



January 28, 2020

*Via Electronic Mail*

Robert E. Feldman  
Executive Secretary  
Attention: Comments  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street NW  
Washington, DC 20429

Re: Comment Letter on Request for Information on a Framework for Analyzing the Effects of FDIC Regulatory Actions (RIN 3064-ZA13)

Ladies and Gentlemen:

The Bank Policy Institute (“BPI”)<sup>1</sup> appreciates the opportunity to submit comments on the Request for Information (“RFI”) by the Federal Deposit Insurance Corporation (“FDIC”) on its framework for analyzing the effects of its regulatory actions,<sup>2</sup> including whether and how to subject its regulatory actions to cost-benefit analysis (“CBA”) and cost-effectiveness analysis (“CEA”).<sup>3</sup> The RFI is a welcome step in the right direction, and BPI applauds the FDIC’s efforts to consider whether and how its regulatory actions should be subject to CBA and CEA. CBA and CEA have been required for executive agencies since President Reagan issued an Executive Order stressing their importance,<sup>4</sup> and have been reaffirmed by subsequent presidents.<sup>5</sup> If conducted properly, they almost always result in more efficient, transparent and publicly accountable regulation that is just as effective as alternatives. BPI is writing to provide three recommendations regarding the use

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<sup>1</sup> BPI is a nonpartisan public policy, research and advocacy group, representing the nation’s leading banks. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost two million Americans, make nearly half of the nation’s small business loans, and are an engine for financial innovation and economic growth.

<sup>2</sup> Federal Deposit Insurance Corporation, *Request for Information on a Framework for Analyzing the Effects of FDIC Regulatory Actions*, 84 Fed. Reg. 65808 (Nov. 29, 2019).

<sup>3</sup> *Id.* at 65809 (providing an overview of the economic analysis the FDIC is considering including in its rulemaking actions). For definitions of CBA and CEA, see Office of Management and Budget, Circular A-4, Regulatory Analysis, at 6–7 (Sept. 17, 2003), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

<sup>4</sup> See Executive Order 12291, Federal Regulation, 46 Fed. Reg. 13193 (Feb. 19, 1981).

<sup>5</sup> See Executive Order 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011) (President Obama); Executive Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993) (President Clinton).

of CBA and CEA, two of which apply to the FDIC and the last of which applies to the other federal banking agencies.

First, the FDIC should formalize its commitment to CBA and CEA by proposing a policy statement governing how it will subject its regulatory actions to CBA and CEA.

Second, the proposed policy statement should include a clear and definite public commitment to voluntarily comply with Executive Order 12866 (“**EO 12866**”)<sup>6</sup> and Office of Management and Budget (“**OMB**”) Circular A-4 (“**OMB Circular A-4**”)<sup>7</sup> as if the FDIC were an executive agency. Among other things, the proposed policy statement should seek to establish a dedicated unit within the FDIC with sufficient expertise, experience, stature and resources to conduct CBA and CEA properly. It should also voluntarily seek input from or review by the Office of Information and Regulatory Affairs (“**OIRA**”) of the quality of the dedicated unit’s CBA and CEA. Voluntary compliance with EO 12866 and OMB Circular A-4 pursuant to such a policy statement is entirely consistent with the FDIC’s status and respect as “an independent regulatory agency [that] is not *required* to follow OMB’s guidance with regard to regulatory analysis.”<sup>8</sup> Indeed, such a commitment to a process that will enhance the efficiency, transparency and public accountability of the FDIC’s regulatory actions should reinforce the FDIC’s reputation for independence, rather than undermine it.

Third, the Board of Governors of the Federal Reserve System (“**Federal Reserve**”) and the Office of the Comptroller of the Currency (“**OCC**”) should propose similar policy statements that include clear and definite public commitments to subject their regulatory actions to EO 12866 and OMB Circular A-4 as if they were executive agencies.

**I. The FDIC should formalize its commitment to CBA and CEA by proposing a policy statement governing how it will subject its regulatory actions to CBA and CEA.**

In the RFI, the FDIC states that it is “considering a more structured approach to regulatory analysis and one that incorporates a number of analytical practices identified in standard references,”<sup>9</sup> including CBA and CEA.<sup>10</sup> BPI believes that the FDIC should not only consider such an approach, but also adopt a formal policy statement that outlines how it will subject its regulatory actions to CBA and CEA. The form of FDIC action matters because it will determine whether the

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<sup>6</sup> Executive Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993).

<sup>7</sup> Office of Management and Budget, Circular A-4, Regulatory Analysis (Sept. 17, 2003), *available at* <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

<sup>8</sup> 84 Fed. Reg. at 65809 (emphasis added).

<sup>9</sup> *Id.* at 65808.

<sup>10</sup> *Id.* at 65610–11.

public can have confidence that the FDIC will subject its regulatory actions to CBA and CEA in a consistent and rigorous manner.

