



Cost Benefit Analysis Process for Rulemaking

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Evaluation Report Program Audits and Evaluations





Executive Summary

Cost Benefit Analysis Process for Rulemaking

Through the Banking Act of 1933, Congress provided the FDIC with the authority to promulgate rules to fulfill the goals and objectives of the Agency. The FDIC is required to abide by the requirements of the Administrative Procedure Act (APA), which governs Federal rulemaking and outlines processes that Federal agencies must follow in issuing regulations. The APA defines a rule as the whole or part of an agency statement “designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” The APA defines rulemaking as the “agency process for formulating, amending, or repealing a rule.”

To assist agencies in issuing rules, the Office of Management and Budget (OMB) issued OMB Circular A-4, *Regulatory Analysis* (September 2003), which guides agencies in employing regulatory analysis, such as cost benefit analysis, that anticipates and evaluates the likely consequences of rules. As an independent regulatory agency, the FDIC is not required to follow OMB Circular A-4. The FDIC, however, stated that “its policy is broadly consistent with the principles in OMB Circular A-4.”

A cost benefit analysis is performed to identify the key effects—both positive and negative—of various alternatives for a rule. Cost benefit analysis informs the agency and the public whether the benefits of a rule are likely to justify the costs, or determines which of various possible alternatives would be the most cost effective.

If the FDIC has weak rulemaking or a weak process for reviewing existing rules (retrospective review process), its rules may:

- Be overly burdensome, outdated, or inappropriately tailored;
- Create market inefficiencies for financial institutions and consumers;
- Fail to achieve agency goals and objectives; or
- Cause unintended outcomes.

Our evaluation objective was to determine if the FDIC’s cost benefit analysis process for rules was consistent with best practices.

Results

We found that the FDIC's cost benefit analysis process was not consistent with widely recognized best practices identified by the OIG. Specifically:

- The FDIC had not established and documented a process to determine when and how to perform cost benefit analyses. As a result, the FDIC's process (1) did not ensure the appropriate depth of analyses was performed; (2) resulted in inconsistent analyses; and (3) limited public awareness and transparency. Without thorough cost benefit analyses, the FDIC could implement or continue to enforce poorly conceived or overly burdensome rules.
- The FDIC did not leverage the expertise of its Regulatory Analysis Section economists during initial rule development. As a result, the FDIC may have missed opportunities for the economists to enhance the FDIC's initial policy determinations by (1) providing insight into various policy options based on available data, tools, and studies; (2) influencing better rule design; and (3) ensuring rules were appropriately tailored. Early involvement of economists could yield greater confidence in the FDIC's rulemaking process by producing rules that are structured to impose the least burden on society, consistent with obtaining the regulatory objectives.
- The FDIC did not require the Chief Economist to review and concur on the cost benefit analyses performed, which is an important quality control. Without Chief Economist concurrence, cost benefit analyses may not be sound, logical, or consistent with agency guidance, and could ultimately result in inferior rulemaking. As a result, rules may not achieve their intended objectives or may result in cost inefficiencies or rules needing later revisions.
- The FDIC was not always transparent in its disclosure of cost benefit analyses to the public. In particular, the FDIC was not transparent in publishing (1) the reason(s) why a cost benefit analysis was or was not performed; (2) the reason(s) for the depth of analysis performed; (3) the analytical scope and methodology used; and (4) the analysis performed. Without transparent cost benefit analyses, stakeholders such as financial institutions, the public, and Congress may not understand the FDIC's analyses and conclusions, which may limit stakeholders' ability to meaningfully participate in the rulemaking process. In particular, the final rules may not reflect the experiences and insights of the public, be

appropriately crafted, or receive public acceptance. The rules may also need revision, requiring additional and unnecessary investments of FDIC resources.

- The FDIC did not perform cost benefit analyses after final rule issuance. Without performing cost benefit analyses of existing rules or establishing a formal process to proactively review each final rule, the FDIC may not identify duplicative, outdated, or overly burdensome rules in a timely manner. In addition, the FDIC may not ensure that its rules are effective and achieve their intended objectives/outcomes.

Recommendations

We made five recommendations to the FDIC's Director, Division of Insurance and Research, to improve the FDIC's cost benefit analysis process. Management concurred with four recommendations and planned to complete all corrective actions by June 30, 2021. Management partially concurred with one recommendation, and we will seek resolution during the evaluation follow-up process.

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February 4, 2020

Subject | Cost Benefit Analysis Process for Rulemaking

When issuing rules, the FDIC is required to abide by the requirements of the Administrative Procedure Act (APA), which governs Federal rulemaking.¹ The APA was enacted in 1946 to standardize the administrative rulemaking process and outlines processes that Federal agencies must follow in issuing regulations. The APA defines a rule as the whole or part of an agency statement “designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” The APA defines rulemaking as the “agency process for formulating, amending, or repealing a rule.”

To assist agencies in issuing rules, the Office of Management and Budget (OMB)² issued OMB Circular A-4, *Regulatory Analysis* (September 2003) (OMB Circular A-4), which guides agencies in employing regulatory analysis that anticipates and evaluates the likely consequences of rules. As an independent regulatory agency, the FDIC is not required to follow OMB Circular A-4. The FDIC, however, stated that “its policy is broadly consistent with the principles in OMB Circular A-4.”

A *cost benefit analysis* is performed to identify the key effects—both positive and negative—of various alternatives for a rule. Cost benefit analysis informs the agency and the public whether the benefits of a rule are likely to justify the costs, or determines which of various possible alternatives would be the most cost effective. OMB Circular A-4 states that cost benefit analysis provides decision makers with clarity on the “alternative” that provides the “largest” benefit to society.

If financial institution regulatory agencies, like the FDIC, have weak rulemaking or weak retrospective review processes,³ their rules may:

- Be (upon issuance) or become (over time) overly burdensome, outdated, or inappropriately tailored;⁴

¹ 5 U.S.C. §§ 551-559.

² The **OMB** is a Federal agency within the Executive Office of the President of the U.S. that evaluates, formulates, and coordinates management procedures and program objectives within and among Executive Branch departments and agencies. The OMB measures the quality of agency programs, policies, and procedures to see if they comply with the President’s policies and coordinates inter-agency policy initiatives.

³ For this evaluation, a **retrospective review** is defined as a “look back” at agency rules that were promulgated. In the context of an agency’s existing rules, a retrospective review is conducted to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.

⁴ For this evaluation, **tailored regulations** are defined as rules structured 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.

- Create market inefficiencies with financial institutions or consumers or both bearing unreasonable financial cost; and
- Fail to achieve agency goals and objectives or cause unintended outcomes.

Our objective was to determine if the FDIC's cost benefit analysis process for rules was consistent with best practices.

We reviewed the FDIC's cost benefit analysis process for 40 rules finalized and published in the Federal Register⁵ from January 1, 2016 through December 31, 2018. We also reviewed the FDIC's retrospective review process for existing, long-standing final rules. Our methodology relied on identifying best practices from various reputable sources, including Federal agencies and Academia, and comparing the FDIC's rulemaking process with these best practices. We conducted this evaluation in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation*. Appendix 1 of this report includes additional details on our objective, scope, and methodology. Additional appendices include acronyms and abbreviations, the Agency's comments on a draft of this report, and a summary of the Agency's corrective actions.

BACKGROUND

Through the Banking Act of 1933, Congress provided the FDIC with the authority to promulgate rules to fulfill the goals and objectives of the agency. Congress may also require rules or amendments through other acts. Congress further granted the FDIC the power to "prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this Act or any other law which it has the responsibility of administering or enforcing."⁶ Agencies, like the FDIC, use their technical expertise to develop rules to achieve agency goals and objectives, and implement congressionally enacted laws.

The APA outlines processes that Federal agencies must follow in issuing regulations, such as the "notice-and-comment" rulemaking process. The "notice-and-comment" rulemaking process typically requires agencies to provide public notice of a rule in

⁵ The Federal Register is a daily publication of the U.S. Federal government that issues public notices and proposed and final administrative regulations of Federal agencies.

⁶ 12 U.S.C. § 1819(a).

the Federal Register, followed by a period of time for public comment before enactment.⁷

Executive Orders and Best Practices

Over the years, Presidents have established their own rulemaking requirements for Federal agencies through Executive Orders. These orders remain in effect until rescinded by a subsequent order or unless otherwise specified in the order. Some Executive Orders encourage Federal agencies to consider the cost and benefits of proposed rules during the rulemaking process and during retrospective reviews of existing rules. For example, Executive Order No. 12866, *Regulatory Planning and Review* (September 1993) (Executive Order 12866), in deciding “whether and how” to regulate, advised Federal agencies that they should assess all costs and benefits of available regulatory alternatives, and to choose the regulatory approaches that maximize net benefits, to the extent permitted by law and unless a statute required another regulatory approach. This order also advised agencies that they should examine both new and existing rules. Similarly, Executive Order No. 13563, *Improving Regulation and Regulatory Review* (January 2011) (Executive Order 13563), directed Federal agencies to consider how best to promote retrospective analyses in order to facilitate periodic review of existing regulations. However, the FDIC, as an independent agency, is not required to follow these orders.⁸

Executive Order No. 13579, *Regulation and Independent Regulatory Agencies* (July 2011) (Executive Order 13579) is specific to independent regulatory agencies, such as the FDIC, and it provides that to “the extent permitted by law, such [regulatory] decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).” Executive Order 13579 further provides the following:

To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data and evaluations, should be released online whenever possible.

⁷ Federal agencies may promulgate rules through various methods. However, the APA’s notice-and-comment rulemaking procedures represent the most commonly followed process for legislative rules. Legislative rules that have been promulgated through the notice-and-comment process have the force and effect of law. Non-legislative rules, such as interpretive or procedural rules are generally exempt from the APA’s notice-and-comment requirements. For procedural rules, if the proposed rule will have a substantive impact, then the agency must promulgate the rule through notice-and-comment rulemaking.

⁸ An **independent regulatory agency** is a freestanding government organization that is not part of any other Federal department or other agency. Independent regulatory agencies are listed at 44 U.S.C. § 3502(5).

According to the U.S. Government Accountability Office (GAO),⁹ best management practices “refer to the processes, practices, and systems identified in public and private organizations that performed exceptionally well and are widely recognized as improving an organization’s performance and efficiency in specific areas. Successfully identifying and applying best practices can reduce business expenses and improve organizational efficiency.”¹⁰

For our evaluation, we identified best practices through the review of Executive Orders, OMB guidance, GAO reports, and the Administrative Conference of the United States (ACUS)¹¹ recommendations; and interviews with officials at other Federal agencies and members of Academia. Our interviews at other Federal agencies included the National Credit Union Administration (NCUA), the Securities and Exchange Commission (SEC), the Consumer Financial Protection Bureau (CFPB), the Office of the Comptroller of the Currency (OCC), the Office of Management and Budget – Office of Information and Regulatory Affairs (OMB-OIRA), the Financial Industry Regulatory Authority (FINRA), the Federal Communications Commission (FCC), the Federal Trade Commission (FTC), and the Commodity Futures Trading Commission (CFTC). Our interviews with Academia included the Professors of Finance at the University of Maryland, the University of Florida, and Lehigh University; Professor of Law at Vanderbilt University; Research Professor at The George Washington University Regulatory Studies Center; and Assistant Professor of Finance formerly at Michigan State University. During our interviews, Federal officials and members of Academia identified or confirmed those best practices that they deemed to work well and that were recognized as improving an organization’s rulemaking performance and retrospective reviews. Table 1 summarizes these best practices.

⁹ The **GAO** is a legislative branch government agency that provides auditing, evaluation, and investigative services for the U.S. Congress. It is an independent, nonpartisan congressional audit agency of the U.S. Federal government.

¹⁰ GAO Report, *Best Practices Methodology: A New Approach for Improving Government Operations* (GAO/NSIAD-95-154) (May 1995).

¹¹ The **ACUS** is an independent executive branch Federal agency charged with convening expert representatives from the public and private sector to investigate, deliberate, and recommend improvements to administrative processes and procedures. The ACUS’s initiatives promote efficiency, participation, and fairness in the promulgation of Federal regulations and in the administration of Federal programs. The ACUS engages consultants to study administrative processes or procedures that may need improvement, and uses consultants or in-house staff to prepare comprehensive research reports proposing recommendations – from which the ACUS considers and adopts final recommendations. In 2013, ACUS adopted recommendations relating to the use of economic analysis by independent regulatory agencies. See Administrative Conference Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies* (June 2013). Prior to adoption of these recommendations, ACUS sponsored a report that provides additional information about the benefits of independent regulatory agencies performing cost benefit analysis when issuing regulations. See ACUS–Sponsored Report, *Economic Analysis and Independent Regulatory Agencies* (April 2013).

Cost Benefit Analysis Process for Rulemaking

Table 1: Commonly Acknowledged Best Practices and Their Sources

Best Practices	Executive Order/OMB	GAO	ACUS	Select Federal Agencies	Academics
Determine when and how to perform a cost benefit analysis.	✓	✓	✓	✓	✓
Involve the economist in a rule's initial development.	—	—	✓	✓	✓
Have the Chief Economist review the cost benefit analysis.	—	—	—	✓	✓
Provide full transparency of the cost benefit analysis.	✓	✓	✓	✓	✓
Conduct retrospective cost benefit analysis.	✓	✓	—	—	✓

Source: OIG analysis of Executive Orders, OMB guidance, GAO reports, ACUS-sponsored report and recommendations, and interview statements from Academia and Federal agencies.

Legend: ✓ The source identified this item. | — The source did not mention this item.

Cost Benefit Analysis

A cost benefit analysis systematically examines, estimates, and compares the potential economic costs and benefits of a proposed rule. A cost benefit analysis determines the expected or likely effects of a rule and shows whether or not the rule is beneficial. According to OMB Circular A-4, a “good regulatory analysis should include the following three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs – quantitative and qualitative – of the proposed action and the main alternatives identified by the analysis.” Although the FDIC is not required to follow OMB Circular A-4, the FDIC stated that “its policy is broadly consistent with the principles in OMB Circular A-4.”

In performing cost benefit analyses, economists use theory, modeling, and statistical analysis to estimate the likely outcomes (costs and benefits) of a proposed rule. Analysis is performed using a quantitative and/or qualitative approach. The likely outcomes of the rule are determined for alternative approaches such as if no regulation were implemented or if a different regulation were implemented. Next, the positive outcomes (benefits) are weighed against the negative outcomes (costs) of a regulatory action to determine whether and to what degree a regulation is beneficial to society. The outcomes (costs and benefits) of FDIC rules to financial institutions,

consumers, businesses, the FDIC, and the banking industry must be considered during the cost benefit analysis of rules.

Retrospective Cost Benefit Analysis

Independent regulatory agencies are encouraged to conduct periodic retrospective reviews of their rules, and of the costs and benefits of regulations.¹² In doing so, they can determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. Retrospective cost benefit analysis occurs after a rule's implementation. While not part of the rulemaking process, retrospective analyses can be used to assess for outdated, unnecessary, or unduly burdensome rules or requirements imposed on financial institutions, and identify regulations that should be amended or repealed. In addition, retrospective analysis complements the analysis that agencies conduct as part of their initial rulemaking. It can provide insights on how the existing rule is working, and the strengths and weaknesses of the initial rulemaking process. This feedback can be used to enhance an agency's future rulemaking capabilities.

Retrospective cost benefit analyses estimate the actual costs and benefits (both quantitative and qualitative) following some period of time after implementation of a rule. This analysis shows the outcomes under the regulation.

Key Challenges and Constraints in Performing Cost Benefit Analyses

Federal agencies face challenges and constraints that may limit their ability to perform cost benefit analyses, including limited data availability, limited statutory discretion, insufficient analytical models, use of sensitive information (such as proprietary information,¹³ personally identifiable information,¹⁴ and sensitive customer information¹⁵), and analytical discretion and negotiation. Refer to Appendix 2 for a further description of these challenges and constraints.

¹² Executive Order 13579; OMB Memorandum, *Executive Order 13579, "Regulation and Independent Regulatory Agencies,"* M-11-28 (July 2011) (OMB Memorandum M-11-28) (memorandum providing guidance to the Heads of Independent Regulatory Agencies relating to Executive Order 13579).

¹³ **Proprietary information**, also known as a trade secret, is information a company wishes to keep confidential. Proprietary information can include processes and methods used in operations.

¹⁴ **Personally identifiable information** is any information about an individual that can be used to distinguish or trace that individual's identity, or any other personal information which is linked or linkable to that individual.

