

ENTERED
Office of Proceedings
March 14, 2019
Part of
Public Record

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Cynthia Richman
Direct: +1 202.955.8234
Fax: +1 202.530.9691
CRichman@gibsondunn.com

March 14, 2019

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

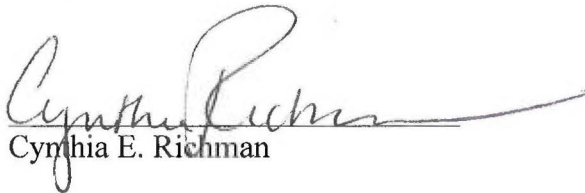
Re: EP 752, Association of American Railroads Petition for Rulemaking

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding is the petition for rulemaking of the Association of American Railroads.

Thank you for your assistance in this matter.

Respectfully,



Cynthia E. Richman

Counsel for the Association of American Railroads

Enclosure

BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte No. 752

PETITION FOR RULEMAKING

Thomas H. Dupree Jr.
Cynthia E. Richman
Matt Gregory
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500

Kathryn D. Kirmayer
Timothy J. Strafford
Association of American Railroads
425 Third Street, SW
Suite 1000
Washington, DC 20024
(202) 639-2100

*Counsel for the Association of American
Railroads*

March 14, 2019

INTRODUCTION

In spite of the polarized political climate, one tenet of good government enjoys bipartisan consensus: agencies should consider the costs and benefits of proposed rules before imposing additional regulation. Cost-benefit analysis has been a focus of the current administration's regulatory-reform efforts, and agencies throughout the federal government have recognized the importance of committing to meaningful consideration of costs and benefits during rulemakings. The Surface Transportation Board's rulemaking proceedings are no exception to these principles, and incorporating cost-benefit analysis into the Board's procedures would put the new Board at the forefront of regulatory reform.

The Board is an expert agency whose rules can have significant real-world effects on the nation's economy. As such, the Board should focus its regulatory efforts on correcting market failures, which cost-benefit analyses are well-suited to identify. Thus, a commitment to cost-benefit analysis would help the Board do its job by ensuring that the Board has the information it needs to make sensible decisions about where, when, and how to regulate. And cost-benefit analysis will help the Board adopt more effective and less burdensome rules, something that benefits all stakeholders and the broader economy. Indeed, cost-benefit analysis is a critically important tool that can help the Board fulfill its statutory mandates to “minimize the need for Federal regulatory control over the rail transportation system,” “foster sound economic conditions in transportation,” and “ensure effective competition and coordination between rail carriers and other modes.” 49 U.S.C. § 10101(2), (5).

Chairman Begeman herself has highlighted the need to fully evaluate the economic consequences of new rules, warning in one proceeding that “what we do here, ultimately, could cause greater harm than good.” Decision, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules* (“*Switching Decision*”), EP 711, at 36 (STB served July 27, 2016) (Board

Member Begeman, dissenting). To minimize the risk identified by Chairman Begeman, this petition requests that the Board adopt rules designed to ensure that Board Members have the information they need to make sound regulatory decisions. Specifically, the Board should adopt reforms that incorporate meaningful cost-benefit analysis into its rulemaking proceedings and require the Board's decisions to be informed by the most up-to-date and reliable information available. Accordingly, pursuant to 49 C.F.R. § 1110.2(b) the Association of American Railroads ("AAR") respectfully requests that the Board initiate a rulemaking proceeding and adopt three new procedural requirements for future rulemakings: first, a requirement that the Board consider the economic costs and benefits of new rules when it proposes and adopts them; second, a requirement that the Board consider the cumulative impact of regulations; and third, a requirement that the Board base its decisions on up-to-date and reliable data.¹

Meaningful cost-benefit analysis (sometimes called "economic analysis," "regulatory-impact analysis," or "benefit-cost analysis") facilitates sound agency decision-making through an evaluation of whether additional rules will achieve positive outcomes, and at what cost. Cost-benefit analysis is a widely accepted feature of modern administrative law and is an indispensable part of reasoned policymaking. In fact, presidents of both parties have long required executive agencies to incorporate cost-benefit analysis into their rulemakings. Although these requirements do not currently apply to independent agencies like the Board, independent agencies share the public policy objectives that have led other agencies to assess costs and benefits of regulatory action and would achieve substantial improvements in their processes by

¹ AAR is a trade association representing the interests of North America's major freight railroads. AAR and its members have a vital interest in ensuring that the Board comply with its statutory obligations to minimize regulation of the railroad industry and assist railroads in achieving revenue adequacy. AAR regularly participates in the Board's rulemaking proceedings, and its members bear the burden imposed by the Board's rules.

following suit. Additionally, recent judicial opinions make clear that cost-benefit analysis is a necessary part of notice-and-comment rulemaking. Thus, incorporating cost-benefit analysis into an agency's rulemakings will have the added benefit of increasing the likelihood that the rulemakings comply with the Administrative Procedure Act.

Among other things, proper cost-benefit analysis requires identification of the problem that justifies a new rule, examination of regulatory alternatives, and an evaluation of the economic and non-economic costs and benefits of a proposed rule and the alternatives. One additional aspect of cost-benefit analysis bears mention here and should be explicitly incorporated into the Board's rulemaking procedures: the need to consider the cumulative impact of regulation. Cumulative impact is an especially important consideration for the Board, which has statutory mandates to promote the long-term financial health of the railroad industry. Board Members should not be asked to make important policy decisions that may have broad effects on the nation's freight transportation network without this information.

Finally, an agency's ability to make informed, well-reasoned decisions depends on the quality of the data on which it relies. The Board cannot make sensible regulatory decisions unless it uses reliable economic data that reflects market realities. The Board should therefore make clear that, when it considers whether to propose or adopt new rules, it will use only up-to-date and reliable data. Importantly, the Board need not labor to comply with this requirement: stakeholders and outside experts already disclose significant public information, and parties participating in a proceeding are more than capable of submitting to the Board up-to-date and reliable information to make decisions that reflect economic conditions in the real world.

These procedural reforms would bring the Board in line with a broader regulatory-reform movement taking place across the federal government. For example, the current administration

ordered executive agencies to establish “Regulatory Reform Task Force[s]” to identify regulations that “impose costs that exceed benefits.” Exec. Order No. 13,777 § 3, 82 Fed. Reg. 12,285, 12,285–86 (Mar. 1, 2017). The Department of Transportation recently announced new policies for its rulemakings, including requirements that the agency’s decisionmakers conduct meaningful cost-benefit analyses and support their regulations with “the best and most relevant scientific, technical, and economic information reasonably available to the Department.” *Policies and Procedures for Rulemakings* (“DOT Order”), DOT Order 2100.6, at 3, 14 (Dec. 20, 2018) (attached as Exhibit A). In a similar effort, another independent agency, the Federal Communications Commission, voluntarily adopted new regulations that require its (newly created) Office of Economics and Analytics to analyze the costs and benefits of major rules.

Here, too, the Board can make permanent improvements to its rulemaking procedures and ensure that in future rulemakings all Board Members have the information they need. Reforms like these will also ensure that the Board’s policies are consistent with its statutory obligations and sound regulatory practice generally, and, therefore, make the Board more effective in achieving its goals.

ARGUMENT

Administrative agencies must understand the pros and cons of competing regulatory alternatives before they make important decisions that have the potential to impose enormous cost and other short- and long-term disruptions to a stable and healthy marketplace. At its most basic, cost-benefit analysis simply helps agencies articulate the purpose of regulation and weigh potential outcomes. This sort of analysis is a widely accepted feature of modern administrative law. Over the last several decades, executive agencies and the Office of Management and Budget (“OMB”) have developed expertise in cost-benefit analysis. *See, e.g.*, Exec. Order 12,866 (Sept. 30, 1993), 58 Fed. Reg. 51,735 (Oct. 4, 1993). And agencies are increasingly

required to consider the costs and benefits of their proposed rules, both to fulfill their statutory mandates and under general principles of administrative law. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Accordingly, agencies like the Board should ensure that they are incorporating meaningful cost-benefit analysis into their rulemakings. Meaningful cost-benefit analysis includes consideration of the cumulative impact of regulations. And agencies should ensure that their regulatory decisions are based on reliable economic data that reflects market realities.

In recent years, the Board has proposed a series of new rules that, if adopted, “will impose the most significant regulatory changes since implementing the Staggers Act.” Letter from Board Member Ann D. Begeman to the House Comm. on Transportation and Infrastructure (Oct. 5, 2016). A regulatory expert later described the Board’s decision in one of these proceedings as “a textbook case” for why cost-benefit analysis “is essential for sensible decisionmaking.” Patrick A. McLaughlin, *Rail Regulation Highlights Need for Required Economic Analysis*, TheHill.com (Oct. 4, 2017), <https://tinyurl.com/ycza8l2k>. As described in more detail below, the Board’s recent rulemaking proceedings underscore the importance of incorporating cost-benefit analysis into the Board’s regulatory decisions, as well as ensuring that the Board consider the cumulative impact of its regulations and base its decisions only on reliable data that reflects market realities, so that Board Members have adequate and dependable information on which to base their decisions.

A. Cost-Benefit Analysis Is Important To Good Governance

An agency cannot make an informed regulatory decision without first considering the fundamental question of whether a proposed rule will do more harm than good. Cost-benefit analysis provides a means for answering this question and ensures “that decisionmakers fully contemplate the risks and rewards of any proposed regulatory strategy.” Administrative

Conference Recommendation 2013-2, 78 Fed. Reg. 41,352, 41,355 (July 10, 2013). Put another way, it “is the tool that helps agencies identify whether alternative regulatory proposals are likely to solve a real problem and at what cost.” Jerry Ellig, *Why and How Independent Agencies Should Conduct Regulatory Impact Analysis*, 28 Cornell J. L. & Pub. Pol’y 1, 7 (2018). “It is not possible to do evidence-based, data-driven regulation without assessing both costs and benefits, and without being as quantitative as possible.” *Remarks of FCC Chairman Ajit Pai at the Hudson Institute, The Importance of Economic Analysis at the FCC*, at 3 (Apr. 5, 2017) (quoting Cass Sunstein), <https://tinyurl.com/y78cwfls>.

Cost-benefit analysis has other advantages. It makes an agency’s decisions more understandable and transparent. Administrative Conference Recommendation 2013-2, 78 Fed. Reg. at 41,355. And it helps an agency avoid the pitfalls of regulation-by-anecdote and undue influence from special-interest groups. Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 Harv. Envtl. L. Rev. 1, 10 (2017).

For these reasons and more, presidents from both parties have repeatedly affirmed that cost-benefit analysis is an indispensable part of sound policymaking. Executive Order 12,866, for example, requires executive agencies to assess the economic costs and benefits of significant proposed regulations, consider regulatory alternatives, and “select those approaches that maximize net benefits ... unless a statute requires another regulatory approach.” Exec. Order 12,866 § 1(a). These requirements, put in place in 1993 by President Clinton, have been accepted and refined by Republican and Democratic administrations alike. *See, e.g.*, Exec. Order 13,771 (Jan. 30, 2017), 82 Fed. Reg. 9,339 (Feb. 3, 2017); Exec. Order 13,563 (Jan. 18, 2011), 76 Fed. Reg. 3,821 (Jan. 21, 2011). Pursuant to these orders, executive agencies work with

OMB's Office of Information and Regulatory Affairs ("OIRA") to develop regulatory plans and estimate the costs and benefits of proposed rules.

In 2003, OMB published Circular A-4, which provides detailed guidance for conducting effective cost-benefit analysis. OMB Circular A-4 (Sept. 17, 2003), <https://tinyurl.com/yaork9v2>. For example, Circular A-4 instructs agencies that "[b]efore recommending Federal regulatory action, an agency must demonstrate that the proposed action is necessary." *Id.* at 3. "Thus, [agencies] should try to explain whether the action is intended to address a significant market failure or to meet some other compelling public need such as improving governmental processes or promoting intangible values such as distributional fairness or privacy." *Id.* at 4. In a primer on cost-benefit analysis, OMB stated that a complete analysis would: "[d]escribe the need for the regulatory action"; "[d]efine the baseline"; "[s]et the timeframe of analysis"; "[i]dentify a range of regulatory alternatives"; "[q]uantify and monetize the benefits and costs"; "[d]iscount future benefits and costs"; "[e]valuate non-quantified and non-monetized benefits and costs"; and "[c]haracterize uncertainty in benefits, costs, and net benefits." OMB, Regulatory Impact Analysis: A Primer ("OMB Primer") at 4 (Aug. 15, 2011), <https://tinyurl.com/y9kxe9y6>. Agencies should generally choose the regulatory option with "the highest net benefits" and their analyses should "include an explanation of why the planned regulatory action is preferable to the identified potential alternatives." OMB, Agency Checklist: Regulatory Impact Analysis ("OMB Checklist") at 2 (Oct. 28, 2010), <https://tinyurl.com/ybr2v32f>.²

² See also, e.g., OMB, 2009 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Act (Jan. 27, 2010), at 42 ("[T]he best practice is to accompany all significant regulations with (1) a tabular presentation, placed prominently and offering a clear statement of qualitative and quantitative

Executive Order 12,866 and its progeny do not bind independent agencies like the Board. But they are still sensible requirements that improve regulatory actions. The Board has in the past taken action to comply with the spirit of executive orders where such action has been consistent with its governing statute. *See, e.g., Regulatory Reform Task Force*, EP 738 (STB served June 20, 2017) (“RRTF was established to comply with the spirit of Exec. Order No. 13,777, 82 Fed. Reg. 12285 (Mar. 1, 2017), and to move forward ongoing agency regulatory and process review initiatives.”). Similarly, presidents, the Administrative Conference, regulatory experts, and scholars have all urged independent agencies to analyze the costs and benefits of their rules, develop written guidance on their use of cost-benefit analysis, and consider conforming their analyses to the standards that apply to executive agencies. *See, e.g., Exec. Order 13,579* (July 11, 2011), 76 Fed. Reg. 41,587 (July 14, 2011); Administrative Conference Recommendation 2013-2, 78 Fed. Reg. 41,352; Arthur Fraas & Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions*, 63 Admin. L. Rev. 213, 235–36 (2011); Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 Admin. L. Rev. (Special Edition) 103, 109–10 (2011). Independent agencies like the Board can demonstrate their commitment to high-quality cost-benefit analysis by adopting reforms to their rulemaking procedures, including reforms that rely on the experience and expertise of OMB. *See* Ellig, *supra* 6, at 33. The Commodity Futures Trading Commission (“CFTC”), for example, entered a memorandum of understanding with OMB pursuant to which OMB agreed to provide “technical assistance” with the CFTC’s “consideration of the costs and benefits of proposed and final

benefits and costs of the proposed or planned action, together with (2) a presentation of the uncertainties and (3) similar information for reasonable alternatives to the proposed or planned action.”).

rules.” *Memorandum of Understanding Between OIRA and the CFTC* (March 20, 2012), <https://tinyurl.com/ydhqegw5> (attached as Exhibit B).

In its annual reports to Congress, OMB has repeatedly advised that “it would be highly desirable to obtain better information on the benefits and costs of the rules issued by independent agencies” and cautioned that “[t]he absence of such information is a continued obstacle to transparency, and it might also have adverse effects on public policy.” OMB, 2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Act (Feb. 23, 2018), at 32; *see also, e.g.*, OMB, 2014 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Act (June 15, 2015), at 34 (same). Members of Congress from both parties have sponsored legislation that would expressly require all agencies to include cost-benefit analysis in their proposed rules. *See* Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017) § 3(3); Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017) § 103(b). And the Trump Administration has indicated that it is considering expanding OIRA review to independent agencies. Douglas Holtz-Eakin, *Expanding the Scope of OIRA Review*, AmericanActionForum.org (Dec. 5, 2018), <https://tinyurl.com/y8rc47dk>.

Even in the absence of further action from Congress or the President, cost-benefit analysis can be a foundational element of reasoned rulemaking under an agency’s governing statutes and the Administrative Procedure Act. *See Michigan v. EPA*, 135 S. Ct. at 2707 (“One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits”). “[C]ourts are already requiring cost-benefit analysis, and are likely to move even more decisively in that direction in the future.” Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the*

Administrative State: The Case of Financial Services Regulation, 34 Yale J. on Reg. 545, 589 (2017). Indeed, courts often reverse agency action for failing to consider both costs and benefits or for performing inadequate cost-benefit analyses. *See, e.g., Michigan v. EPA*, 135 S. Ct. at 2707; *Business Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011). “Consequently, independent agencies should build the capacity to conduct more thorough economic analysis and integrate it into the regulation-writing process.” Jerry Ellig, *Building Capacity for Economic Analysis at Independent Agencies*, The Regulatory Review (Dec. 10, 2018), <https://tinyurl.com/ybeojx9>.

B. Effective Cost-Benefit Analysis Requires Consideration Of Cumulative Impacts

A second component of effective cost-benefit analysis is particularly important here: awareness of the cumulative impact of regulation. Cost-benefit analysis can be misleading if an agency focuses only on the impact of individual rules, as opposed to the overall, cumulative impact of regulation on the economy or an industry. The cumulative impact of regulation is easy to overlook when an agency is focused on individual proposals. *See* Cass R. Sunstein, *The Regulatory Lookback*, 94 Boston Univ. L. Rev. 579, 588–89 (2014). But narrowly focusing on the costs of individual proposals can lead to poor long-term policy. *Id.* at 588. That is especially true for an agency like the Board, which has statutory obligations to minimize regulation and promote the railroad industry’s financial health.

