

## NOTE

### THE POLITICAL ECONOMY OF FINANCIAL RULEMAKING AFTER *BUSINESS ROUNDTABLE*

Jonathan D. Guynn\*

#### INTRODUCTION

**I**N *Business Roundtable v. SEC*,<sup>1</sup> the U.S. Court of Appeals for the D.C. Circuit struck down the Securities and Exchange Commission's ("SEC") proxy access rule.<sup>2</sup> The court held that the rulemaking process was arbitrary and capricious and not in accordance with law because the SEC failed to perform an adequate cost-benefit analysis ("CBA") of the rule.<sup>3</sup>

The court's scrutiny of the SEC's cost-benefit analysis was so exacting that it appeared to go well beyond the standard of review established in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,<sup>4</sup> by giving little or no deference to the SEC's judgments about the balance of the costs and benefits of the proposed rule. *State Farm* requires agencies to include a reasoned consideration of alternatives to their selected course of action in the agency record. In so doing, agencies need only offer a rational connection between the facts that they have found and the choice that was made.<sup>5</sup> Under *State Farm*, one would think that an expert financial regulator, like the SEC, would meet this standard as long as it performed its own evaluation of a rule's

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<sup>1</sup> 647 F.3d 1144 (D.C. Cir. 2011).

<sup>2</sup> The proxy access rule gave shareholders of a public company the right to require that their preferred candidates for board members be included in the company proxy card. *Id.* at 1147.

<sup>3</sup> *Id.* at 1148.

<sup>4</sup> 463 U.S. 29 (1983).

<sup>5</sup> *Id.* at 41, 43.

costs and benefits based on reports prepared by its staff or submitted by the public during the notice and comment period, provided it found those reports to be more convincing than any alternative estimates of costs and benefits in the record. But *Business Roundtable* appears to require agencies to do more than just consider every alternative cost-benefit analysis in the record. *Business Roundtable* appears to require courts to police the quality of agency cost-benefit analysis and directs judges to look more closely at agency analysis to determine whether the agency has correctly—not just rationally—considered and ascertained a rule’s costs and benefits based on all the alternative analyses in the record.

If the D.C. Circuit adheres to this approach, *Business Roundtable* could become one of the most significant decisions since cost-benefit analysis was developed in the early 1970s by holding financial regulatory agencies strictly accountable for the quality of their cost-benefit analysis. Cost-benefit analysis has become a garden-variety provision in agency program statutes, but until now it has not had much teeth in the financial regulatory area because the standard of review has been so deferential. The cost-benefit analyses performed by these agencies have typically read as if they were written by lawyers trying to make a plausible case for a precooked conclusion, rather than as a rigorous analysis based on actual data and solid scientific methods. *Business Roundtable* is significant because it gives cost-benefit mandates real teeth, at least those that apply to independent agencies. Depending on one’s view, such a powerful new filter of financial regulation could either further ossify the financial rulemaking process<sup>6</sup> or make the rules that emerge from the process more rational, efficient, and transparent.<sup>7</sup>

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<sup>6</sup> See, e.g., Recent Case, *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), 125 Harv. L. Rev. 1088, 1092, 1095 (2012) (arguing that the *Business Roundtable* approach creates a “judicial blockade” that will result in “ossification of SEC regulations”). This type of ossification claim has been a pretty standard criticism of the rulemaking process in general in the administrative law literature. See, e.g., William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 Nw. U. L. Rev. 393, 393 n.1, 394 n.4 (2000) (citing to literature about ossification); see also Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 65 (1995) (asserting the “judicial branch is responsible for most of the ossification of the rulemaking process”).

<sup>7</sup> See, e.g., Matthew D. Adler & Eric A. Posner, *New Foundations of Cost-Benefit Analysis* 122, 185–90 (2006); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 Yale L.J. 165, 225–26 (1999) [hereinafter *Rethinking Cost-Benefit Analysis*]; Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administra-*

The *Business Roundtable* decision was the first challenge of a regulation issued under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),<sup>8</sup> based on the implementing agency’s failure to perform an adequate cost-benefit analysis. The Dodd-Frank Act has mandated the biggest explosion of financial regulation in the history of the Republic.<sup>9</sup> The ink was barely dry on the *Business Roundtable* decision when additional lawsuits were filed,<sup>10</sup> and others were threatened,<sup>11</sup> challenging regulations issued under Dodd-Frank based on a failure to perform an adequate cost-benefit analysis.

Part I of this Note summarizes the history of cost-benefit analysis and its relatively recent application to financial regulation. Part II summarizes the *Business Roundtable* decision and argues that it established a far more exacting standard of review than the financial regulatory agencies, interest groups, and Congress had previously expected or that *State*

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tive State, 78 N.Y.U. L. Rev. 461, 476 (2003) (arguing that requirements obliging agencies to explain their decisionmaking process and justify their decisions ensure rational decisionmaking); Eric A. Posner, Controlling Agencies with Cost-Benefit Analysis, 68 U. Chi. L. Rev. 1137, 1185–93 (2001).

<sup>8</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

<sup>9</sup> According to the *Wall Street Journal*, the financial regulatory agencies published more than 3500 pages of new regulations and explanatory text under the Dodd-Frank Act within ten months of its passage, which if laid end-to-end would measure more than two and a half times the Empire State Building and be equivalent to sixteen copies of *Moby Dick*. Jean Eaglesham, Financial Overhaul Grows and Slows, *Wall St. J.*, May 2, 2011, at C1, available at <http://online.wsj.com/article/SB10001424052748703346704576295873060349068.html>. To put even that in perspective, the financial regulatory agencies had only completed about 20% of the required rulemakings under the Dodd-Frank Act as of the first anniversary of the statute. See Dodd-Frank Progress Report, Davis Polk 2 (July 22, 2011), [http://www.davispolk.com/files/uploads/FIG/072211\\_Dodd\\_Frank\\_Progress\\_Report.pdf](http://www.davispolk.com/files/uploads/FIG/072211_Dodd_Frank_Progress_Report.pdf). As of September 4, 2012, the agencies had only completed 32.9% of the required rulemakings under the Dodd-Frank Act. See Dodd-Frank Progress Report, Davis Polk 2 (Sept. 4, 2012) [hereinafter September Dodd-Frank Progress Report], [http://www.davispolk.com/files/Publication/2de563f3-93a9-40c4-bb57-04e90d534b58/Presentation/PublicationAttachment/209a8a98-285b-4eba-b217-05c5511d2f48/Sept2012\\_Dodd.Frank.Progress.Report.pdf](http://www.davispolk.com/files/Publication/2de563f3-93a9-40c4-bb57-04e90d534b58/Presentation/PublicationAttachment/209a8a98-285b-4eba-b217-05c5511d2f48/Sept2012_Dodd.Frank.Progress.Report.pdf).

<sup>10</sup> See, e.g., Complaint at 4, *Int’l Swaps & Derivatives Ass’n v. CFTC*, 887 F. Supp. 2d 259 (D.D.C. 2012) (No. 11-cv-02146 (RLW)) (challenging a rule issued by the CFTC under the Dodd-Frank Act to impose position limits on swap dealers based in part on failure to conduct an adequate cost-benefit analysis as required by § 15(a) of the Commodity Exchange Act, 7 U.S.C. § 19(a) (2000)).

<sup>11</sup> See, e.g., Comment Letter from Sec. Indus. & Fin. Mkts. Ass’n et al., to CFTC et al. concerning CFTC RIN 3083-AC et al., Annex C-4 to C-12 (Feb. 13, 2012), <http://www.sec.gov/comments/s7-41-11/s74111-210.pdf> (containing a thinly veiled threat to litigate the validity of any regulations implementing the Volcker Rule if the agencies did not perform a rigorous cost-benefit analysis of the regulations).

*Farm* required. Part III discusses how this unexpectedly rigorous judicial review of cost-benefit analyses has already affected and will continue to affect the political economy of financial rulemaking. By changing the expected costs and benefits of cost-benefit analysis itself, the *Business Roundtable* decision may induce behavior in the political economy that could affect the amount and quality of financial rulemaking in surprising ways.

### I. A HISTORY OF COST-BENEFIT ANALYSIS

Cost-benefit analysis became an important public policy tool in the mid-1970s in reaction to a surge in environmental, health, safety, and other social regulations.<sup>12</sup> Its advocates argued that CBA was a neutral filtering tool that would make federal regulations more rational and efficient.<sup>13</sup> Without CBA, the costs of social regulation would frequently exceed its benefits and put upward pressure on what was then “double-digit” inflation.<sup>14</sup> CBA was developed to be a check on “the desire for perfection—for a world without risk,” which could be prohibitively expensive.<sup>15</sup> Its detractors argued that CBA was not a neutral filtering tool.<sup>16</sup> Instead, it was designed to further a deregulatory agenda by creating regulatory gridlock, imposing an impossible burden of proof on the regulators or making it prohibitively expensive for agencies to issue regulations.<sup>17</sup> Despite these and other critiques that have been leveled against CBA over the years, CBA has become a mainstream tool used

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<sup>12</sup> See, e.g., James C. Miller III, Lessons of the Economic Impact Statement Program, Reg.: AEI J. on Gov't & Soc'y, July–Aug. 1977, at 14, 15–16.

<sup>13</sup> See, e.g., id. at 15–16, 19 (noting that the purpose of CBA is making the rulemaking process “as rational as possible”); Murray L. Weidenbaum, Reforming Government Regulation, Reg.: AEI J. on Gov't & Soc'y, Nov.–Dec. 1980, at 15, 17 (describing CBA as a “neutral policy concept”).

<sup>14</sup> See, e.g., Miller, *supra* note 12, at 15.

<sup>15</sup> Benefit-Cost Analyses of Social Regulation: Case Studies from the Council on Wage and Price Stability 4 (James C. Miller III & Bruce Yandle eds., 1979).

<sup>16</sup> See, e.g., Mark Green, The Faked Case Against Regulation, Wash. Post, Jan. 21, 1979, at C1 (“Given the current state of economic art, mathematical cost-benefit analyses are about as neutral as voter literacy tests in the Old South.”).

<sup>17</sup> See, e.g., Edward M. Kennedy, Regulatory Reform: Striking a Balance, in Reforming Regulation 21, 21–22 (Timothy B. Clark, Marvin Kusters & James Miller eds., 1980); see also Ralph Nader, Can a Regulatory Budget Be Calculated?, in Reforming Regulation, *supra*, at 76, 76; see also Mark J. Green, Cost-Benefit Analysis as a Mirage, in Reforming Regulation, *supra*, at 113, 113.

by Presidents of both parties and members of Congress on both sides of the aisle.

But appearances can be deceptive. Mandating CBA does not ensure quality analysis.<sup>18</sup> Indeed, proponents of CBA learned very early on that the quality of analysis depends on the good faith of the agency performing the analysis or on the existence of an effective enforcement mechanism to invalidate rules that are not supported by an adequate CBA.<sup>19</sup> Without a credible process for ensuring the quality of CBA, it can be used as political cover rather than as a genuine check on excessively costly regulations.

CBA mandates were initially confined to executive agencies and social regulations. Substantial CBA mandates were not imposed on financial regulations or independent financial regulatory agencies until 1996. It then took nearly a decade for the first legal challenge of a financial regulation based on an inadequate CBA to reach the courts.

This Part first describes how CBA has evolved as a tool used by Presidents of both parties to discipline the rulemaking process by executive agencies. It then describes the main congressional mandates governing CBA reviews of financial regulations. Next, it describes the generally low quality of the CBAs of financial regulations and tries to explain why this has been so. It concludes by briefly surveying the continuing struggle between CBA's proponents and detractors.

#### *A. Executive Branch Programs*

Every President since Richard Nixon has had a CBA reviewing process to screen regulations proposed by executive agencies, and has attempted to cajole independent agencies into using CBA as well.<sup>20</sup> But

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<sup>18</sup> See, e.g., Miller, *supra* note 12, at 16 (explaining that quality and compliance with cost-benefit standards varied from agency to agency, depending on the agency head's commitment or hostility to CBA).

<sup>19</sup> See, e.g., Weidenbaum, *supra* note 13, at 16–17 (observing that “[r]eluctant regulators can merely go through the motions of studying the economic effects of their proposals—and then proceed as they originally intended” unless “[a] regulatory oversight office” that focuses on costs and benefits has the power to require quality CBAs).

