Written Statement of

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Introduction

Thank you for the opportunity to present my written views at this Symposium on cost-benefit analysis at the Consumer Financial Protection Bureau. I am Amit Narang, Regulatory Policy Advocate at Public Citizen. Public Citizen is a national public interest organization with more than 450,000 members and supporters. For more than 45 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Since its inception, the CFPB has played an essential role in protecting consumers from financial abuse, deception, and harm in financial markets and has done so with a strong track record of success. The Bureau has relied on the robust authorities provided to it by Congress and has acted to protect consumers by taking enforcement actions that have secured tens of billions in financial relief for consumers, provided tools to enhance transparency for consumers of financial products, and adopted regulations that are intended to benefit consumers.

When the CFPB has taken strong and effective action to protect consumers, it has relied on extensive data and evidence-based decision-making.[1] Indeed, the CFPB has approached consumer protection rulemakings in a deliberate, thoughtful, and balanced manner on a foundation of rigorous analysis. Yet, CFPB's commitment to rigorous data analysis as a prerequisite to issuing regulations that protect consumers has not been reflected in the agency's analysis of the costs and benefits of its recent regulations that reduce consumer protections. In particular, the CFPB has struggled to fully represent the benefits of its consumer protections to consumers.

To be clear, methodological and data limitations can and does prevent the CFPB from translating the very clear benefits of consumer protections into quantifiable values. In short, the CFPB simply does not have the data or methodology necessary to quantify the very real benefits of CFPB regulations to consumers. Indeed, the CFPB is not alone in this respect. Many

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[1] Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 Minn. L.R. 2583, 2559-61 (2019).

agencies issue regulations that provide identifiable and tangible benefits to the public, yet because of methodological limitations inherent in regulatory cost-benefit analysis, such benefits cannot be quantified.[2] In short, regulatory cost-benefit analysis is generally a poor and unreliable metric for assessing the impacts of regulations, particularly on consumers.

But, as the CFPB has recognized in the past, protecting consumers brings many important benefits, whether or not they can be quantified. Thus, the CFPB should carefully consider the proper role of cost-benefit analysis in its rulemakings, including under section 1022(b), in order (1) to ensure that CFPB is not placing more weight and reliance on cost-benefit analysis than is appropriate under section 1022(b), and (2) to ensure the CFPB is not undermining its commitment to protecting consumers by viewing its regulations through a narrow cost-benefit lens that arbitrarily downplays or ignores regulatory benefits to consumers due to methodological and data limitations.

Comparative Analysis of CFPB's 1022(b) mandate

In order to more fully assess the nature of the CFPB's requirement under section 1022(b) to "consider" the costs and benefits of its rulemakings, and in particular whether such language requires the CFPB to compare costs to benefits or justify its rulemaking on the basis of analyzing costs and benefits, it is instructive to compare this statutory language with other statutory provisions related to cost-benefit analysis that apply to the CFPB as well as cost-benefit provisions in statutes and Executive Orders that apply to other agencies. Such an analysis makes clear that CFPB's requirement under 1022(b) is more narrow than other statutes and limited only to consideration of costs and benefits.

In the Dodd-Frank Act, the CFPB was authorized to undertake rulemakings under section 1022, with the aforementioned requirement to "consider" costs and benefits, which is distinct from language in other provisions of Dodd-Frank that require comparing or weighing of costs and benefits. For example, Section 1031(c)(1) requires the CFPB to determine if the substantial injury from an unfair, deceptive, or abusive practice is not outweighed by benefits to

[2] *See, e.g.* Cass Sunstein, *Arithmetic of Arsenic*, 90 Geo. L.J. 2255, 2258 (2002), Frank Ackerman & Lisa Heinzerling *Pricing the Priceless*: Cost-Benefit Analysis of Environmental Protection, 150 U. Pa. L. Rev. 1553 (2002).

consumers or competition.[3] Similarly under 1041(c)[4], the CFPB must take into account the intended benefits of the proposed regulation for consumers and determine if such benefits outweigh increased costs for consumers before using the authority under this Section to establish federal consumer protections in areas where a majority of States have adopted resolutions in support of a Bureau rulemaking. Comparing the three, it is clear that the CFPB's requirement to merely "consider" costs and benefits is the least prescriptive and "weakest."

