January 22, 2020

Sent via email to comments@fdic.gov.

Ms. Annmarie H. Boyd
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

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

Dear Ms. Boyd,

I appreciate the opportunity to submit comments concerning the Federal Deposit Insurance Corporation's ("FDIC" or "Corporation") request for information ("RFI") on a framework for analyzing the effects of FDIC regulatory actions ("analytical framework"). I am a federal government attorney specializing in administrative law; however, I submit these comments in my personal capacity.

I. Summary of Comments

When finalizing its analytical framework, the FDIC must address the following to ensure that it is provided the most flexibility under the law to undertake the analysis most appropriate for the regulatory action at hand:

A. The FDIC should clarify the regulatory actions to which its analytical framework will apply. The framework appears to be drafted with rulemakings in mind but, as written, would apply to adjudications as well.

B. The analytical framework should be developed to ensure that the regulatory action being analyzed becomes effective by encouraging analyses to be developed in line with legal requirements.

C. The analytical framework should not be issued as a legislative rule so as to not bind the FDIC to its requirements, even when not appropriate.

D. The analytical framework should encourage preliminary impact analyses, but only so long as those analyses are relatively theoretical and do not involve data collection or complex quantified data analyses.

E. The analytical framework should ensure consideration of financial crises and such events' harms to the real economy.

F. When considering a proposed regulatory action, the FDIC's baseline should be the "world immediately before the Commission issues a proposal."

G. The analytical framework should make clear that predicting how the private sector will react to regulatory changes is extremely difficult or impossible.

H. The analytical framework should ensure that any quantitative data, statistics, or qualitative arguments relied upon in analyses are real or are thoroughly justified, and should discount any data, statistics, or qualitative arguments offered by commenters not supported by raw data or thoroughly justified.

I. The analytical framework should not require the quantification or monetization of all costs and benefits. It should further make clear that intangible values are to be considered.

J. The analytical framework should not require analyses with both monetized and non-monetized costs and benefits to display information in ways that compare top line quantified numbers.

K. The analytical framework should require analysts to consider what data would be necessary for a retrospective review, but should not mandate when a retrospective review is to take place.

II. Overview of the Request for Information

The FDIC requests comment on the approach it is considering using to analyze the effects of its regulatory actions. The Corporation understands that quality analyses "support[] both good policy decisions and the meaningful involvement and trust of the public in the rulemaking process."[1]

The Corporation recognizes that its analyses of legislative rules (i.e., those which are generally required to undergo notice-and-comment) are subject to several statutory requirements, including the Administrative Procedure Act ("APA") (mandating rulemakings not be, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"),[2] Regulatory Flexibility Act (RFA) (mandating agencies review a proposed rule's "impact … on small entities");[3] and Paperwork Reduction Act (PRA) (mandating agencies estimate the number of man-hours required to fulfill a rule's information collection requests).[4] It also recognizes that its rules are subject to the Congressional Review Act ("CRA"),[5] and is required by the Office of Management and Budget to submit analyses to the Office of Information and

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[1] Federal Deposit Insurance Corporation, Request for Information on a Framework for Analyzing the Effects of FDIC Regulatory Actions, 84 Fed. Reg. 65,808 (Nov. 29, 2019) (henceforth, "RFI").

[2] 5 U.S.C. § 706(2)(A).

[3] 5 U.S.C. § 603(a).

[4] 44 U.S.C. § 3514.

[5] 5 U.S.C. § 801 *et seq*.

Regulatory Affairs ("OIRA") "sufficient to allow OIRA to determine whether the rule is major under the criteria of" the CRA.[6]

The FDIC proposes including four "sections" in its analyses: (1) "A statement of the need for the proposed action;" (2) "the identification of a baseline against which the effects of the action are compared;" (3) "the identification of alternative regulatory approaches;" and (4) "an evaluation of the benefits and costs from all major stakeholder perspectives," that would discuss quantitative and qualitative analyses "of the proposed action and the main alternatives identified by the analysis." It also proposes evaluating the benefits and costs of ten identified "topics."

III. Comments on the Request for Information

A. The FDIC should clarify the regulatory actions to which its analytical framework will apply.

The FDIC undertakes a variety of regulatory actions, including issuing binding legislative rules, non-binding interpretive rules, and policy statements (*see infra* III.C for a discussion of the differences); adjudicating cases before administrative law judges or the Corporation's Board of Directors ("Board") itself; beginning or ending enforcement actions; and resolving failed insured depository institutions and systemically-important banks and financial institutions. As drafted, the FDIC's RFI appears to contemplate that the framework will only be used for legislative rules, although the RFI does not state that expressly.