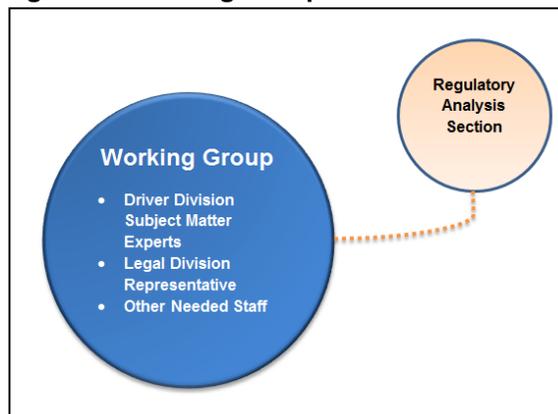
¹⁵ **Sensitive customer information** is a customer's name, address, or telephone number, in conjunction with the customer's Social Security Number, driver's license number, account number, credit or debit card number, or a personal identification number or password that would permit access to the customer's account. Sensitive customer information also includes any combination of components of customer information that would allow someone to log onto or access the customer's account, such as user name or password or password and account number.

The FDIC's Rulemaking Participants

The FDIC's rulemaking process involves a number of component Divisions within the Agency. The Division most affected by the proposed rule leads the rulemaking process and, for purposes of this report, is referred to as the Driver Division. The FDIC Driver Divisions include:

- Division of Risk Management Supervision (RMS);
- Division of Depositor and Consumer Protection (DCP);
- Division of Complex Institution Supervision & Resolution (CISR);¹⁶
- Division of Resolutions and Receiverships (DRR);
- Legal Division; and
- Division of Insurance and Research (DIR).

Figure 1: Working Group Formation



Source: OIG analysis of FDIC interview statements.

To facilitate the rulemaking process, the Driver Division establishes a Working Group as shown in Figure 1. The Working Group consists of subject matter experts from the Driver Division, a representative from the Legal Division, and other needed staff.¹⁷ The Working Group consults with the DIR's Regulatory Analysis Section (RAS) (discussed later) in performing the proposed rule's cost benefit analysis. Appendix 3 provides a description of the organizations involved in the rulemaking process.

The FDIC's Rulemaking Process

According to the FDIC's Assistant General Counsel, the Working Group is responsible for drafting the rule, and it should consider for instance:

- Policy and regulatory objectives, expected effects, benefits, costs, and possible alternatives; and
- Comments submitted by the public, industry, and other stakeholders.

¹⁶ Effective July 2019, the FDIC formed CISR to centralize the supervision and resolution activities for the largest banks and complex financial institutions. CISR is responsible for the FDIC's supervision and monitoring of banks with assets greater than \$100 billion for which the FDIC is not the primary Federal regulator. For resolutions, CISR is responsible for planning for and executing the FDIC's resolution mandates for these institutions, as well as other financial companies if called upon to protect U.S. financial stability. Previously, those activities were divided among three separate FDIC Divisions.

¹⁷ The Driver Division may arrange for other staff to be assigned to the Working Group, such as another Division's subject matter experts, analysts, or accountants, depending on the rule.

In addition, the Working Group is responsible for preparing the rule's Board Case Package.¹⁸

As the Working Group drafts a proposed rule, it consults with senior leaders who review and provide input to the proposed rule and the Board Case Package. The Driver Division's Director submits, or authorizes the submission of, the Board Case Package to the Office of the Chairman, and the Chairman's authorization must be obtained before a rulemaking case can be placed on a Board meeting agenda. The Driver Division and Working Group may brief senior management officials, including Deputies of the individual Board members and sometimes the Board members themselves, before and/or after the case is placed on a Board meeting agenda. These briefings allow the Board members and/or their Deputies to ask questions and obtain any additional information needed. Ultimately, the FDIC's Board of Directors reviews the proposed rule for publication in the Federal Register, and may approve such proposal. Following Board approval, the Legal Division's Executive Secretary Section performs a final editorial review and submits the proposed rule to the Federal Register. Any analyses, such as cost benefit analyses, performed by the FDIC in drafting the proposed rule are also published in the Federal Register. Although the APA generally requires a minimum 30-day notice-and-comment period, the FDIC generally provides for a 60-day notice-and-comment period. Based on the public comments received, the FDIC may suspend the proposed rule or resubmit the rule through the drafting, review, and approval process until finalized.

DIR's Regulatory Analysis Section

According to the FDIC's Chief Economist, in 2014, in response to increasing calls for independent Federal agencies to "improve the regulatory analysis of rules," and the FDIC to enhance its rulemaking process, the then-FDIC Chairman established a Regulatory Analysis Steering Committee.¹⁹ The then-Chairman tasked the steering committee with identifying cost benefit analysis process enhancements, and establishing a regulatory analysis group dedicated to providing and facilitating cost benefit analyses for rules.

In 2015, the FDIC's Chief Economist formed a regulatory analysis group, which began reviewing statutory requirements, reviewing available literature for best practices, working on rules in process, and consulting with the Driver Divisions.

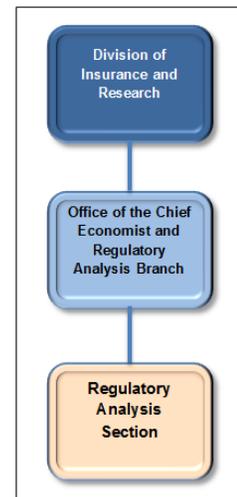
¹⁸ A **Board Case Package** includes the following documents: (1) **Board Memorandum**, which includes a brief description of the rule, the reasons for the rule, and other aspects of the rule that would be helpful in assisting the Board in rendering a decision; (2) **Board Resolution**, which contains, in summary form, the statutory authority for the rule as well as the Board's findings and decision regarding the rule and directs the rule to be published in the Federal Register; and (3) **Federal Register Notice**, which is the notice to be published in the Federal Register – attached to the Board Memorandum.

¹⁹ The FDIC formed the former Regulatory Analysis Steering Committee to guide the development and implementation of the RAS. A former Executive Officer chaired the steering committee and members included key Division Directors.

In 2016, based on the former Regulatory Analysis Steering Committee's recommendation, the FDIC formally created the RAS within the DIR as shown in Figure 2.²⁰ According to the former Regulatory Analysis Steering Committee's briefing materials dated September 2015, as presented by the Chief Economist to the former Regulatory Analysis Steering Committee, the FDIC established the following goals for the RAS to:

- Ensure that analysis informs the rulemaking process at appropriate stages;
- Ensure that economic analyses required by existing statutes are conducted in an effective and well-documented manner;
- Preserve the role of subject matter experts in leading the rulemaking process and as key contributors to regulatory analysis;
- Clarify economic analysis by working with subject matter experts to apply a standard analytical outline to the preambles of FDIC rules;²¹ and
- Ensure that the FDIC Board of Directors is adequately informed about analytical considerations underlying its decisions.

Figure 2: The RAS's Location Within the FDIC



Source: OIG analysis of the FDIC's online resources.

In addition, when conceived in 2015, the FDIC's former Regulatory Analysis Steering Committee's briefing materials noted that the RAS's major tasks would include:

- **Identifying Complex Rules.** At the beginning of the rulemaking process, the RAS would identify certain complex rules as "resource intensive" to ensure an appropriate level of analysis would be performed. The RAS would also assign DIR analysts (to the rulemaking process) to provide or facilitate analysis, as necessary.
- **Engaging Early in the Rulemaking Process.** In order to promote analytical rigor and consistency in rule development, the RAS would work with the Working Group to determine the analytical foundation for the rule.

²⁰ In November 2019, after the completion of our field work, DIR senior management stated that the DIR reorganized certain functions. The RAS was moved from the Office of the Chief Economist and Regulatory Analysis Branch to DIR's Center for Financial Research and aligned with the Division's research function; and the Center for Financial Research was renamed to Research and Regulatory Analysis. While the FDIC's Chief Economist will continue to serve in his designated role, he was moved to a Senior Advisor position that reports directly to the Division Director.

²¹ The standard preamble outline addresses the proposed rule's policy objectives, background, description, expected effects, alternatives considered, request for comment, and regulatory analysis.

- **Drafting Regulatory Analysis.** The RAS would coordinate with and draft the regulatory analysis in conjunction with the Working Group, and the Working Group would submit the regulatory analysis to the Driver Division.

While the FDIC created the RAS to enhance the FDIC's rulemaking process, the Driver Divisions have historically controlled and currently control the rulemaking process and corresponding cost benefit analyses. The role of the RAS as implemented was different than initially anticipated by the former Regulatory Analysis Steering Committee, as evidenced by early briefing materials. These areas are discussed in our evaluation results below.

EVALUATION RESULTS

The FDIC's cost benefit analysis process was not consistent with widely recognized best practices that we identified. Specifically:

- (1) The FDIC had not established and documented a process to determine when and how to perform cost benefit analyses;
- (2) The FDIC did not leverage the expertise of its RAS economists during initial rule development;
- (3) The FDIC did not require the Chief Economist to concur on the cost benefit analyses performed;
- (4) The FDIC was not transparent in its disclosure of cost benefit analyses to the public; and
- (5) The FDIC did not perform cost benefit analyses after final rule issuance.

The FDIC Had Not Established a Process to Determine When and How to Perform Cost Benefit Analyses

The OIG identified best practices from Academia, Federal agencies, Executive Orders, the ACUS, and the GAO that support the FDIC should establish and document a process for determining when to perform cost benefit analyses and how the analyses should be conducted.

According to these best practices, the FDIC should include a cost benefit analysis for all new rules, but all new rules should not require the same depth of analysis. For example, the depth of analysis needed depends upon the rule's importance and significance to the banking sector and economy. Significant rules require greater scrutiny than those less significant.²² Therefore, agencies need a method for determining when to perform cost benefit analyses and the depth of analysis needed. (Please refer to Appendix 4 for a description of the best practices we identified related to cost benefit analyses.)

The 2019 FDIC Performance Goals (February 2019) include a goal for the FDIC to “implement a more structured and robust cost benefit analysis of proposed regulations.” In particular, the FDIC will “(a) review and analyze relevant policies, including OMB Circular A-4, to identify alternatives for a more robust cost benefit analysis process, including engagement with OMB and the GAO to identify best practices that can be incorporated into an FDIC-appropriate framework; and, (b) develop a strategy that includes roles, responsibilities, procedures, and resource requirements.”

In addition, the GAO's *Standards for Internal Control in the Federal Government*, (GAO-14-704G) (September 2014), states that agencies should implement internal control standards and activities, in part, by designing control activities (documented policies, procedures, techniques, and mechanisms that enforce management directives) to achieve agency objectives and respond to risks, and to implement these activities through policies. In applying these Standards, the FDIC needs to establish its policies and procedures for conducting cost benefit analyses.

The FDIC's Existing Rulemaking Process

According to the Assistant General Counsel, the rulemaking process is a flexible and iterative process. This process relies primarily upon the Driver Divisions to assemble a cross-functional Working Group and lead the group in drafting, reviewing, and finalizing proposed rules. As such, this process heavily relies on the Working

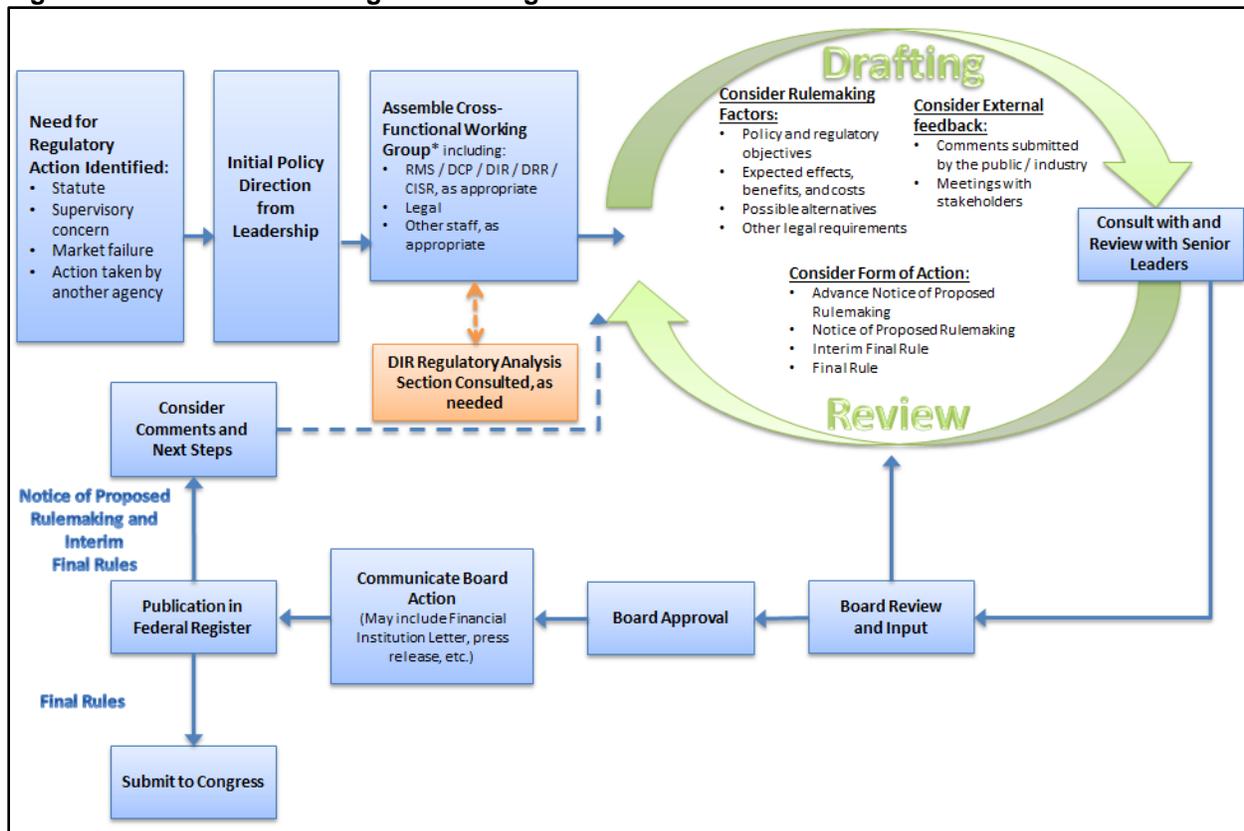
²² For example, Executive Order 12866 advises Federal agencies, not including the FDIC, to conduct in-depth cost benefit analyses for certain significant regulatory actions. The order defines **significant regulatory action** as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, or a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this order.

Cost Benefit Analysis Process for Rulemaking

Group's knowledge, expertise, and professional judgment to determine whether or not cost benefit analyses are performed and the depth of analysis conducted.

Figure 3 illustrates the FDIC's rulemaking process during the period of our evaluation. The FDIC used this process for all rules as it did not categorize rules based on each rule's degree of significance. At a minimum, the FDIC should be identifying and categorizing significant rules.

Figure 3: The FDIC's Existing Rulemaking Process



Source: FDIC and OIG analysis of the FDIC's rulemaking process.

* The Working Group may be a part of a larger interagency group in cases where the rulemaking process involves an interagency rule and interagency coordination is needed.

According to FDIC officials, such as the Legal Division's Assistant General Counsel and RMS's Assistant Director, this process allows the Driver Divisions the flexibility and autonomy to implement their rules as they deem appropriate. However, the process lacks a written policy and procedures that instruct and guide the Working Group in employing their professional judgment in determining when and how to perform cost benefit analyses. Further, the process does not establish a framework

to categorize rules²³ based on the significance of the rule. Ultimately, the FDIC's rulemaking process is not in line with best practices for determining when and how to perform a cost benefit analysis. Due to the lack of a written policy and procedures, and the absence of an established framework to categorize rules, the FDIC's performance of cost benefit analyses was inconsistent, as discussed below.

The FDIC's Depth of Analysis Based on the "Substance" of a Rule

According to Executive Order 12866, a regulatory action is any substantive action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking. For purposes of this report, we use the term "substantive rule" to signify a rule that in our professional judgment creates or defines meaningful rights, duties, obligations, and causes of action that can be enforced by law.

As discussed above, the FDIC had not established a framework to categorize rules based on "significance." In addition, the FDIC lacked quantitative data to determine each rule's economic significance. As a result, the FDIC was not able to plan for the depth of its cost benefit analyses based on a rule's significance. However, based on documentation published in the Federal Register, it was clear that the FDIC performed cost benefit analyses for some rules.