With respect to other agencies, statutes authorizing regulations can be placed on a spectrum when it comes to imposing requirements for the assessment of costs and benefits. For example, the majority of all environmental statutes, and potentially statutes authorizing regulations generally, are silent or ambiguous on the assessment of cost and benefits and the balancing or weighing of such costs and benefits.[5]

Certain environmental statutes unambiguously bar the use of cost-benefit analysis in setting regulatory standards. For example, when the Environmental Protection Agency (EPA) sets standards under Section 109 of the Clean Air Act[6] to regulate air pollutants such as smog, those standards must protect human health and allow "an adequate margin of safety" and must not be based on economic or cost considerations. Other environmental statutes do require assessment and balancing of costs and benefits. For example, The Safe Drinking Water Act requires the EPA to determine whether the benefits justify, or not justify, the costs when setting a national primary drinking water regulation.[7]

Certain consumer protection statutes require some form of cost benefit assessment and balancing although many do not. The Consumer Product Safety Act requires the Consumer Product Safety Commission (CPSC) to demonstrate that a safety regulation's benefits "bear a reasonable relationship" to its costs and that the agency select "the least burdensome" option

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[3] 12 U.S.C. 5531(c)(1) (2012).
[4] 12 U.S.C. 5551(c) (2012).
[5] Paul R Noe & John D. Graham, *The Ascendancy of the Cost-Benefit State?* (working paper) *available at* https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2019/09/Noe-Graham-Working-Paper-19-20.pdf
[6] 42 U.S.C. § 7409 (1970).
[7] 42 U.S.C. § 300g-1 (1996).

that accomplishes the safety aims of the regulation, although an update to this Act in 2008 has exempted numerous safety standards required under that law from these cost-benefit requirements.[8]

By comparison, the language in section 1022(b) places CFPB somewhere in the middle of this spectrum, with an explicit requirement to "consider" costs and benefits of its section 1022 rulemakings but well short of express requirements in other statutes to compare, balance, or justify benefits with respect to costs. Thus, it is clear that Congress did not intend to impose a mathematical cost-benefit "test" where the CFPB must net quantifiable benefits and costs when promulgating a rule.

Further, Congress specifically designated the CFPB as an "independent" agency for purposes of compliance with the Paperwork Reduction Act,[9] meaning that Congress intended for the CFPB to be exempt from regulatory review by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).[10] By doing so, Congress made clear that it does not want the CFPB to be subject to the cost-benefit analysis criteria in Executive Order 12866 that directs agencies to adopt regulations "only upon a reasoned determination that the benefits of the intended regulation justify its costs."[11] This lends further support to the notion that the 1022(b) language does not require the CFPB to compare costs and benefits or assert that its regulations maximize net benefits or pass a cost-benefit "test."

Situating CFPB's 1022(b) mandate among the broader variety of statutory mandates for cost-benefit analysis at other agencies sheds light on Congress' intent with respect to the scope and nature of the analysis of costs and benefits at CFPB. Thus, the analysis of costs and benefits under Section 1022(b) should inform the CFPB's rulemaking, but the language in 1022(b) should not be read to require quantification or monetization of costs and benefits given the absence of

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[8] *Compare* 15 U.S.C. § 2056a(b) (requiring the CPSC to issue a mandatory safety standard for children's toys pursuant to the rulemaking procedures codified at 5 U.S.C. § 553) with 15 U.S.C. § 2058.

[9] 44 U.S.C. Sec. 3502(10) (2012).

[10] Prior to the Dodd-Frank Act, regulations from the Office of Comptroller Currency (OCC) were subject to EO 12866 and the OIRA review process. In Dodd-Frank, Congress designated the OCC as an "independent" agency in the same manner as the CFPB. Since this designation, OCC has ceased submitting its regulations for OIRA review and compliance with EO 12866 and other Executive Orders on rulemaking.

[11] E.O. 12866, Sec. 1(b).

a mandate in that Section to compare, balance, or otherwise justify a regulation's costs with respect to its benefits.

Cost-Benefit Analysis Does Not Reflect True Benefits of CFPB Consumer Protections

Although the idea of cost- benefit analysis may sound appealing, any narrow focus on identifying and netting quantifiable benefits and costs will do little to enhance the CFPB's ability to accomplish its statutory mission of protecting consumers.

