.

Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs

Table 1. Most Rules That OIRA Reviewed Were Coded in Database as Changed or Not Changed

<table>
<thead>
<tr>
<th>Year</th>
<th>Consistent with change</th>
<th>Consistent without change</th>
<th>Withdrawn</th>
<th>Returned</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>37.3</td>
<td>53.4</td>
<td>4.3</td>
<td>0.2</td>
<td>4.9</td>
</tr>
<tr>
<td>1995</td>
<td>39.0</td>
<td>53.1</td>
<td>5.2</td>
<td>0.5</td>
<td>2.3</td>
</tr>
<tr>
<td>1996</td>
<td>51.5</td>
<td>41.4</td>
<td>5.1</td>
<td>0.0</td>
<td>2.0</td>
</tr>
<tr>
<td>1997</td>
<td>56.0</td>
<td>37.4</td>
<td>5.1</td>
<td>0.8</td>
<td>0.6</td>
</tr>
<tr>
<td>1998</td>
<td>59.3</td>
<td>36.1</td>
<td>3.1</td>
<td>0.0</td>
<td>1.4</td>
</tr>
<tr>
<td>1999</td>
<td>62.2</td>
<td>31.5</td>
<td>3.1</td>
<td>0.0</td>
<td>3.2</td>
</tr>
<tr>
<td>2000</td>
<td>60.4</td>
<td>34.3</td>
<td>3.9</td>
<td>0.0</td>
<td>1.4</td>
</tr>
<tr>
<td>2001</td>
<td>45.6</td>
<td>28.1</td>
<td>22.0</td>
<td>2.6</td>
<td>1.7</td>
</tr>
<tr>
<td>2002</td>
<td>54.3</td>
<td>31.7</td>
<td>7.6</td>
<td>0.7</td>
<td>5.6</td>
</tr>
<tr>
<td>2003</td>
<td>60.3</td>
<td>30.1</td>
<td>6.9</td>
<td>0.3</td>
<td>2.2</td>
</tr>
<tr>
<td>2004</td>
<td>62.7</td>
<td>29.8</td>
<td>6.5</td>
<td>0.2</td>
<td>0.8</td>
</tr>
<tr>
<td>2005</td>
<td>65.4</td>
<td>27.0</td>
<td>6.6</td>
<td>0.2</td>
<td>1.0</td>
</tr>
<tr>
<td>2006</td>
<td>69.2</td>
<td>26.5</td>
<td>3.7</td>
<td>0.0</td>
<td>0.7</td>
</tr>
<tr>
<td>2007</td>
<td>72.3</td>
<td>21.1</td>
<td>6.3</td>
<td>0.2</td>
<td>0.2</td>
</tr>
<tr>
<td>2008</td>
<td>69.8</td>
<td>23.5</td>
<td>5.6</td>
<td>0.3</td>
<td>0.8</td>
</tr>
<tr>
<td>2009</td>
<td>71.6</td>
<td>17.1</td>
<td>10.4</td>
<td>0.5</td>
<td>0.4</td>
</tr>
<tr>
<td>2010</td>
<td>78.7</td>
<td>14.1</td>
<td>5.7</td>
<td>0.0</td>
<td>1.6</td>
</tr>
</tbody>
</table>

Source: OIRA.

Note: “Other” includes rules that were sent improperly, emergency rules, and rules with a statutory or judicial deadline. Numbers do not total to 100.0 due to rounding.

The type of review that OIRA conducts under Executive Order 12866 sometimes depends on the type of draft rule submitted. For example, if the draft rule contains a collection of information covered by the PRA, the desk officer would also review it for compliance with that act. If the draft rule is “economically significant” (e.g., has an annual impact on the economy of at least $100 million), the executive order requires agencies to prepare an economic analysis describing, among other things, the alternatives that the agency considered and the costs and benefits of those alternatives.37 For those economically significant rules, OIRA desk officers are to review the economic analyses using the office’s guidance on how to prepare regulatory analyses under the executive order.38

37 Section 3(f) of the executive order also defines an economically significant rule as adversely affecting “in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”

38 This guidance was issued as OMB Circular A-4 in September 2003. For a copy of this guidance, see http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.
An attachment to a September 20, 2001, memorandum to the President’s Management Council described the general principles and procedures that OIRA reportedly uses in the implementation of Executive Order 12866. For example, the attachment indicated that the office would, where appropriate, (1) include an evaluation of whether the agency has conducted an adequate risk assessment, (2) give “a measure of deference” to regulatory impact analyses and other supporting technical documents that have been peer reviewed in accordance with specified procedures, (3) ensure that regulatory clearance packages satisfy the requirements in other executive orders (e.g., include the certifications required by Executive Order 13132 on “Federalism” and Executive Order 13175 on “Consultation and Coordination with Indian and Tribal Governments”), (4) consult with the Small Business Administration (SBA) and the SBA Chief Counsel for Advocacy, and (5) ensure that agencies evaluate the possible impact of the draft rule on the programs of other federal agencies.

There is usually some type of communication during the review process (often via e-mail or telephone) between the OIRA desk officer and the rulemaking agency regarding specific issues in the draft rule. Briefings and meetings are sometimes held between OIRA and the agency during the review process, with OIRA branch chiefs, the deputy administrator, or the administrator involved in some of these meetings. According to OIRA representatives, the desk officers always consult with the resource management officers on the budget side of OMB as part of their reviews, and reviews of draft rules are not completed until those resource management officers sign off. If the draft rule is economically significant, the desk officer would also consult with a government economist to help review the required economic analysis. For other rules the desk officer might consult with other OIRA staff on issues involving statistics and surveys, information technology and systems, or privacy issues. In certain cases, OIRA may circulate a draft rule to other parts of the Executive Office of the President (e.g., the Office of Science and Technology Policy or the Council on Environmental Quality) or other agencies (e.g., the Departments of Energy, the Interior, or Transportation for certain Environmental Protection Agency rules).

Executive Order 12866 requires OIRA to complete its regulatory reviews within certain time frames—(1) within 10 working days of submission for any preliminary actions prior to a notice of proposed rulemaking (e.g., a notice of inquiry or an advance notice of proposed rulemaking) or (2) within 90 calendar days of submission for all other regulatory actions (or 45 days if OIRA had previously reviewed the material). In some instances, however, agency officials said OIRA will ask the rulemaking agency to withdraw the rule and resubmit it, restarting the review period. The executive order does not permit OIRA to “approve” or “disapprove” a draft rule; it is up to the agency to decide whether to proceed with publication of a rule after it had been returned, or to accept OIRA’s suggested changes. OIRA representatives said it is often an iterative process in which the agencies and OIRA negotiate issues and clarify terms. Nevertheless, agencies very rarely publish rules that OIRA returns or ignore substantive OIRA suggestions. In some instances, agency officials will formally or informally appeal OIRA determinations to the White House.

**OIRA’s Informal Reviews**

Figure 2 also shows that, for some rules, there is an additional phase of “informal review” before the rule is officially submitted to OIRA. In its December 2001 report on the costs and benefits of

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39 For a copy of this September 20, 2001 memorandum and the attachment, see [http://www.whitehouse.gov/omb/inforeg/oira_review-process.html](http://www.whitehouse.gov/omb/inforeg/oira_review-process.html).
federal regulations, OIRA stated that the office’s original review process “was designed as an end-of-the-pipeline check against poorly conceived regulations.” OIRA also said, however, that by the time an agency formally submits a rule to OIRA for review there may be “strong institutional momentum” behind the proposal and, as a result, the agency may be reluctant to address certain issues that OIRA analysts might raise. Therefore, OIRA indicated “there is value in promoting a role for OIRA’s analytic perspective earlier in the process, before the agency becomes too entrenched.” OIRA went on to state the following:

“A common yet informal practice is for agencies to share preliminary drafts of rules and/or analyses with OIRA desk officers prior to formal decision making at the agency. This practice is useful for agencies since they have the opportunity to educate OIRA desk officers in a more patient way, before the formal 90-day review clock at OMB begins to tick. The practice is also useful for OIRA analysts because they have the opportunity to flag serious problems early enough to facilitate correction before the agency’s position is irreversible.”

OIRA cannot informally review each of the hundreds of significant proposed and final rules that are submitted to the office each year. Informal reviews are most common when there is a statutory or legal deadline for a rule or when the rule is extremely large and requires discussion with not only OMB but also other federal agencies. The Environmental Protection Agency (EPA) and the Departments of Agriculture, Health and Human Services, and Transportation often issue those types of rules, and therefore are more likely to have their rules reviewed informally before formal submission.

OIRA has informally reviewed agencies’ draft rules since its review function was established in 1981, but informal reviews reportedly became more common when Executive Order 12866 was adopted in 1993 and OIRA’s reviews were focused on “significant” rules. There have been some indications, though, that OIRA has increased its use of informal reviews even further in recent years. For example, in its March 2002 draft report to Congress on the costs and benefits of federal regulation, OIRA said “agencies are beginning to invite OIRA staff into earlier phases of regulatory development in order to prevent returns late in the rulemaking process. It is at these early stages where OIRA’s analytic approach can most improve on the quality of regulatory analyses and the substance of rules.” Separately, in 2002, the OIRA administrator said “an increasing number of agencies are becoming more receptive to early discussions with OMB, at least on highly significant rulemakings.”

The administrator also indicated that agencies’ “receptivity” to informal reviews may be enhanced by the possibility of a returned rule. For example, in early 2002 he said that OIRA was trying “to create an incentive for agencies to come to us when they know they have something that in the final analysis is going to be something we’re going to be looking at carefully. And I think that agencies that wait until the last minute and then come to us—well, in a sense, they’re rolling the dice.”

41 Dr. John D. Graham, remarks prepared for the American Hospital Association, July 17, 2002. For a copy of this speech, see http://www.whitehouse.gov/omb/inforeg/graham_ama071702.html.
Effects of OIRA’s Reviews

Although a great deal has been written about OIRA’s reviews of agencies’ draft rules, few studies have systematically tried to determine the extent to which those reviews result in substantive changes to the rules. One such study (using data prior to the advent of Executive Order 12988) concluded that OIRA’s reviews resulted in the rejection of some regulations that would have been economically inefficient, but did not appear to have improved the cost-effectiveness (e.g., cost-per-life saved) of many of the rules.43 Other studies have used OIRA’s database showing the number of rules that were coded as “consistent with change” and “consistent without change” in an attempt to determine the significance of OIRA’s effects on agencies’ rules and whether those effects have changed over time.44 As mentioned previously, however, the “consistent with change” code includes changes made at the initiation of the agencies as well as changes suggested by OIRA. Also, the code does not differentiate between minor editorial changes and changes that radically alter the effect of the rule. “Returns” and “withdrawals” in OIRA’s database also need careful interpretation. A return may be for purely administrative reasons, not for substantive OIRA objections. Conversely, a withdrawal of a rule by an agency may have been initiated by OIRA. In order to use these data effectively, researchers should examine the associated documentation in the agencies’ and OIRA’s rulemaking dockets.

GAO’s Analysis of OIRA’s Effects

GAO published such an analysis in September 2003, supplementing information from OMB’s database with information in the dockets and interviews with agency officials.45 GAO reported that from July 1, 2001, through June 30, 2002, OIRA completed 642 reviews of agencies’ draft proposed and final rules. Of these,

- About 33% (214) were coded in the database as “consistent with no change,” indicating that OIRA considered the rules consistent with the executive order as submitted.
- About 50% (322) were coded as “consistent with change,” indicating that the rules had changed after being submitted to OIRA, and that OIRA subsequently concluded that the rule was consistent with the executive order’s requirements.
- About 8% (50) were coded as “withdrawn” by the agency.
- About 3% (21) were coded as “returned” to the agency by OIRA.
- About 5% (35) had some other disposition (e.g., “sent improperly,” “emergency,” or “statutory or judicial deadline”).

In order to make its review manageable, GAO focused on 85 of those rules that were coded as changed, withdrawn, or returned and that were submitted to OIRA by nine selected health, safety,

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or environmental agencies or offices: the Animal and Plant Health Inspection Service within the Department of Agriculture; the Food and Drug Administration within the Department of Health and Human Services; the Occupational Health and Safety Administration within the Department of Labor; the Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration, and the National Highway Traffic Safety Administration (NHTSA) with the Department of Transportation (DOT); and the offices of air and radiation, water, and solid waste and emergency response within EPA. Seventy-one of the 85 rules had been coded “consistent with change,” nine were coded as “returned,” and five were coded as “withdrawn.”

OIRA’s Impact on Rules

GAO’s analysis of the underlying documents indicated that OIRA had a significant effect on at least 25 of the 85 draft rules. Specifically:

- Of the 71 “changed” rules, GAO concluded that OIRA had suggested significant changes to 17 of them—changes that affected the scope, impact, or estimated costs or benefits of the rules as originally submitted. In general, the focus of OIRA’s suggested changes appeared to be on reducing regulatory burden (and, in some cases, the expected benefits as well). Fourteen of the 17 significantly changed rules were from EPA’s office of air and radiation or its office of water. For example, at OIRA’s recommendation, EPA removed manganese from a list of hazardous wastes, deleted certain types of engines from coverage of a rule setting emissions standards, and delayed the compliance dates for two other types of emissions. Of the remaining 54 “changed” rules, the most significant changes made at OIRA’s suggestion involved adding explanatory language to the preambles of the rules and asking for comment on particular provisions. In 20 of the 54 rules, OIRA suggested only minor editorial changes (e.g., correcting spelling errors or citations) or made no suggestions at all.

- Of the nine rules that had been returned to the agencies by OIRA, two were returned because they had been improperly submitted, not because of substantive defect. OIRA returned the remaining seven rules because of concerns about the agencies’ regulatory analyses or a perceived lack of coordination between rulemaking agencies. For example, OIRA returned one EPA rule because the agency did not provide a quantitative analysis of costs and benefits, and returned a NHTSA rule because OIRA did not believe that the agency had demonstrated that it had selected the best available alternative. Five of the seven rules returned for substantive reasons had been submitted by the FAA.

- Of the five rules that were withdrawn, GAO determined that only one had been withdrawn at OIRA’s suggestion. The other four rules were withdrawn solely at the agencies’ initiative or as a result of a mutual decision by the agencies and OIRA.

If anything, GAO’s analysis understates the influence that OIRA has on agencies’ rules because its findings were often limited to the documentation that was available. If OIRA suggested a change to a rule before it was formally submitted to OIRA (e.g., during informal review), GAO’s analysis would not reflect those changes. In fact, the rule might not have even been in the universe of rules that GAO examined (i.e., those coded as changed, returned, or withdrawn during OIRA’s formal review). Other forms of OIRA influence may be even more indirect and harder to
document. For example, some agencies have indicated that they do not even propose certain regulatory provisions because they believe that OIRA would find them objectionable.

**Regulated Entities’ Contacts with OIRA**

GAO also reported that regulated entities directly contacted OIRA either before or during its review process regarding 11 of the 25 rules that OIRA significantly affected. 46 Eight of those 11 cases involved EPA rules, and the nature of the contacts ranged from meetings with OIRA representatives to letters sent to OIRA. In 7 of the 11 cases, GAO concluded that what OIRA ultimately recommended to the rulemaking agencies was similar to what these regulated parties recommended to OIRA—in some cases, using similar language to that used by the regulated entities. For example, during OIRA’s review of an EPA rule on identification and listing of hazardous waste, industry representatives met with and sent letters to OIRA opposing the listing of manganese as a hazardous waste constituent. (The industry representatives had made essentially the same argument to EPA during the public comment phase, but EPA did not agree.) The main focus of OIRA’s comments to EPA at the conclusion of its review was that final action on listing manganese as a hazardous contaminant should be deferred. Notwithstanding the congruence between the comments of the regulated entities and OIRA’s comments, GAO said it was impossible to determine the extent to which this or other suggestions made by the regulated entities might have influenced OIRA’s actions, if at all.

**GAO’s April 2009 Report**

In April 2009, GAO again reported that OIRA’s reviews often resulted in changes to draft rules. Of 12 rules that GAO examined in detail, 10 were changed at OIRA’s suggestion. 47 Some of the changes resulted in alteration of regulatory text. GAO said that the agencies used a variety of methods to document OIRA’s reviews, and that there was inconsistent interpretation of which changes were “substantive” enough to require documentation and “uneven attribution” of the sources of the changes made to the agencies’ rules.

**Changes in OIRA’s Policies and Practices During the George W. Bush Administration**

The formal process by which OIRA reviews agencies’ draft rules has changed little since Executive Order 12866 was issued in 1993. 48 There have, however, been several subtle yet notable changes in OIRA policies and practices in recent years—particularly after Dr. John D. Graham became OIRA administrator in July 2001. In October 2002, Administrator Graham said “the changes we are making at OMB in pursuit of smarter regulation are not headline grabbers:

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46 Environmental and public interest groups also contacted OIRA regarding three of the rules.


48 There has been only one amendment to Executive Order 12866 since it was issued. As mentioned earlier in this report, Executive Order 13258 reassigned all roles originally assigned to the Vice President in Executive Order 12866 (e.g., to be principal advisor to the President on regulatory policy, planning, and review) to the President’s chief of staff.
No far-reaching legislative initiatives, no rhetoric-laden executive orders, and no campaigns of regulatory relief. Yet we are making some changes that we believe will have a long-lasting impact on the regulatory state."49

Return of the "Gatekeeper" Role

As noted previously, during the Reagan Administration, OIRA was often criticized for acting as a regulatory gatekeeper, actively overseeing and recommending changes to agencies’ rules. During the Clinton Administration, however, the opposite concerns were expressed. A number of observers criticized OIRA for not overseeing the actions of the rulemaking agencies more aggressively. In September 1996, the then-administrator of OIRA testified that “we have consciously changed the way we relate to the agencies,” and described OIRA’s relationship with the rulemaking agencies as “collegial” and “constructive.”50 She also said she agreed with an article that said OIRA functioned during that period “more as a counselor during the review process than as an enforcer of the executive order.”51

OIRA during the George W. Bush Administration returned to the role it had during the Reagan Administration, even describing itself in an annual report as the “gatekeeper for new rulemakings.”52 Then-OIRA Administrator Graham said one of the office’s functions is “to protect people from poorly designed rules,” and said OIRA review is a way to “combat the tunnel vision that plagues the thinking of single-mission regulators.” He also compared OIRA’s review of agencies’ rules to OMB’s role in reviewing agencies’ budget requests. This return to the gatekeeper perspective of OIRA’s role had implications for an array of OIRA’s functions, and underlays many of the other changes described below.

 Increased (and Decreased) Use of Return Letters

As noted previously in Table 1, during the Clinton Administration, OIRA only rarely returned rules to the agencies for reconsideration. Specifically, according to OIRA’s database, of the more than 4,000 rules that OIRA reviewed from 1994 through 2000, OIRA returned only seven rules to the agencies—three in 1995 and four in 1997. OIRA administrators during that period said they viewed the use of return letters as evidence of the failure of the collaborative review process, since OIRA and the agencies were part of the same presidential Administration.

In contrast, OIRA Administrator Graham referred to return letters as the office’s “ultimate weapon,” and viewed them as a way to make clear that the office is serious about the review process. In the first eight months after he took office in July 2001, OIRA returned 21 draft rules to the agencies for reconsideration. DOT had the most rules returned during 2001 and 2002 (eight),

followed by the Social Security Administration (five) and the Department of Veterans Affairs (four). The letters commonly indicated that OIRA returned the rules because of concerns about the agencies’ analyses (e.g., whether the agencies had considered all reasonable alternatives or had selected the alternative that would yield the greatest net benefits).

Subsequently, however, the pace of OIRA’s return letters slowed. Although the average number of rules that OIRA reviewed each month stayed about the same, in the period from March 2002 until January 2008, OIRA returned a total of seven draft rules to the agencies—a dramatic decline from the 21 returns during Administrator Graham’s first eight months in office. OIRA officials attributed the decline in return letters to the improved quality of agencies’ regulatory submissions after the initial flurry of returns.

Advent (and Decline) of Prompt Letters

OIRA has traditionally been a reactive force in the rulemaking process, commenting on draft proposed and final rules that are generated by the agencies. Although OIRA occasionally suggested regulatory topics to the agencies during previous administrations, the practice was relatively uncommon and the discussions were not made public. In contrast, OIRA Administrator Graham was more publicly proactive, sending several agencies “prompt letters” (and posting them on the OIRA website) suggesting that they develop regulations in a particular area or encouraging the agencies’ ongoing efforts. For example, one such letter encouraged NHTSA to give greater priority to modifying its frontal occupant protection standard, and another letter suggested that OSHA make the promotion of automatic external heart defibrillators a higher priority. Other prompt letters recommended that the agencies better focus certain research or programs. Between September 2001 and December 2003, OIRA sent a total of 13 prompt letters to regulatory agencies, and several of the agencies took action in response to the letters. Since then, however, the number of prompt letters diminished substantially. Only two prompt letters were issued in 2004, none in 2005, one in 2006, and none in 2007.

Increased Emphasis on Economic Analysis

Although OIRA has always encouraged agencies to provide well-developed economic analyses for their draft rules, Administrator Graham expressed greater interest in this issue than his predecessors. Also, according to agency officials, there has been a perceptible “stepping up the bar” in the amount of support required for their rules, with OIRA reportedly more often looking for regulatory benefits to be quantified and a cost-benefit analysis for every regulatory option that the agency considered, not just the option selected.

In September 2003, OIRA published revised guidelines for economic analysis under the executive order—updating “best practices” guidance issued in January 1996. The new guidelines were

53 Copies of OIRA’s return letters are available on OMB’s website at http://www.whitehouse.gov/omb/inforeg/return_letter.html.
54 Two of the five returns during this period involved the same DOT rule.
55 Copies of these prompt letters are available on OMB’s website at http://www.whitehouse.gov/omb/inforeg/prompt_letter.html.
56 As noted earlier in this report, this guidance (OMB Circular A-4) is available at http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.
generally similar to the earlier guidance, but differed in several key areas—e.g., encouraging agencies to (1) perform both cost-effectiveness and cost-benefit analyses in support of their major rules, 57 (2) use multiple discount rates when the benefits and costs of rules are expected to occur in different time periods, 58 and (3) use a formal probability analysis of benefits and costs when a rule is expected to have more than a $1 billion impact on the economy (unless the effects of the rule are clear).

Although OIRA has said that regulations based on economic analysis are more likely to be better than those that are not, it has also signaled that these analyses are sometimes difficult or impossible for certain types of rules. In November 2005, OIRA Administrator Graham said “[h]omeland security regulations account for about half of our major-rule costs in 2004 but we do not yet have a feasible way to fully quantify benefits.” 59 He also said that cost-benefit analysis may not be appropriate for homeland security rules, and that a more practical “soft” test was being used for them. 60 Some have questioned why assessments of homeland security rules should be treated differently than health, safety, and environmental rules. 61

Increased Transparency

As noted previously, many of the longstanding concerns about OIRA’s role in the rulemaking process have centered on the perceived lack of transparency of its reviews. Executive Order 12866 attempted to address some of those concerns, requiring (among other things) that agencies disclose after the publication of a rule the changes made to the rule during OIRA’s review and the changes made at the suggestion or recommendation of OIRA. The executive order requires OIRA to maintain a publicly available log disclosing the status of all regulatory actions under review and the names and dates of those involved in substantive oral communications (e.g., meetings, telephone calls) between OIRA staff and parties outside of the executive branch. These requirements notwithstanding, concerns about the lack of transparency continued. For example, even after issuance of the executive order, OIRA disclosed contacts with outside parties only if they occurred during the office’s formal review period, not if they occurred during its informal reviews.

In October 2001, the OIRA administrator published a memorandum to OIRA staff on the office’s website that extended the executive order’s disclosure requirements in several areas. For example, the memorandum said that OIRA would disclose substantive meetings and other contacts with

57 Cost-benefit analysis involves the systematic identification of all costs and benefits associated with a forthcoming regulation. Cost-effectiveness analysis seeks to determine how a given goal can be achieved at the least cost. In contrast to cost-benefit analysis, the concern in cost-effectiveness analysis is not with weighing the merits of the goal, but with identifying and analyzing the costs of alternatives to reach that goal (e.g., dollars per life saved).

58 Discounting can have a significant effect on the present value of future health benefits. For example, in a February 2003 speech the OIRA administrator noted that the present value of 1,000 lives saved 50 years in the future is only 34 lives in present value when evaluated at a 7 % discount rate.


61 For example, former OIRA administrator Sally Katzen said “when it matters to them to get rules out quickly, they wink and blink. But in the areas of public health and safety, where they have longstanding relations with the business communities involved, they’re insistent on satisfying these standards,” in Rebecca Adams, “Graham Leaves OIRA With a Full Job Jar,” CQ Weekly, Jan 23, 2006, p. 226.
outside parties about a rule under review even if OIRA was only informally reviewing the rule. OIRA also said it would disclose substantive telephone calls with outside parties that were initiated by the administrator, not just calls initiated by outside parties. OIRA has also posted on its website lists of regulations currently under review, reviews concluded in the previous 30 days, and its contacts with outside parties. Although these changes have improved the transparency of OIRA’s reviews, as discussed later in this report, the effects of OIRA’s reviews (particularly informal reviews) are not always apparent.

Changes in OIRA Staffing

When OIRA was created in FY1981, the office had a “full-time equivalent” (FTE) ceiling of 90 staff members. By 1997, OIRA’s FTE allocation had declined to 47—a nearly 50% reduction. Although Executive Order 12866 (issued in late 1993) permitted OIRA to focus its resources on “significant” rules, this decline in OIRA staffing also occurred during a period in which regulatory agencies’ staffing and budgetary levels were increasing and OIRA was given a number of new statutory responsibilities. Specifically, as discussed later in this report, OIRA was expected to perform various duties under the Unfunded Mandates Reform Act of 1995, the Small Business Regulatory Enforcement Fairness Act of 1996, and the Regulatory Right-to-Know Act of 2001.

Starting in 2001, OIRA’s staffing authorization began to increase; by 2002, it stood at 55 FTEs. Between 2001 and 2003, OIRA hired five new staff members in such fields as epidemiology, risk assessment, engineering, and health economics. OIRA indicated that these new hires reflected the increasing importance of science-based regulation in federal agencies, and would enable OIRA to ask penetrating technical questions about agency proposals. Since 2003, OIRA staffing has been relatively stable.

Changes to OIRA Review by Executive Order 13422

On January 18, 2007, President George W. Bush issued Executive Order 13422, making the most significant amendments to Executive Order 12866 since it was published in 1993. The changes made by this new executive order were controversial, characterized by some as a “power grab” by the White House that undermined public protections and lessened congressional authority, and by others as “a paragon of common sense and good government.”

The most important changes made to Executive Order 12866 by Executive Order 13422 fell into five general categories: (1) a requirement that agencies identify in writing the specific market

64 A list of OIRA’s meetings with outside parties can be found at http://www.whitehouse.gov/omb/oira/meetings.html. A list of its oral communications can be found at http://www.whitehouse.gov/omb/oira/oral_communications.html.
failure or problem that warrants a new regulation, (2) a requirement that each agency head
designate a presidential appointee within the agency as a “regulatory policy officer” who can
control upcoming rulemaking activity in that agency, (3) a requirement that agencies provide their
best estimates of the cumulative regulatory costs and benefits of rules they expect to publish in
the coming year, (4) an expansion of OIRA review to include significant guidance documents,
and (5) a provision permitting agencies to consider whether to use more formal rulemaking
procedures in certain cases.

A separate CRS report discusses each of these changes, noting areas that are unclear and the
potential implications of the changes; provides background information on presidential review of
rules; discusses three congressional hearings on the executive order in 2007; and notes
congressional efforts to block the implementation of the order. A separate CRS report discusses each of these changes, noting areas that are unclear and the
potential implications of the changes; provides background information on presidential review of
rules; discusses three congressional hearings on the executive order in 2007; and notes
congressional efforts to block the implementation of the order. It concludes by pointing out that
the significance of the changes made to the review process by Executive Order 13422 may
become clear only through their implementation. The changes made by this executive order
represented a clear expansion of presidential authority over rulemaking agencies. In that regard,
Executive Order 13422 can be viewed as part of a broader statement of presidential authority
presented throughout the Bush Administration.

OIRA and the Barack Obama Administration

On January 30, 2009, President Barack Obama issued Executive Order 13497, which revoked
both Executive Order 13422 and Executive Order 13258 (which had been issued in February
2002, and amended Executive Order 12866 to reassign all roles originally assigned to the Vice
President to the President’s chief of staff). On March 4, 2009, however, the Director of OMB
issued a memorandum to federal agencies instructing them to continue sending significant
guidance documents to OIRA for review.

On January 30, 2009, President Barack Obama issued a memorandum to the heads of executive
departments and agencies instructing the Director of OMB, in consultation with representatives of
regulatory agencies, to “produce within 100 days (i.e., by May 10, 2009) a set of
recommendations for a new Executive Order on Federal regulatory review.” The memorandum
said that the recommendations should, among other things:

- offer suggestions for the relationship between OIRA and the agencies; provide guidance on
disclosure and transparency; encourage public participation in agency regulatory processes;
- offer suggestions on the role of cost-benefit analysis; address the role of distributional
considerations, fairness, and concern for the interests of future generations; identify methods
of ensuring that regulatory review does not produce undue delay; clarify the role of the
behavioral sciences in formulating regulatory policy; and identify the best tools for achieving
public goals through the regulatory process.

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67 CRS Report RL33862, Changes to the OMB Regulatory Review Process by Executive Order 13422, by Curtis W.
Copeland.

68 Executive Order 13497, “Revocation of Certain Executive Orders Concerning Regulatory Planning and Review,” 74

69 See http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf. The OMB Director
said these guidance documents had been reviewed by OIRA prior to the adoption of Executive Order 13422.

On February 26, 2009, the Director of OMB published a notice in the Federal Register requesting comments from the public on how to improve the regulatory review process. The Director noted that although executive orders are not subject to notice and comment procedures, and public comments are not normally invited before their issuance, OMB was doing so in this case because there had been an “unusually high level of public interest,” and because of the “evident importance and fundamental nature of the relevant issues.” The initial deadline for comments was March 16, 2009, but the comment period was extended until March 31, 2009, because of “requests from a number of interested members of the public.”

In response to its request, OMB received 183 comments from the public, including Members of Congress, representatives of public interest and private sector interest groups, academicians, and individuals. The comments and suggestions varied widely, with some advocating a reduced role for OIRA, and others pushing for OIRA to assume a stronger role. Some of the comments proposed a stronger role for cost-benefit analysis, while others suggested that the analysis be used only when required by statute.

Executive Order 13563

On January 18, 2011, President Obama issued Executive Order 13563 on “Improving Regulation and Regulatory Review.” In many respects, the new executive order simply restates many of the principles enunciated in Executive Order 12866, or in related documents. In fact, Section 1(b) of the new order specifically states that “This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993.” Perhaps most notably, Section 6 of Executive Order 13563 requires covered federal agencies (most agencies, excluding independent regulatory agencies) to submit to OIRA within 120 days “a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified.

72 Ibid.
74 The comments may be viewed at http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp.
77 Most new provisions in Executive Order 13563 seem to be covered in other documents. For example, Section 1(c) of the new executive order states that, in applying the order’s rulemaking principles, each agency is to “use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” Although there does not appear to be any directly comparable language in Executive Order 12866, OMB Circular A-4 (issued in 2003) goes into great detail in describing what techniques should be used to quantify and monetize regulatory costs and benefits. Also, in November 2010, OMB published a checklist for agencies to use in conducting regulatory impact analyses under Executive Order 12866 and Circular A-4. To view this checklist, see http://www.whitehouse.gov/sites/default/files/omb/inforeg/Regpol/RIA_Checklist.pdf.
streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.” Although Section 5 of Executive Order 12866 had previously required agencies to develop a plan for retrospective reviews, this new requirement appears to require the development of a new plan.

On February 2, 2011, OIRA administrator Cass R. Sunstein issued a memorandum to federal agencies elaborating certain aspects of Executive Order 13563. In particular, the memorandum described what agencies’ plans for retrospective reviews should address (e.g., public participation, prioritization, and costs and benefits), and encouraged independent regulatory agencies to “give consideration” to the executive order’s provisions, particularly the provisions relating to retrospective analysis. However, neither this memorandum nor Executive Order 13563 changed OIRA’s regulatory review responsibilities.

OIRA’s Other Responsibilities

In addition to its regulatory review responsibilities under Executive Order 12866 and its multiple responsibilities under the Paperwork Reduction Act (paperwork review, information resources management, statistical policy and coordination, records management, privacy and security, and information technology), Congress has assigned OIRA a number of other specific functions related to the rulemaking and regulatory process. For example:

- The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532-1538) generally requires agencies to prepare written statements describing the effects of their rules that are subject to the act’s requirements. The act requires the director of OMB to collect those written statements and provide them to the Congressional Budget Office, to establish pilot programs to test innovative regulatory approaches, and to prepare an annual report on the implementation of the act. The OMB director has delegated these responsibilities to OIRA.

- The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 601 note) required EPA and OSHA to convene “advocacy review panels” before publishing proposed rules expected to have a significant economic impact on a substantial number of small entities. The act specifically requires the review panel to include full-time employees from OIRA as well as other agencies.

- SBREFA also contains provisions commonly referred to as the “Congressional Review Act,” which (among other things) requires agencies to delay the effective date of “major” rules, and requires GAO to submit a report on those rules within 15 days of their issuance. SBREFA defines a major rule as one that the OIRA administrator concludes has resulted or is likely to result in (among other things) a $100 million annual effect on the economy.

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79 For a more complete discussion of UMRA, see CRS Report RS20058, Unfunded Mandates Reform Act Summarized, by Keith Bea and Richard S. Beth.

80 This requirement is codified at 5 U.S.C. 609.

81 For a more complete discussion of the Congressional Review Act, see CRS Report RL30116, Congressional Review (continued...)
• Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (44 U.S.C. 3504 (d)(1) and 3516), generally known as the “Data Quality Act” or the “Information Quality Act,” directed OMB to take several actions (all of which were delegated to OIRA). Specifically, the act required OMB to issue governmentwide guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.” OMB published those guidelines in final form on February 22, 2002. The act also required agencies to develop their own guidelines (which were reviewed by OMB), and to report to OMB on the number and nature of complaints received and how such complaints were handled by the agency.

• Section 624 of the Treasury and General Government Appropriations Act, 2001, (31 U.S.C. 1105 note), sometimes known as the “Regulatory Right-to-Know Act,” requires OMB to prepare and submit with the budget an annual “accounting statement and associated report” containing an estimate of the costs and benefits (including quantifiable and nonquantifiable effects) of federal rules and paperwork, to the extent feasible, (1) in the aggregate, (2) by agency and agency program, and (3) by major rule. The accounting statement is also required to contain an analysis of impacts of federal regulation on state, local, and tribal governments, small businesses, wages, and economic growth. Similar one-year requirements were in previous appropriations acts.

• The same legislation requires OMB to include “recommendations for reform” in its cost-benefit reports. Rather than rely on its own expertise, OIRA decided to solicit suggestions from the public. For example, in March 2002, OIRA asked the public for recommendations to eliminate or modify existing rules as well as to expand or extend existing programs. In response, OIRA received more than 300 suggestions, which OIRA turned over to the appropriate agencies for prioritization. In February 2004, OIRA asked the public for suggested reforms of rules affecting the manufacturing sector. OIRA said it was focusing on manufacturing because of the relatively large impact that regulations have on that sector.

• The Small Business Paperwork Relief Act of 2002 (P.L. 107-198) requires OMB to annually publish, in the Federal Register and on the Internet, a list of

(...continued)

Of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade, by Morton Rosenberg.


83 A similar requirement for “recommendations for reform” was included in section 628(a)(3) of the FY2000 Treasury and General Government Appropriations Act. OIRA received 71 suggestions from the public in response to its call for “suggestions on specific regulations that could be rescinded or changed that would increase net benefits to the public,” most of which came from the Mercatus Center at George Mason University. OIRA reviewed these suggestions and identified 23 as a “high priority” for review. Eight of the 23 high priority recommendations involved EPA rules, and five involved rules from the Department of Labor. Although business groups generally applauded this effort, environmentalists and public interest groups characterized it as the development of a “hit list” of rules that the Bush Administration wanted to eliminate.
compliance assistance resources available to small businesses. The act also requires OMB to convene and chair a task force to study the feasibility of streamlining paperwork requirements on small businesses. The task force was required to file an initial report by the end of June 2003, and is required to file a second report by the end of June 2004.

- The E-Government Act of 2002 (P.L. 107-347) requires the OIRA administrator to work with the administrator of the Office of Electronic Government to establish the strategic direction of the governmentwide e-government program and to oversee its implementation. OIRA has been particularly active in the Administration’s e-rulemaking initiative.

- In the Treasury and General Government Appropriations Act, 2002 (P.L. 107-67), Congress stated that about $6.3 million of OMB’s $70.7 million appropriation was for OIRA, but stipulated that nearly $1.6 million of that amount should not be obligated until OMB “submits a report to the Committees on Appropriations that provides an assessment of the total costs and benefits of implementing Executive Order No. 13166.”

- The conference report for OMB’s appropriation for FY2004 (to accompany H.R. 2673) directed OIRA to submit a report to the House and Senate Committees on Appropriations by June 1, 2004, on “whether agencies have been properly responsive to public requests for correction of information pursuant to the (Data Quality Act).”

Congress also sometimes limits OIRA’s actions through riders on OMB’s appropriation. For example, since 1983, language has been included in OMB’s appropriation stating that none of the funds appropriated to OMB could be used for the purpose of reviewing any agricultural marketing orders issued by the Department of Agriculture. Marketing orders, which cover dozens of commodities from lemons to milk, basically keep prices up by regulating supplies, and had been targeted for elimination or amendment by President Reagan’s task force on regulatory relief in the early 1980s. In response, Members of Congress have inserted this restriction in each subsequent appropriation bill, asserting that the Department of Agriculture, not OMB, has statutory authority in this area.

In other cases, OIRA has taken on additional responsibilities, sometimes basing its actions on previous statutory or executive order authorities. For example:

- In December 2004, OIRA published a final bulletin establishing government-wide guidance aimed at enhancing the practice of peer review of government science documents. The bulletin applied to all “influential scientific information” and “highly influential scientific assessments.” The final version of the bulletin gave agencies significantly greater discretion to decide when information required peer review than the September 2003 proposed bulletin, but

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85 OIRA submitted this report in April 2004. For a copy of the report, see http://www.whitehouse.gov/omb/inforeg/fy03_info_quality_rpt.pdf.

86 To view a copy of this bulletin, see http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf.
OIRA retained significant authority in certain areas (e.g., when information is “highly influential” and requires more stringent peer review).

- In November 2005, OMB published a proposed bulletin “Good Guidance Practices,” saying that it was concerned that agency guidance documents “may not receive the benefit of careful consideration accorded under the procedures for regulatory development and review.” OMB did not cite any specific statutes or executive orders as authorizing the issuance of the bulletin, but did indicate that it was “responsible both for promoting good management practices and for overseeing and coordinating the Administration’s regulatory policy.” The bulletin would require agencies to develop written procedures for the approval of significant guidance documents, and to publish “economically significant” documents in the Federal Register and invite comments.

- In January 2006, OIRA published a proposed bulletin on agency risk assessment practices for public comment and peer review by the National Academy of Sciences (NAS). However, in January 2007, an NAS committee reported that the proposed bulletin was “fundamentally flawed” and should be withdrawn. In September 2007, OMB withdrew the proposed bulletin and instead issued a memorandum reiterating and reinforcing principles for risk assessment that were originally written in 1995, indicating that agencies should comply with the principles.