Therefore, in the absence of the FDIC's categorization by "significance," we sought to determine if the cost benefit analyses correlated to a rule's "substance." For that reason, we assessed the depth of the FDIC's cost benefit analysis against the "substance" of each rule to determine if the FDIC's process for conducting cost benefit analyses was consistent. The results of our review are presented below.

Inconsistent Practices for Cost Benefit Analyses

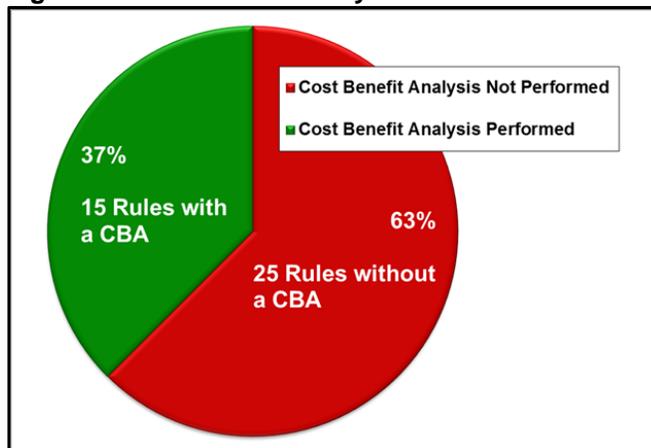
The FDIC's rulemaking process resulted in inconsistent practices for conducting cost benefit analyses. Based on our review of rules finalized by the FDIC from January 2016 to December 2018, we found that the FDIC performed cost benefit analyses on 15 of 40 final rules (37 percent) published in the Federal Register, as shown in Figure 4. The FDIC did not publish in the Federal Register why these 15 rules warranted cost benefit analyses and the other 25 rules did not.²⁴ As indicated below, we noted the existence of both substantive and less substantive rules without a cost benefit analysis. For those substantive rules without a cost

²³ **Rule categorization** is a process by which a rule is placed in a particular class or group based on varying degrees of potential significance and likely impact to the economy, industries, communities, and governments. For rulemaking, this process can be used to facilitate the decision of when and how to perform cost benefit analyses and the identification of resource requirements.

²⁴ For purposes of our review, we did not look at documentation outside of the Federal Register as, according to RAS senior management, it is the FDIC's practice to publish its analyses, when conducted, in the Federal Register.

benefit analysis, the Federal Register did not document a clear reason or distinguish why those rules did not receive a cost benefit analysis from those that did.²⁵

Figure 4: Cost Benefit Analysis Performance



Source: OIG analysis of the FDIC's finalized rules published in the Federal Register. (January 2016 – December 2018)

The FDIC also did not have an established process for determining how to perform cost benefit analyses, including the depth of analysis that it needed to conduct. Based on our review, we found that the FDIC performed an in-depth cost benefit analysis²⁶ on only 4 of 40 final rules (10 percent) published in the Federal Register.²⁷ In addition, the FDIC's depth of analysis for a particular rule did not always

align with the rule's substance. Specifically, we found substantive rules without corresponding cost benefit analyses, and less substantive rules with cost benefit analyses.

The process used by the FDIC did not ensure that a proposed rule's substance was identified and defined, and costs and benefits were appropriately and consistently analyzed among and within the various Divisions and corresponding Working Groups. The FDIC did not explain in the Federal Register why it performed an in-depth analysis on four rules, and not others. Without thorough and consistent cost benefit analyses, the FDIC could implement or continue to enforce poorly conceived or overly burdensome rules, as described further below.

Inconsistent Cost Benefit Analyses for Sampled Rules

Our review of three sampled rules showed that the FDIC's analyses were not proportional to the rules' substance, nor were the analyses consistently performed:

²⁵ Our review included 25 FDIC-only rules and 15 interagency rules.

²⁶ The OIG defines an "in-depth" cost benefit analysis as a cost benefit analysis that contains supporting quantitative and qualitative data and analysis of the proposed action and main alternatives identified.

²⁷ Our review consisted of 25 FDIC-only rules and 15 interagency rules (published jointly by two or more Federal Agencies); only 4 FDIC-only rules had in-depth analyses. In addition, the FDIC performed a cost benefit analysis for only one interagency rule. Nevertheless, the best practices we identified apply to both FDIC-only and interagency rules, so we did not treat them differently in our analysis.

- **Substantive Rule with no Cost Benefit Analysis.** From January 2016 to December 2018, the FDIC issued a series of four interagency rules to expand the definition of financial institutions that qualified for an extended examination cycle. The series of interagency rules consisted of two sets of “interim final” and “final” rules that increased the eligibility of financial institutions for an extended 18-month examination cycle. In particular, in February 2016, the FDIC redefined eligible financial institutions from institutions with total assets of “Less than \$500 million” to “Less than \$1 billion.” Subsequently, in 2018, the FDIC again redefined eligible financial institutions from institutions with total assets “Less than \$1 billion” to total assets of “Less than \$3 billion.”

Based on our review, the FDIC did not perform a cost benefit analysis – even when the amendments were substantive changes that redefined financial institution eligibility. Financial institution eligibility doubled and then tripled in a time span of less than 2 years. Although Congress prompted these legislative amendments,²⁸ none of these final rules documented a cost benefit analysis that quantitatively or qualitatively assessed the rule amendment(s) or considered potential alternatives. According to the ACUS and Academia interview statements, even when Congress mandates a legislative change, an agency should still perform a cost benefit analysis to provide public transparency and build analytical awareness for future legislative action.²⁹

While the FDIC documented an analysis of financial institution failure rates by CAMELS ratings³⁰ and certain asset sizes to support the regulatory amendment of February 2016, this analysis was not a cost benefit analysis. The FDIC did not perform a cost benefit analysis that incorporated quantitative data or qualitative statements concerning the rule’s cost and benefits. Additionally, the FDIC did not translate its failure rate analysis into a cost benefit analysis to calculate the costs associated with a financial institution’s failure in comparison to the benefits of an extended examination cycle.

²⁸ In 2016, the FDIC issued a set of interim final (in February 2016) and final (in December 2016) rules to implement section 83001 of the *Fixing America’s Surface Transportation Act* (FAST Act), which was enacted in December 2015. Section 83001 of the FAST Act permitted the FDIC to examine qualifying insured depository institutions with less than \$1 billion in total assets no less than once during each 18-month period. In 2018, the FDIC issued a set of interim final (in August 2018) and final (in December 2018) rules to implement section 210 of the *Economic Growth, Regulatory Relief, and Consumer Protection Act* (Economic Growth Act) (Pub. L. No. 115-174), which was enacted in May 2018. Section 210 of the Economic Growth Act permits the FDIC to examine qualifying insured depository institutions with less than \$3 billion in total assets once every 18 months.

²⁹ Administrative Conference Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies* (June 2013).

³⁰ Financial institution regulators and examiners use the Uniform Financial Institutions Rating System to evaluate a bank’s performance in six components represented by the **CAMELS** acronym: **C**apital adequacy, **A**sset quality, **M**anagement practices, **E**arnings performance, **L**iquidity position, and **S**ensitivity to market risk. Each component and an overall composite score is assigned a rating of 1 through 5, with 1 having the least regulatory concern and 5 having the greatest concern.

In addition, the FDIC did not consider or analyze any alternatives beyond the proposed legislative change. The FDIC did not analyze the cost and benefits of at least one alternative that was more stringent and one alternative that was less stringent than the selected alternative, as recommended by best practices. Ultimately, the FDIC's analysis did not demonstrate the need or justify the 12-month examination cycle (versus an 18-month examination cycle) for any institution threshold based on total assets. Less than 2 years later, in 2018, when the FDIC tripled the threshold, the Agency did not provide any corresponding analysis.³¹

- **Less Substantive Rule with Cost Benefit Analysis.** By contrast, in January 2018, the FDIC amended a rule to adjust assigned civil money penalties for inflation. As published within the Federal Register, the FDIC described the amendment as providing minimal adjustments and a minimal increase to the FDIC's administrative cost. Although Congress prompted this legislative amendment,³² the FDIC performed a cost benefit analysis that consisted of qualitative statements of the rule's expected effects. The analysis, however, was not complete as it provided limited quantitative data and did not consider other alternatives.
- **Substantive Rule with Cost Benefit Analysis.** For *Part 370 – Recordkeeping for Timely Deposit Insurance Determination*, 12 C.F.R. § 370 (April 2017) (Part 370),³³ the FDIC performed extensive cost benefit analyses in 2015 and 2016 based on quantitative and qualitative analyses of the rule's expected effects, and the consideration of alternatives. This rule and the corresponding analyses are discussed later in detail.

According to the RAS's senior management, and in accordance with the FDIC's Statement of Policy *Development and Review of FDIC Regulations and Policies* (April 2013), the FDIC's cross-functional Working Group considers the expected effects, benefits, and costs of each rule, based on available information. However, the Working Group's consideration of the costs and benefits was not always

³¹ As published within the Federal Register, in 2016, the FDIC identified the increase in qualifying institutions and analyzed the frequency with which institutions rated a composite CAMELS rating "1" or "2" failed within 5 years, versus the frequency with which institutions rated a composite CAMELS rating of "3," "4," or "5" failed within 5 years. The FDIC also segmented and analyzed the failure rates by institutions with assets between \$200 million and \$500 million as compared to institutions with assets between \$500 million to \$1 billion. Based on this analysis, the FDIC concluded that extending the examination cycle for these institutions would not negatively affect the institutions' safety and soundness or the ability of the agencies to effectively supervise and protect the safety and soundness of these institutions. In 2018, the FDIC provided similar conclusions at a higher threshold without any analysis.

³² In June 2016, the FDIC issued an interim final rule to implement the *Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (2015 Adjustment Act). Under the 2015 Adjustment Act, the FDIC is required to (1) adjust the civil money penalties with an initial catch-up adjustment and (2) make subsequent annual adjustments for inflation.

³³ The FDIC adopted Part 370 to facilitate the prompt payment of FDIC-insured deposits when large insured depository institutions fail. In general, the rule requires each covered institution to implement the information technology system and recordkeeping capabilities needed to calculate the amount of deposit insurance coverage available for each deposit account in the event of the institution's failure.

documented and published in the Federal register. This documentation by the Working Group is important, because it provides transparency and allows for a better informed public review and comment.

In addition, senior management acknowledged that the FDIC's analysis on all issued rules would not meet the standards prescribed by OMB Circular A-4, because cost and benefits are not quantified and expressed in monetary units when appropriate, and decision makers are not provided with a clear indication of the most efficient alternative – the alternative with the largest net benefit(s) to society. Senior management also stated that it often is not possible to quantitatively assess a rule's cost, benefits, and alternatives to determine the most efficient alternative as recommended by best practices. While the FDIC stated it always considers the expected effects, benefits, and costs of each rule – at least on a qualitative, undocumented basis; we believe that this consideration is not sufficient, because the FDIC has not translated its “consideration” into a cost benefit analysis and published it within the Federal register.

In addition, according to RMS senior management, congressionally mandated legislative action limits the FDIC's ability to analyze reasonable regulatory alternatives and take action – which is a recognized challenge to the rulemaking process. We disagree with this view, however, because as discussed above, even when Congress mandates a legislative change, an agency should still perform a cost benefit analysis that considers reasonable alternatives to provide public transparency and build analytical awareness for future legislative action.

The FDIC's process did not establish the procedures to determine when and how to perform cost benefit analyses; did not ensure an appropriate level of analyses were performed; resulted in inconsistent analyses; and limited public awareness and transparency. Without thorough cost benefit analyses, the FDIC could implement or continue to enforce poorly conceived or overly burdensome rules.

Recommendation

We recommend that the FDIC:

- (1) Establish, document, and implement policy and procedures for conducting cost benefit analyses, including when and how the cost benefit analyses will be performed.

The FDIC Did Not Leverage the Expertise of Its RAS Economists in Determining the Initial Policy Direction of Rules

The OIG identified best practices from Academia, Federal agencies, and the ACUS that support the FDIC should establish and document a process that involves the RAS economists in determining the initial policy direction of a rule. The initial policy direction is a description of what FDIC Leadership³⁴ seeks to establish with the rule or policy. Once FDIC Leadership identifies the potential need for regulatory action, it deliberates and formulates its initial policy direction.

Best practices state that economists should be involved early in the rulemaking process, before the initial policy direction is determined and prior to the formation of the Working Group. Economists should be involved at this stage to provide insight into currently available economic data, tools, studies, and methodologies that can assist in the selection and evaluation of different or competing policy options by identifying the major economic effects of those options.

The early involvement of an economist allows the agency to enhance its policy framework from an economic perspective, the cost benefit analysis performed, the decision making processes, and the substance of rules. (Please refer to Appendix 4 for the best practices we identified related to the economist's early involvement in the rulemaking process.)

In addition, the FDIC's former Regulatory Analysis Steering Committee and Rulemaking Process Guide support engaging the RAS economists during early rule development. Based on our review, we found the following:

- **FDIC Regulatory Analysis Steering Committee.** According to the FDIC Chief Economist, the FDIC's former Regulatory Analysis Steering Committee intended that the RAS would provide greater focus early in the rule writing process on policy objectives, reasonable and possible alternatives, and economic effects.
- **FDIC Rulemaking Process Guide.** The FDIC's internal resource and process guide on the *Development of FDIC Rules and Statements of Policy* (July 2018) states that the "rulemaking process is most effective and efficient when rulemaking analytical requirements are addressed beginning in the early phases of a rule's development and revisited as necessary while development progresses." As economists play a critical role in addressing "rulemaking analytical requirements," this guidance supports involving RAS economists early in the rulemaking process.

³⁴ For purposes of this evaluation, **FDIC leadership** includes the FDIC Chairman, the Board, and the Chairman's and Board's advisors (such as the FDIC's Division Directors).

Policy Direction from Leadership

The FDIC did not involve the RAS early in the rulemaking process to obtain its insight in the initial policy determination. Rather, FDIC leadership identified the need for regulatory action and determined the initial policy direction. The Driver Division then assembled a cross-functional Working Group consisting of subject matter experts, Legal personnel, and other staff deemed appropriate. The Working Group invited the RAS to assist in developing the cost benefit analysis at its discretion and not in all instances. When invited, the RAS worked collaboratively with the Working Group to support the rulemaking process.

According to a RAS official, the Working Groups invited the RAS to participate in the rulemaking process for 34 of 40 final rules (85 percent) issued between January 2016 and December 2018. In all 34 instances, the RAS was invited to participate in the rulemaking process after the initial policy determination was made and the Working Group had already been formed. In addition, the RAS senior management stated that the timing of when they were invited to participate in each rulemaking process varied, depending on the Working Groups' needs. The Working Groups invited the RAS to participate either (1) before they initiated the cost benefit analysis; (2) during their performance of the cost benefit analysis; or (3) after they completed their draft cost benefit analysis. The RAS did not formally track or record when they were invited to participate in each rulemaking process.

Ultimately, the FDIC may have missed opportunities for the RAS economists to enhance its initial policy determinations by providing insight into various policy options based on available data, tools, and studies; influencing a better rule design; and ensuring the rules were appropriately tailored. These benefits could yield greater confidence in the FDIC's rulemaking process by producing rules that are structured to impose the least burden on society, consistent with obtaining the regulatory objectives.

The RAS's lack of early involvement in the rulemaking process was due to the Driver Divisions' historical and current control of the process, which allows them the autonomy to implement their rules as they see fit. Also, the RAS did not have clearly defined roles and responsibilities that were understood and accepted by the various organizations within the FDIC, and the RAS perceived its function as a supporting role to the Driver Divisions.

As illustrated by the RAS's late involvement in the rulemaking process for Part 370, the FDIC may have missed the opportunity to ensure an effective and efficient rulemaking process, and an appropriately designed and tailored rule. As noted earlier, the FDIC adopted Part 370 to facilitate the prompt payment of FDIC-insured

deposits when large insured depository institutions fail. In general, the rule requires each covered institution to implement the information technology system and recordkeeping capabilities needed to calculate the amount of deposit insurance coverage available for each deposit account in the event of the institution's failure.