The APA requires judges to set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and the FDIC is required to demonstrate in court that it conducted an analysis sufficient for the action to be sustained. This standard applies just as much to an order permanently barring someone from the banking industry as to the Board's approval of the Volcker Rule, yet conducting the same analysis with the same factors would be improper. If the FDIC intends to apply the analytical framework solely in legislative rulemakings, it so should indicate in any final document it publishes. If it intends to apply the framework to other actions, it should indicate which.

Unless otherwise stated, the remainder of this comment assumes that the framework will be applied only to legislative rulemakings.

B. The analytical framework should be developed to ensure that the regulatory action being analyzed becomes effective.

There is no disagreement that an agency should undertake careful consideration of its regulatory actions. An agency should finalize a regulatory activity only when it identifies a specific need and it has a reasoned belief that its actions will result in the intended consequences.

[6] U.S. OFF. OF MGMT. & BUDGET, M-19-14, GUIDANCE ON COMPLIANCE WITH THE CONGRESSIONAL REVIEW ACT 5 (Apr. 11, 2019), *available at* https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf.

There is often a difference, however, between an agency's careful considerations inside its walls (*e.g.*, analysts trying minor modifications of algorithms, conversations amongst staff, negotiations between Board members) and the final rationale it makes publicly available.[7] Frequently, the written analyses agencies publish by agencies are drafted in such a way as to ensure that the agencies' actions are upheld if challenged in court.[8] The APA only requires agencies to publish "a concise general statement of [a rule's] basis and purpose" when finalizing a legislative rule, but the length of these concise statements, including analyses of the rules' effects, has consistently grown over time in conjunction with the rise of hard look review by courts and the willingness of judges to overturn agency regulations on the basis of inadequate analyses.[9]

To that end, the FDIC should develop its analytical framework keeping in mind what types of analyses are required by various statutes and will be approved by a reviewing court. For legislative rules, the analytical framework should ensure that the analyses comply with the RFA and PRA and, perhaps most importantly, can pass hard look review under the APA.[10] Hard look review, as articulated by the Supreme Court, generally requires courts to hold a rule to be arbitrary and capricious, and therefore unlawful and set aside,

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[11]

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[7] *U.S. Department of Commerce v. New York*, 588 U.S. __ (June 27, 2019) ("[A] court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons."). However, the Court may invalidate an agency's action if finds the "explanation for agency action … is incongruent with what the record reveals about the agency's priorities and decisionmaking process."

[8] *See, e.g.*, Memorandum to Staff of the Rulewriting Divisions and Offices regarding Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012), *available at* https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf (following several losses in court, the Securities and Exchange Commission developed a systematic framework for analyzing regulatory actions).

[9] *See* Sidney A. Shapiro and Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look"*, 92 Notre Dame L. Rev. 331 (2016). The authors detail the evolution of the "concise general statement" required in 5 U.S.C. § 553 from single-page releases to ones that are "hundreds of pages long," developed to be "massive lines of defense that agencies construct to protect their rules from judicial challenges." *Id.*, at 351.

[10] If the FDIC intends to apply to analytical framework to agency actions other than legislative rules, the RFA and PRA would likely not apply and, as such, those analyses need not be conducted. *See* 5 U.S.C. § 603(a); 44 U.S.C. § 3514.

[11] *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983).

As hard look review has been expanded upon by lower courts and is fact-specific, the FDIC should ensure that each analysis is conducted in conjunction with agency lawyers.

Additionally, the FDIC's request for information recognizes that it "is not required to follow OMB's guidance with regard to regulatory analysis," but "nonetheless views OMB Circular A-4 … as a useful set of general principles." This is an appropriate position for the FDIC to take. Executive, non-independent agencies are required to use Circular A-4 because OMB can prohibit those agencies from enacting regulations under Executive Order 12,866 (i.e., if an executive agency desires to issue a legislative rule, it has no choice but to comport itself with OMB's mandates). This is not the case for independent agencies. Although OMB has dictated that independent agencies "should follow the analytical approach set forth in OMB Circular A-4" for purposes of allowing OMB to evaluate whether a rule is "major" under the CRA, the FDIC should undertake analyses only as it deems necessary. To the extent that OMB wishes the FDIC to undertake or format analyses in ways that the FDIC would not otherwise, the FDIC should not do so. The FDIC should not bind itself to (or feel bound to follow) Circular A-4.