**OIRA and the Future of Presidential Regulatory Review**

For 30 years, OIRA has played a central role in the federal rulemaking process. Although some argued early in OIRA's history that the office's regulatory review role was unconstitutional, few observers continue to hold that view. No court has directly addressed the constitutionality of the OIRA regulatory review process, but in 1981 (the year that OIRA was created) the D.C. Circuit said the following:

> The court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.90

OIRA is located within the Executive Office of the President and is the President’s direct representative in the governmentwide rulemaking process. As Executive Order 12866 states, OIRA is the “repository of expertise on regulatory issues” within the Executive Branch, and is uniquely positioned both within OMB (with its budgetary influence) and within the federal

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87 To view a copy of this document, see http://www.whitehouse.gov/omb/inforeg/good_guid/good_guidance_preamble.pdf.
88 To view a copy of this bulletin, see http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf.
89 See http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/m07-24.pdf for a copy of this memorandum.
rulemaking process (reviewing and commenting on rules just before they are published in the Federal Register) to enable it to exert maximum influence.

Variations in how OIRA operates—as a gatekeeper or a counselor—are largely a function of the wishes of the President that the office serves. For example, in a June 2001 article in Harvard Law Review, Elena Kagan posited that, while it is generally acknowledged that President Reagan used OIRA’s review function as a tool to control the policy and political agenda in an anti-regulatory manner, President Clinton did much the same thing to accomplish pro-regulatory objectives. She said he did so by exercising directive authority and asserting personal ownership over a range of agency actions, thereby making them “presidential” in nature. She also characterized this emergence of enhanced methods of presidential control over the regulatory state—as she termed the “presidentialization of administration”—as “the most important development in the last two decades in administrative process.”

Other observers, however, view OIRA (like other executive branch agencies) as having more of a shared allegiance between the President and the Congress. They point out that OIRA was created by Congress, and has been given a number of statutory responsibilities through the PRA and other laws. Nevertheless, even supporters of a strong legislative perspective recognize that OIRA is part of the Executive Office of the President, and that Congress gave OIRA its responsibilities because of its strategic position within that office. With both statutory and executive order responsibilities, OIRA embodies a broader tension between Congress and the President for control of administrative agencies.

Although major differences of opinion exist among observers of the federal rulemaking process regarding the appropriateness of OIRA’s regulatory review role, the broad reach and influence of the office’s is undebatable. Rulemaking agencies formally challenge OIRA’s returns and “suggestions” for change only rarely, and sometimes refrain from even submitting draft rules for review if they believe they will be opposed by OIRA. Regulated entities also recognize OIRA’s influence, and seem to view the office as a “court of second resort” if they are unable to influence regulatory agencies to their position directly.

Possible Legislative Issues

Congress also recognizes the importance that OIRA plays in the rulemaking process, and sometimes holds hearings examining OIRA’s implementation of its responsibilities pursuant to various statutes and executive orders. Proposals for changes to OIRA’s authority and responsibilities have focused on such issues as (1) providing a statutory underpinning for regulatory reviews, (2) increasing or decreasing the office’s funding and staffing, (3) including independent agencies’ rules under the office’s regulatory review function, and (4) improving the transparency of OIRA’s regulatory review processes.

92 For example, David H. Rosenbloom, in Building a Legislative-Centered Public Administration (Tuscaloosa, AL: The University of Alabama Press, 2001) states that “where coordinated government-wide clearance is required to achieve Congress’ policy objectives, there may be few or no alternatives (to paperwork and regulatory review within OMB).”
Statutory Authority for Regulatory Review

As noted previously, Congress has enacted legislation expanding OIRA’s statutory responsibilities, and has considered (but not enacted) legislation that would provide a statutory basis for OIRA’s regulatory review function. For example, in the 106th Congress, section 632 of S. 746 (the “Regulatory Improvement Act of 1999”) would have required the President (via OMB and OIRA) to “establish a process for the review and coordination of Federal agency regulatory actions.” The proposed legislation also would have placed in statute many of the transparency requirements in Executive Order 12866.

Congress has also considered legislation that would affect OIRA as part of broader OMB changes. For example, during the 107th Congress, proposed legislation was introduced (H.R. 616) that would have established an Office of Management within the Executive Office of the President and redesignated OMB as the Office of the Federal Budget. As part of that process, OIRA and other offices within OMB would have been abolished and their functions and authorities transferred to the new Office of Management. Neither of these bills was enacted.

Funding and Staffing

OIRA does not have a specific line item in the budget, so its funding is part of OMB’s appropriation. Similarly, OIRA’s staffing levels are allocated from OMB’s totals. Although OIRA staffing increased somewhat during the Bush Administration, OIRA has still fewer staff than it had when its regulatory review function was first established in 1981. Currently, about 30 to 40 OIRA desk officers and branch chiefs review about 3,000 agency information collection requests each year and between 500 and 700 significant rules each year. At various times in its history, certain Members of Congress have attempted to reduce funding for OIRA in order to signal congressional displeasure with the office’s actions. Other observers, however, believe that OIRA’s funding should be increased, not reduced, arguing that a relatively small amount of additional resources for OIRA could yield substantial benefits.

At other times, proposed legislation has been introduced designating how OIRA staff should be used. For example, in the 108th Congress, a provision in H.R. 2432 as originally introduced would have required the OMB Director to “assign, at a minimum, the equivalent of at least 2 full time staffers to review the Federal information collection burden on the public imposed by the Internal Revenue Service.” The Internal Revenue Service accounts for more than 80% of the estimated paperwork burden, but OIRA indicated that it devoted less than one FTE to reviewing the agency’s paperwork requests (because much of the burden is mandated by statute). The Bush Administration objected to this specific direction of OIRA staff, so the sponsors of the bill agreed to delete this requirement before it was approved by the House of Representatives in May 2004.

For example, as noted previously, in OMB’s appropriation for 2002, Congress stipulated that nearly $1.6 million should not be obligated until OMB submitted a report assessing the total costs and benefits of implementing Executive Order No. 13166. Also, in the conference report for OMB’s FY2004 appropriation (under the heading “Office of Information and Regulatory Affairs”), the conferees directed that $1 million “be withheld from obligation until resolution of existing programmatic concerns by House conferees are addressed and the House and Senate Committee on Appropriations approve of such obligations.”

Addition of Independent Agencies’ Rules

Although several of the statutes that OIRA helps to administer include rules issued by independent regulatory agencies (e.g., the PRA, the Regulatory Flexibility Act, the Congressional Review Act, and the Data Quality Act), the executive orders that have established regulatory review within OIRA have explicitly excluded rules issued by those agencies. Some observers have suggested that this limitation be lifted, arguing that independent regulatory agencies issue regulations that have a significant impact on the economy (about $230 billion per year according to OIRA) but their rules often contain little quantitative information on regulatory costs and benefits. Those opposed to this expansion in OIRA’s duties point out that independent regulatory agencies were established to be relatively independent of the President, and inclusion of their rules under OIRA’s would be counter to this purpose. In response, proponents argue that independent regulatory agencies’ rules are already reviewed for purposes such as paperwork clearance and ensuring that data quality requirements are met, so examining the substance of the rules is just an extension of those reviews.

Transparency of Reviews

One consistent area of concern to some observers has been the lack of transparency of the OIRA review process to the public. Notwithstanding recent improvements, they argue that it is difficult for the public to know with any degree of certainty what changes OIRA has suggested to agencies’ draft rules, what contacts OIRA has made with regulated entities and other outside parties regarding those rules, or whether documents were exchanged between OIRA and the agencies. In its September 2003 report, GAO said that the documentation that agencies are required to provide showing the changes made at OIRA’s suggestion or recommendation were not always available and, when done, were not always clear or consistent. GAO also said that the transparency requirements incumbent on OIRA were not always clear, and recommended several improvements. For example:

- Although OIRA indicated that it can have its greatest impact on agencies’ rules during informal reviews before review packages are formally submitted, OIRA indicated that agencies only had to disclose the changes made at OIRA’s suggestion during formal review (some of which were as short as one day). GAO recommended that OIRA define this requirement in the executive order to include informal reviews, just as it did with regard to the requirements involving the office’s communications with outside parties.

- As noted previously, the “consistent with change” code in OIRA’s database does not differentiate between OIRA- or agency-initiated changes, or changes that were major or minor in nature. GAO recommended that the database be changed to more clearly indicate which rules were substantively changed at OIRA’s suggestion.

95 For purposes of regulatory review, both Executive Order 12291 and Executive Order 12866 defined a covered “agency” as excluding those agencies specified in 44 U.S.C. 3502(10).

96 See, for example, the Center for Regulatory Effectiveness, A Blueprint for OMB Review of Independent Agency Regulations, Mar. 2002. The previously mentioned bill (S. 746) that proposed to establish in law presidential review of rules would have included rules issued by independent regulatory agencies.
• GAO also recommended refinements to the executive order’s requirements applicable to OIRA (e.g., more clearly indicating on its website the regulatory actions being discussed at meetings with outside parties and the affiliations of the participants) and the requirements applicable to the agencies (e.g., defining the types of “substantive” changes that agencies should disclose).

In commenting on GAO’s report, the administrator of OIRA said that the office planned to review its implementation of the executive order’s transparency requirements and would work to improve the clarity of its meeting log. The administrator did not, however, believe that changes made during informal OIRA reviews should be disclosed—even though he said that OIRA can have its greatest influence during informal reviews. Disclosure of these informal review changes could be required through an administrative directive issued by the OIRA administrator or, alternatively, through legislation.

In April 2009, GAO again examined the changes made during OIRA’s reviews, and concluded that OIRA had implemented only one of the eight recommendations in its 2003 report. GAO recommended that OIRA (1) define in guidance what types of changes made as a result of those reviews are substantive and need to be publicly identified, (2) instruct agencies to clearly identify those changes made at OIRA’s suggestion or recommendation, (3) direct agencies to clearly state in their final rules whether substantive changes were made to their rules as a result of OIRA’s reviews, and (4) standardize how agencies label documentation of these changes in their rulemaking dockets. OMB said that these recommendations had merit and warranted further consideration.

### Congressional Office of Regulatory Analysis

In the 112th Congress, H.R. 214 would, if enacted, establish a “Congressional Office of Regulatory Analysis.” Among other things, the office would be required to “provide to the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate, information that will assist the committee in the discharge of all matters within its jurisdiction, including information with respect to its jurisdiction over authorization and oversight of the Office of Information and Regulatory Affairs of the Office of Management and Budget.”

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Summary

Federal health, safety, and environmental regulations are often designed to reduce the risk of death, illness, or injury from exposure to a particular hazard (e.g., arsenic in drinking water or rollover car crashes). As part of an economic analysis required by Executive Order 12866, the issuing agencies often place a monetary value on these expected health benefits by determining the number of “statistical lives” that the rules are expected to extend or save, and then multiplying that number by an estimated “value of a statistical life” (VSL). For example, if 100,000 people are each willing to pay an average of $50 to reduce a 1 in 100,000 risk of dying from a particular risk, then the VSL for the population relative to that risk is $5 million ($50 times 100,000).

The monetization of regulatory health benefits is often controversial, and the process by which federal agencies do so is not widely understood. This report summarizes current government-wide requirements for benefit-cost analysis and the monetization of health benefits, and describes agency-specific policies in selected health, safety, and environmental agencies. Also, the report provides examples of final rules published by the selected agencies from 2007 through 2009 that monetized expected health benefits and describes how those values were used in the economic analyses for the rules. Finally, the report offers some concluding observations.

OMB Circular A-4, which was issued in September 2003, delineates what is expected in a good regulatory analysis while giving the agencies substantial flexibility. The circular notes that academic studies have identified VSLs from $1 million to $10 million, but it does not recommend that agencies use a particular VSL. Circular A-4 says that VSLs should not vary by age, but recommends that agencies consider providing estimates in terms of both VSLs and the value of statistical life years (VSLY) extended. The circular says that agencies should use larger VSLYs for senior citizens, but does not specify how much larger or what constitutes a “senior citizen.” When the benefits and costs of a rule are expected to occur at different times, the circular says agencies should compare them in “present values” using both a 3% and a 7% discount rate.

Some federal agencies have written policies on the monetization of expected health benefits, and those policies differ in some respects. For example, in 2009, the Department of Transportation’s (DOT) VSL was $6.0 million while the Environmental Protection Agency’s (EPA) VSL was nearly $7.9 million. Other agencies tended to use the DOT or EPA VSLs, or used VSLs that they or other agencies have used in previous rules. DOT’s policy established the value of injuries prevented as percentages of the VSL, whereas EPA’s policy does not recommend particular values for injuries or illnesses.

In more than 20 final rules that were issued between 2007 and 2009, federal agencies used somewhat different VSLs, and used VSL information in different ways. The agencies often compared monetized health benefits with costs to determine whether to regulate, but in some cases the agencies used VSL estimates in “break-even” analyses (showing at what point the value of the health benefits equal the cost), or to rule out a regulatory option. The agencies sometimes used lower and higher VSLs, and sometimes used multiple discount rates, in sensitivity analyses. Some of the rules illustrated that the size of the VSL used can affect whether a rule is expected to produce positive net benefits. Some of the apparent variations in the agencies’ economic analyses may be due to differences in the degree to which the agencies disclosed their procedures.

This report will not be updated.
How Agencies Monetize “Statistical Lives”
Expected to Be Saved By Regulations

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March 24, 2010
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Introduction

Many federal health, safety, and environmental regulations are primarily designed to reduce the risk of death, illness, or injury from exposure to a particular hazard (e.g., arsenic in drinking water, rollover car crashes, or terrorist attacks on airplanes). The agencies issuing these regulations often place a monetary value on these expected health benefits by determining the number of “statistical lives” that the rules are expected to save, and then multiplying that number by an estimated “value of a statistical life.” The term “statistical life” is used to reflect the degree of risk reduction expected in a given population, and does not refer to any individual’s life.

For example, on January 15, 2010, the Federal Railroad Administration (FRA) within the Department of Transportation (DOT) published a final rule in the Federal Register defining criteria for “positive train control” systems that were required on certain passenger and freight rail lines by the Rail Safety Improvement Act of 2008 (P.L. 110-432, 122 Stat. 4854, October 16, 2008). Congress enacted the statutory requirement in the wake of several serious rail accidents involving dozens of fatalities and hundreds of injuries. FRA estimated that the rule would reduce deaths and injuries from this type of accident by more than 50%, valued each “statistical life” expected to be saved by the rule at $6 million, and considered each prevented injury a percentage of the value of a statistical life. The agency ultimately valued the estimated reductions in deaths over the next 20 years at between $175 million and $269 million (in 2009 dollars), and valued the reductions in injuries at between $133 million and $204 million (also in 2009 dollars). Together, these monetized health benefits represented more than 70% of the rule’s estimated total benefits.

The monetization of reductions in the number of expected fatalities, injuries, and illnesses in the rulemaking process is often controversial, and the process by which federal agencies place monetary values on such benefits is not widely understood. This report summarizes current government-wide requirements for benefit-cost analysis and the monetization of health benefits, and describes agency-specific policies in selected health, safety, and environmental agencies. Also, the report provides examples of final rules published by the selected agencies from 2007 through 2009 that monetized expected health benefits, and describes how those values were used in the economic analyses for the rules. Finally, the report offers some concluding observations.

Government-Wide Standards

Although a variety of statutes and executive orders require some form of economic analysis during the rulemaking process, the most broadly applicable of those requirements is in Executive Order 12866, which was issued by President Clinton in 1993. The executive order requires

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1 U.S. Department of Transportation, Federal Railroad Administration, “Positive Train Control Systems,” 75 Federal Register 2598, January 15, 2010. “Positive train control systems” refers to technology that can prevent accidents such as train-to-train collisions and train movements through a switch left in the wrong position.


3 The President, Executive Order 12866, “Regulatory Planning and Review,” 58 Federal Register 51735, October 4, 1993. Earlier executive orders (e.g., Executive Order 12291) had also required economic analyses for certain rules.
covered federal agencies to determine the costs and benefits of all “significant” regulatory actions, and requires more complete benefit-cost analyses for all regulatory actions that are expected to be “economically significant” (e.g., have an annual $100 million impact on the economy). In recent years, an average of about 600 federal rules have been considered “significant” each year, of which about 100 have been considered “economically significant.”

The executive order also says that agencies are to adopt a regulation only after determining that the benefits of the rule “justify” its costs.

With regard to regulatory benefits, Section 6(a)(3)(C) of Executive Order 12866 requires the issuing agency to provide to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) “an assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits.” The executive order requires similar assessments of regulatory costs, and an explanation of why the planned regulatory action is preferable to potential alternatives.

**OMB Circular A-4**

The regulatory analysis requirements in Executive Order 12866 are more fully delineated in OMB Circular A-4, which was issued in September 2003. The circular states that it is “designed to assist analysts in the regulatory agencies by defining good regulatory analysis ... and standardizing the way benefits and costs of Federal regulatory actions are measured and reported.” Although Circular A-4 states that a “complete regulatory analysis includes a

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4 Section 3(b) of Executive Order 12866 defines a covered agency as “any authority of the United States that is an ‘agency’ under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).” Exempt independent regulatory agencies include the Federal Communications Commission, the Nuclear Regulatory Commission, and the Securities and Exchange Commission.

5 Section 3(f) of Executive Order 12866 defines a “significant” regulatory action as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”

6 See http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init for information on the number of rules considered “significant” and “economically significant” under Executive Order 12866.

7 Section 1(b)(6) of Executive Order 12866. Some statutes forbid any consideration of costs in setting a health standard (e.g., the national ambient air quality standards in the Clean Air Act), and such prohibitions have been upheld in court (e.g., Whitman v. American Trucking Associations, 531 U.S. 457 (2001)). Other statutes establish other requirements (e.g., requiring agencies to regulate to the extent “feasible” or “achievable”) whose effect on the use of cost-benefit analysis in decision making is less clear.


9 Ibid., p. 1.
How Agencies Monetize “Statistical Lives” Expected to Be Saved By Regulations

discussion of non-quantified as well as quantified benefits and costs,” it also says that a “distinctive feature of [benefit-cost analysis] is that both benefits and costs are expressed in monetary units, which allows you to evaluate different regulatory options with a variety of attributes using a common measure.” It goes on to say that agencies “should monetize quantitative estimates whenever possible."

Estimates of regulatory health benefits are sometimes derived from risk assessments, which systematically determine whether a particular hazard exists, and if so how much damage or injury can be expected from exposures to that hazard. In addition to its use in benefit-cost analysis, risk assessment can also help agencies identify issues of potential concern (e.g., whether exposure to a given risk agent causes effects such as cancer), and can help them select regulatory options.

As noted previously, the number of “statistical lives” expected to be saved reflects the degree of risk reduction expected in a given population, and does not refer to any particular individual. For example, if a regulation is expected to reduce the annual risk of death from a particular hazard by 1 in 100,000 for a population of 100,000, that effect is characterized as representing one “statistical life” extended or “saved” per year. The number of statistical lives saved is a function of the size of the population involved and the size of the risk. For example, if the annual risk of death from the same hazard is reduced by one in a million for each of a million people, the regulation is also characterized as saving one statistical life per year. Alternatively, if the risk is reduced by 1 in 100,000 for a population of 500,000, the rule is said to save five statistical lives.

Willingness-to-Pay and the Value of a Statistical Life

Circular A-4 indicates that the concept of “opportunity cost” “is the appropriate concept for valuing both benefits and costs,” and describes the principle of “willingness-to-pay” as capturing the notion of opportunity cost “by measuring what individuals are willing to forgo to enjoy a particular benefit.” The public’s willingness-to-pay is often measured using surveys (sometimes referred to as “stated preference” studies) in which respondents are asked how much they would be willing to pay to avoid particular risks or outcomes. For example, if 100,000 people are each willing to pay an average of $50 to reduce a 1 in 100,000 risk of dying from exposure to a particular risk, then the “value of a statistical life” (VSL) for the population relative to that risk is $5 million ($50 times 100,000).

An alternative to “willingness-to-pay” is to measure individuals’ “willingness-to-accept” a risk, which Circular A-4 says “can also provide a valid measure of opportunity cost.” These “revealed preference” studies use data from market transactions or observed behavior to estimate the value of certain risks. One example is wage-risk studies, in which researchers compare

10 Ibid., p. 3.
11 Ibid., p. 10.
12 Ibid., p. 27.
13 For information on current, government-wide risk assessment policies, see “Updated Principles for Risk Analysis,” which was issued in September 2007 by OIRA and the Office of Science and Technology Policy (available at http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/m07-24.pdf). For information on OMB’s efforts to issue other risk analysis guidance, see CRS Report RL33500, OMB and Risk Assessment, by Curtis W. Copeland.
14 Circular A-4, p. 29.
15 Ibid., p. 18.
16 Ibid.
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workers’ earnings in occupations with varying levels of on-the-job risks. Circular A-4 says that revealed preference studies “are sometimes difficult to implement given the complexity of market transactions and the paucity of relevant data.”

The circular also says that economists tend to view willingness-to-pay as “the most appropriate measure of opportunity costs,” and that the willingness-to-pay approach is “the best methodology to use if reductions in fatality risks are monetized.” In monetizing health benefits, the circular states that a willingness-to-pay measure is “the conceptually appropriate measure as compared to other alternatives (e.g., cost of illness or lifetime earnings), in part because it attempts to capture pain and suffering and other quality-of-life effects,” and also because it “allows you to directly compare your results to the other benefits and costs in your analysis.”

Circular A-4 draws a clear distinction between monetizing anticipated reductions in the risk of death and placing a value on human life.

Some describe the monetized value of small changes in fatality risk as the “value of statistical life” (VSL) or, less precisely, the “value of a life.” The latter phrase can be misleading because it suggests erroneously that the monetization exercise tries to place a “value” on individual lives. You should make clear that these terms refer to the measurement of willingness to pay for reductions in only small risks of premature death. They have no application to an identifiable individual or to very large reductions in individual risks. They do not suggest that any individual’s life can be expressed in monetary terms. Their sole purpose is to help describe better the likely benefits of a regulatory action.

Flexibility and Transparency

OMB has, in the past, used a particular VSL to assign a monetary value to agencies’ quantified (but unmonetized) regulatory health benefits. However, Circular A-4 does not recommend that agencies use a particular VSL in all of their economic analyses. Noting the “considerable body of academic literature” available on the valuation of reductions in premature mortality, the circular simply states that a “substantial majority of the resulting estimates of VSL vary from roughly $1 million to $10 million per statistical life.” Circular A-4 permits agencies substantial flexibility in determining how expected reductions in mortality and morbidity are valued, but requires agencies to be transparent with regard to those decisions.

17 Ibid., p. 20.
18 Ibid.
19 Ibid., p. 29.
20 Ibid., p. 28.
21 Ibid., p. 29.
24 Circular A-4, p. 30. In some cases, agencies have viewed this statement as an OMB approval of VSLs in this range. For example, DOT’s February 2008 guidance states that OMB Circular A-4 “endorse values between $1 million and $10 million.” See p. 1 of “Revised Departmental Guidance” portion of the February 2008 DOT memorandum discussed later in this report.
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The valuation of fatality risk reduction is an evolving area in both results and methodology. Hence, you should utilize valuation methods that you consider appropriate for the regulatory circumstances. Since the literature-based VSL estimates may not be entirely appropriate for the risk being evaluated (e.g., the use of occupational risk premia to value reductions in risk from environmental hazards), you should explain your selection of estimates and any adjustments of the estimates to reflect the nature of the risks being evaluated. You should present estimates based on alternative approaches, and if you monetize mortality risk reduction, you should do so on a consistent basis to the extent feasible. You should clearly indicate the methodology used and document your choice of a particular methodology. You should explain any significant deviations from the prevailing state of knowledge. If you use different methodologies in different rules, you should clearly disclose the fact and explain your choices.25

As a consequence of this flexibility, federal agencies reportedly use somewhat different VSLs.26

VSLs and Contextual Factors

Circular A-4 also notes a “continuing debate within the economic and public policy analysis community on the merits of using a single VSL for all situations versus adjusting the VSL estimates to reflect the specific rule context.”27 Contextual factors that have been considered potentially relevant include whether the death being prevented by the rule is sudden or prolonged, whether the risk is incurred voluntarily or not, and the age of the affected population. Age has been a particularly controversial contextual issue, with some asserting that older beneficiaries of a rule with relatively little additional life expectancy should be valued less than younger beneficiaries with much longer life expectancies.28

In May 2003, the Environmental Protection Agency (EPA) used an “age adjustment factor” that valued the “statistical lives” of older people 37% less than those of younger people in calculating the benefits of the George W. Bush Administration’s “Clear Skies” initiative ($2.3 million per statistical life for older people versus $3.7 million for younger people).29 Using the lower VSL for older people in a “sensitivity analysis”30 had the effect of lowering the annual estimated benefits

27 Ibid.
28 See, for example, Cass R. Sunstein, “Lives, Life Years, and Willingness to Pay,” Columbia Law Review, vol. 104 (January 2004), pp. 205-252, in which the author said that “A program that saves younger people is better, along every dimension, than an otherwise identical program that saves older people.” Sunstein was confirmed as administrator of OIRA in September 2009.
29 Steve Cook, “OMB, EPA Accused of Suggesting Lives of Older People Valued Less Than Others,” BNA Daily Report for Executives, May 8, 2003. EPA used the “age adjustment factor” as part of an alternative “sensitivity” analysis for this initiative. The OIRA administrator at the time later said that the Clinton Administration first used such a factor in 2000 emissions limits for highway diesel engines.
30 A sensitivity analysis tests the effect that changes in certain variables (e.g., the VSL) has on the results of an analysis.
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of the Clear Skies initiative by more than $13 billion from the base estimate. After criticisms from some interest groups and Members of Congress, the EPA administrator announced that the age adjustment factor (which had been characterized by critics as a “senior death discount”) would no longer be used. The OIRA administrator later issued a memorandum to the President’s Management Council advising analysts at EPA and other federal agencies to discontinue the use of age adjustment factors in VSL analysis. Subsequently, a general provision in the FY2004 consolidated appropriations bill prohibited funding for any economic analyses that used age-adjustment factors.

Circular A-4 states that “[i]n light of continuing questions over the effect of age on VSL estimates, you should not use an age-adjustment factor in an analysis using VSL estimates.” The circular notes that an EPA science advisory board had examined the issue of whether differing valuations should be used for age and other contextual factors and concluded that “the available literature does not support adjustments of VSL for most of these factors.”

Value of Statistical Life Years (VSLY)

Circular A-4 does, however, recommend that federal agencies consider providing estimates of both VSL and another measure of reductions in fatality risks—the “value of statistical life years (VSLY) extended.” As described in the circular,

If a regulation protects individuals whose average remaining life expectancy is 40 years, a risk reduction of one fatality is expressed as “40 life-years extended.” Those who favor this alternative approach emphasize that the value of a statistical life is not a single number relevant for all situations. In particular, when there are significant differences between the effect on life expectancy for the population affected by a particular health risk and the populations studied in the labor market studies, they prefer to adopt a VSLY approach to reflect those differences.

The circular goes on to say that when agencies present estimates based on the VSLY method, “you should adopt a larger VSLY estimate for senior citizens because senior citizens face larger overall health risks from all causes and they may have accumulated savings to spend on their

32 See http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/pmc_benefit_cost_memo.pdf for a copy of this memorandum.
33 Section 419 of the Consolidated Appropriations Act for 2004 (P.L. 108-199, 118 Stat. 416) stated that “none of the funds provided in this Act may be expended to apply, in a numerical estimate of the benefits of an agency action prepared pursuant to Executive Order No. 12866 or section 312 of the Clean Air Act (42 U.S.C. 7612), monetary values for adult premature mortality that differ based on the age of the adult.”
34 Circular A-4, p. 30.
35 Ibid. The panel did, however, reportedly consider it appropriate to adjust those values for changes in income and any time lag in the occurrence of adverse health effects.
36 The OIRA administrator at the time, John Graham, had recommended the use of both VSL and VSLY methods when performing benefit-cost analyses in his May 30, 2003, memorandum to the President’s Management Council. For a copy of this memorandum, see http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/pmc_benefit_cost_memo.pdf.
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health and safety.” Circular A-4 does not indicate how much larger the VSLY should be for senior citizens, or what constitutes a “senior citizen.” The circular goes on to say that agencies should not conclude that regulations with greater numbers of life-years extended are necessarily better than regulations with fewer numbers of life-years extended.

Some observers have criticized the use of VSLY as discriminatory against older people, for older people have shorter life expectancies and, therefore, lower cumulative values of life than younger people. They assert that the use of VSLYs can have the same bottom-line effect as using a lower VSL for older people (i.e., causing lower values being placed on mortality risks to the old). This effect can occur even if a much larger VSLY is used for senior citizens. For example, an agency could use a $400,000 VSLY for those 65 years of age or older with an average life expectancy of 15 years, yielding an effective VSL of $6 million. However, using a VSLY of only $200,000 for younger citizens with an average life expectancy of 40 years yields an effective VSL of $8 million.

Others have voiced strong support for the use of VSLY in agencies’ regulatory analyses, with some preferring its use over VSLs. For example, current OIRA administrator Cass Sunstein wrote the following in 2004 (five years before he became administrator in 2009):

My simplest claim in this Essay is that in terms of welfare, it is fully appropriate to focus on life-years, not merely lives, and that both academic and public criticisms of the life years approach are misconceived. The reasons for this conclusion are simple. No program literally “saves” lives; life-extension is always what is at issue. If the goal is to promote people’s welfare by lengthening their lives, a regulation that saves five hundred life-years (and, let us say, twenty-five people) is, other things being equal, better than a regulation that saves fifty life-years (also, let us say, twenty-five people). A program that saves younger people is better, in this sense, than an otherwise identical program that saves older people—a statement that seems controversial only if we see life as a snapshot in which people are frozen at their current points in the age distribution.

38 Ibid. OIRA Administrator Graham also took this position in his May 30, 2003, memorandum to the President’s Management Council.
39 In his May 30, 2003, memorandum to the President’s Management Council, OIRA Administrator Graham said that EPA had used $434,000 per life-year saved for persons over age 65 and $172,000 per life-year saved for those under age 65. However, the administrator did not recommend those values, saying that “more research is needed to provide a complete picture of how VSLY varies over the life span.”
40 Circular A-4, p. 30.
41 See, for example, Laura J. Lowenstein and Richard L. Revesz, “Anti-Regulation Under the Guise of Rational Regulation: The Bush Administration’s Approaches to Valuing Lives in Environmental Cost-Benefit Analyses,” Environmental Law Reporter, vol. 34 (2004), pp. 10954 – 10994. The authors cite three basic problems in the VSLY approach: (1) inconsistency with the willingness-to-pay tenet of economic theory, (2) inconsistency with the standard economic observation that individuals generally assign greater value to goods that are limited in supply, and (3) inconsistency with existing empirical data.
42 See, for example, Steve Cook, “OMB Calls for Cost-Benefit Analysis Assigning Less Value to Lives of Elderly,” BNA Daily Report for Executives, June 5, 2003, p. A-23. The article referred to the endorsement of VSLY in the OIRA administrator’s May 30, 2003, memorandum. Lisa Heinzerling of the Center for Progressive Regulation was quoted as saying that using VSLYs accomplishes the same thing as the age-adjustment factor, devaluing the lives of seniors.
Sunstein goes on to suggest that, when “willingness to pay” is used as part of a benefit-cost analysis, “primary attention should be paid to VSLY rather than VSL.”

Discount Rates

In many instances, the benefits and the costs of a regulation are expected to occur at different times. For example, EPA may require that oil refineries spend money immediately to reduce a certain type of air pollution, but the anticipated reductions in pollution-related deaths and illnesses may not be expected to occur until years or even decades later. In such situations, Circular A-4 states that “a discount factor should be used to adjust the estimated benefits and costs for differences in timing.” The circular cites three primary rationales for discounting:

(a) Resources that are invested will normally earn a positive return, so current consumption is more expensive than future consumption, since you are giving up that expected return on investment when you consume today.

(b) Postponed benefits also have a cost because people generally prefer present to future consumption. They are said to have positive time preference.

(c) Also, if consumption continues to increase over time, as it has for most of U.S. history, an increment of consumption will be less valuable in the future than it would be today, because the principle of diminishing marginal utility implies that as total consumption increases, the value of a marginal unit of consumption tends to decline.

Discounted benefits or costs are sometimes referred to as “discounted present values,” or simply “present values.” Circular A-4 states that costs and benefits can be compared to determine net benefits only when they have been discounted to present values, and says that agencies should provide estimates of net benefits in regulatory analyses using both a 3% and a 7% discount rate. However, noting that the 7% rate is “the average before-tax rate of return to private capital in the U.S. economy,” the circular also says that the 7% rate “is the appropriate discount rate whenever the main effect of a regulation is to displace or alter the use of capital in the private sector.”

Some observers assert that while discounting makes sense in financial decision making (e.g., $100 received today is worth more than $100 received 10 years from now), the use of discounting in health, safety, and environmental regulation is inappropriate in that it diminishes the value of lives saved in the future. For example, they argue, using a 3% discount rate, $100 million in monetized “statistical lives” saved 20 years from now has a discounted present value of just $55 million. Using a 5% discount rate, $100 million 20 years from now has a present value of only

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44 Ibid., p. 211.
45 Circular A-4, p. 32. OMB’s basic guidance on discount rates is in OMB Circular A-94. To view a copy of this circular, see http://www.whitehouse.gov/omb/assets/a94/a094.pdf.
46 Ibid.
47 Ibid., p. 34. Circular A-94 provides OMB’s basic guidance on discount rates, which states that the 7% rate be used as a base case for regulatory analysis.
48 Ibid., p. 33.
$38 million. 49 Other, more normative concerns have also been raised regarding the ethics of intergenerational discounting. 50

Cost-Effectiveness Analysis

In addition to benefit-cost analysis, Circular A-4 also recommends that agencies use cost-effectiveness analysis, which attempts to determine how a given regulatory goal can be achieved at the least cost (e.g., dollars per life saved). The circular says that agencies should prepare both benefit-cost analysis and cost-effectiveness analysis “wherever possible.” 51 It also says that agencies “should prepare [cost-effectiveness analyses] for all major rulemakings for which the primary benefits are improved public health and safety to the extent that a valid effectiveness measure can be developed to represent expected health and safety outcomes.” 52 Benefit-cost analysis should be performed for such rules “to the extent that valid monetary values can be assigned to the primary expected health and safety outcomes.” 53

Circular A-4 also says that final outcomes such as lives saved or life-years saved are better measures of effectiveness than more intermediate measures such as tons of pollution reduced or crashes avoided. 54 It goes on to say that more integrated measures of effectiveness, such as the number of “equivalent lives” saved or “quality-adjusted life years” saved, have the advantage of accounting for a rule’s impact on both morbidity (i.e., nonfatal illness, injury, and impairment of the quality of life) as well as premature death, although such measures also have certain disadvantages (e.g., assumptions about individual preferences). 55 Ultimately, Circular A-4 does not require agencies to use any specific measure of effectiveness. Instead, it encourages agencies to report results with multiple measures of effectiveness, and to explain why certain measures were used. 56

Break-Even Analysis

When non-quantified benefits and costs are likely to be important considerations in a rule, Circular A-4 states that agencies should carry out a “threshold” or “break-even” analysis to evaluate their significance. 57 This type of analysis answers the question “How small could the value of the non-quantified benefits be before the costs exceed the benefits?” In the context of health and safety regulations that are expected to reduce fatalities, a break-even analysis could use different VSLs or VSLYs to determine the point at which net benefits would be provided. For

51 Circular A-4., p. 9.
52 Ibid.
53 Ibid.
54 Ibid., p. 12.
55 “Quality-adjusted life year” measures attempt to assess not only the quantity of life extensions, but also the quality of life during that period. For example, whereas a year of perfect health might be weighted 1.0, a year in which a person is forced to remain in bed might be weighted 0.5.
56 Ibid., p. 13.
57 Ibid., p. 2.
example, if a rule is expected to cost $100 million, at a VSL of $5 million, the rule would only have to prevent 20 deaths for the benefits to equal the costs (assuming that prevented premature mortalities are the only benefits). However, if the VSL is $10 million, the rule would only have to prevent 10 deaths for the benefits to equal the costs.

**Agency-Specific Policies**

In addition to the government-wide policies established in OMB Circular A-4, some federal departments and agencies have established their own policies regarding how expected reductions in deaths, illnesses, and injuries are to be valued in their economic analyses. Other departments and agencies have no written policies regarding how such benefits should be valued, but indicated that they rely on the policies of other departments or agencies, or have a consistent approach even without a written policy.

**Department of Transportation**

Since the early 1980s, DOT has had written policies regarding how expected reductions in fatalities and non-fatalt injuries should be valued by agencies throughout the department. In June 1990, DOT issued departmental guidance recommending that agencies use $1.5 million as the dollar value of a statistical life in economic analyses, but noted that research was underway that could cause that value to be revised. In January 1993, DOT concluded that research and established the value of a statistical life to be used in departmental analyses at $2.5 million. DOT later adjusted that value for inflation to $2.7 million in March 1995, and to $3.0 million in January 2002.

The DOT VSL remained at that level until February 2008, when the department’s general counsel and assistant secretary for transportation policy issued a memorandum stating that recent scholarship and a comparison with the practices of other federal agencies had demonstrated that the $3.0 million value was “seriously out of date.” The memorandum stated that the best estimate of the economic value of preventing a human fatality at that time was $5.8 million, and said that this value “should be used, effective immediately, for analyses performed by DOT analysts.” To develop its $5.8 million VSL, DOT used the average of five studies that ranged from $2.6 million to $8.5 million in 2007 dollars. DOT also required sensitivity analyses at $3.2 million and $8.4 million to “assist decision-makers in recognizing the necessary imprecision of any assumption of the value of a statistical life, as well as the sensitivity of a cost-benefit

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58 Cited in a memorandum from Walter B. McCormick, Jr., General Counsel, and Jeffrey N. Shane, Assistant Secretary for Policy and International Affairs, to assistant secretaries and modal administrators, January 8, 1993, available from the author of this report.

59 Memorandum from Walter B. McCormick, Jr, General Counsel, and Jeffrey N. Shane, Assistant Secretary for Policy and International Affairs, to assistant secretaries and modal administrators, January 8, 1993, available from the author. DOT said that the 1993 value was based primarily on a 1988 study that yielded a likely VSL of $2.2 million in 1988 dollars. See T.R. Miller, “The Plausible Range for the Value of Life—Red Herrings Among the Mackerel,” *Journal of Forensic Economics*, vol. 3 (1990), pp. 17-40.


61 Ibid., p. 1.
calculation to changes in that value.” Also, analysts were required to disaggregate the major elements of each regulatory action to “enable decision-makers to appreciate the arguments for including or excluding each item.”

In March 2009, the deputy assistant secretary for transportation policy and the acting general counsel issued a memorandum increasing the VSL from $5.8 million to $6.0 million. The memorandum said the increase was based on the wages and salaries component of the Employment Cost Index and the Consumer Price Index. It also said that DOT analysts need not modify analyses already prepared if doing so would be time consuming and would not have a significant impact on the comparison of benefits and costs. The memorandum did not mention changing the values for supplementary analyses (which had been set in 2008 at $3.2 million and $8.4 million).