The marginal cost imposed on an industry by each additional regulation is generally more than the regulation’s standalone cost, since as the breadth and complexity of a regulatory scheme increases the scheme imposes costs above and beyond the sum of the costs of individual rules. *See* Michael Mandel & Diana G. Carew, *Regulatory Improvement Commission: A Politically-*

Viable Approach to U.S. Regulatory Reform, Progressive Policy Institute, at 3–10 (May 5, 2013), <https://tinyurl.com/y72atzn2>.

There are at least four ways the cumulative burden of regulation can harm an industry. First, each new regulation adds its own additional direct and indirect compliance costs. These incremental costs are the burden most commonly measured in cost-benefit analyses. Second, each additional regulation encumbers an industry’s flexibility and impedes its ability to respond to changing market conditions, just as “eventually the accumulation of pebbles will block the flow of the stream.” Mandel & Carew, *supra* 10, at 4. The stagnation in the railroad industry in the late 1970s is one example of this phenomenon. Third, regulations can interact with each other in ways that drive up the overall burden they impose on an industry. *Id.* at 8. For example, the Board’s mandatory-switching proposal, if adopted, will lead to more switches, which will drive up the cost of complying with the Federal Railroad Administration’s safety regulations. Fourth, excessive regulation can overload an industry and cause companies to shift their primary focus to regulatory compliance. Richard Williams & Mark Adams, *Regulatory Overload*, Mercatus Center, at 2 (Feb. 8, 2012), <https://tinyurl.com/y9mtn8xw>.

The problems posed by the cumulative burden of regulations have received renewed attention in light of Executive Order 13,771, titled “Reducing Regulation and Controlling Regulatory Costs,” which was adopted by President Trump in January 2017. *See* 82 Fed. Reg. 9,339. Executive Order 13,771 seeks to control the cumulative burden of regulations in two ways. First, for most new proposed rules, agencies must offset the additional regulatory burden by identifying two existing rules to modify or repeal. Exec. Order 13,771 § 3(a). Second, agencies must limit the incremental cost imposed by their new proposals to “a total amount of incremental costs that will be allowed for each agency.” *Id.* § 3(d). In adopting the Order, the

President determined that “it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.” *Id.* § 1.

Even setting aside Executive Order 13,771, there is widespread acceptance that agencies should consider the cumulative impact that their rules impose on an industry both by periodically reassessing existing regulations and before adopting new regulations. *See, e.g.,* Susan E. Dudley, *Can Fiscal Budget Concepts Improve Regulation?*, 19 N.Y.U. J. Legis. & Pub. Pol’y 259 (2016); Mandel & Carew, *supra* 10; Sunstein, *supra* 10. Accordingly, the Clinton and Obama Administrations both endorsed requirements that agencies consider the cumulative impact of regulation. For example, Executive Order 12,866 requires agencies to “tak[e] into account, among other things and to the extent practicable, the costs of cumulative regulations.” Exec. Order 12,866 § 1(b)(11). And in 2011 President Obama adopted Executive Order 13,563, which requires executive agencies to “tailor [their] regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.” Exec. Order 13,563 § 1(b).

The Administrative Conference also recommends that agencies consider the cumulative impact of their regulations as part of the rulemaking process. Administrative Conference Recommendation 2014-5, 79 Fed. Reg. 75,114 (Dec. 17, 2014). The Conference explains that “the cumulative burden of decades of regulations issued by numerous federal agencies can both complicate agencies’ enforcement efforts and impose a substantial burden on regulated entities.” *Id.* at 75,114. Thus, the Conference “encourages agencies to integrate retrospective analysis into their policymaking framework more generally, urging them not only to reevaluate existing regulations but also to design new regulations with an eye towards later reexamination and to consider the cumulative regulatory burden.” *Id.* at 75,115.

C. Reliable Data

An agency can make informed decisions only if it relies on good information—that is, information that reflects market realities and is complete, relevant, reliable, and up-to-date. Otherwise, an agency can badly misjudge the need for a proposed rule, the benefits it will achieve, and the burden it will impose on the economy. Accordingly, there is widespread agreement that agencies should rely on sound economic data that reflects market realities when proposing or adopting new rules. *See, e.g.*, Exec. Order 12,866 § 1(b)(7) (“Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.”); Circular A-4 at 17 (similar); OMB Checklist at 1 (similar); Ellig, *supra* 6, at 28 (“An honest, objective analysis should meet the standard of evidence articulated in Executive Order 12866.”).

Agencies have several ways to ensure that they are relying on sound economic data. For example, OMB advises agencies to “monetize quantitative estimates whenever possible.” Circular A-4 at 27. Agencies should “rely on peer-reviewed literature, where available, and provide the source for all original information.” *Id.* at 17. When agencies produce their own data, they should “consider subjecting [their] analytic models to peer review.” OMB Primer at 3. “A good analysis should be transparent,” “results must be reproducible,” and agencies “should clearly set out the basic assumptions, methods, and data underlying the analysis and discuss the uncertainties associated with the estimates.” Circular A-4 at 17; *see also* OMB Checklist at 1 (an agency’s data should be “presented in an accurate, clear, complete, and unbiased manner”). OMB also advises agencies to “use an appropriate baseline,” meaning the “best assessment of how the world would look in the absence of the proposed action.” OMB Checklist at 1 (emphasis removed). And an agency should involve stakeholders early in the process so that it can learn as much as possible about the costs and benefits of regulatory alternatives, and from a

wide range of sources, before agency and stakeholder positions harden. Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies* 120 (Apr. 30, 2013).

Of course, agencies have limited resources and must balance competing interests. Accordingly, Executive Order 12,866 requires executive agencies to use “the best *reasonably obtainable*” information. Exec. Order 12,866 § 1(b)(7) (emphasis added). In other words, agencies should use the best information they can get under the circumstances. For an agency like the Board, that would include information the Board’s own economic experts already collect and analyze as well as expert studies by independent third parties, and information that parties provide the Board before and during its rulemaking proceedings. And when needed, the Board can solicit additional information that its major stakeholders (*e.g.*, shippers and railroads) maintain in the ordinary course of business.

All of this data would be “reasonably obtainable” to the Board, and hence the Board should not propose or adopt rules without taking advantage of these resources. Reasonably up-to-date data regarding the financial condition of the railroad industry, for example, is already regularly provided to the Board and can easily be updated during ongoing rulemakings. Hence, there is no reason for the Board to base its regulatory decisions on outdated and irrelevant data.

When an agency uses reliable data that reflects market realities, the agency can be confident that it has an accurate picture of the potential consequences of competing regulatory choices. In contrast, when an agency uses irrelevant, outdated, or otherwise unreliable data, the agency risks misleading itself into a poor decision. Stale data is unreliable because as years go by markets change, competition changes, and an industry’s cost structure can change. Outdated data about the freight-rail industry, for example, will be inherently unreliable on critical issues such as: (1) the health of the industry; (2) competitive constraints on railroads; and (3) railroads’

costs of doing business and the way in which a proposed rule will increase those costs. These are just a few examples of the ways that stale, inaccurate, or otherwise inadequate data can undermine the very purpose and efficacy of regulatory action. Reliance on stale data means that the agency's analysis lacks an accurate measure of what the world looks like with or without the new rule. And reliance on untrustworthy or irrelevant metrics can mislead an agency by making it think a problem exists when there is none—or, alternatively, mask a market failure that better and more relevant economic data might have exposed.

The whole point of rulemaking procedures is to determine whether new rules are necessary and likely to be effective given present conditions, and to illuminate the pros and cons of an agency's regulatory choices. That process depends on agency access to information sufficient to reach an informed decision. Inapt, outdated, or otherwise unreliable information only muddies the waters. Thus, reliance on poor data for any purpose in the rulemaking process undermines the agency's ability to make well-informed choices and increases the likelihood that the agency's rules will be invalidated by reviewing courts. To prevent these problems, agencies should ensure that their analyses are based on reliable economic data that reflects market realities.

D. Proposed Rule

As explained above, cost-benefit analysis is widely accepted as a necessary component of informed rulemaking both as a matter of good practice and administrative law. Cost-benefit analysis helps agencies adopt more effective rules and avoid unintended consequences, and provides agency decisionmakers with critical information about their regulatory options. Here, the Board can demonstrate its commitment to these goals by initiating a proceeding to add the following requirements to its rulemaking procedures in 49 C.F.R. Chapter X, Part 1110:

- *First*, a requirement that when the Board issues a notice of proposed rulemaking it will include a cost-benefit analysis of the proposed rule and reasonable regulatory alternatives, and that if the Board adopts a final rule it will update its cost-benefit analysis and consider costs and benefits.
- *Second*, a requirement that the Board specifically consider the cumulative impact of a proposed rule in light of existing regulatory burdens.
- *Third*, a requirement that the Board use reliable data that reflects market realities, including up-to-date data regarding the financial conditions in the railroad industry, when it decides whether to propose or adopt a new rule.

Reforms like these would promote the Board’s regulatory goals and the public interest.

Indeed, the Board’s statutory obligations already require it to consider the economic consequences of its regulations. *See* 49 U.S.C. §§ 10101, 10704(a)(1). Section 10502(a), which provides that the Board “shall” exercise its exemption authority “to the maximum extent” consistent with the statute, also expresses Congress’s policy judgment in favor of minimizing unnecessary regulatory burdens. *See* 49 U.S.C. § 10502(a). Thus, before the Board imposes any new burdens on the railroad industry it already must consider the costs and benefits of a new rule, including: an assessment of the cumulative burden existing regulations already impose, whether the burden is too great, and whether a new rule is the most effective way to achieve the Board’s goals. Formal requirements in the Board’s regulations would simply clarify existing obligations, ensuring that Board Members have the information they need to make good decisions, and decreasing the likelihood that new rules will be reversed by courts.

E. The Board Would Benefit From Codification Of These Requirements

Some of the Board’s prior decisions demonstrate how these reforms would help ensure that the Board grounds its actions in relevant and up-to-date economic data. As previously noted, commentators have used the Board’s mandatory-switching decision as a case study of the importance of cost-benefit analysis. *See* Ellig, *supra* 6, at 13, 15–16; McLaughlin, *supra* 5. As

one commentator explained, the Board’s decision “was accompanied by little or no analysis of alternative solutions that might be more effective or less burdensome”—the sort of information that “a thorough regulatory impact analysis” would have included. Ellig, *supra* 6, at 16. The Board’s decision was also criticized for failing to identify the problem it was trying to solve or the costs and benefits of increased mandatory switching. As Chairman Begeman recognized at the time, the Board had “no idea how the proposed rule would or even could be utilized” and “[w]e also don’t know the proposal’s potential impact on the rail carriers” or “the fluidity of the rail network.” Decision, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711, at 36 (STB served July 27, 2016) (Board Member Begeman, dissenting in part). These were “fundamental questions that the Board should have asked and answered before issuing today’s proposal.” *Id.* at 34. The reforms proposed in this petition will help ensure that in future rulemaking proceedings the Board asks the fundamental questions, and has the tools to determine the answers.

The Board’s proposal to reregulate several exempt commodities similarly would have benefited from a complete cost-benefit analysis and a greater focus on up-to-date and reliable data. For example, the Board’s decision lacked estimates of the costs and benefits of revoking the exemptions or the costs and benefits of regulatory alternatives. Chairman Begeman described the basis for reregulation as “a waybill-based hunch using limited information.” Decision, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1), at 15 (STB served Mar. 23, 2016) (Board Member Begeman, dissenting). And because the Board’s decision did not rely on reasonably current data, it “fail[ed] to account for the present,” and was “completely uninformed by ... current market considerations.” *See id.* at 15–16. Board Member Miller agreed “that the record on which we are basing this decision is less than robust and could

benefit from additional information.” *Id.* at 15 (Board Member Miller, concurring). Reforms to the Board’s rulemaking procedures will help ensure that the Board has this information in the future so that when Board Members make important and far-reaching decisions they can trust the data.

Moreover, the fact that these two significant proposals are pending at the same time (along with others) illustrates the need for the Board to consider the cumulative impact of regulation. The mandatory-switching and reregulation proposals, if adopted, would not operate in a vacuum. Increased switching could dramatically change routing patterns and costs associated with shipments, including exempt commodities, even if those shipments are not subject to mandatory-switching orders. Such changes would also affect R/VC ratios, the sole basis the Board advanced for revoking the exemptions. Similarly, revoking exemptions for certain commodities could open the door to additional switching orders, increasing the operational burdens associated with forced switching.

The reforms proposed in this petition will help the Board accomplish its regulatory objectives more effectively in future proceedings. These reforms will not unfairly advantage any particular stakeholder—a more-informed Board benefits shippers, carriers, and the broader public alike. And there is no basis for concluding the reforms offered here will create an undue burden or otherwise slow down the Board’s regulatory proceedings. Executive agencies have long been subject to similar requirements, and AAR is unaware of any evidence suggesting that they generally take more time than the Board to propose and adopt new rules. These reforms will also reduce the risk that new rules fail judicial review by ensuring that the Board’s decisions comply with its statutory mandates and general principles of administrative law. “[B]y a significant margin the STB’s affirmance rate is lower for rulemaking decisions than for any other

category of decision” under the Board’s existing procedures. *See* Matthew J. Warren, *Judicial Review of Surface Transportation Board Decisions: An Empirical Analysis*, 45 *Transportation Law Journal* 1, 3 (2018). In short, these reforms should be welcome by all who want the Board’s rules to be fair, well-reasoned, and legally defensible.

F. Reforms Would Put The STB In Good Company

Several agencies have adopted similar reforms that made long-lasting improvements to their rulemaking procedures. *See* Copeland, *supra* 14, at 38–44 (describing reforms at the CFTC and Securities & Exchange Commission (“SEC”)); Fraas & Lutter, *supra* 8, at 231 (describing cost-benefit procedures at the Nuclear Regulatory Commission); *cf.* 10 C.F.R. Pt. 430, Subpt. C, App. A (cost-benefit procedures at the Department of Energy). For example, after the SEC “lost several high-profile court cases because of insufficient economic analysis,” the agency “launched an initiative in 2012 to improve the quality of economic analysis and the influence of economists in regulatory decisions.” Ellig, *supra* 6, at 5. The reforms included new guidance on cost-benefit analysis that explicitly drew on Executive Orders 12,866 and 13,563 and OMB’s instructions to executive agencies in Circular A-4. SEC, Memo: Current Guidance on Economic Analysis in SEC Rulemakings, at 3–4 (March 16, 2012), <https://tinyurl.com/y74qfq76> (attached as Exhibit C). Two years later the SEC’s chief economist said that “this seemingly simple document has focused and enhanced how the Commission and its staff approach economic thought” and that “as a result of all that hard work . . . our rules are strong, robustly supported, and transparently demonstrate the unparalleled expertise of the Commission and its staff.” Craig M. Lewis, *Keynote Address at the Investment Company Institute 2014 Mutual Funds and Investment Management Conference*, SEC.gov (March 18, 2014), <https://tinyurl.com/ycf5pj3z>.

Recent reforms at the Department of Transportation and FCC are similar. In December 2018, the Department of Transportation announced “updated policies and procedures governing

the development and issuance of regulations.” DOT Order at 1; *see also U.S. DOT Continues to Lead Regulatory Reform Through Issuance of Two New Policies*, DOT.gov (Dec. 21, 2018), <https://tinyurl.com/y92hesl6>. Among other things, the Department’s order was “intended to ensure that DOT . . . adheres to . . . best practices for rulemaking, including best practices for economic analyses and for appropriate outreach to interested parties throughout the rulemaking process.” DOT Order at 1. The order makes clear that “regulations should be supported by the best available evidence and data,” that “regulations should be narrowly tailored to address identified market failures or specific statutory mandates,” and that “[t]he process for issuing a rule should be sensitive to the economic impact of the rule.” *Id.* at 3.

In January 2018, the FCC adopted regulations creating a new Office of Economics and Analytics and requiring the Office to prepare “a rigorous, economically-grounded cost-benefit analysis for every rulemaking deemed to have an annual effect on the economy of \$100 million or more.” *In re Establishment of the Office of Economics and Analytics* (“FCC Order”), MD Dkt. 18-3, at 5 (FCC Jan. 30, 2018), 83 Fed. Reg. 63,073 (Dec. 7, 2018) (attached as Exhibit D). The FCC also charged the Office of Economics and Analytics with establishing “best practices for data use throughout the FCC in coordination with FCC Bureaus and Offices.” *Id.* at 1. Chairman Ajit Pai noted the “bipartisan roster of support” for the reforms, including praise from former OIRA administrators Susan Dudley and Cass Sunstein. *Id.* at 10 (Statement of Chairman Pai); *see also* Cass Sunstein (@CassSunstein), Twitter (Dec. 12, 2018), <https://tinyurl.com/yafld2hjf> (praising the FCC and Chairman Pai for “doing some excellent, nonpartisan work in promoting careful regulatory analysis.”). Chairman Pai noted that “the alternative to trying to quantify costs and benefits” is “essentially putting your finger in the wind and making it up as you go along.” *FCC Order* at 11. Although that approach might make sense

“for those who might see principles of economics, like provisions of law, as little more than an inconvenient speed bump that one would rather navigate around,” “it is no basis for reasoned, evidence-based decision-making by an expert agency.” *Id.* Commissioner Michael O’Rielly added that by “ingraining [cost-benefit analysis] into the agency procedures” the FCC’s reforms would “outlast[] the current Commission and remain[] effective for years to come.” *Id.* at 13 (Statement of Commissioner O’Rielly).