Finally, not only should the analytical framework should ensure that the FDIC's analyses are limited to those required by law, but the Corporation should not conduct analyses of jointly-issued regulations that other agencies are required to undertake (*e.g.*, the Securities and Exchange Commission's requirement to consider the effects of a rule on "efficiency, competition, and capital formation," or Commodity Futures Trading Commission's requirement to evaluate a rule's "costs and benefits" in light of five specific considerations).[12] Having the FDIC undertaking these analyses would be duplicative and outside of the Corporation's mandate.

C. <u>The analytical framework should not be issued as a legislative rule.</u>

The Corporation's final analytical framework should be issued as internal guidance for FDIC analysts, rather than as a legislative rule. Doing so will provide the agency the flexibility to diverge from the framework when necessary without subjecting the agency to litigation risk.

The APA provides that agencies may issue four types of rules: legislative rules, interpretive rules, procedural rules, and statements of policy.[13] Legislative rules can affect substantive rights of affected individuals and are legally binding (i.e., carry the force and effect of law and may be relied upon as enforceable in court) on both the public and the issuing agency. Procedural rules affect those processes by which agencies act or those governing agency proceedings; if the language of the procedural rule is appropriately drafted, procedural rules may be considered legislative rules and bind the agency and the public. Finally, interpretive rules and policy statements are generally non-binding and are intended only to provide guidance to the public as to the agency's thinking.

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[12] 15 U.S.C. §§ 77b(b), 78c(f), 80a-2(c), 80b-2(c); 7 U.S.C. § 19(a).

[13] *See* 5 U.S.C. § 553. *See also* 1 KRISTIN HICKMAN & RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE § 4.1.3 (6th ed. 2019).

If issued as a binding legislative or procedural rule, the FDIC would be legally required to follow the analytical framework for every applicable analysis regardless of whether following the framework in any given instance would be informative. If the FDIC failed to adequately follow the mandates of the analytical framework when reviewing a regulatory action, it would be susceptible to losing a lawsuit brought by a party affected by the action, and the action would likely be overturned.[14] For example, if the analytical framework is binding, and if the Corporation decids that it should be applied to all adjudications, the FDIC would be required to analyze whether barring a banker from the industry would have an impact on U.S. economic performance. Such an action would have a negligible impact on the economy, but an analysis would nonetheless be required. Even if the FDIC allowed itself leeway to determine on a case-by-case basis which framework "topics" to consider, promulgating the analytical framework as a binding procedural rule would allow courts to second-guess the agency's decisions.

Should the Corporation decide to issue the analytical framework as non-binding guidance, it should explicitly indicate its intent not to bind itself to the framework in the document and that it is issued only for the benefit of its analysts. Because procedural rules need not be promulgated through notice-and-comment procedures, *see* 5 U.S.C. § 553(b)(A), it is possible for an agency to be bound by a document it did not intend to be a procedural rule if a court determines the document nevertheless is one and "the rights of individuals are affected."[15]

D. The analytical framework should encourage preliminary impact analyses, but only so long as those analyses are relatively theoretical and do not involve data collection or complex quantified data analyses.

Time is a finite resource, and although it is important that the FDIC adequately consider the impact of its regulatory actions, it is equally important that the Corporation act with dispatch. Its analytical framework must ensure that regulatory analyses be completed in a considerate and efficient manner.

The Corporation's staff that will conduct the analysis of a regulatory action should be involved in the decision-making process as early in the regulatory process as are other non-policymaking staff (*e.g.*, regulatory lawyers). Doing so ensures that those conducting the analysis can express their thoughts to policymakers at an early enough stage in the process (and vice versa) so that the regulatory process will not be delayed by a negative analytical assessment late in the process, forcing policymakers to restart their policymaking process with new information. The Administrative Conference of the United States (ACUS), an independent federal agency charged with convening experts from the public and private sectors to recommend improvements

[14] *See Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954). *See also Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005) ("*Accardi* has come to stand for the proposition that agencies may not violate their own rules and regulations to the prejudice of others.").