<sup>20</sup> See, e.g., Exec. Order No. 13,579, 3 C.F.R. 256 (2011) (urging independent agencies to use same CBA review process as executive agencies). President Nixon's program, called the “quality of life” review process, required executive agencies to consider regulatory alternatives and costs when developing “significant” regulations. Murray Weidenbaum, *Regulatory Process Reform from Ford to Clinton*, Reg.: AEI J. on Gov't & Soc'y, Winter 1997, at 20. President Nixon put the Office of Management and Budget (“OMB”) in charge of enforcing this rule, but most of the agencies just ignored the process because the OMB's enforcement

these CBA reviewing processes have had only a limited impact on financial regulations because most of the federal financial regulatory agencies are independent agencies.<sup>21</sup>

President Reagan established the most rigorous CBA review program of all the Presidents in Executive Order 12,291.<sup>22</sup> The Reagan order prohibited executive agencies from undertaking any “regulatory action . . . unless the potential benefits to society for the regulation outweigh the potential costs” and required them to choose the “alternative involving the least net cost to society” of all available alternatives.<sup>23</sup> It gave authority to enforce compliance with the program to a powerful new Presidential Task Force on Regulatory Relief.<sup>24</sup> The Bush Administration continued this program, but transferred enforcement authority to the Office of Information and Regulatory Affairs (“OIRA”) within the Office of Management and Budget (“OMB”).<sup>25</sup>

President Clinton replaced the Reagan/Bush process with a less demanding process outlined in Executive Order 12,866,<sup>26</sup> which remains in effect today. The Clinton process is less demanding than the Reagan/Bush process in two important ways. First, it directed agencies to consider qualitative measures of cost and benefit in addition to quantitative measures.<sup>27</sup> Second, it required an executive agency only to provide “a reasoned determination that the benefits of the intended regulation justify its costs,”<sup>28</sup> rather than showing that the benefits outweigh

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authority “was very limited.” *Id.* Presidents Ford and Carter implemented more rigorous and effective CBA review and enforcement programs. See Exec. Order No. 11,821, 3 C.F.R. 926 (1974); Exec. Order No. 12,044, 3 C.F.R. 152 (1978).

<sup>21</sup> The Office of the Comptroller of the Currency (“OCC”) is the only federal financial regulatory agency that is considered an executive agency for CBA purposes. Both the Federal Home Loan Bank Board (“FHLBB”) and the Office of Thrift Supervision (“OTS”) were also considered to be executive agencies, but the FHLBB was dissolved and replaced by the OTS in § 703 and Title III of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, tit. III, § 703, 101 Stat. 183 (1989), and the OTS was dissolved and replaced by a combination of the FDIC, the OCC, and the Federal Reserve Board in § 312 of the Dodd-Frank Act, Pub. L. No. 111-203, § 312, 124 Stat. 1376 (2010).

<sup>22</sup> Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

<sup>23</sup> *Id.* § 2.

<sup>24</sup> *Id.* § 6(b).

<sup>25</sup> Paperwork Reduction Act of 1980, Pub. L. No. 96-511, §§ 3503–3504, 94 Stat. 2812, 2814–15 (codified at 44 U.S.C. § 3503(a) (2006)).

<sup>26</sup> 3 C.F.R. 638 (1993).

<sup>27</sup> *Id.* § 1(a).

<sup>28</sup> *Id.* § 1(b)(6).

the costs. The second Bush Administration did not make any changes to this program.

President Obama has continued the Clinton program, but supplemented it with Executive Order 13,563.<sup>29</sup> That order requires executive agencies to conduct a retroactive CBA of old rules.<sup>30</sup> President Obama also issued Executive Order 13,579,<sup>31</sup> which urges independent agencies to comply with the CBA mandates in Executive Orders 12,866 and 13,563, even though they are not binding on independent agencies.<sup>32</sup>

### *B. Statutes*

The first government action to impose a substantial CBA mandate on financial regulation was the Unfunded Mandates Reform Act of 1995 (“UMRA”),<sup>33</sup> but it is limited to executive agencies. It requires all federal agencies other than independent regulatory agencies<sup>34</sup> to conduct a CBA of “significant” regulatory actions—that is, regulatory actions that could impose annual costs on the public or private sectors of \$100 million or more<sup>35</sup>—and is expressly subject to judicial review.<sup>36</sup>

The first statute to impose CBA mandates on an independent financial regulatory agency was the National Securities Markets Improvement Act

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<sup>29</sup> 3 C.F.R. 215 (2011).

<sup>30</sup> *Id.* § 6.

<sup>31</sup> See 3 C.F.R. 256 (2011).

<sup>32</sup> *Id.* §§ 1(b), 3.

<sup>33</sup> Pub. L. No. 104-4, 109 Stat. 48 (codified as amended at 2 U.S.C. §§ 1501–1571 (2006)). The Regulatory Flexibility Act of 1980 (“RFA”), Pub. L. No. 96-354, 94 Stat. 1164 (codified as amended at 5 U.S.C. §§ 601–612 (2006)), and the Paperwork Reduction Act of 1980 (“PRA”), Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3521 (2006)), also impose CBA mandates on financial regulations, but they are so limited in scope that they have had only a trivial impact on the timing and quality of financial regulations. The RFA requires all federal agencies to conduct a CBA of any proposed rule that would have a significant economic impact on a substantial number of small entities, see 5 U.S.C. §§ 603–605, and is expressly subject to judicial review. *Id.* § 611. The PRA requires all federal agencies to conduct a CBA review of the paperwork burden of any proposed rulemaking, see 44 U.S.C. §§ 3501, 3506–3508, but is silent as to judicial review.

<sup>34</sup> See 2 U.S.C. § 1502 (incorporating by reference the definitions in 2 U.S.C. § 658 (2006), which in turn incorporates by reference the term “agency” as defined in 5 U.S.C. § 551(1) (2006) other than “independent regulatory agencies”).

<sup>35</sup> *Id.* § 1531 (CBA mandate); *id.* § 1532 (scope of analysis); *id.* § 1535 (requiring agency to “identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule”).

<sup>36</sup> *Id.* § 1571.

of 1996.<sup>37</sup> Section 106 of that Act added identically worded CBA mandates to Section 2(a) of the Securities Act of 1933,<sup>38</sup> Section 3(f) of the Securities Exchange Act of 1934 (“1934 Act”),<sup>39</sup> and Section 2(c) of the Investment Company Act of 1940.<sup>40</sup> The mandates all require the SEC, when engaged in rulemaking under a particular act, to “consider . . . whether the action will promote efficiency, competition, and capital formation.”<sup>41</sup> Congress added a similar CBA mandate to Section 15(a) of the Commodity Exchange Act (“CEA”)<sup>42</sup> in Section 119 of the Commodity Futures Modernization Act of 2000.<sup>43</sup> That mandate provides that “before promulgating a regulation under [the CEA],” the Commodity Futures Trading Commission (“CFTC”) must “consider the costs and benefits of the action” and “evaluate” them in light of a variety of factors including “the efficiency, competitiveness, and financial integrity of futures markets.”<sup>44</sup>

The Dodd-Frank Act, which has mandated nearly 250 new financial regulations,<sup>45</sup> also imposes a number of CBA mandates on a variety of financial regulations.<sup>46</sup> The Act was written against the backdrop of existing law. Thus, the general CBA mandates included in the program and organic acts of each financial regulator (for example, the Securities Exchange Act of 1934) apply with full force to Dodd-Frank rulemaking since they were not altered or eliminated. Many of the most contentious provisions in the Dodd-Frank Act, including the provision that authorized the SEC to issue the proxy access rule that was struck down in *Business Roundtable* and the provisions governing over-the-counter derivatives in Title VII of the Act, are simply amendments to securities or commodities laws. In addition, the SEC relied on the securities laws for

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<sup>37</sup> Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424–25 (1996) (codified at 15 U.S.C. § 77b (2006)).

<sup>38</sup> 15 U.S.C. § 77b(b) (2006).

<sup>39</sup> *Id.* § 78c(f).

<sup>40</sup> *Id.* § 80a-2(c).

<sup>41</sup> *Id.* §§ 77b(b), 78c(f), 80a-2(c).

<sup>42</sup> 7 U.S.C. § 19(a) (2006).

<sup>43</sup> See Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (enacting, among other bills, H.R. 5660, the Commodity Futures Modernization Act of 2000).

<sup>44</sup> 7 U.S.C. § 19(a)(1), (a)(2)(B) (2006).

<sup>45</sup> September Dodd-Frank Progress Report, *supra* note 9.

<sup>46</sup> See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(b)(2)(A)(i), 124 Stat. 1376, 1980 (2010) (codified at 12 U.S.C. § 5512(b)(2)(A)(i) (Supp. IV 2011)) (adopting an express CBA mandate).



authority to issue certain portions of its proposed regulation implementing the Volcker Rule.<sup>47</sup> The Dodd-Frank Act does not exempt any of the regulations issued under these amended provisions from the preexisting CBA mandates in the securities or commodities laws. As a result, any regulations implementing those amendments are subject to the preexisting CBA mandates. The Dodd-Frank Act also effectively incorporates as a structural matter all of the CBA mandates that apply to financial rulemaking by the Office of the Comptroller of the Currency (“OCC”), including the one in UMRA. Thus, any time the OCC issues any financial regulations under the Dodd-Frank Act, such as its regulations implementing the Volcker Rule, the OCC must comply with the CBA mandate in UMRA.

The Dodd-Frank Act also expressly imposes a CBA mandate on all rulemaking by the Consumer Financial Protection Bureau (“CFPB”) under the consumer protection provisions in Title X of the Act.<sup>48</sup> It imposes an express CBA mandate on the Financial Stability Oversight Council (“FSOC”) in issuing regulations governing the designation of financial activities as systemically important under Section 120.<sup>49</sup> Finally, it imposes a CBA mandate on the Federal Deposit Insurance Corporation (“FDIC”) in issuing rules governing the recovery of compensation from officers and directors who are responsible for the failure of a systemically important financial company.<sup>50</sup>

Congress has previously considered, but has not enacted, bills that would require all federal financial regulatory agencies to perform a CBA on all financial rulemaking. For example, the Comprehensive Regulatory Reform Act of 1995 would have required all federal regulatory agencies, including federal financial regulatory agencies, to show a detailed CBA of all proposed rules.<sup>51</sup> It passed the House,<sup>52</sup> but failed by two votes in the Senate.<sup>53</sup> Finally, in the wake of the *Business Roundtable*

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<sup>47</sup> Proprietary Trading and Relationships with Covered Funds, 76 Fed. Reg. 68,971 (proposed Nov. 7, 2011) (to be codified at 12 C.F.R. pts. 44, 248, 351, 17 C.F.R. pt. 255).

<sup>48</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(b)(2), 124 Stat. 1376, 1980–81 (2010) (codified at 12 U.S.C. § 5512(b)(2) (Supp. IV 2011)).

<sup>49</sup> See id. § 120(b)(2)(A).

<sup>50</sup> See id. § 210(s).

<sup>51</sup> S. Rep. No. 104-90 (1995); see also H.R. 926, 104th Cong. (1995).

<sup>52</sup> See Bill Summary & Status, H.R. 926, 104th Cong. (1995), <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR00926:@@L&summ2=m&>.