The Board can do the same thing here. A specific regulatory requirement that the Board incorporate cost-benefit analysis into its rulemakings—including analysis of cumulative impacts—would improve the rules the Board adopts and focus its attention on its statutory obligations. Similarly, a requirement that the Board use reliable data would ensure that all Board Members can make decisions knowing they have the information they need. And unlike the FCC, the Board already has an independent Office of Economics with the expertise necessary to prepare meaningful cost-benefit analyses and produce reliable data that reflects market realities. So the Board is already well-equipped to incorporate these reforms into its rulemaking procedures—indeed, these reforms will strengthen the Board’s existing infrastructure for economic analysis by aligning the Board’s procedures and culture with the best practices of other agencies throughout the federal government.

* * *

The Board should take this opportunity to reform its rulemaking procedures to ensure that Board Members have the information they need for making important regulatory decisions—decisions that have far-reaching consequences for the freight-rail industry, the nation’s transportation system, and the broader economy. Accordingly, AAR respectfully suggests that

the Board add and amend the following provisions to Part 1110 (and renumber the existing provisions to reflect the changes) so that they read as follows:

§ 1110.3(c)(2) An independent and economically-grounded cost-benefit analysis of the proposed rule and reasonable alternatives prepared by the Office of Economics, including, to the extent practicable, consideration of the cumulative impact of the proposed rule in light of existing regulatory burdens;

...

§ 1110.6 Consideration of Costs and Benefits

(a) Before the Board adopts any rule other than those described in 49 C.F.R. § 1110.3(a), the Office of Economics shall prepare an updated cost-benefit analysis of the proposed rule and reasonable alternatives. To the extent practicable, the analysis shall include consideration of the cumulative impact of the proposed rule in light of existing regulatory burdens.

(b) Before the Board adopts any rule other than those described in 49 C.F.R. § 1110.3(a), the Board shall consider the costs and benefits imposed by such rule, including the cumulative impact of the rule in light of existing regulatory burdens.

...

§ 1110.9 Reliable Data

The Board shall rely on the most reliable and up-to-date data that is reasonably obtainable when it proposes or adopts any rule.

...

§ 1110.10 Adoption of Final Rules³

If, after consideration of all comments received and a cost-benefit analysis, final rules are adopted, notice will be published in the Federal Register.

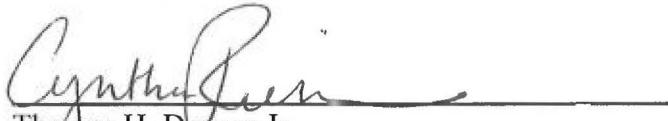
³ Renumbered from § 1110.8.

CONCLUSION

For these reasons, the Board should initiate a proceeding to adopt procedural rules that incorporate meaningful cost-benefit analysis into its rulemaking proceedings. The new procedural requirements should make clear that the Board will consider the cumulative impact of regulation and use only reliable data that reflects market realities.

Dated: March 14, 2019

Respectfully submitted,



Thomas H. Dupree Jr.

Cynthia E. Richman

Matt Gregory

Gibson, Dunn & Crutcher LLP

1050 Connecticut Avenue NW

Washington, DC 20036

(202) 955-8500

Kathryn D. Kirmayer

Timothy J. Strafford

Association of American Railroads

425 Third Street, SW

Suite 1000

Washington, DC 20024

(202) 639-2100

Counsel for the Association of American Railroads

EXHIBIT A



**U.S. Department
of Transportation**

Office of the Secretary
of Transportation

DOT ORDER

DOT Order 2100.6

December 20, 2018

SUBJECT: POLICIES AND
PROCEDURES FOR
RULEMAKINGS

1. PURPOSE

This Order sets forth updated policies and procedures governing the development and issuance of regulations by the Department of Transportation (the Department or DOT). This Order is intended to ensure that DOT, including each of its operating administrations (OAs) and all components of the Office of the Secretary of Transportation (OST) with rulemaking authority, adheres to (i) all statutory requirements applicable to DOT rulemakings, including the rulemaking provisions of the Administrative Procedure Act, referenced below; (ii) Executive Order 12866, as referenced below, and any amendment thereto; (iii) all applicable Office of Management and Budget (OMB) directives for rulemaking; (iv) the Department's Strategic Plan; and (v) best practices for rulemaking, including best practices for economic analyses and for appropriate outreach to interested parties throughout the rulemaking process. This Order shall be interpreted and applied to promote and to be consistent with the safe operation of the transportation systems and transportation activities over which DOT is granted regulatory authority.

2. APPLICABILITY

- a. This Order governs all DOT employees and contractors involved with all phases of rulemaking at DOT.
- b. Unless otherwise required by statute, this Order applies to all DOT regulations, which shall include all rules of general applicability promulgated by any components of the Department that affect the rights or obligations of persons outside the Department, including substantive rules, rules of interpretation, and rules prescribing agency procedures and practice requirements applicable to outside parties. This Order applies to all regulatory actions intended to lead to the promulgation of a rule and any other generally applicable agency directives, circulars, or pronouncements concerning matters within the jurisdiction of an OA or component of OST that are intended to have the force or effect of law or that are required by statute to satisfy the rulemaking procedures specified in section 553 or section 556 of title 5, United States Code.
- c. This Order does not apply to:
 - (1) Any rulemaking in which a notice of proposed rulemaking was issued before the effective date of this Order and which was still in progress on that date;

- (2) Regulations issued with respect to a military or foreign affairs function of the United States;
- (3) Rules addressed solely to internal agency management or personnel matters;
- (4) Regulations related to Federal Government procurement; or
- (5) Guidance documents, which are not intended to, and do not in fact, have the force or effect of law for parties outside the Department.

3. CANCELLATIONS

The following DOT orders are hereby canceled and superseded by this Order:

- a. DOT 2100.2: Policies for Public Contacts in Rule Making.
- b. DOT 2100.5: Policies and procedures for simplification, analysis, and review of regulations.

4. EFFECTIVE DATE

This Order shall be effective upon issuance.

5. REFERENCES

- a. Administrative Procedure Act (APA), 5 U.S.C. 552(a)(1), 553, 556, and 557, which prescribes general procedural requirements of law applicable to all Federal agencies regarding the formulation and issuance of regulations.
- b. Executive Order 12866, "Regulatory Planning and Review" (Oct. 4, 1993), which sets forth a regulatory philosophy and principles to which all Federal agencies should adhere, including requirements to regulate in the "most cost-effective manner," to make "a reasoned determination that the benefits of the intended regulations justify its costs," and to develop regulations that "impose the least burden on society."
- c. Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs" (Jan. 30, 2017), which directed agencies to identify at least two existing regulatory burdens to be revoked for each new significant regulation to be imposed. In addition, agencies must create a regulatory budget that offsets the incremental costs of any new regulations by eliminating costs associated with existing regulations.
- d. Executive Order 13777, "Enforcing the Regulatory Reform Agenda" (Feb. 24, 2017), which directed agencies to designate a Regulatory Reform Officer, to establish a Regulatory Reform Task Force with the Regulatory Reform Officer as the chair, and to evaluate existing regulations and make recommendations for their repeal, replacement, or modification.

6. POLICIES

The following policies govern the development and issuance of regulations at DOT:

- a. There should be no more regulations than necessary. In considering whether to propose a new regulation, policy makers should consider whether the specific problem to be addressed requires agency action, whether existing rules (including standards incorporated by reference) have created or contributed to the problem and should be revised or eliminated, and whether any other reasonable alternatives exist that obviate the need for a new regulation.
- b. All regulations must be supported by statutory authority and consistent with the Constitution.
- c. Where they rest on scientific, technical, economic, or other specialized factual information, regulations should be supported by the best available evidence and data.
- d. Regulations should be written in plain English, should be straightforward, and should be clear.
- e. Regulations should be technologically neutral, and, to the extent feasible, they should specify performance objectives, rather than prescribing specific conduct that regulated entities must adopt.
- f. Regulations should be designed to minimize burdens and reduce barriers to market entry whenever possible, consistent with the effective promotion of safety. Where they impose burdens, regulations should be narrowly tailored to address identified market failures or specific statutory mandates.
- g. Unless required by law or compelling safety need, regulations should not be issued unless their benefits are expected to exceed their costs. For each new significant regulation issued, agencies must identify at least two existing regulatory burdens to be revoked.
- h. Once issued, regulations and other agency actions should be reviewed periodically and revised to ensure that they continue to meet the needs they were designed to address and remain cost-effective and cost-justified.
- i. Full public participation should be encouraged in rulemaking actions, primarily through written comment and engagement in public meetings. Public participation in the rulemaking process should be conducted and documented, as appropriate, to ensure that the public is given adequate knowledge of substantive information relied upon in the rulemaking process.
- j. The process for issuing a rule should be sensitive to the economic impact of the rule; thus, the promulgation of rules that are expected to impose greater economic costs should be accompanied by additional procedural protections and avenues for public participation.

7. RESPONSIBILITIES

- a. The Secretary of Transportation supervises the overall planning, direction, and control of the Department's Regulatory Agenda; approves regulatory documents for issuance and submission to OMB under Executive Order 12866; identifies an approximate regulatory budget for each fiscal year as required by Executive Order 13771; establishes the Department's Regulatory Reform Task Force (RRTF); and designates the members of the RRTF and the Department's Regulatory Reform Officer (RRO) in accordance with Executive Order 13777.
- b. The Deputy Secretary of Transportation assists the Secretary in overseeing overall planning, direction, and control of the Department's Regulatory Agenda and approves the initiation of regulatory action, as defined in Executive Order 12866, by the OAs and components of OST. The Secretary has designated the Deputy Secretary to serve as the Chair of the Leadership Council of the RRTF and as the Department's RRO.
- c. The General Counsel of DOT is the chief legal officer of the Department with final authority on all questions of law for all components of DOT; serves on the Leadership Council of the RRTF; and serves as the Department's Regulatory Policy Officer pursuant to section 6(a)(2) of Executive Order 12866.
- d. The RRO of DOT is delegated authority by the Secretary to oversee the implementation of the Department's regulatory reform initiatives and policies to ensure the effective implementation of regulatory reforms, consistent with Executive Order 13777 and applicable law.
- e. DOT's non-career Deputy General Counsel is a member of the RRTF as designated by the Secretary and serves as the Chair of the RRTF Working Group.
- f. DOT's Assistant General Counsel for Regulation supervises the Office of Regulation (C-50) within the Office of the General Counsel (OGC); oversees the process for DOT rulemakings; provides legal advice on compliance with all APA and other administrative law requirements and with executive orders, OMB directives, and other regulatory procedures; circulates regulatory documents for departmental review and seeks concurrence from reviewing officials; submits regulatory documents to the Secretary for approval before issuance or submission to OMB; coordinates with the Office of Information and Regulatory Affairs (OIRA) within OMB on the designation and review of regulatory documents and the preparation of the Unified Agenda of Regulatory and Deregulatory Actions; publishes the monthly Internet report on significant rulemakings; and serves as a member of the RRTF Working Group.
- g. Pursuant to delegations from the Secretary under 49 CFR Part 1, OA Administrators and Secretarial officers exercise the Secretary's rulemaking authority under 49 U.S.C. 322(a), and they have responsibility for ensuring that the regulatory data included in the Regulatory Management System (RMS) for their OAs and OST components is accurate and is updated at least once a month.

- h. OA Chief Counsels supervise the legal staffs of the OAs; interpret and provide guidance on all statutes, regulations, executive orders, and other legal requirements governing the operation and authorities of their respective OAs; and review all rulemaking documents for legal sufficiency.
- i. Each OA or OST component responsible for rulemaking will have a Regulatory Quality Officer, designated by the Administrator or Secretarial office head, who will have responsibility for reviewing all rulemaking documents for plain language, technical soundness, and general quality.

8. REGULATORY REFORM TASK FORCE

- a. Purpose. The Regulatory Reform Task Force (RRTF) evaluates proposed and existing regulations and makes recommendations to the Secretary regarding their promulgation, repeal, replacement, or modification, consistent with applicable law and Executive Orders 13777, 13771, and 12866.
- b. Structure. The RRTF comprises a Leadership Council and a Working Group.
 - (1) The Working Group coordinates with leadership in the Secretarial offices and OAs, reviews and develops recommendations for regulatory and deregulatory action, and presents recommendations to the Leadership Council.
 - (2) The Leadership Council reviews the Working Group's recommendations and advises the Secretary.
- c. Membership.
 - (1) The Leadership Council comprises the following:
 - (a) The Regulatory Reform Officer (RRO), who serves as Chair;
 - (b) The Department's Regulatory Policy Officer, designated under section 6(a)(2) of Executive Order 12866;
 - (c) A representative from the Office of the Under Secretary of Transportation for Policy;
 - (d) At least three additional senior agency officials as determined by the Secretary.
 - (2) The Working Group comprises the following:
 - (a) At least one senior agency official from the Office of the General Counsel, including at a minimum the Assistant General Counsel for Regulation, as determined by the RRO;

- (b) At least one senior agency official from the Office of the Under Secretary of Transportation for Policy, as determined by the RRO;
 - (c) Other senior agency officials from the Office of the Secretary, as determined by the RRO.
- d. Functions and responsibilities. In addition to the functions and responsibilities enumerated in Executive Order 13777, the RRTF performs the following duties:
 - (1) Reviews each request for a new rulemaking action initiated by an OA or OST component; and
 - (2) Considers each regulation and regulatory policy question (which may include proposed guidance documents) referred to it and makes a recommendation to the Secretary for its disposition.
- e. Support. The Office of Regulation within the Office of the General Counsel (C-50) provides support to the RRTF.
- f. Meetings. The Leadership Council meets approximately monthly and will hold specially scheduled meetings when necessary to address particular regulatory matters. The Working Group meets approximately monthly with each OA and each component of OST with regulatory authority, and the Working Group may establish sub-committees, as appropriate, to focus on specific regulatory matters.
- g. Agenda. The Office of Regulation prepares an agenda for each meeting and distributes it to the members in advance of the meeting, together with any documents to be discussed at the meeting. The OA or OST component responsible for matters on the agenda will be invited to attend to respond to questions.
- h. Minutes. The Office of Regulation prepares summary minutes following each meeting and distributes them to the meeting's attendees.

9. INITIATING A RULEMAKING

- a. Before an OA or component of OST may proceed to develop a regulation, the Administrator of the OA or the Secretarial officer who heads the OST component must consider the regulatory philosophy and principles of regulation identified in section 1 of Executive Order 12866 and the policies set forth in section 6 of this Order. If the OA Administrator or OST component head determines that rulemaking is warranted consistent with those policies and principles, the Administrator or component head may prepare a Rulemaking Initiation Request.
- b. The Rulemaking Initiation Request should specifically state or describe:
 - (1) A proposed title for the rulemaking;

- (2) The need for the regulation, including a description of the market failure or statutory mandate necessitating the rulemaking;
 - (3) The legal authority for the rulemaking;
 - (4) Whether the rulemaking is expected to be regulatory or deregulatory;
 - (5) Whether the rulemaking is expected to be significant or nonsignificant, as defined by Executive Order 12866;
 - (6) Whether the final rule in question is expected to be an economically significant rule or high-impact rule, as defined in section 12 of this Order;
 - (7) A description of the economic impact associated with the rulemaking, including whether the rulemaking is likely to impose quantifiable costs or cost-savings;
 - (8) The tentative target dates for completing each stage of the rulemaking; and
 - (9) Whether there is a statutory or judicial deadline, or some other urgency, associated with the rulemaking.
- c. The OA or OST component submits the Rulemaking Initiation Request to the Office of Regulation, together with any other documents that may assist in the RRTF's consideration of the request.
 - d. The Office of Regulation includes the Rulemaking Initiation Request on the agenda for consideration at the OA's or OST component's next Working Group meeting.
 - e. If the Working Group recommends the approval of the Rulemaking Initiation Request, then the Request is referred to the Leadership Council for consideration. In lieu of consideration at a Leadership Council meeting, the Working Group, at its discretion, may submit a memorandum to the RRO seeking approval of the Rulemaking Initiation Request.
 - f. The OA or OST component may assign a Regulatory Information Number (RIN) to the rulemaking only upon the Leadership Council's (or RRO's) approval of the Rulemaking Initiation Request.
 - g. The process for initiating a rulemaking as described herein may be waived or modified for any rule with the approval of the RRO. Unless otherwise determined by the RRO, the Administrator of the Federal Aviation Administration (FAA) may promulgate an emergency rule under section 106(f)(3)(B)(ii) or section 46105(c) of title 49, United States Code, without first submitting a Rulemaking Initiation Request.
 - h. Rulemaking Initiation Requests will be considered on a rolling basis; however, the Office of Regulation will establish deadlines for submission of Rulemaking Initiation Requests so that new rulemakings may be included in the Unified Agenda of Regulatory and Deregulatory Actions.

