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Independence of Federal Financial Regulators: Structure, Funding, and Other Issues

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Summary

Conventional wisdom regarding regulators is that the structure and design of the organization matters for policy outcomes. Financial regulators conduct rulemaking and enforcement to implement law and supervise financial institutions. These agencies have been given certain characteristics that enhance their day-to-day independence from the President and Congress, which may make policymaking more technical and less "political" or "partisan," for better or worse. Independence may also make regulators less accountable to elected officials and can reduce congressional influence, at least in the short term.

Although independent agencies share many characteristics, there are notable differences. Some federal financial regulators are relatively more independent in some areas but relatively less so in others. Major structural characteristics of federal financial regulators that influence independence include

- **agency head:** the Commodity Futures Trading Commission (CFTC), Federal Deposit Insurance Corporation (FDIC), Federal Reserve (Fed), National Credit Union Association (NCUA), and Securities and Exchange Commission (SEC) have multi-member boards or commissions led by a chair, and the Consumer Financial Protection Bureau (CFPB), Federal Housing Finance Agency (FHFA), and Office of the Comptroller of the Currency (OCC) are led by single directors.
- **party affiliation:** for multi-member boards or commissions, statute sets a party balance among members for all except the Fed.
- **term in office:** terms in office are fixed in length, varying among the regulators from 5 years to 14 years, and do not coincide with the President's term. Terms for Fed governors and NCUA board members are not renewable.
- **grounds for removal:** although not always specified in statute, it appears that the regulator heads can only be removed "for cause" (e.g., malfeasance or neglect of duty), with the exception of the Comptroller of the Currency.
- **executive oversight:** rulemaking, testimony, legislative proposals, and budget requests are not subject to Office of Management and Budget (OMB) review.
- **congressional oversight:** agencies are statutorily required to submit periodic reports to Congress. Agency officials testify before Congress upon request; some are also statutorily required to do so periodically. Agencies are subject to Government Accountability Office (GAO) audits and investigations. Top leadership is subject to Senate confirmation. Agency rulemaking can be overturned under the Congressional Review Act.
- **funding:** the SEC's and CFTC's budgets are set through congressional authorization and appropriations, whereas other regulators set their own budgets. These budgets are funded through the collection of fees or other revenues, with the exception of the CFTC and CFPB.

From time to time, Congress has considered legislation that would alter the structure and design of some of the federal financial regulators, including changes to their leadership and funding structure, the Congressional Review Act, and cost-benefit analysis requirements.

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Introduction

This report discusses institutional features that make federal financial regulators (and other independent agencies) relatively independent from the President and Congress. These characteristics are diverse, their relationship to independence sometimes subtle, and they are not always applied uniformly—certain regulators that have been given relatively more independence in one area have been given relatively less independence in other areas.

Table 1 lists the federal financial regulators that are discussed in this report, together with their respective responsibilities.[1] The financial regulators were created between 1863 (Office of the Comptroller of the Currency [OCC]) and 2010 (Consumer Financial Protection Bureau [CFPB]).[2] Financial regulators set policy, conduct rulemaking to implement law, and supervise financial institutions.[3] Some of these agencies have other responsibilities in addition to their regulatory responsibilities, and some features influencing their independence may have been motivated by those other responsibilities. For example, the Federal Reserve System (Fed) is responsible for monetary policy and the Federal Deposit Insurance Corporation (FDIC) and National Credit Union Administration (NCUA) provide deposit insurance.

Table 1. Overview of Federal Financial Regulators Discussed in this Report

Name/Acronym	General Responsibilities
Commodity Futures Trading Commission (CFTC)	Regulation of derivatives markets
Consumer Financial Protection Bureau (CFPB)	Regulation of financial products for consumer protection
Federal Deposit Insurance Corporation (FDIC)	Provision of deposit insurance, regulation of banks, receiver for failing banks
Federal Housing Finance Agency (FHFA)	Regulation of housing government sponsored enterprises
Federal Reserve System (Fed)	Monetary policy; regulation of banks, systemically important financial institutions, and the payment system
National Credit Union Administration (NCUA)	Provision of deposit insurance, regulation of credit unions, receiver for failing credit unions
Office of the Comptroller of the Currency (OCC)	Regulation of banks
Securities and Exchange Commission (SEC)	Regulation of securities markets

Source: Table compiled by the Congressional Research Service (CRS).