<sup>53</sup> See Bill Summary & Status, S. 343, 104th Cong. (1995), <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:SN00343>.

decision, Senator Shelby introduced the Financial Regulatory Responsibility Act of 2011 (“FRRA”),<sup>54</sup> and Senators Collins, Portman, and Warner introduced the Independent Agency Regulatory Analysis Act of 2012 (“IAAA”).<sup>55</sup>

The FRRA would require all financial regulatory agencies to conduct a rigorous CBA of all proposed financial regulations.<sup>56</sup> It would also require them to conduct a retroactive CBA of existing rules.<sup>57</sup> The bill would give any person harmed by the failure of a financial regulatory agency to comply with its CBA mandate a right to judicial review of the agency action.<sup>58</sup> The IAAA would give the President authority to require all financial regulatory agencies, other than the Board of Governors of the Federal Reserve System (“Federal Reserve”) or the Federal Open Market Committee (“FOMC”), to comply with the CBA mandates applicable to executive agencies when proposing or issuing an economically significant rule (that is, one that is likely to have an effect on the economy of more than \$100 million per year).<sup>59</sup> It would also authorize the President to require all independent financial regulatory agencies other than the Federal Reserve and the FOMC to submit their proposed and final significant rules to the OIRA for a nonbinding analysis of their compliance with applicable executive orders.<sup>60</sup> Failure to comply with these executive orders, however, would not be subject to judicial review.<sup>61</sup>

### *C. Quality of CBA Reviews of Financial Regulation*

The quality of CBAs performed on financial regulations has historically been quite low. They have typically read as if written by lawyers who were trying to make a plausible case for a precooked conclusion, and they have almost never included any empirical evidence for their assertions.<sup>62</sup> It is as though the agencies systematically underestimate the

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<sup>54</sup> S. 1615, 112th Cong. (2011).

<sup>55</sup> S. 3468, 112th Cong. (2012).

<sup>56</sup> See S. 1615, § 3(a), (b)(4).

<sup>57</sup> *Id.* § 7.

<sup>58</sup> *Id.* § 8.

<sup>59</sup> See S. 3468, §§ 2(3), 2(5), 3(b).

<sup>60</sup> *Id.* § 3(c).

<sup>61</sup> *Id.* § 4(a).

<sup>62</sup> See, e.g., Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626, 71,674–83 (Nov. 18, 2011); Proxy Access Rule, 75 Fed. Reg. 66,622, 66,633–37 (Oct. 28, 2010); Risk-Based Capital Standards: Advanced Capital Adequacy Framework—Basel II, 72 Fed. Reg. 69,288,

costs of the proposed regulations. It is as if they were playing a “little game” like Captain Renault in the movie *Casablanca*,<sup>63</sup> only going through the motions of performing a CBA rather than doing so in good faith.

That judgment is consistent with the D.C. Circuit’s conclusion that the SEC failed to meet minimum quality standards in the CBA review of its proxy access rule.<sup>64</sup> It is also consistent with views recently expressed by the Committee on Capital Markets Regulation (“CCMR”), which is an independent and nonpartisan organization dedicated to improving the regulation of U.S. capital markets. The CCMR submitted a scathing letter to the majority and minority leaders of the Senate Banking Committee and the House Financial Services Committee on the lack of adequate CBA in Dodd-Frank rulemaking.<sup>65</sup> The CCMR has reviewed 192 of the proposed and final rules that have been issued under the Dodd-Frank Act so far. It found that fifty-seven of these rules contained no CBA at all; eighty-five contained CBAs, but they were entirely qualitative, and not quantitative; and only fifty rules contained quantitative CBAs.<sup>66</sup> Of this last category, the vast majority were limited to the costs of paperwork, legal and compliance review, technological enhancements, and the like, without any analysis of the broader economic impact of the rules.<sup>67</sup> These low marks are also consistent with reports by the CFTC’s and SEC’s Offices of the Inspector General, evaluating the quality of the CBAs performed by the CFTC and SEC, respectively, on proposed rules under Dodd-Frank.<sup>68</sup>

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69,389–96 (Dec. 7, 2007); Market Risk Disclosure Rule, 62 Fed. Reg. 6044, 6059–63 (Feb. 10, 1997).

<sup>63</sup> When Victor Laszlo offers to pay for a bottle of champagne that Captain Renault has just ordered for them, the captain explains that he will put it on his bill: “[I]t is a little game we play. They put it on the bill, I tear the bill up. It is very convenient.” *Casablanca* (Warner Bros. Pictures 1942).

<sup>64</sup> *Bus. Roundtable*, 647 F.3d 1144.

<sup>65</sup> See Letter from R. Glenn Hubbard, Co-Chair, Comm. on Capital Mkts. Regulation, et al., to Timothy Johnson, Chairman, U.S. Senate Comm. on Banking, et al. (Mar. 7, 2012), [http://capmksreg.org/pdfs/2012.03.07\\_CBA\\_letter.pdf](http://capmksreg.org/pdfs/2012.03.07_CBA_letter.pdf).

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Id.*

<sup>68</sup> See Office of Audits, SEC, Follow-Up Review of Cost-Benefit Analyses in Selected SEC Dodd-Frank Act Rulemakings, at vi (2012), available at <http://www.sec-oig.gov/Reports/AuditsInspections/2012/499.pdf>; Office of the Inspector Gen., CFTC, A Review of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act 27

There may be a variety of explanations for the low average quality of these CBAs. First, as explained above, CBA mandates are relatively new as applied to financial regulations. The financial regulatory agencies may need more experience using this tool or more economists rather than lawyers on their staffs. Second, the financial agencies may view CBA as an unwelcome intrusion into the exercise of their expert discretion rather than a useful tool to sort out good rules from bad rules. Third, some of the financial agencies may lack sufficient resources to hire the economists they need to conduct a quality CBA. The Republican-controlled House of Representatives appears to have put the CFTC and the SEC on a “starvation diet,”<sup>69</sup> intending at least in part to slow down the Dodd-Frank rulemaking process. Fourth, the lack of any independent enforcement arm similar to the enforcement arms that have existed in the executive branch may give independent financial regulatory agencies the sense that they are not accountable to anyone except themselves and their allies in Congress.<sup>70</sup>

#### *D. Academic Reaction to Cost-Benefit Analysis*

Using CBA as a way to filter out excessively costly regulations is a polarizing issue. Opponents of CBA argue that “cost-benefit analysis promotes a deregulatory agenda under the cover of scientific objectivity.”<sup>71</sup> They contend that “the motivating factor [behind CBA as applied by modern courts] is a political bias against regulation.”<sup>72</sup> CBA opponents want to prevent economic considerations from eclipsing other important values that ought to inform agency decisionmaking.<sup>73</sup> In contrast,

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(2011), available at [http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig\\_investigation\\_061311.pdf](http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf).

<sup>69</sup> See, e.g., Bevis Longstreth, Congress and the SEC’s Starvation Diet, *Huffington Post* (Mar. 3, 2011, 3:03 PM), [http://www.huffingtonpost.com/bevis-longstreth/sec-budget\\_b\\_830981.html](http://www.huffingtonpost.com/bevis-longstreth/sec-budget_b_830981.html).

<sup>70</sup> See Robert W. Hahn & Cass R. Sunstein, A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis, 150 *U. Pa. L. Rev.* 1489, 1496, 1509, 1532–33 (2002) (discussing CBA mandate for executive agencies and arguing for CBA requirements for independent agencies).

<sup>71</sup> Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* 9 (2004).

<sup>72</sup> Daniel A. Farber, Rethinking the Role of Cost-benefit Analysis, 76 *U. Chi. L. Rev.* 1355, 1366 (2009) (reviewing Ackerman & Heinzerling, *supra* note 71).

<sup>73</sup> See, e.g., Richard L. Revesz & Michael A. Livermore, Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health 15 (2008) (posing

Professors Matthew Adler and Eric Posner argue that, when properly implemented, CBA is “consistent with a broad array of popular theories of the proper role of government” and is capable of satisfying “every political theory that holds that the government should care about the overall well-being of its citizens.”<sup>74</sup>

On balance, both sides of the debate present reasonable arguments, but their terminology simply reflects their value judgments. Opponents of searching judicial review use the term “ossification” because they believe that rigorous review of CBA overpowers other valuable considerations that ought to inform regulatory choices. To proponents of CBA, that same effect is described as the “rationalization” of the process, because they think the filtering effect is healthy. The difference in value judgments and the biases evident on both sides brings to mind the old aphorism: “One man’s trash is another man’s treasure.”

## II. BUSINESS ROUNDTABLE V. SEC

As noted above, Congress did not impose substantial CBA mandates on independent financial regulatory agencies until 1996. It then took nearly a decade for the first legal challenge of a financial regulation based on an inadequate CBA to reach the courts. In the meantime, financial regulatory agencies performed CBAs as if they expected that the standard of judicial review would be a very deferential one similar to the standard used for statutory interpretation in *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>75</sup> Under *Chevron*, courts defer to any reasonable interpretation of ambiguous statutory language made by an agency responsible for administering the statute.<sup>76</sup> Combining this deferential standard of review with the standard of review established by *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, agencies thought courts would defer to any reasonable CBA performed by an agency, provided the agency considered all the alternative CBAs in the record. This expectation was shattered by the *Business Roundtable* decision.

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counterarguments to various criticisms of CBA and defending it as a useful tool “without being the alpha and omega of policy analysis”).

<sup>74</sup> Rethinking Cost-Benefit Analysis, *supra* note 7, at 168.

<sup>75</sup> 467 U.S. 837, 844 (1984).

<sup>76</sup> See *id.*

*A. Judicial Review of Cost-Benefit Analysis Before Business Roundtable*

The first indication that the standard of review would not be as deferential as the financial regulatory agencies seemed to expect came in *Chamber of Commerce v. SEC* (“*Chamber I*”).<sup>77</sup> In *Chamber I*, the D.C. Circuit considered a challenge to a rule conditioning the ability of mutual funds to rely on certain exemptions from the Investment Company Act of 1940 on satisfying certain corporate governance standards. The plaintiffs argued that the rule should be struck down because the SEC failed to conduct an adequate CBA as required by Section 2(c) of the Investment Company Act.<sup>78</sup> In striking down the rule for failure to conduct such a CBA, the court found that failure to consider reasonable alternatives may be sufficient to invalidate the whole CBA.<sup>79</sup> The court also stated that an agency will not be excused from complying with a statutory obligation to perform a CBA merely because the cost of performing a proper CBA is high, or because factors in the CBA analysis are not susceptible to precise quantification.<sup>80</sup> The court explained that “uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation.”<sup>81</sup>

The court did, however, indicate that it would give significant deference to an agency’s evaluations of studies used to buttress its CBA where the data is within the agency’s “technical expertise.”<sup>82</sup> It stated that an agency need not conduct an independent study of the costs and benefits of a rule to satisfy the statutory mandate. Instead, an agency could satisfy its statutory obligation to perform a credible CBA without the support of an empirical study so long as the agency could indicate that it relied on sufficient evidence that was more persuasive than any hostile empirical or qualitative evidence.<sup>83</sup> The implication of this holding is that an agency must meet hostile evidence with persuasive evidence of its own. An agency may not neglect a comment or duck an is-

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<sup>77</sup> 412 F.3d 133 (D.C. Cir. 2005).

<sup>78</sup> *Id.* at 140; see Investment Company Act of 1940, 15 U.S.C. § 80a-2(c) (2006).

<sup>79</sup> *Chamber I*, 412 F.3d at 144–45.

<sup>80</sup> *Id.* at 143.

<sup>81</sup> *Id.* at 144.

<sup>82</sup> *Id.* at 143 (citing *Hüls Am. Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996)).

<sup>83</sup> See *id.* at 142–43.

sue presented by a challenge to its proposed rule when that challenge has CBA implications.

Despite the very rigorous standard of review used to strike down the rule in *Chamber I*, most of the federal financial agencies, including the SEC, continued to perform CBAs as if *Chamber I* were an aberration and CBAs generally would be subject only to a more deferential standard of judicial review.<sup>84</sup> In fairness, *Chamber I* did seem unusual and was potentially a reaction to its highly unusual facts: It involved the review of a rule that had been approved by a 3-2 vote,<sup>85</sup> over a strongly worded dissent by two of the SEC's Commissioners who accused the SEC of approving the rule without performing a serious CBA as required by the statute.<sup>86</sup>

The SEC responded to the *Chamber I* holding by considering additional CBA data and approving the same rule only eight days after *Chamber I* was announced. The new CBA was purportedly based on the new CBA information,<sup>87</sup> and the rule was yet again promulgated by a 3-2 vote over a strongly worded dissent by one of the SEC's Commissioners.<sup>88</sup> This time the dissenting Commissioner criticized the SEC for rushing the rule through the normal deliberation process and failing to publish the new CBA data or subject it to public comment. In *Chamber of Commerce v. SEC* ("*Chamber II*"), the D.C. Circuit struck the rule down once again.<sup>89</sup> This time the court held that "the Commission failed to comply with section 553(c) of the [Administrative Procedure Act ("APA")] by relying on materials not in the rulemaking record without affording an opportunity for public comment."<sup>90</sup> The court explained that any "technical studies and data" upon which the agency relied must be among the information revealed for public evaluation in a notice-and-comment period.<sup>91</sup> The principle that agencies must make any information upon which they will rely in the record available for public

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<sup>84</sup> See, e.g., Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626, 71,674–83 (Nov. 18, 2011); Proxy Access Rule, 75 Fed. Reg. 66,622, 66,631–37 (Oct. 28, 2010); Risk-Based Capital Standards: Advanced Capital Adequacy Framework—Basel II, 72 Fed. Reg. 69,288, 69,389–95 (Dec. 7, 2007).