The RAS's Involvement in the Rulemaking Process for Part 370

The RAS did not exist at the beginning of the rulemaking process for Part 370. Recognizing the rule's potential economic significance, the Driver Division (DRR) contracted with a third party to formulate a cost model with quantitative cost estimates to be used by the Working Group in preparing a detailed cost benefit analysis. After the third party began formulating the cost model and drafting the initial cost estimates in March 2015, DRR requested that the RAS (known as the "regulatory analysis group" in 2015, which was led by the FDIC's Chief Economist) attend the third party's status meetings and review the third party's cost estimates for sufficiency.³⁵ DRR also requested and obtained the FDIC's Chief Economist's input into the Advance Notice of Proposed Rulemaking questions that were published in the Federal Register in April 2015. Although DRR senior management engaged the RAS soon after the third party began its analysis, DRR could not leverage the expertise of the RAS economists in determining the initial policy direction of the rule, categorizing the rule, determining the depth of analysis to be performed, and considering potential alternatives,³⁶ which occurred before the FDIC contracted with and scheduled the third party to perform a cost analysis. This, in turn, limited the RAS's ability to thoroughly review the sufficiency of the cost benefit analysis.

Data Availability. Data availability is a key challenge in performing cost benefit analyses. For Part 370, the FDIC performed a qualitative and quantitative cost benefit analysis. The FDIC quantitatively assessed the rule's implementation cost, because it had a more concrete basis from which to measure cost – such as, labor cost, labor resources needed (in hours), and assumed complexity factors. However, the FDIC only qualitatively assessed the rule's benefits. Within the cost benefit analysis, the FDIC identified the rule's benefits as (1) ensuring market stability, (2) ensuring market liquidity, (3) enabling timely failed bank resolution, and (4) increasing resolution options. Economists may be able to resolve data availability and analytical model challenges by suggesting alternative solutions.

According to the RAS and DRR senior management, the RAS's review process entailed reviewing the third party's cost analysis and holding a series of meetings with DRR to ask questions. The RAS and DRR did not document the review performed.

DRR senior management stated that if the RAS had existed and could have been involved earlier, it would have benefited the rulemaking process. DRR management

³⁵ In 2014, the Chief Economist was tasked with establishing a "regulatory analysis group." Although the RAS had not been formally established as an organizational unit in early 2015, the FDIC's Chief Economist had assembled and led a "regulatory analysis group."

³⁶ The third party's cost analysis did not consider alternatives.

also stated it should have specifically involved the RAS in the Working Group's discussion and assessment of alternatives.³⁷ From DRR's perspective, senior management had a clear mandate on the need for the rule, but it did not have a clear mandate on the alternatives considered. We believe that at a minimum, the RAS could have provided insight into the analysis of reasonable alternatives that considered the rule's significant provisions, effective compliance dates, and treatment of more complex deposit products.

A rulemaking process that involved the RAS earlier could have enhanced the identification and consideration of alternatives, and the effectiveness and efficiency of the rulemaking process by ensuring that the rule was appropriately tailored. Since the rule became effective in April 2017, DRR re-initiated the rulemaking process and amended the rule in July 2019 to clarify and streamline certain requirements and extend the compliance date for financial institutions to prepare their information technology systems to make deposit insurance determinations.³⁸ During this rulemaking process, according to RAS senior management, the Working Group invited the RAS to participate in the rulemaking process; and working collaboratively, the RAS reviewed the cost model that calculated quantitative costs, considered the proposed rule's potential costs and benefits, participated in the review and drafting of the rule's preamble, and reviewed comments submitted by the public.

Recommendation

We recommend that the FDIC:

- (2) Establish, document, and implement policy and procedures that clearly define the roles and responsibilities for the RAS, and early involvement for the RAS in participating in and framing the initial policy direction of a rule.

The FDIC Did Not Require the Chief Economist to Review and Concur on the Cost Benefit Analyses Performed

The OIG identified best practices from Academia and Federal agencies that support the FDIC should establish and document a process to involve the FDIC's Chief Economist in the review and concurrence of the cost benefit analyses performed.

³⁷ Although the third party did not consider alternatives, the Working Group considered five alternatives, including (1) adjusting thresholds above or below 2 million accounts; (2) imposing recordkeeping requirements on all account types; (3) maintaining the FDIC's current approach to deposit insurance determinations (status quo); (4) developing an internal IT system and transfer processes within the FDIC capable of subsuming the deposit system of any large covered insured depository institution; and (5) simplifying deposit insurance coverage rules. The RAS was not involved in the discussion and assessment of these alternatives.

³⁸ *Recordkeeping for Timely Deposit Insurance Determination*, 12 C.F.R. § 370 (July 2019).

According to these best practices, Chief Economists at Federal agencies review cost benefit analyses as a quality control during the rulemaking process to provide assurance that the economic concepts presented are sound and logical. The Chief Economist also provides assurance that the analysis is consistent with agency guidance and is accurate, sufficient, logical, unbiased, and based on the best data and analysis available at the time of the rule. (Please refer to Appendix 4 for a description of the best practices we identified related to the Chief Economist's involvement in the rulemaking process.)

Agencies also need to establish an appropriate internal control process that considers the segregation of duties. The GAO's *Standards for Internal Control in the Federal Government* (GAO-14-704G) (September 2014) encourages the segregation of duties. In particular, segregation of duties is the concept of having more than one person (or organizational unit) required to complete a task. This internal control prevents errors by precluding one individual from controlling all key aspects of a transaction or event. For the FDIC's rulemaking process and internal control framework, this means that the FDIC should incorporate a control to separate and assign the cost benefit analysis concurrence function to another party or organizational unit independent of the rulemaking process. This other party or unit must have the requisite knowledge, skills, and abilities to carry out that function. The FDIC's Chief Economist could fulfill this role.

The FDIC's Cost Benefit Analysis Review

The FDIC did not involve the Chief Economist (within the FDIC's Office of the Chief Economist and Regulatory Analysis Branch) in the rulemaking process to review and concur on the appropriateness of the cost benefit analysis performed. Based on our review, we found that the FDIC's Chief Economist did not formally review and concur on 15 published rules with cost benefit analyses. In addition, according to the FDIC's rulemaking process, the Chief Economist was not required to review and concur on the cost benefit analyses.

While the cost benefit analyses received a degree of scrutiny from (1) the RAS, (2) the Working Group, (3) the Driver Division executives, (4) the Board of Directors, and (5) the public, the Chief Economist was not required to review and concur with the analyses as suggested by best practices.

Without Chief Economist concurrence, cost benefit analyses may not be sound, logical, or consistent with agency guidance, and could ultimately result in inferior rulemaking. As a result, rules may not achieve their intended objectives or may result in cost inefficiencies or rules needing later revisions. As demonstrated by the FDIC's implementation of Part 370, discussed below, incorporating the FDIC's Chief

Economist into the rulemaking process could enhance the rulemaking process and provide greater assurance that rules are appropriately tailored.

The Chief Economist's Involvement in the Rulemaking Process for Part 370

We found that the FDIC's Chief Economist reviewed the cost benefit analysis for Part 370; however, he did not formally concur on the rule's cost benefit analysis as Chief Economist. The FDIC's lack of a formal review and concurrence process may have affected the rulemaking's effectiveness and quality control.

Specifically, during the rulemaking process for Part 370, the FDIC modified its cost estimates upon receiving public comments that its estimated costs were too low. While we recognize that the Part 370 policy decision was determined by senior FDIC leadership, a quality control review and concurrence by the Chief Economist could have prevented the release of inaccurate cost estimates and saved the FDIC time and effort.

The FDIC's lack of a formal review and concurrence by the Chief Economist was due to the existing design of the rulemaking process. As noted earlier, the FDIC uses a flexible and iterative process to draft, review, and finalize proposed regulations and related cost benefit analyses. The FDIC has not established the Chief Economist as an integral member of the rulemaking process.

Recommendation

We recommend that the FDIC:

- (3) Establish, document, and implement policy and procedures that clearly define the Chief Economist's roles and responsibilities for reviewing and concurring on cost benefit analyses performed.

The FDIC Was Not Transparent in Its Disclosures of Cost Benefit Analyses to the Public

The OIG identified best practices from Academia, Federal agencies, Executive Orders, the ACUS, and the GAO that support agencies should establish and document a process to ensure that cost benefit analyses published in the Federal Register are transparent.

According to best practices, agencies should publish transparent cost benefit analyses that provide (1) the reason(s) why a cost benefit analysis was or was not performed, (2) the reason(s) for the depth of analysis performed, (3) how the analysis (scope and methodology) was performed, (4) the analysis performed, (5) the conclusions derived, and (6) a reconciliation of the derived cost benefit analysis conclusion to the agency's final policy decision. (Please refer to Appendix 4 for a description of the best practices we identified related to ensuring transparency during the rulemaking process.)

In addition, the FDIC's *Statement of Policy Development and Review of FDIC Regulations and Policies*

(April 2013) states that the public should have a meaningful opportunity to participate in an open and transparent rulemaking process, and both the proposed and final rule should discuss the key implications that the FDIC considered in its analysis.

To assess the FDIC's transparency of cost benefit analyses, we reviewed each rule's corresponding analysis as published in the Federal Register.

The FDIC's Transparency of Cost Benefit Analyses

The FDIC was not transparent in publishing (1) the reason(s) why a cost benefit analysis was or was not performed, (2) the reason(s) for the depth of analysis performed, (3) the analytical scope and methodology used, and (4) the analysis performed. Nevertheless, when the FDIC did publish a cost benefit analysis in the Federal Register, the conclusions were clear and supported the agency's final policy decision.

We found that 63 percent of rules reviewed (25 of 40) did not include a cost benefit analysis, nor did the FDIC document, in the Federal Register, why a cost benefit analysis was not completed during the rulemaking process. Although FDIC senior management stated that it always considered the costs and benefits of each rule, this consideration did not always result in a published cost benefit analysis or a discussion of how the FDIC viewed the rule's costs and benefits. For the remaining

The 2019 FDIC Performance Goals includes a goal for the FDIC to increase "the transparency, effectiveness, and efficiency of FDIC operations for greater public accountability and confidence." For this goal, the FDIC is encouraged to continue "to implement the Trust through Transparency initiative", and to regularly "publish meaningful FDIC internal program performance metrics in key areas of interest, such as ... rulemaking."

The FDIC's "Trust through Transparency" Initiative, according to the FDIC Chairman, is an agency-wide effort initiated in 2018 that "unites the FDIC behind the goals of being accessible, understandable, responsive, and accountable... The first step in this initiative was to launch a new section of our website ... where we publish FDIC performance metrics. These are quantifiable measurements of performance..." For rulemaking, the FDIC published the number of proposed rules issued, comments received, rules finalized, and information requests. "Over time, the FDIC will become even more transparent by providing increased access to data that are accessible... understandable to most audiences, and that are responsive to new ideas and demands."

37 percent (15 of 40), the FDIC published cost benefit analyses within the Federal Register that ranged from a single summary paragraph to multiple pages.

Of these 15 rules, the FDIC merely provided a summary paragraph with qualitative analyses and conclusions 73 percent of the time (11 of 15), but did not provide any quantitative support for the rule. For the remaining four rules, the FDIC provided in-depth analyses consisting of qualitative and quantitative analyses. Based on our review of the FDIC's cost benefit analyses published in the Federal Register, the FDIC did not document why some analyses were only summary paragraphs and others were detailed in-depth analyses, or why some included only qualitative analysis and others had both qualitative and quantitative analysis.

Without transparent cost benefit analyses, stakeholders such as financial institutions, the public, and Congress may not understand the FDIC's analyses and conclusions, and thus may not be able to meaningfully participate in the rulemaking process. In particular, the final rules may not reflect the experiences and insights of the public, be appropriately crafted, or receive public acceptance. The rules may also need revision, requiring additional and unnecessary investments of FDIC resources.

Cost Benefit Analysis Transparency of Part 323 – Appraisals Rule Amendment

Based on our review of the interagency rule amendment titled, *Real Estate Appraisals*, 12 C.F.R. § 323 (April 2018),³⁹ a clear and transparent cost benefit analysis was not documented and published in the Federal Register. Instead, the FDIC's analyses and conclusions were decentralized and partially documented in responses to public comments on the proposed threshold increase. Ultimately, the FDIC's responses to public comments should supplement and support the cost benefit analysis performed and published. Conversely, when the Agency only presents its analysis in response to public comments, it lacks transparency.

The FDIC's limited transparency is due to the lack of written policy or procedures for conducting, reviewing, documenting, and publishing cost benefit analyses.

³⁹ The amendment, in part, "increased the threshold level at or below which appraisals are not required for commercial real estate transactions from \$250,000 to \$500,000."

Recommendation

We recommend that the FDIC:

- (4) Establish, document, and implement policy and procedures that address how cost benefit analyses and supporting information, such as scope and methodology, analyses, conclusions, and reconciliation to the Agency's final policy decision will be documented and published in the Federal Register to ensure transparency.

The FDIC Did Not Perform Retrospective Cost Benefit Analyses on Issued Rules

The OIG identified best practices from Academia, Federal agencies, Executive Orders, and the GAO that support agencies should establish and document a process to perform retrospective cost benefit analyses of their issued rules or, at a minimum, perform a regulatory risk assessment⁴⁰ to identify those rules or rule provisions that are at higher risk of being outdated, duplicative, or unduly burdensome. As a result of such a risk assessment, the agency could identify those rules or rule provisions that should be subject to a more thorough retrospective cost benefit analysis. These analyses can inform judgments about whether to modify, expand, streamline, or repeal such regulations. Retrospective cost benefit analysis can also provide valuable insight on the strengths and weaknesses of the agency's rulemaking, by facilitating a comparative analysis of expected effects to actual effects, which can be used to enhance the agency's analytic capability. (Please refer to Appendix 4 for a description of the best practices we identified related to performing cost benefit analyses on existing rules (retrospective cost benefit analyses), and establishing a regulatory risk assessment process.)

The 2019 FDIC Performance Goals includes a goal for the FDIC to promote "the health and vitality of community banks by enhancing FDIC engagement and streamlining and tailoring regulatory requirements and processes." In order to achieve this goal, the FDIC's action steps include, in part, the need to rescind "duplicative or outdated regulations, directives, and guidance...Review thresholds in FDIC rules and regulations; identify non-statutory thresholds that should be updated; and, develop a timeline for updating the rules in future years."

Based on our review, many independent Federal regulatory agencies do not perform periodic retrospective cost benefit analyses unless prompted by public commentary, an agency request, or a congressional mandate. However, going forward, the OCC stated that it is considering incorporating economists into the Economic Growth and

⁴⁰ According to *Federal Internal Control Standards* (GAO-14-704G) (September 2014), a **risk assessment** is the identification and analysis of risks related to achieving the defined objectives to form a basis for designing risk responses. For purposes of this report, the OIG uses the phrase **regulatory risk assessment** to signify a risk assessment tailored to ensure that regulations remain current, effective, and efficient, and continue to meet the FDIC's principles.

Regulatory Paperwork Reduction Act of 1996 (EGRPRA)⁴¹ review process to perform qualitative and quantitative analyses. The EGRPRA review process is discussed in more detail below.

The FDIC's Retrospective Cost Benefit Analyses

The FDIC did not conduct retrospective cost benefit analyses on existing rules, and the FDIC's policy and procedures did not require it to. However, the FDIC periodically reviews, along with Federal Financial Institutions Examination Council (FFIEC) member agencies,⁴² its outstanding rules through the EGRPRA review process. As implemented by the FDIC, this review process does not include cost benefit analyses to determine the effectiveness of existing rules.⁴³

The Economic Growth and Regulatory Paperwork Reduction Act Review Process

Since Congress enacted EGRPRA in 1996, the FDIC (jointly with other agencies under the FFIEC) has completed two reviews and submitted two reports to Congress – the first report was submitted in 2007 and the second report was submitted in 2017. The FDIC performed these reviews over a period of several years and commenced the second EGRPRA review in 2014. The FDIC's EGRPRA review process was a reactive review process that relied solely on public comments to identify and initiate Agency action on rules that may be outdated, unnecessary, or unduly burdensome. The FDIC solicited public comments on particular categories of regulations, through notices in the Federal Register and outreach meetings held across the country.⁴⁴ The Agency published in the Federal Register a summary of the comments received, identified significant issues raised and FDIC comments on such issues, and submitted the reports to Congress.

The EGRPRA review process that was completed in 2017 did not involve the RAS, nor did the review process include cost benefit analyses or quantitative analyses unless brought forward through public commentary. In addition, while the FDIC collected, reviewed, and summarized comments received, there was no regulatory risk assessment that was considered (by the Agency and public) in determining

⁴¹ 12 U.S.C. § 3311 (1996). Under EGRPRA, the Federal Financial Institutions Examination Council and certain member agencies (Federal bank regulators – FDIC, OCC, and FRB), and the NCUA (as a participating member), are directed to conduct a joint review of their regulations every 10 years and to consider whether any of those regulations are outdated, unnecessary, or unduly burdensome.