10. UNIFIED AGENDA OF REGULATORY AND DEREGULATORY ACTIONS

- a. The Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda) provides uniform reporting of data on regulatory and deregulatory activities under development throughout the Federal Government, covering approximately 60 departments, agencies, and commissions. DOT's faithful participation in the Unified Agenda demonstrates the Department's ongoing commitment to fundamental regulatory reform and to reducing unnecessary regulatory burdens on the American people.
- b. Fall editions of the Unified Agenda include the Regulatory Plan, which presents the Department's statement of regulatory priorities for the coming year. Fall editions also include the outcome and status of the Department's reviews of existing regulations, conducted in accordance with section 11(d) of this Order.
- c. The OAs and components of OST with rulemaking authority must:
 - (1) Carefully consider the principles contained in Executive Orders 13771, 13777, and 12866 in the preparation of all submissions for the Unified Agenda;
 - (2) Ensure that all data pertaining to the OA's or OST component's regulatory and deregulatory actions are accurately reflected in the Department's Unified Agenda submission; and
 - (3) Timely submit all data to OGC's Office of Regulation (C-50) in accordance with the deadlines and procedures communicated by that office.
- d. Unless required to address a safety emergency or otherwise required by law, approved by the RRTF (or RRO), or approved by the Director of OMB (as appropriate), no regulation may be issued by an OA or component of OST if it was not included on the most recent version or update of the published Unified Agenda. Furthermore, no significant regulatory action may take effect until it has appeared in either the Unified Agenda or the monthly Internet report of significant rulemakings for at least 6 months prior to its issuance, unless good cause exists for an earlier effective date or the action is otherwise approved by the RRTF (or RRO).

11. GENERAL RULEMAKING PROCEDURES

- a. Definitions.
 - (1) "Significant rulemaking" means a regulatory action designated by OIRA under Executive Order 12866 as likely to result in a rule that may:
 - (a) Have an annual effect on the U.S. 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;

- (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, the President's priorities, or the principles set forth in Executive Order 12866.
- (2) "Nonsignificant rulemaking" means a regulatory action not designated significant by OIRA.

b. Departmental review process.

- (1) OST review and clearance.
 - (a) Except as provided herein or as otherwise provided in writing by OGC, all departmental rulemakings are to be reviewed and cleared by the Office of the Secretary.
 - (b) The FAA Administrator may promulgate emergency rules pursuant to sections 106(f)(3)(B)(ii) and 46105(c) of title 49, United States Code, without prior approval from OST; provided that, to the maximum extent practicable and consistent with law, the FAA Administrator will give OST advance notice of such emergency rules and will allow OST to review the rules in accordance with the provisions of this Order at the earliest opportunity after they are promulgated.
- (2) Leadership within the proposing OA or component of OST shall:
 - (a) Ensure that the OA's or OST component's Regulatory Quality Officer reviews all rulemaking documents for plain language, technical soundness, and general quality;
 - (b) Ensure that the OA's Office of Chief Counsel (or for OST rules, the Office within OGC responsible for providing programmatic advice) reviews all rulemaking documents for legal support and legal sufficiency; and
 - (c) Approve the submission of all rulemaking documents, including any accompanying analyses (e.g., regulatory impact analysis), to the Office of Regulation through the Regulatory Management System (RMS) for OST review and clearance.
- (3) To effectuate departmental review under this Order, the following Secretarial offices ordinarily review and approve DOT rulemakings: the Office of the Under Secretary for Policy, the Office of Public Affairs, the Office of Budget and Programs and Chief Financial Officer, OGC, and the Office of Governmental Affairs. OGC's Office of Regulation may also require review and clearance by

other Secretarial offices and OAs depending on the nature of the particular rulemaking document.

- (4) Reviewing offices should provide comments or otherwise concur on rulemaking documents within 7 calendar days, unless exceptional circumstances apply that require expedited review.
- (5) The Office of Regulation (C-50) provides a pass back of comments to the proposing OA or OST component for resolution. Comments should be resolved and a revised draft submitted to the Office of Regulation by the OA or OST component within 14 calendar days.
- (6) The Office of Regulation prepares a rulemaking package for the General Counsel to request the Secretary's approval for the rulemaking to be submitted to the OMB for review (for significant rulemakings) or to the *Federal Register* for publication (for nonsignificant rulemakings). These rulemaking packages are submitted through the General Counsel to the Office of the Executive Secretariat.
- (7) The Office of Regulation notifies the proposing OA or OST component when the Secretary approves or disapproves the submission of the rulemaking to OMB or to the *Federal Register*.
- (8) The Office of Regulation is responsible for coordination with OIRA staff on the designation of all rulemaking documents, submission and clearance of all significant rulemaking documents, and all discussions or meetings with OMB concerning these documents. OAs and OST components should not schedule their own meetings with OIRA without Office of Regulation involvement. Each OA or OST component should coordinate with the Office of Regulation before holding any discussions with OIRA concerning regulatory policy or agreements to modify regulatory documents.

c. Petitions for rulemaking.

- (1) Any person may petition an OA or OST component with rulemaking authority to issue, amend, or repeal a rule, or for a permanent or temporary exemption from any rule.
- (2) Petitions for rulemaking are processed in accordance with 49 CFR Part 5 or other OA regulations or procedures.
- (3) When an OA or OST component receives a petition for rulemaking, the petition should be filed with the Docket Clerk in a timely manner. If a petition for rulemaking is filed directly with the Docket Clerk, the Docket Clerk will submit the petition in a timely manner to the OA or component of OST with regulatory responsibility over the matter described in the petition.

d. Review of existing regulations.

- (1) All departmental regulations are on a 10-year review cycle, as described in Appendix D of the Unified Agenda of Regulatory and Deregulatory Actions.
- (2) The OA or OST component that issued the regulation will review it for the following:
 - (a) Continued cost justification: Whether the regulation requires adjustment due to changed market conditions or is no longer cost-efficient or cost-justified in accordance with section 6(h) of this Order;
 - (b) Regulatory flexibility: Whether the regulation has a significant economic impact on a substantial number of small entities and, thus, requires review under section 610 of the Regulatory Flexibility Act;
 - (c) General updates: Whether the regulation may require technical corrections, updates (e.g., updated versions of voluntary consensus standards), revisions, or repeal;
 - (d) Plain language: Whether the regulation requires revisions for plain language; and
 - (e) Other considerations as required by relevant executive orders and laws.
- (3) The results of each OA's or OST component's review will be reported annually in Appendix D of the Unified Agenda of Regulatory and Deregulatory Actions.

e. Supporting economic analysis.

- (1) Rulemakings shall include, at a minimum:
 - (a) An assessment of the potential costs and benefits of the regulatory action (which may entail a regulatory impact analysis, or RIA) or a reasoned determination that the expected impact is so minimal or the safety need so significant and urgent that a formal analysis of costs and benefits is not warranted; and
 - (b) If the regulatory action is expected to impose costs, either a reasoned determination that the benefits outweigh the costs or, if the particular rulemaking is mandated by statute or compelling safety need notwithstanding a negative cost-benefit assessment, a detailed discussion of the rationale supporting the specific regulatory action proposed and an explanation of why a less costly alternative is not an option.
- (2) To the extent practicable, economic assessments shall quantify the foreseeable annual economic costs and cost savings within the United States that would likely result from issuance of the proposed rule and shall be conducted in accordance

with the requirements of section 6(a)(B) & (C) of Executive Order 12866 and OMB Circular A-4, as specified by OIRA in consultation with OGC's Office of Regulation. If the proposing OA or OST component has estimated that the proposed rule will likely impose economic costs on persons outside the United States, such costs should be reported separately.

- (3) Deregulatory rulemakings (including nonsignificant rulemakings) shall be evaluated for quantifiable cost savings. If it is determined that quantification of cost savings is not possible or appropriate, then the proposing OA or OST component shall provide a detailed justification for the lack of quantification upon submission of the rulemaking to the Office of Regulation. Other nonsignificant rulemakings shall include, at a minimum, the economic cost-benefit analysis described in paragraph (1) of this subsection.
- f. Regulatory flexibility analysis. All rulemakings subject to the requirements of sections 603-604 of title 5, United States Code (sections 603-604 of the Regulatory Flexibility Act), and any amendment thereto, shall include a detailed statement setting forth the required analysis regarding the potential impact of the rule on small business entities.
- g. Advance notices of proposed rulemaking. Whenever the OA or OST component responsible for a proposed rulemaking is required to publish an advance notice of proposed rulemaking (ANPRM) in the *Federal Register*, or whenever the RRTF determines it appropriate to publish an ANPRM, the ANPRM shall:
 - (1) Include a written statement identifying, at a minimum—
 - (a) The nature and significance of the problem the OA or OST component may address with a rule;
 - (b) The legal authority under which a rule may be proposed; and
 - (c) Any preliminary information available to the OA or OST component that may support one or another potential approach to addressing the identified problem;
 - (2) Solicit written data, analysis, views, and recommendations from interested persons concerning the information and issues addressed in the ANPRM; and
 - (3) Provide for a reasonably sufficient period for public comment.
- h. Notices of proposed rulemaking.
 - (1) When required. Before determining to propose a rule, and following completion of the ANPRM process under subsection g, if applicable, the responsible OA or OST component shall consult with the RRTF concerning the need for the potential rule. If the RRTF thereafter determines it appropriate to propose a rule, the proposing OA or OST component shall publish a notice of proposed rulemaking (NPRM) in the *Federal Register*, unless a controlling statute provides

otherwise or unless the RRTF (in consultation with OIRA, as appropriate) determines that an NPRM is not necessary under established exceptions.

- (2) Contents. The NPRM shall include, at a minimum—
- (a) A statement of the time and place for submission of public comments and the time, place, and nature of related public rulemaking proceedings, if any;
 - (b) Reference to the legal authority under which the rule is proposed;
 - (c) The terms of the proposed rule;
 - (d) A description of information known to the proposing OA or OST component on the subject and issues of the proposed rule, including but not limited to—
 - (i) A summary of material information known to the OA or OST component concerning the proposed rule and the considerations specified in section 9(a) of this Order;
 - (ii) A summary of any preliminary risk assessment or regulatory impact analysis performed by the OA or OST component; and
 - (iii) Information specifically identifying all material data, studies, models, available voluntary consensus standards and conformity assessment requirements, and other evidence or information considered or used by the OA or OST component in connection with its determination to propose the rule;
 - (e) A reasoned preliminary analysis of the need for the proposed rule based on the information described in the preamble to the NPRM, and an additional statement of whether a rule is required by statute;
 - (f) A reasoned preliminary analysis indicating that the expected economic benefits of the proposed rule will meet the relevant statutory objectives and will outweigh the estimated costs of the proposed rule in accordance with any applicable statutory requirements;
 - (g) If the rulemaking is significant, a summary discussion of (i) the alternatives to the proposed rule considered by the OA or OST component, (ii) the relative costs and benefits of those alternatives, (iii) whether the alternatives would meet relevant statutory objectives, and (iv) why the OA or OST component chose not to propose or pursue the alternatives;
 - (h) A statement of whether existing rules have created or contributed to the problem the OA or OST component seeks to address with the proposed rule, and, if so, whether or not the OA or OST component proposes to amend or rescind any such rules and why; and

- (i) All other statements and analyses required by law, including, without limitation, the Regulatory Flexibility Act or any amendment thereto.
- (3) Information access and quality.
 - (a) To inform public comment when the NPRM is published, the proposing OA or OST component shall place in the docket for the proposed rule and make accessible to the public, including by electronic means, all material information relied upon by the OA or OST component in considering the proposed rule, unless the information is exempt from disclosure under section 552(b) of title 5, United States Code. Material provided electronically should be made available in accordance with the requirements of section 794d of title 29, United States Code (section 508 of the Rehabilitation Act of 1973, as amended).
 - (b) If the proposed rule rests upon scientific, technical, or economic information, the proposing OA or OST component shall base the proposal on the best and most relevant scientific, technical, and economic information reasonably available to the Department and shall identify the sources and availability of such information in the NPRM.
 - (c) A single copy of any relevant copyrighted material (including consensus standards and other relevant scientific or technical information) should be placed in the docket for public review if such material was relied on as a basis for the rulemaking.
- i. Public comment.
 - (1) Following publication of an NPRM, the Department will provide interested persons a fair and sufficient opportunity to participate in the rulemaking through submission of written data, analysis, views, and recommendations.
 - (2) The Department, in coordination with OIRA for significant rulemakings, will ensure that the public is given an adequate period for comment, taking into account the scope and nature of the issues and considerations involved in the proposed regulatory action.
 - (3) Generally, absent special considerations, the comment period for nonsignificant DOT rules should be at least 30 days, and the comment period for significant DOT rules should be at least 45 days.
- j. Exemptions from notice and comment.
 - (1) Except when prior notice and an opportunity for public comment are required by statute or determined by the Secretary to be advisable for policy or programmatic reasons, the responsible OA or OST component may, subject to the approval of the RRTF (in consultation with OIRA, as appropriate), publish certain final rules in the *Federal Register* without prior notice and comment. These may include:

- (a) Rules of interpretation and rules addressing only DOT organization, procedure, or practice, provided such rules do not alter substantive obligations for parties outside the Department;
 - (b) Rules for which notice and comment is unnecessary to inform the rulemaking, such as rules correcting de minimis technical or clerical errors or rules addressing other minor and insubstantial matters, provided the reasons to forgo public comment are explained in the preamble to the final rule; and
 - (c) Rules that require finalization without delay, such as rules to address an urgent safety or national security need, and other rules for which it would be impracticable or contrary to public policy to accommodate a period of public comment, provided the responsible OA or OST component makes findings that good cause exists to forgo public comment and explains those findings in the preamble to the final rule.
- (2) Except when required by statute, issuing substantive DOT rules without completing notice and comment, including as interim final rules (IFRs) and direct final rules (DFRs), must be the exception. IFRs and DFRs are not favored. In most cases where an OA or OST component has issued an IFR, the RRTF will expect the OA or OST component to proceed at the earliest opportunity to replace the IFR with a final rule.
- k. Final rules. The responsible OA or OST component shall adopt a final rule only after consultation with the RRTF. The final rule, which shall include the text of the rule as adopted along with a supporting preamble, shall be published in the *Federal Register* and shall satisfy the following requirements:
 - (1) The preamble to the final rule shall include—
 - (a) A concise, general statement of the rule's basis and purpose, including clear reference to the legal authority supporting the rule;
 - (b) A reasoned, concluding determination by the adopting OA or OST component regarding each of the considerations required to be addressed in an NPRM under subsection h(2)(e)-(i) of this section;
 - (c) A response to each significant issue raised in the comments to the proposed rule;
 - (d) If the final rule has changed in significant respects from the rule as proposed in the NPRM, an explanation of the changes and the reasons why the changes are needed or are more appropriate to advance the objectives identified in the rulemaking; and
 - (e) A reasoned, final determination that the information upon which the OA or OST component bases the rule complies with the Information Quality Act,

- (3) Unless otherwise approved by the General Counsel, all DOT negotiated rulemakings should involve the assistance of a convener and a facilitator, as provided in the Negotiated Rulemaking Act. A convener is a person who impartially assists the agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking. A facilitator is a person who impartially aids in the discussions and negotiations among members of a negotiated rulemaking committee to develop a proposed rule. The same person may serve as both convener and facilitator.
- (4) All charters, membership, *Federal Register* notices, and operating procedures (or bylaws) for negotiated rulemaking committees must be approved by OGC.

12. SPECIAL PROCEDURES FOR ECONOMICALLY SIGNIFICANT RULES AND HIGH-IMPACT RULES

a. Definitions

- (1) “Economically significant rule” means a significant rule likely to impose (i) a total annual cost on the U.S. economy (without regard to estimated benefits) of \$100 million or more, or (ii) a total net loss of at least 75,000 full-time jobs in the U.S. over the five years following the effective date of the rule (not counting any jobs relating to new regulatory compliance).
- (2) “High-impact rule” means a significant rule likely to impose (i) a total annual cost on the U.S. economy (without regard to estimated benefits) of \$500 million or more, or (ii) a total net loss of at least 250,000 full-time jobs in the U.S. over the five years following the effective date of the rule (not counting any jobs relating to new regulatory compliance).

b. ANPRM required. Unless directed otherwise by the RRTF or otherwise required by law, in the case of a rulemaking for an economically significant rule or a high-impact rule, the proposing OA or OST component shall publish an ANPRM in the *Federal Register*.

c. Additional requirements for NPRM.

- (1) In addition to the requirements set forth in section 11(h) of this Order, an NPRM for an economically significant rule or a high-impact rule shall include a discussion explaining an achievable objective for the rule and the metrics by which the OA or OST component will measure progress toward that objective.
- (2) Absent unusual circumstances and unless approved by the RRTF (in consultation with OIRA, as appropriate), the comment period for an economically significant rule shall be at least 60 days and for a high-impact rule at least 90 days. If a rule is determined to be an economically significant rule or high-impact rule after the publication of the NPRM, the responsible OA or OST component shall publish a notice in the *Federal Register* informing the public of the change in classification and shall extend or reopen the comment period by not less than 30 days and allow

further public comment as appropriate, including comment on the change in classification.

d. Procedures for formal hearings.