<sup>85</sup> Investment Company Governance, 69 Fed. Reg. 46,378, 46,390–93 (Aug. 2, 2004) (Glassman & Atkins, Comm'rs, dissenting) (to be codified at 17 C.F.R. pt. 270).

<sup>86</sup> Id.

<sup>87</sup> Investment Company Governance, 70 Fed. Reg. 39,390, 39,390–93 (July 7, 2005).

<sup>88</sup> Id. at 39,405–10 (Glassman & Atkins, Comm'rs, dissenting).

<sup>89</sup> 443 F.3d 890, 909 (D.C. Cir. 2006).

<sup>90</sup> Id. at 894 (citations omitted).

<sup>91</sup> Id. at 899 (citing *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991)).

comment has long been enshrined in administrative law,<sup>92</sup> but it was not obvious before *Chamber II* that CBA was subject to this sort of APA challenge.

The federal financial agencies and Congress seem to have treated *Chamber II* the way they had treated *Chamber I*—as an aberration limited to its unusual facts without any application to CBA of financial regulations generally. They continued to perform CBAs as if they expected very deferential review of CBA in ordinary cases.<sup>93</sup>

The final case that set the stage for *Business Roundtable* was *American Equity Investment Life Insurance Company v. SEC*.<sup>94</sup> In *American Equity*, the D.C. Circuit struck down a regulation that would have subjected fixed index annuities to regulation for failure to conduct an adequate CBA of the regulation.<sup>95</sup> The court criticized the SEC's CBA for failing to gather hard quantitative analysis. The SEC had asserted that its rule would have a positive impact on competition for two reasons. First, the mere presence of a rule would "make the previously unregulated market clearer than it would be without [the rule]" and would increase the ability of market participants to compete confidently.<sup>96</sup> The court rejected this argument, reasoning that a CBA mandate "does not ask for an analysis of whether *any* rule would have an effect on competition. Rather, it asks for an analysis of whether the *specific rule* will promote [competition]."<sup>97</sup> Second, the Commission asserted that competition would increase because its rule would increase price transparency. The court rejected this justification because the court found that the Commission had failed to make any findings on the existing level of competition in the marketplace under the current state law regime.<sup>98</sup> Without an empirical baseline, the court determined that the Commission's assertion, even if based on common sense economic theory, was baseless because it was grounded on speculation alone.

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<sup>92</sup> See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252–53 (2d Cir. 1977) (holding that the FDA's failure to disclose to interested persons the scientific data upon which it relied in promulgating regulation establishing time-temperature-salinity prescriptions for processing smoked whitefish was procedurally erroneous).

<sup>93</sup> See *supra* note 84.

<sup>94</sup> 613 F.3d 166 (D.C. Cir. 2010).

<sup>95</sup> *Id.* at 179.

<sup>96</sup> *Id.* at 178.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*



### B. Business Roundtable

The *Business Roundtable* decision involved a challenge to the SEC's proxy access rule, which had been promulgated under the 1934 Act, as amended by the Dodd-Frank Act.<sup>99</sup> Compulsory proxy access has been debated for more than sixty-five years in what one former SEC Commissioner has called "a knockdown, drag-out political brawl."<sup>100</sup> Prior to the Dodd-Frank Act, there was genuine concern as to whether the 1934 Act granted the SEC authority to promulgate a proxy access rule, but the Dodd-Frank Act removed that uncertainty by expressly authorizing the SEC to promulgate a rule mandating proxy access.<sup>101</sup> The SEC almost immediately promulgated Rule 14a-11, by a 3-2 vote.<sup>102</sup> The rule allowed shareholders who had held at least three percent of a public company's common stock for at least three years to nominate individuals for election to the board of directors. The rule required the company to include these nominations on the corporation's proxy statement. Shortly after the promulgation of the rule, the Business Roundtable and the Chamber of Commerce sued the SEC alleging that the Commission's adoption of the rule violated the APA, primarily because the SEC failed to give adequate consideration to the impact of the rule on "efficiency, competition, and capital formation."<sup>103</sup> The D.C. Circuit ruled for the plaintiffs almost exclusively on CBA grounds.

The SEC defended the sufficiency of the CBA of its proxy access rule (Rule 14a-11) by identifying a variety of benefits that it believed outweighed the costs of the rule. The rule would "provide shareholders direct cost savings in the form of reduced expenditures for advertising and promoting their director nominees as well as reduced printing and postage costs."<sup>104</sup> The SEC also cited studies showing both "improved corporate governance and shareholder value" in situations where incumbent

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<sup>99</sup> *Bus. Roundtable*, 647 F.3d at 1146.

<sup>100</sup> Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 *Bus. Law.* 361, 378 (2009).

<sup>101</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971(a)(2), 124 Stat. 1376, 1915 (2010) (codified at 15 U.S.C. § 78n(a) (Supp. IV 2011)).

<sup>102</sup> See *Bus. Roundtable*, 647 F.3d at 1148 (noting Commissioners Troy Paredes and Kathleen Casey voted against the rule for theoretical and empirical reasons).

<sup>103</sup> *Id.* at 1148 (citing 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c) (2006), which each require the SEC to consider those factors whenever it is engaged in rulemaking pursuant to the Securities Act, Exchange Act, or Investment Company Act).

<sup>104</sup> Final Brief of the SEC, Respondent at 11, *Bus. Roundtable*, 647 F.3d 1144 (No. 10-1305), 2011 WL 2014799, at \*11.

directors were more vulnerable to replacement by shareholder action.<sup>105</sup> It argued that the rule would provide shareholders with “intangible benefits”<sup>106</sup>; “mitigate ‘collective action’ and ‘free-rider’ problems”;<sup>107</sup> enable shareholders to evaluate both types of candidate fairly since shareholder nominees would no longer be prejudiced by being presented on an unfamiliar proxy statement;<sup>108</sup> allow shareholders to avoid expending as many resources advertising their nominee since the candidate would be presented alongside incumbent candidates;<sup>109</sup> and foster greater shareholder participation in corporate governance by including all candidates on one proxy statement, since a single set of proxy statements would reduce shareholder confusion and frustration associated with the proxy voting process.<sup>110</sup>

Despite the Commission’s arguments and nearly twenty pages of CBA attached to the proposed rule,<sup>111</sup> the court in *Business Roundtable* concluded that the CBA fell short of the minimum standards required by Section 3(f) of the 1934 Act. In addition, the D.C. Circuit’s tone betrayed significant frustration with the SEC’s CBA habits over the last decade.<sup>112</sup> There were five flaws with the SEC’s CBA that the court found particularly vexing. The court faulted the SEC for: First, “inconsistently and opportunistically fram[ing] the costs and benefits of the rule”;<sup>113</sup> second, “fail[ing] adequately to quantify the certain costs or to explain why those costs could not be quantified;”<sup>114</sup> third, “neglect[ing] to support its predictive judgments;”<sup>115</sup> fourth, “contradict[ing] itself;”<sup>116</sup> and fifth, “fail[ing] to respond to substantial problems raised by com-

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<sup>105</sup> Id. at 13.

<sup>106</sup> Id. at 11.

<sup>107</sup> Id.

<sup>108</sup> Id. at 11–12.

<sup>109</sup> Id. at 12.

<sup>110</sup> Id.

<sup>111</sup> See Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,753–71 (Sept. 16, 2010).

<sup>112</sup> The introduction to the court’s analysis section states: “[T]he Commission acted arbitrarily and capriciously for having failed once again—as it did most recently in *American Equity Investment Life Insurance Company v. SEC* and before that in *Chamber of Commerce*—adequately to assess the economic effects of a new rule.” *Bus. Roundtable*, 647 F.3d at 1148 (citations omitted).

<sup>113</sup> Id. at 1148–49.

<sup>114</sup> Id. at 1149.

<sup>115</sup> Id.

<sup>116</sup> Id.

menters.”<sup>117</sup> These flaws with the SEC’s CBA, the court explained, demonstrated that the SEC had not sufficiently “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made.”<sup>118</sup> The court concluded that a CBA characterized with such faults rendered the rule “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>119</sup>

The first flaw was exemplified by the SEC’s refusal to consider the marginal impact of its rule. The SEC discounted costs associated with Rule 14a-11 by blaming state corporate governance laws. The SEC argued that since state laws grant shareholders the right to elect directors, it is really state law that generates the costs associated with Rule 14a-11.<sup>120</sup> The court rejected the SEC’s argument, explaining that “this type of reasoning, which fails to view a cost at the margin, is illogical and, in an economic analysis, unacceptable.”<sup>121</sup>

The second flaw in the SEC’s CBA, according to the D.C. Circuit, related to the costs derived from divisive proxy contests. The SEC had received many comments explaining that Rule 14a-11 would enable shareholder groups to trigger intense election campaigns.<sup>122</sup> The Chamber of Commerce had submitted a comment letter “report[ing] that proxy contests cost anywhere from \$4 million to \$14 million for large companies, and \$800,000 to \$3 million for smaller companies.”<sup>123</sup> A Business Roundtable survey estimated that each shareholder nominee would cause a company to incur more than \$1.1 million in outside costs.<sup>124</sup> The SEC responded to these comments by suggesting that two factors were likely to mitigate these costs: First, directors might consider it a violation of their fiduciary duties to expend corporate funds on a proxy con-

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<sup>117</sup> Id.

<sup>118</sup> Id. at 1148 (alteration in original) (quoting *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>119</sup> Id. (quoting 5 U.S.C. § 706(2)(A) (2006)).

<sup>120</sup> Id. at 1151.

<sup>121</sup> Id.

<sup>122</sup> *Facilitating Shareholder Director Nominations*, 75 Fed. Reg. 56,668, 56,770 (Sept. 16, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249).

<sup>123</sup> Opening Brief of Petitioners Business Roundtable and Chamber of Commerce of the United States of America at 18–19, *Bus. Roundtable*, 647 F.3d 1144 (No. 10-1305), 2011 WL 2014800, at \*18–19.

<sup>124</sup> Id. at 19.

test; second, the required minimum amount and duration of share ownership would limit the number of directors nominated by shareholders.<sup>125</sup>

In response to the SEC's first factor, the court concluded that the SEC had failed to provide any concrete evidence supporting its theory. Without any supporting evidence, the SEC's prediction was "mere speculation."<sup>126</sup> The court made short shrift of the second factor since the frequency of proxy contests "says nothing about the amount a company will spend on solicitation and campaign costs when there is a contested election."<sup>127</sup> The SEC's response to the comments did nothing to estimate the costs it expected companies to incur from proxy contests. In lieu of quantitative analysis or even serious qualitative arguments to rebut the commenters' concerns, the court found that the SEC had dismissed the concerns with two factors that failed to "make tough choices about which of the competing estimates is most plausible, [or] to hazard a guess as to which is correct."<sup>128</sup>

The third flaw in the SEC's CBA involved an improper evaluation of competing studies. One of the benefits asserted by the SEC was the potential for improved board performance by facilitating the election of dissident shareholder nominees.<sup>129</sup> Many commenters, however, had submitted studies that reached the opposite result. One such study found that companies underperform their peers by nineteen to forty percent for two years after dissident directors win elections.<sup>130</sup> The SEC relied on two other studies that touted the virtues of "hybrid boards."<sup>131</sup> The court held that the SEC's choice to rely on its preferred studies was unreasonable because these two studies were "relatively unpersuasive."<sup>132</sup> The court also faulted the SEC for having "completely discounted" the studies that were inconsistent with its CBA conclusions.<sup>133</sup> The court held that "[i]n view of the admittedly (and at best) 'mixed' empirical evi-

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<sup>125</sup> Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,770.