In the RFI, the FDIC cites to an existing policy statement<sup>11</sup> to demonstrate its “longstanding commitment to improving the quality of its regulations and policies, to minimizing regulatory burdens on the public and the banking industry, and generally to ensuring that its regulations and policies achieve legislative goals efficiently and effectively.”<sup>12</sup> The FDIC requests input on how to strengthen its regulatory analysis, without stating precisely what it intends to do with that input.<sup>13</sup>

The FDIC should go beyond requesting information to formalizing its commitment to CBA and CEA in a proposed policy statement. This could be accomplished either by revising the FDIC’s existing policy statement cited in the RFI or by issuing a new policy statement.

**II. The proposed policy statement should include a clear and definite public commitment to voluntarily comply with EO 12866 and OMB Circular A-4 as if the FDIC were an executive agency.**

The RFI makes reference to and draws inspiration from OMB Circular A-4. It does not, however, include any public commitment by the FDIC to comply with OMB Circular A-4 or EO 12866 as if it were an executive agency. Instead, the RFI emphasizes that “the FDIC is an independent regulatory agency [that] is not required to follow OMB’s guidance with regard to regulatory analysis.”<sup>14</sup> While the RFI states that the FDIC “views OMB Circular A-4 . . . as a useful set of general principles,” it stresses that OMB Circular A-4 “draws its examples generally from health, safety and environmental regulation, and does not explicitly address banking or financial regulation.”<sup>15</sup> It therefore emphasizes that “[p]rofessional judgment is needed to apply A-4’s principles to the analysis of bank regulation.”<sup>16</sup>

These statements suggest that the principles in EO 12866 and OMB Circular A-4 are less general than they really are. In fact, the principles in EO 12866 and OMB Circular A-4 can be usefully applied to both financial and nonfinancial regulation.<sup>17</sup> They reflect best practices as

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<sup>11</sup> Federal Deposit Insurance Corporation, Statement of Policy on the Development and Review of Regulations, 63 Fed. Reg. 25157 (May 7, 1998), revised 78 Fed. Reg. 22771 (Apr. 17, 2013).

<sup>12</sup> 84 Fed. Reg. at 65808.

<sup>13</sup> *See id.*

<sup>14</sup> *Id.* at 65809.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See, e.g.,* Eric A. Posner & E. Glen Weyl, *Benefit-Cost Paradigms in Financial Regulation*, 43 J. Legal Stud. S1 (2014); Eric A. Posner & E. Glen Weyl, *Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms*, 124 Yale L. J. F. 246 (2015) (responding primarily to John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 Yale L. J. 882 (2015)).

developed and applied to a wide variety of regulatory agencies over a long period of time. OMB Circular A-4 also contemplates the use of professional judgment when performing a CBA or CEA of financial or nonfinancial regulation, especially when certain costs or benefits are difficult to quantify or when legislation requires an agency to consider distributional effects, as well as efficiency effects.<sup>18</sup>

Although the RFI provides information on the types of effects the FDIC might consider in its regulatory analysis,<sup>19</sup> OMB Circular A-4 is much more specific than the RFI in discussing how costs and benefits should be measured and computed. In particular, OMB Circular A-4 contains the following features that either are not addressed in or differ from the more limited framework discussed in the RFI:

- While both the RFI<sup>20</sup> and OMB Circular A-4 discuss how an agency should identify the need for a regulatory action, OMB Circular A-4 provides much more detailed guidance to help agencies identify the types of reasons that would justify a regulatory action.<sup>21</sup> Possible reasons discussed in OMB Circular A-4 include externalities, market power, information asymmetries and other social purposes.
- The RFI mentions a need to discuss “reasonable and possible alternatives” to a proposed course of action.<sup>22</sup> OMB Circular A-4 goes into additional detail in this regard, stating that agencies should consider alternatives to federal regulation (as opposed to alternative federal regulations, unless required by statutory mandate) and consider alternative regulatory approaches along a number of specific parameters.<sup>23</sup>
- OMB Circular A-4 expressly states that agencies’ analyses should be transparent, reproducible and posted on the internet along with supporting documents and compliance with OMB data quality guidelines.<sup>24</sup>

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<sup>18</sup> See Circular A-4, at 2–3, 10–11, 14.

<sup>19</sup> These include the effects of a proposed rule on (a) bank safety and soundness and public confidence, (b) the treatment of bank customers or financially underserved communities, (c) the potential for illicit use of the financial system, (d) the FDIC’s statutory resolution functions, (e) the FDIC’s Deposit Insurance Fund, (f) the availability of bank credit and other financial services, (g) compliance costs or profitability effects on banks or the public, (h) U.S. economic performance, (i) distributional effects and (j) other identified significant issues. 84 Fed. Reg. at 65811.

<sup>20</sup> See *id.* at 65809.

<sup>21</sup> See Circular A-4, at 3–5.

<sup>22</sup> 84 Fed. Reg. at 65810.