- (1) Petitions for hearings. Following publication of an NPRM for an economically significant rule or a high-impact rule, and before the close of the comment period, any interested party may file in the rulemaking docket a petition asking the proposing OA or OST component to hold a formal hearing on the proposed rule in accordance with this subsection.
- (2) Mandatory hearing for high-impact rule. In the case of a proposed high-impact rule, the responsible OA or OST component shall grant the petition for a formal hearing if the petition makes a plausible *prima facie* showing that—
 - (a) The proposed rule depends on conclusions concerning one or more specific scientific, technical, economic, or other complex factual issues that are genuinely in dispute or that may not satisfy the requirements of the Information Quality Act;
 - (b) The ordinary public comment process is unlikely to provide the OA or OST component an adequate examination of the issues to permit a fully informed judgment on the dispute; and
 - (c) The resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule or on whether the proposed rule would achieve the statutory purpose.
- (3) Authority to deny hearing for economically significant rule. In the case of a proposed economically significant rule, the responsible OA or OST component may deny a petition for a formal hearing that includes the showing described in paragraph (2) but only if the OA or OST component reasonably determines that—
 - (a) The requested hearing would not advance the consideration of the proposed rule and the OA's or OST component's ability to make the rulemaking determinations required under this Order; or
 - (b) The hearing would unreasonably delay completion of the rulemaking in light of a compelling safety need or an express statutory mandate for prompt regulatory action.
- (4) Denial of petition. If the OA or OST component denies a petition for a formal hearing under this subsection in whole or in part, the OA or OST component shall include a detailed explanation of the factual basis for the denial in the rulemaking record, including findings on each of the relevant factors identified in paragraph (2) or (3) above. The denial of a good faith petition for a formal hearing under this subsection shall be disfavored.

- (5) Notice and scope of hearing. If the OA or OST component grants a petition for a formal hearing under this subsection, the OA or OST component shall publish a notice of the hearing in the *Federal Register* not less than 45 days before the date of the hearing. The notice shall specify the proposed rule at issue and the specific factual issues to be considered in the hearing. The scope of the hearing shall be limited to the factual issues specified in the notice.
- (6) Hearing process.
 - (a) A formal hearing for purposes of this subsection shall be conducted using procedures borrowed from sections 556 and 557 of title 5, United States Code, or similar procedures as approved by the Secretary, and interested parties shall have a reasonable opportunity to participate in the hearing through the presentation of testimony and written submissions.
 - (b) The OA or OST component shall arrange for an administrative judge or other neutral administrative hearing officer to preside over the hearing and shall provide a reasonable opportunity for cross-examination of witnesses at the hearing.
 - (c) After the formal hearing and before the record of the hearing is closed, the presiding hearing officer shall render a report containing findings and conclusions addressing the disputed issues of fact identified in the hearing notice and specifically advising on the accuracy and sufficiency of the factual information in the record relating to those disputed issues on which the OA or OST component proposes to base the rule.
 - (d) Interested parties who have participated in the hearing shall be given an opportunity to file statements of agreement or objection in response to the hearing officer's report, and the complete record of the proceeding shall be made part of the rulemaking record.
- (7) Actions following hearing.
 - (a) Following completion of the formal hearing process, the responsible OA or OST component shall consider the record of the hearing and, subject to the approval of the RRTF (in consultation with OIRA, as appropriate), shall make a reasoned determination whether (i) to terminate the rulemaking, (ii) to proceed with the rulemaking as proposed, or (iii) to modify the proposed rule.
 - (b) If the decision is made to terminate the rulemaking, the OA or OST component shall publish a notice in the *Federal Register* announcing the decision and explaining the reasons therefor.
 - (c) If the decision is made to finalize the proposed rule without material modifications, the OA or OST component shall explain the reasons for its

decision and its responses to the hearing record in the preamble to the final rule, in accordance with subsection e below.

- (d) If the decision is made to modify the proposed rule in material respects, the OA or OST component shall, subject to the approval of the RRTF (in consultation with OIRA, as appropriate), publish a new or supplemental NPRM in the *Federal Register* explaining the OA's or OST component's responses to and analysis of the hearing record, setting forth the modifications to the proposed rule, and providing an additional reasonable opportunity for public comment on the proposed modified rule.
- (8) Relationship to interagency process. The formal hearing procedures under this subsection shall not impede or interfere with OIRA's interagency review process for the proposed rulemaking.
- e. Additional requirements for final rules.
 - (1) In addition to the requirements set forth in section 11(k) of this Order, the preamble to a final economically significant rule or a final high-impact rule shall include—
 - (a) A discussion explaining the OA's or OST component's reasoned final determination that the rule as adopted is necessary to achieve the objective identified in the NPRM in light of the full administrative record and does not deviate from the metrics previously identified by the OA or OST component for measuring progress toward that objective; and
 - (b) In accordance with subsection d(7)(c) of this section, the OA's or OST component's responses to and analysis of the record of any formal hearing held under subsection d.
 - (2) Absent exceptional circumstances and unless approved by the RRTF or Secretary (in consultation with OIRA, as appropriate), the OA or OST component shall adopt as a final economically significant rule or final high-impact rule the least costly regulatory alternative that achieves the relevant objectives.
- f. Additional requirements for retrospective reviews. For each economically significant rule or high-impact rule, the responsible OA or OST component shall publish a regulatory impact report in the *Federal Register* every 5 years after the effective date of the rule while the rule remains in effect. The regulatory impact report shall include, at a minimum—
 - (1) An assessment of the impacts, including any costs, of the rule on regulated entities;
 - (2) A determination about how the actual costs and benefits of the rule have varied from those anticipated at the time the rule was issued; and

- (3) An assessment of the effectiveness and benefits of the rule in producing the regulatory objectives it was adopted to achieve.
- g. Waiver and Modification. The procedures required by section 12 of this Order may be waived or modified as necessary with the approval of the RRO or the Secretary.

13. PUBLIC CONTACTS IN INFORMAL RULEMAKING

- a. Agency contacts with the public during informal rulemakings conducted in accordance with section 553 of title 5, United States Code.
 - (1) DOT personnel may have meetings or other contacts with interested members of the public concerning an informal rulemaking at any stage of the rulemaking process, provided the substance of material information submitted by the public that DOT relies on in proposing or finalizing the rule is adequately disclosed and described in the public rulemaking docket such that all interested parties have notice of the information and an opportunity to comment on its accuracy and relevance.
 - (2) After the issuance of the NPRM and pending completion of the final rule, DOT personnel should avoid giving persons outside the Executive Branch information regarding the rulemaking that is not available generally to the public.
 - (3) If DOT receives an unusually large number of requests for meetings with interested members of the public during the comment period for a proposed rule or after the close of the comment period, the issuing OA or component of OST should consider whether there is a need to extend or reopen the comment period, to allow for submission of a second round of “reply comments,” or to hold a public meeting on the proposed rule.
 - (4) If the issuing OA or OST component meets with interested persons on the rulemaking after the close of the comment period, it should be open to giving other interested persons a similar opportunity to meet.
 - (5) If DOT learns of significant new information, such as new studies or data, after the close of the comment period that the issuing OA or OST component wishes to rely upon in finalizing the rule, the OA or OST component should reopen the comment period to give the public an opportunity to comment on the new information. If the new information is likely to result in a change to the rule that is not within the scope of the NPRM, the OA or OST component should consider issuing a Supplemental NPRM to ensure that the final rule represents a logical outgrowth of DOT’s proposal.
- b. Contacts during OIRA review.
 - (1) Executive Orders 12866 and 13563 lay out the procedures for review of significant regulations by OIRA, which include a process for members of the public to request meetings with OIRA regarding rules under OIRA review. Per

Executive Order 12866, OIRA invites the Department to attend these meetings. The Office of Regulation will forward these invitations to the appropriate regulatory contact in the OA or component of OST responsible for issuing the regulation.

- (2) If the issuing OA or OST component wishes to attend the OIRA-sponsored meeting or if its participation is determined to be necessary by the Office of Regulation, the regulatory contact should identify to the Office of Regulation up to two persons from the OA or OST component who will attend the meeting along with a representative from the Office of Regulation. Attendance at these meetings can be by phone or in person. These OIRA meetings are generally listening sessions for DOT.
- (3) The attending DOT personnel should refrain from debating particular points regarding the rulemaking and should avoid disclosing the contents of a document or proposed regulatory action that has not yet been disclosed to the public, but may answer questions of fact regarding a public document.
- (4) Following the OIRA meeting, the attendee(s) from the issuing OA or OST component will draft a summary report of the meeting and submit it to the Office of Regulation for review. After the report is reviewed and finalized in coordination with the Office of Regulation, the responsible OA or OST component will place the final report in the rulemaking docket.

14. POLICY UPDATES AND REVISIONS

This Order shall be reviewed from time to time to reflect improvements in the rulemaking process or changes in Administration policy. If Congress revises applicable laws or if the Executive Branch issues new Executive Orders, Presidential memoranda, guidance, or implementing instructions governing Federal agency rulemaking, such changes shall be considered incorporated by reference in this Order.

15. DISCLAIMER

This Order is intended to improve the internal management of the Department. It is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, officers or employees, or any other person. In addition, this Order shall not be construed to create any right to judicial review involving the compliance or noncompliance with this Order by the Department, its OAs or OST components, its officers or employees, or any other person.

16. DISTRIBUTION

This Order is distributed to all Secretarial office heads and OA Administrators and will be available to the Department electronically and posted to a public Web site.

17. CONTACT

If you have specific questions related to this Order, please contact the Office of Regulation in OGC.

FOR THE SECRETARY OF TRANSPORTATION:

/s/

Steven G. Bradbury

General Counsel and Regulatory Policy Officer
U.S. Department of Transportation



EXHIBIT B



Office of Information and Regulatory Affairs
Executive Office of the President
Office of Management and Budget
Washington, DC 20503



U.S. Commodity Futures Trading Commission
Washington, DC 20581

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (MOU) is set forth for the purpose of permitting staff of the Office of Information and Regulatory Affairs (OIRA) to provide technical assistance to the Commodity Futures Trading Commission (CFTC) staff during the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, particularly with respect to the consideration of the costs and benefits of proposed and final rules.

As required by and in accordance with section 15(a) of the Commodity Exchange Act (CEA), the CFTC considers the costs and benefits of its rulemakings and orders. The CFTC staff guidance for the consideration of costs and benefits in rulemakings is informed by OIRA's guidance for the conduct of cost-benefit analyses as well as the best practices of other federal agencies, to the extent permitted by law.

The provision and acceptance of this technical assistance shall not be interpreted to alter in any way the current relationship between OIRA and the CFTC during the rulemaking process. The sharing of draft and final CFTC documents and other information with OIRA staff pursuant to this technical assistance shall not constitute submission of such materials to OIRA for review. Further, any documents and information exchanges between the staffs of the CFTC and OIRA shall: retain any applicable legal or governmental privilege; and treat as confidential, to the extent permitted by applicable laws, all non-public information provided pursuant to this MOU. This MOU shall become effective as of the date of its signing, and may be revised or modified only upon the written agreement of the signatories or their successors.

Set forth this 9 day of May, 2012 by:

Cass Sunstein, Administrator
Office of Information and Regulatory Affairs
Executive Office of the President
Office of Management and Budget

Gary Gensler, Chairman
U.S. Commodity Futures Trading Commission

EXHIBIT C

MEMORANDUM

To: Staff of the Rulewriting Divisions and Offices

From: RSFI and OGC

Date: March 16, 2012

Re: Current Guidance on Economic Analysis in SEC Rulemakings

BACKGROUND

High-quality economic analysis is an essential part of SEC rulemaking. It ensures that decisions to propose and adopt rules are informed by the best available information about a rule's likely economic consequences, and allows the Commission to meaningfully compare the proposed action with reasonable alternatives, including the alternative of not adopting a rule. The Commission has long recognized that a rule's potential benefits and costs should be considered in making a reasoned determination that adopting a rule is in the public interest.

Recent court decisions, reports of the U.S. Government Accountability Office ("GAO") and the SEC's Office of Inspector General ("OIG"), and Congressional inquiries have raised questions about and/or recommended improvements to various components of the Commission's economic analysis in its rulemaking, including: (1) identifying the need for the rulemaking and explaining how the proposed rule will meet that need;¹ (2) articulating the appropriate economic baseline against which to measure the proposed rule's likely economic impact (in terms of potential benefits and costs, including effects on efficiency, competition, and capital formation in the market(s) the rule would affect);² (3) identifying and evaluating reasonable alternatives to the proposed regulatory approach;³ and (4) assessing the potential economic impact of the

¹ SEC Office of Inspector General, *Follow-Up Review of Cost-Benefit Analyses in Selected SEC Dodd-Frank Act Rulemakings*, Report No. 499 (Jan. 27, 2012) ("OIG Report No. 499") at 31-36.

² *American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178-79 (D.C. Cir. 2010); OIG Report No. 499 at 16-29.

³ *Chamber of Commerce v. SEC*, 412 F.3d 133, 144-5 (D.C. Cir. 2005) ("*Chamber I*").

proposed rule and reasonable alternatives by seeking and considering the best available evidence of the likely quantitative and qualitative costs and benefits of each.⁴

OIG Report No. 499, comments on proposed rulemakings, and communications from Members of Congress have also included suggestions for improving the process by which economic analyses are developed and incorporated into Commission rulemaking, including earlier and more substantial involvement of SEC economists⁵ and more effective integration of economic analyses into rulemaking releases.⁶

After careful review of relevant caselaw, economic literature, guidance from other regulatory authorities, and the foregoing comments and recommendations, the Division of Risk, Strategy, and Financial Innovation (“RSFI”) and the Office of the General Counsel (“OGC”) are providing the following guidance on economic analysis for SEC rules that addresses each of the substantive and procedural issues identified above. Much of the guidance set forth below will be familiar to you as practices that have already been incorporated into our rulemaking or improvements that RSFI and OGC recently have been working with the Divisions to implement.

Rulewriting teams should recognize that this guidance is by necessity general in nature. This guidance—while broadly outlining best practices—is intended to allow for flexibility in the context of any particular rulemaking. The rulewriting division or office, RSFI, and OGC should work closely to determine the appropriate approach for each rulemaking.

SEC STATUTORY OBLIGATIONS AND POLICY CHOICES TO CONDUCT REGULATORY ECONOMIC ANALYSIS

Statutory provisions added by the National Securities Market Improvement Act of 1996 and the Gramm-Leach-Bliley Act of 1999 to the 1933, 1934, and 1940

⁴ *Business Roundtable v. SEC*, 647 F.3d 1144, 1150 (D.C. Cir. 2011); GAO Report to Congressional Addressees, “DODD-FRANK ACT REGULATIONS Implementation Could Benefit from Additional Analyses and Coordination” (Nov. 2011) (“GAO Report No. 12-151”), at 17-18.

⁵ OIG Report 499 at 12-16.

⁶ *Id.* at 29-31.

Acts—which require the Commission to consider 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”—expressly call for consideration of several broad economic issues in addition to the protection of investors. Additionally, Section 23(a)(2) of the Exchange Act requires the Commission to consider the impact that any rule promulgated under that Act would have on competition and to include in the rule’s statement of basis and purpose “the reasons for the Commission’s . . . determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of [the Exchange Act].”⁷ The D.C. Circuit has viewed these provisions, together with the requirement under the Administrative Procedure Act that Commission rulemaking be conducted “in accordance with law,” as imposing on the Commission a “statutory obligation to determine as best it can the economic implications of the rule.”⁸ Similarly, the court has found certain Commission rules arbitrary and capricious based on its conclusion that the Commission failed adequately to evaluate a rule’s economic impact.⁹

No statute expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities.¹⁰ But as SEC chairmen have informed Congress since at least the early 1980s—and as rulemaking releases since that time reflect—the Commission considers potential costs and benefits as a matter of good regulatory practice whenever it adopts rules.

Although as an independent regulatory agency the SEC is not obligated to follow the guidelines for regulatory economic analysis by executive agencies set out in Executive Order 12866 (“Regulatory Planning and Review”)

⁷ The Commission also is subject to the Paperwork Reduction Act of 1995 (“PRA”), the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), and the Regulatory Flexibility Act. The analyses required by these statutes are narrowly tailored to particular statutory requirements.

⁸ *Chamber I*, 412 F.3d at 143.

⁹ *E.g., Business Roundtable*, 647 F.3d at 1148 (finding that the Commission had failed “adequately to assess the economic effects of a new rule”).

¹⁰ See GAO Report No. 12-151 at 9.

(“EO 12866”)¹¹ and Executive Order 13563 (“Improving Regulation and Regulatory Review”) (“EO 13563”),¹² the following guidance draws on principles set forth in those orders and in the Office of Management and Budget’s Circular A-4 (2003), which provides guidance for implementing Executive Order 12866.¹³

GUIDANCE

A. Substantive requirements for economic analysis in SEC rulemaking.

It is widely recognized that the basic elements of a good regulatory economic analysis are: (1) a statement of the need for the proposed action; (2) the definition of a baseline against which to measure the likely economic consequences of the proposed regulation; (3) the identification of alternative regulatory approaches; and (4) an evaluation of the benefits and costs—both quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.¹⁴ As a general matter, every economic analysis in SEC rulemakings should include these elements, and the following guidance addresses ways to strengthen these aspects of our economic analyses.

¹¹ 58 FR 51735 (Oct. 4, 1993).

¹² 76 FR 3821 (Jan. 21, 2011). Executive Order 13579 (“Regulation and Independent Regulatory Agencies”), 76 FR 41587 (Jul. 14, 2011), encourages independent regulatory agencies to follow certain policies set forth in Executive Order 13563.

¹³ In developing this updated guidance, OGC and RSFI have also reviewed other guidance for regulatory economic analysis. See, e.g., U.S. Commodity Futures Trading Commission, Staff Guidance on Cost-Benefit Considerations for Final Rulemakings under the Dodd-Frank Act, (May 13, 2011) in U.S. Commodity Futures Trading Commission Office of the Inspector General, *A Review of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act*, June 13, 2011 at 34-45, available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf; Isaac Alfon & Peter Andrews, Financial Services Authority, *Cost-Benefit Analysis in Financial Regulation How to do it and how it adds value* (Financial Services Authority Occasional Paper Series 3, September 1999), available at: <http://www.fsa.gov.uk/pubs/occpapers/op03.pdf>; Financial Services Authority Central Policy, *Practical Cost-Benefit Analysis for Financial Regulators Version 1.1* (June 2000), available at: <http://www.fsa.gov.uk/pubs/foi/cba.pdf>.