<sup>126</sup> *Bus. Roundtable*, 647 F.3d at 1150.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (alteration in original) (quoting *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1221 (D.C. Cir. 2004)).

<sup>129</sup> Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,761–62.

<sup>130</sup> *Bus. Roundtable*, 647 F.3d at 1151.

<sup>131</sup> Hybrid boards are boards of incumbent and dissident directors. See *Facilitating Shareholder Director Nominations*, 75 Fed. Reg. at 56,762.

<sup>132</sup> *Bus. Roundtable*, 647 F.3d at 1151.

<sup>133</sup> *Id.*

dence,” the SEC had failed to sufficiently support its conclusion that board performance would improve.<sup>134</sup>

The fourth flaw in the SEC’s CBA involved inconsistent predictions about the frequency of proxy contests. The SEC had predicted that nominating shareholders would realize “[d]irect cost savings” from not having to print and mail their proxy materials,<sup>135</sup> and cited comment letters forecasting frequent use of the new rule. But this frequency calculation contradicted a previous SEC assertion that costs for corporations fighting proxy contests would be low because of limited use of the rule. The “Commission anticipated frequent use of [the rule] when estimating benefits, but assumed infrequent use when estimating costs.”<sup>136</sup> The court held this type of internally inconsistent CBA to be arbitrary and capricious.

The fifth flaw was that the SEC “entirely fail[ed] to consider an important aspect of the problem.”<sup>137</sup> Commenters had argued that unions and state pension funds posed a unique problem for corporations since these special interest groups are extremely active shareholders with incentives that often do not align with other shareholders.<sup>138</sup> Many commenters had expressed concern that these types of employee benefit groups would use Rule 14a-11 as leverage to gain concessions from corporate boards that were unrelated to shareholder value.<sup>139</sup> The SEC responded that it had considered this argument during its CBA, but that it had not considered the problem *in haec verba*.<sup>140</sup> The SEC pointed to scattered segments of its CBA that addressed the petitioners’ concerns, but the court did not consider this to be adequate evidence of serious evaluation capable of addressing the comments.<sup>141</sup> Instead, the court concluded that the SEC had “duck[ed] serious evaluation of the costs

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<sup>134</sup> Id.

<sup>135</sup> Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,756.

<sup>136</sup> *Bus. Roundtable*, 647 F.3d at 1154.

<sup>137</sup> Id. at 1151 (quoting *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>138</sup> See Eugene Scalia, *Business Roundtable v. SEC and the Future of Proxy Access*, The Federalist Society (Jan. 18, 2012), available at <http://www.fed-soc.org/publications/detail/business-roundtable-v-sec-and-the-future-of-proxy-access-podcast>.

<sup>139</sup> *Bus. Roundtable*, 647 F.3d at 1151.

<sup>140</sup> Id. at 1152. The SEC seemed to be asserting that it had considered the comments expressing concern about the impact of 14a-11 on special interest participation in proxy contests, but that these considerations were never recorded in the text of the CBA. See Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,760–62.

<sup>141</sup> *Bus. Roundtable*, 647 F.3d at 1152.

that could be imposed upon companies from use of the rule by shareholders representing special interests.”<sup>142</sup>

### C. The Significance of Business Roundtable

#### 1. Literature Review

The *Business Roundtable* decision has attracted substantial attention in the news media because of the opinion’s leverage value against financial regulators.<sup>143</sup> It has also started to receive substantial attention in academic literature, but the analyses to date have all been largely uniform, critical, predictable, and polemical. Commentators have been too quick to label *Business Roundtable* as a run-of-the-mill example of ossification.

By hastily pigeonholing the opinion into an ideological category, commentators have not read the opinion for all it is worth and have thereby failed to appreciate *Business Roundtable*’s full significance. In this respect, practically all of the published articles are essentially clones of each other, reflecting varying levels of sophistication. For example, one recent critique of *Business Roundtable* lampooned the decision as a “hard-line application of economic review” that imposes an “unattainable standard[] that bar[s] agency action.”<sup>144</sup> Viewed from this perspective, the decision was little more than an example of the courts imprudently “joining political fights”<sup>145</sup> and further ossifying the rulemaking process. Another detractor of the opinion argued that the decision imposed a “nigh impossible”<sup>146</sup> CBA standard that requires agencies to re-

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<sup>142</sup> Id.

<sup>143</sup> See, e.g., Jessica Holzer, Corporate News: Court Deals Blow to SEC, Activists, Wall St. J., July 23, 2011, at B3 (arguing that the court’s holding could have far-reaching implications for all Dodd-Frank rulemaking); see also Ben Protess, Court Ruling Offers Path to Challenge Dodd-Frank, N.Y. Times (Aug. 17, 2011, 8:41 PM), <http://dealbook.nytimes.com/2011/08/17/court-ruling-offers-path-to-challenge-dodd-frank> (explaining that *Business Roundtable* exposes many Dodd-Frank rules to challenge since the economic analysis in the SEC’s proxy access rule is better than most other final rules).

<sup>144</sup> Recent Case, *supra* note 6, at 1095.

<sup>145</sup> Id.

<sup>146</sup> J. Robert Brown, Jr., Shareholder Access and Uneconomic Economic Analysis: *Business Roundtable v. SEC*, *Denv. U. L. Rev. Online* (Sept. 30, 2011, 2:57 PM), <http://www.denverlawreview.org/online-articles/2011/9/30/shareholder-access-and-uneconomic-economic-analysis-business.html> (quoting Stanley Keller, What Now for Proxy Access?, *Harv. L. Sch. F. on Corp. Governance & Fin. Reg.* (Aug. 18, 2011, 9:29 AM), <http://blogs.law.harvard.edu/corpgov/2011/08/18/what-now-for-proxy-access>).

but unsubstantiated costs that are raised by commenters.<sup>147</sup> This standard, so it is argued, far exceeds any standards previously enunciated by Congress or the courts.<sup>148</sup> Relying on the legislative history of the statute that created the CBA mandate at issue in *Business Roundtable*, one opponent of expanded CBA argued that some of the court's holdings were "utterly incorrect" and that the holding is a "potential death-knell for the SEC and the sweeping financial reforms" built into the Dodd-Frank Act.<sup>149</sup> Finally, another recent critic described the D.C. Circuit's holding as "dramatically inconsistent with the standard enacted by Congress."<sup>150</sup>

While remaining agnostic on the rightness or wrongness of ossification or the arguments made by previous commentators, one thing is certain: Because these critics were fixated on the stunting effect that *Business Roundtable* would have on the rulemaking process, they did not explore precisely what made the economic analysis "hard-line" or the CBA standard "nigh impossible" to satisfy. The next Subsection will explore the contours of the CBA standard developed in *Business Roundtable*. It concludes that the standard is even more stringent than its detractors realized. Part III contains an analysis of the effects that *Business Roundtable* could have on the political economy of financial rulemaking.

## 2. Why Business Roundtable Matters

The *Business Roundtable* decision upended the expectations of the financial regulatory agencies and Congress. The agencies had been performing their CBAs as if they expected the standard of review to be far more deferential than the standard employed by the D.C. Circuit in *Business Roundtable*.<sup>151</sup> They seem to have been surprised when *Business Roundtable* applied such a rigorous standard of review.

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<sup>147</sup> Id.

<sup>148</sup> Id.

<sup>149</sup> Anthony W. Mongone, Note, *Business Roundtable: A New Level of Judicial Scrutiny and Its Implications in a Post-Dodd-Frank World*, 2012 Colum. Bus. L. Rev. 746, 749–50.

<sup>150</sup> James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 Tex. L. Rev. 1811, 1813 (2012).

<sup>151</sup> See, e.g., Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626, 71,662–80 (Nov. 18, 2011); Proxy Access Rule, 75 Fed. Reg. 66,622, 66,631–37 (Oct. 28, 2010); Risk-Based Capital Standards: Advanced Capital Adequacy Framework—Basel II, 72 Fed. Reg. 69,288, 69,391–93 (Dec. 7, 2007); Market Risk Disclosure Rule, 62 Fed. Reg. 6044, 6060–62 (Feb. 10, 1997).

This reaction might seem naive to many administrative law scholars because the *Business Roundtable* decision arguably just continued the development of how the arbitrary and capricious standard of review would apply to CBAs of financial regulation begun in *Chamber I*. In light of *Chamber I*, it is unsurprising that the court in *Business Roundtable* required internal consistency, evidence supporting the SEC's assertions, and careful consideration and responses to all comments raising significant problems with the rule. After all, these requirements have been hallmarks of arbitrary and capricious review since *State Farm*.

The language in certain parts of *Business Roundtable*, however, suggests that Judge Ginsburg may have altered the CBA playing field in a significant way, whether he intended to do so or not. The court's analysis of the SEC's third CBA defect may be the biggest game changer of all. Yet this aspect of the opinion has gone largely unnoticed.

As explained above, the court rejected the SEC's choice to rely on favorable empirical studies in the face of hostile studies. The court described this choice as a decision to "rel[y] upon insufficient empirical data"<sup>152</sup> since, in the court's estimation, the studies relied upon by the agency were "relatively unpersuasive."<sup>153</sup> Given that the SEC presented only "mixed empirical evidence," the court ruled that the SEC had not "sufficiently supported its conclusion."<sup>154</sup> This does not look like the sort of deference courts have previously said they would give to agency decisions under the arbitrary and capricious test with respect to their evaluations of statistical studies and other data.<sup>155</sup>

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<sup>152</sup> *Bus. Roundtable*, 647 F.3d at 1150.

<sup>153</sup> *Id.* at 1151.

<sup>154</sup> *Id.* (citation omitted) (internal quotation marks omitted).

<sup>155</sup> See, e.g., *Hüls Am. Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996) (explaining that review of agency choices under the arbitrary and capricious test is highly deferential and that the court further owes an "extreme degree of deference to the agency when it 'is evaluating scientific data within its technical expertise'" (quoting *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992))); see also *Am. Trucking Ass'n v. EPA*, 283 F.3d 355, 362 (D.C. Cir. 2002) (holding that the function of the court is not to "resolve disagreement among the experts or to judge the merits of competing expert views" (quoting *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1160 (D.C. Cir. 1980)); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 802 (D.C. Cir. 1998) (explaining that "[s]tatistical analysis is perhaps the prime example of those areas of technical wilderness into which judicial expeditions are best limited to ascertaining the lay of the land," and that this determination requires only that agency choice was rational); *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1005 (D.C. Cir. 1997) (holding that agency evaluations should be overturned only where they bear no rational relationship to the data).



The court's language suggests two potential developments in CBA analysis—neither of which are readily apparent in D.C. Circuit precedents prior to *Business Roundtable*. First, the burden of proving that a rule's costs outweigh its benefits has been allocated to the agency. Second, the court will perform a very rigorous review of CBA that seems more like de novo review than arbitrary and capricious review.

Agencies would be required to provide ample evidence of each asserted benefit in order to outweigh evidence to the contrary. The SEC was faulted in *Business Roundtable* because it did not “sufficiently support its conclusion that increasing the potential for election of directors nominated by shareholders will result in improved board and company performance and shareholder value.”<sup>156</sup> This statement makes sense only if the SEC bore the burden to support its CBA balance in the first place. Of course, an agency always bears the burden of demonstrating that its rulemaking was not arbitrary and capricious, but arbitrary and capricious review is reasonableness review when applied to an individual decision. Reasonableness review is a porous filter that would normally permit a decision based on “mixed evidence” to survive scrutiny. Instead, the *Business Roundtable* court seems to be applying a more rigorous standard of review. The burden imposed resembles something more like a preponderance of the evidence standard than mere reasonableness review.

The second meaning may involve courts reviewing CBAs de novo, rather than under the deferential arbitrariness review, which they have previously applied. Such a development would be logical, but it would also be controversial. Appellate courts generally defer to findings of fact made by an agency or lower court.<sup>157</sup> They also defer to an agency's interpretation of ambiguous statutory language if the agency has responsibility for administering the statute.<sup>158</sup> Factual findings may only be overturned on a finding of “clear error.”<sup>159</sup> An agency's interpretations of the text of a statute it administers may only be overturned if the language of the statute is unambiguous or the agency's interpretation of ambiguous language is unreasonable.<sup>160</sup> These deferential standards of review are

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<sup>156</sup> *Bus. Roundtable*, 647 F.3d at 1151.