[15] *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). *See also Damus v. Nielsen*, 313 F. Supp. 3d 317 (D. D.C. 2018) (permitting asylum-seekers to use the *Accardi* doctrine as grounds to sue U.S. Immigrations and Customs Enforcement for systematically departing from a directive "set[ting] out a series of procedures ICE must undertake to determine whether a given asylum-seeker should be granted parole").

to administrative process and procedure, has recommended that agencies "promote the flow of information among decisionmakers, rule-writers, economists, and other rule development staff as early in the decision-making process as feasible."[16]

Further, although the FDIC could conduct a preliminary review of the impacts of alternative approaches early in the regulatory process, any such review prior to the final rulemaking stage should be relatively theoretical and should not involve the collection and (significant or complex) analysis of quantified data. Conducting a quantified economic analysis of alternative approaches before major details have been deliberated would be unduly time consuming and unwarranted at the advanced notice of proposed rulemaking or notice of proposed rulemaking ("NPRM") stages. Additionally, in analyzing alternatives during the final rulemaking stage, the FDIC's position that a "discussion of alternatives is a matter for judgment" and that discussing all proposed alternatives "may not be practicable" is accurate.[17]

E. <u>The analytical framework should ensure consideration of whether policy options are (or could be) designed to minimize the probability of seismic financial events and such events' harms to the real economy.</u>

When considering the impacts of regulations, the FDIC must consider the Congressional intent behind the statutory language that provides the Corporation the ability to regulate in the first place. With most of the FDIC's statutes, that aim is to ensure financial stability so the real economy can operate.

One of the, if not the, foremost reasons Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act was to ensure that the financial system does not cause another economic crisis like it did in 2007–08, causing enormous harm to individuals outside the financial sector. The Senate version of the legislation was originally titled the *Restoring American Financial Stability Act*,[18] and at the bill's markup Senate Banking Committee Chairman Chris Dodd stated:

> Some of the most prominent financial institutions in our country have been destroyed or seriously weakened – but as bad as that has been the far worse damage has been done to millions of ordinary families across America who did nothing wrong but are paying a terrible price. … We must reform our regulatory structure so a crisis on Wall Street doesn't wipe out working families and businesses.[19]

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[16] Admin. Conf. of the U.S., Recommendation 2019-5, *Agency Economists*, 84 Fed. Reg. 71,349 (Dec. 27, 2019).

[17] RFI at 65,810.

[18] S. 3217, 111th Cong. (2010).

[19] Statement of Sen. Chris Dodd at the Executive Session to Mark-Up an original bill entitled Restoring American Financial Stability Act of 2010: Markup of the S. Comm. On Banking, Housing, and Urban Affairs, 111th Cong. (2010), *available at* https://www.banking.senate.gov/imo/media/doc/DoddStatement32210.pdf.

Further, in his statement before signing the legislation in 2010, President Obama stated:

> Over the past two years, we have faced the worst recession since the Great Depression. Eight million people lost their jobs. Tens of millions saw the value of their homes and retirement savings plummet. Countless businesses have been unable to get the loans they need and many have been forced to shut their doors. And although the economy is growing again, too many people are still feeling the pain of the downturn.[20]

The first title of the Dodd-Frank Act is even named the *Financial Stability Act of 2010*, demonstrating the primacy of Congress's intention to ensure financial stability.[21]

Nearly eight decades prior, Congress created the FDIC and provided it with most of its authorities in the Banking Act of 1933 (and subsequently again in the Federal Deposit Insurance Act of 1950 ("FDIA")). This law was similarly intended to ensure financial stability following a financial crisis; the creation of deposit insurance was intended to stem bank runs and keep liquidity in the banking system, preventing bank collapses and ensuring the provision of financial services to the real economy.[22]

To that end, if the FDIC considers enacting a regulation using statutory authority granted to it as a result of Congress's attempt to ensure the United States maintains a stable banking system and the continued operation of banking services, it must analyze whether or to what extent that rule will minimize the risk of a financial crisis occurring. However, in the ten "topics" the RFI proposes the FDIC will consider when analyzing the impact of a regulation, only one mentions consideration of a financial crisis; in *Effects on U.S. economic performance*, the Corporation states that, "[i]n the extreme, banking crises may have substantially adverse spillover effects on economic output."[23] This is insufficient, as a regulation (or series of regulations) may have a positive effect on the real economy for years or decades only to quickly cause a sharp, negative effect. For example, bank regulations that lower capital or leverage requirements may allow banks to increase lending in good times but may also help cause a the bad that lead to an immediate withdrawal of liquidity. The FDIC should analyze a rule's impact on U.S. economic performance in periods of good economic activity and to what extent the rule may help cause institutions' financial distress, the impact on the economy caused by that distress, and the rule's impact on bank behavior during that distress, but it should analyze those separately.

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[20] Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), *available at* https://obamawhitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act.

[21] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 101, 124 Stat. 1376, 1391 (2010).

[22] *See* FEDERAL DEPOSIT INSURANCE CORPORATION, A BRIEF HISTORY OF DEPOSIT INSURANCE Ch.3 (1998), *available at* https://www.fdic.gov/bank/historical/brief/ch3.pdf.

[23] RFI at 65,813.