⁴² The **FFIEC** is a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the Federal examination of financial institutions by the FRB, FDIC, NCUA, OCC, and CFPB.

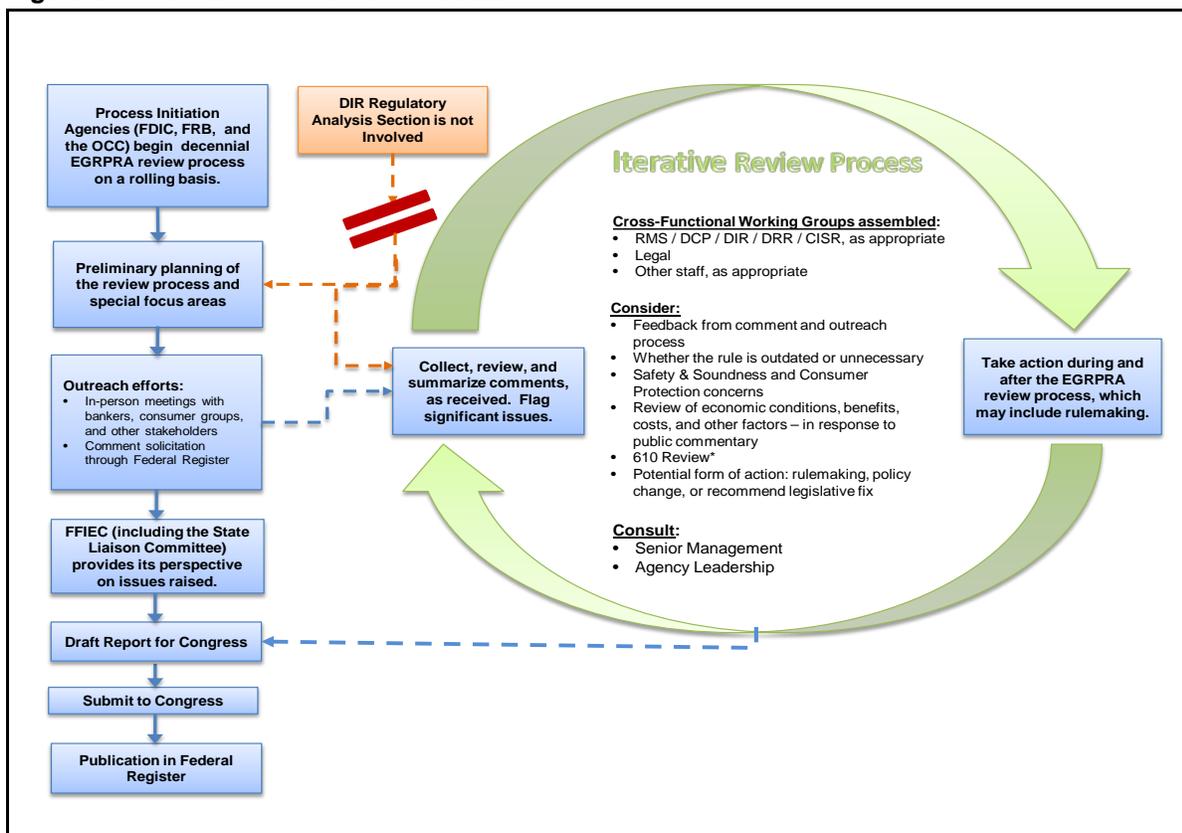
⁴³ While the FDIC performs EGRPRA reviews on a retrospective basis, the review process does not incorporate retrospective cost benefit analyses.

⁴⁴ The FDIC (jointly with other FFIEC agencies) commenced the second EGRPRA review in 2014, and the FDIC hosted six outreach sessions across the country, in which representatives from banks, community and consumer groups, and other interested parties could participate and provide their views to agency senior management and staff on any of the regulations subject to EGRPRA review.

whether an existing rule or rule provision should be revised or eliminated. When the FDIC identified and “flagged” a significant issue, the Driver Division considered the issue and determined the course of action in consultation with FDIC leadership. Regardless of the action taken, the EGRPRA report segmented and summarized all public comments within topical categories, and documented the Agency’s responses.

Figure 5 summarizes the EGRPRA review process, and notes that the RAS was not involved in the process.

Figure 5: The EGRPRA Review Process



Source: FDIC and OIG analysis of the FDIC’s EGRPRA review process.

*A 610 Review is an agency review of rules that have a significant economic impact upon a substantial number of small entities, within 10 years of the rule’s final publication/issuance, to determine whether such rules should be retained, amended, or rescinded to minimize regulatory burden. The FDIC typically combines this review with its reviews under EGRPRA.

Regulatory Risk Assessment Process

The FDIC had not implemented a regulatory risk assessment process to proactively identify rules with outdated, duplicative, or overly burdensome

requirements/provisions. Best practices support that the agency should enact a structured regulatory review process that proactively identifies, measures, monitors, reports, and mitigates the potential risk of insufficient, outdated, duplicative, or overly-burdensome requirements (regulatory burden). By implementing these best practices, the FDIC will be able to take initiative by acting rather than reacting to events or to public comments every 10 years.

Agencies with limited resources can proactively assess existing rules, and rule provisions, by key metrics (or thresholds)⁴⁵ using a regulatory risk assessment process to identify regulations that are at risk of becoming outdated, duplicative, or overly burdensome. In addition, the risk assessment and any corresponding written analysis could be published and made available for public review and comment. Then, based on the consideration of public comments, the agency could identify those rules or rule provisions that should be subject to a thorough cost benefit analysis; or, as appropriate, the rulemaking (and amendment) process.

The FDIC Chairman's Statements on Regulatory Burden and Retrospective Review

The FDIC Chairman actively engages with the public, Congress, and the FDIC to improve the FDIC's regulatory and supervisory processes. In particular, the Chairman stated:

By increasing transparency, engaging more effectively and directly with our regulated entities and consumers and by eliminating unnecessary regulatory burdens the FDIC will be better positioned to support the health [of] the nation's banks to ensure economic growth and job creation.⁴⁶

To meet this priority, the FDIC commenced various initiatives to eliminate certain requirements.

Specifically, the Chairman requested that the FDIC review outstanding Financial Institution Letters⁴⁷ for outdated or duplicative guidance. Based on this review, in September 2018, the FDIC announced it planned to rescind more than 50 percent of the FDIC's outstanding Financial Institution Letters related to safety and soundness and compliance, after determining they were outdated or duplicative.⁴⁸ From

⁴⁵ **Metrics** are measures of quantitative assessment used for assessment, comparison, or to track performance or production.

⁴⁶ Implementation of Economic Growth, Regulatory Relief, and Consumer Protection Act: Hearing on S.R. 2155 Before the S. Comm. on Banking, Housing and Urban Affairs, 115th Cong. 15 (2018) (statement of Jelena McWilliams, FDIC Chairman).

⁴⁷ **Financial Institution Letters** are communications to FDIC-supervised institutions. These letters announce new regulations and policies, new FDIC publications, and a variety of other matters of interest to financial institution management.

⁴⁸ Implementation of Economic Growth, Regulatory Relief, and Consumer Protection Act: Hearing on S.R. 2155 Before the S. Comm. on Banking, Housing and Urban Affairs, 115th Cong. 14 (2018) (statement of Jelena McWilliams, FDIC Chairman).

October 2018 to March 2019, the FDIC carried out its plan, and deactivated 500 Financial Institution Letters; and, as of September 2019, the FDIC had 577 active Financial Institution Letters remaining. This initiative illustrates the benefit of streamlining and eliminating outdated communications regardless of whether they are in the form of guidance or rules.

Without performing cost benefit analyses of existing rules, the FDIC may not identify duplicative, outdated, or overly burdensome rules in a timely manner. In addition, the FDIC may not ensure that its rules are effective and achieve their intended objectives/outcomes.

Identification of Part 323 – Appraisals Rule Amendment

We found that with a timely regulatory risk assessment or retrospective analysis, the FDIC could have identified earlier a need to amend an interagency rule related to Real Estate Appraisals that was originally issued in 1990.⁴⁹ In 2017, based on public comments obtained through the EGRPRA review process, the FDIC identified the need to revise the rule's monetary threshold for conducting appraisals. However, with a regulatory risk assessment process and retrospective cost benefit analyses, the FDIC could have identified a need to amend the regulation earlier, thus decreasing regulatory burden sooner. In particular, the rule amendment decreased regulatory burden by increasing the commercial real estate transaction threshold at which appraisals were required from \$250,000 (and above) to \$500,000 (and above). According to the FDIC, this threshold increase could reduce loan origination costs for borrowers and increase financial institution lending activity. Therefore, if the threshold had been modified earlier, more borrowers could have benefitted from the change.

Senior management officials did not believe that they needed to perform this type of review, because they felt that they already adequately understood their rules' regulatory effectiveness. In addition, the FDIC did not conduct retrospective cost benefit analyses on existing rules, because they were not required to do so.

Although the Driver Divisions did not perform cost benefit analyses or monitor every existing rule or rule provision, they identified and monitored topical issues from a policy perspective. In particular, senior FDIC officials stated that they regularly met with stakeholders (the public, industry representatives, and other agencies), read articles, and reviewed studies; and had their "finger on the pulse" of the financial industry and supervisory oversight. In addition, senior FDIC management used these various data sources to identify, monitor, and recommend regulatory amendments or new rules.

⁴⁹ *Real Estate Appraisals*, 12 C.F.R. § 323 (2018), which amended *Part 323-Appraisals*.

As discussed above, the FDIC's established process did not adequately ensure that the need for rule amendments was identified timely. Without a formal process to proactively review each rule, and obtain and document public and supervisory comments, the FDIC cannot be assured that its rules are not outdated, duplicative, or unduly burdensome.

Recommendation

We recommend that the FDIC:

- (5) Establish, document, and implement policy and procedures for conducting retrospective cost benefit analyses on existing rules, including a regulatory risk assessment, as well as roles and responsibilities for the Driver Divisions, Chief Economist, and DIR/RAS.

FDIC COMMENTS AND OIG EVALUATION

On January 21, 2020, the FDIC's Director, Division of Insurance and Research, on behalf of the Agency, provided a written response to a draft of this report (FDIC Response), which is presented in its entirety in Appendix 6. We carefully considered the comments in the FDIC Response.

The FDIC concurred with four and partially concurred with one of the five recommendations made in this report. The FDIC stated that it is "committed to continually 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 and regulatory goals effectively and efficiently."

The FDIC agreed to undertake the following actions to address Recommendations 1 through 4:

- Finalize and implement written procedures and guidance for rule-writing staff and regulatory analysis staff regarding the roles and responsibilities for cost benefit analysis and when and how cost benefit analysis will be performed.
- Finalize and implement written procedures that provide an opportunity for RAS to participate in framing the initial policy direction of a rule.
- Finalize and implement written procedures that clearly define the role of the Chief Economist, or similarly designated FDIC official with appropriate skills

and experience, for reviewing and concurring on cost benefit analyses performed.

- Finalize and implement written procedures that address how cost benefit analysis and supporting information, such as scope and methodology, analyses, conclusions, and the reasons for the Agency's final policy decision, will be documented and published in the Federal Register to ensure transparency.

These planned actions are responsive and, therefore, we consider Recommendations 1 through 4 to be resolved.

For the remaining recommendation with partial concurrence (Recommendation 5), the FDIC agreed to undertake the following actions:

- Decide whether the existing EGRPRA process for reviewing existing rules should be enhanced, whether analytical processes separate from EGRPRA should be developed, or **whether the current status quo should be maintained** [emphasis added], and document the decision in a memorandum.
- If the FDIC decides to enhance the existing EGRPRA process or develop a separate process, it will identify options for how to enhance the analytical review of existing rules and the level of resources needed, and develop and implement a plan.

We do not consider Recommendation 5 to be resolved because if the FDIC chooses to “[maintain] the current status quo,” it will not address the recommendation. Best practices support that the FDIC should establish and document a process to perform retrospective cost benefit analyses of its issued rules or, at a minimum, perform a regulatory risk assessment to identify those rules or rule provisions that are at higher risk of being outdated, duplicative, or unduly burdensome. The FDIC's existing EGRPRA review process is a reactive review process that relies solely on public comments to identify and initiate Agency action. In addition, maintaining the status quo would not meet the FDIC Chairman's priority of “eliminating unnecessary regulatory burdens... to support the health [of] the nation's banks to ensure economic growth and job creation.” It also is not in line with actions the FDIC agreed to take to address its 2019 Performance Goals, including rescinding duplicative or outdated regulations, identifying non-statutory rule thresholds that should be updated, and developing a timeline for updating the rules in the future. We will seek resolution of Recommendation 5 during the evaluation follow-up process.

Although the FDIC acknowledged necessary improvements in its rulemaking process by concurring wholly or in part with the OIG's recommendations, the FDIC also

criticized our analysis and some of our conclusions. We take exception to this criticism, and it is at odds with the FDIC's overall concurrence and agreement with our findings.

The FDIC criticized our use of "best practices" to evaluate its rulemaking process and stated they were not from official sources or the OIG overstated the status of some as a settled best practice. The GAO recognizes the best practices methodology as a valid approach for improving government operations. In addition, in conducting this evaluation, we complied with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation*, which states that criteria include "expert opinions" and "best practices of leading organizations." The FDIC's comments demonstrate a misunderstanding of our evaluation methodology and the evidence supporting our findings and conclusions.

The FDIC also stated that our review focused on a subset of the regulatory analysis the FDIC conducted and did not consider other analysis which was pertinent to the evaluation of the costs and benefits of the rules. The FDIC specifically referenced the Regulatory Flexibility Act (RFA) and Paperwork Reduction Act (PRA) analyses required for rules. The RFA and PRA are specific to the economic effects on small entities and the recordkeeping, reporting and disclosure costs; respectively. Our evaluation, however, addressed the much broader cost benefit analysis process. Best practices support conducting cost benefit analyses, beyond the RFA and PRA, that identify the key aspects of various alternatives for a rule and inform the Agency and the public whether the benefits of a rule are likely to justify the costs, or determine which of various possible alternatives would be the most cost effective. During our evaluation, senior management acknowledged that the FDIC's analysis on all issued rules would not meet best practices because cost and benefits are not quantified and expressed in monetary units when appropriate and decision makers are not provided with a clear indication of the most efficient alternative.

The FDIC also criticized our characterization of the rules we reviewed because we did not differentiate between interagency and FDIC-only rules. Our evaluation, however, assessed the FDIC's rulemaking process for deciding when and how it would perform a cost benefit analysis for all rules issued during our scope period and the FDIC's transparency in disclosing its cost benefit analyses to the public. We acknowledged in our report that we reviewed both interagency and FDIC-only rules, and the best practices we identified applied to both interagency and FDIC-only rules. Therefore, we did not treat them differently in our analysis.

In addition, the FDIC suggested we should have concluded that 14 of the 16 substantive FDIC-only rules contained a cost benefit analysis since the FDIC believes that nine of the 25 FDIC-only rules had no effect or negligible effect on

institutions. However, as our report noted, only 4 of the FDIC-only rules had an in-depth analysis.

The FDIC's observations do not change our conclusions that the FDIC's process did not establish the procedures to determine when and how to perform cost benefit analyses; did not ensure an appropriate level of analyses were performed; resulted in inconsistent analyses; and limited public awareness and transparency.

Finally, the FDIC stated that our presentation of Part 370 as an example of when economists should have been involved earlier was incomplete because the FDIC provided documentation showing DIR economists were involved in the initial development of the rule. However, our report and FDIC guidance supports that RAS economists (the economists who perform regulatory analysis), not other DIR economists, possess the needed expertise, bear responsibility for this function, and should be involved early.

We acknowledge the efforts of the FDIC to conduct cost benefit analyses during rulemaking, and we appreciate the information provided for this report. We look forward to the FDIC's implementation of our recommendations to improve its cost benefit analysis process for rulemaking.

Objective

Our evaluation objective was to determine if the FDIC's cost benefit analysis process for rules was consistent with best practices. We performed our work from May 2018 to July 2019 at the FDIC's offices in Washington D.C. and Arlington, Virginia, in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation*.