<sup>157</sup> Fed. R. Civ. P. 52(a)(6).

<sup>158</sup> See, e.g., *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–44 (1984).

<sup>159</sup> Fed. R. Civ. P. 52(a)(6); see also *Anderson v. Bessemer City*, 470 U.S. 564, 572–73 (1985).

<sup>160</sup> *Chevron*, 467 U.S. at 844.

justifiable for at least two reasons: First, agencies and lower courts are generally better at fact-finding than appellate courts, and agencies charged with administering a statute are better at interpreting ambiguous language; second, in the case of fact-finding, agencies and lower courts have had the opportunity to observe the demeanor of witnesses and are thus better positioned to assess credibility accurately.

In contrast, an appellate court generally applies *de novo* review to questions of law, including statutes administered by agencies where the language is plain and unambiguous or where the agency's interpretation of ambiguous language is arguably unreasonable. Under this standard, little or no deference is paid to an agency's or lower court's determinations. Both of the justifications favoring deferential review of fact-finding or agency interpretations of ambiguous language are reversed and favor non-deferential review of questions of law: First, appellate courts are just as expert in evaluating questions of law, including the text of statutes administered by the agency as lower courts; and second, credibility issues are irrelevant to evaluations of legal questions.<sup>161</sup> Where courts are presented with mixed questions of fact and law, courts engage in implement *de novo* review. CBA seems to fall somewhere on the spectrum between questions of fact and questions of law.

There are reasons to treat CBA like a question of law subject to *de novo* review, with little to no deference to the agencies. Courts are generally in as good a position as an agency to interpret the language of a CBA mandate. Plus, an agency has a conflict of interest in interpreting such a mandate—agencies have an incentive to interpret their CBA mandates narrowly so that they don't become significant barriers to rulemaking. Additionally, cost-benefit data and statistical studies do not lend themselves to credibility disputes quite as readily as witnesses often do, so there is less reason to defer to agency evaluations of data. This appears to be the most logical explanation for the *Business Roundtable* court's unwillingness to defer to the SEC's CBA. From the D.C. Circuit's perspective, CBA mandates require honest and impartial balancing of a rule's costs and benefits and a court is capable of evaluating economic reports and determining which side has mustered the most convincing evidence. Since there are no real credibility issues, the SEC occupies no unique vantage point to evaluate the CBA. And since the

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<sup>161</sup> *State v. Pepin*, 328 N.W.2d 898, 900 (Wis. 1982); Thomas A. Sheehan, *Standard of Review on Appeal*, 53 J. Mo. B. 281, 283 (1997).

D.C. Circuit regularly reviews CBAs from a variety of agencies, it may be or become a genuine CBA expert.

The court's decision in *Business Roundtable* not to defer to the SEC looks much more like de novo review. The SEC had evidence upon which to rely, and according to a recent critique of *Business Roundtable*, the studies favored by the court were methodologically flawed as well.<sup>162</sup> The SEC's CBA finding would not have been disturbed under a "clearly erroneous" standard and would have been upheld as reasonable under the arbitrary and capricious standard. The best explanation for why the SEC's CBA finding was overturned is that the D.C. Circuit believes that CBA should be subject to a more rigorous standard of review—a standard that approaches de novo review.

As a policy matter, it is not clear that the court's approach is justified because there are reasons to believe that courts should be more deferential to agency CBAs. Judges are generally not trained in the analytical methods or social sciences required to evaluate data and statistical studies as rigorously as required by a quality CBA, but an agency can employ economists who are. In addition, it is not entirely correct to say that a CBA is not susceptible to credibility challenges. Researchers can massage data to support a variety of propositions, and experts often make their careers chasing data to support their ideological positions. Thus, the agencies may be in a better position than the courts to make these credibility determinations. For these and other reasons, the court's non-deferential approach may not be entirely justifiable.

### III. IMPACT OF *BUSINESS ROUNDTABLE* ON POLITICAL ECONOMY OF FINANCIAL REGULATION

We now turn to the impact of the *Business Roundtable* decision—that is, the impact of a more rigorous than expected standard of judicial review of the cost-benefit analysis of financial regulations—on the political economy of financial regulation. The most immediate and obvious impact has been to increase the expected administrative and litigation costs of financial rulemaking, and to slow down its pace. This impact has been most obvious in the vast rulemaking process underway to im-

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<sup>162</sup> See Recent Case, supra note 6, at 1093–94.

plement the Dodd-Frank Act.<sup>163</sup> According to one author, this immediate impact will inevitably lead to the ossification of the entire financial rulemaking process.<sup>164</sup> In order to avoid that inevitable outcome, the author urges the D.C. Circuit to abandon *Business Roundtable* in favor of a more deferential standard of review.<sup>165</sup>

The ossification prediction, however, assumes that the judiciary can set the agenda for CBA and that none of the other actors in the political economy can or will respond to that agenda in ways that could change the predicted outcome. If these other actors can and do respond, the long-term impact of *Business Roundtable* could be just the opposite of the predicted ossification. For example, Congress could respond to *Business Roundtable* by repealing the CBA mandates in existing laws or taking away the right to judicial review. If it did, *Business Roundtable* would actually result in a streamlining of the financial rulemaking process rather than its ossification. In short, by changing the expected costs and benefits of the cost-benefit analysis itself, the *Business Roundtable* decision creates incentives for other actors in the political economy of financial rulemaking to react in ways that could change the impact of *Business Roundtable*, sometimes in unpredictable or surprising ways.<sup>166</sup>

This mode of analysis is similar to the type of analysis used by Professor William Stuntz in his groundbreaking work on the criminal justice system.<sup>167</sup> Professor Stuntz has argued that the Warren Court's expansion of constitutional criminal procedure rights hurt rather than helped the intended beneficiaries because state legislatures responded by multiplying the number of crimes on the books and prosecutors became more aggressive in the number of crimes with which they might charge a defendant in order to induce plea bargains.<sup>168</sup> The net result has not been a

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<sup>163</sup> See, e.g., Steven Sloan, Cost-Benefit Analysis Puts the Brakes on Dodd-Frank, Bloomberg (May 7, 2012, 11:18 AM), <http://www.bloomberg.com/news/2012-05-07/cost-benefit-analysis-puts-the-brakes-on-dodd-frank.html>.

<sup>164</sup> See Recent Case, *supra* note 6, at 1095.

<sup>165</sup> *Id.*

<sup>166</sup> This type of analysis was pioneered by former University of Virginia Professor James M. Buchanan, founder of the university's Thomas Jefferson Center for Political Economy and recipient of the 1986 Nobel Prize in economics for his groundbreaking work. See, e.g., James M. Buchanan & Gordon Tulluck, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* 19–20 (1962) (arguing that government agencies behave like other self-interested actors).

<sup>167</sup> See generally William J. Stuntz, *The Collapse of American Criminal Justice* (2011).

<sup>168</sup> *Id.* at 216–17, 253–65.

more lenient, but a substantially harsher, criminal justice system with record incarceration rates.

This Part analyzes how five types of actors in the political economy of financial rulemaking might respond to the *Business Roundtable* decision, and how those reactions could lead to a variety of outcomes, including some surprising ones. Those five categories of actors are the financial industry, the financial regulators, Congress, the executive branch, and the Supreme Court.

### A. *Financial Industry*

The financial industry has already responded to the *Business Roundtable* decision by increasing its focus on agency compliance with applicable CBA mandates in its comment letters on proposed rulemaking and by filing lawsuits challenging various rules based on an alleged failure to conduct an adequate CBA. Within months of the *Business Roundtable* decision, two of the leading financial trade organizations filed a lawsuit challenging a rule issued under the Dodd-Frank Act, arguing that it should be struck down because the CFTC failed to perform an adequate CBA.<sup>169</sup> Additionally, four of the most important financial trade organizations submitted a comment letter challenging the quality of the CBA review in the proposed regulations implementing the Volcker Rule.<sup>170</sup> In that comment letter, they all but threatened to mount a judicial challenge to the proposed regulations implementing the Volcker Rule unless the financial regulatory agencies re-proposed the regulations after performing a rigorous cost-benefit analysis of the proposed regulations as a whole and rule-by-rule.<sup>171</sup>

*Business Roundtable* is a blueprint for effective challenges to an agency's rulemaking process. During the notice-and-comment period, *Business Roundtable* gives opponents of a particular rule an incentive to submit detailed comments identifying a variety of costs—particularly costs that will be difficult for the agency to quantify and rebut. The financial industry, for example, can submit such comments in order to in-

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<sup>169</sup> See Complaint, *supra* note 10, at 27; Petition for Review at 2–3, *Int'l Swaps & Derivatives Ass'n v. CFTC*, No. 11-1469 (D.C. Cir. Dec. 2, 2011).

<sup>170</sup> See Comment Letter from Sec. Indus. & Fin. Mkts. Ass'n, Am. Bankers Ass'n, Fin. Servs. Roundtable & The Clearing House Ass'n, to CFTC et al. concerning CFTC RIN 3083-AC et al., Annex C-4 to C-12 (Feb. 13, 2012), <http://www.sec.gov/comments/s7-41-11/s74111-210.pdf>.

<sup>171</sup> See *id.*

crease the costs incurred by the agency to research and rebut the comments, and eventually defend itself in court. Given the D.C. Circuit's willingness to second-guess an agency's appraisal of conflicting studies in *Business Roundtable*, the industry is likely to include empirical analyses and expert witnesses that undercut any unfounded assumptions, dubious reasoning, or debatable research on which an agency bases its rule. *Business Roundtable* provides the industry with an incentive to raise every aspect of the CBA that might be poorly reasoned, insufficiently supported, or procedurally defective because even the smallest defect could lead to reversal.

The *Business Roundtable* decision both reduced the cost and increased the likely benefits of challenges to financial regulations. It reduced the costs to challengers by effectively imposing the burden of proof on the financial regulators to show that the quality of their CBA satisfies the relevant statutory mandate. Instead of having to bear the burden of proving that an agency's CBA is defective, challengers only have to raise sufficient doubt about whether the agency satisfied its burden of proof. Ties in the evidence will be resolved against the agencies. *Business Roundtable* increased the likely benefits from such litigation for a similar reason. By holding agencies strictly accountable for the quality of their CBA reviews, challengers can expect agencies to respond by creating rules that are most narrowly tailored to the regulatory goal and least burdensome on the financial industry and the broader public.

*Business Roundtable* also provides a powerful incentive for the financial industry to lobby for more statutory CBA mandates. They will almost certainly urge Congress to enact statutes imposing CBA mandates on all financial regulations.

## B. Financial Regulators

### 1. Rulemaking Process: Quantity, Cost, and Speed of Rulemaking

The immediate impact of *Business Roundtable* is that the financial regulators will not be able to promulgate as many rules with their current CBA resources. The holding will drive up the costs of the rulemaking process for at least two reasons. First, the cost of defending more rules in court on CBA grounds will represent a significant administrative cost for agencies. Second, the increased threat of litigation over inadequate CBAs will provide a powerful incentive for financial regulatory agen-

cies to spend more time and money conducting more persuasive CBAs. To avoid litigation, the agencies will need to devote more resources to each rulemaking. They will need to hire more economists, or redirect economists already on their staffs, to improve the quality of CBAs. Since rulemaking is so expensive, agencies are likely to reduce the number of rules that they promulgate. If rulemaking is mandated, as it is under Dodd-Frank, agencies will continue to miss deadlines or promulgate as few rules as possible.

The pace of agency rulemaking procedures will be significantly reduced. There is already evidence that the financial regulatory agencies have slowed down the process of issuing rules under the Dodd-Frank Act as a result of *Business Roundtable's* rigorous scrutiny.<sup>172</sup> Many agencies feel bullied by the requirement to improve their CBA apparatus. As Commissioner Bart Chilton of the CFTC explained, “[s]ome regulators live in constant fear and are virtually paralyzed by the threat” of “spuriously” filed lawsuits focusing on agency CBA.<sup>173</sup> Whether challenges to agency rules and procedures are spurious or not, *Business Roundtable* will open a Pandora’s box of challenges to financial regulations going forward. Rules currently in the pipeline will be delayed so regulators can revisit the CBA portions of their proposed rules. It is better for the agencies to delay a rule and salvage it by performing a sufficient CBA than to risk having the rule overturned in court and begin the entire process over again.