<sup>23</sup> See Circular A-4, at 6–9. These parameters include choices offered in a statute, compliance date, enforcement method, degree of stringency, tailoring by firm size, tailoring by geography, outcome-based versus means-based regulation, market-oriented regulation versus direct control and information disclosure versus substantive regulation.

<sup>24</sup> See *id.* at 17.

- OMB Circular A-4 contains an extensive guide about various methods that might be used to estimate costs and benefits that are applicable to both financial and nonfinancial regulation.<sup>25</sup> This includes discussions of opportunity costs, revealed preference methods, stated preference methods, benefit-transfer methods, ancillary benefits and countervailing risks and methods for treating non-monetized benefits and costs.
- OMB Circular A-4 provides guidance on applying discount rates as part of CBA and CEA, which is necessary to properly account for benefits and costs that accrue over time.<sup>26</sup>
- OMB Circular A-4 provides guidance on the treatment of uncertainty, including quantifying uncertainty and transparently presenting uncertain CBA and CEA estimates in public regulatory analysis.<sup>27</sup>
- Finally, OMB Circular A-4 provides guidance on other key CBA and CEA considerations, including accounting for lower-order benefits and costs, incorporating the impact of technological change and distinguishing between real costs and transfer payments, the latter of which should be analyzed as a distributional effect.<sup>28</sup>

Because EO 12866 and OMB Circular A-4 reflect best practices in CBA and CEA as developed and applied to a wide variety of regulatory agencies over a long period of time, and because the principles in EO 12866 and OMB Circular A-4 can usefully be applied to both financial and nonfinancial regulations, the proposed policy statement should contain a clear and definite public commitment by the FDIC to comply with EO 12866 and OMB Circular A-4 as if it were an executive agency.

In addition to including such a commitment, the proposed policy statement should also include a proposal to establish a dedicated unit within the FDIC with sufficient expertise and resources to conduct CBA and CEA. That unit should include economists who are qualified to quantify the costs and benefits of various regulatory actions and alternatives, to the extent such costs and benefits can be quantified. It should also have sufficient expertise, experience, stature and resources to conduct regulatory analysis, including CBA and CEA, in a prompt, efficient, transparent and reliable manner.

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<sup>25</sup> *See id.* at 18–27.

<sup>26</sup> *See id.* at 31–37.

<sup>27</sup> *See id.* at 38–42.

<sup>28</sup> *See id.* at 37–38.

Finally, the policy statement should include a public commitment to voluntarily seek input from or review by OIRA of the quality of the dedicated unit's CBA and CEA. History has shown that the quality of CBA and CEA is enhanced when the agencies performing that analysis are subject to oversight and review by a central body that is qualified and committed to evaluate the quality of CBA and CEA, and that has the ability to conduct a horizontal review of the CBA and CEA conducted by a substantial number of agencies.<sup>29</sup> OIRA has the relevant expertise and experience to perform that type of centralized review. Although the FDIC may not be *required* to subject its CBA or CEA to OIRA review, the quality of the FDIC's CBA and CEA is likely to be higher if it voluntarily seeks input from or review by OIRA.

Voluntary compliance with EO 12866 and OMB Circular A-4 pursuant to a policy statement would not undermine the FDIC's independence. On the contrary, voluntary compliance with those documents and voluntarily seeking input from or review by OIRA of the FDIC's CBA or CEA should reinforce the FDIC's reputation for efficiency, transparency and public accountability, which in turn should reinforce its independence.

**III. The Federal Reserve and the OCC should similarly adopt policy statements that include clear and definite public commitments to subject their regulatory actions to EO 12866 and OMB Circular A-4 as if they were executive agencies.**

While we applaud the FDIC's initiative in releasing the RFI, the Federal Reserve and the OCC should also propose policy statements that include clear and definite public commitments to subject their regulatory actions to EO 12866 and OMB Circular A-4 as if they were executive agencies. They too should establish dedicated units to perform CBA and CEA of their regulatory actions. They too should propose to seek input from or review by OIRA of their CBA and CEA to ensure such analyses are carried out in a sound and rigorous manner.

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<sup>29</sup> See, e.g., Jonathan D. Guynn, *The Political Economy of Financial Rulemaking After Business Roundtable*, 99 Va. L. Rev. 641, 650–52, 679–80 (2013).

BPI appreciates the opportunity to submit comments on the FDIC's RFI on its framework for analyzing the effects of its regulatory actions. If you have any questions, please contact the undersigned by phone at 202-589-2409 or by email at [john.court@bpi.com](mailto:john.court@bpi.com).

Respectfully submitted,

A handwritten signature in black ink that reads "John Court". The signature is written in a cursive, slightly stylized font.

John Court  
Senior Vice President & General  
Counsel  
Bank Policy Institute

cc: Randall Guynn, Partner, Davis Polk  
Eric Lewin, Associate, Davis Polk