A Corporation analysis of a regulation's effect on financial stability would likely use qualitative analyses rather than quantitative. It is impossible to quantify just how much a rule will increase or decrease the probability of a financial crisis (10%? 1%? 0.1?), just as it is impossible to quantify the harms to GDP (6 to 13%?[24] 40 to 90%?[25]), let alone the emotional tolls, of a crisis. Instead, the FDIC should consider how a proposed regulation would theoretically promote or impede financial stability.

F. <u>The analytical framework should require a baseline that is the "world immediately before the Commission issues a proposal."</u>

The FDIC asks whether an analysis should include a pre-statute baseline. This would be difficult to determine in many situations and ultimately unhelpful. Although many of the FDIC's recent regulations have been enacted due to mandates in the Dodd-Frank Act, the Corporation will continue to issue regulations under authority granted to it by Congress decades ago. Take, for example, the FDIC's recent proposal with the Comptroller of the Currency to amend their Community Reinvestment Act regulations.[26] Not only would it be unreasonable to require the FDIC to conduct an analysis in 2019 with a baseline that assumes the 1977 Community Reinvestment Act was not enacted, but also it would be unreasonable to require the FDIC consider a world that it has no ability to enact. As the RFI itself states, the FDIC "does not have the option of not implementing statutes."[27] If Congress requires the Corporation to finalize a rule, it has no option but to finalize a rule.

Instead, the only analysis that will be useful to the agency's leadership is the differences between policy options it may legally implement. To that end, the FDIC's analysis baseline should be how actors have responded to Congress's statute. If the statute itself has changed behavior (e.g., the FDIC is clarifying a statute, but the statute does not require a regulation), the FDIC should take that into account when determining the effects of a proposed rule. If the statute has not yet changed behavior (e.g., the statute has no effect until the FDIC finalizes a rule), the FDIC should take that into account as well. Similarly, if the FDIC is analyzing the effects of guidance (pursuant to OIRA's requirement under the CRA, for example),[28] its baseline should account for behavioral changes following implementation of a statute or regulation.[29]

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[24] Eric A. Posner and E. Glen Weyl, *Benefit-Cost Analysis for Financial Regulation*, 103 AM. ECON. REV. 393 (May 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188990.

[25] David Luttrell, Tyler Atkinson and Harvey Rosenblum, *Assessing the Costs and Consequences of the 2007–09 Financial Crisis and Its Aftermath*, 8 Dallas Fed Econ. Letter (Sept. 2013), *available at* http://www.dallasfed.org/research/eclett/2013/el1307.cfm.

[26] Office of the Comptroller of the Currency, Treasury and Federal Deposit Insurance Corporation, *Community Reinvestment Act Regulations*, 85 Fed. Reg. 1204 (Jan. 9, 2020).

[27] RFI at 65,810.

[28] *See* U.S. OFF. OF MGMT. & BUDGET, *supra* note 6.

[29] When analyzing the effects of non-binding guidance, the FDIC should be sure to take into consideration the fact that behavioral changes may not be permanent, given the non-binding

Simply put, as a practical matter, a regulation that does not address the world as it is at the time the Corporation is implementing it would be of limited value. Therefore, the baseline from which the FDIC's analysis starts should be the "world immediately before the Commission issues a proposal."

The FDIC also requests comment on which baseline to use when finalizing a regulation that has been previously proposed or when re-proposing a regulation. The RFI states that "it might be argued that affected entities have already adjusted their activities as a result of the previously proposed rule."[30] Although it is true that the public may have adjusted its activities due to an expectation that the FDIC's original policy proposal would be adopted, the analytical framework should make clear that such a modification should not be considered for analysis purposes; behaviors can easily adjust back once the public begins to expect that the policy will not ultimately be adopted. This logic should easily apply when the time between the NPRM and final rule stages is short. When extensive time (several years) has lapsed between the NPRM and final rule, or between an initial NPRM and a re-proposal, the FDIC should begin with the premise that private actors' behaviors have not permanently changed absent a showing otherwise.

G. The analytical framework (and all analyses) should make clear that predicting how the private sector will react to regulatory changes—especially in the context of banking and financial services—is extremely difficult or impossible.

It is often said that prediction is very difficult, especially if it's about the future. As a result, agencies have a poor track record of predicting the consequences of their regulatory activities. In what appears to be the most recent study comparing agency cost and benefit estimates at the rulemaking stage with post-regulation costs and benefits, OIRA analysts in 2005 found that, of the 47 rules reviewed, only 23% had an "accurate" costs-to-benefits ratio.[31] That is, 77% of reviewed predictions were inaccurate. To make matters worse, the analysts defined a regulation's estimate to be "accurate" when it was "within +/- 25 percent" of the real-world effects of the rule—a very large margin of error.