Value of Preventing Injuries

DOT’s January 1993 VSL guidance also established the relative value of injuries of varying severity as a percentage of the economic value of a statistical life. DOT said it did so because detailed willingness-to-pay estimates for a range of injuries were unavailable, and using previously conducted research, based the percentages on the Maximum Abbreviated Injury Scale (MAIS), which categorizes non-fatal injuries into five levels ranging from minor to critical. The percentages used in the January 1993 guidance have not been updated, and are reflected in Table 1 below. The last column of the table shows the monetary value of those percentages using DOT’s current $6.0 million VSL.

<table>
<thead>
<tr>
<th>MAIS Level</th>
<th>Severity</th>
<th>Fraction of VSL</th>
<th>Dollar Value at VSL of $6.0 million</th>
</tr>
</thead>
<tbody>
<tr>
<td>MAIS 1</td>
<td>Minor</td>
<td>0.0020</td>
<td>$12,000</td>
</tr>
<tr>
<td>MAIS 2</td>
<td>Moderate</td>
<td>0.0155</td>
<td>$93,000</td>
</tr>
<tr>
<td>MAIS 3</td>
<td>Serious</td>
<td>0.0575</td>
<td>$345,000</td>
</tr>
<tr>
<td>MAIS 4</td>
<td>Severe</td>
<td>0.1875</td>
<td>$1,125,000</td>
</tr>
<tr>
<td>MAIS 5</td>
<td>Critical</td>
<td>0.7625</td>
<td>$4,575,000</td>
</tr>
</tbody>
</table>

Source: Memorandum from Tyler D. Duvall, Assistant Secretary for Transportation Policy, and D.J. Gribbin, General Counsel, to DOT secretarial officers and modal administrators, February 5, 2008, which was included as an attachment to DOT’s March 2009 policy memorandum.

62 Ibid.

63 Memorandum from Joel Szabat, Deputy Assistant Secretary for Transportation Policy, and Lindy Knapp, Acting General Counsel, to secretarial officers and modal administrators, “Treatment of the Economic Value of a Statistical Life in Departmental Analyses—2009 Annual Revision,” March 18, 2009. For a copy of this memorandum, see http://regs.dot.gov/docs/VSL%20Guidance%202008%20and%202009rev.pdf.

Department of Homeland Security

An official from the Department of Homeland Security (DHS) told CRS that the department does not have a written policy regarding the valuation of the expected health or safety benefits of its rules. When DHS was first established in 2003, he said the department tended to rely on DOT’s policies regarding how reductions in fatality and injury risks should be valued, particularly in those DHS agencies that were originally housed within DOT (e.g., the U.S. Coast Guard and the Transportation Security Administration (TSA)). As indicated later in this report, although DHS was created in 2003, some DHS agencies have continued to reference DOT’s VSL policy in rules that they issued in 2008 and 2009.

A June 2008 report prepared for U.S. Customs and Border Protection (CBP) within DHS stated that wage-risk studies “provide the most appropriate source for VSL estimates for application in the homeland security context.” The report recommended the use of a VSL of $6.1 million in 2007 dollars, with a 95% confidence interval of $4.8 million to $7.6 million. After adjustment of the estimates for changes in real income over time, the values rose to $6.3 million, with a range of $4.9 million to $7.9 million in 2008 dollars. Also, because available evidence suggests that the public may be willing to pay more to avoid the risk of terrorism, the report suggested that DHS may wish to conduct a sensitivity analysis with a mean value of $12.6 million (i.e., twice the $6.3 million estimate used in the main analysis).

At least one other agency within DHS has used the CBP report to establish a VSL. In a December 2008 proposed rule, the Coast Guard estimated that the total discounted benefits (injuries and fatalities) resulting from 68 marine casualty cases between 1996 and 2003 were between $24.7 million and $30.6 million, using the $6.3 million VSL recommended in the CBP report at discount rates of 7% and 3%. The Coast Guard also used the $6.3 million VSL in a break-even analysis showing the extent to which the risk of casualty would have to be reduced for benefits to equal costs.

Environmental Protection Agency

The Environmental Protection Agency (EPA) issued its first guidance on the valuation of mortality and morbidity risks in December 1983. The guidance said that if mortality risks are to

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68 According to the Bureau of Labor Statistics’ inflation calculator, these values were virtually the same in 2009.
be assessed directly, then a range of values should be used to determine the sensitivity of the results to those values, and noted workplace studies that suggest VSLs ranging from $0.4 million to $7.0 million (in 1982 dollars). The guidance also said that illnesses should be valued by measuring their direct costs (e.g., medical costs and lost wages), but cautioned that this approach underestimates benefits and should be treated as a lower bound. EPA updated and reprinted the guidance in 1991.

EPA's current policies on the valuation of health risks are contained in the agency’s Guidelines for Preparing Economic Analyses, which was published in September 2000. The guidelines were reportedly based on 26 studies published between 1974 and 1991, most of which were market studies that examined the additional compensation that workers received for additional risk. With regard to mortality risks, after discussing the academic literature on the valuation of statistical life estimates (with mean values ranging from $0.7 million to $16.3 million in 1997 dollars), the document states that “EPA recommends a central estimate of $4.8 million (1990$), updated to the base year of the analysis. For example, updating this figure for inflation produces an estimate of $6.1 million in 1999 dollars.” Although EPA has not changed its guidance since 2000, further updating that central estimate for inflation indicates that it was nearly $7.9 million in 2009.

The EPA guidelines also state that “it is important to consider differences in the nature of the base and policy cases,” and that for fatal risks these differences fall into two major categories: (1) differences in the characteristics of the population (e.g., age/longevity and health status); and (2) differences in the characteristics of the risks being valued (e.g., whether the risk is voluntary or involuntary, and whether the risk is delayed or immediate). In summary, the guidelines say the following:

Due to current limitations in the existing economic literature, these guidelines conclude that an appropriate default approach for valuing these [mortality risk reduction] benefits is provided by the central VSL estimate described earlier. However, analysts should carefully present the limitations of this estimate. Economic analyses should also fully characterize the nature of the risk and populations affected by the policy action and should confirm that these parameters are within the scope of the situations considered in these guidelines. While a qualitative discussion of these issues is generally warranted in EPA economic analyses, analysts should also consider a variety of quantitative sensitivity analyses on a case-by-case basis as data allow.

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75 Guidelines for Preparing Economic Analyses, p. 90.
77 Guidelines for Preparing Economic Analyses, pp. 93-94.
Valuation of Prevented Illnesses and Injuries

With regard to the valuation of preventing illnesses and injuries, the EPA guidance states that analysts must consider a more diverse set of issues than in mortality valuation. For example, the nature of any illnesses or injuries vary with respect to their severity, discomfort, duration, and the availability of existing value estimates. After discussing available methods for estimating morbidity values (e.g., measuring the actual avoided cost of illness, averting behavior, and stated preference methods), the guidance concludes that all of them have certain shortcomings. It goes on to say that “addressing these shortcomings explicitly, conducting appropriate sensitivity analysis, and clearly stating assumptions can greatly enhance the credibility of the benefits analysis.” In contrast to the valuation of mortality, the EPA guidance does not recommend the use of a central monetary estimate, or multiple estimates, for the valuation of non-fatal health effects.

EPA Science Advisory Board Recommendations

In October 2007, in response to a request from EPA’s National Center for Environmental Economics, the EPA Science Advisory Board (SAB) sent a memorandum to the EPA administrator regarding “issues in valuing mortality risk reduction.” Among other things, the SAB said that before combining VSL estimates from different studies, the agency should identify important characteristics that are associated with differences in those estimates, and should establish criteria for what constitutes a set of acceptable empirical studies. The SAB also recommended that EPA “determine which studies are appropriate for estimating the VSL in a specific policy context, depending on the nature of the risk addressed by a policy and the population affected.” Only then, the SAB said, could appropriate statistical techniques be used to combine the VSL estimates.

The SAB also said that both stated preference and revealed preference studies had particular strengths and weaknesses, and recommended that EPA not rely exclusively on either approach in all contexts. In addition, the SAB said it did not believe that the literature on the relationship between age and the VSL was “sufficiently robust to allow the Agency to use a VSL that varies with age,” and that the use of a constant VSLY (which assumes that the VSL is strictly proportional to remaining life expectancy) was “unwarranted.” (However, like Circular A-4, the SAB did not indicate how much VSLYs should vary, or even in what direction.) Finally, because reductions in the risk of death constitute most of the benefits from air pollution and drinking water regulations, the SAB urged EPA to fund more research on empirical estimates of the VSL.

Use of Lower VSL by EPA’s Office of Air and Radiation

In July 2008, the Associated Press reviewed EPA benefit-cost analyses for more than 12 years and concluded that the agency had reduced the VSL it used in the agency’s air office regulations. A

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78 For example, the guidance says that the cost-of-illness method captures only certain expenses, and should be considered the lower bounds of willingness-to-pay.
79 Guidelines for Preparing Economic Analyses, p. 98.
80 See http://www.epa.gov/sab/pdf/sab-08-001.pdf for a copy of this memorandum and report.
81 Ibid., p. 1.
82 Seth Borenstein, “An American Life Worth Less Today,” Connecticut Post, July 10, 2010; and “American Life (continued...)”
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separate analysis by a noted expert in the field reached a similar conclusion. According to that study, from 1996 until 2004, the EPA Office of Air and Radiation had consistently used a VSL of nearly $8 million (in 2008 dollars), but starting in 2004 the office began using $7 million (in 2008 dollars) for most of its rules. Meanwhile, EPA’s Office of Water reportedly used VSLs of $9 million in a 2005 rule and $8.5 million in a 2006 rule (both in 2008 dollars). Although critics of this VSL change suspected that the reduced values for air office rules were used to lower the expected benefits of the rules, EPA said the reductions were based on more current information about what individuals were willing to pay for risk reduction. EPA said that the air office used the results of three “meta-analyses” of the labor market literature on the VSL that were published after the agency’s guidelines were issued in 2000. The co-author of one of those studies ultimately questioned the reasoning behind that decision:

A possibly sound policy evaluation approach would be to select the average VSL estimate based on one of the three studies that EPA considered to have attributes that made it the most reliable estimate of the VSL. Instead, the EPA Air Office selected as its preferred VSL the midpoint of the 25th percentile of the estimates in [one study] and the 75th percentile of [another study]. This unusual mathematical formulation creates the illusion of precision but lacks any scientific basis.  

He went on to say that there were “substantial differences in methodology and the resulting estimates” in these studies, and raised broader questions about whether agencies’ choice of a VSL should be based on meta-analyses or more focused studies. According to EPA, the agency neither changed its official guidance on the use of VSL in rule-makings nor subjected the interim estimate to a scientific peer-review process through the Science Advisory Board (SAB) or other peer-review group. While the Agency is updating its guidance by incorporating the most up-to-date literature and recent recommendations from the SAB-EEAC, it has determined that a single, peer-reviewed estimate applied consistently best reflects the SAB-EEAC advice until updated guidance is available. Therefore, EPA has decided to return to the value established in the 2000 Guidelines for all its actions until a revised estimate can be fully vetted within the Agency and by EPA’s Science Advisory Board.

Legislative Reaction to EPA’s Lowered VSL

In reaction to the concerns expressed about the lowered VSL at EPA, Senator Barbara Boxer introduced the “Restoring the Value of Every American in Environmental Decisions Act” (S. 3564, 110th Congress). The bill was ordered to be reported by the Senate Committee on (...continued)

84 Ibid., pp. 115-117. Viscusi co-authored one of the three studies that the EPA air office used to reset the VSL. EPA also said that the estimate was based on these three studies in its “Frequently Asked Questions on Mortality Risk Valuation,” available at http://yosemite.epa.gov/ee/epa/eed.nsf/webpages/MortalityRiskValuation.html#adjustments.
85 Ibid., p. 116.
86 Ibid.
Environment and Public Works in September 2008, but it was not subsequently voted on by the Senate. Among other things, the bill would have required the administrator of EPA to (1) not reduce the agency’s VSL below the highest value of statistical life used in a decision making before the enactment of the legislation; and (2) increase that value at least once each year, by adjusting the value to reflect the average annual total compensation of individuals, the average capital that may be liquidated upon the death of an individual, and the value of nonpaid activities. It would have also prohibited the EPA administrator from decreasing the VSL based on age, income, race, illness, disability, date of death, or any other personal attribute or relativistic analysis of the value of life.” Finally, the bill would have required the administrator to (1) ensure that the process for establishing a value of statistical life is open to the public; and (2) provide to specified congressional committees, concurrently with public notice, any proposed revision of a VSL.

Department of Health and Human Services

An official in the Executive Secretariat within the Department of Health and Human Services (HHS) told CRS that he was not aware of any department-wide policy governing the valuation of mortality or morbidity risks in rulemaking.88 He described HHS as similar to a “holding company” of federal agencies, and suggested contacting each agency in the department to determine whether they had any agency-specific VSL policies.

An official in the Food and Drug Administration (FDA) within HHS said that FDA did not have written policies in this regard, and said that the agency tended to follow EPA policies.89 A 2007 article also indicated that FDA did not have formal internal guidance on this issue, but “applies a similar approach across many of its rules.”90 Examining rules issued between 2003 and 2005, the article indicated that FDA often used a VSL of $5 million for premature mortality, and only occasionally adjusted its VSL estimates for scenario differences or used alternative VSLY estimates for mortality risks. VSLY estimates were reportedly a key component in FDA valuations of non-fatal risk reductions, however, with the agency using values ranging from $100,000 to $500,000 per life-year.91

An official in the Centers for Medicare and Medicaid Services (CMS) said that she had researched the issue in conjunction with the development of a 2008 CMS rule on automatic sprinkler systems and was unaware of any CMS-specific policies in this area.92 As discussed more fully later in this report, CMS said in the 2008 rule that it used VSL and life-year estimates derived from a 2006 FDA rule on patient examinations and surgeons’ gloves.93 In that rule, FDA

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88 Telephone conversation between the author and John Gallivan, Executive Secretariat, Department of Health and Human Services, January 27, 2010.
89 Telephone conversation between the author and Clark Nardinelli, Food and Drug Administration, January 27, 2010.
91 Ibid.
92 Telephone conversation between the author and Danielle Shearer, CMS, January 27, 2010. Ms. Shearer was a listed contact for a CMS rule on “Medicare and Medicaid Programs; Fire Safety Requirements for Long Term Care Facilities, Automatic Sprinkler Systems,” 73 Federal Register 47075, August 13, 2008.
started with a VSL of $5 million, but then calculated a quality-adjusted life-year value of between $213,000 and $373,000 (at 3% and 7% discount rates, respectively).

**Occupational Safety and Health Administration**

According to an official in the Occupational Safety and Health Administration (OSHA), the agency does not have a written policy on the valuation of mortality or morbidity risks. He said the clearest explanation of what OSHA does in this area was provided in a February 2006 rule on occupational exposure to hexavalent chromium, a substance that is believed to cause lung cancer in workers. The rule established an eight-hour average exposure limit of five micrograms of hexavalent chromium per cubic meter of air, which was estimated to prevent 1,782 to 6,546 lung cancers over the working lifetime of the current worker population.

In that rule, OSHA said it could not use benefit-cost analysis as a basis for determining the permissible exposure limits for a health standard, so the agency said that it estimated the monetary value of the rule’s health benefits “for informational purposes only.” To estimate those benefits, OSHA said it had reviewed the approaches that other agencies used and decided to adopt EPA’s approach of valuing each premature fatality avoided at $6.8 million. OSHA said that it did so because “occupational illnesses are analogous to the types of illnesses targeted by EPA regulations.”

For nonfatal cases of lung cancer, OSHA decided to use EPA’s “cost of illness” approach as the lower bound value of nonfatal cases of lung cancer, updated to 2003 and with values for lost productivity added ($188,502). For the upper-bound value of nonfatal lung cancer, OSHA used an EPA “willingness to pay” value of 58.3% of the value of a fatal cancer (0.583 times $6.8 million, or nearly $4 million). OSHA also assigned monetary values to other health effects of occupational exposure to hexavalent chromium (e.g., dermatitis) using a “cost of illness” approach plus lost productivity, but did not attempt to place a value on reductions in other health effects (e.g., nasal perforations and ulcerations) due to insufficient data.

**Summary of Agencies’ VSL Policies**

Table 2 below summarizes the selected agencies’ VSL policies. Only DOT and EPA reported having a written policy, and their base VSLs varied by nearly $2 million (in 2009 dollars). The other agencies said they tend to use VSLs used in DOT, EPA, or other agencies and rules.

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94 Telephone conversation between the author and Robert Burt, Director, Office of Regulatory Analysis, OSHA, January 26, 2010.
98 Ibid.
How Agencies Monetize “Statistical Lives” Expected to Be Saved By Regulations

Table 2. Summary of Department/Agency VSL Policies

<table>
<thead>
<tr>
<th>Department/Agency</th>
<th>VSL Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Transportation</td>
<td>Policy requires base VSL of $6.0 million in 2009, with supplementary analyses at $3.2 million and $8.4 million (last set in 2008).</td>
</tr>
<tr>
<td>Department of Homeland Security</td>
<td>No department-wide policy. Some agencies (e.g., TSA) tend to follow DOT’s policy. A report to CBP in 2008 recommended base VSL of $6.3 million, with supplementary analyses at $4.9 million and $7.9 million.</td>
</tr>
<tr>
<td>Environmental Protection Agency</td>
<td>Policy requires base VSL of $6.1 million (in 1999 dollars, or $7.9 million in 2009 dollars).</td>
</tr>
<tr>
<td>Department of Health and Human Services</td>
<td>No department-wide policy. FDA has no policy, but tends to follow EPA’s VSL policy. CMS has no policy, but in 2008 used $5 million VSL from a 2006 FDA rule.</td>
</tr>
<tr>
<td>Occupational Safety and Health Administration</td>
<td>No agency-wide policy, but OSHA used EPA’s VSL of $6.8 million in a 2006 rule that reportedly describes OSHA’s general approach.</td>
</tr>
</tbody>
</table>

Source: CRS.

Valuation of Health Benefits in Selected Agency Rules

In addition to describing agencies’ written or unwritten policies regarding the valuation of health benefits in rulemaking, it is helpful to examine how those policies are carried out in the context of specific regulations. The rules discussed below were selected by searching the GPO Access database using the terms “statistical life” and “statistical lives,”99 and by examining a database of rules considered “major” under the Congressional Review Act.100 In most of the rules, the issuing agency stated in the preamble to the rules what VSL, VSLY, or other monetization method was used to determine the value of anticipated health benefits. In other cases, however, the agencies did not clearly indicate in the preamble what VSL or VSLY was used, but those values could be determined from the information provided, or from the regulatory impact analysis in the rulemaking docket.

In most of the selected rules, the agencies used the monetized health benefits information to show whether the rules would produce positive net benefits (i.e., regulatory benefits that were greater than the costs). In other cases, the agencies used VSL estimates in break-even analyses, or to rule out a regulatory option. The agencies frequently indicated what central VSL or VSLY estimate was used, and sometimes used lower and higher estimates in a sensitivity analysis. In a few of the rules discussed below, although the agencies indicated that the rules would provide health benefits, the agencies did not monetize those benefits using VSLs or VSLYs.

100 See http://www.gao.gov/fedrules/.
Department of Transportation

Regulatory agencies within DOT monetized the expected health benefits of their rules relatively frequently, using VSLs that were relatively consistent with each other and with departmental policies (i.e., $5.8 million in 2008, and $6.0 million in 2009). Nevertheless, there were some differences in how the agencies used VSL information in their economic analyses.

FRA—Highway-Rail Grade Crossing Action Plans

A September 2, 2009, direct final rule issued by the Federal Railroad Administration (FRA) complied with a statutory mandate that DOT issue a rule to require the 10 states with the most highway-rail grade crossing collisions to develop action plans.101 The rule discussed the contents of the required action plans and time periods for implementation. FRA noted in the preamble to the rule that almost 4,200 grade crossing collisions in the 10 states with the most such accidents from 2006 through 2008 resulted in 546 fatalities and 1,666 injuries. FRA valued each fatality at $6.0 million per statistical life saved, and concluded that the total value of the statistical lives lost was $3.28 billion. Also, FRA “conservatively” assumed that all of the injuries were minor (i.e., did not require professional medical treatment), and valued each injury at $12,000 (i.e., 0.2% of the VSL), resulting in total estimated injury costs of nearly $20 million. In what was essentially a break-even analysis, FRA concluded that the monetized benefits of preventing one average accident (valued at $792,000) more than exceeded the total expected costs of the rule (estimated at between $217,000 and $326,000). The agency also said it was “reasonable to expect that such an incident may be prevented by implementing this rule.”102

NHTSA—Truck Tractor Air Brake Systems

A July 27, 2009, final rule that was issued by the National Highway Traffic Safety Administration (NHTSA) amended the federal motor vehicle safety standard on air brake systems to improve the stopping distance performance of truck tractors.103 The rule required most new heavy truck tractors to achieve a 30% reduction in stopping distance compared to currently required levels. NHTSA estimated that the rule would prevent an average of 227 fatalities and 300 serious injuries each year. In the net benefits analysis provided in the final regulatory impact analysis (but not discussed in the preamble to the rule), NHTSA valued injury and fatality benefits at $6.1 million per statistical life, and concluded that the net benefits ranged from $1.27 billion to $1.75 billion (depending on the brake system used and whether benefits are discounted at 3% or 7%).104 The


102 Ibid., p. 45339. On November 13, 2009, FRA removed this direct final rule and published a notice of proposed rulemaking that contained similar information. The agency said it had received one adverse comment regarding the direct final rule, and under FRA regulations, the agency was required to withdraw it and publish a proposed rule. For the removal, see U.S. Department of Transportation, Federal Railroad Administration, “State Highway-Rail Grade Crossing Action Plans,” 74 Federal Register 58560, November 13, 2009. For the proposed rule, see U.S. Department of Transportation, Federal Railroad Administration, “State Highway-Rail Grade Crossing Action Plans,” 74 Federal Register 58589, November 13, 2009.


preamble to the rule discussed the agency’s cost-effectiveness analysis, which estimated that the highest net cost per equivalent life saved would be $108,000 (i.e., much less than the $6.1 million VSL). In most scenarios, NHTSA concluded that the estimated value of just the property damages prevented exceeded the expected costs of the rule.

**NHTSA—Roof Crush Resistance**

As part of a comprehensive plan to reduce the risk of rollover crashes and the risk of death and serious injury, on May 12, 2009, NHTSA published a final rule that upgraded the agency’s safety standard in roof crush resistance in several ways (e.g., doubling the amount of force that the roof structure must withstand). The rule had been mandated by Section 10301 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU, P.L. 109-59), which required the Secretary to upgrade roof crush protection regulations.

NHTSA estimated that the rule would prevent 135 fatalities and 1,065 nonfatal injuries annually. The agency estimated the value of each prevented fatality at $6.1 million ($5.8 million as specified in DOT’s guidance at the time of the analysis plus $300,000 of “economic savings to represent the comprehensive societal benefit from preventing a fatality.”) NHTSA also translated the 1,065 nonfatal injuries expected to be prevented into 55 “fatality equivalents” (i.e., with each injury considered an average of about 5.2% of one fatality), yielding a total of 190 equivalent fatalities (156 at a 3% discount rate, and 125 at a 7% discount rate). Using these values, and estimating regulatory costs at $875 million to nearly $1.4 billion, NHTSA estimated the impact of the rule at between $6 million in net benefits and a net loss of $458 million. NHTSA also did an uncertainty analysis, and concluded that if each statistical life was valued at $8.7 million, the impact of the rule could range from $388 million in net benefits to a net loss of $151 million. On the other hand, if each statistical life was valued at $3.5 million, net losses could range from $376 million to $824 million. In a cost-effectiveness analysis, NHTSA concluded that the rule would cost from $6.1 million to $9.8 million per equivalent life saved.

**FMCSA—Intermodal Equipment Inspection**

On December 17, 2008, the Federal Motor Carrier Safety Administration (FMCSA) issued a final rule that, among other things, required intermodal equipment providers to (1) register and file a report with the agency; (2) establish a systematic inspection, repair, and maintenance program; and (3) maintain documentation of their maintenance program. The rule implemented Section 4118 of SAFETEA-LU, and made intermodal equipment providers subject to Federal Motor Carrier Safety Regulations for the first time.

(...continued)


106 U.S. Department of Transportation, Federal Motor Carrier Safety Administration, “Requirements for Intermodal Equipment Providers and for Motor Carriers and Drivers Operating Intermodal Equipment,” 73 Federal Register 76814, December 17, 2008. “Intermodal equipment” is an international freight system that permits transshipment among sea, highway, rail, and air modes of transportation.
Although FMCSA said the rule was expected to save lives and prevent injuries, the preamble to the rule did not specifically discuss monetization of those health benefits. Instead, the agency said it did a “threshold” (breakeven) analysis because of a lack of data that specifically identified crashes associated with hauling intermodal freight. In that analysis, FMCSA said it had computed crash costs using a VSL of $5.8 million (“in accordance with DOT guidance”), and estimated the average cost of a truck crash involving a truck tractor with a single semitrailer at $170,229.107 FMCSA said the net present value of a single crash avoided per year over 10 years, discounted at 7%, was about $1.25 million. The present value of compliance costs over the same period (also discounted at 7%) were estimated at between $52.4 million and $285.4 million. Therefore, FMCSA said the final rule would need to prevent between about 40 and 230 crashes per year to yield positive net benefits ($52.4 million divided by $1.25 million equals 41.9; $285.4 million divided by $1.25 million equals 229.6).

**FMCSA—New Entrant Safety Audits**

On December 16, 2008, FMCSA issued a final rule that, among other things, raised the standard of compliance for passing the new entrant safety audit, and identified 16 regulations that are required elements of basic safety management controls needed to operate in interstate commerce.108 FMCSA estimated that the rule would eliminate nearly 40,000 crashes over 10 years, avoiding a total of 487 fatalities. To monetize these expected health benefits, the agency used a baseline VSL of $5.8 million, but also used $3.2 million and $8.4 million as part of a sensitivity analysis. FMCSA concluded that “even the lowest [VSL] still results in strong positive net benefits.” For example, using a $3.2 million VSL and a 7% discount rate resulted in five times more benefits than costs. At the other extreme, using an $8.4 million VSL and a 7% discount rate yielded nearly 11 times more benefits than costs.

**FMCSA—Hours of Service for Commercial Drivers**

On November 19, 2008, FMCSA adopted as final a December 17, 2007, interim final rule concerning hours of service for commercial motor vehicle drivers.109 Among other things, the rule allowed drivers to continue to drive up to 11 hours within a 14-hour window, following at least 10 consecutive hours off duty. FMCSA conducted a sensitivity analysis in which it (among other things) increased the VSL from $5.5 million to more than $10 million (which the regulatory impact analysis described as “the upper limit of the range recommended by OMB”). Although the change resulted in increased safety benefits related to costs, FMCSA said that “none of these changes in individual assumptions made elimination of the 11th driving hour cost beneficial.” However, there was no discussion in the preamble to the rule about the monetized health benefits of the regulatory option selected.

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107 This estimate was derived from a December 2006 study that included medical costs, pain and suffering, quality of life adjustments, and lost productivity. See footnote 15 of the rule at 73 Federal Register 76816.

108 U.S. Department of Transportation, Federal Motor Carrier Safety Administration, “New Entrant Safety Assurance Process,” 73 Federal Register 76472, December 16, 2008. According to the rule, “new entrants” include motor carrier owners and operators who are granted new operating authority. Congress mandated increased oversight of new entrants because studies indicated these operators had a much higher rate of non-compliance with basic safety management requirements and were subject to less oversight than established operators.

Department of Homeland Security

In many of the rules that DHS has issued in recent years, the department did not monetize or quantify its estimates of regulatory benefits. For example, in its April 2007 rule on “Chemical Facility Anti-Terrorism Standards,” DHS estimated the cost of the rule to be $3.6 billion during the period from 2006 through 2009, and $8.5 billion from 2006 through 2015. DHS described the benefits of the rule in qualitative terms (e.g., increased ability of site personnel to detect, delay, and respond to unauthorized access to facilities). There was no discussion of a benefit-cost analysis or break-even analysis, and the listing of supporting material in the rulemaking docket contained no references to such studies.

In the rules described below, DHS agencies used VSLs to monetize possible health benefits as part of a break-even analysis. In response to comments about one such analysis, the agency issuing the rule said the following:

A break-even analysis is not a traditional benefit-cost ratio. The qualitative description of benefits ... is appropriate as no assertion is made of an exact level. All DHS components are working hard to improve the methods of presenting security benefits in relationship to costs. The very nature of terrorism makes it impossible to assign traditional probabilities to events or to describe a risk as a specific probability. At present, the break-even analysis balances the need to present comparable methodologies among rules while not disclosing any highly sensitive intelligence.

TSA—Air Cargo Screening

A September 16, 2009, Transportation Security Administration (TSA) final rule implemented a statutory requirement in Section 1602 of the 9/11 Commission Act of 2007 (P.L. 110-53) that the agency establish a system to screen 100% of cargo transported on passenger aircraft by August 2010. The rule required affected passenger aircraft operators to ensure that either an aircraft operator or certified cargo screening facility does so in accordance with TSA standards (or TSA itself would screen all cargo). TSA assessed the benefits of the rule through a break-even analysis of the cost of the reduction in risk with the dollar amount of the benefit of the rule in four attack scenarios involving: (1) a standard narrow body aircraft and 119 fatalities, (2) an average U.S. commercial passenger aircraft and 133 fatalities, (3) an average U.S. commercial passenger wide-body aircraft and 210 fatalities, and (4) four wide body aircraft and 840 fatalities.

TSA used a $5.8 million VSL in its analysis (citing DOT’s policy), and concluded that for the benefits of the rule to equal costs (estimated at $276.9 million per year after discounting at 7%), the rule would have to stop one attack (1) every 2.6 years in the first scenario, (2) every 2.8 years in the second scenario, (3) every 4.5 years in the third scenario, or (4) every 18.2 years in the fourth scenario.

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100 For example, in its annual reports to Congress on the costs and benefits of federal rules, OIRA has frequently noted that most homeland security rules do not have quantified or monetized estimates of benefits. See, for example, http://www.whitehouse.gov/omb/assets/legislative_reports/2009_final_BC_Report_01272010.pdf.


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fourth scenario. Although TSA said the rule would provide “increased security of commercial passenger aviation,” the agency did not indicate that the rule would, in fact, prevent any of the four types of attack.

TSA—Secure Flight Program

On October 28, 2008, TSA published a final rule implementing a requirement in Section 4012(a) of the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) that DHS assume the function of conducting pre-flight comparisons of airline passenger information to federal watch lists. In the preamble to the resulting “secure flight” rule, TSA estimated that it would cost air carriers and others an estimated $3.2 billion over 10 years (before discounting), but described the benefits in non-quantitative terms (e.g., more accurate, timely and comprehensive screening, and reducing redundancies between similar programs, in turn resulting in improvements in national security “through more efficient and targeted use of national resources”). TSA indicated that it had conducted a break-even analysis for the rule, but the results were not presented in the preamble.

In the break-even analysis provided in the rulemaking docket, TSA used three attack scenarios: (1) the destruction of an airplane and the loss of 132 lives; (2) the use of a large aircraft as a missile in a densely populated urban area, resulting in 3,000 fatalities and more than $21 billion in property damage; and (3) the use of an aircraft to deliver a nuclear or biohazard device to an urban center, resulting in more than $1 trillion in direct consequences from the loss of hundreds of thousands of lives and enormous property damage. Using the DOT VSL at the time of $5.8 million, TSA estimated that prevention of the lowest level attack would be worth nearly $790 million. At that rate, the analysis said that the rule would have to reduce the risk of attack by more than 40% for the rule’s benefits and costs to “break even.” On the other hand, the analysis said that if the rule prevented the much more catastrophic attack in the third scenario, the rule would only have to reduce the risk of attack by 0.03% for benefits to equal costs. TSA did not indicate in either the preamble to the rule or the sensitivity analysis whether the agency believed the rule would prevent any of the three types of attack.

CBP—Transmission of Manifests on Private Flights

On November 18, 2008, U.S. Customs and Border Protection (CBP) published a final rule that (among other things) required private aircraft pilots or their designees arriving in the U.S. from a foreign port or location, or departing from the U.S. to a foreign port or location, to transmit electronically to CBP passenger manifest information for each individual on board. The agency said that key data were not available to estimate the reduction in the probability of a successful terrorist attack, the consequences of the avoided event, or individuals’ willingness to pay for risk reduction. Therefore, the agency conducted a break-even analysis to determine what change in the reduction of risk would be necessary for the benefits to exceed the cost. CBP used two estimates

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114 Ibid. This rule is related to an August 23, 2007, rule issued by CBP that is discussed elsewhere in this report.
115 Ibid., p. 64052.
116 Loss of life was valued at $766 million (132 lives times $5.8 million), and loss of the aircraft was valued at $22 million.
of the VSL ($3 million and $6 million), four attack scenarios, and four levels of casualties within each VSL. The results indicated when the VSL is $3 million and the attack resulted in four deaths, the rule would have to reduce annual risk by 184%. (The agency said it recognized that reductions in risk of more than 100% are not possible.) At the other extreme, when the VSL is $6 million and the attack resulted in 1,000 casualties and catastrophic loss of property, CBP said that the rule would have to reduce risk by less than 1% for the costs to equal the benefits.

CBP—Transmission of Manifests on Commercial Flights

On August 23, 2007, CBP published a final rule amending its regulations concerning electronic manifest transmission requirements relative to travelers (e.g., passengers and crew members) onboard international commercial flights and voyages arriving in and departing from the U.S. CBP said that key data were not available to estimate the rule's reduction in the probability of a successful terrorist attack, the consequences of the avoided event, or individuals' willingness to pay for risk reduction. Therefore, the agency conducted a break-even analysis to determine what change in the reduction of risk would be necessary for the benefits to exceed the cost. CBP used two estimates of the value of a statistical life ($3 million and $6 million), three attack scenarios, and five levels of casualties within each VSL. The results indicated that when the VSL was $3 million and the attack resulted in 100 deaths, the rule would have to reduce annual risk by as much as 44% for net costs to equal benefits. At the other extreme, when the VSL was $6 million and the attack resulted in 3,000 deaths and catastrophic loss of property, the rule would have to reduce risk by as little as 0.2% in order for net costs to equal benefits. In an accounting statement included with the rule, CBP estimated 10-year monetized costs of the rule at $126.8 million (in 2005 dollars), and estimated the 10-year monetized benefits at $15 million, plus unquantified "enhanced security" benefits.

Environmental Protection Agency

Nonroad Spark-Ignition Engines

An October 8, 2008, EPA final rule established emission standards for new nonroad spark ignition engines (e.g., marine engines and garden equipment). EPA estimated that by the year 2030, reductions in emissions would annually prevent 230 premature deaths related to particulate matter, between 77 and 350 premature deaths related to ozone, and approximately 1,700 hospitalizations and emergency room visits. Total annual benefits in 2030 were estimated at between $1.6 billion and $4.4 billion, and costs in 2030 were estimated at about $190 million.

120 EPA also presented other estimates of the rule’s health effects, but the values cited here were those cited in the rule summary. For example, a “Six-Cities study" indicated that the rule would prevent 510 particulate matter premature fatalities in the year 2030, and experts reportedly said the number of such deaths could be anywhere between 120 and 1,300.
Although EPA did not specifically indicate in the preamble to the rule what VSL was used to monetize the benefits from reductions in premature mortality or morbidity, the agency provided estimates of the number of those effects and the dollar values associated with each estimate. For example, the 230 premature deaths related to particulate matter that were expected to be prevented in 2030 were valued (in 2005 dollars) at $1.6 billion. Therefore, it appears that the agency effectively used a VSL of nearly $7 million ($1.6 billion divided by 230) to value these averted deaths. EPA appears to have used VSLs of about $7.5 million for averted deaths related to ozone. EPA appears to have valued the prevention of a case of chronic bronchitis in 2030 at $500,000 (220 cases valued at a total of $110 million), and valued the prevention of an acute, non-fatal heart attack that year at about $98,000 (530 cases valued at a total of $52 million).122

### Locomotive Engine Emissions

On June 30, 2008, EPA issued a rule on “Control of Emissions of Air Pollution from Locomotive Engines and Marine Compression-Ignition Engines Less Than 30 Liters per Cylinder.” EPA estimated that by the year 2030, the reductions in particulate matter as a result of the rule would prevent up to 1,100 premature deaths per year, 280 premature ozone-related deaths, and would provide other non-fatal health benefits. The agency valued these annual health benefits in 2030 at between $9.2 billion and $11 billion, assuming a 3% discount rate; and at between $8.4 billion and $10 billion, assuming a 7% discount rate. The projected costs of the rule in 2030 were estimated at $740 million.

EPA did not specifically indicate in the preamble to the rule what VSL was used to monetize the benefits from reductions in premature mortality or morbidity. However, the agency provided estimates of the number of those effects and the dollar values associated with each estimate. For example, the estimated 1,100 premature deaths averted in 2030 because of reduced particulate matter were valued at $8.1 billion (in 2006 dollars, using a 3% discount rate), or about $7.4 million per averted death. EPA valued 2,500 prevented acute, non-fatal heart attacks at $260 million, or just over $100,000 per attack, and valued the prevention of 680 cases of chronic bronchitis at $340 million, or $500,000 per case.

### Stationary Spark Ignition Engines

In a January 18, 2008, EPA rule on “Standards of Performance for Stationary Spark Ignition Internal Combustion Engines and National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines,” EPA used a different approach to monetize human health benefits. Rather than placing an explicit or implicit value on statistical lives or illnesses,

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121 For example, EPA valued the low-end estimate 77 premature deaths averted from ozone at $590 million (in 2005 dollars), or about $7.7 million per death. EPA valued the high-end estimate of 350 premature deaths averted from ozone at $2.6 billion, or about $7.4 million per death.


124 Ibid., pp. 37178-31180. Using a 7% discount rate, the 1,100 averted deaths were valued at $7.3 billion, or about $6.6 million per averted death.

EPA used what it termed a “benefits transfer approach” that it had used in an earlier air pollution rule. In this rule, EPA estimated the expected reductions in ozone emissions (77,362 tons), placed a dollar value on each ton of emissions ($2,800), and calculated the monetized benefits that were expected to result from the rule by 2015 ($220 million in 2005 dollars, using a 3% discount rate). Annualized costs were estimated to be $22 million. Although EPA indicated that the benefits estimate was based on a mortality estimate in an earlier study of particulate matter, and although the agency indicated in the regulatory impact analysis that premature mortality typically accounts for at least 90% of total benefits, EPA did not indicate how many deaths were expected to be avoided or place a monetary value on such deaths.

### Lead Exposure in Renovation, Repair, and Painting

On April 22, 2008, EPA issued a final rule addressing “hazards created by renovation, repair, and painting activities that disturb lead-based paint in target housing and child-occupied facilities.” Among other things, the rule established requirements for training renovators and others, certifying these firms, renovation work practices, and recordkeeping requirements. Among the benefits discussed in the rule was the avoidance of IQ loss in 1.4 million children under the age of six through reduced lead exposure.

EPA estimated the 50-year annualized cost of the rule at $400 million when using either a 3% or 7% discount rate. EPA estimated the 50-year annualized benefits of the rule to children at $700 million to $1.8 billion using a 7% discount rate. Although EPA did not indicate in the preamble to the rule the annual benefits of not losing IQ points, it appears to be about $500 to $1,300 per child ($700 million to $1.8 billion divided by 1.4 million children). In the regulatory impact analysis in the rulemaking docket, EPA said that it estimated the economic value of avoiding lost IQ points “by using an estimate of the foregone lifetime income due to IQ point loss. The estimated value per IQ point lost is $8,346 (1995 dollars).” In a sensitivity analysis, EPA also valued each IQ point at $6,847.