These agency responses are, on balance, a positive outcome of *Business Roundtable*. Agencies will only promulgate the best rules reaching the most defensible areas of need, and the rules will be much more sharply crafted to fit the harm to be remedied. A cost of *Business Roundtable*, however, is that certain areas in need of regulation will be left fallow since the cost of formulating a satisfactory rule is prohibitive.

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<sup>172</sup> The pace of rulemaking at the SEC has decreased by about half. SEC Chairman Mary Shapiro has confirmed the lull in her agency’s rulemaking and indicated that many factors have caused their rulemaking process to slow down, but the cardinal explanatory factor for the hiatus is increased attention to CBA. See Jesse Hamilton, *Dodd-Frank Rules Slow at SEC After Cost Challenge*, Bloomberg (Mar. 6, 2012, 12:01 AM), <http://www.bloomberg.com/news/2012-03-06/dodd-frank-rules-slow-at-sec-after-court-cost-benefit-challenge.html>.

<sup>173</sup> Silla Brush, *U.S. Regulators “Paralyzed” by Cost-Benefit Suits*, Chilton Says, Bloomberg (Mar. 8, 2012, 6:00 AM), <http://www.bloomberg.com/news/2012-03-08/u-s-regulators-paralyzed-by-cost-benefit-suits-chilton-says.html>.

## 2. Rulemaking Process: *Quality of CBA Reviews*

If the financial regulatory agencies respond to *Business Roundtable* by increasing the size and quality of their CBA resources, and the D.C. Circuit continues to hold agencies strictly accountable for the quality of their CBA reviews, the average quality of those reviews should increase. The SEC and CFTC especially, which are currently subject to the most stringent statutory CBA mandate of any of the financial regulators, will try to avoid the hazards of court challenges by investing to improve the quality of their CBAs. Unless and until the quality of their CBAs is significantly increased, they will face a high risk of challenge by private litigants and a high risk of having rules struck down by the D.C. Circuit. Under current law, the Federal Reserve, the FDIC, and the OCC are likely to face fewer challenges to their rules because they are not subject to a general statutory CBA mandate like the SEC.

## 3. Enforcement Actions: *Be Careful What You Wish For*

Although agency rulemaking procedures can be subjected to a CBA mandate and judicial review, the choice to engage in enforcement actions and the pattern of enforcement actions that these agencies bring are not similarly scrutinized. Agencies have nearly unfettered discretion to either employ the rulemaking process or implement a statute piecemeal via case-by-case adjudication.<sup>174</sup> In view of the prospect of having a rule struck down in court and being sent back to square one, agencies might opt instead to bring enforcement actions.

Such strategic behavior by agencies makes it less clear that it is in the best interest of regulated parties to challenge every rule that they would be able to defeat in court. The purpose of challenging unfavorable rules in court is, of course, to have them struck down so that they can either be replaced by more favorable rules or—even better—replaced by no rules at all. An unintended consequence of such a challenge, however, could be far worse. An agency Star Chamber could be far more burdensome on a regulated party than an unfavorable rule.<sup>175</sup> Regulated parties

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<sup>174</sup> SEC v. Cheney Corp., 332 U.S. 194, 203 (1947) (holding that the choice between “proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency”).

<sup>175</sup> The Star Chamber has become a symbol of secrecy, severity, and extreme injustice resulting from a violation of due process rights. Daniel L. Vande Zande, *Coercive Power and the Demise of Star Chamber*, 50 Am. J. Legal Hist. 326, 326–27 (2008–2010).



might find that it is in their best interest to operate under a predefined unfavorable rule instead of a legislative court with power to interpret and enforce statutory language in unanticipated ways.

#### 4. Case Study: Dodd-Frank Rulemaking

##### a. CFTC Positions Limit Rule

In December 2011, the International Swaps and Derivatives Association (“ISDA”) and the Securities Industry and Financial Markets Association (“SIFMA”) filed suit against the CFTC, challenging the CFTC’s rule imposing position limits on swap dealers. ISDA’s complaint focused primarily on the alleged inadequacy of the CFTC’s CBA.<sup>176</sup> An opinion granting plaintiffs’ motion for summary judgment was granted on September 28, 2012 by the U.S. District Court for the District of Columbia. The rule was vacated for failure to perform a proper cost-benefit analysis and remanded to the CFTC for revision.<sup>177</sup>

The Dodd-Frank Act gave the CFTC power to create position limits for futures, options, and swaps.<sup>178</sup> The Notice of Proposed Rulemaking (“NPR”) for the position limits rule included a one-page discussion of the costs and benefits of the rule.<sup>179</sup> Incredibly, one of the three Commissioners who voted in favor of the CFTC’s rule admitted that “no one has presented this agency any reliable economic analysis to support either the contention that excessive speculation is affecting the market we regulate or that position limits will prevent excessive speculation.”<sup>180</sup> Commissioner Dunn explained, “[His] fear is that position limits, at best a cure for a disease that does not exist, are a placebo for one that does. At worst, position limits may harm the very markets [the CFTC is] intending to protect.”<sup>181</sup> The Commissioner said that he had voted for the

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<sup>176</sup> Complaint, *supra* note 10, at 27; Petition for Review, *supra* note 169, at 1–3.

<sup>177</sup> *Int’l Swaps & Derivatives Ass’n v. CFTC*, 887 F. Supp. 2d 259, 269, 285 (D.D.C. 2012).

<sup>178</sup> See Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626, 71,626 (Nov. 18, 2011); see also 7 U.S.C. § 6a(a)(1), 6a(a)(2)(A), 6a(a)(3)(B), 6a(a)(5) (Supp. V 2007–2012).

<sup>179</sup> Disclosure for Asset-Backed Securities, 76 Fed. Reg. 4489, 4764 (Jan. 26, 2011) (to be codified at 17 C.F.R. pts. 229, 232, 240, 249).

<sup>180</sup> Transcript of Open Meeting on Two Final Rule Proposals Under the Dodd-Frank Act at 13, Commodity Futures Trading Comm’n (Oct. 18, 2011), [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission7\\_101811-trans.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission7_101811-trans.pdf).

<sup>181</sup> *Id.* at 14.

position limits rule solely on the assumption that the Dodd-Frank Act required the establishment of position limits irrespective of cost.<sup>182</sup>

In its complaint, ISDA alleged that the Commission “grossly misinterpreted its statutory authority” by finding that Congress did not require the CFTC to prepare a CBA for the rule.<sup>183</sup> ISDA alleged that the Commodity Exchange Act, as amended by Dodd-Frank, authorized the CFTC to establish position limits only if it first finds that they “are necessary to diminish, eliminate, or prevent an undue and unnecessary burden on interstate commerce caused by [e]xcessive speculation and are otherwise appropriate.”<sup>184</sup> This is a crucial component of ISDA’s argument because without a CBA mandate, the CFTC’s deficient CBA is irrelevant. The statutory language does not clearly call for a CBA and permits the CFTC to promulgate rules that are “necessary” or otherwise “appropriate” to accomplish its statutory mandate. Although these terms do not plainly require the CFTC to perform a CBA, this statutory language seems no less clear than the provisions in *Chamber I* and *Business Roundtable* that were construed to mandate CBA.

ISDA alleged that the CFTC failed to conduct any substantial CBA, much less the rigorous CBA required by the *Business Roundtable* decision. The most significant blemish was the Commission’s repeated admission that its final rule lacked empirical evidence for many of the CFTC’s assertions.<sup>185</sup> ISDA alleges that “[r]ather than making a genuine effort to estimate [the] costs, the [CFTC] cited its own failure to obtain empirical data that would enable it to assess the impact of the Position

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<sup>182</sup> Id. at 11.

<sup>183</sup> Complaint, *supra* note 10, at 3.

<sup>184</sup> Id. (citations omitted) (internal quotation marks omitted). More specifically, the provision explains that before any rule is promulgated, the “costs and benefits of the [rule must] be evaluated in light of—(A) considerations of protection of market participants and the public; (B) considerations of efficiency, competitiveness, and financial integrity of futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations.” 7 U.S.C. § 19(a) (2006).

<sup>185</sup> See, e.g., Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626, 71,670 (Nov. 18, 2011) (“At this time, the Commission’s data set does not allow the Commission to estimate the specific number of traders that could potentially be impacted by the limits on cash-settled contracts . . . .”); *id.* at 71,672 (“[T]he Commission is unable to determine or estimate the number of entities that may need to alter their business strategies.”); *id.* at 71,668 (discussing the evidence supporting the swaps rule, the Commission stated that its “estimates of the number of affected participants for both spot-month and non-spot-month limits are based on data it currently has on futures, options, and the limited set of data it has on cleared swaps” (emphasis added)).

Limits Rule.”<sup>186</sup> The CFTC’s substantive CBA is far less exacting than even the SEC’s analysis was in *Business Roundtable*. Given that the CFTC’s CBA of the position limits rule is generally unsupported by evidence, it seems likely to fail under the standard of review established in *Business Roundtable*, which will not credit “mere speculation” that insufficiently supports an agency’s position.<sup>187</sup>

The CFTC also engaged in some of the behavior that *Business Roundtable* painstakingly criticized. Although ISDA’s complaint did not catch these rulemaking defects, the CFTC failed to make a good faith effort to quantify the consequences or costs of the rule on market participation or trading strategies.<sup>188</sup> *Business Roundtable* requires agencies to make tough choices and to at least identify likely ranges of factors eluding precise quantification. The CFTC also refused to take full responsibility for the costs stemming from the position limits rule and to analyze the impact of the rule at the margin.<sup>189</sup> ISDA’s successful challenge to the position limits rule demonstrates the vitality and effectiveness of challenges to financial rules premised on CBA flaws post-*Business Roundtable*.

#### *b. The Volcker Rule*

Section 619 of the Dodd-Frank Act has been named the “Volcker Rule” since it was the brainchild of Paul Volcker, former Chairman of the Federal Reserve. The Volcker Rule was designed to allay concerns about the moral hazard created when financial institutions are permitted to engage in risky financial transactions while benefiting from the federal safety net (that is, deposit insurance or routine access to the Federal Reserve’s lender-of-last-resort facilities). The Volcker Rule is a statutory prohibition against banks and their affiliates engaging in proprietary trading, and it limits their relationships with hedge funds and private eq-

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<sup>186</sup> Complaint, *supra* note 10, at 4.

<sup>187</sup> *Bus. Roundtable*, 647 F.3d at 1150.

<sup>188</sup> Position Limits for Futures and Swaps, 76 Fed. Reg. at 71,665 (“The Commission does not believe it reasonably feasible to quantify or estimate the costs from such changes in trading strategies.”).

<sup>189</sup> *Id.* In support of the rule, the CFTC explained: “The Commission believes that many of the costs that arise from the application of the final rule are a consequence of the congressional mandate that the Commission impose position limits.” This explanation completely ignores the marginal impact of the rule, *ceteris paribus*, by attributing the costs stemming from the rule to Congress’s initial requirement that a rule be promulgated. *Id.*

uity funds.<sup>190</sup> A number of agencies, including the SEC and the CFTC, are involved in a coordinated rulemaking process to implement the Volcker Rule. The comment period for the SEC closed in February 2012, and the CFTC comment period ended in April 2012.<sup>191</sup> The statute took effect on July 21, 2012 without any implementing regulations.<sup>192</sup>

The Volcker Rule's implementing regulations may be susceptible to attack if the final rule does not correct significant deficiencies in the CBA that are readily apparent in the proposed rule. The CBA that the SEC provided appears to be deficient under *Chamber I*, *Chamber II*, and *Business Roundtable*, and the SEC's refusal to perform a CBA pursuant to ancillary mandates could also be legally fatal for the rule.