¹⁴ See generally EO 12866; EO 13563; Circular A-4. Cf. Alfon & Andrews, *supra* note 13; Financial Services Authority Central Policy, *supra* note 13.

1. Clearly identify the justification for the proposed rule.

Rule releases must include a discussion of the need for regulatory action and how the proposed rule will meet that need.¹⁵ In some circumstances, there will be more than one justification for a particular rulemaking. Frequently, the proposed rule will be a response to a market failure that market participants cannot solve because of collective action problems. Traditional market failures include market power, externalities, principal-agent problems (such as economic conflicts of interest), and asymmetric information.¹⁶ Other justifications for rulemaking can include, among others, “improving government processes,”¹⁷ interpreting provisions in statutes the Commission administers,¹⁸ and providing exemptive

¹⁵ See EO 12866, 58 FR at 51735 (“Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.”); *id.* (“Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.”).

¹⁶ See, e.g., Circular A-4 at 4 (listing “externality, market power, and inadequate or asymmetric information” as examples of market failures that could be addressed through regulation). Various forms of these market failures are applicable to the markets the Commission regulates. Negative externalities can arise in the form of spill-over financial risks to investors that cannot be effectively managed by managers or intermediaries. See, e.g., SEC Final Rule, *Risk Management Controls for Brokers or Dealers with Market Access*, 75 FR 69792 (Nov. 15, 2010). Positive externalities can arise from network effects of standards (such as accounting standards), or social benefits from information disclosure that are not fully reaped by the disclosing party. See, e.g., Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice is Not Investor Empowerment*, 85 VA. L. REV. 1335 (1999). Principal-agent problems often arise in the form of moral hazard or in situations involving potential conflicts of interests. See, e.g., SEC Final Rule, *Custody of Funds or Securities of Clients by Investment Advisers*, 75 FR 1456 (Jan. 11, 2010); SEC Final Rule, *Proxy Disclosure Enhancements*, 74 FR 68334 (Dec. 23, 2009); and SEC Final Rule, *Political Contributions by Certain Investment Advisers*, 75 FR 41018 (July 14, 2010). There is asymmetric information, for example, when investors seeking to trade securities are not fully informed of all material information that could affect their investment decisions. See, e.g., SEC Final Rule, *Amendment to Municipal Securities Disclosure*, 75 FR 33100 (June 10, 2010).

¹⁷ Circular A-4 at 4-5 (also identifying the “protect[ion of] privacy, permit[ting] more personal freedom,” and promoting “other democratic aspirations” as examples of “social purposes” that can be a justification for rulemaking).

¹⁸ See EO 12866, 58 FR at 51735 (rules “necessary to interpret the law” are justified).

relief from statutory prohibitions where the Commission concludes that doing so is in the public interest. Additionally, Circular A-4 recognizes that Congressional direction to adopt a rule is, itself, an independent justification for rulemaking, explaining that “[i]f the regulatory intervention results from a statutory or judicial directive, you should describe the specific authority for your action, the extent of discretion available to you, and the regulatory instruments you might use.”¹⁹

2. Define the baseline against which to measure the proposed rule’s economic impact.

The economic consequences of proposed rules (potential costs and benefits including effects on efficiency, competition, and capital formation) should be measured against a baseline, which is the best assessment of how the world would look in the absence of the proposed action.²⁰ The baseline serves as a primary point of comparison for an analysis of the proposed regulation. An economic analysis of a proposed regulatory action compares the current state of the world, including the problem that the rule is designed to address, to the expected state of the world with the proposed regulation (or regulatory alternatives) in effect.²¹

¹⁹ Circular A-4 at 3. We have considered the recommendation in OIG Report No. 499 (at pages 31-36) that even where Congress directs the Commission to engage in rulemaking, the Commission should identify a market failure or other compelling need for rulemaking apart from the Congressional directive, and we conclude that this is unnecessary. Instead we believe that the better approach is set forth in Executive Order 12866, which states that agencies “should promulgate only such regulations as are required by law . . . **or** are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people” (emphasis supplied), making clear that a statutory mandate and a market failure are *alternative* possible justifications for a rule. EO 12866, 58 FR at 51734. Although we conclude that the Commission is not obligated to identify a justification for rulemaking beyond a Congressional mandate, there may be circumstances in which it could be useful to do so. For example, where Congress has itself stated that the mandate to engage in rulemaking is premised on a market failure or other compelling social need, the rulemaking release may identify that justification (and attribute it to Congress) in its description of the statutory mandate and explain how the rule (including any discretionary choices the Commission is making in the rulemaking) responds to the market failure or other compelling need that Congress identified.

²⁰ See Circular A-4 at 15.

²¹ See Circular A-4 at 2 (“To evaluate properly the benefits and costs of regulations . . . you will need to . . . [i]dentify a baseline. Benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a ‘no-action’ baseline: what the world will be like if the proposed rule is not adopted.”).

Economic impacts of proposed regulations are measured as the differences between these two scenarios. The baseline includes both the economic attributes of the relevant market and the existing regulatory structure, including (where relevant) state law.²²

In articulating the appropriate economic baseline for a rulemaking, rulewriting staff should work with the RSFI economists to describe the state of the world in the absence of the proposed rule, including the existing state of efficiency, competition, and capital formation, against which to measure the likely impact of the proposed rule and the principal alternative regulatory approaches. It is important to clearly describe the assumptions that underlie the description of the relevant baseline and to detail those aspects of the baseline specification that are uncertain. Defining the baseline typically involves identifying and describing the market(s) and participants affected by the proposed rule. Most SEC rules affect one or more markets directly but it may also be appropriate to consider additional markets or participants that may be indirectly affected by the proposed rule.

OIG Report No. 499 and letters from some Members of Congress have questioned the Commission's approach to selecting economic baselines for assessing the consequences of regulations promulgated to comply with statutory

²² For example, in *American Equity*, the D.C. Circuit addressed the adequacy of the SEC's economic analysis of a rule (Rule 151A) that could result in certain insurance products that had been regulated exclusively under state insurance law *also* being subject to the federal securities laws. The court concluded that the SEC's analysis was inadequate because it did not measure the rule's likely effect on efficiency, competition, and capital formation against a baseline that included the existing level of those economic factors under the state insurance law to which the products were subject. *See American Equity*, 613 F.3d at 178 ("The SEC asserted competition would increase based upon its expectation that Rule 151A would require fuller public disclosure of the terms of FIAs and thereby increase price transparency. The SEC could not accurately assess any potential increase or decrease in competition, however, because it did not assess the baseline level of price transparency and information disclosure under state law."); *see also id.* at 179 ("The SEC advanced further that the rule's sales practice protections would enable sellers to promote more suitable recommendations to investors; this, in turn, would lead to investors making even better informed decisions, which would offer greater efficiency. As with its analysis of competition, however, the SEC's analysis is incomplete because it fails to determine whether, under the existing regime, sufficient protections existed to enable investors to make informed investment decisions and sellers to make suitable recommendations to investors. The SEC's failure to analyze the efficiency of the existing state law regime renders arbitrary and capricious the SEC's judgment that applying federal securities law would increase efficiency.").

directives, including a number of the rulemakings under the Dodd-Frank Act.²³ As a policy matter, where a statute directs rulemaking, rulewriting staff should consider the overall economic impacts, including *both* those attributable to Congressional mandates *and* those that result from an exercise of the Commission's discretion.²⁴ This approach will often allow for a more complete evaluation of alternative means of meeting the mandate and give the most complete picture of a rule's economic effects, particularly because there are many situations in which it is difficult to distinguish between the mandatory and discretionary components of a rule.²⁵

The baseline being used should be specified, either at the beginning of the economic analysis section or as part of a general introduction to the economic issues that will be considered throughout the release. Using the same baseline assumptions throughout the economic analysis of each element of the proposed rule is important. However, when considering alternatives, it may sometimes make better sense to evaluate the economic implication of alternatives against the proposed rule, since the primary inquiry in considering the alternatives must be whether these alternatives are better or worse (in terms of achieving the regulatory purpose in a cost-effective manner) than the proposed rule. If the release follows such an approach, it should carefully explain the reasons for doing so.

3. Identify and discuss reasonable alternatives to the proposed rule.

The release should identify and discuss reasonable potential alternatives to the approach in the proposed rule. Reasonable alternatives include only those that are available to the SEC and not, for example, those that the SEC lacks the authority to implement. In addition to the preferred approach, a release could identify as alternatives realistic approaches that are more or less stringent than the

²³ See OIG Report No. 499 at 16-23.

²⁴ See Circular A-4 at 15-16 ("In some cases, substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action. In these cases, you should use a pre-statute baseline. If you are able to separate out those areas where the agency has discretion, you may *also* use a post-statute baseline to evaluate the discretionary elements of the action.") (emphasis supplied).

²⁵ The analysis should not be viewed as an attempt to challenge the Congressional policy decisions that may underlie the statutory mandate.

preferred option. Other types of alternative approaches could include different compliance dates and different requirements for large and small firms. The proposing release should also solicit public comment to help assess and inform the economic analysis of the alternatives.

Circular A-4 states that “[t]he number and choice of alternatives selected for detailed analysis is a matter of judgment,” and recognizes that “[t]here must be some balance between thoroughness and the practical limits on your analytical capacity.”²⁶ Courts have likewise made clear that “the Commission is not required to consider ‘every alternative . . . conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative’ may be.”²⁷ But the Commission is required to consider *reasonable* alternatives raised during the rulemaking.²⁸ Such alternatives include those that are “neither frivolous nor out of bounds”: “[W]here a party raises facially reasonable alternatives . . . the agency must either consider those alternatives or give some reason . . . for declining to do so.”²⁹

4. Analyze the economic consequences of the proposed rule and the principal regulatory alternatives.

In analyzing the likely consequences of the proposed rule and alternative regulatory approaches, rulewriting staff should work with the RSFI economists to: (1) identify and describe the most likely economic benefits and costs of the proposed rule and alternatives; (2) quantify those expected benefits and costs to the extent possible; (3) for those elements of benefits and costs that are quantified, identify the source or method of quantification and discuss any uncertainties

²⁶ Circular A-4 at 7.

²⁷ *Chamber I*, 412 F.3d at 144 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 51 (1983)).

²⁸ See *id.* (concluding that it was a violation of the APA for the Commission not to consider, as an alternative to a proposed rule imposing an independent chair requirement as a condition for certain exemptions, dissenting Commissioners’ proposal that “each fund be required prominently to disclose whether it has an inside or an independent chairman and thereby allow investors to make an informed choice”).

²⁹ *Id.* at 145 (quoting *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989) (emphases removed)).

underlying the estimates; and (4) for those elements that are not quantified, explain why they cannot be quantified.

As others have noted, “the difficulty of reliably estimating the costs of regulations to the financial services industry and the nation has long been recognized, and the benefits of regulation generally are regarded as even more difficult to measure.”³⁰ Thus, although we should endeavor to quantify the rule’s likely economic effects, it may not be feasible to quantify many of the costs and benefits of the rule.

Identify relevant benefits and costs. Rulewriting staff should work with RSFI economists to identify relevant potential benefits and costs of the proposed rule and the principal regulatory alternatives examined in the rulemaking. In addition to the direct benefits and costs, the economic analysis should address significant ancillary economic consequences. Although the likely costs and benefits will vary depending on the rule, there are certain general principles that apply to most rulemakings.³¹

Benefits In general, the likely benefits of a rule correspond to the justification for the rulemaking. Thus, for example, where the rule is being proposed to remedy a market failure in the form of inadequate information available to investors, and the rule would require new or enhanced disclosure, the likely benefits to be derived from the rule presumably would include better informed investment decisions. This, in turn, could result in better alignment of investors’ objectives and investments, greater investor trust in the markets, lower risk premiums, and, ultimately, better allocation of capital. Typically, the economic benefits of a rule include likely gains in economic efficiency such as (among others):

- reduced incentive misalignment/reduced monitoring costs;
- lower cost of capital;

³⁰ GAO Report No. 12-151 at 19 (citing GAO Report No. 08-32). *See also* OIG Report No. 499 at 14 n. 37 (same).

³¹ The following examples of benefits and costs are not intended to be comprehensive but are included to supply a general idea of the types of benefits and costs that could be analyzed. The benefits and costs that should be considered during the rulewriting process will be developed by the rulewriting staff and RSFI and will vary depending on the nature of the rule.

- better information sharing, which can result in lower risk premiums and better allocation of capital;
- enhanced competition, which can lead to reduced prices or higher quality;
- overcoming collective action problems;
- the avoidance of harmful transactions by reducing principal-agent problems, such as excessive risk-taking or actions that are otherwise characterized by moral hazard;
- reduced transaction costs;
- more efficient enforcement of Commission rules.

Costs The economic analysis should consider compliance costs, direct costs, and indirect costs. For example, the compliance costs of a reporting requirement may include in-house personnel time and resources and outside accounting or legal fees.³² Direct costs could include costs arising from intended changes to the behavior of regulated firms or persons in response to the reporting requirement. Indirect costs could include costs arising from changes to the behavior of regulated firms or persons beyond those that the rule was intended to achieve, or costs arising from changes in behavior by parties other than regulated firms or persons. In general, other types of indirect costs can include, but are not limited to:

- the distributional and competitive effects of the rule;
- negative collateral consequences, such as the potential misuse of newly created rights;
- a misallocation of resources resulting from regulatory arbitrage (race to the bottom).

³² Rulewriters should work with the RSFI economists to determine whether some of these expenses are better analyzed as “transfers”—economic consequences that result in a redistribution of income. In addition, our rules frequently include calculation of paperwork burden as required under the PRA. Rulewriters should be aware that PRA burdens do not necessarily characterize all compliance costs and in most cases, they are only one of many possible inputs, both qualitatively and quantitatively, into the overall analysis of costs. With most rules, the cost estimate that results from multiplying PRA burden-hours by hourly wage rates is not substitutable for the broader analysis of a rule’s likely economic consequences contained in the release’s economic analysis.

Depending on the significance of the costs and benefits of a rule that are internal to the SEC, it can be appropriate to consider them in the cost-benefit analysis. The staff's general practice has been not to consider administrative costs or savings in cost-benefit analyses because such costs and benefits typically are not a significant or material component of the overall costs and benefits of a rule. But in some cases the effect of the rules on internal SEC operations may be significant enough to be considered as a component of the overall costs and benefits. The degree of consideration given to internal costs and benefits will differ depending on their importance in a particular rulemaking.

Quantify expected benefits and costs to the extent feasible. Rulewriting staff should work closely with the RSFI economists so that they may attempt to monetize or otherwise quantify potential costs and benefits of the rule whenever such quantification is practicable and should discuss with the economists the methodology to be used to obtain estimates.³³ To achieve this objective, rulewriting staff should engage with RSFI economists at the earliest stages of rulemaking to determine whether there are areas in which monetization or other quantification can reasonably be undertaken and, if so, whether RSFI has the available resources necessary to develop such data. Before issuing a proposing release, staff should identify any specific data that would be necessary for or that would assist in quantification, and should consider various mechanisms by which to seek such data. The proposing release should also include a request for such data.

Identify and discuss uncertainties underlying the estimates of benefits and costs. Where particular benefits or costs cannot be monetized, the release should present any available quantitative information: for example, quantification of the size of the market(s) affected, or the number and size of market participants subject to the rule. Even without hard data, quantification may be possible by making and explaining certain assumptions. For example, if proposed rules would enable the operation of a new trading system, it may be reasonable to assume the system will attract a percentage of all market volume (*e.g.*, one percent). With that

³³ As discussed above, *see* note 30 and corresponding text, it is frequently difficult to reliably quantify the benefits and costs of financial regulations.

assumption, the cost-benefit analysis could then estimate a distributional effect of a certain magnitude. It is important to make assumptions (and the rationales for the assumptions) explicit and, where alternative assumptions are plausible, to include analysis based on each.

Court decisions addressing the economic analysis in Commission rules have likewise stressed the need to attempt to quantify anticipated costs and benefits, even where the available data is imperfect and where doing so may require using estimates (including ranges of potential impact) and extrapolating from analogous situations.³⁴

If monetization or other quantification is possible, the proposing release should include those numbers and solicit comment on them, and the adopting release should address any comments on those numbers, including any data submitted to challenge them. When quantifying costs and benefits, staff should describe the measurement approach used, include references to statistical and stakeholder data if available, and specify the timeframe analyzed.