(...continued)


126 Ibid., p. 3587. EPA cited the technical supporting document accompanying the agency’s 2007 benefits analysis of the proposed changes to the National Ambient Air Quality Standards for Ozone.

127 EPA used a similar approach in another 2008 rule. See U.S. Environmental Protection Agency, “Standards of Performance for Petroleum Refineries,” 73 Federal Register 35838, June 24, 2008, at pp. 35861-35862. The agency estimated the number of tons of emissions expected to be reduced as a result of the rule, placed a monetary value on each ton for each pollutant, and calculated a total benefit.


129 EPA said that data were insufficient to develop dose-response functions for other health effects in children or for pregnant women, and the benefits of avoided exposure to 5.4 million adults were not quantified due to uncertainties about their exposure.

Department of Health and Human Services

FDA—Manufacturing Practices for Dietary Supplements

On June 25, 2007, FDA issued a final rule establishing minimum current good manufacturing practices necessary for activities related to manufacturing, packaging, labeling, or holding dietary supplements to ensure their quality. Using data on the number of recalls per year, FDA estimated that the rule would have reduced 1,180 acute illnesses per year during the 1990 through 1999 period, and estimated the average value of preventing each such illness at $33,800. FDA assumed that the benefits for the average year for this period represented the annual average benefits that could be expected in the future. Therefore, the monetized benefits from fewer acute illnesses totaled nearly $40 million (1,180 illnesses times an average of $33,800 per illness)—more than 90% of the rule’s central estimate of $44 million in benefits. FDA estimated the baseline annual costs of the rule at about $164 million.

In a discussion of “uncertainties in the analysis,” FDA said it assumed $5 million as the VSL and $300,000 as the value of a quality-adjusted life year in calculating its $40 million baseline estimate of the rule’s health benefits. In a sensitivity analysis, FDA also used values of $3 million for a statistical life and $100,000 for a quality-adjusted life year to generate a “low” estimate of health benefits, and values of $7 million and $500,000 to generate a “high” estimate. The agency also used alternative assumptions of regulatory costs. In each scenario, the costs of the rule far exceeded the quantified benefits. FDA said that many benefits could not be quantified, however, and stated that the total benefits of the rule justified the costs.

FDA—Identification of Hepatitis C Donors

On August 24, 2007, FDA published a final rule that (among other things) required establishments collecting whole blood or blood components to establish, maintain, and follow an “appropriate system” for identifying donations from someone who tests reactive for hepatitis C infection in a subsequent donation. The rule also revised the HIV “lookback” requirements for consistency with the hepatitis C virus requirements, and extended the record retention requirements for 10 years. FDA said it was taking this action to help ensure the safety of the blood supply, and to help ensure that recipients of infected blood were aware of these issues.

132 To monetize these illnesses, FDA used a base estimate of $300,000 for a quality-adjusted life year, which was converted to $822 per quality-adjusted life day ($300,000 divided by 365). In some cases, the cost of an acute illness was roughly equivalent to the VSL. For example, FDA valued a case of spina bifida at $5 million ($4.5 million in lost quality-adjusted life years plus $500,000 in direct medical costs).
133 “Current Good Manufacturing Practice in Manufacturing, Packaging, Labeling, or Holding Operations for Dietary Supplements,” p. 34936.
134 For example, at the low estimate, annual quantified benefits were $36 million and annual costs were $109 million. At the high estimate, annual quantified benefits were $54 million, and annual costs were $260 million.
By allowing recipients of the infected blood to be treated, the agency estimated that the rule would provide one-time benefits of 2,640 quality-adjusted life years with an estimated discounted value of between $264 million (at $100,000 per quality-adjusted life year) to $1,228 million (at $465,000 per quality-adjusted life year). FDA said it used the $100,000 figure as a lower bound, and derived the $465,000 value by starting with a $10 million VSL and annualizing it over 35 years at a 3% discount rate. A more central $300,000 value for a quality-adjusted life year (derived by annualizing a $6.5 million VSL over 35 years at 3%) yielded one-time benefits of $792 million, with annualized net benefits of $82.5 million. FDA also did a cost effectiveness analysis, showing that the present value of all costs ($87.6 million) divided by the anticipated number of quality-adjusted life years gained (2,640) results in a cost per quality-adjusted life year of $33,200.

FDA—Warning and Labels for Certain Over-the-Counter Drugs

On April 29, 2009, FDA published a final rule requiring new warnings and labels for certain over-the-counter drugs (e.g., acetaminophen and NSAIDs), informing consumers about the risks of liver injury and stomach bleeding.\footnote{U.S. Department of Health and Human Services, Food and Drug Administration, “Organ-Specific Warnings; Internal Analgesic, Antipyretic, and Antirheumatic Drug Products for Over-the-Counter Human Use; Final Monograph,” 74 Federal Register 19385, April 29, 2009.} The agency estimated that there were about 100 deaths per year related to unintentional acetaminophen overdose, estimated that the rule would prevent one to three of those deaths per year, and monetized those expected benefits by using a VSL of $5 million (in 2001 dollars). FDA said it used the $5 million VSL because it had done so in a rule issued in January 2001.\footnote{The rule that was referenced was U.S. Department of Health and Human Services, Food and Drug Administration, “Hazard Analysis and Critical Control Point (HAACP); Procedures for the Safe and Sanitary Processing and Importing of Juice,” 66 Federal Register 6137, January 19, 2001.} The agency also monetized expected reductions in illnesses related to unintentional overdosing at between $0.6 million to $1.8 million per year. Therefore, the total monetized value of prevented illnesses and death were estimated at $5.6 million to $16.8 million per year. The one-time cost of the rule to industry was estimated at $32 million (in 2001 dollars).

FDA concluded that, over a 10-year period, the benefits of the rule would exceed the costs even with the most conservative estimates of health effects and the highest discount rate. For example, using the lowest estimates of mortality and morbidity effects (i.e., preventing one death per year and $0.6 million in illness benefits), the 10-year benefits would be $41.2 million (in 2001 dollars), more than the $32 million in estimated costs.\footnote{“Organ-Specific Warnings; Internal Analgesic, Antipyretic, and Antirheumatic Drug Products for Over-the-Counter Human Use; Final Monograph,” p. 19405.} Because of the uncertainty in its estimates of the health effects of the rule, FDA also did a break-even analysis and determined that the rule would have to prevent less than one death each year over 10 years (0.9 deaths at a 7% discount rate and 0.7 deaths at a 3% discount rate) for the benefits to equal costs. Alternatively, if no deaths are prevented, FDA said that the rule would need to prevent 407 to 476 hospitalizations per year (using a 3% or a 7% discount rate, respectively) to reach the “break even” point.\footnote{Ibid., p. 19406.}
On June 30, 2009, FDA published a corrected benefits-cost comparison that reached somewhat different conclusions. The agency increased the estimated 10-year costs of the rule from $32 million to nearly $80 million (in 2007 dollars), and used both a $5 million and a $7 million VSL. Using the most conservative assumptions of regulatory benefits (e.g., the $5 million VSL), FDA concluded that the annualized costs of the rule exceeded the annualized benefits. However, at the mid- and upper-end of the benefits range (e.g., using the $7 million VSL), the agency said that the benefits exceeded the costs. FDA also corrected the break-even analysis, saying that for benefits to equal costs, the rule would need to prevent about two deaths each year over 10 years (up from less than one death per year in the original rule), or 928 to 1,058 hospitalizations each year (up from 407 to 476 in the original rule).

**FDA—Prevention of Salmonella Enteritidis in Shell Eggs**

On July 9, 2009, FDA published a final rule requiring shell egg producers to implement procedures to prevent Salmonella Enteritidis (SE) from contaminating eggs on the farm or growing during storage and transportation, and to maintain certain records and register with the agency. FDA said it was taking this action because SE was one of the leading causes of foodborne illnesses in the U.S., and shell eggs are a primary source of human SE infections. To monetize the expected reduction in SE health consequences, the agency used two VSLs ($5 million and $6.5 million) to value expected reductions in death, three VSLYs ($100,000, $300,000, and $500,000) to value expected reductions illnesses and arthritis cases at different levels of severity and duration, and two discount rates (3% and 7%). The expected value of a typical case of SE ranged from $7,600 to $49,500 (depending on which VSL, VSLY, and discount rate was used), so FDA used $17,900 as a central estimate (based on a VSL of $5 million, VSLY of $300,000, and a discount rate of 7%). Ultimately, FDA estimated that the rule would prevent 79,170 SE cases per year, and the rule would cost about $1,000 per case—much less than the expected $17,900 value of an SE related illness. Also, the agency estimated that the rule would cost between $9,300 and $16,100 per life-year saved—much less than the most conservative estimate used ($100,000). Using the central estimate assumptions, FDA estimated that the rule would provide annual net benefits of more than $1.4 billion.

**CMS—Automatic Sprinkler Systems in Long Term Care Facilities**

In an August 13, 2008, final rule, the Centers for Medicare and Medicaid Services (CMS) required that all long term care facilities be equipped with automatic sprinkler systems within five years of the date the rule was published, and required such facilities to maintain those systems after they are installed. CMS estimated that installing sprinklers in facilities without them would save five lives each year, and using data on the life expectancy of an average resident in

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141 Ibid., p. 31179. For example, at a 3% discount rate, annualized costs over 10 years were estimated at $9.4 million, and benefits were estimated at a low of $6.3 million, and a high of $23.7 million.


such facilities (6.6 years), calculated that the rule would save 33 life years annually (five lives saved times 6.6 years per life). Noting that a 2006 FDA rule had used a VSL of $5 million,144 CMS concluded that the annual life-saving benefits of the rule once all facilities are compliant would be approximately $25 million (five lives saved each year times $5 million per life). Over a 20-year period, CMS said that the undiscounted mortality benefits would be as much as $500 million (five lives times $5 million times 20 years). Also, noting that the 2006 FDA rule had valued each quality-adjusted life year at between $213,000 and $373,000, CMS assumed that the number of severe non-fatal injuries were equal to the number of life years, and estimated that the benefits from morbidity reduction ranged from $7 million to $10 million (33 life years times either $213,000 or $373,000). CMS ultimately estimated that the rule would provide total 20-year benefits of $722.4 million to $991.4 million, with total costs estimated at between $715.0 and $806.4 million (using discount rates of 7% and 3%, respectively).

Occupational Safety and Health Administration

Payment for Personal Protective Equipment

On November 15, 2007, OSHA published a final rule stating that, when an employer is required to provide employees with personal protective equipment (e.g., hard hats, gloves, goggles, and safety shoes), employers are generally required to do so at no cost to the employee.145 Using estimates of the number of injuries that were expected to be prevented by the rule for various body parts (e.g., eye, face and ear, hand and finger, foot and toe), OSHA estimated that the rule would prevent more than 6,700 injuries each year with an estimated “willingness to pay” value of more than $337 million (an average of nearly $50,000 per injury). The agency estimated that the rule would prevent 1.7 fatalities each year, which it valued at $7 million per fatality (totaling nearly $12 million). Therefore, the total monetized annual benefits were estimated at $349 million using the “willingness to pay” approach. OSHA also used the “direct cost” approach to value the benefits, and estimated the annual benefits at $228 million. The total annual cost of compliance to employers was estimated to be $85.7 million.

Electrical Standard

On February 14, 2007, OSHA issued a final rule revising the general industry electrical installation standard (Subpart S of 29 CFR Part 1910) for the first time since 1981.146 The rule centered on safety in the design and installation of electrical equipment in the workplace, and reflected changes in consensus standards that had more recently been updated. Focusing on just one type of electrical accident in seven states, OSHA estimated that the rule would save between one and two lives per year, which the agency valued at $6.1 million each (using EPA's VSL in 1999 dollars). Therefore, the monetized benefit of avoiding these deaths was estimated to be between $6.1 million and $12.2 million (or $7.2 million to $14.4 million in 2005 dollars). OSHA

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144 The rule that was referenced was U.S. Department of Health and Human Services, Food and Drug Administration, “Medical Devices: Patient Examination and Surgeon’s Gloves; Test Procedures and Acceptance Criteria,” 71 Federal Register 75865, December 19, 2006.


did not provide an estimate for the injuries that could be avoided by the rule. The agency estimated the cost of the rule for all employers at $9.6 million.

Summary of Monetization in Rules

Table 3 below summarizes the information provided above in narrative form. The information suggests that “statistical lives” that are expected to be saved by rules are valued somewhat differently across and within federal departments and agencies. The VSL estimates are also used by the agencies differently—sometimes to demonstrate that the rule provides net benefits at those levels of monetized health improvements, sometimes to demonstrate how effective a rule would have to be to yield net benefits, and sometimes to eliminate a regulatory option.

Table 3. Summary of Monetization of Health Benefits in Selected Rules

<table>
<thead>
<tr>
<th>Date</th>
<th>Department/Agency: Rule</th>
<th>VSL</th>
<th>Valuation of Injuries</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>09/02/09</td>
<td>DOT/FRA: Grade Crossing Plans</td>
<td>Used $6.0 million (M) VSL</td>
<td>Valued each injury “conservatively” at $12,000 (0.2% of VSL)</td>
<td>FRA concluded that the benefits of preventing one average accident would exceed the cost of the rule.</td>
</tr>
<tr>
<td>07/27/09</td>
<td>DOT/NHTSA: Air Brake Systems</td>
<td>Valued 227 prevented fatalities at $6.1M ($5.8M VSL + $300K in economic savings)</td>
<td>Translated 300 prevented serious injuries to 80 equivalent fatalities (26.7% of death)</td>
<td>Net benefits were estimated at $1.4B to $1.7B with the most likely braking system.</td>
</tr>
<tr>
<td>05/12/09</td>
<td>DOT/NHTSA: Roof Crush Resistance</td>
<td>Valued 135 prevented fatalities at $6.0M; $5.8M VSL + $300K in societal benefits. Also did uncertainty analysis using $3.5M and $8.7M for each prevented fatality.</td>
<td>Translated 1,065 prevented injuries to 55 “fatality equivalents” (each injury averaged 5.2% of death)</td>
<td>In most scenarios, the rule yields negative net benefits. Base net benefits ranged from -$458M to $6M. Cost-effectiveness (CE) analysis indicates rule will cost $6.1M to $9.8M per life saved. Rule was required by statute.</td>
</tr>
<tr>
<td>12/17/08</td>
<td>DOT/FMCSA: Intermodal Equipment Inspection</td>
<td>Used VSL of $5.8M in break-even analysis</td>
<td>N/A</td>
<td>Break-even analysis concluded that the rule would have to prevent between 40 and 230 crashes per year to yield positive net benefits.</td>
</tr>
<tr>
<td>12/16/08</td>
<td>DOT/FMCSA: New Entrant Safety Audits</td>
<td>Used base VSL of $5.8M; also used VSLs of $3.2M and $8.4M in sensitivity analysis</td>
<td>N/A</td>
<td>Analysis indicated strong positive net benefits even with lowest VSL and highest discount rate.</td>
</tr>
<tr>
<td>Date</td>
<td>Department/Agency: Rule</td>
<td>VSL</td>
<td>Valuation of Injuries</td>
<td>Other</td>
</tr>
<tr>
<td>-----------</td>
<td>----------------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>11/19/08</td>
<td>DOT/FMCSA: Hours of Service for Commercial Drivers</td>
<td>Used base VSL of $5.5M; used $10.0M VSL in sensitivity analysis</td>
<td>N/A</td>
<td>Analysis was used to eliminate the regulatory option of driving 11 hours.</td>
</tr>
<tr>
<td>09/16/09</td>
<td>DHS/TSA: Air Cargo Screening</td>
<td>Used VSL of $5.8M (citing DOT’s policy) and four attack scenarios in break-even analysis</td>
<td>N/A</td>
<td>Break-even analysis shows rule would have to avert one attack every 2.6 to 18.2 years for benefits to equal costs (depending on the attack scenario).</td>
</tr>
<tr>
<td>10/28/08</td>
<td>DHS/TSA: Secure Flight</td>
<td>Used VSL of $5.8M (citing DOT’s policy) and three attack scenarios in break-even analysis</td>
<td>N/A</td>
<td>Break-even analysis shows rule would have to reduce the risk of attack by 41%, 0.83%, or 0.03% for benefits to equal cost (depending on the attack scenario).</td>
</tr>
<tr>
<td>11/18/08</td>
<td>DHS/CBP: Transmission of Manifests on Private Flights</td>
<td>Used VSLs of $3.0M and $6.0M, four attack scenarios, and four levels of casualties within each VSL in break-even analysis</td>
<td>N/A</td>
<td>Break-even analysis shows rule would have to reduce risk by less than 1% to 184% for benefits to equal costs (depending on the VSL and attack scenario).</td>
</tr>
<tr>
<td>08/23/07</td>
<td>DHS/CBP: Transmission of Manifests on Commercial Flights</td>
<td>Used VSLs of $3.0M and $6.0M, three attack scenarios, and five levels of casualties within each VSL</td>
<td>N/A</td>
<td>Break-even analysis shows rule would have to be 0.2% to 44% effective for benefits to equal costs (depending on the VSL and attack scenario).</td>
</tr>
<tr>
<td>06/25/07</td>
<td>HHS/FDA: Dietary Supplements</td>
<td>N/A, but FDA noted it had used $5.0M in other rules. Some illnesses expected to be prevented were valued at that level (e.g., spina bifida).</td>
<td>Used $300,000 as base value of a quality-adjusted life year (QALY), adjusted to quality-adjusted life days ($822/day), with sensitivity analysis at QALYs of $100,000 and $500,000. Did not quantify chronic illnesses.</td>
<td>Estimated costs of rule were more than three times the monetized benefits. CE analysis shows $3.370 in costs per quality-adjusted life day.</td>
</tr>
</tbody>
</table>
### How Agencies Monetize “Statistical Lives” Expected to Be Saved By Regulations

<table>
<thead>
<tr>
<th>Date</th>
<th>Department/Agency: Rule</th>
<th>VSL</th>
<th>Valuation of Injuries</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>08/24/07</td>
<td>HHS/FDA: Identification of Donors with Hepatitis</td>
<td>N/A, although FDA said the $300,000 QALY was based on a VSL of $6.5M discounted at 3% over 35 years.</td>
<td>Used three values of QALYs ($100,000, $300,000, and $465,000). At $300,000, annual net benefits estimated at $82.5 million.</td>
<td>Cost-effectiveness analysis showed that present value of all costs was $33,200 per QALY (less than most conservative value of a QALY).</td>
</tr>
<tr>
<td>04/29/09</td>
<td>HHS/FDA: Over-the-Counter Drug Warnings</td>
<td>Used VSLs of $5.0M and $7.0M. Also used two estimates of rule effectiveness (1% and 3%), and two discount rates (3% and 7%).</td>
<td>Different illnesses valued at various levels. In break-even analysis, average hospitalization valued at $8,936 (lowest monetized value of poisoning at 7% discount rate).</td>
<td>At lower end of assumptions (1% effectiveness and $5M VSL), costs exceeded benefits. To break even, rule would have to prevent 2 deaths per year over 10 years, or 1,058 hospitalizations per year.</td>
</tr>
<tr>
<td>07/29/09</td>
<td>HHS/FDA: Prevention of Salmonella in Shell Eggs</td>
<td>Used VSLs of $5M and $6.5M.</td>
<td>Used VSLYs of $100,000, $300,000, and $500,000. Typical illness valued at $17,900.</td>
<td>Cost of the rule was estimated at $1,000 per case. CE analysis showed rule would cost $9,300 to $16,100 per life-year saved (less than most conservative VSLY).</td>
</tr>
<tr>
<td>08/13/08</td>
<td>HHS/CMS: Automatic Sprinkler Systems</td>
<td>Used VSL of $5.0M.</td>
<td>Used VSLYs of $213,000 to $373,000.</td>
<td>Estimated 20-year benefits of $722.4 million to $991.4 million; costs estimated at between $715.0 and $806.4 million.</td>
</tr>
<tr>
<td>11/15/07</td>
<td>DOL/OSHA: Personal Protective Equipment</td>
<td>Used VSL of $7.0M.</td>
<td>Average injury estimated at $50,000.</td>
<td>Annual benefits estimated at $349M. Using “direct costs,” benefits estimated at $228M. Costs estimated at $88.5M.</td>
</tr>
<tr>
<td>02/14/07</td>
<td>DOL/OSHA: Electrical Standard</td>
<td>Used VSL of $6.1M, based on EPA’s estimate in 1999 ($7.2M in 2007 dollars).</td>
<td>No estimate.</td>
<td>Annual mortality benefits estimated at $7.2M to $12.2M. Costs estimated at $9.6M.</td>
</tr>
<tr>
<td>10/08/08</td>
<td>EPA: Nonroad Spark-Ignition Engines</td>
<td>Appears to have used VSL of about $7.0M for particulate matter; $7.5M for ozone (in 2005 dollars).</td>
<td>Case of chronic bronchitis appears to be $500,000; acute, non-fatal heart attack appears to be $98,000.</td>
<td>Benefits in 2030 estimated at between $1.6B and $4.4B; costs were estimated at $980M.</td>
</tr>
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<tr>
<td>06/30/08</td>
<td>EPA: Locomotive Engine Emissions</td>
<td>Appears to have used VSL of about $7.4M for particulate matter.</td>
<td>Case of chronic bronchitis appears to be $500,000; acute, non-fatal heart attack appears to be $100,000.</td>
<td>Benefits in 2030 estimated at between $8.4 billion and $11.0 billion; costs were estimated at $740 million.</td>
</tr>
<tr>
<td>01/18/08</td>
<td>EPA: Stationary Spark Ignition Engines</td>
<td>Statistical lives saved not directly valued. Instead, EPA valued each ton of ozone emission reduced at $2,800.</td>
<td>Injuries not directly valued. Instead, EPA valued each ton of ozone emission reduced at $2,800.</td>
<td>Benefits by 2015 estimated at $220 million; costs were estimated at $22 million.</td>
</tr>
<tr>
<td>04/22/08</td>
<td>EPA: Lead-Based Paint Exposure</td>
<td>N/A</td>
<td>Avoided IQ loss by 1.4 million children under age 6 valued at up to $1.8 billion per year or about $500 to $1,300 per child. (No estimate for 5.4 million affected adults.)</td>
<td>The 50-year annualized net benefits were estimated at $300 million to $1.3 billion per year.</td>
</tr>
</tbody>
</table>

Source: CRS, based on information provided in agencies’ rules and other documents.

Concluding Observations

Broad Government-Wide Policies Give Agencies Discretion

The government-wide policies regarding the monetization of regulatory health benefits in OMB Circular A-4 are often very general, giving federal agencies substantial discretion in how to proceed. For example, OMB Circular A-4 does not require the agencies to use a particular VSL; it simply notes that academic studies have suggested values between $1 million and $10 million. The circular also suggests that agencies “consider” providing estimates of both VSL and VSLY, but does not require that agencies do so. It says that agencies should do a cost-effectiveness analysis “wherever possible,” and should do a break-even analysis when the agencies conclude that non-quantified benefits are “likely to be important.” More definitive government-wide requirements would help ensure that agencies’ policies and practices are more consistent, but doing so could prevent agencies from tailoring those policies and practices to the particular types of risk and population at issue in their rules.

Circular A-4 does require agencies to take some specific actions, but some of those requirements could arguably be updated or clarified. For example, the circular requires agencies to discount future costs or benefits to present values, and says that agencies should use discount rates of both 3% and 7%. The circular says that the 7% rate is the “average before-tax rate of return to private capital in the U.S. economy,” and that 7% is the “appropriate discount rate whenever the main effect of a regulation is to displace or alter the use of capital in the private sector.” While the average pre-tax rate of return may have been 7% in September 2003 when Circular A-4 was
issued, rates of return have fallen sharply in recent years. An appendix to Circular A-94 (OMB’s basic guidance on discount rates) has reduced discount rates used in other types of analyses in recent years, but specifically indicates that those reduced rates are not to be used in regulatory benefit-cost analyses. The most recent OMB update of the discount rate in December 2009 placed the 30-year real interest rate on Treasury notes and bonds at 2.7%.\textsuperscript{147}

Also, although Circular A-4 states that agencies should use a larger VSLY estimate for senior citizens, it does not indicate how much larger the value should be, or at what age individuals should be considered “senior citizens.” As a result, variations could occur in which two agencies addressing similar types of risk for similar populations could reach very different conclusions regarding whether a particular regulatory approach is advisable. Also, as noted earlier in this report, even if a larger VSLY estimate is used for senior citizens, it may still result in the “statistical lives” of those citizens being valued less than the lives of younger citizens.

\section*{No Policies in Some Departments/Agencies}

DOT and EPA have each had written, department-wide policies in place for nearly 30 years regarding the monetization of health benefits in agencies’ regulatory analyses. Other departments and agencies, however, do not appear to have such policies, and instead sometimes refer to the policies and values used by other agencies. For example:

\begin{itemize}
  \item HHS does not appear to have a departmental-wide policy, with FDA indicating that it tends to follow EPA policies, and CMS saying in one rule that it used VSL and life-year estimates that FDA had used in an earlier rule.
  \item OSHA said that it reviewed the approaches that other agencies used, and decided to use EPA’s VSL because “occupational illnesses are analogous to the types of illnesses targeted by EPA regulations.”\textsuperscript{148}
  \item DHS does not appear to have a departmental-wide policy, and some DHS agencies have cited DOT’s policy in establishing VSLs in break-even analyses. Also, the Coast Guard cited a study conducted for CBP in establishing a VSL.
\end{itemize}

Agencies have also said that they used a particular VSL because they or another agency had done so previously, sometimes years earlier. For example, in FDA’s April 2009 rule on warnings and labels for certain over-the-counter drugs, the agency indicated that it used a $5 million VSL because it had done so in a previous, unrelated rule more than eight years earlier. Adopting earlier VSLs, whether from the same agency or another agency, without increasing the value for inflation can result in VSLs that are lower than they would be if kept whole for changes in inflation.

Agencies’ use of other departments and agencies’ VSLs and VSLYs in their economic analyses can provide a degree of consistency across agencies in how economic analyses are conducted. However, application of the VSL used in one policy area to a completely different area may not accurately reflect the public’s “willingness to pay” to prevent a specific mortality risk. EPA’s Science Advisory Board indicated in its October 2007 memorandum that before combining VSLs from a variety of empirical studies, EPA should determine which studies are appropriate “in a

\textsuperscript{147} See http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-07.pdf for a copy of this memorandum.

specific policy context, depending on the nature of the risk addressed by a policy and the population affected.” Similar care would appear to be appropriate before using VSLs and VSLYs from other agencies, or from earlier unrelated rules within the same agency.

**Similar VSLs, but Some Differences**

The VSLs that agencies used in their regulatory impact analyses were generally somewhat similar, with most agencies using central values ranging from about $5.0 million to $8.0 million (in 2009 dollars). Agencies sometimes did sensitivity analyses using VSLs as low as $3 million and as high as $10 million. One study suggested that DHS conduct sensitivity analyses using values as high as $12.6 million.

There appeared to be some differences in how fatalities were valued, and in how injuries were valued. For example:

- In its May 2009 rule on roof crush resistance, NHTSA used the DOT VSL at the time of the analysis of $5.8 million, but added $300,000 in “economic savings to represent the comprehensive societal benefit from preventing a fatality.” It is not clear whether the $5.8 million VSL in DOT’s policy already included such economic savings. Other DOT rules that used the department’s VSL did not appear to include the “economic savings” supplement.

- In the same roof crush resistance rule, NHTSA converted more than 1,000 non-fatals into 55 “fatality equivalents,” each of which the agency valued at $6.1 million. Although the use of such integrated measures of effectiveness are specifically permitted in Circular A-4, DOT’s policy indicates that non-fatals should be valued on the MAIS scale provided in the department’s January 1993 guidance.

The agencies’ VSLs also appeared to vary in age and how they were developed. For example, whereas the DOT VSL has been revised several times in recent years, the EPA guidance has not been changed in nearly 10 years. However, the EPA guidance does recommend updating the agency’s $6.1 million VSL in 1999 dollars to “the base year of the analysis” (which would have been nearly $7.9 million in 2009, using an inflation calculator provided by the Bureau of Labor Statistics). Also, EPA’s September 2000 guidelines were reportedly based on 26 studies published between 1974 and 1991, 21 of which were market studies that examined the additional compensation that workers received for additional risk. Circular A-4 cautions against the use of inappropriate literature-based VSL estimates, and characterizes the use of occupational risk premiums to value reductions in risk from environmental hazards as an example of this practice.\(^{149}\)

\(^{149}\) Circular A-4, pp. 30-31. Also, Chapter 7 of the EPA guidance indicates that hedonic wage studies capture different types of risk than those affected by environmental regulation (e.g., hedonic studies focus on accidental deaths among prime-age males who voluntarily accept risk, whereas deaths due to environmental risks are often involuntarily borne by the elderly with an extended latency period).
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Agencies Used VSLs in Different Ways

The agencies also appeared to vary in how the VSL information was used. For example, whereas most departments and agencies used VSLs to monetize health benefits in a traditional benefit-cost comparison, DHS agencies did not do so in any of the rules that were examined. Instead, the agencies did break-even analyses in which VSL estimates were used as one variable in determining how effective the rule would have to be in order for benefits to equal costs. The DHS agencies said they did so because key data were not available to estimate the reduction in the probability of a successful terrorist attack, the consequences of an avoided attack, or individuals’ willingness to pay for risk reduction. Similarly, although DOT agencies monetized health benefits in most of their rules, FMCSA did not do so in its December 2008 rule on intermodal equipment, reportedly because of a lack of data showing which crashes were associated with hauling intermodal freight. Instead, the agency did a “threshold” (i.e., breakeven) analysis showing the number of crashes that would have to be prevented for the rule to produce net benefits.

In other rules, the agencies implicitly or explicitly used VSL information in cost-effectiveness analyses. For example, in NHTSA’s truck tractor air brake systems rule, the agency estimated that the highest net cost per equivalent life saved would be $108,000 (i.e., much less than the department’s $6.1 million VSL). In its roof crush resistance rule, however, NHTSA concluded that the new standard would cost from $6.1 million to $9.8 million per equivalent life saved (i.e., potentially more than the department’s VSL).

In the FMCSA rule on hours of service for drivers, the agency used VSL information to eliminate a regulatory option (here, ruling out the prohibition on the 11th hour of driving). Another DOT agency also used VSL information in a 2009 advance notice of proposed rulemaking to indicate why a regulatory option did not appear feasible. In that notice, NHTSA presented its initial research efforts on an initiative to amend Federal Motor Vehicle Safety Standards on rearview mirrors to improve drivers’ ability to see behind a vehicle and reduce backover accidents. Two of the regulatory options that the agency considered were rear object detection sensors (e.g., ultrasonic or radar-based devices) and rearview video camera systems. However, NHTSA said “none of the systems are cost effective compared to our comprehensive cost estimate for a statistical life of $6.1 million.”

VSL and Other Variables Can Affect Regulatory Conclusions

Some of the rules discussed in this report illustrate that the size of the VSL used in the economic analysis and other variables have the potential to affect whether the rule is expected to produce positive net benefits. For example:

- The May 2009 NHSTA rule on roof crush resistance indicated that raising the VSL from $6.1 million to $8.7 million could, with changes to other variables, cause the upper-level estimate of net benefits to go from about $6 million to $388


151 Ibid., p. 9479. NHTSA said that the net cost per equivalent life saved for the camera systems ranged from $13.8 million to $72.2 million, and the net cost per life saved for the sensors ranged from $11.3 million to $62.5 million—more than the DOT $6.1 million VSL.
million. On the other hand, lowering the VSL to $3.5 million could cause the upper-level estimate to drop to a net loss of about $376 million.

- In its April 2009 rule on over-the-counter drugs, FDA initially determined that the benefits exceeded the costs even with the most conservative estimate of health benefits and the highest discount rate. However, when FDA issued a correction two months later, the agency concluded that the annualized costs exceeded the benefits using the most conservative assumptions of regulatory benefits (e.g., a $5 million VSL).

In other cases, however, the size of the VSL did not appear to affect whether the rule yielded net benefits. For example:

- The November 2008 FMCSA rule on new entrant safety audits indicated that even the smallest VSL resulted in “strong positive net benefits.”

- Although NHTSA did not mention alternative VSLs in its July 2009 air brake rule, the data provided indicated that the use of a VSL one-tenth of that used ($6.1 million) would have still provided net benefits.

- FDA said in its July 2009 rule on salmonella in shell eggs that the estimated monetized benefits of the rule exceeded the estimated costs even when the most conservative VSLY value was used.

### Monetization of Injuries and Illnesses

Although Circular A-4 recommends that agencies consider providing estimates of fatality risks using both VSLs and VSLYs, only a few of the rules that were examined appeared to provide both estimates. Instead, the agencies appeared to use life-year measures primarily to determine the value of non-fatal injuries and illnesses. For example in its June 2007 rule on manufacturing practices for dietary supplements, FDA used a base estimate of $300,000 for a quality-adjusted life year, converted that value to “life days” ($822 per life day), and used that information to estimate the average value of preventing a typical illness ($33,800).

The other way that agencies placed a monetary value on injuries is by viewing them as a percentage of a death (e.g., the MAIS scale in DOT’s policy), or by assigning a specific average value to an injury. For example:

- In the FRA highway-rail grade crossing rule, the agency “conservatively” assumed that all of the injuries in grade crossing collisions were minor, and valued each injury at $12,000 in determining the benefits of preventing an average accident.

- In the OSHA rule on personal protective equipment, the agency developed estimates of workers’ “willingness to pay” to prevent certain types of injuries, and valued the injuries expected to be prevented by the rule at more than $337 million (an average of nearly $50,000 per injury).

In other rules, however, the agencies did not estimate the number or monetary value of injuries that could be avoided by rules (e.g., OSHA’s electrical standard rule).
Statutory Mandates Can Alter the Use of Benefits Information

In a standard benefit-cost analysis, estimates of the expected health benefits of a rule are monetized, added to other expected benefits, and that total is compared to the total estimated costs of the rule to help decision makers determine whether or not the rule should be issued. Executive Order 12866 states that agencies should adopt regulations only if the benefits of the rule “justify” its costs.

In some of the rules discussed in this report, even after monetizing the health benefits, the expected costs of the rules were greater than the benefits. In those instances, the agencies issuing the rules often indicated that the rules were statutorily required. For example:

- In the “positive train control systems” rule that was cited at the beginning of this report, FRA estimated that the cost of the rule would be about 20 times greater than the estimated benefits. (The 20-year costs of the rule were estimated at between $9.5 billion and $13.2 billion; benefits were estimated at between $440 million and $674 million.) FRA noted this imbalance in the rule, but said it was “constrained by the requirements of [the Rail Safety Improvement Act of 2008], which do not provide latitude for implementing [positive train controls] differently.”

- The August 2007 CBP rule on electronic transmission of manifests on commercial flights had estimated 10-year costs of about $126 million, and 10-year estimated monetized benefits of about $15 million (plus unquantified benefits of “enhanced security”). Sections 4012 and 4071 of the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) require DHS to establish procedures to allow for pre-departure vetting of passengers onboard aircraft, and passengers and crew onboard vessels, bound for and departing from the United States.

In other cases, however, the agencies appeared to issue rules with quantified net losses even when the underlying statutes did not specifically require them to do so. For example, the June 2007 FDA rule on good manufacturing practices for dietary supplements had a 10-year central estimate of net loss of $120 million, but FDA noted that the losses could be as low as $96 million, or as high as $258 million. The underlying statute, DSHEA, says that FDA “may” establish these practices; the agency does not appear to have been required to do so. FDA said that it was unable to quantify certain benefits, and that the benefits of the rule “justified” the costs.

Also, as OSHA noted in its February 2006 rule on hexavalent chromium, certain statutes prohibit the consideration of costs in setting a health standard, and such prohibitions have been upheld in court. Therefore, even if the monetized estimated benefits of a rule are less than the estimated costs, the issuing agency cannot use that information in determining whether to

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154 See, for example, Whitman v. American Trucking Associations, 531 U.S. 457 (2001), a case that involved the national ambient air quality standards issued by EPA.
regulate. Including such information in the preamble to the rule, however, can improve the transparency of the rulemaking process.

**Variations May Be Due to Transparency Differences**

The agencies appeared to vary substantially in the degree to which they used various techniques in the monetization of health benefits. For example, some agencies discussed cost-effectiveness studies that they conducted in addition to benefit-cost analyses, while other agencies did not mention such studies. Some agencies used VSLs at various levels to show the effect on net benefits, while other agencies did not appear to use other VSLs. Some showed discounting at 3% and 7%, while others did not discuss discounting or only showed discounting at one level.

These differences may reflect real variations in agency practices, or they may simply reflect differences in the degree to which the agencies disclosed their analytic procedures in the preambles to their rules or elsewhere. For example, the preamble to the NHTSA rule on air brake systems did not discuss what VSL was used to monetize the projected reductions in fatalities and serious injuries, but that information was included in the regulatory impact analysis that was located in the agency’s rulemaking docket. The agencies that did not mention sensitivity analyses using different VSLs may have done so but just did not discuss that effort. The information provided in this report is drawn primarily from the preambles to the rules and any retrievable final economic analyses that were retrievable from the agency’s electronic docket at http://www.regulations.gov.

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Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act

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November 3, 2010
Summary

The Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010) contains more than 300 provisions that expressly indicate in the text that rulemaking is required or permitted. However, it is unclear how many rules will ultimately be issued pursuant to the act because, among other things, (1) most of the provisions appear to be discretionary (e.g., stating that an agency “may” issue a rule); (2) individual provisions may result in multiple rules; (3) some provisions appear to provide rulemaking authorities to agencies that they already possess; and (4) rules may be issued to implement provisions that do not specifically require or permit rulemaking.

Nearly 80% of the relevant provisions in the Dodd-Frank Act assign rulemaking responsibilities or authorities to four agencies: the Securities and Exchange Commission (SEC), the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission (CFTC), and the Consumer Financial Protection Bureau. Many of the mandatory provisions specify the details of the rules to be issued, but many of the discretionary provisions allow the agencies to issue such rules “as may be necessary.” Most of the rulemaking provisions in the act do not indicate how the regulations should be developed, but some either require or prohibit notice-and-comment procedures before the final rule is issued.

Fewer than 40% of the rulemaking provisions in the Dodd-Frank Act indicate when the required or permitted rule should be issued or go into effect. Of the provisions with deadlines, four require rules to be issued within 90 days of enactment (i.e., by October 19, 2010), and five other provisions require rules within 180 days (i.e., by January 17, 2011). As of October 20, 2010, 10 final rules had been published in the Federal Register implementing the act, including six by the SEC and two by the CFTC.

Many of the government-wide rulemaking requirements (e.g., the Administrative Procedure Act) appear to apply to rulemaking under the Dodd-Frank Act, but the exceptions and exemptions to those requirements also apply. Other rulemaking requirements and controls (e.g., Executive Order 12866) are not applicable to the independent regulatory agencies like the SEC and the CFTC, who are responsible for issuing most of the rules under the act. Also, some of the rulemaking agencies do not receive congressionally appropriated funds, and therefore may not be subject to appropriations restrictions that Congress has used to control rulemaking.

Nevertheless, Congress has a number of oversight tools available to affect the nature of Dodd-Frank Act rulemaking, including confirmation hearings for nominees to head the agencies, oversight hearings, and letters to and meetings with agency representatives. Appropriations restrictions can be used with regard to agencies who receive appropriated funds. Congressional Review Act resolutions of disapproval can call attention to certain rules.