Scope and Methodology

We reviewed the FDIC's prospective and retrospective cost benefit analysis processes. Specifically, we reviewed the FDIC's overall process for conducting cost benefit analyses of both FDIC and interagency rules finalized from January 1, 2016 through December 31, 2018. We also reviewed the FDIC's process for conducting retrospective cost benefit analyses of the FDIC's existing long-standing rules for requirements that may be overly burdensome, and to determine whether there are opportunities for the FDIC to update (or assess) an existing rule's cost benefit analysis. The evaluation methodology included (1) gaining an understanding of the rulemaking and retrospective review processes; (2) researching industry trends and literature, and speaking with officials at other Federal agencies, and academics on the subject matter; (3) selecting appropriate organizations for comparison; (4) collecting data from selected organizations; (5) identifying potential challenges and constraints to change; and (6) comparing and contrasting processes to develop recommendations.

To address our evaluation objective, we performed the following procedures and techniques:

- Researched applicable criteria such as Executive Orders, OMB guidance, and the FDIC Statements of Policy. Applicable sources of criteria included the following:
 - Executive Order No. 12866, *Regulatory Planning and Review* (September 1993);
 - OMB Circular No. A-4, *Regulatory Analysis* (September 2003);
 - Executive Order No. 13563, *Improving Regulation and Regulatory Review* (January 2011);
 - Executive Order No. 13579, *Regulation and Independent Regulatory Agencies* (July 2011);

- OMB Memorandum, *Executive Order 13579, "Regulation and Independent Regulatory Agencies,"* M-11-28 (July 2011);
 - Executive Order No. 13610, *Identifying and Reducing Regulatory Burdens* (May 2012);
 - FDIC Statement of Policy *Development and Review of FDIC Regulations and Policies* (April 2013);
 - Executive Order No. 13771, *Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs* (January 2017); and
 - Executive Order No. 13772, *Presidential Executive Order on Core Principles for Regulating the United States Financial System* (February 2017).
- Researched the draft report sponsored by the ACUS for its consideration entitled, *Economic Analysis and Independent Regulatory Agencies* (April 2013); ACUS-adopted recommendations presented within Administrative Conference Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies* (June 2013); and GAO and other regulatory agencies' work. Applicable GAO reports included the following:
 - GAO Report, *Dodd-Frank Act Regulations: Implementation Could Benefit from Additional Analyses and Coordination* (GAO-12-151) (November 2011);
 - GAO Report, *Dodd-Frank Act: Agencies' Efforts to Analyze and Coordinate Their Rules* (GAO-13-101) (December 2012);
 - GAO Report, *Dodd-Frank Regulations: Agencies Conducted Regulatory Analyses and Coordinated but Could Benefit from Additional Guidance on Major Rules* (GAO-14-67) (December 2013);
 - GAO Report, *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals* (GAO-14-268) (April 2014);
 - GAO Report, *Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent* (GAO-14-714) (September 2014);
 - GAO Report, *Dodd-Frank Regulations: Regulators' Analytical and Coordination Efforts* (GAO-15-81) (December 2014);
 - GAO Report, *Dodd-Frank Regulations: Impacts on Community Banks, Credit Unions and Systemically Important Institutions* (GAO-16-169) (December 2015);

- GAO Report, *Banking: Federal Agencies' Compliance with Section 302 of the Riegle Community Development and Regulatory Improvement Act* (GAO-16-213R) (January 2016);
 - GAO Report, *Dodd-Frank Regulations: Agencies' Efforts to Analyze and Coordinate Their Recent Final Rules* (GAO-17-188) (December 2016);
 - GAO Report, *Financial Services Regulations: Procedures for Reviews under Regulatory Flexibility Act Need to Be Enhanced* (GAO-18-256) (January 2018); and
 - GAO Report, *Community Banks and Credit Unions: Regulators Could Take Additional Steps to Address Compliance Burdens* (GAO-18-213) (February 2018).
- Identified best practices and cost benefit analyses challenges and constraints through the following procedures:
 - Researched Executive Orders, OMB guidance, GAO reports, ACUS-sponsored report and recommendations, Congressional Research Service Reports, and articles on cost benefit analyses and related control processes;
 - Interviewed officials at other Federal agencies (independent financial agencies and non-financial agencies);⁵⁰
 - This report, however, did not evaluate and makes no representations regarding the extent that other agencies, including other Federal banking agencies, actually follow these practices.
 - Interviewed the OMB Office of Information and Regulatory Affairs officials and members of Academia, including economists.
 - Researched prior FDIC OIG work including:
 - OIG Report, [Evaluation of the FDIC's Economic Analysis of Three Rulemakings to Implement Provisions of the Dodd-Frank Act](#) (EVAL-11-003) (June 2011).
 - OIG Report, [Claims Administration System Functionality](#) (EVAL-18-002) (March 2018).

⁵⁰ **Independent financial agencies** included the CFPB, OCC, FINRA, NCUA, SEC, and CFTC; and, **non-financial agencies** included the FCC and FTC.

- Researched the FDIC's 2016 and 2017 Annual Reports and Assurance Statements, FDIC Strategic Plan 2018 to 2022 (January 2018), FDIC Performance Goals from 2015 to 2019, and the FDIC Chairman's 2018 Congressional testimony before the *S. Comm. on Banking, Housing and Urban Affairs*, 115th Cong. 14 (2018).
- Interviewed FDIC personnel in DIR, RMS, DCP, DRR, and the Legal Division to understand their:
 - Goals, roles, responsibilities, and key activities surrounding the FDIC's rulemaking and cost benefit analyses processes, and plans to develop/mature these processes;
 - Cost benefit analyses processes (prospectively and retrospectively), and implementation of best practices;
 - Risk identification and analysis for potentially overly burdensome and outdated rules, and cumulative regulatory burden; and
 - Challenges and constraints associated with performing cost benefit analyses.
- Compared and contrasted the FDIC's rulemaking and cost benefit analyses processes against best practices, and key principles and standards promulgated by the GAO.
- Reviewed all FDIC final rules published in the Federal Register from January 2016 through December 2018. For each final rule, we reviewed the published rule's cost benefit analysis for qualitative and quantitative analyses, the consideration of alternatives, and formulated conclusions. In addition, we categorized and reviewed each rule based on its substance – as a substantive or less substantive rule, and we stratified the cost benefit analyses performed by depth – as (1) detailed cost benefit analysis, (2) high-level cost benefit analysis, or (3) no cost benefit analysis performed.
 - For two rules, Part 370 and Part 323 rule amendment, we also reviewed the Agency's rulemakings and cost benefit analyses processes against best practices, public comments, and the FDIC's analyses and responses to public comments; and we discussed our observations with the RAS and the corresponding Driver Divisions.
- Collected and analyzed rule and interview data on an aggregate basis, and analyzed and determined the impact of potential mitigating factors, such as the rule's degree of significance.

- Reviewed the FDIC's EGRPRA review process and the *FFIEC: Joint Report to Congress: Economic Growth and Regulatory Paperwork Reduction Act* (March 2017) report for retrospective cost benefit analyses, the identification of potentially overly burdensome or outdated rules, and agency actions in response to public comments.
- Reviewed the FDIC's Report, *FDIC Community Banking Study – Appendix B - Regulatory Compliance Costs - A Summary of Interviews with Community Bankers* (December 2012) for industry commentary on regulatory burden.

Sampling Methodology

We reviewed all 40 FDIC and Interagency final rules published in the Federal Register between January 2016 and December 2018.

The 40 rules were sponsored by various FDIC Divisions, including RMS, DCP, DRR, DIR, and the Legal Division. Table 2 presents the list of 40 rules by the FDIC's sponsoring Division and issuance date.

Table 2: Rules by Sponsoring Division (January 2016 - December 2018)

No.	Rules by Sponsoring Division	Issuance Date
Division of Risk Management Supervision		
1	Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks	2/29/2016
2	Regulatory Capital Rules: Regulatory Capital, Final Revisions Applicable to Banking Organizations Subject to the Advanced Approaches Risk-Based Capital Rule	4/15/2016
3	Registration of Securities Transfer Agents	5/6/2016
4	Rules of Practice and Procedure	6/29/2016
5	Margin and Capital Requirements for Covered Swap Entities	8/2/2016
6	Regulatory Capital Rules, Liquidity Coverage Ratio: Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions	10/17/2016
7	Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks	12/16/2016
8	Restrictions on Qualified Financial Contracts of Certain FDIC-Supervised Institutions; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions	10/30/2017
9	Restrictions on Qualified Financial Contracts of Certain FDIC-Supervised Institutions	12/28/2017
10	Regulatory Capital Rules: Retention of Certain Existing Transition Provisions for Banking Organizations That Are Not Subject to the Advanced Approaches Capital Rules	11/21/2017
11	Alternatives to References to Credit Ratings With Respect to Permissible Activities for Foreign Branches of Insured State Nonmember Banks and Pledge of Assets by Insured Domestic Branches of Foreign Banks	3/5/2018
12	Removal of Transferred OTS Regulations Regarding Minimum Security Procedures Amendments to FDIC Regulations	4/2/2018
13	Real Estate Appraisals	4/9/2018
14	Regulatory Capital Rules: Regulatory Capital, Final Revisions Applicable to Banking Organizations Subject to the Advanced Approaches Risk-Based Capital Rule	4/23/2018
15	Regulatory Capital Rules: Removal of Certain Capital Rules That Are No Longer Effective	4/24/2018

Objective, Scope, and Methodology

No.	Rules by Sponsoring Division	Issuance Date
	Following the Implementation of the Revised Capital Rules	
16	Securities Transaction Settlement Cycle	6/7/2018
17	Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks	8/29/2018
18	Liquidity Coverage Ratio Rule: Treatment of Certain Municipal Obligations as High-Quality Liquid Assets	8/31/2018
19	Margin and Capital Requirements for Covered Swap Entities; Final Rule	10/10/2018
20	Transferred OTS Regulations Regarding Fiduciary Powers of State Savings Associations and Consent Requirements for the Exercise of Trust Powers	11/26/2018
21	Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks	12/28/2018
Division of Depositor and Consumer Protection		
22	Loans in Areas Having Special Flood Hazards	2/5/2016
23	Removal of FDIC Regulations Regarding Fair Credit Reporting Transferred to the Consumer Financial Protection Bureau	8/25/2016
24	Community Reinvestment Act Regulations	1/18/2017
25	Community Reinvestment Act Regulations	11/24/2017
26	Community Reinvestment Act Regulations	12/27/2017
27	Removal of Transferred OTS Regulations Regarding Consumer Protection in Sales of Insurance	4/2/2018
28	Community Reinvestment Act Regulations; Correction	4/10/2018
29	Community Reinvestment Act Regulations	12/27/2018
Division of Resolutions and Receiverships		
30	Record Retention Requirements	6/27/2016
31	Treatment of Financial Assets Transferred in Connection with a Securitization or Participation	6/27/2016
32	Recordkeeping for Timely Deposit Insurance Determination	12/5/2016
33	Recordkeeping Requirements for Qualified Financial Contracts	7/31/2017
Division of Insurance and Research		
34	Assessments	3/25/2016
35	Assessments	5/20/2016
36	Assessment Regulations	4/5/2018
Legal Division		
37	Revision of the FDIC's Freedom of Information Act Regulations	11/22/2016
38	Rules of Practice and Procedure	12/28/2016
39	Rules of Practice and Procedure	1/12/2018
40	Rules of Practice and Procedure	11/28/2018

Source: OIG analysis of on-line data within the Federal Register.

Rulemaking and retrospective review processes for all agencies can be subject to the following cost benefit analysis challenges and constraints.

CBA Challenges and Constraints	Description
Limited Data Availability	Agencies often do not have the data needed (or sufficient data) to conduct a reliable cost benefit analysis or to assess a rule's economic impact. As a result, agencies rely, in part, on expert judgment.
Limited Statutory Discretion	Some individuals may view cost benefit analysis as unnecessary or less meaningful when an agency is compelled by statute to adopt a regulation with little or no discretion over the precise language of the regulation.
Limited Staff Resources	Agencies have limited staff resources, and employees may have competing priorities to performing cost benefit analyses.
Insufficient Analytical Models	Agencies face modeling challenges in their consideration of costs and benefits, particularly for more complex rules intended to address systemic risk or market stability, which are complex concepts that are not well defined or easily modeled. In addition, identifying a "baseline" is a key element of an analytical model and the cost benefit analysis. Benefits and cost are defined in comparison to a stated alternative. This generally will be a "no action" baseline: what the world will be like if the proposed rule is not adopted. "Baselines" can be difficult to define in finance and their utility can degrade over time.
Use of Sensitive Information	In addition to personally identifiable information and sensitive customer information, regulated entities possess proprietary information that they may not want to publicize, or that they may not be permitted to publicize.
Analytical Discretion and Negotiation	<p>Subject matter experts and economists employ professional judgment and discretion when selecting and applying analytical tools and methods, metrics, and assumptions. As a result, when performing a cost benefit analysis, two individuals may reasonably employ differing methodologies (analytical approaches) and assert differing assumptions.</p> <p>In addition, the process of reaching agreement on the cost benefit analysis for an interagency rule, where one or more agencies are agreeing to and promulgating the same regulation under their respective authorities, can affect the analysis presented to the public.</p>

Source: OIG analysis of interview statements.

FDIC Entity	Rulemaking Function
Office of the Chairman	In consultation with the FDIC Board of Directors and agency advisors, FDIC leadership will identify a need for regulatory action and an initial policy direction. During the later stages of the rulemaking process, the Office of the Chairman reviews the proposed rulemaking Board Case Package and authorizes the Board Case Package to be placed on the Board agenda.
Driver Division	Based on the subject area under consideration, the FDIC Division most impacted by the potential rule will lead the rulemaking process. The primary Driver Division (RMS, DCP, CISR, DRR, DIR, and Legal Division) will assemble a cross-functional Working Group and lead the group in drafting, reviewing, and finalizing a proposed rule.
Working Group	The cross-functional Working Group is made up of subject matter experts from one or more Divisions, a representative(s) from the Legal Division, and other staff, as appropriate. The Working Group is responsible, in part, for considering the expected effects, benefits, and costs of each rule, based on available information. The Working Group is led by the Driver Division. For interagency rules, the Working Group will coordinate with its counterparts at other agencies, as needed. Given the unique factors covering each proposed rule, each Working Group often involves different participants.
Legal Division	The Legal Division, as part of the assembled Working Group, works closely with the subject matter experts as a resource for the legal requirements covering rulemaking, and the RAS as a resource for general legal review to ensure compliance with various congressional Acts (such as the APA).
Regulatory Analysis Section	The RAS is staffed with economists that work closely with other FDIC Divisions and Offices (the assembled Working Group) to analyze the likely effects of proposed FDIC rules. For interagency rules, the section will also coordinate with its counterparts at other agencies, as appropriate. Administratively, the RAS reports to the FDIC's Chief Economist.
Chief Economist	The Office of the Chief Economist and Regulatory Analysis Branch oversees the RAS, and reports to the Director of DIR. The role of the Chief Economist is to direct policy research and analysis activities. In addition, the Chief Economist and his staff work with other DIR analysts to identify and study banking industry trends.
FDIC Board of Directors	The FDIC Board of Directors reviews the proposed rulemaking Board Case Package for approval and authorizes the draft and final rule to be published in the Federal Register.

Source: OIG analysis of the FDIC's interview statements, July 2018 Rulemaking Process Guide, and briefing materials.

We identified the following commonly acknowledged best practices from selected sources.