Explain why costs and benefits cannot be quantified. If RSFI economists and the rulewriting staff conclude that costs or benefits cannot reasonably be quantified, the release should include an explanation of the reason(s) why quantification is not practicable and include a qualitative analysis of the likely

³⁴ See, e.g., *Business Roundtable*, 647 F.3d at 1150 (“Although the Commission acknowledged that companies may expend resources to oppose shareholder nominees, see 75 Fed. Reg. at 56,770/2, it did nothing to estimate and quantify the costs it expected companies to incur; nor did it claim estimating those costs was not possible, for empirical evidence about expenditures in traditional proxy contests was readily available. Because the agency failed to ‘make tough choices about which of the competing estimates is most plausible, [or] to hazard a guess as to which is correct,’ *Pub. Citizen [v. Federal Motor Carrier Safety Admin.]*, 374 F.3d [1209] 1221[(D.C. Cir. 2004)], we believe it neglected its statutory obligation to assess the economic consequences of its rule”); *Chamber I*, 412 F.3d at 144 (“Although the Commission may not have been able to estimate the aggregate cost to the mutual fund industry of additional staff because it did not know what percentage of funds with independent chairman would incur that cost, it readily could have estimated the cost to an individual fund, which estimate would be pertinent to its assessment of the effect the condition would have upon efficiency and competition, if not upon capital formation. And, as we have just seen, uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure.”).

economic consequences of the proposed rule and reasonable regulatory alternatives. The release should discuss the strengths and limitations of the information underlying the qualitative cost-benefit analysis. Rulewriters should work with RSFI economists to clearly identify important uncertainties underlying the analysis and to explain the implications of these uncertainties for the analysis.

Support predictive judgments and clearly address contrary data or predictions. To the extent that the economic analysis includes predictive judgments, it should provide support for those judgments. At the outset of a rulemaking, RSFI economists should determine whether there are studies or empirical evidence that would help inform the economic analysis of the proposed rule and of possible alternatives. RSFI economists should work with the rulewriters to include such information in the proposing release and should solicit comment on it. Where the Commission is giving greater weight to some empirical evidence/studies than to others, it should clearly state the reason(s) for doing so. To the extent that the staff believes that a study or comment should be discounted, the release should explain why and cite available evidence supporting that position.

Frame costs and benefits neutrally and consistently. The release should evaluate the costs and benefits even-handedly and candidly, acknowledging any limitations in the data or quantifiable information. To the extent that the release discusses scenarios that might mitigate the costs or enhance the benefits, consider and discuss the impact that those scenarios would have on both the costs and the benefits.

Combine the economic analysis considering costs and benefits with consideration of the effects on efficiency, competition, and capital formation. SEC rulemaking releases have often included separate sections captioned “Cost Benefit Analysis” (“CBA”) and “Efficiency, Competition, and Capital Formation” (“ECCF”). We do not believe this is necessary. This approach can result in redundancy and unnecessary parsing of economic effects.³⁵ We believe that the better approach is to provide an integrated economic analysis of the rule rather than

³⁵ See OIG Report No. 499 at 29-31 (“[R]ulewriting divisions should consider discontinuing the practice of drafting separate cost-benefit analysis and efficiency, competition, and capital formation sections and instead provide a more integrated discussion of these issues in rule releases.”).

to provide separate CBA and ECCF sections. This can be accomplished either through a single “Economic Analysis” section that combines the formerly separate CBA and ECCF sections and discusses the economic consequences in a more comprehensive manner or by incorporating the economic analysis throughout the release rather than in a dedicated section.

B. Enhanced integration of economic analysis into the rulemaking process and rule releases.

Both OIG Report No. 499 and communications from Members of Congress have suggested earlier and more extensive involvement of RSFI economists in the rulemaking process.³⁶ A primary goal in the creation of RSFI was to enhance the agency’s economic analysis capabilities for rulemaking. To make the best use of RSFI’s expertise, RSFI economists should be involved at the earliest stages of the rulemaking process (*e.g.*, before the specific preferred regulatory course is determined) and throughout the course of writing proposed and final rules. RSFI economists should be fully integrated members of the rulewriting team, and contribute to all elements of the rulewriting process. Close collaboration with RSFI will help to integrate economic analysis as key policy choices are made, in order to (1) assist in the evaluation of different or competing policy options by identifying the major economic effects of those options; (2) influence the choice, design, and development of policy options; (3) assist in the evaluation of whether and to what extent any proposed policy would promote efficiency, competition, and capital formation; (4) improve the quality of regulation; (5) better support policy choices made by the Commission; and (6) increase confidence in the regulatory process.

Pre-proposal stage. The rulewriting team should prepare (1) an explanation of the policy and economic rationale for regulatory action, including the problem to be addressed and the goals sought to be achieved; and (2) a high-level discussion of the likely elements of the economic analysis (*e.g.*, the nature and scale of expected market impacts from the main regulatory alternatives under consideration), and additional data needs. RSFI economists responsible for the rulemaking should be fully integrated into the rulewriting team at this stage so that

³⁶ OIG Report No. 499 at 12-15.

they may prepare or assist in preparing the high-level economic analysis and begin work on gathering the additional data needed or performing additional analysis necessary for preparation of the rule proposal.

Proposing stage. The proposing release should include a substantially complete analysis of the most likely economic consequences of the rule proposal. The economic analysis should be drafted by RSFI economists or in close collaboration with RSFI economists. The release should also include a discussion of any existing studies or data that bear on the proposal so that the public knows what studies or data we are relying on, can comment on it, and can provide additional data relevant to the topic. RSFI's concurrence in the proposing release's economic analysis should be obtained for the final draft that is formally circulated to the Commission for action.

Comment period. The proposing release should be specific in its request for comment on the economic analysis and should identify any quantitative information that market participants are requested to provide. As part of their continuing analysis of the potential economic effects of the proposed rule, the RSFI economists assigned to the rulemaking team should pay particular attention to any comment letters containing economic analysis and data. Where appropriate, RSFI economists should attend meetings with commenters or other third parties regarding the proposed rule, particularly in those instances when the rulewriting team expects that the outside party will provide additional data or comment upon the economic analysis or data contained in the proposing release.

Adopting stage. As part of the development of the adopting release, the staff should prepare a high-level economic analysis (prepared by or with the assistance of RSFI economists) that addresses (1) any significant policy alternatives suggested by commenters that are not recommended for adoption; (2) other comments received relevant to the economic effects of the proposed rule and realistic alternative approaches; and (3) data gathered. The adopting release should then be drafted in close consultation with the RSFI economists to develop a complete economic analysis of the final rule, addressing comments and realistic alternatives to the approach chosen. RSFI's concurrence in the economic analysis

should be obtained for the draft that is formally circulated to the Commission for action.

EXHIBIT D

¹ The Office may also include other staff members not specifically described by these categories but which nonetheless will assist the Office in carrying out its duties.

- The Commission will create an Economic Analysis Division within the Office of Economics and Analytics. The Economic Analysis Division will provide analytical and quantitative support as needed to Bureaus and Offices engaged in rulemakings, transactions, auctions, adjudications, and other matters.
- The Commission will create an Industry Analysis Division within the Office of Economics and Analytics. To accomplish this, the Commission will generally shift the functions of the Industry Analysis and Technology Division of WCB to OEA. Through its Industry Analysis Division, OEA will serve as the Commission's principal resource with regard to designing and administering significant, economically-relevant data collections used by a variety of Bureaus and Offices, providing support to Bureaus and Offices with respect to these data collections as well as support using the data for Continuity of Operations (COOP)/Emergency Response Group (ERG)/Incident Management Team (IMT), and performing analyses and studies.
- The Commission will create an Auctions Division within the Office of Economics and Analytics. To accomplish this, the Commission will generally shift the functions of the Auctions and Spectrum Access Division in the Wireless Telecommunications Bureau (WTB) to OEA. Through its Auctions Division and in consultation with WTB and the Wireline Competition Bureau (WCB), OEA will serve as the Commission's principal resource with regard to all auction design and implementation issues. OEA will collaborate with other Bureaus involved in establishing and conducting auctions, such as spectrum or universal service auctions.
- The Commission will create a Data Division within the Office of Economics and Analytics. The Data Division help develop and implement best practices, processes, and standards for data management in order to meet the needs of Commission staff who rely on data to inform policymaking and other core activities of the Commission.²

6. The amendments adopted herein pertain to agency organization, procedure, and practice. Consequently, the notice and comment and effective date provisions of the Administrative Procedure Act contained in 5 U.S.C. §§ 553(b) and (d) do not apply.

7. Consistent with the Consolidated Appropriations Act, 2017,³ this reorganization will not become effective until the appropriate clearance has been obtained, and the Order has thereafter been published in the Federal Register.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to sections 1, 4, 5(b), 5(c), 201(b), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 155(b), 155(c), 201(b), 303(r), this Order IS ADOPTED.

9. IT IS FURTHER ORDERED that Part 0 of the Commission rules IS AMENDED as set forth in the Appendix.

² The FCC's financial and investigative data management functions will continue to be managed separately.

³ See Pub. L. 115-31, at Division E, Title VI, § 608, 131 Stat. 371 (2017); see also Continuing Appropriations Act, 2018, Pub. L. 115-56 at § 101 (a), 131 Stat. 1139 (2017); Further Additional Continuing Appropriations Act, H.R. 1370, at § 1001 (2017).

10. IT IS FURTHER ORDERED that this Order WILL BECOME EFFECTIVE when the Commission publishes this Order in the Federal Register in accordance with paragraph 7.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX**Final Rules**

The Federal Communications Commission amends 47 CFR Part 0 as follows:

PART 0 – COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Amend section 0.5 to revise subsection (a) to replace paragraph (4) to read as follows:

§ 0.5 General description of Commission organization and operations.

- (a) *Principal staff units.* The Commission is assisted in the performance of its responsibilities by its staff, which is divided into the following principal units:

* * * * *

(4) Office of Economics and Analytics.

* * * * *

3. Amend section 0.21 to read as follows:

OFFICE OF ECONOMICS AND ANALYTICS**§ 0.21 Functions of the Office.**

The Office of Economics and Analytics advises and makes recommendations to the Commission in the areas of economic and data analysis and data management policy. The Office reviews all Commission actions involving significant economic or data analysis and provides expertise, guidance, and assistance to the Bureaus and other Offices in applying the principles of economic and data analysis. The Office coordinates the Commission's research and development activities relating to economic and data analysis and data management policy. In addition, the Office serves, in close coordination with other relevant Bureaus and Offices, as a principal resource for policy and administrative staff of the Commission with regard to the design, implementation, and administration of auctions. The Office also establishes and implements Commission data management policies in conjunction with the relevant Bureaus and Offices and with the Office of Managing Director and Office of General Counsel. The Office of Economics and Analytics has the following duties and responsibilities:

- (a) Identifies and evaluates significant communications policy issues, based on the principles and methods of economics and data analysis.
- (b) Collaborates with and advises other Bureaus and Offices in the areas of economic and data analysis and with respect to the analysis of benefits, costs, and regulatory impacts of Commission policies, rules, and proposals.

- (c) Prepares a rigorous, economically-grounded cost-benefit analysis for every rulemaking deemed to have an annual effect on the economy of \$100 million or more.
- (d) Confirms that the Office of Economics and Analytics has reviewed each Commission rulemaking to ensure it is complete before release to the public.
- (e) Reviews and comments on all significant issues of economic and data analysis raised in connection with actions proposed to be taken by the Commission and advises the Commission regarding such issues.
- (f) Develops, recommends, and implements data management policies in conjunction with the Office of Managing Director, the Office of General Counsel, and relevant Bureaus and Offices, and collaborates with and advises other Bureaus and Offices with respect to data management and data analysis.
- (g) Manages the Commission's economic and data analysis research programs, recommends budget levels and priorities for these programs, and serves as central account manager for all contractual economic and data analysis research studies funded by the Commission.
- (h) Conducts economic, statistical, cost-benefit, and other data analysis of the impact of existing and proposed communications policies and operations, including cooperative studies with other staff units and consultant and contract efforts as appropriate.
- (i) Coordinates the Commission's evaluation of government (state and federal), academic, and industry-sponsored research affecting Commission policy.
- (j) Coordinates with other Bureaus and Offices in making recommendations to the Commission on communications policy issues that involve economic and data analysis, cost-benefit analysis; represents the Commission at appropriate discussions and conferences.
- (k) Develops and recommends procedures and plans for effective economic and data analysis, cost-benefit analysis, within the Commission.
- (l) Seeks to ensure that FCC policy encourages and promotes competitive markets by providing Bureaus and Offices with the necessary support to identify, evaluate, and resolve competition issues.
- (m) In conjunction with the relevant subject matter Bureau, serves as the Commission's principal policy and administrative staff resource with regard to the design, implementation, and administration of auctions and other types of competitive bidding.
- (n) Administers Commission spectrum auctions for wireless telecommunications in conjunction with the Wireless Telecommunications Bureau. Administers Commission spectrum auctions for broadcasting in conjunction with the Media Bureau. Works with the Wireless Telecommunications Bureau to develop recommendations to the Commission on policies, programs and rules concerning auctions of spectrum for wireless telecommunications. In conjunction with the Wireless Telecommunications Bureau, Media Bureau, Wireline Competition Bureau, and other relevant Bureaus and Offices, advises the Commission on policy relating to auctions and competitive bidding to achieve other Commission policy objectives. Administers procurement of auction-related services from outside contractors. Provides policy, administrative and technical assistance to other Bureaus and Offices on auction issues.
- (o) In conjunction with the Wireline Competition Bureau and Wireless Telecommunications Bureau,

provides policy and administrative staff resources for the use of market-based mechanisms, including competitive bidding, to distribute universal service support.

- (p) With respect to applicable data and reporting duties assigned to the Office, coordinates with the Public Safety and Homeland Security Bureau and other relevant Bureaus and Offices on all matters affecting public safety, homeland security, national security, emergency management, disaster management, and related issues.
- (q) With respect to applicable data and reporting duties assigned to the Office, and in coordination with the Wireline Competition Bureau and the Wireless Telecommunications Bureau, provides federal staff support for the Federal-State Joint Board on Universal Service and the Federal-State Joint Board on Jurisdictional Separations.
- (r) In coordination with other relevant Bureaus and Offices, provides economic, financial, and technical analyses of communications markets and provider performance.
- (s) In coordination with the Wireline Competition Bureau, provides technical support for *de novo* review of decisions of the Administrative Council for Terminal Attachments regarding technical criteria pursuant to §68.614.
- (t) Prepares briefings, position papers, and proposed Commission actions, as appropriate.
- (u) In coordination with other relevant Bureaus and Offices, develops and recommends responses to legislative, regulatory or judicial inquiries and proposals concerning or affecting matters within the purview of its functions.

4. Amend section 0.31 to revise subsection (g) to read as follows:

OFFICE OF ENGINEERING AND TECHNOLOGY

§ 0.31 Functions of the Office.

* * * * *

- (g) In cooperation with the relevant Bureaus and Offices, including the Office of General Counsel and the Office of Economics and Analytics, to advise the Commission, participate in and coordinate staff work with respect to general frequency allocation proceedings and other proceedings not within the jurisdiction of any single bureau, and render service and advice with respect to rule making matters and proceedings affecting more than one Bureau.

* * * * *

5. Amend section 0.91 to revise subsection (p) to read as follows:

WIRELINE COMPETITION BUREAU

§ 0.91 Functions of the Office.

* * * * *

- (p) In coordination with the Office of Economics and Analytics and Wireless Telecommunications

Bureau, serves as the Commission's principal policy and administrative staff resource with respect to the use of market-based mechanisms, including competitive bidding, to distribute universal service support. Develops, recommends and administers policies, programs, rules and procedures concerning the use of market-based mechanisms, including competitive bidding, to distribute universal service support.

6. Amend section 0.131 by revising subsections (a), (c), and (r) to read as follows:

WIRELESS TELECOMMUNICATIONS BUREAU

§ 0.131 Functions of the Bureau

* * * * *

- (a) Advises and makes recommendations to the Commission, or acts for the Commission under delegated authority, in all matters pertaining to the licensing and regulation of wireless telecommunications, including ancillary operations related to the provision or use of such services; any matters concerning wireless carriers that also affect wireline carriers in cooperation with the Wireline Competition Bureau; and, in cooperation with the Office of Economics and Analytics, all matters regarding spectrum auctions and, in cooperation with the Wireline Competition Bureau, USF mechanisms affecting wireless carriers. These activities include: policy development and coordination; conducting rulemaking and adjudicatory proceedings, including licensing and complaint proceedings for matters not within the responsibility of the Enforcement Bureau; acting on waivers of rules; acting on applications for service and facility authorizations; compliance and enforcement activities for matters not within the responsibility of the Enforcement Bureau; determining resource impacts of existing, planned or recommended Commission activities concerning wireless telecommunications, and developing and recommending resource deployment priorities.

* * * * *

- (c) Serves as a staff resource, in coordination with the Office of Economics and Analytics, with regard to the development and implementation of spectrum policy through spectrum auctions. Develops, recommends and administers policies, programs and rules concerning licensing of spectrum for wireless telecommunications through auctions. Advises the Commission on policy, engineering and technical matters relating to auctions of spectrum used for other purposes.

* * * * *

- (r) In coordination with the Wireline Competition Bureau and the Office of Economics and Analytics, develops and recommends policies, programs, rules and procedures concerning the use of market-based mechanisms, including competitive bidding, to distribute universal service support.

* * * * *

7. Amend section 0.271 by revising it to read as follows:

OFFICE OF ECONOMICS AND ANALYTICS

§ 0.271 Authority delegated.