This report will not be updated.
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Rulemaking Requirements and Authorities in the Dodd-Frank Act

Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010, hereafter the Dodd-Frank Act) was enacted in the wake of what many believe was the worst U.S. financial crisis since the Great Depression. Among other things, the act creates a new Financial Stability Oversight Council with the authority to designate certain financial firms as “systemically significant,” thereby subjecting them to increased regulation; consolidates consumer protection responsibilities in a new Consumer Financial Protection Bureau (CFPB); consolidates bank regulation by merging the Office of Thrift Supervision into the Office of the Comptroller of the Currency; requires more derivatives to be cleared and traded through regulated exchanges; and attempts to reduce the incentives to take excessive risks by reforming executive compensation and securitization.1

Although the Dodd-Frank Act itself may change the financial sector landscape in some ways, many of the changes are likely to be implemented through regulations that are to be developed and issued by regulatory agencies. As one observer put it, the rules would “turn reform into reality.”2 Shortly after the legislation was enacted, another observer said, “In most pieces of legislation like this, the real teeth is in the regulations.”3 Another said that the Dodd-Frank Act “is complicated and contains substantial ambiguities, many of which will not be resolved until regulations are adopted.”4 An article in the New York Times stated that the legislation is basically a 2,000-page missive to federal agencies, instructing regulators to address subjects ranging from derivatives trading to document retention. But it is notably short on specifics, giving regulators significant power to determine its impact—and giving partisans on both sides a second chance to influence the outcome.5

More than two months after the Dodd-Frank Act was enacted, Jeremy J. Siegel, a professor at the University of Pennsylvania’s Wharton School, said the following:

The vast majority of regulations required by the law are yet to be written. If they become burdensome, they will make our financial sector less competitive. If not, they can contribute to growth and stability. The devil of this law is not only in the details, but also in the regulators who enforce them.6

Although it is clear that rulemaking will be important to the implementation of the Dodd-Frank Act, the number and nature of the rules that will be issued is less clear—in part because it is difficult to determine which provisions to include as “rulemaking” provisions, and whether those provisions will ultimately result in rules. The law firm of Davis Polk & Wardwell has estimated that the law will require at least 243 rules to be issued by 10 different federal agencies. Others, like the U.S. Chamber of Commerce, have put the number of rules to be issued even higher.

This Report

In a previous report, CRS identified several dozen provisions in Title X and Title XIV of the Dodd-Frank Act that require or permit the CFPB (either individually or with other agencies) to issue rules. This report takes a broader view, and identifies provisions in the act as a whole that either require or permit rulemaking by any federal agency, including the Board of Governors of the Federal Reserve System (hereafter, the Board of Governors), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the CFPB. The list of mandatory rulemaking provisions identified in the act is provided in Appendix A of this report, and the list of discretionary rulemaking provisions is provided in Appendix B. Most of these provisions amended statutes that were first enacted decades earlier (e.g., the Securities and Exchange Act of 1934, the Commodity Exchange Act, the Investment Advisers Act of 1940, and the Truth in Lending Act). As used in this report, the term “rulemaking” includes all agency actions that may result in rules, including any amendments to existing regulations and rules that are issued without notice and comment. The section numbers referred to in this report and the appendices refer to sections in the Dodd-Frank Act, not to the underlying statutes that are often amended by the act.

Methodology

To develop the lists of rulemaking provisions in the Dodd-Frank Act, CRS searched the text of the act in the enrolled version of H.R. 4173 as passed by the House of Representatives and the Senate (since the text of the public law was not then available) using the words “regulation” and “rule.” Mandatory rulemaking was indicated by such phrases as “shall establish, by regulation,” “shall promulgate regulations,” “shall issue regulations,” “shall issue final rules,” “shall prescribe regulations,” and “shall amend regulations.” Phrases such as “may prescribe regulations,” “may issue regulations,” “may, by rule or regulation,” and “shall prescribe such regulations as are necessary” were treated as discretionary rulemaking provisions. Certain other phrases were also considered to be discretionary rulemaking authority. For example, Section 165(g)(3) states that the term “short-term debt” means “such liabilities with short-dated maturity that the Board of Governors identifies, by regulation.” Because the act appears to authorize, but not require, the issuance of rules on this point, the provision was treated as a discretionary rulemaking provision.

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7 See http://www.davispolk.com/files/Publication/70849fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786b90464a/070910_Financial_Reform_Summary.pdf.
9 CRS Report R41380, The Dodd-Frank Wall Street Reform and Consumer Protection Act: Regulations to be Issued by the Consumer Financial Protection Bureau, by Curtis W. Copeland.
The lists of regulatory provisions do not include provisions that limit (rather than require or allow) agency rulemaking activity. For example, the mandatory rulemaking list does not include Section 153(c)(1) of the act, which states that the Office of Financial Research within the Financial Stability Oversight Council “shall issue rules, regulations, and orders only to the extent necessary to carry out the purposes and duties prescribed in (previous paragraphs).” Also not included are provisions that require the implementation, rather than the promulgation, of rules (e.g., Section 153(c)(2) of the act, which requires member agencies to implement certain rules). Neither do the lists include provisions that require or allow entities to establish internal rules of procedure. For example, not included is Section 210(A)(16)(d)(i), which states that “The [Federal Deposit Insurance] Corporation shall prescribe such regulations and establish such retention schedules as are necessary to maintain the documents and records of the Corporation generated in exercising the authorities of this title.”

Also, if one rulemaking requirement was clearly a subset of another requirement, only the larger requirement was included. For example:

- Section 165(e)(1) requires the Board of Governors of the Federal Reserve System to issue regulations limiting the risks that “the failure of any individual company could pose to a nonbank financial company supervised by the Board.” The next paragraph states that “The regulations prescribed by the Board of Governors under paragraph (1) shall” contain certain prohibitions. In this case, the second set of requirements appears to be a subset of the first, and therefore was not included in the list of mandatory rulemaking provisions.

- Section 619 amends the Bank Holding Company Act of 1956 (12 U.S.C. § 1841 et seq.), and subsection (b)(2) of those amendments requires various agencies to “adopt rules to carry out this section.” Later in Section 619, the act requires “the appropriate Federal banking agencies,” the CFTC, and the SEC to “issue regulations to implement subparagraph (A) (limitation on certain transactions or activities being deemed a permitted activity), as part of the regulations issued under subsection (b)(2).” As a result of this construction, this and several other rulemaking requirements in Section 619 were considered to be part of the rules required under subsection (b)(2).

If it was unclear whether one provision was a subset of another, or if a provision could result in the issuance of two or more sets of regulations, the provisions were counted separately. For example:

- Section 210(c) of the act (“Provisions Relating to Contracts Entered Into Before Appointment of Receiver”) contains several provisions permitting the Federal Deposit Insurance Corporation (FDIC) to issue regulations on a variety of subjects. Although FDIC may ultimately issue one regulation covering all of the provisions, there is no requirement that the agency do so. Therefore, the provisions were treated separately in this report.

- Section 358(2) states that “the Comptroller of the Currency shall prescribe regulations applicable to savings associations and the Board of Governors shall prescribe regulations applicable to insured State member banks, bank holding companies and savings and loan holding companies.” Because each organization may issue separate regulations to satisfy this requirement, it was treated as two rulemaking provisions.
Number of Dodd-Frank Act Rules Is Unknowable

CRS searches of the Dodd-Frank Act identified a total of 330 provisions that expressly indicated in the text that rulemaking is required or permitted. For a variety of reasons, however, the number of final rules that will be ultimately issued pursuant to the act is unknowable. First of all, 182 of the 330 rulemaking provisions (55.2%) appear to be discretionary in nature, stating that certain agencies “may” issue rules to implement particular provisions, or that the agencies shall issue such rules as they “determine are necessary and appropriate.” Therefore, the agencies may decide to promulgate rules regarding all, some, or none of these provisions.

Also, as indicated previously, an agency may issue one rule that covers multiple rulemaking requirements, or may decide to issue more than one rule under a single requirement. For example, Section 922(a) of the Dodd-Frank Act (amending the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.)) states that “the term ‘whistleblower’ means any individual who provides … information relating to a violation of the securities laws to the (Securities and Exchange) Commission, in a manner established, by rule or regulation, by the Commission.” Another provision states that awards are to be paid to whistleblowers “under regulations prescribed by the Commission.” The SEC is also given the authority to issue “such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.” The agency may issue one rule covering all of these provisions, or may issue separate rules under each rulemaking authority.10

A number of Dodd-Frank Act provisions state that the responsible agency shall or may establish certain requirements “by rule, regulation, or order.”11 Therefore, the agencies may take action pursuant to those provisions by issuing rules or regulations, or by issuing orders that are not promulgated through the rulemaking process.

Some individual provisions appear to contemplate that multiple agencies will issue multiple rules, but even there, the eventual outcome is not clear. For example, Section 165(i)(2)(C) of the act requires “each Federal primary financial regulatory agency” to issue “consistent and comparable regulations to implement this paragraph.” While each agency may issue separate rules after ensuring that they are “consistent” and “comparable,” the agencies may also decide to accomplish that goal by issuing a single joint rule.

Some Rulemaking Authorities May Have Existed Previously

Some sections of the Dodd-Frank Act provide financial regulatory agencies with new statutory authority to issue rules.12 Other sections, however, arguably provide rulemaking authority that the designated agency already possessed. For example, Section 411 of the act amended the

10 On September 21, 2010, the SEC issued a final rule rescinding the rules that had been issued to administer a program under the statutory provision that was removed by Section 922. See U.S. Securities and Exchange Commission, “Recession of Rules Pertaining to the Payment of Bounties for Information Leading to the Recovery of Civil Penalties for Insider Trading,” 75 Federal Register 57384, September 21, 2010.

11 See, for example, Section 618(d)(1), Section 737(a)(4), and Section 805(a)(1) in Appendix A of this report. Similar constructions include “by rule or order” and “by regulation and order.”

12 For example, Title VII of the Dodd-Frank Act establishes a regulatory structure for derivatives that had not previously existed, and that title contains numerous provisions requiring or authorizing the issuance of rules.
Investment Advisers Act of 1940 (15 U.S.C. § 80b-1 et seq.) and states that a registered investment advisor “shall take such steps to safeguard client assets over which such advisor has custody...as the Commission may, by rule, prescribe.” The SEC appears to have had this authority before the Dodd-Frank Act was enacted. Because the agency’s rulemaking authority in this area has not changed, the SEC may decide not to issue any new rules. On the other hand, the agency may decide to issue new rules in the context of the reforms enacted through the Dodd-Frank Act that are the same as, or similar to, rules that the agency would have issued even if the Dodd-Frank Act had not been enacted.

Other provisions in the Dodd-Frank Act appear to transfer rulemaking authority from one agency (or set of agencies) to another agency. For example, one provision in Section 1088(a) of the act amends Section 604(g) of the Fair Credit Reporting Act (at 15 U.S.C. § 1681b(g)) to say that 15 U.S.C. § 1681a(d)(3) must not be construed so as to treat information or any communication of information as a consumer report if the information or communication is disclosed in a manner “determined to be necessary and appropriate, by regulation or order, by the [Consumer Financial Protection] Bureau or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).” Prior to this amendment, that authority had been given to the “[Federal Trade] Commission, any Federal banking agency or the National Credit Union Administration (with respect to any financial institution subject to the jurisdiction of such agency or Administration under paragraph (1), (2), or (3) of section 1681s(b) of this title, or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).”

Non-rulemaking Provisions May Result in Rules

In addition to the provisions in the Dodd-Frank Act that explicitly require or permit rulemaking, there are numerous other provisions in the act that may ultimately lead to regulations. For example, Section 120 of the act states that the Financial Stability Oversight Council “may provide for more stringent regulation of a financial activity by issuing recommendations to the primary financial regulatory agencies to apply new or heightened standards and safeguards.” The primary regulatory agencies are required to “impose the standards recommended by the Council” or “explain in writing to the Council, not later than 90 days after the date on which the Council issues the recommendation, why the agency has determined not to follow the recommendation of the Council.” If those “new or heightened standards and safeguards” are intended to be binding on regulated entities, then it is possible that the council’s recommendations could lead to new regulations.13

Other provisions in the Dodd-Frank Act also require regulatory agencies to take certain actions, but do not specifically mention “regulations” or “rules.” For example, Section 732 of the act amended Section 4d of the Commodity Exchange Act (7 U.S.C. § 6d), and states that the CFTC

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13 Many reviewing courts and scholars divide agency-issued documents into two categories: (1) “legislative rules,” which are required to conform to the notice-and-comment requirements in Section 553 of the Administrative Procedure Act (5 U.S.C. § 551 et seq.), and therefore, have the full force and effect of law; and (2) so-called “nonlegislative rules,” which are exempt from the requirements of Section 553 and not legally binding. Judicial inquiry in this area, however, is extremely fact intensive and is done on a case-by-case basis with emphasis placed on the specific terms used in the document at issue. For a summary of these cases, see Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking, 4th edition (Chicago: American Bar Association, 2006), pp. 73-105.
shall require that futures commission merchants and introducing brokers implement conflict-of-interest systems and procedures that (1) establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in trading or clearing activities might potentially bias the judgment or supervision of the persons; and (2) address such other issues as the Commission determines to be appropriate.

It is possible that many of these kinds of provisions will, either by the agencies’ choice or by legal necessity, be implemented through the rulemaking process. This has been the case in the implementation of other statutes. For example, of the first 10 final rules that were issued pursuant to the health care reforms in the Patient Protection and Affordable Care Act (P.L. 111-148), only three were specifically required or permitted in the legislation.14

Various Agencies Are Required or Permitted to Issue Rules

As Table 1 below indicates, nearly 80% of the relevant provisions in the Dodd-Frank Act (258 of 330) assign rulemaking authorities or responsibilities to four agencies: the SEC, the Board of Governors, the CFTC, and the CFPB. In addition to the rules they may promulgate independently, these four agencies are also required or permitted to issue rules with one or more other agencies. For example, of the 25 provisions that give rulemaking responsibilities to three or more agencies, at least seven of them specifically involve the Board of Governors and the CFPB.15

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14 CRS Report R41346, PPACA Regulations Issued During the First Four Months of the Act’s Implementation, by Curtis W. Copeland.

15 Others listed in these seven provisions are the Comptroller of the Currency, the FDIC, the National Credit Union Administration Board, and the Federal Housing Finance Agency. Other multiple agency provisions are to be implemented by “the appropriate federal regulators” and “each federal primary financial regulatory agency,” so they may also include these agencies.
Table 1. Provisions in the Dodd-Frank Act That Expressly Reference Rulemaking, by Agency

<table>
<thead>
<tr>
<th>Agency or Agencies</th>
<th>Mandatory Provisions</th>
<th>Discretionary Provisions</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>SEC</td>
<td>46</td>
<td>51</td>
<td>97</td>
</tr>
<tr>
<td>Board of Governors</td>
<td>25</td>
<td>42</td>
<td>67</td>
</tr>
<tr>
<td>CFTC</td>
<td>21</td>
<td>31</td>
<td>52</td>
</tr>
<tr>
<td>CFPB</td>
<td>17</td>
<td>25</td>
<td>42</td>
</tr>
<tr>
<td>FDIC</td>
<td>7</td>
<td>8</td>
<td>15</td>
</tr>
<tr>
<td>Other individual agencies</td>
<td>4</td>
<td>10</td>
<td>14</td>
</tr>
<tr>
<td>Two agencies</td>
<td>8</td>
<td>10</td>
<td>18</td>
</tr>
<tr>
<td>Three or more agencies</td>
<td>20</td>
<td>5</td>
<td>25</td>
</tr>
<tr>
<td>Total</td>
<td>148</td>
<td>182</td>
<td>330</td>
</tr>
</tbody>
</table>

Source: CRS.

Note: The “other individual agencies” include the Secretary of the Treasury, the Federal Trade Commission, and the Comptroller of the Currency. The “two agencies” provisions include rules to be issued by the CFTC and the SEC, and by the FDIC and the Board of Governors. Provisions requiring rules to be issued by “all primary financial regulatory agencies,” “each federal primary financial regulatory agency,” “the appropriate federal banking agencies,” or “the prudential regulators” were treated as issued by three or more agencies. Other “three or more agencies” provisions listed the agencies required or permitted to issue rules (e.g., “Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Bureau of Consumer Financial Protection”).

Some of the Dodd-Frank Act rulemaking provisions require multiple agencies to issue certain rules jointly, other provisions require multiple agencies to issue rules separately, and some provisions involve a mix of these approaches. For example, Section 619 of the act (amending the Bank Holding Company Act of 1956 (12 U.S.C. § 1841 et seq.)) requires that certain rules be issued jointly by the “appropriate Federal banking agencies,” while other rules required under this section are to be issued individually by the Board of Governors, the Commodity Futures Trading Commission, and the Securities and Exchange Commission. Section 623(a) of the act assigns rulemaking responsibilities to the Office of Thrift Supervision before the date that certain responsibilities are to be transferred to the CFPB, and to the Comptroller of the Currency after that date. Section 1088(a) permits certain rules to be issued by the CFPB “or the applicable State insurance authority.”

Several Dodd-Frank Act provisions require that rules be issued by one agency, in consultation with another agency. For example:

- Section 166(a) requires the Board of Governors to prescribe certain regulations, in consultation with the Financial Stability Oversight Council and the FDIC.

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16 The same requirement appears in Sections 623(b) and 623(c) of the act, with the three provisions amending three different underlying statutes. The three sections were all treated as one rulemaking requirement in this report. The Secretary of the Treasury has announced that the transfer date will be July 21, 2011 (the one-year anniversary of the Dodd-Frank Act). See Bureau of Consumer Financial Protection, “Designated Transfer Date,” 75 Federal Register 57252, September 20, 2010.
• Section 205(h) requires the SEC and the FDIC to issue certain rules after consulting with the Securities Investor Protection Corporation.

• Section 210(o)(6)(A) requires the FDIC to consult with the Secretary of the Treasury before issuing certain rules.

• Section 1024(a)(2) requires the CFPB to consult with the FTC before issuing certain rules.

• Section 1094(3)(B) (amending the Home Mortgage Disclosure Act of 1975 (12 U.S.C. § 2801 et seq.)) requires the CFPB to issue certain rules after consulting with “appropriate banking agencies,” the FDIC, the National Credit Union Administration Board, and the Secretary of Housing and Urban Development.

Because these provisions only require the rulemaking agency to consult with other parties, they were each counted in this report as requiring the issuance of rules by a single agency. However, the agencies may ultimately decide to issue these rules jointly with the consulted agency.

Other provisions appear to establish a stricter standard, and require the “concurrence” or “approval” of at least one other agency before a rule can be issued. For example, Section 152(g) requires the Secretary of the Treasury to obtain the concurrence of the Office of Government Ethics before issuing certain conflict-of-interest regulations. Also, Section 155(d) requires the Secretary of the Treasury to receive the approval of the Financial Stability Oversight Council before issuing certain rules. Each of these provisions was counted in this report as requiring the issuance of rules by two agencies. However, the agencies may ultimately decide not to issue these rules jointly.

Rulemaking Agency Discretion

In many of the mandatory rulemaking provisions, the Dodd-Frank Act specifies the details of the required regulations. For example, Section 165(e)(1) of the act requires the Board of Governors to prescribe standards in regulation limiting the risks that the failure of any individual company could pose to a nonbank financial company supervised by the board. Subsection (e)(2) requires that the regulation shall prohibit each nonbank financial company supervised by the Board of Governors and bank holding company described in subsection (a) from having credit exposure to any unaffiliated company that exceeds 25 percent of the capital stock and surplus (or such lower amount as the Board of Governors may determine by regulation to be necessary to mitigate risks to the financial stability of the United States) of the company.

The provision goes on to provide five categories of definition for the term “credit exposure,” as well as “any other similar transactions that the Board of Governors, by regulation, determines to be a credit exposure for purposes of this section.” Other provisions in the act are even more detailed.

Many of the discretionary rulemaking provisions, on the other hand, give the rulemaking agencies substantial leeway to decide not only whether to issue rules, but also the content of those rules. For example:
Section 355 of the act (amending Section 106(b)(1) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. § 1972(1))) states that Board of Governors may “issue such regulations as are necessary to carry out this section.”

Section 369(4) (amending the Home Owners’ Loan Act (12 U.S.C. § 1461 et seq.)) states that the Comptroller of the Currency “may prescribe regulations with respect to savings associations, as the Comptroller determines to be appropriate to carry out the purposes of this Act.”

Section 1093(3)(A) (amending Title V of the Gramm-Leach-Bliley Act (15 U.S.C. § 6801 et seq.)) states that the CFTC “shall have authority to prescribe such regulations as may be necessary to carry out the purposes of this subtitle with respect to financial institutions and other persons subject to the jurisdiction of the Commodity Futures Trading Commission under section 5g of the Commodity Exchange Act.”

These kinds of broad delegations of rulemaking authority to the agencies may be chosen because of the technical expertise needed to craft detailed legislation, or because Congress cannot reach consensus on how particular issues should be resolved. Nevertheless, when Congress permits agencies to prescribe “such regulations as are necessary,” it grants substantial policymaking discretion to rulemaking agencies. On the other hand, when Congress requires that a regulation contain certain elements, Congress retains a measure of control over (and responsibility for) the subsequent policymaking process.

Methods of Rulemaking

Most federal rulemaking is governed by the Administrative Procedure Act (5 U.S.C. § 551 et seq.), which generally requires that agencies (1) publish a notice of proposed rulemaking (NPRM) in the Federal Register, (2) take comments from “interested persons” on the proposed rule, (3) publish a final rule in the Federal Register after considering those comments, and (4) make the rule effective not less than 30 days after it is published. There are, however, numerous exceptions to these general requirements. For example, an agency may dispense with notice and comment and issue a final rule without a prior proposed rule when the agency concludes that there is “good cause” to do so.17 A procedure known as “interim final rulemaking” is a particular application of this “good cause” exception in which an agency issues a final rule without an NPRM that is often effective immediately, but with a post-promulgation opportunity for the public to comment.18

Most of the rulemaking provisions in the Dodd-Frank Act do not specify the method by which the agencies should issue the required or permitted rules. In a few cases, however, the act stipulates that the agencies issue rules through notice-and-comment rulemaking processes. For example:

17 5 U.S.C. §553(b)(3)(B). The agency must conclude that notice and comment is “impracticable, unnecessary, or contrary to the public interest,” and must incorporate the finding and a brief explanation in the rule being issued.

18 Interim final rulemaking has been used for some time, and has been recommended by the Administrative Conference of the United States for noncontroversial and expedited rulemaking. To view this recommendation, see http://www.law.fsu.edu/library/admin/acus/305954.html.
• Section 332(1)(B) requires the FDIC to “prescribe, by regulation, after notice and opportunity for comment, the method for the declaration, calculation, distribution, and payment of dividends under this paragraph.”

• Section 413(b)(1)(B) permits the SEC to “make such adjustments to the definition of the term ‘accredited investor’ ... as the Commission may deem appropriate for the protection of investors, in the public interest, and in light of the economy.” If the SEC does make those adjustments, it is required to use “notice and comment rulemaking.”

• Section 982(e) states that the Public Company Accounting Oversight Board “may, by rule, conduct and require a program of inspection in accordance with paragraph (1), on a basis to be determined by the Board, of registered public accounting firms that provide one or more audit reports for a broker or dealer.” It goes on to say that “Any rules of the Board pursuant to this paragraph shall be subject to prior approval by the Commission pursuant to section 107(b) before the rules become effective, including an opportunity for public notice and comment.”

• Section 1088(a)(4)(B) (amending the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.)) states that the CFPB “may, after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs.”

• Section 1473(d) (amending Section 1106 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. § 3335)) permits the appraisal subcommittee to “prescribe regulations in accordance with [the Administrative Procedure Act] after notice and opportunity for comment” regarding certain issues.

Several other provisions, most of which require rules to be issued relatively quickly, require or permit the agencies to issue interim final rules without prior notice and comment. For example:

• Section 729 (amending the Commodity Exchange Act after section 4q (7 U.S.C. § 60-1)) requires the CFTC to “promulgate an interim final rule... providing for the reporting of each swap entered into before the date of enactment as referenced in subparagraph (A).” The interim final rule is required by October 19, 2010, 90 days after the date of enactment.

• Section 766(a) (amending the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.)) requires the SEC to “promulgate an interim final rule... providing for the reporting of each security-based swap entered into before the date of enactment,” the terms of which had not expired as of that date. The interim final rule is required by October 19, 2010, 90 days after the date of enactment.

• Section 1472(a) (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. § 1631 et seq.)) requires the Board of Governors to “prescribe interim final regulations defining with specificity acts or practices that violate appraisal independence in the provision of mortgage lending services for a consumer credit transaction secured by the principal dwelling of the consumer or mortgage brokerage services for such a transaction and defining any terms in this section or such regulations.” This rule is also required by October 19, 2010.
One provision stipulates that notice and comment not be provided, but does not require interim final rulemaking. Section 916(a) (amending Section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78s(b))) requires the SEC to “promulgate rules setting forth the procedural requirements of the proceedings required under this paragraph,” and says that the rules “are not required to include republication of proposed rule changes or solicitation of public comment.”

Additional Comment Opportunities and Transparency

The agencies that are expected to issue most of the rules under the Dodd-Frank Act have indicated that they will offer the public enhanced and expanded opportunities to track and participate in the rulemaking process. For example, both the FDIC and the SEC said they will allow the public to participate in the process before the rules are drafted, and will attempt to meet with any interested parties who want to discuss pending rules.19 The FDIC said it will hold a series of roundtable discussions with external parties on implementation issues, and the CFTC and the SEC said they have created a series of e-mail inboxes, organized by topic, to facilitate participation and commenting.20 The Federal Reserve reportedly plans to require all staff members to keep track of all meetings with private sector representatives about the rules being developed under the Dodd-Frank Act, and summaries of those meetings are to be placed on the agency’s website. However, not all agencies intend to expand commenting and transparency. For example, both the Office of the Comptroller of the Currency and the Office of Thrift Supervision indicated that they plan no changes in their rulemaking practices.21

It appears that some individuals and organizations are using these new opportunities for public participation. A study by the Sunlight Foundation reportedly showed that the CFTC had 192 meetings with outside groups from July 26, 2010, to October 4, 2010.22 The two most frequent visitors were officials from the firms Morgan Stanley and Goldman Sachs, each of which met with the agency 16 times during that period.

Most Rulemaking Provisions Have No Deadlines

In addition to specifying the content of rules and the methods by which they are to be promulgated, Congress has also attempted to control and expedite agency rulemaking by establishing deadlines for the issuance or implementation of rules. Although the Administrative Conference of the United States has questioned the value of statutory rulemaking deadlines,23 Congress has continued to use them, and they are regularly cited in litigation in an effort to force agencies to either initiate or complete regulatory actions.24

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21 Ibid.


24 For a summary of these cases, see Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking, 4th edition (Chicago: (continued...)}
As shown in Table 2 below, 208 of the 330 rulemaking provisions in the Dodd-Frank Act (63.0%) did not expressly provide a deadline for when the required or permitted rule should be issued. As one might expect, a higher percentage of the discretionary rulemaking provisions had no specified deadline (157 of 182, or 86.3%) than the mandatory provisions (51 of 148, or 34.0%).

Table 2. Deadlines for Issuing Rules Pursuant to the Dodd-Frank Act

<table>
<thead>
<tr>
<th>Deadline</th>
<th>Mandatory Rulemaking Provisions</th>
<th>Discretionary Rulemaking Provisions</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>No deadline</td>
<td>51</td>
<td>157</td>
<td>208</td>
</tr>
<tr>
<td>Less than 360 days after enactment</td>
<td>22</td>
<td>4</td>
<td>26</td>
</tr>
<tr>
<td>By 360 days of enactment (i.e., by July 16, 2011)</td>
<td>27</td>
<td>2</td>
<td>29</td>
</tr>
<tr>
<td>Within one year of enactment (i.e., by July 21, 2011)</td>
<td>17</td>
<td>1</td>
<td>18</td>
</tr>
<tr>
<td>One to two years after enactment (i.e., by July 21, 2012)</td>
<td>15</td>
<td>16</td>
<td>31</td>
</tr>
<tr>
<td>More than two years after enactment (i.e., after July 21, 2012)</td>
<td>16</td>
<td>2</td>
<td>18</td>
</tr>
<tr>
<td>Total</td>
<td>148</td>
<td>182</td>
<td>330</td>
</tr>
</tbody>
</table>

Source: CRS.

Notes: The category “less than 360 days after enactment” includes provisions in which rules were required to be issued “as soon as is practicable,” within 90 days, within 180 days, within six months, within 270 days, and within nine months after the date of enactment. The “more than two years after enactment” category includes all deadlines after July 21, 2012.

Although most of the Dodd-Frank Act provisions establishing rulemaking deadlines do not provide consequences if those deadlines are not met, at least one provision appears to do so. Section 210(c)(8)(H)(iii) of the act (entitled “Back-Up Rulemaking Authority”) states that if the “primary financial regulatory agencies” do not jointly prescribe certain rules on records maintenance within 24 months after the date of enactment (i.e., by July 21, 2012), the chairperson of the Financial Stability Oversight Council (the Secretary of the Treasury, per Section 111(b)(1)(A)) is required to issue the rules.

How Rulemaking Deadlines Are Established

Most of the 122 rulemaking deadlines in the Dodd-Frank Act are keyed to the date that the legislation was enacted (July 21, 2010). In most of these cases, the act requires the rule to be issued within a specified period of time after that date. Therefore, agencies appear to be able to satisfy these deadlines at any point prior to the specified date. For example, Section 924(a) states that the SEC is to issue certain regulations “not later than 270 days after the date of enactment of this Act,” or by April 17, 2011. The SEC could satisfy the requirement by issuing the regulations on that date, or months earlier than that date.

(...continued)

In a few cases, however, the act does not permit the required rule to be issued or made effective before the deadline. For example:

- Section 155(d) of the act states that, “beginning 2 years after the date of enactment,” the Secretary of the Treasury must establish certain requirements “by regulation.” Therefore, it does not appear that the required rule can be made effective before July 21, 2012.

- Section 1083(a) of the act (amending the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. § 3801 et seq.)) states that a required rule to be issued by the CFPB applies to transactions “after the designated transfer date.” The “transfer date” is the date that certain functions are required to be transferred from the existing prudential regulators to the CFPB, and has been established as July 21, 2011 (the one-year anniversary of the date of enactment). Therefore, it does not appear that the rule required by this section can take effect until at least July 22, 2011.

Other deadlines are based not on the date of enactment, but on the act’s effective date (which Section 4 of the Dodd-Frank Act says is July 22, 2010, unless otherwise specified). For example, Section 168 of the act states that, except as otherwise specified in subtitles A or C, the Board of Governors is required to issue final regulations in those subtitles “not later than 18 months after the effective date of this Act.” Therefore, these rules are required to be issued by January 22, 2012.

As noted previously, other rulemaking deadlines are based on the transfer date. For example, Section 1402(a) of the Dodd-Frank Act (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. § 1631 et seq.)) requires that the Board of Governors prescribe regulations requiring depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions, the subsidiaries of such institutions, and the employees of such institutions or subsidiaries with the requirements of this section and the registration procedures established under section 1507 of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.

Although this provision does not specify when the regulations are to be issued, Section 1400(c) of the act requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance. Because the transfer date is July 21, 2011, these rules (and all other mandatory Title XIV rules) must be issued by January 21, 2013.

Several other provisions in the Dodd-Frank Act also require that all rules within a particular title or subtitle must be promulgated or made effective by a certain date. For example:

- Section 168 states that, except as otherwise specified in subtitles A or C, the Board of Governors is required to issue final regulations in those subtitles “not later than 18 months after the effective date of this Act.” As noted previously, the effective date of the act was July 22, 2010. Therefore, all final regulations under subtitles A and C are required to be issued by January 22, 2012.

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• Section 712(e) requires that all Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.

• Section 937 states that, unless otherwise specified, the SEC “shall issue final regulations, as required by this subtitle and the amendments made by this subtitle (subtitle C on ‘Improvements to the Regulation of Credit Rating Agencies’), not later than 1 year after the date of enactment of this Act.”

The deadlines for several other rules required in the act are contingent upon other actions. For example:

• Section 619 (amending the Bank Holding Company Act of 1956 (12 U.S.C. § 1841 et seq.)) states that the agencies responsible for issuing rules “shall consider the findings of the study under paragraph (1) and adopt rules to carry out this section.” The referenced study is required to be completed within six months of enactment, and the rules are required within nine months of the completion of the study. Therefore, the rules are required no later than 15 months after the date of enactment (i.e., by October 21, 2011).

• Section 809(b)(3) states that the Board of Governors “may, upon an affirmative vote of the [Financial Stability Oversight] Council, prescribe regulations under this section that impose a recordkeeping or reporting requirement on designated clearing entities or financial institutions engaged in designated activities that are subject to standards that have been prescribed under section 805(a)(2).” Therefore, the rules cannot be issued unless the council gives its approval.

In a few cases, the deadlines appear to be flexible. For example, Section 626 of the act (amending Home Owners’ Loan Act (12 U.S.C. § 1461 et seq.)) states that, under certain conditions, the Board of Governors may require companies “to establish and conduct all or a portion of such financial activities in or through an intermediate holding company, which shall be a savings and loan holding company, established pursuant to regulations of the Board.” The provision goes on to say that the regulations must be issued within 90 days of the transfer date, “or such longer period as the Board may deem appropriate.”

Some Early Deadlines

Of the 122 provisions in the Dodd-Frank Act with a deadline, 73 (59.8%) fall on or before the one-year anniversary date of the enactment of the legislation (i.e., by July 21, 2011). Some of the earliest deadlines (those within the first six months after enactment) are discussed below.

As Soon As Practicable

Two provisions require that rules be issued “as soon as is practicable after the date of enactment.”

• Section 1101(a)(6) of the act (amending Section 13 of the Federal Reserve Act (12 U.S.C. § 343)) states that the Board of Governors “shall establish, by regulation, in consultation with the Secretary of the Treasury, the policies and procedures governing emergency lending under this paragraph.”
• Section 1105(b)(1) states that the FDIC “shall establish, by regulation, and in consultation with the Secretary, policies and procedures governing the issuance of guarantees authorized by this section” (on “emergency financial stabilization”).

Within 90 Days

Four provisions in the act require rules to be issued within 90 days of the date of enactment (i.e., by October 19, 2010):

• Section 729 (amending the Commodity Exchange Act (at 7 U.S.C. § 60-1)) requires the CFTC to “promulgate an interim final rule … providing for the reporting of each swap entered into before the date of enactment,” the terms of which had not expired as of that date.26

• Section 766(a) (amending the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.)) requires the SEC to “promulgate an interim final rule … providing for the reporting of each security-based swap entered into before the date of enactment,” the terms of which had not expired as of that date.27

• Section 939B requires the SEC to “revise Regulation FD (17 C.F.R. 243.100) to remove from such regulation the exemption for entities whose primary business is the issuance of credit ratings (17 C.F.R. 243.100(b)(2)(iii)).”28

• Section 1472(a) of the Dodd-Frank Act (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. § 1631 et seq.)) requires the Board of Governors to “prescribe interim final regulations defining with specificity acts or practices that violate appraisal independence in the provision of mortgage lending services for a consumer credit transaction secured by the principal dwelling of the consumer or mortgage brokerage services for such a transaction and defining any terms in this section or such regulations.”29

Within 180 Days

Five other Dodd-Frank Act provisions require that rules be issued within 180 days of enactment (i.e., by January 17, 2011):

• Section 726(a) states that the CFTC, “in order to mitigate conflicts of interest … shall adopt rules which may include numerical limits on the control of, or the

26 As noted later in this report, this interim final rule has been issued. See U.S. Commodity Futures Trading Commission, “Interim Final Rule for Reporting Pre-Enactment Swap Transactions,” 75 Federal Register 6380, October 14, 2010.
27 As noted later in this report, this interim final rule has been issued. See U.S. Securities and Exchange Commission, “Reporting of Security-Based Swap Transaction Data,” 75 Federal Register 64643, October 20, 2010.
28 As noted later in this report, this interim final rule has been issued. See U.S. Securities and Exchange Commission, “Removal from Regulation FD of the Exemption for Credit Rating Agencies,” 75 Federal Register 6150, October 4, 2010.
29 As noted later in this report, although this interim final rule had not been published in the Federal Register as of October 20, 2010, the Board of Governors had published a version of the rule on the agency’s website and requested comments. See http://www.federalreserve.gov/newsevents/press/bcreg/20101018a.htm.
voting rights with respect to, any derivatives clearing organization that clears swaps, or swap execution facility or board of trade designated as a contract market that posts swaps or makes swaps available for trading, by a bank holding company ... with total consolidated assets of $50,000,000,000 or more, a nonbank financial company ... supervised by the Board, an affiliate of such a bank holding company or nonbank financial company, a swap dealer, major swap participant, or associated person of a swap dealer or major swap participant.”

- Section 916(a) (amending Section 19(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78s(b))) states that the SEC (after consulting with other regulatory agencies) “shall promulgate rules setting forth the procedural requirements of the proceedings required under this paragraph.”

- Section 943 requires the SEC to “prescribe regulations on the use of representations and warranties in the market for asset-backed securities.”

- Section 945 (amending Section 7 of the Securities Act of 1933 (15 U.S.C. § 77g)) states that the SEC “shall issue rules relating to the registration statement required to be filed by any issuer of an asset-backed security (as that term is defined in section 3(a)(77) of the Securities Exchange Act of 1934) that require any issuer of an asset-backed security—(1) to perform a review of the assets underlying the asset-backed security; and (2) to disclose the nature of the review under paragraph (1).”

- Section 972 (amending the Securities Exchange Act of 1934 (15 U.S. C. § 78a et seq.), creating a new Section 14B) states that the SEC “shall issue rules that require an issuer to disclose in the annual proxy sent to investors the reasons why the issuer has chosen—(1) the same person to serve as chairman of the board of directors and chief executive officer (or in equivalent positions); or (2) different individuals to serve as chairman of the board of directors and chief executive officer (or in equivalent positions of the issuer).”

Within Six Months

Two provisions require rules to be issued within six months of enactment (i.e., by January 21, 2011):

- Section 619 (amending the Bank Holding Company Act of 1956 (12 U.S.C. § 1841 et seq.)) requires that the Board of Governors issue rules to implement provisions on “conformance period for divestiture” and “extended transition for illiquid funds.”

- Section 951 (amending the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.)) requires the SEC to issue rules regarding the disclosure of “agreements and understandings” (in proxy or consent solicitation materials by those making those solicitations) or “related to the compensation of executives where a corporation is acquired through tender offer.”

An “Obligation of Speed”

Although some rules are not required to be issued until much later than these early deadlines, it is possible that they could be issued more quickly. Secretary of the Treasury Timothy F. Geithner
has indicated that federal financial agencies “have an obligation of speed” when it comes to issuing rules under the Dodd-Frank Act, and said “We will move as quickly as possible to bring clarity to the new rules of finance. The rule writing process traditionally has moved at a frustrating, glacial pace. We must change that.”

Others, however, have questioned how the rules can be written quickly in light of the complexities of the legislation and the requirements for public participation.