None of the regulations reviewed in the 2005 analysis were issued by banking or financial regulators, but it would not be surprising if rules issued by these agencies were just as

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nature of the interpretive rule or policy statement. *See Kisor v. Wilkie*, 588 U.S. ___, 139 S. Ct. 2400, 2420 (2019) ("interpretive rules, even when given *Auer* deference, do *not* have the force of law. An interpretive rule itself never forms 'the basis for an enforcement action'—because, as just noted, such a rule does not impose any 'legally binding requirements' on private parties. An enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment.") (internal citations omitted).

[30] RFI at 65,810.

[31] OFFICE OF INFORMATION AND REGULATORY AFFAIRS, VALIDATING REGULATORY ANALYSIS: 2005 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 47 (2005), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/inforeg/2005_cb/final_2005_cb_report.pdf.

inaccurate or worse. Finance is a system with rules developed not by the natural world but by humans (specifically, humans whose job is to minimize the impact of regulations) and, according to one academic, "it is not only the rules but the adaptation to them, including regulatory arbitrage, that create the system of finance."[32] "Changes in an important rule will change the system of finance not just through direct, immediate effects but through the subsequent adaptations." Another academic explains that determining the effects of regulatory changes in finance is more complicated than in the natural sciences: "While a chemical can interact with the environment in ways that are challenging to model and predict, those interactions are generally simpler than interactions of groups of humans. Every human possesses agency and interacts with others in non-linear, unpredictable ways."[33]

Regarding the humans that the FDIC specifically regulates, decisionmakers in financial corporations may be more unpredictable than average, and unless a regulator can predict how financial market participants will arbitrage the rule, it is impossible to calculate its co-costs and co-benefits and ultimately perform an adequate, quantified cost-benefit analysis. As one of the professors quoted above writes:

> Anything presented as quantified [cost-benefit analysis on financial regulation] is in fact judgmental in nature, not an actual alternative to judgment but rather its equivalent in numerical form—"judgment in disguise." Such quantitative [cost-benefit analysis on financial regulation] as has been done is better understood as "guesstimated," and has been presented without clear disclaimers and sensitivity analyses.[34]

With this in mind, the FDIC's analytical framework must ensure written analyses are upfront and transparent about any uncertainties faced and should not require analysts to shoehorn inapplicable data into the analysis in an attempt to predict or quantify a rule's effects. Not only will this produce a more accurate analysis but acknowledging the gaps in studies will also make the analysis more likely to be upheld in court. Last year, the D.C. Circuit Court of Appeals held an agency regulation to be not arbitrary and capricious in part based on the rule's analysis "repeatedly flagging shortcomings in studies it cites[] and qualifying their probative force."[35]

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[32] Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. 351, 360 (2014).

[33] John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J. 882, 1001 (2015).

[34] *Id.*

[35] *Mozilla Corp. v. FCC*, 940 F.3d 1, 55 (D.C. Cir. 2019).

H. <u>The analytical framework should ensure that any quantitative data, statistics, or qualitative arguments relied upon in analyses are real or are thoroughly justified. The framework should require analysts to consider discounting any data, statistics, or qualitative arguments offered by commenters that are not thoroughly supported by raw data or otherwise thoroughly justified.</u>

The FDIC will no doubt rely upon data, statistics, or other quantified information when conducting regulatory impact analyses, and it would be improper not to when real-world information is available. The Corporation should first look to data sets of historic information it has readily available to analyze a proposed rule's impacts. For example, if the FDIC were attempting to determine the impacts a proposed regulation would have on bank earnings, it should look to Call Report data. The FDIC should also look to data sets it may purchase or subpoena[36] with relevant information.

However, the FDIC may not have easy access to the information upon which it wishes to rely or it may find the act of purchasing or subpoenaing data too onerous, and it may instead be required to rely instead on information provided by commenters. In doing so, the Corporation must ensure that the information it is being provided with is accurate and valid or must otherwise consider discounting the information it is being provided. In other words, the FDIC must not simply take at face value figures it is being provided.