The reason is both simple and obvious: the costs of CFPB regulations to financial institutions of complying with new consumer protections are much easier to measure and quantify than are the benefits of CFPB regulations to consumers of receiving such protections. Cost-benefit analysis is conceptually attractive because it rests on the assumption that all costs and benefits of a regulation can be known, and potentially quantified, due to perfect information. Yet, in the real world, CFPB and other regulators rely on imperfect information that asymmetrically reflects costs to a significantly greater degree than benefits.

In a recent study that conducted an empirical analysis of numerous CFPB and other agency rulemakings,[12] the authors of the study concluded that regulators were unable to quantify the benefits of rulemakings to the same extent as they were able to quantify costs.[13] The authors found that this was not for lack of trying on the regulators part. Rather, the challenges in translating regulatory benefits that were clearly identified by the regulators into quantifiable terms was the primary reason the authors cited in accounting for the lower quality and quantification of benefit analyses as compared to cost analyses. This is a strong and clear indication that cost-benefit analysis, as it is currently practiced, is systematically underestimating the benefits of regulations to consumers due to the methodological limitations in analyzing and, especially quantifying, those benefits.

The lesson for the CFPB should be clear: placing increasing reliance and weight on cost-benefit analysis will exacerbate the disproportionate methodological difficulties that the CFPB is

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[12] Howell E. Jackson & Paul Rothstein, *The Analysis of Benefits in Consumer Protection of Regulations*, 9 Harv. Bus. L. Rev. 197 (2019).
[13] *Id*. at 248-49.

already struggling with on the benefits to consumers side of cost-benefit analysis. This in turn will lead to a rulemaking process that is even more informed and influenced by analysis of regulatory costs to financial institutions, as compared to regulatory benefits to consumers, thereby giving the CFPB an unbalanced view of the impacts of its regulations and potentially resulting in a misleading basis for undermining consumer protections in the future.

Case Study: Reducing Reporting Requirements under HMDA

A recent rulemaking finalized by the CFPB revising reporting requirements under the Home Mortgage Disclosure Act (HMDA)[14] illustrates the harms of allowing CFPB decision-making to be driven by analysis that places the cost savings to financial institutions over the welfare of consumers. In the rule, the CFPB sought to reduce the scope of the reporting requirements under HMDA, which would in turn reduce the disclosure of lending data to the public.[15] In the absence of such data, the CFPB, and the public more generally, will be unable to monitor lending patterns at the newly exempted financial institutions in order to identify and combat discriminatory lending practices, which is one of the primary purposes of HMDA.

In the Section 1022(b) analysis of the rule, the CFPB placed considerable weight on the cost savings of reduced reporting requirements to financial institutions, which the agency was able to quantify.[16] Yet, on the benefits side, the CFPB conceded that while the data that would no longer be collected "may also help improve the processes used to identify possible discriminatory lending patterns and enforce antidiscrimination statutes,"[17] the CFPB claimed that "to quantify the reduction of such benefits to consumers present substantial challenges."[18] Instead, the CFPB placed the burden on commenters to provide data and analysis to quantify such lost benefits to consumers.

The CFPB also failed to provide any meaningful analysis of the harms of reducing reporting requirements under HMDA to specific vulnerable populations that would be disproportionately

[14] Home Mortgage Disclosure (Regulation C), 85 Fed. Reg. 28634 (May 12, 2020).
[15] *Id*.
[16] *Id*. at 28394-97.
[17] *Id*. at 28397.
[18] *Id*. at 28392.

impacted under the rule. Regulatory benefits to specific vulnerable and minority populations that address disproportionate harms to those communities and the potential disproportionate benefits to such communities of regulations that enhance equity and fairness (including racial equity) have long been recognized as benefits that should be identified and considered as strong justifications for adopting regulations. Compliance with reporting requirements under HMDA, and the resulting disclosure and information provided to the public, is critical to the CFPB in its efforts to combat housing discrimination as intended by Congress.

More broadly, benefits analysis that does not identify distributive benefits to certain vulnerable populations that Congress intended to protect further exacerbates the methodological problems in regulatory benefits analysis. At a time when our country is rightfully focused on addressing systemic racial inequities and ensuring racial justice, the CFPB must not ignore distributive benefits related to equity and fairness by placing too much weight on regulatory costs to financial institutions.