Ten Dodd-Frank Act Final Rules Have Been Published

As of October 20, 2010, 10 final rules implementing provisions in the Dodd-Frank Act had been published in the Federal Register:

- an August 13, 2010, FDIC final rule implementing Section 335 of the act, which made permanent the standard maximum share insurance amount of $250,000;
- a September 2, 2010, final rule issued by the National Credit Union Administration implementing Section 335 of the act, which made permanent the standard maximum share insurance amount of $250,000;
- a September 8, 2010, SEC “interim final temporary rule” to implement changes made by Section 975 of the act to Section 15B(a) of the Securities and Exchange Act (which made it unlawful for municipal advisors to provide certain advice or solicit municipal entities or certain other persons without registering with the SEC);
- a September 10, 2010, CFTC final rule implementing Section 742 of the act regarding off-exchange transactions in foreign currency with members of the retail public;
- a September 21, 2010, SEC final rule implementing changes made by Section 989G of the act, which added a new Section 404(c) to the Sarbanes-Oxley Act of 2002;
- a September 21, 2010, SEC final rule rescinding then-existing rules under a statutory requirement that was rescinded by Section 922 of the act.

32 U.S. Federal Deposit Insurance Corporation, “Deposit Insurance Regulations; Permanent Increase in Standard Coverage Amount; Advertisement of Membership; International Banking; Foreign Banks,” 75 Federal Register 49363, August 13, 2010.
Rulemaking Requirements and Authorities in the Dodd-Frank Act

- an October 4, 2010, SEC final rule implementing Section 939B of the act removing the specific exemption for disclosures made to nationally recognized statistical rating organizations and credit rating agencies for the purpose of determining or monitoring credit ratings; 38
- an October 12, 2010, SEC final rule implementing changes made by Section 916 of the act regarding new deadlines by which the SEC must act upon proposed rule changes submitted by self-regulatory organizations; 39
- an October 14, 2010, CFTC interim final rule implementing Section 729 of the act for the reporting of swap transactions entered into before the date of enactment whose terms had not expired; 40 and
- an October 20, 2010, SEC “interim final temporary rule” implementing Section 766 of the act on reporting of security-based swaps entered into before July 21, 2010. 41

Also, the Board of Governors posted on its website and requested comments on an interim final rule implementing Section 1472(a) of the Dodd-Frank Act. 42 As of October 20, 2010, however, this rule had not been published in the Federal Register. Several other final rules that were published in the Federal Register mentioned the Dodd-Frank Act, but did not implement its provisions. 43 Also, federal agencies have issued several proposed rules pursuant to the act. 44

Some Federal Rulemaking Requirements Are Not Applicable to Dodd-Frank Rules

During the past 65 years, Congress and various presidents have developed an elaborate set of procedures and requirements to guide and oversee the federal rulemaking process. Statutory

(...continued)


43 See, for example, U.S. National Credit Union Administration, “Corporate Credit Unions,” 75 Federal Register 64786, October 20, 2010, in which the agency noted that certain sections of the Dodd-Frank Act would affect the rule being issued, but those changes would be made in the future.

requirements include the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Congressional Review Act—each of which states that certain procedural or analytical requirements be addressed before the agencies’ rules can be published and take effect.\footnote{For more information on these and other rulemaking statutes, see CRS Report RL32240, The Federal Rulemaking Process: An Overview, by Curtis W. Copeland.} Presidential review of agency rulemaking is currently centered in Executive Order 12866, which requires covered agencies to submit their “significant” regulatory actions to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) before they are published in the \textit{Federal Register}.\footnote{The President, Executive Order 12866, “Regulatory Planning and Review,” 58 \textit{Federal Register} 51735, October 4, 1993, Section 6(a). A “significant” regulatory action is defined in Section 3(f) as “Any regulatory action that is likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive order.” For more information on OIRA and its review process, see CRS Report RL32397, \textit{Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs}, by Curtis W. Copeland.} OIRA reviews the rules to determine their consistency with the analytic requirements in the executive order, the statutes under which they are issued, the President’s priorities, and the rules issued by other agencies. The executive order states that the agencies are to “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”\footnote{Section 1(b)(6) of Executive Order 12866. As the executive order and OMB Circular A-4 make clear, even under this standard, the monetized benefits of a rule are not required to exceed the monetized costs of the rule before the agency can issue the rule, only that the costs of the rule be “justified” by the benefits (quantitative or non-quantitative).} Covered agencies are required to estimate the costs and benefits of their “significant” rules, and to conduct a full cost-benefit analysis before issuing any “economically significant” rule (e.g., one that is expected to have a $100 million annual impact on the economy).\footnote{Section 6(a)(3)(C) of Executive Order 12866.} That analysis is required to include an assessment of not only the underlying benefits and costs, but also the costs and benefits of “potentially effective and reasonably feasible alternatives to the planned regulation.”\footnote{Section 6(a)(3)(C)(iii) of Executive Order 12866.} OIRA also plays a key role in implementing the requirements of the Paperwork Reduction Act (PRA, 44 U.S.C. §§ 3501-3520). The PRA created OIRA, and generally requires that federal agencies receive OIRA approval for certain information collection requests before they are conducted. Before approving a proposed collection of information, OIRA must determine whether the collection is “necessary for the proper performance of the functions of the agency.”\footnote{44 U.S.C. 3508.} OIRA’s information collection approvals must be renewed at least every three years if the agency wishes to continue collecting the information.

**Many Rulemaking Requirements, and Exceptions, Apply to Dodd-Frank Act Rules**

Many of the government-wide rulemaking requirements appear to apply to rulemaking under the Dodd-Frank Act, but the exceptions and exemptions to those requirements also apply.
Administrative Procedure Act

For example, as noted earlier in this report, the Administrative Procedure Act (APA) generally requires that federal agencies publish a notice of proposed rulemaking in the *Federal Register*, give “interested persons” an opportunity to comment on the rule, consider those comments and publish a final rule with a general statement of its basis and purpose, and make the final rule effective no less than 30 days after its publication.\(^{51}\) However, the APA also says that these “notice and comment” procedures do not apply when the agency finds, for “good cause,” that those procedures are “impracticable, unnecessary, or contrary to the public interest.”\(^{52}\) Also, agencies can make their rules take effect less than 30 days after they are published if there is “good cause.”\(^ {53}\) Therefore, the agencies issuing rules under the Dodd-Frank Act can publish final rules without allowing the public to comment on prior proposed rules, and can make those final rules effective immediately, if they conclude that there is “good cause” to do so. Agencies’ use of the APA’s good cause exceptions are subject to judicial review.

Of the 10 Dodd-Frank Act final rules that had been published in the *Federal Register* as of October 20, 2010, the issuing agencies invoked the “good cause” exception in eight rules,\(^ {54}\) and the agency said notice and comment was not required in one other rule because it only involved agency organization and procedure.\(^ {55}\) The remaining rule was preceded by a notice of proposed rulemaking, but that notice was published on January 20, 2010, more than six months before the Dodd-Frank Act was enacted.\(^ {56}\)

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA, 5 U.S.C. §§ 601-612) requires federal agencies to assess the impact of their forthcoming rules on “small entities,” which includes small businesses, small governmental jurisdictions, and small not-for-profit organizations.\(^ {57}\) Under the RFA, federal agencies must prepare a regulatory flexibility analysis at the time that proposed and certain final rules are published in the *Federal Register*. The act requires the analyses to describe, among other things, (1) why the regulatory action is being considered and its objectives; (2) the small entities to which the rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the rule; and, for final rules, (4) steps the agency has taken to minimize the impact of the rule on small entities. However, these requirements are not triggered if the head of the issuing agency certifies that the rule would not

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\(^{51}\) 5 U.S.C. 553.

\(^{52}\) 5 U.S.C. 553(b)(3)(B). These requirements also do not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice (5 U.S.C. 553(b)(A)).

\(^{53}\) 5 U.S.C. 553(d).

\(^{54}\) These rules were the FDIC’s August 13, 2010, rule; the National Credit Union Administration’s September 2, 2010, rule; the CFTC’s October 14, 2010, rule; and the SEC’s rules of September 8, September 21 (two rules), October 4, and October 20, 2010.

\(^{55}\) This rule was the SEC’s October 12, 2010, rule on “Delegation of Authority to the Director of the Division of Trading and Markets.”

\(^{56}\) This was the CFTC’s September 10, 2010, rule on “Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries.” The January 20, 2010, proposed rule was issued in response to the CFTC Reauthorization Act of 2008 (CRA, P.L. 110-246). CFTC noted in the final rule that the Dodd-Frank Act dealt with some of the same issues, so the final rule was being issued pursuant to both the CRA and the Dodd-Frank Act.

have a “significant economic impact on a substantial number of small entities.” The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion regarding when the act’s analytical requirements apply.58 Also, the RFA’s analytical requirements do not apply when an agency is not required to publish a notice of proposed rulemaking.59 Therefore, if an agency publishes a final rule implementing the Dodd-Frank Act without a prior proposed rule (e.g., using the “good cause exception), then the RFA’s analytical requirements do not apply.

Of the 10 Dodd-Frank Act final rules that had been published as of October 20, 2010, the issuing agencies certified that four of them did not have a “significant economic impact” on a “substantial number of small entities,”60 and said that four other rules were not covered by the RFA because there was no prior proposed rule.61 Another rule did not mention the RFA.62 In the remaining rule, the agency did a regulatory flexibility analysis even though the final rule had been published without a prior proposed rule.63

Some Rulemaking Requirements and Controls Are Not Applicable to Certain Agencies

In addition to these exceptions and exclusions, some notable regulatory oversight mechanisms (e.g., Executive Order 12866) do not apply to the independent regulatory agencies that are required or permitted to issue most of the rules under the Dodd-Frank Act—the SEC, the Board of Governors, the CFTC, the CFPB, and the FDIC.64 Also, those agencies may be able to void certain other rulemaking requirements. (These inapplicable requirements were also not applicable to most, if not all, of the independent regulatory agencies before the Dodd-Frank Act was enacted.)

Executive Order 12866

Most of the requirements in Executive Order 12866 do not apply to independent regulatory agencies.65 Therefore, the independent regulatory agencies that are expected to issue most of the

58 Agencies’ interpretations of these phrases are, however, subject to judicial review (5 U.S.C. 611).
59 See 5 U.S.C. 603(a), which states that agencies must prepare initial regulatory flexibility analyses “whenever an agency is required…to publish a general notice of proposed rulemaking for any proposed rule.” See also 5 U.S.C. 604(a), which requires agencies to prepare a final regulatory flexibility analysis when an agency publishes a final rule “after being required…to publish a general notice of proposed rulemaking.”
60 These were the FDIC rule of August 13, 2010; the National Credit Union Administration rule of September 2, 2010; the CFTC rule of September 10, 2010; and the SEC rule of October 20, 2010.
61 These were the SEC’s rules of September 21, 2010, (two rules) and October 4, 2010; and the CFTC rule of October 14, 2010.
62 This was the SEC’s October 12, 2010, rule on “Delegation of Authority to the Director of the Division of Trading and Markets.”
63 This was the SEC’s September 8, 2010, final rule on “Temporary Registration of Municipal Advisors.”
64 As used in this report, the term “independent regulatory agencies” refers to the boards and commissions identified as such in the Paperwork Reduction Act (44 U.S.C. §3502(5)). Independent regulatory agencies are generally established to be more independent of presidential direction and control than Cabinet departments and other agencies. For more information, see Paul R. Verkuil, “The Purposes and Limits of Independent Agencies,” Duke Law Journal, vol. 37 (1988), pp. 257-279.
65 Certain planning requirements in Section 4(b) and Section 4(c) regarding the “unified regulatory agenda” and the (continued...)
rules under the Dodd-Frank Act do not have to submit their proposed or final significant rules to OIRA for review before they are published. Also, these independent regulatory agencies do not have to conduct cost-benefit analyses for their economically significant rules, and do not have to show that the benefits of their significant rules “justify” the costs. Although certain sections of the Dodd-Frank Act (e.g., Sections 1022 and 1041(c)(1)) require that certain agencies “consider” and “take into account” the potential benefits and costs of their rules, these provisions may be interpreted to establish somewhat less stringent analytical thresholds than the general requirement in Executive Order 12866 that the benefits of agencies’ rules “justify” the costs.66

**Paperwork Reduction Act**

Also, although the Paperwork Reduction Act covers independent regulatory agencies, and permits OIRA to disapprove their proposed collections of information, the agencies may be able to collect information even if OIRA objects. The PRA states that

An independent regulatory agency which is administered by 2 or more members of a commission, board, or similar body, may by majority vote void (A) any disapproval by the Director [of OMB], in whole or in part, of a proposed collection of information of that agency; or (B) an exercise of authority under subsection (d) of section 3507 concerning that agency (regarding information collections that are part of a proposed rule).67

Therefore, for example, if OIRA denies a request to collect information by the SEC, the Board of Governors, or the CFTC, those agencies can, by a majority vote, void that disapproval. Although the CFPB is an independent regulatory agency, it is headed by a single director, not a multi-member body. Therefore, this PRA authority would not appear to apply to the bureau. However, Section 1100D(c) of the Dodd-Frank Act amended the PRA, and states that

Notwithstanding any other provision of law, the Director (of OMB) shall treat or review a rule or order prescribed or proposed by the Director of the Bureau of Consumer Financial Protection on the same terms and conditions as apply to any rule or order prescribed or proposed by the Board of Governors of the Federal Reserve System.

Applying this subsection, because the Board of Governors, a multi-member board, is authorized to void OIRA disapprovals of its information collections, the director of the CFPB may arguably be authorized to do so as well.

**Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act (UMRA) of 1995 was enacted in an effort to reduce the costs associated with federal imposition of responsibilities, duties, and regulations upon state, local, and tribal governments and the private sector without providing the funding appropriate to

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“regulatory plan” apply to independent regulatory agencies. Generally, however, the executive order does not apply to independent regulatory agencies.

66 Other sections of the Dodd-Frank Act require agencies to study certain issues, including the costs and benefits of certain actions. (See, for example, Section 929Y, a study on extraterritorial private rights of action.) However, those studies are not in the context of rulemaking.

the costs imposed by those responsibilities. Title II of UMRA (2 U.S.C. §§ 1532-1538) generally requires Cabinet departments and other agencies to prepare a written statement containing specific descriptions and estimates for any proposed rule that is expected to result in the expenditure of $100 million or more in any year to state, local, or tribal governments, or to the private sector.

However, UMRA does not apply to independent regulatory agencies, and therefore does not apply to many of the rules to be issued pursuant to the Dodd-Frank Act. Even if UMRA did apply to these agencies, UMRA contains numerous other exceptions and exclusions that may exempt their rules from its requirements.68

**Appropriations Restrictions**

In recent years, Congress has added provisions to agency appropriations bills that restrict federal rulemaking or regulatory activity, including provisions that (1) prevent the finalization of particular proposed rules, (2) restrict regulatory activity within certain areas, (3) inhibit the implementation or enforcement of certain rules, and (4) employ condition restrictions (e.g., preventing the implementation of a rule until certain actions are taken).69 Appropriations restrictions have been advocated by representatives of virtually all political parties and interest groups, and some of these restrictions have been repeated year after year.

It should be noted that several of the agencies required or authorized to issue rules under the Dodd-Frank Act do not receive appropriated funds. As a result, Congress arguably may not be able to use appropriations restrictions to control their rulemaking actions.70 For example, the Federal Reserve System, of which the Board of Governors is a part, receives income primarily from the interest on U.S. government securities that it has acquired through open market operations.71 The CFPB is funded (up to certain caps) using money from the combined earnings of the Federal Reserve System, and the Dodd-Frank Act states that those funds are not reviewable by either the House or the Senate appropriations committees.72 However, the SEC, the CFTC, and several other agencies issuing rules under the Dodd-Frank Act receive appropriations, so Congress can place restrictions on those agencies’ appropriations to control their rulemaking actions.73

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70 Others, however, take the view that even these non-appropriated funds must be at least figuratively deposited into the Treasury, and that “all spending in the name of the United States must be pursuant to legislative appropriation.” Kate Stith, “Congress’ Power of the Purse,” *The Yale Law Journal*, vol. 97 (1988), p. 1345.

71 See http://www.federalreserve.gov/governinfo/faq/faqfrs.htm#6. Other sources of income are the interest on foreign currency investments held by the system; fees received for services provided to depository institutions, such as check clearing, funds transfers, and automated clearinghouse operations; and interest on loans to depository institutions (the rate on which is the so-called discount rate). After paying its expenses, the Federal Reserve turns the rest of its earnings over to the U.S. Treasury.

72 Section 1017. However, if the director of the CFPB determines that these non-appropriated funds are insufficient, the Dodd-Frank Act authorizes appropriations of up to $200 million per year for FY2010 through FY2014. Appropriations restrictions could be added to any such appropriated funds.

73 As noted in CRS Report R40801, *Financial Services and General Government (FSGG): FY2010 Appropriations*, coordinated by Garrett Hatch, the SEC’s budget is set through the normal appropriations process, but funds for the (continued...)
Depending on how they are written, appropriations restrictions to affect rulemaking may have certain limitations. In general, they do not nullify existing regulations (i.e., remove them from the Code of Federal Regulations) or permanently prevent the agencies from issuing the same or similar regulations. As a result, any final rule that has taken effect and been codified in the Code of Federal Regulations will continue to be binding—even if language in the relevant regulatory agency’s appropriations act prohibits the use of funds to enforce the rule. Regulated entities may still be required to adhere to applicable requirements (e.g., installation of pollution control devices, submission of relevant paperwork), even if violations are unlikely to be detected and enforcement actions cannot be taken by federal agencies. Also, unless otherwise indicated, regulatory restrictions in appropriations acts are generally binding only for the period of time covered by the legislation (i.e., a fiscal year or a portion of a fiscal year). Therefore, any such restriction that is not repeated in the next relevant appropriations act or enacted in other legislation is no longer binding on the relevant agency or agencies.

Congressional Oversight

In order for Congress to oversee the rules implementing the Dodd-Frank Act, it must first have a sense of what rules the agencies are going to issue, and when. By identifying the provisions in the act that require or permit rulemaking, this report can help to inform Congress in this regard. As noted previously, however, many of the rules that the agencies will likely issue to implement the Dodd-Frank Act are not specifically mentioned in the act. Also, some of the rules that the agencies are permitted (but not required) to issue may never be developed.

Another way for Congress to identify upcoming rules is by reviewing the Unified Agenda of Federal Regulatory and Deregulatory Actions, which is published twice each year. The Unified Agenda lists upcoming rulemaking activities, by agency, in five separate categories: (1) prerule stage (e.g., advance notices of proposed rulemaking); (2) proposed rule stage (i.e., upcoming proposed rules); (3) final rule stage (i.e., upcoming final rules); (4) long-term actions (i.e., rules that agencies do not expect to issue in the next 12 months); and (5) completed actions (i.e., final rules or rules that have been withdrawn since the last edition of the Unified Agenda). There is no penalty for issuing a rule without a prior notice in the Unified Agenda, and some prospective rules listed in the Unified Agenda never get issued. Nevertheless, the Unified Agenda can help Congress and the public know what actions are about to occur. A previous CRS report indicated that about three-fourths of the significant proposed rules published after having been reviewed by OIRA in 2008 were previously listed in the “proposed rule” section of the Unified Agenda. The

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agency come from fees that are imposed on sales of stock, new issues of stocks and bonds, corporate mergers, and other securities market transactions. When the fees are collected, they go to a special offsetting account available to appropriators, not to the Treasury’s general fund. The SEC is required to adjust the fee rates periodically in order to make the amount collected approximately equal to target amounts set in statute.

74 See U.S. General Accounting Office, Principles of Appropriations Law, Third Edition, Volume I, GAO-04-261SP, (January 2004), p. 2-34, which states that “Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent.”

75 The Unified Agenda is available at http://www.reginfo.gov/public/do/eAgendaMain.

first edition of the Unified Agenda after the enactment of the Dodd-Frank Act is expected to be published on November 22, 2010.\footnote{E-mail from Therese A. Taylor, Regulatory Information Service Center, General Services Administration, October 18, 2010.}

### Options

Congress has a number of oversight tools available to affect the nature of Dodd-Frank Act rulemaking, including

- confirmation hearings for nominees to head the rulemaking agencies;
- oversight hearings on the agencies’ implementation of the act; and
- letters and meetings between individual Members and representatives of the agencies regarding pending rules, and filing comments on proposed and interim final rules.\footnote{\textit{In Sierra Club v. Costle} (657 F.2d 298, D.C. Cir. 1981), the D.C. Circuit concluded (at 409) that it was “entirely proper for congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as the individual Members of Congress do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure.”}


> [I]nvestigations conducted by congressional committees constitute another powerful device of formal political supervision…. The public legislative hearings, in which administrative action is carefully scrutinized and a commissioner or staff member is plied with questions, symbolizes the unparalleled sophistication of American congressional control over administrative action, in general and by [independent regulatory agencies], in particular. Individual oversight by representatives or senators also takes place. Through correspondence or meetings, the latter convey the concerns of their constituents.\footnote{A complete list of these GAO studies is available from the author of this report.}

Congress, committees, and individual Members can also request that the Government Accountability Office (GAO) evaluate the agencies’ actions to implement the Dodd-Frank Act. However, the act itself contains more than 40 provisions requiring GAO to conduct studies and write reports.\footnote{A complete list of these GAO studies is available from the author of this report.} For example:

- Section 412 of the act requires GAO to examine compliance costs associated with SEC rules regarding custody of funds or securities of clients by investment advisers, and any additional costs if a portion of a rule relating to operational independence is eliminated. GAO is required to submit a report on the results of the study to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services not later than three years after the date of enactment (i.e., by July 21, 2013).
- Section 939E requires GAO to study the feasibility and merits of creating an independent professional organization for rating analysts employed by nationally recognized statistical rating organizations. GAO is to submit a report on the
results of the study to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services not later than one year after the date of publication of the rules issued by the commission pursuant to Section 936 of the act.

- Section 1421 requires GAO to submit a report to Congress within one year of the date of enactment (i.e., by July 21, 2011) assessing the effects of the Dodd-Frank Act on the availability and affordability of credit for consumers, small businesses, homebuyers, and mortgage lending.

GAO has indicated that it considers congressional mandates as a top priority, followed by requests from senior congressional leaders and committee leaders, with the third priority being individual Member requests.81

Restrictions on the use of agencies’ appropriations is also an option, at least for the agencies that receive congressionally appropriated funds (e.g., the SEC and the CFTC). As noted previously, while such restrictions can prevent agencies from using such funds to finalize or implement the rules in question, they do not eliminate published final rules, and do not relieve regulated parties from complying with their requirements. Also, unless otherwise indicated, regulatory restrictions in appropriations acts are binding only for the period of time covered by the legislation.

**Congressional Review Act**

Another congressional oversight option regarding agencies’ rules is the Congressional Review Act (CRA, 5 U.S.C. § 801 et seq.), which was enacted in 1996 in an attempt to reestablish a measure of congressional authority over rulemaking “without at the same time requiring Congress to become a super regulatory agency.”82 The act generally requires all federal agencies (including independent regulatory agencies) to submit all of their covered final rules to both houses of Congress and GAO before they can take effect.83 It also established expedited legislative procedures (primarily in the Senate) by which Congress may disapprove agencies’ final rules by enacting a joint resolution of disapproval.84 The definition of a covered rule in the CRA is quite broad, arguably including any type of document (e.g., legislative rules, policy statements, guidance, manuals, and memoranda) that the agency wishes to make binding on the affected public.85 After a rule is submitted, Congress can use the expedited procedures specified in the CRA to disapprove of the rule. CRA resolutions of disapproval must be presented to the President for signature or veto.

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83 If a rule is considered “major” (e.g., has a $100 million annual effect on the economy), then the CRA generally prohibits it from taking effect until 60 days after the date that it is submitted to Congress.
84 For a detailed discussion of CRA procedures, see CRS Report RL31160, Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act, by Richard S. Beth.
85 For more on the potential scope of the definition of a “rule” under the CRA, see CRS Report RL30116, Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade, by Morton Rosenberg.
For a variety of reasons, however, the CRA has been used to disapprove only one rule in the more than 14 years since it was enacted.\(^8\) Perhaps most notably, it is likely that a President would veto a resolution of disapproval to protect rules developed under his own administration, and it may be difficult for Congress to muster the two-thirds vote in both houses needed to overturn the veto. Congress can also use regular (i.e., non-CRA) legislative procedures to disapprove agencies’ rules, but such legislation may prove even more difficult to enact than a CRA resolution of disapproval (primarily because of the lack of expedited procedures in the Senate), and if enacted may also be vetoed by the President.

These difficulties notwithstanding, even if the use of the CRA does not result in the disapproval of a rule, just the threat of filing a resolution of disapproval can sometimes exert pressure on agencies to modify or withdraw their rules.\(^7\) Also, the expedited procedures in the Senate can provide a forum to discuss concerns about a rule. After a joint resolution is introduced, it is referred to the appropriate committee of jurisdiction. If the committee does not report the resolution within a specified period, it can be discharged from committee by a petition signed by 30 Senators. After the joint resolution has been reported by the appropriate committee or discharged by petition, it is placed on the Senate calendar. At that point, it is in order to consider a motion to proceed to the consideration of the joint resolution at any time. The CRA provides that all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion to proceed is not debatable and is also not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. If the motion to proceed were agreed to, debate on the joint resolution would be limited to no more than 10 hours (debate may be less than 10 hours if the Senate agrees to a non-debatable motion to limit debate). Amendments and motions to recommit are not in order. The 10 hours of debate would be divided equally between those favoring and those opposing the joint resolution. Immediately following the conclusion of debate on the joint resolution, the Senate is required to vote on final passage of the joint resolution.

\(^8\) The rule overturned in March 2001 was the Occupational Safety and Health Administration’s ergonomics standard. This reversal was the result of a unique set of circumstances in which the incoming President (George W. Bush) did not veto the resolution disapproving the outgoing President’s (William J. Clinton’s) rule. See CRS Report RL30116, Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade, by Morton Rosenberg, for a description of several possible factors affecting the CRA’s use, and for other effects that the act may have on agency rulemaking.

\(^7\) See CRS Report RL30116, Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act after a Decade, by Morton Rosenberg, for a description of instances in which the filing of a resolution of disapproval had an effect on agencies’ decisions.
Appendix A. Mandatory Rulemaking Provisions

Table A-1 below lists provisions in the Dodd-Frank Act that require agencies to issue certain rules (e.g., stating that the agency or agencies “shall” establish, promulgate, or issue rules or regulations on a particular topic).