Notes: For more information on the roles, duties, and responsibilities of the federal financial regulators, see CRS Report R43087, *Who Regulates Whom and How? An Overview of U.S. Financial Regulatory Policy for Banking and Securities Markets*, by Edward V. Murphy.

Recent Congresses have considered legislation that would alter the structure and design of some of the federal financial regulators. Congress has debated structural changes such as whether those agencies should be subject to appropriations and should be led by a single leader or a multi-member board. Congress also has debated oversight changes such as whether it should be easier for Congress to reverse agency rulemaking and whether to subject agencies to the same cost-benefit analysis requirements as

[1] This report covers all regulatory agencies that are part of the Financial Stability Oversight Council (FSOC), an inter-agency council. Hereinafter, the report will refer to this group as the "federal financial regulators," unless otherwise noted. State financial regulators and federal independent agencies unrelated to financial regulation are beyond the scope of this report.

[2] The Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Act (P.L. 111-203).

[3] A companion CRS Report R43087, *Who Regulates Whom and How? An Overview of U.S. Financial Regulatory Policy for Banking and Securities Markets*, discusses and analyzes in detail the roles, duties, and responsibilities of these regulators.

executive agencies. The issues raised in this report highlight the importance of how those agencies would be structured.

This report provides a history and overview of the rationale for making financial regulators independent and a discussion of what structural characteristics contribute toward independence and how those characteristics vary among regulators.

Background and Context

Public administration scholars and observers of federal government functioning have long studied structural characteristics that endow certain agencies with greater independence from the President and Congress than is typical for such organizations.

What is an Independent Agency?

In a broad sense, the term *independent agency* refers to a freestanding executive branch organization that is not part of any department or other agency. However, the term is also used to denote a federal organization with greater autonomy from the President's leadership and insulation from partisan politics than is typical of executive branch agencies. These two uses of this term can sometimes lead to confusion. Some agencies within departments, such as the Federal Energy Regulatory Commission in the Department of Energy, have considerable independence from the direction and control of the President. At the same time, some so-called independent agencies outside the departments, such as the Small Business Administration (SBA), generally adhere to the President's policies and priorities. Congress has sometimes given agencies greater autonomy from its own direction and influence, as well, thereby expanding the meaning of independence.[4] In the context of this report, *independence* refers to greater autonomy from presidential or congressional direction and insulation from partisan politics, unless otherwise noted.

Where agencies have been structured to have greater independence from presidential or congressional direction, their actions are typically constrained by a statutory framework, beginning with the terms of the statutes that empower them to take action. Such statutes vary in their specificity, and independent agencies consequently have varying levels of discretion when promulgating more specific rules and otherwise implementing the law. In a well-known example, the Federal Reserve's mandate to achieve full employment and stable prices is set in statute, but it independently determines which policies and tools will best achieve its mandate.[5] Generally, such agencies also are constrained by the Administrative Procedure Act and administrative law;[6] institutionalized oversight mechanisms, such as inspectors general and the Government Accountability Office (GAO); and judicial review.[7]

[4] Many of these structural elements may also influence the agency's independence from the regulated industry—a topic beyond the scope of this report. For more information, see Rachel Barkow, "Insulating Agencies: Avoiding Capture Through Institutional Design," *Texas Law Review*, vol. 89, no. 1 (November 2010), p. 15.

[5] For more information on central bank independence, see CRS Report RL31056, *Economics of Federal Reserve Independence*, by Marc Labonte, and CRS Report RL31955, *Central Bank Independence and Economic Performance: What Does the Evidence Show?*, by Marc Labonte and Gail E. Makinen. For more information on the Fed's statutory mandate, see CRS Report R41656, *Changing the Federal Reserve's Mandate: An Economic Analysis*, by Marc Labonte.