Finally, this case study also reinforces the important point that high quality data and information is crucial to regulatory benefits analysis. In other words, CFPB regulatory actions that reduce the scope of reporting requirements, thereby reducing the amount of data available to the CFPB and the public, make it harder for the CFPB to take regulatory actions to protect consumers in the future. In this particular instance, the lack of data from financial institutions on lending to underserved and distressed communities undermined the CFPB's ability to determine the benefits of reporting requirements and served as part of the basis for scaling back such reporting requirements. Yet, this makes the problems in the benefits analysis of reporting requirements even worse by ensuring that the CFPB has even less data from financial institutions in the future when attempting to ascertain the benefits of increasing reporting requirements, thereby compounding the problems in regulatory benefits analysis. While strengthening reporting requirements leads to more data which leads to better benefits analysis, the opposite occurs when weakening reporting requirements which then leads to less data and even less robust and informative benefits analysis.

Preserving the Integrity of Cost-Benefit Analysis at the CFPB

The credibility and integrity of the CFPB's analysis of costs and benefits depends on the analysis being independent from political influence.

The CFPB must preserve the independence of CFPB's analysis of costs and benefits from political influence by ensuring that CFPB staff working on such analyses are "walled off" from political leadership in order to avoid any political influence over cost-benefit analysis to achieve desired outcomes. Indeed, even the perception of such influence is corrosive to the credibility of cost-benefit analyses, and CFPB rulemakings more broadly. Thus, the CFPB must avoid placing CFPB staff economists working on cost-benefit analyses directly under the Director's control or within the Director's office, or under the control of any high-level political appointee, in order to avoid any appearance of improper influence.

Retrospective Review of CFPB Regulations

While the CFPB does have a mandate to reviewing existing regulations, it must ensure that such a process is designed to identify ways in which the existing rule can be strengthened to achieve its goal of protecting consumers, including whether market changes since the promulgation of the rule require changes to make the rule more effective in protecting consumers. Unfortunately, the CFPB's recently announced retrospective review effort[19] appears skewed towards focusing on addressing alleged regulatory burdens to financial institutions which is likely to weaken the ability for existing regulations to continue to protect consumers. It is crucial for the integrity of the CFPB's section 610 review process and for the CFPB's fidelity to its mission to avoid the perception that it is using this process as a one-sided avenue to accomplish political goals in weakening or repealing CFPB rules that industry stakeholders oppose based on alleged compliance concerns that are being stipulated by those very stakeholders.

In addition, the CFPB must not allow its "backward" looking retrospective review mandate to interfere, distract from, or undermine in any way its "forward" looking mission from Congress to protect consumers, including from small businesses that may violate the law or engage in

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[19] Plan for the Review of Bureau Rules for Purposes of the Regulatory Flexibility Act, 84 Fed. Reg. 21732 (May 15, 2019).

abusive, deceptive, unfair, or otherwise fraudulent practices with respect to financial products. The CFPB can narrow and streamline its retrospective review process in two ways.

First, the CFPB should restrict its section 610 review plan, and individual reviews taken thereunder, to only those rules that the CFPB had initially identified as "significantly impacting a significant number of small entities" at the time of the rule promulgation for purposes of complying with the Regulatory Flexibility Act (RFA). This is necessary to align the CFPB's section 610 retrospective review process with the plain language of section 610[20] as well as the clear interpretation of such language by multiple agencies which have restricted their section 610 review processes to those existing rules that included both initial and final regulatory flexibility analyses when initially promulgated due to the agency finding that the rule would "significantly impact a significant number of small entities."

Second, CFPB should consider streamlining its multiple statutory requirements regarding retrospective reviews of its rules in order to avoid wasteful duplication and redundancy. The CFPB has already commenced retrospective reviews of its rules under section 1022(d) of the Dodd-Frank Act which requires the CFPB to review significant rules it has issued five years after promulgation of the rule. Last year, the CFPB issued its report on the first rules it has reviewed, finding that they are generally working as intended and should not be modified.

The Small Business Administration has issued guidance[21] to agencies on compliance with the Regulatory Flexibility Act that indicates that agencies can satisfy the section 610 review requirement under the RFA if the agency has already conducted a retrospective review under a separate statutory requirement. It makes little sense, and is redundant and wasteful, for the CFPB to subject rules to separate retrospective review requirements when such review requirements are largely similar. Thus, the CFPB can streamline and harmonize its Dodd-Frank section 1022(d) and RFA section 610 review requirements by categorically exempting rules that

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[20] 5 U.S.C. § 610.
[21] https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf

have undergone review under one of the statutory requirements from review under the other statutory requirement.