Best Practices	Executive Order/OMB	GAO	ACUS	Select Federal Agencies	Academics
Determine when and how to perform a cost benefit analysis.	✓	✓	✓	✓	✓

- **Executive Orders / OMB Guidance.** Executive Orders 12866 and 13563 advise certain agencies that they should consider costs and benefits during the rulemaking process. While all Executive Orders are not applicable to independent regulatory agencies, Executive Order 13579 applies directly to these agencies and encourages agencies, including the FDIC, to consider costs and benefits during the rulemaking process. OMB Circular A-4 provides guidance to Federal agencies regarding the development of regulatory guidance, including assessing costs and benefits of regulatory action. The FDIC stated that the principles articulated in the FDIC's *Statement of Policy Development and Review of FDIC Regulations and Policies* (April 2013) are broadly consistent with the principles in OMB Circular A-4. The following is additional information about the Executive Orders and OMB guidance that support the best practice that agencies should determine when and how to perform a cost benefit analysis:
 - **Executive Order 12866 (September 1993).** Executive Order 12866 advises that Federal agencies (not including independent regulatory agencies) should assess all costs and benefits of available regulatory alternatives, and to choose the alternative regulatory approaches that maximize net benefits, unless a statute required another regulatory approach. The order further advises that Federal agencies should conduct an in-depth cost benefit analysis for certain significant regulatory actions, including rules that may have an annual effect on the economy of \$100 million or more.
 - **OMB Circular A-4 (September 2003).** OMB Circular A-4 provides guidance to Federal agencies (not including independent regulatory agencies) for implementing Executive Order 12866 and assisting with the development of regulatory analysis. The circular was designed to assist analysts in the regulatory agencies by defining good regulatory analysis, and standardizing the way that benefits and costs of Federal regulatory actions are measured and reported.
 - **Executive Order 13563 (January 2011).** Executive Order 13563 supplements and reaffirms the principles, structures, and definitions governing regulatory review that were established in Executive Order 12866 for Federal agencies (not including independent regulatory agencies).
 - **Executive Order 13579 (July 2011).** Executive Order 13579 encourages independent regulatory agencies, including the FDIC, to the extent permitted by law, to make regulatory decisions only after consideration of their costs and benefits (both quantitative and qualitative); and to follow the key principles of Executive Order 13563.
 - Of particular note, Executive Order 13579 did not directly apply the cost benefit principles in Executive Order 12866 and 13563 to independent regulatory agencies, nor did it require these regulators to conduct cost benefit analysis before issuing their rules.
 - **OMB Memorandum M-11-28 (July 2011).** OMB Memorandum M-11-28 provides relevant guidance to independent agencies on Executive Order 13579.
- **GAO Recommendations.** The GAO report, *Financial Services Regulations: Procedures for Reviews under Regulatory Flexibility Act Need to Be Enhanced* (GAO-18-256) (January 2018) found, in part, that financial regulators' evaluation of key components required by the Regulatory Flexibility Act* – potential economic effects and alternative regulatory approaches – was limited. Most regulators also did not disclose data sources or methodologies used for their analyses and were unable to provide documentation supporting their analyses. In

addition, regulators generally did not have specific policies and procedures to assist staff in complying with the Regulatory Flexibility Act. Ultimately, the GAO concluded that these weaknesses could undermine the Act's goal and limit transparency and public accountability. As a result, the GAO recommended that the FDIC should develop and implement specific policies and procedures for consistently complying with the Regulatory Flexibility Act and for conducting analyses.

In response, the FDIC agreed, and stated that the Agency would consider the GAO's recommendations as it continued to enhance its policies and procedures for performing regulatory analyses, in particular compliance with the Regulatory Flexibility Act.

The GAO report, *Dodd-Frank Act Regulations: Implementation Could Benefit from Additional Analyses and Coordination* (GAO-12-151) (November 2011) found, in part, that financial regulators' rulemaking practices and policies were inconsistent with OMB Circular A-4 guidance. The GAO noted that the independent regulators were not required to follow OMB Circular A-4 but used the OMB Circular A-4 as an example of best practices for the agencies to follow when conducting their regulatory analysis and, therefore, used it as criteria and applied it to the agencies. To strengthen the rigor and transparency of their regulatory analyses, the GAO recommended that the FDIC should take steps to incorporate OMB's guidance into their rulemaking policies and ensure that it is consistently followed, to the extent applicable.

In response, the FDIC agreed, and stated that the Agency would review the FDIC's Statement of Policy *Development and Review of FDIC Regulations and Policies* (May 1998) and regulatory processes to evaluate where improvements could be made given the GAO's recommendations.

* Similar to performing a cost benefit analysis for a rule, to comply with the Regulatory Flexibility Act, during the rulemaking process, agencies generally must assess a proposed rule's potential impact on small entities and consider alternatives that may minimize any significant economic impact of the rule. Alternatively, agencies may certify that a rule would not have a significant economic impact on a substantial number of small entities. Furthermore, section 610 of the Act requires agencies to review, within 10 years of issuance, existing rules that have a significant economic impact on a substantial number of small entities to determine if such rules should be continued without change, amended, or rescinded.

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- **ACUS Recommendation.** Based on the Administrative Conference Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies* (June 2013), the ACUS recommended that each "independent regulatory agency should develop and keep up to date written guidance regarding the preparation of benefit-cost and other types of regulatory analyses. That guidance should be tailored to the agency's particular statutory and regulatory environment..."
-
- **Federal Agencies.** Federal agencies perform a cost benefit analysis on each proposed rule and consider the rule's significance in determining the proportional depth of analysis needed. They also classify the rule based on its likely impact to the economy, industries, communities, and governments to facilitate their cost benefit analysis. For example, the CFPB conducts cost benefit analyses for proposed and final rules that focus on the rules' most significant provisions – such as those that cover the most entities, have the biggest effects, or serve a special population. To determine the depth of analysis for these provisions, the CFPB considers data availability or collectability, and conducts a qualitative cost benefit analysis when quantitative data is unavailable. The CFPB recognizes that the depth of analysis relies on professional judgment but also recognizes the need for guidance to facilitate that judgment.
-
- **Academia.** An agency should categorize proposed rules to determine the need to perform cost benefit analyses and the depth of analyses to be performed based on their likely impact to the economy, industries, communities, and governments. Rule categorization sorts rules by significance based on those affected. It also identifies resource requirements for cost benefit analyses and the requisite depth of analyses. Ultimately, the amount of analysis should be proportional to the regulation's economic significance.
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Identified Best Practices and Their Sources

Involve the economist in a rule's initial development.	—	—	✓	✓	✓
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- ACUS Recommendation.** The Administrative Conference Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies* (June 2013) states that “if an independent regulatory agency prepares a regulatory analysis for a proposed or final rule, the analysis should be developed as early in the rulemaking process as reasonably practical...”

A finding in the ACUS sponsored report, *Economic Analysis and Independent Regulatory Agencies* (April 2013), led to the above recommendation by the ACUS. The finding, *Making Analysis Part of Rule Development*, included examples supporting the early involvement of economists. Specifically, the finding stated:

Several of the independent regulatory agencies indicated that a "best practice" was to make regulatory analysis an early part of the rule development process. For example, both SEC and FCC officials said economists are part of the rulemaking process from the earliest stages of rule development. The CFTC Chief Economist said that economists work with line staff early in the process, asking questions about costs, benefits and alternatives.

As economists play a critical role in preparing the “regulatory analysis” for a proposed or final rule at the FDIC and other Federal agencies, the ACUS’s recommendation supports the best practice of involving economists early in the rulemaking process.

The ACUS approved a recommendation on the involvement of economists during its 72nd Plenary Session, December 12, 2019. This recommendation stated that:

To promote meaningful consideration of economic analysis early in the decision-making process, agencies should consider developing guidance clarifying that economists will be involved in regulatory development before significant decisions about the regulation are made. Agencies should make this guidance publicly available by posting it on their websites.

- Academia and Federal Agencies.** With early involvement, an economist has the opportunity to influence the initial development of the rule and policy determination from an economic perspective, which could enhance the policy framework and the agency’s corresponding cost benefit analysis. When leveraged early, economists can also identify challenges related to data availability and analytical models, and suggest solutions.

For example, the SEC ensures close collaboration with economists to help integrate economic analysis as key policy choices are made 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.

Have the Chief Economist review the cost benefit analysis.	—	—	—	✓	✓
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- Academia and Federal Agencies.** An agency’s Chief Economist should review and approve the cost benefit analyses performed through an established concurrence process. The Chief Economist should provide assurance that the economic concepts presented are sound and logical, and that the analysis is consistent with agency guidance, and is accurate, sufficient, logical, unbiased, and based on the best data and analysis available at the time of the rule.

Provide full transparency of the cost benefit analysis.	✓	✓	✓	✓	✓
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- **Executive Orders / OMB Guidance.** According to OMB Circular A-4, transparency is achieved by documenting and publishing the cost benefit analyses scope and methodology, analyses, and conclusions; and by providing the public with clear and complete information so that they can reasonably recreate or understand rulemaking and what was done for the cost benefit analyses.

- **GAO Recommendation.** The GAO report, *Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent* (GAO-14-714) (September 2014) found that agencies' cost benefit analyses included key elements, but information on rule designation lacked transparency. As a result, the GAO recommended that OMB should work with agencies to clearly communicate the reasons for designating a regulation as a significant regulatory action, and encourage agencies to clearly state those reasons in the preamble of the final regulation (although OMB has not taken action to implement GAO's recommendation).

- **ACUS Recommendation.** Based on the Administrative Conference Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies* (June 2013), the ACUS recommended that subject "to the limitations of law and applicable policies, independent regulatory agencies' regulatory analyses should be as transparent and reproducible as practicable. In particular, agencies should consider disclosing how the analyses were conducted, posting the analyses on their websites and other appropriate online fora, and summarizing the methods and results in the preambles of the notice of proposed rulemaking and the final rule."

- **Academia and Federal Agencies.** An agency's published cost benefit analysis should be transparent. Academics also stated that a standard of transparency is needed that ensures underlying studies and evidence are disclosed, so that an informed party can reasonably recreate or understand what was done. In addition, the agency should reconcile the conclusion from the cost benefit analysis to the agency's final policy decision.

Conduct retrospective cost benefit analysis.	✓	✓	—	—	✓
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- **Executive Orders / OMB Guidance.** According to Executive Order 13579 and OMB Memorandum M-11-28, independent regulatory agencies are encouraged to engage in a retrospective analysis of the costs and benefits (both quantitative and qualitative) of regulations chosen for review. The memorandum notes that such analyses can inform judgments about whether to modify, expand, streamline, or repeal such regulations, and can also provide valuable insight on the strengths and weaknesses of pre-regulatory assessments (rulemaking), which can be used to enhance the agency's analytic capability.

While not directed to independent regulatory agencies, as a best practice, Executive Order 13610 stated that it is particularly important for agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies. The above best practice is supported by the following Executive Orders and OMB guidance:

- **Executive Order 12866 (September 1993).** Executive Order 12866 directed Federal agencies (not including independent regulatory agencies) to develop a program under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the priorities and principles set forth in this order.
- **Executive Order 13563 (January 2011).** Executive Order 13563 directed Federal agencies (not

- including independent regulatory agencies) to consider how best to promote retrospective analysis of significant rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.
- **Executive Order 13579 (July 2011).** Executive Order 13579 directed independent regulatory agencies, to consider how best to promote periodic retrospective analysis of significant rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data and evaluations, should be released online whenever possible.
 - **OMB Memorandum M-11-28 (July 2011).** OMB Memorandum M-11-28 provided relevant guidance to independent agencies on Executive Order 13579. In addition, the OMB Memorandum stated that agencies should consider retrospective analysis of the costs and benefits (both quantitative and qualitative) of regulations chosen for review.
 - **Executive Order 13610 (May 2012).** Executive Order 13610 directed Federal agencies (not including independent regulatory agencies) to conduct retrospective analyses of their existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.
-
- **GAO Recommendations.** The GAO Report, *Community Banks and Credit Unions: Regulators Could Take Additional Steps to Address Compliance Burdens* (GAO-18-213) (February 2018), stated that as part of their retrospective reviews, the depository institution regulators should develop plans to report quantitative rationales for their actions and addressing the cumulative burden of regulations. In particular, GAO recommended that the FDIC Chairman should, as part of the EGRPRA review process: (1) develop plans for their regulatory analyses describing how they will conduct and report on quantitative analysis whenever feasible to strengthen the rigor and transparency of the EGRPRA review process; and (2) develop plans for conducting evaluations that would identify opportunities for streamlining bodies of regulation.

In response, the FDIC agreed, and stated that going forward, and as part of the EGRPRA review process, the FDIC would work with the OCC and FRB to enhance the EGRPRA review processes and analyses where feasible and consistent with the statute.

The GAO report, *Dodd-Frank Act Regulations: Implementation Could Benefit from Additional Analyses and Coordination* (GAO-12-151) (November 2011), found, in part, that financial regulators' rulemaking practices and policies were inconsistent with OMB Circular A-4 guidance. To maximize the usefulness of retrospective reviews, the GAO recommended that the FDIC develop plans that determine how the Agency will measure the impact of certain regulations – for example, determining how and when to collect, analyze, and report needed data.

In response, the FDIC agreed, and stated that in connection with the EGRPRA review process, the Agency would develop a plan for how to measure the impact of the Dodd-Frank regulations that the FDIC implemented, including how and when to collect, analyze, and report needed data. In addition, the FDIC also expressed a willingness to work with the Financial Stability Oversight Council (FSOC) and the Office of Financial Research (OFR)* to identify data needed to assess the impact of certain regulations – among other things, the stability, efficiency, and competitiveness of the U.S. financial markets.

* **The FSOC** monitors risks to the U.S. financial sector from the issues of large banks or financial holding companies that could derail the economy. The FSOC's main tasks are to identify risks to the financial stability of the United States from financial organizations as well as stability risks outside of the financial sector. **The OFR** was established to support the FSOC, FSOC member organizations, and the public, and promote financial stability by delivering high-quality financial data, standards, and analysis.

- **Academia.** A Federal agency should conduct some type of retrospective review that includes quantitative and qualitative considerations to determine the effectiveness of existing regulations. For those agencies with resource constraints, a noted key cost benefit analysis challenge, a regulatory risk assessment process could be an effective tool to identify regulations that are at a higher risk of being outdated, duplicative, or overly burdensome.

Source: OIG analysis of Executive Orders, OMB guidance, GAO reports, ACUS-sponsored report and recommendations, and interview statements from Academia and Federal agencies.

Legend: ✓ The source identified this item. | — The source did not mention this item.

ACUS	Administrative Conference of the United States
APA	Administrative Procedure Act
CAMELS	<u>C</u> apital adequacy, <u>A</u> sset quality, <u>M</u> anagement, <u>E</u> arnings, <u>L</u> iquidity and <u>S</u> ensitivity to market risk
CBA	Cost Benefit Analysis
CFPB	Consumer Financial Protection Bureau
CFTC	Commodity Futures Trading Commission
CISR	Division of Complex Institution Supervision & Resolution
DCP	Division of Depositor and Consumer Protection
DIR	Division of Insurance and Research
DRR	Division of Resolutions and Receiverships
EGRPRA	Economic Growth and Regulatory Paperwork Reduction Act of 1996
FCC	Federal Communications Commission
FDIC	Federal Deposit Insurance Corporation
FHFA	Federal Housing Finance Agency
FINRA	Financial Industry Regulatory Authority
FRB	Board of Governors of the Federal Reserve System
FTC	Federal Trade Commission
GAO	U.S. Government Accountability Office
NCUA	National Credit Union Administration
OCC	Office of the Comptroller of the Currency
OFR	Office of Financial Research
OIG	Office of Inspector General
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
PRA	Paperwork Reduction Act
RAS	Regulatory Analysis Section
RFA	Regulatory Flexibility Act
RMS	Division of Risk Management Supervision
SEC	Securities and Exchange Commission



Federal Deposit Insurance Corporation
550 17th Street NW, Washington, D.C. 20429-9990

Division of Insurance and Research

January 21, 2020

TO: Terry L. Gibson
Assistant Inspector General for Program Audits and Evaluations,
Office of Inspector General

FROM: Diane Ellis */Signed/*
Director, Division of Insurance and Research

SUBJECT: Management Response to the OIG Draft Report, *Cost Benefit Analysis Process for Rulemaking*

We appreciate the opportunity to comment on the Office of Inspector General's (OIG) draft evaluation report titled *Cost Benefit Analysis Process for Rulemaking* (henceforth, the report).

Introduction

The FDIC strives to carefully consider the need for regulatory action, evaluate the potential costs and benefits of those actions, consider those actions relative to other reasonable and practicable alternatives, carefully consider input from key stakeholders and members of the public, and be as transparent as possible in doing so. The FDIC is committed to continually 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 and regulatory goals effectively and efficiently.

The report reviewed the 40 final rules issued by the FDIC during the three-year period January 1, 2016-December 31, 2018, with a focus on whether a cost-benefit analysis was conducted for each rule, and how the process for developing the analyses compared to "best practices" that the OIG identified. Our response addresses: 1) the process of developing regulatory analysis at the FDIC and the types of analyses conducted, important aspects of which were not reviewed by the report; 2) issues that we believe are presented incorrectly or incompletely in the report, including that the report did not point out that the OIG's review found that the FDIC conducted a cost benefit analysis for the majority of FDIC-only rules (and for 14 of the 16 FDIC-only rules that, in our judgment, had substantive effects); and 3) the report's recommendations, with which we generally concur.