The SEC conducted a limited CBA of the information requirements of the proposed rules under the Paperwork Reduction Act.<sup>193</sup> The SEC also performed a CBA pursuant to the 1934 Act to determine the impact that its proposed rules would have on efficiency, competition, and capital formation.<sup>194</sup> But in the proposed rule, the Commission failed to provide any preliminary estimate of the costs of the recordkeeping and documentation requirements associated with its regulation. In *Chamber I*, the court required that an agency at least try to determine a range within which costs would fall.<sup>195</sup> More recently, the *Business Roundtable* court faulted an SEC CBA because the Commission "did nothing to estimate and quantify the costs it expected companies to incur."<sup>196</sup> *Chamber II* required that the proposed rule contain sufficient information to enable commenters to reply to the economic bases of the agency's rule.

The SEC did not perform a CBA under the Regulatory Flexibility Act ("RFA") because it concluded that the proposed rules would not have a

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<sup>190</sup> Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,625, 68,847-49 (Nov. 7, 2011) (to be codified at 12 C.F.R. pts. 44, 248, 351, 17 C.F.R. pt. 255).

<sup>191</sup> See Daniel M. Gallagher & Troy A. Paredes, Statement by SEC Commissioners: Statement Regarding Volcker Rule Comment Period, SEC (Dec. 23, 2011), <http://www.sec.gov/news/speech/2011/spch122311dmg-tap.htm>; Statement of Policy Regarding the Conformance Period for Entities Engaged in Prohibited Proprietary Trading or Private Equity Fund or Hedge Fund Activities, 77 Fed. Reg. 33,949 (June 8, 2012) (to be codified at 12 C.F.R. pt. 225).

<sup>192</sup> See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. at 68,855.

<sup>193</sup> Id. at 68,846, 68,936-38.

<sup>194</sup> Id. at 68,940-42.

<sup>195</sup> Chamber of Commerce v. SEC (*Chamber I*), 412 F.3d 133, 143 (D.C. Cir. 2005).

<sup>196</sup> *Bus. Roundtable*, 647 F.3d at 1150.

substantial impact on many small entities and because small entities are not directly addressed by the proposed rules.<sup>197</sup> This reasoning fails to take into account the significant indirect effects that the proposed rules will have on small entities, whether targeted by the regulations or not. The proposed rules would restrict the access that small entities enjoy to market-making and underwriting services from larger institutions. In 2007, the D.C. Circuit rejected the very same line of reasoning from the SEC.<sup>198</sup> Regulating the sellers of market-making services (financial institutions) also regulates the consumers of those services (small entities). As such, the SEC should have performed a CBA pursuant to the RFA.

Nor did the SEC perform a CBA under the Small Business Regulatory Enforcement Fairness Act (“SBREFA”) of 1996. The SEC tried to shift the burden of proof for the CBA to the public by requesting comment on whether the economic effects of the proposed rules would trigger the SBREFA.<sup>199</sup> *Business Roundtable*, however, allocates such burdens to the agency and the SEC’s refusal to substantiate its own position is chum in the water for challengers.

### C. Congress

#### 1. Legislative Tactics

*Business Roundtable* significantly affects the incentives of lobbyists and members of Congress. There are many tactics that legislative drafters can exploit, for many purposes: budgeting, new CBA mandates, statutory language, sunset provisions, and rulemaking conditions.

Opponents and proponents of exacting CBA will undoubtedly both engage in strategic budgeting behavior. The increased costs on the rulemaking process imposed by *Business Roundtable* accentuate the effectiveness of strategic budgeting. Republicans in control of the House are currently trying to starve the ability of agencies to implement a range of programs, including Dodd-Frank.<sup>200</sup> Supporters of CBA will try to in-

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<sup>197</sup> Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. at 68,939.

<sup>198</sup> *Aeronautical Repair Station Ass’n v. FAA*, 494 F.3d 161, 177 (D.C. Cir. 2007) (holding that for purposes of the RFA, even though a regulation was immediately addressed to the employees of air carriers, contractors performing maintenance services were directly affected and therefore regulated).

<sup>199</sup> See Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. at 68,939.

<sup>200</sup> See supra note 69.

crease fiscal pressure on agencies tasked with implementing Dodd-Frank by reducing their budgets even further. Opponents of “ossification” will fight to open the state’s purse for regulators.

*Business Roundtable* highlights the importance of statutory CBA mandates. Those who wish to “rationalize” the rulemaking process by driving up rulemaking costs will attempt to insert CBA mandates into new legislation wherever possible. Supporters of CBA have already succeeded in installing CBA mandates in the Dodd-Frank Act. For example, the Dodd-Frank Act created the Consumer Financial Protection Bureau (“CFPB”). In Section 1022 of the Dodd-Frank Act, Congress explicitly required the CFPB to analyze each rule’s costs and benefits to consumers, as well as each rule’s expected broader economic impact.<sup>201</sup>

Supporters of stringent CBA will likewise attempt to pass blanket CBA mandates to reach future and past rules promulgated by independent and executive agencies. Bills proposing such mandates have already been introduced. For example, Senator Shelby introduced the Financial Regulatory Responsibility Act of 2011, which would impose rigorous prospective and retroactive CBA requirements on all financial regulations.<sup>202</sup> Additionally, Senators Collins, Portman, and Warner introduced the Independent Agency Regulatory Analysis Act of 2012, which would authorize the President to require independent financial regulatory agencies, other than the Federal Reserve and the FOMC, to comply with the CBA mandates applicable to executive agencies under existing executive orders.<sup>203</sup>

In contrast, opponents of strict CBA review will almost certainly try to roll back CBA mandates since these have been given such sharp bite by the D.C. Circuit. Rolling back CBA mandates may be a politically unpopular line unless a politician is able to propose some alternate means of review.

*Business Roundtable* also gives both opponents and proponents of CBA an increased incentive to fight over the precise language of CBA mandates in legislation. The hardest-line CBA, which demands pure quantitative CBA, will probably never prevail since even the most fervent proponents of CBA recognize that some costs and benefits do not yield to precise measurement. But proponents of CBA would have an

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<sup>201</sup> See *supra* note 46.

<sup>202</sup> Financial Regulatory Responsibility Act of 2011, S. 1615, 112th Cong. §§ 3, 7 (2011).

<sup>203</sup> Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong. § 3 (2012).

incentive to push for language that requires benefits to outweigh the costs of any proposed rule. Such language would strengthen the D.C. Circuit's holding in *Business Roundtable* and legislatively allocate the burden of proof to agencies. Opponents of CBA, however, would have an incentive to push for vague language in CBA mandates requiring that agencies merely "consider" costs. Vague language exposes *Business Roundtable* to reversal by subsequent D.C. Circuit panels or by the Supreme Court itself. Opponents could even seek to legislatively reverse *Business Roundtable* by introducing language allocating the burden of CBA to parties challenging a final rule in court.

Opponents of CBA will also be incentivized to attach sunset provisions to CBA mandates such that they will be renewed only if they are successful. Since the proponents of CBA are likely to be the same people who demand sunset provisions in other contexts, they will be chary to oppose this suggestion. Conversely, CBA's proponents will try to attach CBA conditions to agency rulemaking procedures. An example of such a condition would prevent rules from going into effect until they pass through a meaningful CBA filter.

## 2. Clarify APA Review

Opponents of CBA and strict, hard-look APA review might seize upon *Business Roundtable* as a confirmation of the need for Congress to clarify the proper scope of judicial review of agency action under the APA. *Business Roundtable*'s result does not necessarily follow from the language of the APA. In fact, it is a significant innovation beyond the plain meaning of the APA's language granting judicial review of agency rulemaking procedures. Opponents might try to characterize *Business Roundtable* as a particularly egregious judicial deviation from the APA's mandate in a long list of deviations.

## 3. New CBA Oversight Agency

Congress could plausibly respond to *Business Roundtable* by denying courts jurisdiction to review agency CBAs by vesting jurisdiction in a new CBA oversight agency. Review of CBA requires an impartial and expert umpire. Judges are impartial arbiters of rules, but they are not experts of the economic data and reasoning inherent in CBA. Agencies are experts, but they are unlikely to be able to evaluate their rules impartially. After all, agency heads and many of their subordinates are career par-

tisan actors. A superimposed, independent CBA oversight agency could be populated with expert non-partisans capable of properly evaluating agency CBAs in an impartial and expert manner.

Creating such an agency could also have the added benefit of refining the CBA methodology. With reviewing power for this narrow issue concentrated in a single locus, it is likely that proper attention would be paid to the development of CBA into a purely objective filter.

#### D. Executive Branch

As it stands, lip service to CBA is free for the President and the rest of the executive branch. Executive orders mandating that executive agencies perform wide-ranging CBA are not likely to give rise to a private right of action.<sup>204</sup> But *Business Roundtable* may provide an unpleasant jolt that could tone down the CBA language in executive orders. Although it is unlikely that a court would or even could imply a right of action from an executive order, the executive will probably want to reduce the chance of an errant court grasping at executive CBA commitments. *Business Roundtable* could attach a price to the CBA grandstanding that Presidents have enjoyed for so long.

The executive branch may view *Business Roundtable* as an affront to the Take Care Clause and perhaps a violation of separation of powers principles. The executive could challenge CBA mandates on constitutional grounds and argue that CBA mandates are analogous to a legislative veto. After a law is passed, Congress has no legitimate role regulating the manner in which the executive enforces the law. CBA would seem to trample, at least indirectly, on the executive branch's ability to enforce statutes put at its disposal. Congress, however, would have a powerful rejoinder that CBA is simply Congress's attempt to help the executive and judicial branches interpret a particular statute.

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<sup>204</sup> Lawsuits brought to enforce executive orders against agencies and government actors are usually dismissed on the ground that the orders do not provide a cause of action. See *Cohen v. Ill. Inst. of Tech.*, 524 F.2d 818 (7th Cir. 1975) (denying a professor's claim against university to recover damages for sex discrimination in violation of Executive Order No. 11,246 because the existence of the executive order did not give rise to a private right of action); *Acevedo v. Nassau Cnty.*, 500 F.2d 1078, 1082-84 (2d Cir. 1974) (dismissing plaintiffs' claim challenging the placement of a federal office building because Executive Order No. 11,512 did not create a private right of action and because plaintiffs lacked standing); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456-57 (D.C. Cir. 1965) (suggesting that even if Postmaster General violated Executive Order No. 10,988, the executive order did not create a private right of action).



*E. Supreme Court*

The Supreme Court has never directly addressed the proper scope of judicial review as it applies to CBA. The most recent innovation of CBA review in *Business Roundtable* presents the Court with that opportunity. The D.C. Circuit's review was performed under the guise of the arbitrary and capricious standard in the APA, but as mentioned above, the court's review was significantly more stringent than standard hard-look review. Although the D.C. Circuit's non-deferential review of CBA may have been intended as a means to reduce partisan bias in agency rule-making, the Court may determine that courts have no role beyond the limited review of the APA.

## CONCLUSION

The *Business Roundtable* decision appears to have mandated a more exacting standard of judicial review of the CBAs of financial regulations than financial regulatory agencies, interest groups, and Congress had previously expected. The conventional responses to the *Business Roundtable* decision are either to bemoan its tendency to "ossify" the financial rulemaking process or to cheer its tendency to improve the rationality, efficiency, and transparency of that process. Both of these responses assume that the judiciary can set the agenda for CBA and that none of the other actors in the political economy of financial rulemaking can or will respond to that agenda in ways that could change either of these predicted outcomes.

This Note has argued that the *Business Roundtable* decision changed the expected costs and benefits of cost-benefit analysis itself. As a result, it created incentives for other actors in the political economy of financial rulemaking to react in ways that could change the impact of *Business Roundtable* in somewhat unpredictable and even surprising ways. For example, strict CBA review, which industry leaders might initially favor, could cause agencies to opt out of the rulemaking process and pursue piecemeal formation of rules without the need to perform CBA by pursuing enforcement actions. These other actors can, and almost certainly will, respond to *Business Roundtable* in ways that will change either of the outcomes predicted by the conventional approach. By analyzing the potential reactions of these other actors, based on the incentives created by the *Business Roundtable* decision as seen above, this Note has tried to provide a richer and more accurate analysis of the impact of

the *Business Roundtable* decision on the future of financial rulemaking. *Business Roundtable* may temporarily ossify rulemaking by providing an effective means to challenge financial rules under Dodd-Frank, but it could also provide the impetus and direction that Congress needed to reform CBA and APA review generally.