[6] For more information on the Administrative Procedures Act and the rulemaking process, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[7] See CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey and Daniel T. Shedd, and CRS Report R43203, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*, by Daniel T. Shedd and Todd Garvey.

Independence and Accountability

The basic policymaking relationship between Congress and the independent agencies is similar to the relationship between Congress and the other agencies. Goals, principles, missions, and mandates are laid out by Congress for independent agencies in statute, just as they are for other agencies. Furthermore, Congress has granted the independent agencies and other agencies some discretion over how best to implement and conduct these policies, including the limited ability to initiate new policies under broad authority in an area where Congress has not weighed in. Likewise, congressional oversight of policymaking at the independent agencies is similar to how it oversees the Administration—it may require an agency to testify, prepare reports, and turn over records for investigatory purposes. In this sense, independent agencies are independent from the President because the President does not lead or directly influence the implementation and conduct of policy at independent agencies. This arrangement raises a normative question (which this report does not answer)—does the removal of presidential direction from agency policymaking lead to better policy outcomes?

Although independent, the federal financial regulators often work together with the President when their policy priorities are aligned with the Administration's priorities, perhaps because the agency heads and the President share similar views or because the President still retains some influence over these agencies, for the reasons that will be discussed in subsequent sections. At other times, when a regulator's priorities are in opposition to the Administration, a regulator might advocate against the Administration's policy position.

Agency independence is traditionally viewed relative to the Administration, but the structural features discussed in this report can also increase or decrease independence from Congress. Agencies that are more independent from the Administration can sometimes become more congressionally dependent for resources and power. In contrast, where Congress is successful in limiting the President's authority over an agency, this might indirectly reduce the influence of Members over that agency. Inasmuch as Members sometimes raise issues about agency actions through the Administration, a decrease in the President's ability to direct agency action could weaken this channel of congressional influence.

Some agency characteristics that more directly shield an agency from congressional control and presidential direction, such as funding the agency outside of the appropriations process, might further insulate the agency from partisan political influence. Although the agency would be constrained by a statutory framework and institutionalized oversight mechanisms, such insulation from partisan influence might lead to more limited accountability by the agency to, and less control of agency activities by, elected officials. In addition, other stakeholders, such as the parties regulated by the agency, might exert greater influence over the agency's activities than would otherwise be the case. Where accountability is a concern, curbing agency discretion is one solution. However, less responsiveness to constituents and other political actors may be inevitable—or even desirable—when the goal is to insulate an agency from political pressures. In short, decisions about the degree of independence to accord an agency involve tradeoffs among various values and goals.

Historical Origin of the Independent Agencies

The development of the independent agency model in American national government began in 1887 with the establishment of the Interstate Commerce Commission (ICC), created to regulate the railroad industry.[8] Although the ICC is generally viewed as the first independent regulatory commission at the

[8] Related agency models had been under development in the preceding decades in Great Britain and a number of American states. See Marshall J. Breger and Gary J. Edles, "Established by Practice: The Theory and Operation of Independent Federal Agencies," *Administrative Law Review*, vol. 52 (2000), pp. 1119-1128; and Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941), pp. 19-36.

national level, it was not initially created with the level of authority and independence that it later achieved. Rather, the ICC's creation in 1887 was the first of a series of congressional actions that aimed to regulate a complex industry fairly and with a minimum of political influence. The agency's regulatory authority initially included quasi-judicial functions, and later included quasi-legislative functions. These functions were seen to differ from the executive functions that were more characteristic of the work of the executive departments, within which composed nearly all national governmental activity at that time.

As first created, the ICC was located in the Department of the Interior (DOI). Many administrative matters of the commission required the Secretary of the Interior's approval.[9] In 1889, the commission was moved out of the department and became a freestanding agency.