<table>
<thead>
<tr>
<th>Section</th>
<th>Text of the Provision</th>
<th>Agency</th>
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<tbody>
<tr>
<td>Section 102(b)</td>
<td>“…shall establish, by regulation, the requirements for determining if a company is predominantly engaged in financial activities…”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 120(e)(2)(B)</td>
<td>“…shall promulgate regulations to establish a procedure under which entities under its jurisdiction may appeal a determination by such agency under this paragraph that standards imposed under this section (providing more stringent regulation of a financial activity) should remain in effect.”</td>
<td>All primary financial regulatory agencies that impose standards under this section.</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C of this title must be issued within 18 months of the act’s effective date.)</td>
</tr>
<tr>
<td>Section 152(g)</td>
<td>“…shall issue regulations prohibiting the Director and any employee of the Office (of Financial Research) who has had access to the transaction or position data maintained by the Data Center or other business confidential information about financial entities required to report to the Office from being employed by or providing advice or consulting services to a financial company, for a period of 1 year after last having had access in the course of official duties to such transaction or position data or business confidential information, regardless of whether that entity is required to report to the Office.”</td>
<td>Secretary of the Treasury, with the concurrence of the Office of Government Ethics</td>
<td>None</td>
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<td>Section 154(b)(1)(C)</td>
<td>“…shall promulgate regulations pursuant to subsections (a)(1), (a)(2), (a)(7), and (c)(1) of section 153 regarding the type and scope of the data to be collected by the Data Center under this paragraph.” (Data to be used by Council to determine threats to financial stability.)</td>
<td>Department of the Treasury, Office of Financial Research</td>
<td>None</td>
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<td>Section 155(d)</td>
<td>“…shall establish, by regulation … an assessment schedule and rates, applicable to bank holding companies with total consolidated assets of $50,000,000,000 or greater and nonbank financial companies supervised by the Board of Governors….”</td>
<td>Secretary of the Treasury, with the approval of the Financial Stability Oversight Council</td>
<td>July 21, 2012 (Rules can be issued starting two years after the date of enactment.)</td>
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<tr>
<td>Section 165(d)(8)</td>
<td>“…shall jointly issue final rules implementing this subsection” (on “Resolution Plan and Credit Exposure Reports”).</td>
<td>Board of Governors and the Federal Deposit Insurance Corporation</td>
<td>January 21, 2012 (Within 18 months after the date of enactment.)</td>
</tr>
<tr>
<td>Section 165(e)(1)</td>
<td>“In order to limit the risks that the failure of any individual company could pose to a nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a), the Board of Governors, by regulation, shall prescribe standards that limit such risks.”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
</tr>
<tr>
<td>Section 165(h)</td>
<td>“…shall issue final rules to carry out this subsection…” (on “Risk Committee”). Specifically required to “issue regulations requiring each bank holding company that is a publicly traded company and that has total consolidated assets of not less than $10,000,000,000 to establish a risk committee….”</td>
<td>Board of Governors</td>
<td>July 21, 2012 (Rules must be issued within one year after the transfer date, and must take effect no later than 15 months after the transfer date (i.e., by October 21, 2012).)</td>
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<td>Section 165(i)(2)(C)</td>
<td>“…shall issue consistent and comparable regulations to implement this paragraph that shall—(i) define the term ‘stress test’ for purposes of this paragraph; (ii) establish methodologies for the conduct of stress tests required by this paragraph that shall provide for at least 3 different sets of conditions, including baseline, adverse, and severely adverse; (iii) establish the form and content of the report required by subparagraph (B); and (iv) require companies subject to this paragraph to publish a summary of the results of the required stress tests.”</td>
<td>“Each Federal primary financial regulatory agency, in coordination with the Board of Governors and the Federal Insurance Office”</td>
<td>None</td>
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<td>Section 165(j)(3)</td>
<td>“…shall promulgate regulations to establish procedures and timelines for complying with the requirements of this subsection” (on 'leverage limitation').”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
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<td>Section 166(a)</td>
<td>“…shall prescribe regulations establishing requirements to provide for the early remediation of financial distress of a nonbank financial company supervised by the Board of Governors or a bank holding company described in section 165(a).…”</td>
<td>Board of Governors, in consultation with the Financial Stability Oversight Council and the Federal Deposit Insurance Corporation</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
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<tr>
<td>Section 170(a)</td>
<td>“…shall promulgate regulations...setting forth the criteria for exempting certain types or classes of U.S. nonbank financial companies or foreign nonbank financial companies from supervision by the Board of Governors.”</td>
<td>Board of Governors, in consultation with the Financial Stability Oversight Council</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
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<td>Section 201(b)</td>
<td>“…shall establish, by regulation” definitional criteria to determine if the consolidated revenues of a company from certain activities constitute less than 85 percent of the total consolidated revenues of such company.</td>
<td>Federal Deposit Insurance Corporation, in consultation with the Secretary</td>
<td>None</td>
</tr>
<tr>
<td>Section 205(h)</td>
<td>“… shall jointly issue rules to implement this section” (on “Orderly Liquidation of Covered Brokers and Dealers”).</td>
<td>The Securities and Exchange Commission and the Federal Deposit Insurance Corporation, after consultation with the Securities Investor Protection Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 210(c)(8)(H)(i)</td>
<td>“…shall jointly prescribe regulations requiring that financial companies maintain such records with respect to qualified financial contracts (including market valuations) that the Federal primary financial regulatory agencies determine to be necessary or appropriate in order to assist the Corporation as receiver for a covered financial company in being able to exercise its rights and fulfill its obligations under this paragraph or paragraph (9) or (10).” The rules issued may be “joint final or interim final regulations.”</td>
<td>“Federal primary financial regulatory agencies” (or the chairperson of the Financial Stability Oversight Council, if the deadline is not met)</td>
<td>July 21, 2012 (Within 24 months of the date of enactment.)</td>
</tr>
<tr>
<td>Section 210(n)(7)</td>
<td>“…shall jointly … prescribe regulations governing the calculation of the maximum obligation limitation defined in this paragraph.”</td>
<td>Federal Deposit Insurance Corporation and the Secretary of the Treasury, in consultation with the Financial Stability Oversight Council</td>
<td>None</td>
</tr>
<tr>
<td>Section 210(o)(6)(A)</td>
<td>“…shall prescribe regulations to carry out this subsection” (on assessments to pay for obligations issued by the FDIC).</td>
<td>Federal Deposit Insurance Corporation, in consultation with the Secretary of the Treasury</td>
<td>None</td>
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<td>Section 210(r)</td>
<td>“…shall prescribe regulations which, at a minimum, shall prohibit the sale of assets of a covered financial company by the Corporation to … (any person who has certain characteristics).”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 210(s)(3)</td>
<td>“…shall promulgate regulations to implement the requirements of this subsection (on recoupment of compensation from senior executives and directors of failed financial companies), including….”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 213(d)</td>
<td>“…shall jointly prescribe rules or regulations to administer and carry out this section” (on banning certain activities by senior executives and directors).</td>
<td>Federal Deposit Insurance Corporation and the Board of Governors, in consultation with the Financial Stability Oversight Council</td>
<td>None</td>
</tr>
<tr>
<td>Section 331(b)</td>
<td>“…shall amend the regulations issued by the Corporation under section 7(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(2)) to define the term ‘assessment base’ with respect to an insured depository institution for purposes of that section 7(b)(2), as an amount equal to….”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 332(1)(B)</td>
<td>“…shall prescribe, by regulation, after notice and opportunity for comment, the method for the declaration, calculation, distribution, and payment of dividends under this paragraph.”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 358(2) (amending Section 806 of the Community Reinvestment Act of 1977 (12 U.S.C. 2901 et seq.))</td>
<td>“… shall prescribe regulations applicable to savings associations ….“</td>
<td>Comptroller of the Currency</td>
<td>None</td>
</tr>
<tr>
<td>Section 358(2) (amending Section 806 of the Community Reinvestment Act of 1977 (12 U.S.C. 2901 et seq.))</td>
<td>“… shall prescribe regulations applicable to insured State member banks, bank holding companies and savings and loan holding companies.”</td>
<td>Board of Governors</td>
<td>None</td>
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<td>Section 404(2) (amending Section 204 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-4))</td>
<td>“...shall issue rules requiring each investment adviser to a private fund to file reports containing such information as the Commission deems necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 406(2) (amending Section 211 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-11))</td>
<td>“…shall … jointly promulgate rules to establish the form and content of the reports required to be filed with the Commission under subsection 204(b) and with the Commodity Futures Trading Commission by investment advisers that are registered both under this title and the Commodity Exchange Act (7 U.S.C. 1a et seq.).”</td>
<td>Securities and Exchange Commission and Commodity Futures Trading Commission</td>
<td>July 21, 2011 (Not later than 12 months after the date of enactment of the Private Fund Investment Advisers Registration Act of 2010, which is Title IV of the Dodd-Frank Act.)</td>
</tr>
<tr>
<td>Section 407 (amending Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3))</td>
<td>“…shall issue final rules to define the term ‘venture capital fund’ for purposes of this subsection” (on “Exemption of Venture Capital Fund Advisers”).</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Not later than one year after the date of enactment.)</td>
</tr>
<tr>
<td>Section 409 (amending Section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)))</td>
<td>Requires an exemption for “any family office, as defined by rule, regulation, or order of the Commission, in accordance with the purposes of this title...” Goes on to require that the exemption meet certain criteria.</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 413(a)</td>
<td>“...shall adjust any net worth standard for an accredited investor, as set forth in the rules of the Commission under the Securities Act of 1933...”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 616(d) (amending the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.)</td>
<td>“…shall jointly issue final rules to carry out this section” (which requires holding companies to serve as a “source of strength” for subsidiaries).</td>
<td>The “appropriate Federal banking agencies.”</td>
<td>July 21, 2012 (Within one year after the transfer date.)</td>
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<td>Section 618(d)(1)</td>
<td>“…shall, by regulation or order, prescribe capital adequacy and other risk management standards for supervised securities holding companies that are appropriate to protect the safety and soundness of the supervised securities holding companies and address the risks posed to financial stability by supervised securities holding companies.”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 619 (amending the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.))</td>
<td>“…shall consider the findings of the study under paragraph (1) (on implementing the provisions in this section on prohibitions on proprietary trading and relationships with hedge funds and private equity funds) and adopt rules to carry out this section.”</td>
<td>Certain rules are to be issued jointly by the “appropriate Federal banking agencies,” while other rules are to be issued individually by the Board of Governors, the Commodity Futures Trading Commission, and the Securities and Exchange Commission</td>
<td>October 21, 2011 (Within 15 months of the date of enactment. Study required within six months of enactment, and rule required within nine months of enactment.)</td>
</tr>
<tr>
<td>Section 619 (amending the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.))</td>
<td>“…shall issues [sic] rules to implement paragraphs (2) and (3)” (on “Conformance Period for Divestiture” and “Extended Transition for Illiquid Funds”).</td>
<td>Board of Governors</td>
<td>January 21, 2011 (Not later than six months after the date of enactment.)</td>
</tr>
<tr>
<td>Section 620(a) (amending the Securities Act of 1933 (15 U.S.C. 77a et seq.))</td>
<td>“…shall issue rules for the purpose of implementing subsection (a)” (on conflicts of interest relating to certain securitizations).</td>
<td>Securities and Exchange Commission</td>
<td>April 17, 2011 (Within 270 days after the date of enactment.)</td>
</tr>
<tr>
<td>Section 621 (amending the Securities Act of 1933 (15 U.S.C. 77a et seq.), new Section 27B)</td>
<td>“…shall issue rules for the purpose of implementing subsection (a)” (which establishes certain conflict of interest requirements).</td>
<td>Securities and Exchange Commission</td>
<td>April 17, 2011 (Within 270 days after the date of enactment.)</td>
</tr>
<tr>
<td>Section 622 (amending the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.))</td>
<td>The term “liabilities,” “with respect to an insurance company or other nonbank financial company supervised by the Board, (means) such assets of the company as the Board shall specify by rule, in order to provide for consistent and equitable treatment of such companies.”</td>
<td>Board of Governors</td>
<td>None</td>
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<tr>
<td>Section 622 (amending the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.), new Section 14)</td>
<td>“…shall issue regulations implementing this section (on ‘Concentration Limits on Large Financial Firms’) in accordance with the recommendations of the (Financial Stability Oversight) Council….”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 622 (amending the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.), new Section 14)</td>
<td>“…shall issue final regulations implementing this section, which shall reflect any recommendations by the (Financial Stability Oversight) Council under paragraph (1)(B).”</td>
<td>Board of Governors</td>
<td>October 21, 2011 (Within 15 months of the date of enactment. Study required within six months of enactment, and rule required within nine months of enactment.)</td>
</tr>
<tr>
<td>Section 626 (creating a new Section 10A on “Intermediate Holding Companies” to the Homeowners’ Loan Act)</td>
<td>“…shall promulgate regulations to establish the criteria for determining whether to require a grandfathered unitary savings and loan holding company to establish an intermediate holding company under subsection (b)…”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 712(a)(8)</td>
<td>“…shall jointly prescribe such regulations regarding mixed swaps, as described in section 1a(47)(D) of the Commodity Exchange Act (7 U.S.C. 1a(47)(D)) and in section 3(a)(68)(D) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(D)), as may be necessary to carry out the purposes of this title.”</td>
<td>Commodity Futures Trading Commission and the Securities and Exchange Commission, after consultation with the Board of Governors</td>
<td>July 16, 2011 (Section 712(a)(3) states that regulations “shall be prescribed in accordance with applicable requirements of title 5, United States Code, and shall be issued in final form not later than 360 days after the date of enactment of this Act.”)</td>
</tr>
<tr>
<td>Section 721(a)(16) (amending Section 1a of the Commodity Exchange Act (7 U.S.C. 1a))</td>
<td>“…shall define by rule or regulation the term ‘substantial position’ at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<td>Section 721(a)(21) (amending Section 1a of the Commodity Exchange Act (7 U.S.C. 1a))</td>
<td>“The Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
</tr>
<tr>
<td>Section 721(c)</td>
<td>“To include transactions and entities that have been structured to evade this subtitle, (the Commission) shall adopt a rule to further define the terms ‘swap,’ ‘swap dealer,’ ‘major swap participant,’ and ‘eligible contract participant.’”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 723(a)(3) (amending Section 2 of the Commodity Exchange Act (7 U.S.C. 2))</td>
<td>“…shall adopt rules for a derivatives clearing organization’s submission for review, pursuant to this paragraph, of a swap, or a group, category, type, or class of swaps, that it seeks to accept for clearing.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 21, 2011 (Within one year after the date of enactment.)</td>
</tr>
<tr>
<td>Section 723(a)(3) (amending Section 2 of the Commodity Exchange Act (7 U.S.C. 2))</td>
<td>“…shall adopt rules for reviewing, pursuant to this paragraph, a derivatives clearing organization’s clearing of a swap, or a group, category, type, or class of swaps, that it has accepted for clearing.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 21, 2011 (Within one year after the date of enactment.)</td>
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<tr>
<td>Section 725(d)</td>
<td>“…shall adopt rules mitigating conflicts of interest in connection with the conduct of business by a swap dealer or a major swap participant with a derivatives clearing organization, board of trade, or a swap execution facility that clears or trades swaps in which the swap dealer or major swap participant has a material debt or material equity investment.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<td>Section 726(a)</td>
<td>“…shall adopt rules which may include numerical limits on the control of, or the voting rights with respect to, any derivatives clearing organization that clears swaps, or swap execution facility or board of trade designated as a contract market that posts swaps or makes swaps available for trading, by a bank holding company ... with total consolidated assets of $50,000,000,000 or more, a nonbank financial company ... supervised by the Board, an affiliate of such a bank holding company or nonbank financial company, a swap dealer, major swap participant, or associated person of a swap dealer or major swap participant.”</td>
<td>Commodity Futures Trading Commission</td>
<td>January 17, 2011 (Within 180 days after enactment.)</td>
</tr>
<tr>
<td>Section 727 (amending Section 2(a) of the Commodity Exchange Act (7 U.S.C. 2(a)))</td>
<td>“…is authorized and required to provide by rule for the public availability of swap transaction and pricing data as follows…”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 728 (amending the Commodity Exchange Act by inserting a new section after section 20 (7 U.S.C. 24))</td>
<td>“…shall adopt rules governing persons that are registered under this section” (on swap data repositories).</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 729 (amending the Commodity Exchange Act after section 4q (7 U.S.C. 60-I))</td>
<td>“…shall promulgate an interim final rule … providing for the reporting of each swap entered into before the date of enactment,” the terms of which were in effect as of that date.</td>
<td>Commodity Futures Trading Commission</td>
<td>October 19, 2010 (Within 90 days of the date of enactment.)</td>
</tr>
<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>…shall adopt rules governing reporting and recordkeeping for swap dealers and major swap participants.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>…shall adopt rules for persons that are registered as swap dealers or major swap participants under this section” (on registration and regulation of swap dealers and major swap participants).</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>… shall prescribe rules under this subsection governing business conduct standards for swap dealers and major swap participants.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
</tr>
<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>…shall jointly adopt rules for swap dealers and major swap participants, with respect to their activities as a swap dealer or major swap participant, for which there is a prudential regulator imposing (i) capital requirements; and (ii) both initial and variation margin requirements on all swaps that are not cleared by a registered derivatives clearing organization.”</td>
<td>The prudential regulators, in consultation with the Commodity Futures Trading Commission and the Securities and Exchange Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>…shall adopt rules for swap dealers and major swap participants, with respect to their activities as a swap dealer or major swap participant, for which there is not a prudential regulator imposing (i) capital requirements; and (ii) both initial and variation margin requirements on all swaps that are not cleared by a registered derivatives clearing organization.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>“shall prescribe rules under this subsection governing duties of swap dealers and major swap participants.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>“shall adopt rules governing daily trading records for swap dealers and major swap participants.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>“shall prescribe rules under this subsection governing business conduct standards for swap dealers and major swap participants.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>“shall adopt rules governing documentation standards for swap dealers and major swap participants.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 733 (amending the Commodity Exchange Act by inserting after section 5g (7 U.S.C. 7b-2) a new Section 5h on “Swap Execution Facilities”)</td>
<td>“shall prescribe rules governing the regulation of alternative swap execution facilities under this section.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<td>Section 737(a)(4) (amending Section 4a(a) of the Commodity Exchange Act (7 U.S.C. 6a(a)))</td>
<td>“…shall by rule, regulation, or order establish limits on the amount of positions, as appropriate, other than bona fide hedge positions, that may be held by any person with respect to contracts of sale for future delivery or with respect to options on the contracts or commodities traded on or subject to the rules of a designated contract market.”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 737(a)(4) (amending Section 4a(a) of the Commodity Exchange Act (7 U.S.C. 6a(a)))</td>
<td>“…shall, by rule or regulation, establish limits (including related hedge exemption provisions) on the aggregate number or amount of positions in contracts based upon the same underlying commodity (as defined by the Commission) that may be held by any person…”</td>
<td>Commodity Futures Trading Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<td>Section 761 (amending Section 3(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a))</td>
<td>“…shall define, by rule or regulation, the term 'substantial position' at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States.”</td>
<td>Securities and Exchange Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 761 (amending Section 3(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a))</td>
<td>“…shall exempt from designation as a security-based swap dealer an entity that engages in a de minimis quantity of security based swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of any determination to exempt.”</td>
<td>Securities and Exchange Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<td>Section 763(a) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“…shall prescribe rules under this section (and issue interpretations of rules prescribed under this section), as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.”</td>
<td>Securities and Exchange Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 763(a) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“…shall adopt rules for a clearing agency’s submission for review, pursuant to this subsection, of a security-based swap, or a group, category, type, or class of security-based swaps, that it seeks to accept for clearing.”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Within one year after the date of enactment.)</td>
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<tr>
<td>Section 763(b) (amending Section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1))</td>
<td>“…shall adopt rules governing persons that are registered as clearing agencies for security-based swaps under this title.”</td>
<td>Securities and Exchange Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<td>Section 763(c) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“…shall prescribe rules governing the regulation of security-based swap execution facilities under this section.”</td>
<td>Securities and Exchange Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 763(g) (amending Section 9 of the Securities Exchange Act of 1934 (15 U.S.C. 78ii))</td>
<td>“…shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such transactions, acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, and such quotations as are fictitious.”</td>
<td>Securities and Exchange Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<td>Section 763(i) (amending Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m))</td>
<td>“…shall adopt rules governing persons that are registered under this subsection.”</td>
<td>Securities and Exchange Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 764 (amending Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) creating a new Section 15F)</td>
<td>“…shall issue rules under this section to provide for the registration of security-based swap dealers and major security-based swap participants.”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Within one year after the date of enactment.)</td>
</tr>
<tr>
<td>Section 766(a) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“…shall promulgate an interim final rule … providing for the reporting of each security-based swap entered into before the date of enactment,” the terms of which had not expired as of that date.</td>
<td>Securities and Exchange Commission</td>
<td>October 19, 2010 (Within 90 days of the date of enactment.)</td>
</tr>
<tr>
<td>Section 805(a)1</td>
<td>“…by rule or order … shall prescribe risk management standards, taking into consideration relevant international standards and existing prudential requirements, governing….”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 806(e)(1)(B)</td>
<td>“…shall prescribe regulations that define and describe the standards for determining when notice (of proposed changes to a designated financial market utility’s rules, procedures or operations) is required to be provided under subparagraph (A).”</td>
<td>Each supervisory agency, in consultation with the Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 915 (amending Section 4 of the Securities Exchange Act of 1934 (15 U.S.C. 78d))</td>
<td>“…shall, by regulation, establish procedures requiring a formal response to all recommendations submitted to the Commission by the Investor Advocate, not later than 3 months after the date of such submission.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<td>Section 916(a)</td>
<td>“…shall promulgate rules setting forth the procedural requirements of the proceedings required under this paragraph.”</td>
<td>Securities and Exchange Commission, after consultation with other regulatory agencies</td>
<td>January 17, 2011 (Within 180 days after enactment.)</td>
</tr>
<tr>
<td>Section 924</td>
<td>“…shall issue final regulations implementing the provisions of section 21F of the Securities Exchange Act of 1934, as added by this subtitle…”</td>
<td>Securities and Exchange Commission</td>
<td>April 17, 2011 (Within 270 days after the date of enactment.)</td>
</tr>
<tr>
<td>Section 926</td>
<td>“…shall issue rules for the disqualification of offerings and sales of securities made under section 230.506 of title 17, Code of Federal Regulations…”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Within one year after the date of enactment.)</td>
</tr>
<tr>
<td>Section 929W</td>
<td>“…shall revise its regulations in section 240.17Ad-17 of title 17, Code of Federal Regulations, as in effect on December 8, 1997, to extend the application of such section to brokers and dealers and to provide for the following…”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 929X(a)</td>
<td>“…shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of the reporting period. At a minimum, such public disclosure shall occur every month.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<tr>
<td>Section 932(a)(2)(B)</td>
<td>“…shall prescribe rules requiring each nationally recognized statistical rating organization to submit to the Commission an annual internal controls report, which shall contain…”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Per Section 937, within one year of the date of enactment.)</td>
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<td>Section 932(a)(8) (amending Section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o-7))</td>
<td>“…shall adopt rules requiring a nationally recognized statistical rating organization … to disclose the certification described in subparagraph (B) to the public in a manner that allows the public to determine the adequacy and level of due diligence services provided by a third party.”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Per Section 937, within one year of the date of enactment.)</td>
</tr>
<tr>
<td>Section 932(a)(4) (amending Section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7))</td>
<td>“…shall issue rules to prevent the sales and marketing considerations of a nationally recognized statistical rating organization from influencing the production of ratings by the nationally recognized statistical rating organization.” (Goes on to detail contents.)</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Per Section 937, within one year of the date of enactment.)</td>
</tr>
<tr>
<td>Section 932(a)(8) (amending Section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7))</td>
<td>“…shall (A) establish, by rule, fines, and other penalties applicable to any nationally recognized statistical rating organization that violates the requirements of this section and the rules thereunder; and (B) issue such rules as may be necessary to carry out this section.”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Per Section 937, within one year of the date of enactment.)</td>
</tr>
<tr>
<td>Section 932(a)(8) (amending Section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7))</td>
<td>“…shall, by rule, require that each nationally recognized statistical rating organization publicly disclose information on the initial credit ratings determined by the nationally recognized statistical rating organization for each type of obligor, security, and money market instrument, and any subsequent changes to such credit ratings….”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Per Section 937, within one year of the date of enactment.)</td>
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<tr>
<td>Section 932(a)(8) (amending Section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7))</td>
<td>“…shall prescribe rules, for the protection of investors and in the public interest, with respect to the procedures and methodologies, including qualitative and quantitative data and models, used by nationally recognized statistical rating organizations that require each nationally recognized statistical rating organization….”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Per Section 937, within one year of the date of enactment.)</td>
</tr>
<tr>
<td>Section 932(a)(8) (amending Section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7))</td>
<td>“…shall require, by rule, each nationally recognized statistical rating organization to prescribe a form to accompany the publication of each credit rating that discloses….”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Per Section 937, within one year of the date of enactment.)</td>
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<tr>
<td>Section 936</td>
<td>“…shall issue rules that are reasonably designed to ensure that any person employed by a nationally recognized statistical rating organization to perform credit ratings—(1) meets standards of training, experience, and competence necessary to produce accurate ratings for the categories of issuers whose securities the person rates; and (2) is tested for knowledge of the credit rating process.”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Per Section 937, within one year of the date of enactment.)</td>
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<td>Section 938</td>
<td>“…shall require, by rule, each nationally recognized statistical rating organization to establish, maintain, and enforce written policies and procedures that…”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2011 (Per Section 937, within one year of the date of enactment.)</td>
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<tr>
<td>Section 939B</td>
<td>“…shall revise Regulation FD (17 C.F.R. 243.100) to remove from such regulation the exemption for entities whose primary business is the issuance of credit ratings (17 C.F.R. 243.100(b)(2)(iii)).”</td>
<td>Securities and Exchange Commission</td>
<td>October 19, 2010 (Within 90 days of the date of enactment.)</td>
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<td>Section 941(b) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“…shall jointly prescribe regulations to require any securitizer to retain an economic interest in a portion of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party.”</td>
<td>Federal banking agencies and the Securities and Exchange Commission</td>
<td>April 17, 2011 (Within 270 days after the date of enactment.)</td>
</tr>
<tr>
<td>Section 941(b) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“…shall jointly issue regulations to exempt qualified residential mortgages from the risk retention requirements of this subsection.”</td>
<td>Federal banking agencies, the Securities and Exchange Commission, the Secretary of Housing and Urban Development, and the Director of the Federal Housing Finance Agency</td>
<td>None. (However, all rules under this section become effective either one year or two years after the date they are published.)</td>
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<tr>
<td>Section 942(b) (amending Section 7 of the Securities Act of 1933 (15 U.S.C. 77g))</td>
<td>“…shall adopt regulations under this subsection requiring each issuer of an asset-backed security to disclose, for each tranche or class of security, information regarding the assets backing that security.” (Goes on to detail contents.)</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<tr>
<td>Section 943</td>
<td>“…shall prescribe regulations on the use of representations and warranties in the market for asset-backed securities … that…”</td>
<td>Securities and Exchange Commission</td>
<td>January 17, 2011 (Within 180 days after enactment.)</td>
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<td>Section 945 (amending Section 7 of the Securities Act of 1933 (15 U.S.C. 77g))</td>
<td>“…shall issue rules relating to the registration statement required to be filed by any issuer of an asset-backed security (as that term is defined in section 3(a)(77) of the Securities Exchange Act of 1934) that require any issuer of an asset-backed security—(1) to perform a review of the assets underlying the asset backed security; and (2) to disclose the nature of the review under paragraph (1).”</td>
<td>Securities and Exchange Commission</td>
<td>January 17, 2011 (Within 180 days after enactment.)</td>
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<td>Section 951 (amending</td>
<td>“…the person making such solicitation shall disclose in the proxy or consent solicitation material, in a clear and simple form in accordance with regulations to be promulgated by the Commission, any agreements or understandings that….”</td>
<td>Securities and Exchange</td>
<td>January 21, 2011 (Rule must be in place six months after the date of enactment.)</td>
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<tr>
<td>the Securities Exchange</td>
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<td>Act of 1934 (15 U.S.C.</td>
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<td>78a et seq.)</td>
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<td>Section 952(a) (amending</td>
<td>“…shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer (other than certain ones) that does not comply with the requirements of this subsection.”</td>
<td>Securities and Exchange</td>
<td>None</td>
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<td>the Securities Exchange</td>
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<td>et seq.)</td>
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<tr>
<td>Section 952(a) (amending</td>
<td>“…shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of this section.”</td>
<td>Securities and Exchange</td>
<td>July 16, 2011 (Within 360 days after the date of enactment.)</td>
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<td>the Securities Exchange</td>
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<td>et seq.)</td>
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<td>Section 953(a) (amending</td>
<td>“…shall, by rule, require each issuer to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer a clear description of any compensation required to be disclosed by the issuer under section 229.402 of title 17, Code of Federal Regulations…”</td>
<td>Securities and Exchange</td>
<td>None</td>
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<tr>
<td>the Securities Exchange</td>
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<td>Commission</td>
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<tr>
<td>Section 953(b)</td>
<td>“…shall amend section 229.402 of title 17, Code of Federal Regulations, to require each issuer to disclose in any filing of the issuer … (certain compensation levels and ratios)…”</td>
<td>Securities and Exchange</td>
<td>None</td>
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<td>Section 954 (amending the Securities Exchange Act of 1934 after section 10C)</td>
<td>“…shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not comply with the requirements of this section.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 955 (amending Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n))</td>
<td>“…shall, by rule, require each issuer to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer whether any employee or member of the board of directors of the issuer, or any designee of such employee or member, is permitted to purchase financial instruments … that are designed to hedge or offset any decrease in the market value of equity securities….”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<tr>
<td>Section 956(a)</td>
<td>“…shall prescribe regulations or guidelines to require each covered financial institution to disclose to the appropriate Federal regulator the structures of all incentive-based compensation arrangements offered by such covered financial institutions….”</td>
<td>The “appropriate Federal regulators”</td>
<td>April 21, 2011 (Within nine months after the date of enactment.)</td>
</tr>
<tr>
<td>Section 956(b)</td>
<td>“…shall jointly prescribe regulations or guidelines that prohibit any types of incentive-based payment arrangement, or any feature of any such arrangement, that the regulators determine encourages inappropriate risks by covered financial institutions….”</td>
<td>The “appropriate Federal regulators”</td>
<td>April 21, 2011 (Within nine months after the date of enactment.)</td>
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<tr>
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<td>Section 972 (amending Securities Exchange Act of 1934 (15 U.S. C. 78a et seq.) creating a new Section 14B)</td>
<td>“…shall issue rules that require an issuer to disclose in the annual proxy sent to investors the reasons why the issuer has chosen—(1) the same person to serve as chairman of the board of directors and chief executive officer (or in equivalent positions); or (2) different individuals to serve as chairman of the board of directors and chief executive officer (or in equivalent positions of the issuer).”</td>
<td>Securities and Exchange Commission</td>
<td>January 17, 2011 (Within 180 days of the date of enactment.)</td>
</tr>
<tr>
<td>Section 984(b)</td>
<td>“…shall promulgate rules that are designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities.”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2012 (Within two years after the date of enactment.)</td>
</tr>
<tr>
<td>Section 1022(c)(6)(A)</td>
<td>“…shall prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial law.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1024(a)(2)</td>
<td>“…shall consult with the Federal Trade Commission prior to issuing a rule, in accordance with paragraph (1)(B), to define covered persons subject to this section…” (on “Supervision of Nondepository Covered Persons”).</td>
<td>Consumer Financial Protection Bureau, in consultation with the Federal Trade Commission</td>
<td>July 21, 2012 (“Initial rule” required within one year after the designated transfer date.)</td>
</tr>
<tr>
<td>Section 1024(b)(7)(A)</td>
<td>“... shall prescribe rules to facilitate supervision of persons described in subsection (a)(1) and assessment and detection of risks to consumers.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1025(e)(4)(E)</td>
<td>“...shall prescribe rules to provide safeguards from retaliation against the insured depository institution, insured credit union, or other covered person described in subsection (a) instituting an appeal under this paragraph, as well as their officers and employees.”</td>
<td>Consumer Financial Protection Bureau and the “prudential regulators.”</td>
<td>None</td>
</tr>
<tr>
<td>Section 1033(d)</td>
<td>“...by rule, shall prescribe standards applicable to covered persons to promote the development and use of standardized formats for information, including through the use of machine readable files, to be made available to consumers under this section” (on “Consumer Rights to Access Information”).</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1035(c)</td>
<td>“The Ombudsman designated under this subsection (re private education loans) shall ... in accordance with regulations of the Director, receive, review, and attempt to resolve informally complaints from borrowers of loans described in subsection (a).....”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1041(c)(1)</td>
<td>“...shall issue a notice of proposed rulemaking whenever a majority of the States has enacted a resolution in support of the establishment or modification of a consumer protection regulation by the Bureau.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1042(c)</td>
<td>“...shall prescribe regulations to implement the requirements of this section...” (on &quot;Preservation of Enforcement Powers of the States&quot;).</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1053(e)</td>
<td>“…shall prescribe rules establishing such procedures as may be necessary to carry out this section” (on “Hearings and Adjudication Proceedings”).</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1071(a) (amending the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.))</td>
<td>“Each financial institution shall compile and maintain, in accordance with regulations of the Bureau, a record of the information provided by any loan applicant pursuant to a request under subsection (b).”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1071(a) (amending the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.))</td>
<td>“Information compiled and maintained under this section (&quot;Small Business Loan Data Collection&quot;) shall be—(A) retained for not less than 3 years after the date of preparation; (B) made available to any member of the public, upon request, in the form required under regulations prescribed by the Bureau; (C) annually made available to the public generally by the Bureau, in such form and in such manner as is determined by the Bureau, by regulation.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1075(a) (amending the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.))</td>
<td>“…shall prescribe regulations in final form … to establish standards for assessing whether the amount of any interchange transaction fee described in paragraph (2) is reasonable and proportional to the cost incurred by the issuer with respect to the transaction.”</td>
<td>Board of Governors</td>
<td>April 21, 2011 (Within nine months of the date of enactment of the Consumer Financial Protection Act of 2010.)</td>
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<td>Section 1075(a) (amending the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.))</td>
<td>“…shall ... prescribe regulations providing that an issuer or payment card network shall not directly or through any agent, processor, or licensed member of a payment card network, by contract, requirement, condition, penalty, or otherwise, restrict the number of payment card networks on which an electronic debit transaction may be processed….”</td>
<td>Board of Governors</td>
<td>July 21, 2011 (Within one year of the date of enactment.)</td>
</tr>
<tr>
<td>Section 1079(c)</td>
<td>“…shall, consistent with subtitle B (&quot;General Powers of the Bureau&quot;), propose regulations or otherwise establish a program to protect consumers who use exchange facilitators.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>July 21, 2014 (Rule or program must be established within two years after the submission of a report (which is required within one year of the transfer date).)</td>
</tr>
<tr>
<td>Section 1083(a) (amending the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.))</td>
<td>Bureau is required to determine whether the existing regulations applicable under paragraphs (1) through (3) of subsection (a) are “fair and not deceptive and otherwise meet the objectives of the Consumer Financial Protection Act of 2010,” and “(3) promulgate regulations under subsection (a)(4)….”</td>
<td>Consumer Financial Protection Bureau</td>
<td>July 22, 2011 (Regulations to be promulgated “after the designated transfer date.”)</td>
</tr>
<tr>
<td>Section 1084 (amending the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.))</td>
<td>“… shall prescribe rules to carry out the purposes of this title” (with certain exceptions).</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1085(3)(F) (amending the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.))</td>
<td>“…shall prescribe regulations to carry out the purposes of this title with respect to a person described in section 1029(a) of the Consumer Financial Protection Act of 2010.”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 1088(a)(9) (amending the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.))</td>
<td>“…shall prescribe rules to carry out this subsection” (on amendments to the Fair Credit Reporting Act).</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1088(a)(11)(C) (amending the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.))</td>
<td>“…shall … prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1088(b)(3)</td>
<td>“Regulations to carry out section 624 of the Fair Credit Reporting Act (15 U.S.C. 1681s-3), shall be prescribed, as described in paragraph (2), by….”</td>
<td>Commodity Futures Trading Commission, Securities and Exchange Commission, and the Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1094(3)(B) (amending the Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.))</td>
<td>“…, shall develop regulations that” (establish certain information collection and disclosure requirements).</td>
<td>Consumer Financial Protection Bureau, in consultation with “appropriate banking agencies,” the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, and the Secretary of Housing and Urban Development.</td>
<td>None</td>
</tr>
<tr>
<td>Section 1094(3)(F) (amending the Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.))</td>
<td>“The data required to be disclosed under subsection (b) shall be submitted to the Bureau or to the appropriate agency for any institution reporting under this title, in accordance with regulations prescribed by the Bureau.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1101(a)(6) (amending Section 13 of the Federal Reserve Act (12 U.S.C. 343))</td>
<td>“… shall establish, by regulation … the policies and procedures governing emergency lending under this paragraph.”</td>
<td>Board of Governors, in consultation with the Secretary of the Treasury</td>
<td>As soon as is practicable after the date of enactment.</td>
</tr>
<tr>
<td>Section 1105(b)(1)</td>
<td>“…the Corporation shall establish, by regulation … policies and procedures governing the issuance of guarantees authorized by this section.”</td>
<td>Federal Deposit Insurance Corporation, in consultation with the Secretary of the Treasury</td>
<td>As soon as is practicable after the date of enactment.</td>
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<td>Section 1402(a) (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.))</td>
<td>“…shall prescribe regulations requiring depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions, the subsidiaries of such institutions, and the employees of such institutions or subsidiaries with the requirements of this section and the registration procedures established under section 1507 of the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.”</td>
<td>Board of Governors</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1403 (amending Section 129B of the Truth in Lending Act (as added by section 1402(a)))</td>
<td>“…shall prescribe regulations to prohibit (A) mortgage originators from steering any consumer to a residential mortgage loan that (has certain characteristics)....”</td>
<td>Board of Governors</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1405(a) (amending Section 129B of the Truth in Lending Act)</td>
<td>“…shall, by regulations, prohibit or condition terms, acts or practices relating to residential mortgage loans that the Board finds to be abusive, unfair, deceptive, predatory, necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers....”</td>
<td>Board of Governors</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1411(a)(2) (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.))</td>
<td>“In accordance with regulations prescribed by the Board, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that … the consumer has a reasonable ability to repay the loan....”</td>
<td>Board of Governors</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
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<td>Section 1412 (amending Section 129C of the Truth in Lending Act)</td>
<td>“…shall prescribe regulations to carry out the purposes of this subsection” (re “safe harbor and rebuttable presumption”).</td>
<td>Board of Governors</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1412 (amending Section 129C of the Truth in Lending Act)</td>
<td>“…shall prescribe rules adjusting the criteria under subparagraph (A)(vii) in order to permit lenders that extend smaller loans to meet the requirements of the presumption of compliance under paragraph (1).”</td>
<td>Board of Governors</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1412 (amending Section 129C of the Truth in Lending Act)</td>
<td>“…shall … prescribe rules defining the types of loans they insure, guarantee, or administer, as the case may be, that are qualified mortgages for purposes of paragraph (2)(A).”</td>
<td>The Departments of Housing and Urban Development, Veterans Affairs, and Agriculture; and the Rural Housing Service, in consultation with the Board of Governors</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
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<tr>
<td>Section 1442 (amending Section 4 of the Department of Housing and Urban Development Act (42 U.S.C. 3533))</td>
<td>Office is responsible for “establishing rules necessary for (i) the counseling procedures under section 106(g)(1) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(h)(1)); and (ii) carrying out all other functions of the Secretary under section 106(g) of the Housing and Urban Development Act of 1968.”</td>
<td>Office of Housing Counseling within the Department of Housing and Urban Development</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1463(a) (amending Section 6 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605))</td>
<td>“A servicer of a federally related mortgage shall not … charge fees for responding to valid qualified written requests (as defined in regulations which the Bureau of Consumer Financial Protection shall prescribe) under this section” (or) “fail to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this Act.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
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<td>Section 1471 (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.))</td>
<td>“…shall jointly prescribe regulations to implement this section” (“Property Appraisal Requirements”). It goes on to say that the agencies “may jointly exempt, by rule, a class of loans from the requirements of this subsection or subsection (a) if the agencies determine that the exemption is in the public interest and promotes the safety and soundness of creditors.”</td>
<td>Board of Governors, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Consumer Financial Protection Bureau</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1471 (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.))</td>
<td>“…shall jointly prescribe regulations to implement this section” (on property appraisal requirements).</td>
<td>Board of Governors, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Consumer Financial Protection Bureau</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1472(a) (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.))</td>
<td>“…shall, for purposes of this section, prescribe interim final regulations defining with specificity acts or practices that violate appraisal independence in the provision of mortgage lending services for a consumer credit transaction secured by the principal dwelling of the consumer or mortgage brokerage services for such a transaction and defining any terms in this section or such regulations.”</td>
<td>Board of Governors</td>
<td>October 19, 2010 (Rule is required “no later than 90 days after the date of enactment of this section.”) Also, “Effective on the date the interim final regulations are promulgated pursuant to subsection (g), the Home Valuation Code of Conduct announced by the Federal Housing Finance Agency on December 23, 2008, shall have no force or effect.”</td>
</tr>
<tr>
<td>Section 1473(f)(2) (amending Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.))</td>
<td>“…shall jointly promulgate regulations for the reporting of the activities of appraisal management companies to the Appraisal Subcommittee in determining the payment of the annual registry fee.”</td>
<td>Board of Governors, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Consumer Financial Protection Bureau</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
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<tr>
<td>Section 1473(f)(2) (amending Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.))</td>
<td>“…shall jointly, by rule, establish minimum requirements to be applied by a State in the registration of appraisal management companies.”</td>
<td>Board of Governors, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Consumer Financial Protection Bureau</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1473(q) (amending Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.))</td>
<td>“…shall promulgate regulations to implement the quality control standards required under this section” (on automated valuation models used to estimate collateral value for mortgage lending purposes).</td>
<td>Board of Governors, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Consumer Financial Protection Bureau</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1483(b)(2)</td>
<td>Secretary is required to make data tables available to the public at the individual record level, and “shall issue regulations prescribing—(A) the procedures for disclosing such data to the public; and (B) such deletions as the Secretary may determine to be appropriate to protect any privacy interest of any mortgage modification applicant, including the deletion or alteration of the applicant’s name and identification number.”</td>
<td>Secretary of the Treasury</td>
<td>January 21, 2013 (Section 1400(c) requires that all mandatory Title XIV rules be issued within 18 months after the transfer date, and be effective within 12 months after issuance.)</td>
</tr>
<tr>
<td>Section 1502(b) (amending Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m))</td>
<td>“…shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person’s first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country....”</td>
<td>Securities and Exchange Commission</td>
<td>April 17, 2011 (Within 270 days after the date of enactment.)</td>
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<tr>
<td>Section 1504 (amending Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m))</td>
<td>“…shall issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals….”</td>
<td>Securities and Exchange Commission</td>
<td>April 17, 2011 (Within 270 days after the date of enactment.)</td>
</tr>
</tbody>
</table>
Appendix B. Discretionary Rulemaking Provisions

Table B-1 below lists provisions in the Dodd-Frank Act that permit, but do not require, agencies to issue certain rules (e.g., stating that the agency or agencies “may” establish, promulgate, or issue rules or regulations on a particular topic).

<table>
<thead>
<tr>
<th>Section</th>
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<tr>
<td>Section 102(a)(7)</td>
<td>“The terms ‘significant nonbank financial company’ and ‘significant bank holding company’ have the meanings given those terms by rule of the Board of Governors,”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 121(d)</td>
<td>“…may prescribe regulations regarding the application of this section (‘Mitigation of Risks to Financial Stability’) to foreign nonbank financial companies supervised by the Board of Governors and foreign-based bank holding companies....”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
</tr>
<tr>
<td>Section 165(c)(1)</td>
<td>“... may issue regulations that require each nonbank financial company supervised by the Board of Governors and bank holding companies described in subsection (a) to maintain a minimum amount of contingent capital that is convertible to equity in times of financial stress.”</td>
<td>Board of Governors</td>
<td>July 22, 2012 (Subsequent to submission by the Financial Stability Oversight Council of a report to Congress. Report required within two years after enactment.)</td>
</tr>
<tr>
<td>Section 165(d)(1)(D)</td>
<td>Requires the collection of information regarding “rapid and orderly resolution in the event of material financial distress or failure,” which shall include certain items as well as any other information jointly specified “by rule or order.”</td>
<td>Board of Governors and the Federal Deposit Insurance Corporation</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
</tr>
<tr>
<td>Section 165(e)(3)(F)</td>
<td>The definition of “credit exposure” includes “any other similar transactions that the Board of Governors, by regulation, determines to be a credit exposure for purposes of this section.”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
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<td>Per Section 165(e)(7), the rules cannot take effect for at least three years after the date of enactment.</td>
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## Rulemaking Requirements and Authorities in the Dodd-Frank Act