Regulatory Analysis at the FDIC

The OIG's review included 40 final rules issued during the years 2016-2018. The review focused on a subset of the analysis the FDIC conducted for these rules, and much of the analysis the OIG did not review is pertinent to the evaluation of the costs and benefits of those rules. Consequently, the report does not fully describe the extent of the FDIC's regulatory analysis efforts.

As the report mentions, the Administrative Procedures Act (APA) governs the procedural requirements for all federal government rulemakings, including the FDIC. Additionally, the FDIC is subject to a number of statutory mandates relevant to the effects of regulations. The Regulatory Flexibility Act (RFA)

requires the FDIC, and other agencies, to review the effects of regulatory actions on small entities, identify whether the actions would have a significant economic effect on a substantial number of small entities, and if so, consider whether the purpose of the rule could be achieved in a way that mitigates adverse impacts on small entities. The Paperwork Reduction Act (PRA) requires the FDIC and other agencies to identify and quantify the recordkeeping, reporting and disclosure costs of regulatory actions. The analytical findings for both of these statutory mandates are routinely found in the Federal Register Notices for FDIC rules, and represent important elements in the consideration of the potential costs and benefits.

On page 13, the report notes that the OIG's review was limited to the Federal Register notice for each FDIC final rule, but it does not mention the analytical findings of the RFA or PRA sections of those Federal Register notices or the degree to which they may have reflected on the presence and depth of the FDIC's regulatory analysis efforts. Further, Section 605 of the Regulatory Flexibility Act recognizes that agencies may, to avoid duplication and promote clarity, reference analyses presented elsewhere. In so doing, Section 605 recognizes the principle that a satisfactory regulatory analysis presented in one part of a Federal Register notice need not be duplicated elsewhere in the notice.

The FDIC is also subject to The Congressional Review Act (CRA) which requires any agency promulgating a rule covered by that Act to submit a report to each House of Congress and to the Comptroller General, that contains a copy of the rule, a concise general statement describing the rule (including whether it is a major rule¹), and the proposed effective date of the rule. Congress has the ability to review the rule, and potentially disapprove it. The Office of Management and Budget (OMB) determines whether regulatory actions are "major rules" for purposes of the CRA. The FDIC assists the OMB by providing, for each final rule, analysis and recommendations regarding whether that rule should be deemed major.

The FDIC performs all statutorily required analyses in connection with its rulemakings. In addition, the FDIC's revised "Statement of Policy on the Development and Review of Regulations" describes the FDIC's commitment to carefully reviewing the potential costs and benefits of its regulatory actions.² In 2016, the FDIC established a Regulatory Analysis Section (RAS) within the Division of Insurance and Research to provide an analytical perspective on the development of regulatory analysis, including analysis of the benefits and costs of these actions. The RAS reviews essentially all rules that come before the FDIC Board, provides most of the analytical content for Regulatory Flexibility Act analyses of effects on small institutions and for major rule recommendations provided by the FDIC to the OMB for final rules, provides input into required Paperwork Reduction Act analyses, and has provided "expected effects" sections of Federal Register notices, addressing costs and benefits for most FDIC-only rules, both proposed and final, that have the potential to affect institutions. Additionally, in 2018 the FDIC adopted new policies and procedures to more consistently comply with the analysis requirements of the Regulatory Flexibility Act.

Issues that We Believe Are Presented Incorrectly or Incompletely in the Report

The report states that 15 of the 40 FDIC rules it reviewed contained a cost benefit analysis. It does not identify important distinctions among the 40 rules that reflected actual practice during the 2016-2018

¹ A "major rule" is a rule that has resulted in or is likely to result in: (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

² See 77 Fed. Reg. 22771 April 17, 2013.

period. First, 15 of the 40 rules the OIG reviewed were interagency rules. The portions of the Federal Register notices for interagency rules that the OIG reviewed are the agreed joint statements of the participating agencies about the rules, and are not within the unilateral control of the FDIC. The OIG found that only 1 of the 15 interagency rules contained a cost benefit analysis, but did not note this in its report. In contrast, it found that 14 of the 25 FDIC-only rules contained a cost benefit analysis, but did not note this in its report.

Of the 25 FDIC-only final rules that the OIG reviewed for its report, we believe that nine had no effect or negligible effects on institutions. The nine consist of five technical corrections of previous Federal Register notices, one rescission of capital rules that were no longer in effect, and three removals of Office of Thrift Supervision rules where the removed rules were supplanted by similar or identical FDIC rules. We believe these nine rules should not have been included in a list of rules for which, the report suggests implicitly, the FDIC should have performed a cost-benefit analysis. In our view, if the OIG had attempted to differentiate based on the substance of rules, it would have concluded that 14 of the 16 substantive FDIC-only rules (88 percent) contained a cost benefit analysis.

The report evaluates the FDIC's cost benefit analysis against "best practices" identified by the OIG, with sources for these practices cited in Appendix 4 of the report. Some of these practices are not from official sources but from "select federal agencies" or "academics." At a high level, the report could be taken by some readers to suggest that the FDIC is an exceptionally poor performer relative to the best practices identified by the OIG. However, as the report notes in the Objective, Scope, and Methodology section, "This report, however, did not evaluate and makes no representations regarding the extent that other agencies, including other Federal banking agencies, actually follow these practices." As suggested by the high percentage noted above of substantive FDIC-only rules containing a cost-benefit analysis, the FDIC is committed to credible and transparent analysis of the effects of its rulemaking actions.

In some instances, the report cites "best practices" with which we disagree. We agree in broad terms with other cited practices, but note that the report may overstate the status of some of them as settled best practices. The report states on page 11, "According to these best practices, the FDIC should include a cost benefit analysis for all new rules, but all new rules should not require the same depth of analysis." As indicated above, nine of the FDIC-only final rules had no effect or negligible effects. While it may have been desirable to state in the rulemaking actions why no analysis was presented (as the OIG report on page 24 also states is a best practice), we do not agree that as a substantive matter, a cost-benefit analysis should have been presented for these rules. In general, we believe there may be some rules, including new rules, that should not require a cost-benefit analysis to be presented in the Federal Register, and we believe this idea is consistent with another best practice cited by the OIG, which is to determine *when* (emphasis added) a cost-benefit analysis should be performed.

In a similar vein, pages 15 through 17 of the report criticize the FDIC for not performing a cost-benefit analysis of the interagency rules implementing legislative changes to statutory minimum safety-and-soundness examination frequencies, and in particular for not analyzing a more stringent and a less stringent alternative. As a general matter, we believe analysis of alternatives that is useful for decision making should reflect the statutory discretion available to the FDIC, and provide no utility when the statute provides no discretion.

Another best practice identified by the report is to have the Chief Economist review the cost benefit analysis. As indicated by our agreement with the report's recommendation in this area, we agree that the Chief Economist, or a similar official, should do this. As a matter of practice, the Chief Economist or other senior FDIC official with appropriate skills and experience reviewed the regulatory analysis for most FDIC rules since 2016. Nonetheless, the report overstates the status of this idea as a settled best practice. For example, some agencies may not have an official with this title, or duties may differ over

time or across agencies. The source for this practice is identified on page 42 of the report as “select federal agencies” and “academics” (but not OMB, GAO or ACUS).
OIG’s presentation of Part 370 – Recordkeeping for Timely Deposit Insurance Determination, as an example where the FDIC should have involved economists earlier in the rulemaking process is also incomplete. OIG cites as best practices recommendations from ACUS that economists should be involved in regulatory development before significant decisions about the regulation are made and should be part of the rulemaking process from the earliest stages of rule development. While FDIC did not form RAS until 2016, we provided OIG documentation showing that DIR economists were involved in the initial development of the rule. For example, a DIR economist was a member of an interdivisional working group formed in September 2013 to develop a comprehensive approach to deposit insurance determination capacity. The working group also considered alternative courses of action. Additionally, multiple economists, including ones that would later join RAS, were involved in the effort as early as December 2014 and a DIR economist had primary responsibility for drafting the rule.

The OIG report also concludes that lack of formal review and concurrence by the FDIC’s Chief Economist may have affected the Part 370 rule’s effectiveness and quality control and may have contributed to the release of inaccurate cost estimates. We provided the OIG with support that the Chief Economist was involved in the rulemaking effort as early as March 2015 and that he provided comments addressing the costs and benefits included in the Advanced Notice of Proposed Rulemaking. While we agree the concurrence process could be more formal, we do not agree that lack of such a process affected the quality of this rule nor would we characterize the initial Part 370 cost estimate as “inaccurate.” The FDIC engaged an experienced consultant to assist it in constructing this initial cost estimate, but the FDIC was fully aware that it would likely require significant adjustment based on industry feedback. This was especially true since the unique requirements of the rule had never been implemented previously and many of the covered companies have proprietary deposit systems that present company-specific challenges.

The report also states that a best practice is to conduct retrospective cost benefit analysis, and specifically advocates for a “regulatory risk assessment process.” Executive Order 13579, while not binding on independent regulatory agencies, offers the following advice:

Sec. 2. Retrospective Analyses of Existing Rules. (a) To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data and evaluations, should be released online whenever possible.

OMB Memorandum M-11-28, which provides guidance to independent agencies regarding Executive Order 13579, includes the following language:

Analysis of costs and benefits and of potential savings. Agencies may well find it useful to engage in a retrospective analysis of the costs and benefits (both quantitative and qualitative) of regulations chosen for review. (M-11-28 page 5)

We agree that retrospective analysis of rules is desirable but we believe the report overstates the extent to which best practices exist regarding the specifics of such a program. For example, none of the citations from official sources referenced in Appendix 4 of the report use the term “regulatory risk assessment process.” The report also downplays the usefulness and importance of the statutory Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) process the FDIC uses to comprehensively review all of its regulations. While we agree that retrospective analysis of the effects of existing rules is desirable, we have not ruled out the EGRPRA process as the primary vehicle for such analysis.

Finally, on page 29, the report states, “Agencies with limited resources can proactively assess existing rules, and rule provisions, by key metrics (or thresholds) using a regulatory risk assessment process to identify regulations that are at risk of becoming outdated, duplicative, or overly burdensome.” We note that while there may be some rules for which “key metrics” could be developed that are useful for evaluating their efficacy, such rules may be in the minority. The report acknowledges this challenge in Appendix 2, where Limited Data Availability is the first identified challenge or constraint to conducting analysis.

Management Response to OIG Recommendations

Recommendation 1: Establish, document, and implement policy and procedures for conducting cost benefit analyses, including when and how the cost benefit analyses will be performed.

Management Decision: Concur.

Corrective Actions: DIR will work with FDIC leadership to do the following:

- (a) Finalize written procedures for rule-writing staff and regulatory analysis staff regarding roles and responsibilities for cost benefit analysis and when such analysis will be performed.
- (b) Finalize written guidance to rule-writing staff and regulatory analysis staff regarding how cost benefit analysis should be performed.
- (c) Implement the procedures described in the directive and guidance.

Estimated Completion Dates:

- (a) March 31, 2021
- (b) March 31, 2021
- (c) June 30, 2021

Recommendation 2: Establish, document, and implement policy and procedures that clearly define the roles and responsibilities for the RAS, and early involvement for the RAS in participating in and framing the initial policy direction of a rule.

Management Decision: Concur

Corrective Actions:

- (a) DIR will work with FDIC leadership to finalize written procedures for rule-writing staff and regulatory analysis staff regarding roles and responsibilities for cost benefit analysis and when such analysis will be performed. The written procedures will include procedures that provide an opportunity for RAS to be involved in participating in and framing the initial policy direction of a rule.
- (b) DIR will implement the procedures

Estimated Completion Dates:

- (a) March 31, 2021
- (b) June 30, 2021

Recommendation 3: Establish, document, and implement policy and procedures that clearly define the Chief Economist’s roles and responsibilities for reviewing and concurring on cost benefit analyses performed.

Management Decision: Concur

Corrective Actions:

- (a) DIR will work with FDIC leadership to finalize written procedures for rule-writing staff and regulatory analysis staff regarding roles and responsibilities for cost benefit analysis and when such analysis will be performed. The written procedures will clearly define the role of the Chief Economist, or similar designated FDIC official with appropriate skills and experience, for reviewing and concurring on cost benefit analyses performed.

(b) DIR will establish delegations for DIR's review of cost benefit analyses and other regulatory analyses, including the role of the Chief Economist or similar designated FDIC official with appropriate experience and expertise.

(c) DIR will implement the procedures

Estimated Completion Dates:

(a) March 31, 2021

(b) March 31, 2021

(c) June 30, 2021

Recommendation 4: Establish, document, and implement policy and procedures that address how cost benefit analyses and supporting information, such as scope and methodology, analyses, conclusions, and reconciliation to the Agency's final policy decision will be documented and published in the Federal Register to ensure transparency.

Management Decision: Concur

Corrective Actions:

(a) DIR will work with FDIC leadership to finalize written procedures for rule-writing staff and regulatory analysis staff regarding roles and responsibilities for cost benefit analysis and when such analysis will be performed. The written procedures will address how cost benefit analysis and supporting information, such as scope and methodology, analyses, conclusions, and the reasons for the Agency's final policy decision, will be documented and published in the Federal Register to ensure transparency.

(b) DIR will implement the procedures

Estimated Completion Dates:

(a) March 31, 2021

(b) June 30, 2021

Recommendation 5: Establish, document, and implement policy and procedures for conducting retrospective cost benefit analyses on existing rules, including a regulatory risk assessment, as well as roles and responsibilities for the Driver Divisions, Chief Economist, and DIR/RAS.

Management Decision: Partially concur.

Corrective Actions:

(a) DIR will work with FDIC leadership to decide whether the existing EGRPRA process for reviewing existing rules should be enhanced, whether analytical processes separate from EGRPRA should be developed, or whether the current status quo should be maintained, and will document the decision in a memorandum.

(b) If FDIC leadership determines that the existing EGRPRA process for reviewing existing rules should be enhanced or supplemented with additional analyses, DIR will work with FDIC leadership to identify options for how to enhance the analytical review of existing rules and the level of resources needed for each option.

(c) If FDIC leadership decides to pursue one of these options, DIR will develop an implementation plan, which may include a transition period to develop consensus with the other EGRPRA agencies, to obtain additional staff resources, or both.

(d) DIR will implement the plan.

Estimated Completion Dates:

(a) September 30, 2020.

(b) March 31, 2021.

(c) September 30, 2021.

(d) June 30, 2022.

This table presents management's response to the recommendations in the report and the status of the recommendations as of the date of report issuance.

Rec. No.	Corrective Action: Taken or Planned	Expected Completion Date	Monetary Benefits	Resolved: ^a Yes or No	Open or Closed ^b
1	Finalize and implement written procedures and guidance for rule-writing staff and regulatory analysis staff regarding the roles and responsibilities for cost benefit analysis and when and how cost benefit analysis will be performed.	June 30, 2021	\$0	Yes	Open
2	Finalize and implement written procedures that provide an opportunity for RAS to participate in framing the initial policy direction of a rule.	June 30, 2021	\$0	Yes	Open
3	Finalize and implement written procedures that clearly define the role of the Chief Economist, or similarly designated FDIC official with appropriate skills and experience, for reviewing and concurring on cost benefit analyses performed.	June 30, 2021	\$0	Yes	Open
4	Finalize and implement written procedures that address how cost benefit analysis and supporting information, such as scope and methodology, analyses, conclusions, and the reasons for the Agency's final policy decision, will be documented and published in the Federal Register to ensure transparency.	June 30, 2021	\$0	Yes	Open
5	Decide whether the existing EGRPRA process for reviewing existing rules should be enhanced, whether analytical processes separate from EGRPRA should be developed, or whether the current status quo should be maintained, and document the decision in a memorandum. If the FDIC decides to enhance the existing EGRPRA process or develop a separate process, it will identify options for how to enhance the analytical review of existing rules and the level of resources needed, and develop and implement a plan.	June 30, 2022	\$0	No	Open

^a Recommendations are resolved when —

1. Management concurs with the recommendation, and the planned, ongoing, and completed corrective action is consistent with the recommendation.
2. Management does not concur with the recommendation, but alternative action meets the intent of the recommendation.
3. Management agrees to the OIG monetary benefits, or a different amount, or no (\$0) amount. Monetary benefits are considered resolved as long as management provides an amount.

^b Recommendations will be closed when the OIG confirms that corrective actions have been completed and are responsive.



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