During its first two decades, the ICC was considered to be relatively weak and ineffective.[10] Congress greatly enhanced its powers with the Hepburn Act of 1906.[11] Thus strengthened, the ICC became a model for the collegial federal regulatory bodies established by Congress in the following decades.[12] These included the Federal Reserve System (1913), Federal Trade Commission (1914), Federal Power Commission (1930), Securities and Exchange Commission (1934), Federal Communications Commission (1934), National Labor Relations Board (1935), United States Maritime Commission (1936), and Civil Aeronautics Board (1938), among others. Congress has continued to establish independent financial regulatory agencies into the 21st century. For example, the Federal Housing Finance Agency (FHFA) was established in 2008, and the CFPB was established in 2010.[13]

Rationale for Independence

Over the course of the development of the independent agency model, several different rationales for constructing federal organizations this way have emerged.

First, agencies have sometimes been given greater independence because they have been vested with quasi-legislative (rulemaking) or quasi-judicial (adjudicatory), as well as executive (supervisory), functions regulating some aspects of the national economy. Structural independence, together with the administrative law framework, can support the principle of separation of powers by *insulating the exercise of quasi-legislative or quasi-judicial powers from executive direction*.[14] In most cases, the independence extends to all functions of the agency, even those that are executive in nature.

Second, agencies have sometimes been given greater independence with the assumption that this will *facilitate better decision-making*. It is argued that an independent agency structure and the administrative law framework might provide a context within which subject matter experts could have more leeway to use their technical knowledge to address complex issues, because they would be partially insulated from

[9] For example, decisions regarding staff hires, salaries, and expenditures required the Secretary's approval. (Act of February 4, 1887, §18; 24 Stat. 379 at 386.)

[10] Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941), pp. 65-68.

[11] 34 Stat. 584.

[12] The Interstate Commerce Commission (ICC), itself, was abolished by the ICC Termination Act of 1995 (P.L. 104-88; 109 Stat. 803).

[13] The Federal Housing Finance Agency (FHFA) is a successor agency to the Office of Federal Housing Enterprise Oversight and the Federal Housing Finance Board, which also had a significant degree of independence from the President. When establishing the FHFA in 2008, Congress elected to maintain independence under the new organizational arrangements.

[14] The merger of legislative, judicial, and executive powers in one agency has sometimes been a source of controversy and debate in Congress, particularly as this model grew in use during the early 20th century. See Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941), pp. 420-427.

political concerns.[15] This could be desirable if there is a presumption that the agency's work is relatively more technical and less political in nature.[16]

Such independence does not guarantee complete insulation from all political considerations, however.[17] Research on bureaucratic functioning indicates that it is virtually impossible to remove all political considerations from administrative activity.[18] This is due, in part, to the level of discretion that necessarily accompanies any activity delegated by Congress to another governmental entity. Independent regulatory commission members and agency administrators, such as the leaders of other federal organizations, exercise judgment and make decisions about how to proceed, and these discretionary judgments and decisions are likely to involve subjective, as well as objective, considerations. The independent regulatory agency model attempts to ensure that such subjective decision making draws on a range of views and is, in this sense, nonpartisan.[19] Nevertheless, a specific appointee might choose to adhere closely to the President's wishes or to approach the job in a partisan manner for other political or policy reasons.

Third, agencies have sometimes been given greater independence from the executive to provide "[f]reedom from Presidential domination."[20] This may be, as noted above, because regulatory agencies exercise primarily quasi-legislative and quasi-judicial functions that arguably should not be under the control and direction of the executive. Some proponents of this rationale have suggested that, at least with regard to the quasi-legislative functions, these agencies are arms of Congress.[21] A reduction of presidential influence also constricts one path by which partisan politics might interfere with apolitical technical- and analytical-based decision making by experts, thus speaking to the second rationale noted above.