The analytical framework should provide the most weight to quantified data that commenters have thoroughly broken down into their composite parts and thoroughly justified with raw data provided to the FDIC. If a commenter wishes to detail how a proposed rule will raise funding costs for consumers, for example, it would be most helpful if they explained the mechanisms by which the rule would do so (e.g., "Proposed section __.3(b) would likely require an institution to hire 0.5 full-time employees at a cost of $60,000 per annum reviewing additional paperwork, of which 50% would likely come from reduced shareholder profits and 50% would come from increased costs to borrowers."), and provided raw historical, relevant data (e.g., the cost of hiring an additional full-time employee doing that job, changes to shareholder dividends when similar rules were previously put into effect).

The framework should provide lesser weight to quantified data or qualitative arguments that commenters have broken down into their component parts but have not thoroughly justified with raw data. Breaking down predicted costs or benefits into their parts will enable FDIC analysts to better consider the validity of the argument the commenter is making, whether assumptions made are justified, or whether the FDIC has data it can use to determine the validity of the argument.

The framework should provide even less weight to quantified data or qualitative arguments that are generally not broken down into component parts and not justified with raw data. Without such a level of detail, it is difficult, if not impossible, for the FDIC to validate the argument being made, and the Corporation should not take at face value quantified data or qualitative arguments not thoroughly justified.

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[36] 12 U.S.C. § 1820(c).

Finally, the framework should provide the least weight to, or even discount entirely, a commenter's quantified data or qualitative arguments that could be supported by data the commenter has, but which the commenter has refused to provide. If a commenter has data that would support their claim but are refusing to provide it, the FDIC should presume that the data would contradict the commenter's argument and should discard the argument entirely. It would be improper for the Corporation to take at face value commenter arguments that can be validated but are not.

In order to facilitate the receipt of confidential business information (CBI), the FDIC should provide assurances to information holders that any CBI provided to the agency for purposes of analyzing a rule's effects will not be made public. This information is exempt from FOIA and regulatory agencies are permitted to keep CBI out of the rulemaking record and frequently do.[37] To that end, the FDIC should consider developing an easy method for commenters to provide CBI in response to rulemakings separate from the traditional methods by which commenters provide comments to put commenters with CBI more at ease in providing it. ACUS is undertaking a project this spring titled *Protected Materials in Public Rulemaking Dockets* that may result in recommendations to agencies on how to best protect CBI in rulemaking dockets.[38]

I. The analytical framework should not require the Corporation to quantify or monetize all costs and benefits (including, if applicable, co-costs and co-benefits) and should make clear that intangible values are to be considered.

Quantifying costs and benefits can lead to absurd results. Required to quantify benefits and costs by Circular A-4,[39] agencies have quantified how much individuals would pay to avoid

[37] See Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking* 52-53 (May 14, 2013) (report to the Admin. Conf. of the U.S.), *available at*
https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf.

[38] Admin. Conf. of the U.S., *Protected Materials in Public Rulemaking Dockets*, *available online at* https://www.acus.gov/research-projects/protected-materials-public-rulemaking-dockets ("The project examines how agencies protect confidential business information, such as trade secrets and financial regulatory information, and personally identifiable information, such as medical information, within their public rulemaking dockets, while achieving an appropriate level of disclosure. … [This project studies] practices agencies use to balance transparency and confidentiality in rulemaking, such as disclosing aggregate data without compromising the underlying information's confidentiality and redacting protected information.").

[39] U.S. OFF. OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS 2 (Sept. 17, 2003) ("Where all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the most efficient alternative, that is, the alternative that generates the largest net benefits to society (ignoring distributional effects).").

dying from externalities imposed by others[40] and how much prisoners would pay to avoid being raped.[41] Although the costs and benefits of bank regulations are mostly already quantified, it is easy to imagine the FDIC considering some benefits or costs that cannot easily be quantified, such as the impacts of recessions caused by financial crises on physical and mental health,[42] including the mental health of the children of unemployed parents decades after that unemployment ended.[43] These are real costs which could be caused indirectly by the FDIC's policies. For example, the FDIC could predict the increased probability of a financial crisis by implementing a policy (which is impossible), could consider how much the typical American would pay over the course of their lifetime to have a parent not be unemployed when they were a child (or, conversely, how much would the typical American need to receive to voluntarily have had a parent be unemployed when they were a child), and multiply the two together to determine just one facet of the cost of a crisis.[44]

While it may be "feasible" to conduct such an analysis, it would be nothing more than a *very* rough guesstimate and not worth seriously considering. As such, the FDIC's analytical framework should not require a quantification or monetization of all costs and benefits "to the extent feasible," as must agencies subject to Circular A-4. Instead, the Corporation should adopt a standard deeming it unnecessary to quantify costs and benefits when doing so (perhaps due to data unavailability or quality) would be such a guesstimate as to not be useful or when considering a cost or benefit in a qualitative manner is preferable.