- (a) Insofar as authority is not delegated to any other Bureau or Office, the Chief, Office of Economics and Analytics, is delegated authority to carry out the performance of functions and activities described in § 0.21, provided that the following matters shall be referred to the Commission en banc for disposition:
- (1) Notices of proposed rulemaking and of inquiry, final orders in rulemaking proceedings and inquiry proceedings and non-editorial orders making changes, and any reports arising from any of the foregoing;
 - (2) Any petition, pleading, request, or other matter presenting new or novel questions of fact, law, or policy that cannot be resolved under existing precedents and guidelines.
 - (3) Applications for review of actions taken to delegated authority, except that the Chief may dismiss any such application that does not comply with the filing requirements of §1.115 (d) and (f) of this chapter.
 - (4) Any applications that are in hearing status.
- (b) Insofar as authority is not delegated to any other Bureau or Office, and with respect only to matters that are not in hearing status, the Chief, Office of Economics and Analytics, is delegated authority to deny requests for extension of time or to extend the time within which comments may be filed in dockets over which the Office of Economics and Analytics has primary authority.
- (c) Insofar as authority is not delegated to any other Bureau or Office, the Chief, Office of Economics and Analytics, is authorized to dismiss or deny petitions for rulemaking that are repetitive or moot or that for other reasons plainly do not warrant consideration by the Commission.
- (d) The Chief, Office of Economics and Analytics, is authorized to dismiss or deny petitions for reconsideration to the extent permitted by §1.429(l) of this Chapter and, jointly with the Wireless Telecommunications Bureau, to the extent permitted by §1.106 of this Chapter.
- (e) The Chief, Office of Economics and Analytics, is delegated authority to make nonsubstantive, editorial revisions to the Commission's rules and regulations contained in part 1, subparts Q, V, W, and AA.

8. Add section 0.272 to read as follows:

§ 0.272 Record of actions taken.

The application and authorization files and other appropriate files of the Office of Economics and Analytics are designated as the Commission's official records of action of the Chief, Office of Economics and Analytics, pursuant to authority delegated to the Chief. The official records of action are maintained in the Reference Information Center in the Consumer and Governmental Affairs Bureau.

9. Add section 0.273 to read as follows:

§ 0.273 Actions taken under delegated authority.

In discharging the authority conferred by § 0.271, the Chief, Office of Economics and Analytics, shall establish working relationships with other bureaus and staff offices to assure the effective coordination of actions taken in the analysis of regulatory impacts, including assessments of paperwork burdens and initial and final regulatory flexibility assessments.

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Establishment of the Office of Economics and Analytics*, MD Docket No. 18-3.

When I announced plans to strengthen the role of economics at the FCC, I identified several problems I thought it was important to address. First, staff economists weren't guaranteed a seat at the policy-making table. Second, notwithstanding a rapidly converging marketplace, economists worked in policy silos. Third, cost-benefit analysis was too often ignored. And fourth, data was not particularly well collected or managed across the agency.

Today, we create the Office of Economics and Analytics (OEA). I look forward to this change, which is the first official step toward remedying each of these problems I mentioned. Notably, this reform has a bipartisan roster of support from people who care about incorporating economic analysis into policymaking. For example, the former head of President Obama's Office of Information and Regulatory Affairs (and my former professor), Cass Sunstein, has cited our plan to create the Office, calling it a "[p]romising idea from [the] FCC."¹ And his predecessor in the Bush Administration, Susan Dudley, has called the OEA's creation "an important first step . . . [toward] improving the basis on which the FCC makes its decisions."²

But the plan for achieving our goals goes beyond a mere organizational change. As explained in the Working Group report released three weeks ago, we also will adopt new operational practices to make sure economics does in fact play a larger role at the FCC. For instance, much like at the Federal Trade Commission, the OEA will provide Commissioners with a memorandum discussing economic issues implicated by all circulated items. And we'll now conduct a rigorous cost-benefit analysis for rulemakings estimated to have over \$100 million of economic impact. Behind the scenes, we'll also be working hard to integrate OEA staff into the day-to-day policy work of the Bureaus.

I also look forward to reigniting the culture of big-picture policy thinking that used to be so common among economists at the FCC. With most economists working closely together in the same office, I expect there will be unique opportunities for intellectual exchanges. In that environment, I want the Commission's economists to be able to ponder the next set of difficult issues and consider how economic insights might help address them. White papers represent one way they could do that. Traditionally, our economists have drafted white papers that have been significant drivers of major policy innovations, like the incentive auction and price cap regulation. Since 1980, FCC experts have submitted nearly 90 papers. Since 2012, that number is zero. Our aim is for the new Office to have a culture of inquiry in which long-range policy research is valued as much as bread-and-butter analysis of current proposals and orders.

Now, some argue that our commitment to conducting cost-benefit analysis is somehow an attack on the public interest standard set forth in the Communications Act. But thoughtful cost-benefit analysis has historically been a bipartisan tradition. Both the Clinton and Obama Administrations issued guidelines on this topic—guidelines which the Trump Administration's Executive Order 13771 directs agencies to follow.³ And in 2011, President Obama's Jobs Council called for separation of economists

¹ Cass Sunstein (@CassSunstein), TWITTER (Jan. 17, 2018, 2:22 AM), <https://twitter.com/CassSunstein/status/953573300210405376>.

² Susan E. Dudley, FCC Votes To Elevate Economic Analysis, *Forbes* (Jan. 26, 2018), <https://www.forbes.com/sites/susandudley/2018/01/26/fcc-votes-to-elevates-economic-analysis/>.

³ Exec. Order 13771, Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/>.

from program offices (as we are doing today) so that functions like cost-benefit analysis could be carried out with integrity.⁴

Additionally, some may say that if certain costs or benefits are hard to quantify, we shouldn't even try. But that view deeply misunderstands cost-benefit analysis. Far from rejecting the public interest standard, cost-benefit analysis allows us to intelligibly apply it. And the alternative to trying to quantify costs and benefits is far worse: It's essentially putting your finger in the wind and making it up as you go along. I can see the appeal of this approach for those who might see principles of economics, like provisions of law, as little more than an inconvenient speed bump that one would rather navigate around. But it is no basis for reasoned, evidence-based decision-making by an expert agency.

Getting to this point required extraordinary effort by our staff, because we truly started from scratch. Thank you to those who have worked so hard planning for this Office, particularly those on the Working Group: team leader Wayne Leighton, Mindy Ginsburg, Sasha Javid, Jay Schwarz, Royce Sherlock, Walt Strack, and Rodger Wook. The Working Group met frequently during 2017, conducting dozens of internal meetings with staff and nearly 50 meetings with outside parties to gather information about how to best design this Office.

I'd also like to thank Rosemary Harold from the Enforcement Bureau; David Krech and Jim Schlichting from the International Bureau; Brendan Holland, Andrew Wise, Mary Beth Murphy, and Michelle Carey from the Media Bureau; Ashley Boizelle, Linda Oliver, Bill Richardson, and Ryan Yates from the Office of General Counsel; Dan Daly, Marlene Dortch, Holly Finney Tom Green, Katura Jackson, Jason Lewis, MaryKay Mitchell, Lori Senft, Deena Shetler, Larry Shields, and Ellen Standiford from the Office of the Managing Director; Jerry Ellig, Amaryllis Flores, and Sean Sullivan from the Office of Strategic Planning and Policy Analysis; Lisa Fowlkes, David Furth, Debra Jordan, Lauren Kravetz, and Erika Olsen from the Public Safety and Homeland Security Bureau; Kris Monteith, Kirk Burgee, Joseph Calascione, Madeleine Findley, Trent Harkrader, Lisa Hone, Sue McNeil, Thomas Parisi, Eric Ralph, Steve Rosenberg, and D'wana Terry from the Wireline Competition Bureau; and Paul D'Ari, Aalok Mehta, Dana Shaffer, Don Stockdale, Suzanne Tetreault, and Margie Wiener from the Wireless Telecommunications Bureau. The benefits of your labors have far exceeded the costs.

⁴ President's Council on Jobs & Competitiveness, *Road Map to Renewal* 45 (2011), http://files.jobs-council.com/files/2012/01/Jobscouncil_2011YearEndReport1.pdf.

**DISSENTING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Establishment of the Office of Economics and Analytics*, MD Docket No. 18-3.

By establishing an Office of Economics and Analytics within the FCC, one might conclude that the Commission is laser-focused on integrating neutral economic analysis into the work of this agency. But what the current Administration is actually doing, is putting in place a mechanism to justify its own interests, while disregarding any analysis that runs counter to their views.

For example, where was the balanced, detailed economic analysis on the impact to edge providers, small businesses, and consumers when the FCC majority gutted net neutrality protections last month? What about the analysis the FCC majority relied on, when they deregulated the \$45 billion business data services market? And the recently adopted order authorizing use of the Next Gen TV standard? Where was the enhanced, deep analysis there? These orders represent three colossal market changing shifts, that were devoid of any cost-benefit analysis, weighing the costs to consumers – both in the loss of services and access costs – against their flimsily philosophical, touted benefits. And where, pray tell, in this three-page Order, is the detailed economic cost/benefit analysis that justifies reshuffling economists from their current positions within the various Bureaus and Offices to this new Office of Economics and Analytics?

Will the creation of an office dedicated to economics lead us to look more closely at the economic impact of our actions on consumers and small businesses? We are only left to guess due to... the lack of analysis in the draft. As the late Carlos Diaz-Alejandro, the most prominent Latin American economist of his generation, once said: “any [economics] graduate student can come up with any policy conclusion he desires, by building appropriate assumptions into his model.” My sense, is the majority will continue to mix and bake this deregulatory feeding frenzy, with the new Office serving as icing on the cake. All the while, disrupting existing staff relationships, pulling employees from their current bureaus where they have established subject matter specific expertise, and plunking them down in a newly created bureaucratic structure.

A long time has passed since my days in Dr. Ferri’s Economics class, but what I learned then is light years away from what is being applied now, when it comes to critical rulemakings, transactions, auctions, adjudications and other relevant matters. If past is prologue, the next 12 months of this Administration – even with new offices, reconstituted titles and reshuffled staff – will be just like the last. New design. Self-serving results. I dissent.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Establishing of the Office of Economics and Analytics*, MD Docket No. 18-3.

I am exceptionally pleased to support today's item, which adopts a key process reform idea I have long advocated: creating an office within the agency focused on economics and analytics. Since receiving the Chairman's draft item, I have worked with two goals in mind. First, guaranteeing that this office has enough weight and authority to ensure that it is successful from the outset. Second, ingrain it into the agency procedures to ensure that it outlasts the current Commission and remains effective for years to come.

In 2011, President Obama issued an Executive Order requiring all executive agencies to conduct a cost-benefit analysis before proposing or adopting regulations. But, the FCC, as an independent agency, was excluded from this mandate and promises made by a long-gone chairman to abide by the directive never materialized. Unfortunately, the practical implication of this failure was a litany of shoddy decisions devoid of economic analysis adopted under previous Commissions. For this reason, Chairman Pai proposed the creation of a new Office of Economics and Analytics ("OEA" or "Office") to better align our work with concrete data and facts.

When the draft item was circulated, I made several proposals, which Chairman Pai graciously accepted, to add additional responsibilities for the new Office. Paramount to my changes is requiring OEA to prepare and review a rigorous, economically-grounded cost-benefit analysis for all rulemakings deemed to have an annual effect on the economy of \$100 million or more.

But, ensuring that a cost-benefit analysis is conducted is only a partial victory. We must also ensure that such an analysis is credible and accurate. To achieve this, I advocated requiring OEA to follow the guidelines of OMB Circular A-4, which standardizes the way benefits and costs are measured and reported across executive agencies. However, due to the Commission resources this may involve, I understand that it may be more prudent to get the Office established before taking this important step. To that end, I look forward to continuing to work with the Chairman's office and Commission staff to get the Office up and running and well positioned for us to incorporate Circular A-4 into our rules down the road.

Another edit I proposed and the Chairman accepted was to add a requirement that, like the Office of General Counsel, OEA must confirm that it has reviewed each Commission rulemaking to ensure it is complete before it is released to the public. Doing so will ensure that its work is not ignored or sidestepped on the way to Commission consideration. As a practical effect, this can be accomplished through the Commission's eBARF signature process.

Together, these reforms will give the new Office greater involvement in the drafting, editing, and finalizing of the Commission's rules. OEA will play a role on the front end in the original drafting of all cost-benefit analysis and play a role on the back end by signing off on each item. I believe that this heightened level of participation will help ensure that OEA gets quickly integrated into the Commission's processes and that future Chairmen less interested in economics and analytics will be unable to turn a blind eye to the real burdens that many of our rules impose.

I am also confident that OEA will not create additional bureaucracy within the agency. When this item was originally circulated it was unclear to me what the budgetary impacts of such an office would be. In speaking with the Chairman's team, I have been assured that the FCC will not increase its FY19 budget request as a result of establishing this Office, and that new hires made pursuant to this Office, if any, will be offset by departures in other places. This will ensure that OEA will utilize our current resources at the Commission, rather than generate an enlarged Commission.

Overall, today is an important day. We are establishing an office that has the potential to take this Commission in a more solid and defensible direction. I support this item and applaud the Chairman and Commission staff for all the good work that went into both the final rules and the report.

**STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Establishment of the Office of Economics and Analytics*, MD Docket No. 18-3.

Today's *Order* might be the most important two and a half page decision the FCC has issued. Last year, FCC leadership announced a renewed commitment to the role that economic analysis should play in our decision-making. We are now codifying that commitment by establishing an Office of Economics and Analytics ("OEA") here at the Commission.

This decision follows the recommendations outlined by a staff working group, which first convened nine months ago. That group conducted at least 80 interviews with a broad range of stakeholders—both within and outside the FCC—and held meetings with every FCC bureau and office that has an economist. Their research found that FCC economists are not uniformly incorporated into our decision-making, do not have regular opportunities to offer their opinions on policy matters, and have limited opportunities to collaborate with their peers. These structural failings only make it more difficult for us to reach decisions that further the public interest.

Establishing OEA will help correct these shortcomings. It will ensure that the agency's first-rate economists have a seat at the table and a voice that will be heard. In fact, my vision is that OEA will play a role similar to the agency's Office of General Counsel ("OGC"). While the agency's operating bureaus may be driving towards particular policy outcomes, OGC functions as the legal conscience of the agency. As a separate office, it enjoys independence from the Commission's policy shops, the chance to develop a specialized body of expertise, and a clearly defined role in our decision-making process. There is no doubt that OGC's feedback ultimately improves and strengthens every agency decision. OEA will soon be empowered to play a similar role, serving as the FCC's economic gut check.

In addition to enhancing the role that economics will play, I also support the decision to move the Auctions Divisions from the Wireless Telecommunications Bureau ("WTB") into OEA. While it used to make sense to house the auctions team in WTB, given the important role that spectrum auctions play at the agency, we are now increasing our reliance on auctions outside the traditional context of spectrum, including in the upcoming CAF II proceeding. So it only make sense to incorporate this group of talented professionals into the new office.

The decision to bring even greater economic rigor to agency decision-making is one that draws on a long, bipartisan tradition. From President Clinton to President Trump, Administrations have consistently called for enhancing the role that economic analysis plays in regulatory proceedings. Indeed, former FCC Chairman Genachowski called on the FCC to increase its reliance on economics seven years ago. So I am pleased that we are moving forward with this idea today.

I want to thank Wayne Leighton, who served as the Team Leader of the agency's working group, as well as Mindy Ginsburg, Sasha Javid, Jay Schwarz, Royce Sherlock, Walt Strack, and Rodger Woock for their service and contribution to that body. This item has my full support.

**DISSENTING STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Establishment of the Office of Economics and Analytics*, MD Docket No. 18-3.

With this decision the FCC embarks on a big reorganization. Improving the day-to-day function of the agency is a laudable goal. I am hopeful that the new Office of Economics and Analytics will positively contribute to the work of the agency. But I am dismayed that my most basic questions about what this office will entail have not been answered.

How many people will the agency have in this office? Are we talking about 50 or 100 or 150? No one will answer. What does it mean to “generally shift the functions” of certain divisions? Does it mean disbanding some we have today? No one will answer. Will we be hiring new experts for this office or simply relying on moving around those we have? No one will answer.

This is striking. When I last voted on big institutional changes—the reorganization of our field offices—we had exacting numbers. We knew precisely what these changes would mean for the agency, its staff, and its workload.

I think it’s irresponsible to vote on a conceptual reorganization—which is what we have here—without frank information about how we will populate this effort. I think this lack of transparency is problematic—for the staff of this agency and the work it does. Having been refused this basic information, I dissent.

That does not mean I lack thoughts for what values should guide this office as this agency moves ahead. In fact, I have three.

First, economic analysis plays an important role in all of our work. But we need to be mindful that we have legal duties that can be at odds with simple cost-benefit analysis. The charge to ensure universal service in our most rural communities—where populations are sparse and the cost of infrastructure is high—do not easily fit through this prism. Likewise, we have duties to ensure broader access to modern communications through the Americans with Disabilities Act and the 21st Century Communications and Video Accessibility Act. How we navigate these efforts in light of this office deserves continued attention and vigilance.

Second, we need to put a premium on peer review. Rigorous peer review of scientific and economic work has been encouraged and even required since President George W. Bush was in the White House. The FCC should not be relying on studies that do not feature peer review. We need to commit to this course right here and right now because it is unacceptable that so much of the economic work of this agency during the past year was not subject to any standard of peer review.

Third, we need more transparency. We need to be honest about how much of the economic data presented to the FCC is advocacy. We want to avoid the risk of relying on numbers masquerading as fact when they simply add up to an effort to champion a desired outcome. There’s a simple remedy. Anyone who appears before our oversight committee in the United States House of Representatives must file a Truth in Testimony disclosure. That disclosure asks something simple—who are you representing? We should ask the same of those who put forward economic studies that are filed in our proceedings.