<table>
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<td>Section 165(e)(5)</td>
<td>“…may issue such regulations and orders, including definitions consistent with this section, as may be necessary to administer and carry out this subsection” (on “Concentration Limits”).</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.) Per Section 165(e)(7), the rules cannot take effect for at least three years after the date of enactment.</td>
</tr>
<tr>
<td>Section 165(e)(6)</td>
<td>“…may, by regulation or order, exempt transactions, in whole or in part, from the definition of the term ‘credit exposure’ for purposes of this subsection, if the Board of Governors finds that the exemption is in the public interest and is consistent with the purpose of this subsection.”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.) Per Section 165(e)(7), the rules cannot take effect for at least three years after the date of enactment.</td>
</tr>
<tr>
<td>Section 165(f)</td>
<td>“… may prescribe, by regulation, periodic public disclosures by nonbank financial companies supervised by the Board of Governors and bank holding companies described in subsection (a) in order to support market evaluation of the risk profile, capital adequacy, and risk management capabilities thereof.”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
</tr>
<tr>
<td>Section 165(g)(1)</td>
<td>“… may, by regulation, prescribe a limit on the amount of short-term debt, including off-balance sheet exposures, that may be accumulated by any bank holding company described in subsection (a) and any nonbank financial company supervised by the Board of Governors.”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
</tr>
<tr>
<td>Section 165(g)(3)</td>
<td>“For purposes of this subsection, the term 'short-term debt' means such liabilities with short-dated maturity that the Board of Governors identifies, by regulation, except that such term does not include insured deposits.”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
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<tr>
<td>Section 165(g)(4)</td>
<td>“... may prescribe such regulations, including definitions consistent with this subsection, and issue such orders, as may be necessary to carry out this subsection.”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
</tr>
<tr>
<td>Section 165(h)(2)(B)</td>
<td>(Under the heading “Permissive Regulations”) ”... may require each bank holding company that is a publicly traded company and that has total consolidated assets of less than $10,000,000,000 to establish a risk committee, as set forth in paragraph (3), as determined necessary or appropriate by the Board of Governors to promote sound risk management practices.”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
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<tr>
<td>Section 165(k)(3)</td>
<td>“The term ‘off-balance-sheet activities’ means an existing liability of a company that is not currently a balance sheet liability, but may become one upon ... such other activities or transactions as the Board of Governors may, by rule, define.”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
</tr>
<tr>
<td>Section 167(b)(1)(A)</td>
<td>“... may require (certain companies) to establish and conduct all or a portion of such activities that are determined to be financial in nature or incidental thereto in or through an intermediate holding company established pursuant to regulation of the Board of Governors, not later than 90 days (or such longer period as the Board of Governors may deem appropriate) after the date on which the nonbank financial company supervised by the Board of Governors is notified of the determination of the Board of Governors under this section.”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
</tr>
<tr>
<td>Section 167(c)(2)</td>
<td>“... may promulgate regulations to establish any restrictions or limitations on transactions between an intermediate holding company or a nonbank financial company supervised by the Board of Governors and its affiliates, as necessary to prevent unsafe and unsound practices in connection with transactions between such company, or any subsidiary thereof, and its parent company or affiliates that are not subsidiaries of such company....”</td>
<td>Board of Governors</td>
<td>January 22, 2012 (Per Section 168, unless otherwise specified, Board of Governors’ final rules in subtitles A and C must be issued within 18 months of the act’s effective date.)</td>
</tr>
<tr>
<td>Section 202(d)(5)</td>
<td>“... may issue regulations governing the termination of receiverships under this title.”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
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<td>Section 209</td>
<td>“... shall ... prescribe such rules or regulations as the Corporation considers necessary or appropriate to implement this title....”</td>
<td>Federal Deposit Insurance Corporation, in consultation with the Financial Stability Oversight Council</td>
<td>None</td>
</tr>
<tr>
<td>Section 210(a)(7)(d)</td>
<td>“... may prescribe such rules, including definitions of terms, as the Corporation deems appropriate to establish an interest rate for or to make payments of post-insolvency interest to creditors holding proven claims against the receivership estate of a covered financial company, except that no such interest shall be paid until the Corporation as receiver has satisfied the principal amount of all creditor claims.”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 210(a)(16)(D)(i)</td>
<td>“... shall prescribe such regulations and establish such retention schedules as are necessary to maintain the documents and records of the Corporation generated in exercising the authorities of this title and the records of a covered financial company for which the Corporation is appointed receiver, with due regard for—(I) the avoidance of duplicative record retention; and (II) the expected evidentiary needs of the Corporation as receiver for a covered financial company and the public regarding the records of covered financial companies.”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 210(c)(3)(E)</td>
<td>“... may, by rule or regulation, prescribe that actual direct compensatory damages shall be no less than the estimated value of the claim as of the date the Corporation was appointed receiver of the covered financial company...”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 210(c)(8)(D)(i)</td>
<td>“The term ‘qualified financial contract’ means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation, resolution, or order to be a qualified financial contract for purposes of this paragraph.”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
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<tr>
<td>Section 210 (c)(8)(D)(ii)(II)</td>
<td>The term “securities contract” “does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such agreement within the meaning of such term.”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 210 (c)(8)(D)(v)(I)</td>
<td>The term “qualified foreign government securities” has certain meanings “as determined by regulation or order ....”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 210 (c)(8)(D)(v)(II)</td>
<td>The term “repurchase agreement” does not include any repurchase obligation under a participation in a commercial mortgage loan, unless so determined “by regulation, resolution, or order....”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 210 (c)(9)(D)(i)</td>
<td>“…the term ‘financial institution’ means a broker or dealer, a depository institution, a futures commission merchant, a bridge financial company, or any other institution determined by the Corporation, by regulation, to be a financial institution.”</td>
<td>Federal Deposit Insurance Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 355 (amending Section 106(b)(1) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972(1)))</td>
<td>“... (may) issue such regulations as are necessary to carry out this section.”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 369(4) (amending the Home Owners’ Loan Act (12 U.S.C. 1461 et seq.))</td>
<td>“... may prescribe regulations with respect to savings associations, as the Comptroller determines to be appropriate to carry out the purposes of this Act.”</td>
<td>Comptroller of the Currency</td>
<td>None</td>
</tr>
<tr>
<td>Section 369(5) (amending the Home Owners’ Loan Act (12 U.S.C. 1461 et seq.))</td>
<td>“... may issue such regulations, and the appropriate Federal banking agency may issue such orders, including those issued pursuant to section 8 of the Federal Deposit Insurance Act, as may be necessary to administer and carry out this paragraph and to prevent evasion of this paragraph.”</td>
<td>Comptroller of the Currency</td>
<td>None</td>
</tr>
<tr>
<td>Section 402(a) (amending Section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)))</td>
<td>The term “foreign private advisor” means (among other things) “has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this title.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<td>Section 404(2) (amending Section 204 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-4))</td>
<td>“An investment adviser registered under this title shall maintain such records of private funds advised by the investment adviser for such period or periods as the Commission, by rule, may prescribe as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 408 (amending Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3))</td>
<td>“In prescribing regulations to carry out the requirements of this section with respect to investment advisers acting as investment advisers to mid-sized private funds, the Commission shall take into account the size, governance, and investment strategy of such funds to determine whether they pose systemic risk, and shall provide for registration and examination procedures with respect to the investment advisers of such funds which reflect the level of systemic risk posed by such funds.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 411 (amending the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.))</td>
<td>“An investment adviser registered under this title shall take such steps to safeguard client assets over which such adviser has custody, including, without limitation, verification of such assets by an independent public accountant, as the Commission may, by rule, prescribe.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 413(b)(1)(B)</td>
<td>“... may, by notice and comment rulemaking, make such adjustments to the definition of the term ‘accredited investor’ ... as the Commission may deem appropriate for the protection of investors, in the public interest, and in light of the economy.”</td>
<td>Securities and Exchange Commission</td>
<td>None (Rules may be issued after completion of a discretionary review.)</td>
</tr>
<tr>
<td>Section 413(b)(2)(B)</td>
<td>“... may, by notice and comment rulemaking, make such adjustments to the definition of the term ‘accredited investor’ ... as the Commission may deem appropriate for the protection of investors, in the public interest, and in light of the economy.”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2014 (Rules may be issued after completion of a review, which can be done no earlier than four years after the date of enactment.)</td>
</tr>
<tr>
<td>Section 502(a)(3) (amending Subchapter I of chapter 3 of subtitle I of title 31, United States Code)</td>
<td>“... may issue orders, regulations, policies, and procedures to implement this section.”</td>
<td>Secretary of the Treasury</td>
<td>None</td>
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<tr>
<td>Section 608(a) (amending Section 23A of the Federal Reserve Act (12 U.S.C. 371c))</td>
<td>&quot;... may issue such regulations or interpretations as the Board determines are necessary or appropriate with respect to the manner in which a netting agreement may be taken into account in determining the amount of a covered transaction between a member bank or a subsidiary and an affiliate....&quot;</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 615(a) (amending Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828))</td>
<td>&quot;... may issue such rules as may be necessary to define terms and to carry out the purposes this subsection.&quot;</td>
<td>Board of Governors, after consulting with the Comptroller of the Currency and the Corporation</td>
<td>None</td>
</tr>
<tr>
<td>Section 618(b)(2)(A)</td>
<td>A securities holding company that elects to be subject to comprehensive consolidated supervision shall register by filing with the Board of Governors such information and documents as the Board of Governors, by regulation, may prescribe as necessary or appropriate in furtherance of the purposes of this section.&quot;</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 618(e)(2)</td>
<td>&quot;Except as the Board of Governors may otherwise provide by regulation or order, a supervised securities holding company shall be subject to the provisions of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.) in the same manner and to the same extent a bank holding company is subject to such provisions....&quot;</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 619 (amending the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.), new Section 13)</td>
<td>Section requires certain entities to bring their activities and investments into compliance within two years of the requirements taking effect or the entity becomes supervised. Also states that &quot;The Board may, by rule or order, extend this two-year period for not more than one year at a time, if, in the judgment of the Board, such an extension is consistent with the purposes of this section and would not be detrimental to the public interest.&quot;</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 619 (amending the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.))</td>
<td>Agencies may permit specific activities, as well as &quot;such other activity as (the agencies) determine, by rule, as provided in subsection (b)(2), would promote and protect the safety and soundness of the banking entity and the financial stability of the United States.&quot;</td>
<td>&quot;Appropriate Federal banking agencies,&quot; the Securities and Exchange Commission, and the Commodity Futures Trading Commission.</td>
<td>None</td>
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<td>Section 623(a) (amending Section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)))</td>
<td>The term “home state” means... “with respect to a Federal savings association, the State in which the home office (as defined by the regulations of the Director of the Office of Thrift Supervision, or, on and after the transfer date, the Comptroller of the Currency) of the Federal savings association is located.”</td>
<td>Director of the Office of Thrift Supervision (before transfer date) or Comptroller of the Currency (after transfer date)</td>
<td>None</td>
</tr>
<tr>
<td>Section 623(b) (amending Section 2(o)(4) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(o)(4)))</td>
<td>The term “home state” means... “with respect to a Federal savings association, the State in which the home office (as defined by the regulations of the Director of the Office of Thrift Supervision, or, on and after the transfer date, the Comptroller of the Currency) of the Federal savings association is located.”</td>
<td>Director of the Office of Thrift Supervision (before transfer date) or Comptroller of the Currency (after transfer date)</td>
<td>None</td>
</tr>
<tr>
<td>Section 623(c) (amending Section 10(e)(2) of the Home Owners' Loan Act (12 U.S.C. 1467a(e)(2)))</td>
<td>The term “home state” means... “with respect to a Federal savings association, the State in which the home office (as defined by the regulations of the Director of the Office of Thrift Supervision, or, on and after the transfer date, the Comptroller of the Currency) of the Federal savings association is located.”</td>
<td>Director of the Office of Thrift Supervision (before transfer date) or Comptroller of the Currency (after transfer date)</td>
<td>None</td>
</tr>
<tr>
<td>Section 626 (amending Home Owners' Loan Act (12 U.S.C. 1461 et seq.)</td>
<td>“If a grandfathered unitary savings and loan holding company conducts activities other than financial activities, the Board may require such company to establish and conduct all or a portion of such financial activities in or through an intermediate holding company, which shall be a savings and loan holding company, established pursuant to regulations of the Board.”</td>
<td>Board of Governors</td>
<td>October 19, 2011 (Within 90 days after the transfer date, or later, if the Board deems it appropriate.)</td>
</tr>
<tr>
<td>Section 626 (creating a new Section 10A on “Intermediate Holding Companies” to the Homeowners' Loan Act)</td>
<td>“... may promulgate regulations to establish any restrictions or limitations on transactions between an intermediate holding company or a parent of such company and its affiliates, as necessary to prevent unsafe and unsound practices in connection with transactions between the intermediate holding company, or any subsidiary thereof, and its parent company or affiliates that are not subsidiaries of the intermediate holding company, except that such regulations shall not restrict or limit any transaction in connection with the bona fide acquisition or lease by an unaffiliated person of assets, goods, or services.”</td>
<td>Board of Governors</td>
<td>None</td>
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<td>Section 712(d)(2)(A)</td>
<td>“…, shall jointly adopt such other rules regarding such definitions as the Commodity Futures Trading Commission and the Securities and Exchange Commission determine are necessary and appropriate, in the public interest, and for the protection of investors.”</td>
<td>Commodity Futures Trading Commission and the Securities and Exchange Commission, in consultation with the Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 712(f)</td>
<td>“… may promulgate rules, regulations, or orders permitted or required by this Act.”</td>
<td>Commodity Futures Trading Commission and the Securities and Exchange Commission</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 714</td>
<td>“…may, by rule or order (1) collect information as may be necessary concerning the markets for any types of (A) swap (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)); or (B) security-based swap (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a))…”</td>
<td>Commodity Futures Trading Commission or the Securities and Exchange Commission, or both</td>
<td>July 16, 2011 (Section 712(e) requires that all mandatory Title VII CFTC and SEC rules (other than those issued jointly) be promulgated within 360 days after the date of enactment, unless another provision states otherwise.)</td>
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<tr>
<td>Section 719(d)(1)(B)</td>
<td>“If the Commissions determine that stable value contracts fall within the definition of a swap, the Commissions jointly shall determine if an exemption for stable value contracts from the definition of swap is appropriate and in the public interest. The Commissions shall issue regulations implementing the determinations required under this paragraph.”</td>
<td>Commodity Futures Trading Commission and the Securities and Exchange Commission</td>
<td>None (Study leading to the regulation is to be conducted within 15 months of the date of enactment (i.e., by October 21, 2011). No prescribed date for the regulation.)</td>
</tr>
<tr>
<td>Section 721(a)(5) (amending Section 1a of the Commodity Exchange Act (7 U.S.C. 1a))</td>
<td>“… by rule or regulation, may include within, or exclude from, the term ‘commodity pool’ any investment trust, syndicate, or similar form of enterprise if the Commission determines that the rule or regulation will effectuate the purposes of this Act.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
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<td>Section 721(a)(10) (amending Section 1a of the Commodity Exchange Act (7 U.S.C. 1a))</td>
<td>&quot;... by rule or regulation, may include within, or exclude from, the term ‘floor broker’ any person in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged who trades for any other person if the Commission determines that the rule or regulation will effectuate the purposes of this Act.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 721(a)(13) (amending Section 1a of the Commodity Exchange Act (7 U.S.C. 1a))</td>
<td>&quot;... by rule or regulation, may include within, or exclude from, the term ‘futures commission merchant’ any person who....”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 721(a)(15) (amending Section 1a of the Commodity Exchange Act (7 U.S.C. 1a))</td>
<td>&quot;... by rule or regulation, may include within, or exclude from, the term ‘introducing broker’ any person who....”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 721(a)(21)</td>
<td>&quot;... all foreign exchange swaps and foreign exchange forwards shall be reported to either a swap data repository, or, if there is no swap data repository that would accept such swaps or forwards, to the Commission pursuant to section 4r within such time period as the Commission may by rule or regulation prescribe.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 721(b)</td>
<td>&quot;... may adopt a rule to define—(1) the term ‘commercial risk’; and (2) any other term included in an amendment to the Commodity Exchange Act (7 U.S.C. 1 et seq.) made by this subtitle.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 721(d) (amending the</td>
<td>&quot;... may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D) if the Commissions determine that the exemption would be consistent with the public interest.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 723(a)(3) (amending Section 2 of the Commodity Exchange Act (7 U.S.C. 2))</td>
<td>&quot;...shall prescribe rules under this subsection (and issue interpretations of rules prescribed under this subsection) as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 723(a)(3) (amending Section 2 of the Commodity Exchange Act (7 U.S.C. 2))</td>
<td>&quot;Swaps entered into on or after such date of enactment shall be reported to a registered swap data repository or the Commission no later than ... such other time after entering into the swap as the Commission may prescribe by rule or regulation.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
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<tr>
<td>Section 723(a)(3) (amending Section 2 of the Commodity Exchange Act (7 U.S.C. 2))</td>
<td>“…may prescribe such rules or issue interpretations of the rules as the Commission determines to be necessary to prevent abuse of the exceptions described in this paragraph.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 724(a) (amending Section 4d of the Commodity Exchange Act (7 U.S.C. 6d))</td>
<td>“… in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, any money, securities, or property of the swaps customers of a futures commission merchant … may be commingled and deposited in customer accounts.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 724(a) (amending Section 4d of the Commodity Exchange Act (7 U.S.C. 6d))</td>
<td>“Money described in paragraph (2) may be invested in obligations of the United States, in … any other investment that the Commission may by rule or regulation prescribe, and such investments shall be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 724(c)</td>
<td>Swap dealers or major swap participants must maintain certain funds or other property in a segregated account “in accordance with such rules and regulations as the Commission may promulgate.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 725(b) (amending Section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1))</td>
<td>“In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of….”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 725(c) (amending Section 5b(c) of the Commodity Exchange Act (7 U.S.C. 7a-1(c)))</td>
<td>“… a derivatives clearing organization shall comply with each core principle described in this paragraph and any requirement that the Commission may impose by rule or regulation.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 727 (amending Section 2(a) of the Commodity Exchange Act (7 U.S.C. 2(a)))</td>
<td>“… may, by rule, regulation, or order, delegate the public reporting responsibilities of the Commission under this paragraph in accordance with such terms and conditions as the Commission determines to be appropriate and in the public interest.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 728 (amending the Commodity Exchange Act after section 20 (7 U.S.C. 24))</td>
<td>“To be registered … the swap data repository shall comply with… any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
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<tr>
<td>Section 728 (amending the Commodity Exchange Act after section 20 (7 U.S.C. 24))</td>
<td>“In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of....”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 729 (amending the Commodity Exchange Act by inserting after section 4q (7 U.S.C. 60-1))</td>
<td>“Each swap that is not accepted for clearing by any derivatives clearing organization shall be reported to ... the Commission pursuant to this section within such time period as the Commission may by rule or regulation prescribe.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 730 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>Large swap trader reporting requirements “shall not apply if (A) the person files or causes to be filed with the properly designated officer of the Commission such reports regarding any transactions or positions described in subparagraphs (A) and (B) of paragraph (1) as the Commission may require by rule or regulation.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>“… may prescribe rules applicable to swap dealers and major swap participants, including rules that limit the activities of swap dealers and major swap participants.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>Registered swap dealers and major swap participant must make such reports and keep books and records “as are required by the Commission by rule or regulation....”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 731 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>“Each registered swap dealer and major swap participant shall conform with such business conduct standards as prescribed in paragraph (3) and as may be prescribed by the Commission by rule or regulation....”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 733 (amending the Commodity Exchange Act by inserting a new section after section 5g (7 U.S.C. 7b-2))</td>
<td>“In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of....”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
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<tr>
<td>Section 733 (amending the Commodity Exchange Act by inserting a new section after section 5g (7 U.S.C. 7b-2))</td>
<td>&quot;... may promulgate rules defining the universe of swaps that can be executed on a swap execution facility.&quot;</td>
<td>Securities and Exchange Commission and Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 738(a)(4) (amending Section 4(b) of the Commodity Exchange Act (7 U.S.C. 6(b)))</td>
<td>&quot;... may adopt rules and regulations requiring registration with the Commission for a foreign board of trade that provides the members of the foreign board of trade or other participants located in the United States with direct access to the electronic trading and order matching system of the foreign board of trade, including rules and regulations prescribing procedures and requirements applicable to the registration of such foreign boards of trade.&quot;</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 742(a)(2) (amending Section 2(c) of the Commodity Exchange Act (7 U.S.C. 2(c)))</td>
<td>Certain requirements do not apply to certain agreements, securities, and contracts if delivered within 28 days &quot;or such other longer period as the Commission may determine by rule or regulation...&quot;</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 745(b) (amending Section 5c of the Commodity Exchange Act (7 U.S.C. 7a-2))</td>
<td>The Commission may determine that certain &quot;agreements, contracts, or transactions are contrary to the public interest &quot; if &quot;determined by the Commission, by rule or regulation, to be contrary to the public interest...&quot;</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 747 (amending Section 4c(a) of the Commodity Exchange Act (7 U.S.C. 6c(a)))</td>
<td>&quot;...may make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to prohibit the trading practices described in paragraph (5) and any other trading practice that is disruptive of fair and equitable trading.&quot;</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 748 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>&quot;The term 'whistleblower' means any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of this Act to the Commission, in a manner established by rule or regulation by the Commission.&quot; (Also several other provisions regarding whistleblowers that may be established by rule or regulation.)</td>
<td>Commodity Futures Trading Commission</td>
<td>April 17, 2011 (Within 270 days after the date of enactment.)</td>
</tr>
<tr>
<td>Section 748 (amending the Commodity Exchange Act (7 U.S.C. 1 et seq.))</td>
<td>&quot;...shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.&quot;</td>
<td>Commodity Futures Trading Commission</td>
<td>April 17, 2011 (Within 270 days after the date of enactment.)</td>
</tr>
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<td>Section 761(b)</td>
<td>“...may, by rule, further define (1) the term 'commercial risk'; (2) any other term included in an amendment to the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) made by this subtitle; and (3) the terms 'security-based swap', 'security-based swap dealer', 'major security-based swap participant', and 'eligible contract participant', with regard to security-based swaps (as such terms are defined in the amendments made by subsection (a)) for the purpose of including transactions and entities that have been structured to evade this subtitle or the amendments made by this subtitle.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(a) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“...shall prescribe rules under this section (and issue interpretations of rules prescribed under this section), as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(a) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>Security-based swaps entered into on or after the date of enactment must be reported within 90 days or &quot;such other time after entering into the security-based swap as the Commission may prescribe by rule or regulation.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(a) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“…may prescribe such rules or issue interpretations of the rules as the Commission determines to be necessary to prevent abuse of the exceptions described in this subsection.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(a) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of ....”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(b) (amending Section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1))</td>
<td>“To be registered and to maintain registration as a clearing agency that clears security-based swap transactions, a clearing agency shall comply with such standards as the Commission may establish by rule.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(c) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“To be registered, and maintain registration, as a security-based swap execution facility, the security-based swap execution facility shall comply with … any requirement that the Commission may impose by rule or regulation.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<tr>
<td>Section 763(c) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of....”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(d) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“…in accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, any money, securities, or property of the security-based swaps customer of a broker, dealer, or security-based swap dealer described in subsection (b) may be commingled and deposited as provided in this section with any other money, securities, or property received by the broker, dealer, or security-based swap dealer and required by the Commission to be separately accounted for and treated and dealt with as belonging to the security-based swaps customer of the broker, dealer, or security-based swap dealer.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(d) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>Certain funds may be invested in certain vehicles or “in any other investment that the Commission may by rule or regulation prescribe, and such investments shall be made in accordance with such rules and regulations and subject to such conditions as the Commission may prescribe.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(h) (amending the Securities Exchange Act of 1934 after section 10A (15 U.S.C. 78j-1))</td>
<td>“…shall, by rule or regulation, as necessary or appropriate in the public interest or for the protection of investors, establish limits (including related hedge exemption provisions) on the size of positions in any security-based swap that may be held by any person.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(h) (amending the Securities Exchange Act of 1934 after section 10A (15 U.S.C. 78j-1))</td>
<td>“…by rule, regulation, or order, may conditionally or unconditionally exempt any person or class of persons, any security-based swap or class of security-based swaps, or any transaction or class of transactions from any requirement the Commission may establish under this section with respect to position limits.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(h) (amending the Securities Exchange Act of 1934 after section 10A (15 U.S.C. 78j-1))</td>
<td>“…by rule, regulation, or order, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, may direct a self-regulatory organization (A) to adopt rules regarding the size of positions in any security-based swap that may be held by....”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<tr>
<td>Section 763(h) (amending the Securities Exchange Act of 1934 after section 10A (15 U.S.C. 78j-1))</td>
<td>“…by rule or regulation, may require any person that effects transactions for such person’s own account or the account of others in any securities-based swap or uncleared security-based swap and any security or loan or group or narrow-based security index of securities or loans as set forth in paragraphs (1) and (2) of subsection (a) under this section to report such information as the Commission may prescribe regarding….”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(i) (amending Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m))</td>
<td>“…is authorized to provide by rule for the public availability of security-based swap transaction, volume, and pricing data as follows….”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(i) (amending Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m))</td>
<td>“…may, by rule, regulation, or order, delegate the public reporting responsibilities of the Commission under this paragraph in accordance with such terms and conditions as the Commission determines to be appropriate and in the public interest.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 763(i) (amending Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m))</td>
<td>“In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of….”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 764(a) (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) after section 15E (15 U.S.C. 78o-7))</td>
<td>“Each registration under this section shall expire at such time as the Commission may prescribe by rule or regulation.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 764 (amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.))</td>
<td>“… may prescribe rules applicable to security-based swap dealers and major security-based swap participants, including rules that limit the activities of non-bank security-based swap dealers and major security-based swap participants.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 805(a)(2)(A)</td>
<td>“…may each prescribe regulations… containing risk management standards … for those designated clearing entities and financial institutions engaged in designated activities for which each is the Supervisory Agency or the appropriate financial regulator….”</td>
<td>Commodity Futures Trading Commission and Securities and Exchange Commission</td>
<td>None</td>
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<tr>
<td>Section 806(b)</td>
<td>“…discounts and borrowing privileges shall be subject to such other limitations, restrictions, and regulations as the Board of Governors may prescribe.”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 809(b)(3)</td>
<td>“…may … prescribe regulations under this section that impose a recordkeeping or reporting requirement on designated clearing entities or financial institutions engaged in designated activities that are subject to standards that have been prescribed under section 805(a)(2).”</td>
<td>Board of Governors, upon an affirmative vote by a majority of the Financial Stability Oversight Council</td>
<td>None</td>
</tr>
<tr>
<td>Section 810</td>
<td>“…are authorized to prescribe such rules and issue such orders as may be necessary to administer and carry out their respective authorities and duties granted under this title (on ‘Payment, Clearing, and Settlement Supervision’) and prevent evasions thereof.”</td>
<td>Board of Governors, the supervisory agencies, and the Financial Stability Oversight Council</td>
<td>None</td>
</tr>
<tr>
<td>Section 913(f)</td>
<td>“…may commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers … to address the legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to such retail customers.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 913(g)(1) (amending Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o))</td>
<td>“… may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 913(g)(1) (amending Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o))</td>
<td>“…may by rule require that (certain brokers or dealers)…provide notice to each retail customer and obtain the consent or acknowledgment of the customer.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
</tr>
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| Section 913(g)(1)  
(amending Section 15  
of the Securities  
Exchange Act of  
1934 (15 U.S.C.  
780)) | “…shall…where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.” | Securities and Exchange Commission | None |
| Section 913(g)(2)  
(amending Section 211 of the  
Investment Advisers  
Act of 1940) | “…may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers … shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.” | Securities and Exchange Commission | None |
| Section 913(g)(2)  
(amending Section 211 of the  
Investment Advisers  
Act of 1940) | “…where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.” | Securities and Exchange Commission | None |
| Section 916(a)  
(amending Section 19(b) of the  
Securities Exchange  
Act of 1934 (15  
U.S.C. 78s(b))) | “…shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations issued under this title that are applicable to such organization.” | Securities and Exchange Commission | None |
| Section 919  
(amending Section 15  
of the Securities  
Exchange Act of  
1934 (15 U.S.C.  
78o)) | “... may issue rules designating documents or information that shall be provided by a broker or dealer to a retail investor before the purchase of an investment product or service by the retail investor.” (Goes on to detail contents) | Securities and Exchange Commission | None |
| Section 921(a)  
(amending Section 15  
of the Securities  
Exchange Act of  
1934 (15 U.S.C.  
78o))  
(Note: same provision in Section 921(b), amending Section 205 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-5)). | “…by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws ...” | Securities and Exchange Commission | None |
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| Section 922(a)  
(amending the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)) | “The term ‘whistleblower’ means any individual who provides … information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” Also, awards are to be paid “under regulations prescribed by the Commission.” Finally, the Commission is given the authority to issue “such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.” | Securities and Exchange Commission | None |
| Section 929D(2)  
(amending Section 17(f)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(f)(1))) | “…stolen, cancelled, or reported in such other manner as the Commission, by rule, may prescribe.” | Securities and Exchange Commission | None |
| Section 929Q(a)  
(amending Section 31 of the Investment Company Act of 1940 (15 U.S.C. 80a-30)) | “…shall maintain and preserve all records that relate to the custody or use by such person of the securities, deposits, or credits of the registered investment company for such period or periods as the Commission, by rule or regulation, may prescribe, as necessary or appropriate in the public interest or for the protection of investors….” (Note: Same requirement in Section 929Q(b), amending Section 16(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78p(a))) | Securities and Exchange Commission | None |
| Section 929R(a)  
(amending Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m)) | Beneficial ownership and short-swing profit reporting is required within 10 days “or within such shorter time as the Commission may establish by rule.” | Securities and Exchange Commission | None |
| Section 929W  
(amending Section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1)) | “…shall adopt such rules, regulations, and orders necessary to implement this subsection…. In proposing such rules, the Commission shall seek to minimize disruptions to current systems used by or on behalf of paying agents to process payment to account holders and avoid requiring multiple paying agents to send written notification to a missing security holder regarding the same not yet negotiated check.” | Securities and Exchange Commission | July 21, 2011 (Within one year of the date of enactment i.e., by July 21, 2011.) |
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<td>Section 929X(b)(2)</td>
<td>“…shall issue such other rules as are necessary or appropriate to ensure that the appropriate enforcement options and remedies are available for violations of this subsection (on short-selling enforcement) in the public interest or for the protection of investors.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<td>Section 929X(c)(2)</td>
<td>“…by rule, as it deems necessary or appropriate in the public interest and for the protection of investors, may prescribe the form, content, time, and manner of delivery of any notice required under this paragraph.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<td>Section 939F(d)</td>
<td>“…shall, by rule, as the Commission determines is necessary or appropriate in the public interest or for the protection of Investors, establish a system for the assignment of nationally recognized statistical rating organizations to determine the initial credit ratings of structured finance products…”</td>
<td>Securities and Exchange Commission</td>
<td>July 21, 2012 (After submission of a report, which is required within 24 months after the date of enactment.)</td>
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<td>Section 941(a)</td>
<td>An “asset-backed security” means (among other things) “a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<tr>
<td>Section 942(a)(3)</td>
<td>“…may, by rule or regulation, provide for the suspension or termination of the duty to file under this subsection for any class of asset-backed security, on such terms and conditions and for such period or periods as the Commission deems necessary or appropriate in the public interest or for the protection of investors.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<td>Section 951</td>
<td>“…may, by rule or order, exempt an issuer or class of issuers from the requirement under subsection (a) or (b).”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<td>Section 956(e)(2)(G)</td>
<td>“The term ‘covered financial institution’ means … any other financial institution that the appropriate Federal regulators, jointly, by rule, determine should be treated as a covered financial institution for purposes of this section.”</td>
<td>The “appropriate Federal regulators”</td>
<td>None</td>
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<td>Section 957(2)</td>
<td>“A shareholder vote described in this subparagraph is a shareholder vote with respect to the election of a member of the board of directors of an issuer, executive compensation, or any other significant matter, as determined by the Commission, by rule.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<td>Section 971(a)</td>
<td>“The rules and regulations prescribed by the Commission under paragraph (1) (on Proxy Access’) may include (A) a requirement that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<tr>
<td>Section 971(b) and (c)</td>
<td>“… may issue rules permitting the use by a shareholder of proxy solicitation materials supplied by an issuer of securities for the purpose of nominating individuals to membership on the board of directors of the issuer …. Also, the Commission ‘may, by rule or order, exempt an issuer or class of issuers from the requirement made by this section or an amendment made by this section.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<td>Section 982(e)</td>
<td>“…may, by rule, conduct and require a program of inspection in accordance with paragraph (1), on a basis to be determined by the Board, of registered public accounting firms that provide one or more audit reports for a broker or dealer.”</td>
<td>Public Company Accounting Oversight Board</td>
<td>None</td>
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<td>Section 984(a)</td>
<td>Prohibits “borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<td>Section 985(b)(5)</td>
<td>“The order granting registration shall not be effective until such broker or dealer has become a member of a registered securities association, or until such broker or dealer has become a member of a national securities exchange, if such broker or dealer effects transactions solely on that exchange, unless the Commission has exempted such broker or dealer, by rule or order, from such membership.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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<td>Section 1002(9)</td>
<td>The term “deposit-taking activity” includes “the receipt of funds or the equivalent thereof, as the Bureau may determine by rule or order, received or held by a covered person (or an agent for a covered person) for the purpose of facilitating a payment or transferring funds or value of funds between a consumer and a third party.”</td>
<td>Consumer Financial Protection Bureau</td>
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<td>Section 1002(15)(A)</td>
<td>The definition of the term “financial product or service” includes “…such other financial product or service as may be defined by the Bureau, by regulation, for purposes of this title.”</td>
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<td>Section 1002(25)</td>
<td>The definition of a “related person” includes “any shareholder, consultant, joint venture partner, or other person, as determined by the Bureau (by rule or on a case-by-case basis) who materially participates in the conduct of the affairs of such covered person.”</td>
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<td>Section 1022(b)(1)</td>
<td>“…may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”</td>
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<td>Section 1022(b)(3)(A)</td>
<td>“…by rule, may conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services, from any provision of this title, or from any rule issued under this title, as the Bureau determines necessary or appropriate to carry out the purposes and objectives of this title, taking into consideration the factors in subparagraph (B).”</td>
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<td>Section 1022(c)(4)(B)</td>
<td>“…may … require covered persons and service providers participating in consumer financial services markets to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual or special reports, or answers in writing to specific questions.”</td>
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<td>Section 1022(c)(5)</td>
<td>“In order to assess whether a nondepository is a covered person, as defined in section 1002, the Bureau may require such nondepository to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual or special reports, or answers in writing to specific questions.”</td>
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<td>Section 1022(c)(7)(A)</td>
<td>“…may prescribe rules regarding registration requirements applicable to a covered person, other than an insured depository institution, insured credit union, or related person.”</td>
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<td>Section 1024(b)(7)(C)</td>
<td>“…may prescribe rules regarding a person described in subsection (a)(1), to ensure that such persons are legitimate entities and are able to perform their obligations to consumers. Such requirements may include background checks for principals, officers, directors, or key personnel and bonding or other appropriate financial requirements.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1027(b)(2)</td>
<td>“…may exercise rulemaking, supervisory, enforcement, or other authority under this title with respect to a person described in paragraph (1) when such person is (A) engaged in an activity of offering or providing any consumer financial product or service … or (B) otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.....”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1027(g)(3)(B)(iii)</td>
<td>“Subject to a request or response pursuant to clause (i) or clause (ii) by the agencies made under this subparagraph (Departments of the Treasury and Labor), the Bureau may exercise rulemaking authority, and may act to enforce a rule prescribed pursuant to such request or response, in accordance with the provisions of this title.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
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<td>Section 1028(b)</td>
<td>“…by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties….”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1031(b)</td>
<td>“…may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1032(a)</td>
<td>“…may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1057(d)(3)</td>
<td>“…an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes arising under subsection (a)(4), unless the Bureau determines, by rule, that such provision is inconsistent with the purposes of this title.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1071(a) (amending the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.))</td>
<td>“…shall prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to this section” (on small business data collection).</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1071(a) (amending the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.))</td>
<td>“…by rule or order, may adopt exceptions to any requirement of this section (on small business data collection) and may, conditionally or unconditionally, exempt any financial institution or class of financial institutions from the requirements of this section, as the Bureau deems necessary or appropriate to carry out the purposes of this section.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<tr>
<td>Section 1073(a)(4) (amending the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.))</td>
<td>“If the Board determines that a recipient nation does not legally allow, or the method by which transactions are made in the recipient country do not allow, a remittance transfer provider to know the amount of currency that will be received by the designated recipient, the Board may prescribe rules … addressing the issue…”</td>
<td>Board of Governors</td>
<td>January 21, 2012 (Within 18 months after the date of enactment.)</td>
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<tr>
<td>Section 1075(a)(2) (amending the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), creating a new Section 920)</td>
<td>“…may prescribe regulations, pursuant to section 553 of title 5, United States Code, regarding any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction, to implement this subsection (including related definitions), and to prevent circumvention or evasion of this subsection.”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 1075(a)(2) (amending the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), creating a new Section 920)</td>
<td>“... may, by regulation prescribed pursuant to section 553 of title 5, United States Code, increase the amount of the dollar value listed in subparagraph (A)(i)(II).”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 1075(a)(2) (amending the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), creating a new Section 920)</td>
<td>“The Board may allow for an adjustment to the fee amount received or charged by an issuer under paragraph (2), if (certain conditions are met).…. The Board shall prescribe regulations … to establish standards for making adjustments under this paragraph.”</td>
<td>Board of Governors</td>
<td>April 21, 2011 (Any regulations must be issued in final form within nine months after the date of enactment.)</td>
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<tr>
<td>Section 1075(a)(2) (amending the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), creating a new Section 920)</td>
<td>“…may prescribe regulations, pursuant to section 553 of title 5, United States Code, regarding any network fee” (subject to certain limitations).</td>
<td>Board of Governors</td>
<td>April 21, 2011 (Any regulations must be issued in final form within nine months after the date of enactment.)</td>
</tr>
<tr>
<td>Section 1075(a)(2) (amending the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), creating a new Section 920)</td>
<td>“…may, by regulation prescribed pursuant to section 553 of title 5, United States Code, increase the amount of the dollar value listed in subparagraph (A)(i)(II)” ($10 minimum dollar value for acceptance of credit cards).</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 1076(b)</td>
<td>The Bureau should issue rules if it “determines through the study required under subsection (a) (on reverse mortgage transactions) that conditions or limitations on reverse mortgage transactions are necessary or appropriate for accomplishing the purposes and objectives of this title.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None (Study must be conducted within one year of enactment (i.e., by July 21, 2011), but no deadline established for possible regulations.)</td>
</tr>
<tr>
<td>Section 1084(3)(A)</td>
<td>“…shall have sole authority to prescribe rules (A) to carry out the purposes of this title with respect to a person described in section 1029(a) of the Consumer Financial Protection Act of 2010; and (B) to carry out the purposes of section 920.”</td>
<td>Board of Governors</td>
<td>None</td>
</tr>
<tr>
<td>Section 1088(a) (amending the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.))</td>
<td>Prohibits the treatment of information as a consumer report if it is disclosed as “…determined to be necessary and appropriate, by regulation or order, by the Bureau or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).”</td>
<td>Consumer Financial Protection Bureau or applicable state insurance authorities</td>
<td>None</td>
</tr>
<tr>
<td>Section 1088(a)(4)(B) (amending the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.))</td>
<td>“…may, after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1088(a)(10)(E) (amending the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.))</td>
<td>“…shall prescribe such regulations as are necessary to carry out the purposes of this title, except with respect to sections 615(e) and 628. The Bureau may prescribe regulations as may be necessary or appropriate to administer and carry out the purposes and objectives of this title, and to prevent evasions thereof or to facilitate compliance therewith.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1089(4)</td>
<td>“Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010, the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this title.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<tr>
<td>Section 1093(3)(A)</td>
<td>“…shall have authority to prescribe such regulations as may be necessary to carry out the purposes of this subtitle with respect to financial institutions and other persons subject to their respective jurisdiction under section 505, …except that the Bureau of Consumer Financial Protection shall not have authority to prescribe regulations with respect to the standards under section 501.”</td>
<td>Consumer Financial Protection Bureau and the Securities and Exchange Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 1093(3)(A)</td>
<td>“…shall have authority to prescribe such regulations as may be necessary to carry out the purposes of this subtitle with respect to financial institutions and other persons subject to the jurisdiction of the Commodity Futures Trading Commission under section 5g of the Commodity Exchange Act.”</td>
<td>Commodity Futures Trading Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 1093(3)(A)</td>
<td>“…shall have authority to prescribe such regulations as may be necessary to carry out the purposes of this subtitle with respect to any financial institution that is a person described in section 1029(a) of the Consumer Financial Protection Act of 2010.”</td>
<td>Federal Trade Commission</td>
<td>None</td>
</tr>
<tr>
<td>Section 1094(5)</td>
<td>“… may, by regulation, exempt from the requirements of this title any State-chartered repository institution within any State or subdivision thereof, if the agency determines that, under the law of such State or subdivision, that institution is subject to requirements that are substantially similar to those imposed under this title, and that such law contains adequate provisions for enforcement.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
</tr>
<tr>
<td>Section 1097(1)</td>
<td>“…shall have authority to prescribe rules with respect to mortgage loans in accordance with section 553 of title 5, United States Code. Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1100(6)(B) (amending the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.))</td>
<td>“…is authorized to promulgate regulations setting minimum net worth or surety bond requirements for residential mortgage loan originators and minimum requirements for recovery funds paid into by loan originators.”</td>
<td>Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1204(b)</td>
<td>“Subject to regulations prescribed by the Secretary under this title, 1 or more eligible entities may participate in 1 or several programs established under subsection (a)” (e.g., grants and cooperative agreements).</td>
<td>Secretary of the Treasury</td>
<td>None</td>
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<td>Section 1209</td>
<td>“…is authorized to promulgate regulations to implement and administer the grant programs and undertakings authorized by this title.”</td>
<td>Secretary of the Treasury</td>
<td>None</td>
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<td>Section 1405(a) (amending Section 129B of the Truth in Lending Act)</td>
<td>“…shall, by regulations, prohibit or condition terms, acts or practices relating to residential mortgage loans that the Board finds to be abusive, unfair, deceptive, predatory, necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section and section 129C…..”</td>
<td>Board of Governors</td>
<td>None</td>
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<td>Section 1405(b)</td>
<td>“…may, by rule, exempt from or modify disclosure requirements, in whole or in part, for any class of residential mortgage loans if the Board determines that such exemption or modification is in the interest of consumers and in the public interest.”</td>
<td>Board of Governors</td>
<td>None</td>
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<td>Section 1412 (amending the Truth in Lending Act (15 U.S.C. 1631 et seq.))</td>
<td>“... may, by regulation, provide that the term ‘qualified mortgage’ includes a balloon loan... (that meets several specified criteria and conditions).”</td>
<td>Board of Governors</td>
<td>None</td>
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<td>Section 1412 (amending the Truth in Lending Act (15 U.S.C. 1631 et seq.))</td>
<td>“…may prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section…..”</td>
<td>Board of Governors</td>
<td>None</td>
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<tr>
<td>Section</td>
<td>Text of the Provision</td>
<td>Agency</td>
<td>Deadline</td>
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<td>Section 1420 (amending Section 128 of the Truth in Lending Act (15 U.S.C. 1638))</td>
<td>&quot;The creditor, assignee, or servicer with respect to any residential mortgage loan shall transmit to the obligor, for each billing cycle, a statement setting forth (a list of items and) … such other information as the Board may prescribe in regulations.&quot;</td>
<td>Board of Governors</td>
<td>None</td>
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<td>Section 1433(e) (amending Section 129 of the Truth in Lending Act (15 U.S.C. 1639))</td>
<td>&quot;…may prescribe such regulations as the Board determines to be appropriate to carry out the requirements of paragraph (1)&quot; (on pre-loan counseling).</td>
<td>Board of Governors</td>
<td>None</td>
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<td>Section 1461(a) (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.))</td>
<td>&quot;…may, by regulation, exempt from the requirements of subsection (a) a creditor that (1) operates predominantly in rural or underserved areas; (2) together with all affiliates, has total annual mortgage loan originations that do not exceed a limit set by the Board; (3) retains its mortgage loan originations in portfolio; and (4) meets any asset size threshold and any other criteria the Board may establish, consistent with the purposes of this subtitle.&quot;</td>
<td>Board of Governors</td>
<td>None</td>
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<tr>
<td>Section 1461(a) (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.), by adding a new Section 129D)</td>
<td>&quot;... may, by regulation, exempt from the requirements of subsection (a) (&quot;Escrow or Impound Accounts&quot;) a creditor that—(1) operates predominantly in rural or underserved areas; (2) together with all affiliates, has total annual mortgage loan originations that do not exceed a limit set by the Board; (3) retains its mortgage loan originations in portfolio; and (4) meets any asset size threshold and any other criteria the Board may establish, consistent with the purposes of this subtitle.&quot;</td>
<td>Board of Governors</td>
<td>None</td>
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<td>Section 1461(b)</td>
<td>&quot;…may prescribe rules that revise, add to, or subtract from the criteria of section 129D(b) of the Truth in Lending Act if the Board determines that such rules are in the interest of consumers and in the public interest.&quot;</td>
<td>Board of Governors</td>
<td>None</td>
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<tr>
<td>Section</td>
<td>Text of the Provision</td>
<td>Agency</td>
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<td>Section 1472(a) (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.))</td>
<td>“…may jointly issue rules, interpretive guidelines, and general statements of policy with respect to acts or practices that violate appraisal independence in the provision of mortgage lending services for a consumer credit transaction secured by the principal dwelling of the consumer and mortgage brokerage services for such a transaction, within the meaning of subsections (a), (b), (c), (d), (e), (f), (h), and (i).”</td>
<td>Board of Governors, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Consumer Financial Protection Bureau</td>
<td>None</td>
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<tr>
<td>Section 1472(a) (amending Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.))</td>
<td>“…may jointly issue regulations that address the issue of appraisal report portability, including regulations that ensure the portability of the appraisal report between lenders for a consumer credit transaction secured by a 1-4 unit single family residence that is the principal dwelling of the consumer, or mortgage brokerage services for such a transaction.”</td>
<td>Board of Governors, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Consumer Financial Protection Bureau</td>
<td>None</td>
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<td>Section 1473(d) (amending Section 1106 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3335))</td>
<td>Allows the appraisal subcommittee to “prescribe regulations in accordance with (the Administrative Procedure Act) after notice and opportunity for comment” regarding “temporary practice, national registry, information sharing, and enforcement.” Requires the appraisal subcommittee to “establish an advisory committee of industry participants, including appraisers, lenders, consumer advocates, real estate agents, and government agencies, and hold meetings as necessary to support the development of regulations.”</td>
<td>Appraisal Subcommittee</td>
<td>None</td>
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<tr>
<td>Section 1503(d)(2)</td>
<td>“… is authorized to issue such rules or regulations as are necessary or appropriate for the protection of investors and to carry out the purposes of this section.”</td>
<td>Securities and Exchange Commission</td>
<td>None</td>
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