Further, the FDIC's analytical framework should ensure that intangible values may be considered and should enumerate specific intangible values that may be considered. Having a set of intangible values written into the framework would be beneficial for analysts, as they may remind analysts to consider such values' applicability to the rule being considered. Such values

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[40] *See, e.g.*, U.S. ENVTL. PROT. AGENCY, VALUING MORTALITY RISK REDUCTIONS FOR ENVIRONMENTAL POLICY: A WHITE PAPER (Draft of Dec. 10, 2010), *available at* https://www.epa.gov/sites/production/files/2017-08/documents/ee-0563-1.pdf.

[41] *See* U.S. DEP'T OF JUST., PRISON RAPE ELIMINATION ACT REG. IMPACT ANALYSIS (May 17, 2012), *available at* https://www.ojp.gov/programs/pdfs/prea_ria.pdf.

[42] *See* Marina Karanikolos, et al., *Effects of the Global Financial Crisis on Health in High-Income OECD Countries: A Narrative Review*, 46 Int'l. J. of Health Serv. 208 (2016).

[43] *See* Milena Nikolova and Boris Nikolaev, *How Having Unemployed Parents Affects Children's Future Well-Being*, BROOKINGS (July 13, 2018), *available at* https://www.brookings.edu/blog/up-front/2018/07/13/how-having-unemployed-parents-affects-childrens-future-well-being/.

[44] The way one monetizes the impacts of a policy change is by considering the marginal rate of substitution between wealth and the impact an intervention will have on the individual, multiplied by the probability of an event occurring. *See, e.g.*, James K. Hammitt, *Valuing Changes in Mortality Risk: Lives Saved Versus Life Years Saved*, 1 REV. OF ENVTL. ECON. & POL. 228 (2007) ("An individual's [value of a statistical life] is her rate of substitution between wealth and survival probability (i.e., one—mortality risk) given her current risk and wealth (it may also depend on other factors such as anticipated future health and income)").

may include income inequality and poverty alleviation, market competition, and environmental protection in addition to those already identified in the RFI.

J. The analytical framework should not require analyses with both monetized and non-monetized costs and benefits to display information in ways that compare top line quantified numbers.

Among its requests for comment, the FDIC asks whether it should use the accounting tables recommended by Circular A-4.[45] It should not. As the Corporation correctly notes, "Comparisons between quantified and non-quantified benefits and costs in such tables could be misleading, and quantified estimates could only be understood relative to a clear discussion of underlying assumptions and uncertainties."[46] These tables encourage the comparison of top-level costs to top-level benefits to the exclusion of unquantifiable costs and benefits even when not warranted. Rather, the FDIC should use prose to more accurately explain what it considers to be a rule's costs and benefits.

K. The analytical framework should require analysts to consider which data would be necessary for a retrospective review. However, the framework (and final regulations) should not mandate when a retrospective review is to take place.

While analyzing the effects of a regulation, the Corporation should consider what data would be necessary for it to conduct a retrospective review in the future, and it should consider whether and how to collect that data. In directing consideration of this data, the framework should ensure analysts deeply consider whether the proposed metrics truly measure the intended impact of the regulatory action (e.g., tier 1 capital adequacy) or are simply an approximation (e.g., using an institution's size or counterparty exposure as a proxy for systemic risk). If the metric is the latter, the FDIC should determine if there is a better method of measuring the rule's impact, or recognize that the metric is not a precise measurement of the impact and discount the analysis accordingly.

In addition, neither the analytical framework nor final regulations should mandate when a retrospective review should take place or what that review should look like. Retrospective reviews have opportunity costs in terms of time, staff attention, and other resources that could be devoted to other review activities, and the decision of when and how to expend FDIC resources should be left to the Board at the time resource allocation occurs, who are in a better position to determine the Board's needs at any given time than the dead hand of the past. Congress has also imposed a retrospective review requirement on the Corporation through statute, mandating in the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA") that the FDIC at least decennially "conduct a review of all regulations … in order to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions."[47] Absent a mandate from Congress, the content (*e.g.*, what factors to consider and how to weigh

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[45] U.S. OFF. OF MGMT. & BUDGET, *supra* note 39 at 47.

[46] RFI at 56,813.

[47] 12 U.S.C. § 3311.

each factor, to what extent should the review be qualitative or quantitative, which data to use) and frequency of this review should be decided by the Board undertaking the review.

IV. Conclusion

Thank you for this opportunity to comment on this RFI on the FDIC's proposed framework for analyzing the impact of regulatory actions.

Sincerely,

Todd Phillips