At times, however, the decision to give an agency greater independence from the President might be a reflection of interbranch rivalries over control of the federal bureaucracy and national policies. As one observer put it:

> Congressional attempts to deviate from the bureau model [where the agency is directly under the President] generally arise from disagreements between members of Congress and the president. Some of these disagreements naturally arise from the *institutional* differences in the two branches. ... The president and members of Congress view the administrative state from entirely different vantage points, and these vantage points, along with their *policy preferences*, lead to disagreements about how the administrative state should be organized.[22]

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[15] Neal Devins and David Lewis, "Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design," *Boston University Law Review*, vol. 88 (2008), p. 463.

[16] Insulation from political concerns could be advantageous in cases where it is desirable for agencies to make decisions that are unpopular in the short run but beneficial in the long run. For example, this dynamic is often said to apply to the Fed's monetary policy decisions.

[17] See Susan Bartlett Foote, "Independent Agencies under Attack: A Skeptical View of the Importance of the Debate," 1988 Duke Law Journal, April 1988, p. 223.

[18] See, for example, Norton E. Long, "Power and Administration," in *The Polity* (Chicago: Rand McNally, 1962), pp. 50-63; and Harold Seidman, *Politics, Position, and Power: The Dynamics of Federal Organization*, 5th ed. (New York: Oxford University Press, 1998).

[19] The degree to which this is so, in practice, might depend, in part, on the polarization of the parties more generally and the dynamics of the appointment process during a given presidency. See Neal Devins and David E. Lewis, "Not-so Independent Agencies: Party Polarization and the Limits of Institutional Design," *Boston University Law Review*, vol. 88 (2008), pp. 459-498.

[20] U.S. Congress, Senate Committee on Governmental Affairs, *Study on Federal Regulation*, committee print, 95th Cong., 1st sess. (Washington: GPO, 1977), p. 28.

[21] Ibid.

[22] David E. Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946-1997* (Stanford, CA: Stanford University Press, 2003), pp. 23-24. [Italics from the original.]

Characteristics of Independent Financial Regulators

Existing typologies of independent federal agencies and their characteristics are idealized models that describe such organizations in general terms. In reality, although independent agencies share many characteristics, individual independent agencies often have features that might be considered atypical for the category. As one scholar observed with regard to governmental organization more generally:

> There are no general laws defining the structure, powers, and immunities of the various institutional types. Each possesses only those powers enumerated in its enabling act, or in the case of organizations created by executive action, set forth by Executive Order or in a contract. Whatever special attributes may have been acquired by the various organizational types are entirely the product of precedent, as reflected in successive enactments by the Congress; judicial interpretations; and public, agency, and congressional attitudes.[23]

According to one law review article, "there is no general, all-purpose statutory or judicial definition of 'independent agency' ... notions of what constitutes independence expand easily.... "[24] A list of independent regulatory agencies is provided in the Paperwork Reduction Act (PRA),[25] but only for purposes of that act; the act does not provide a definition of independent. However, the literature identifies a few key traits that distinguish independent agencies from executive agencies.[26] Organizational features that might affect the functional independence of a federal agency include those related to agency location; selection, appointment, and tenure of its leadership; presidential oversight; the authority to issue rules and collect information; and congressional oversight and funding.

Leadership characteristics include leadership structure (collegial, e.g., board, or singular, e.g., director), the term of office, level of protection from at-will removal by the President, holdover provisions, and qualifications for office-holding.

Presidential oversight characteristics include the organization's ability submit reports, testimony, and budget requests to relevant congressional committees independently and without the Administration's review. With regard to rulemaking and information collection, many rules developed by most agencies and departments are reviewed by the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA).[27] Rules developed by regulatory agencies specified as independent in the PRA, however, are not reviewed by OIRA and not subject to executive order requirements that their "economically significant" rules be subject to cost-benefit analysis. In contrast, the PRA requires that

[23] Harold Seidman, "A Typology of Government," in *Federal Reorganization: What Have We Learned?,* ed. Peter Szanton (Chatham, NJ: Chatham House, 1981), p. 34.

[24] Marshall Breger and Gary Edles, "Established by Practice: The Theory and Operation of Independent Federal Agencies," *Administrative Law Review*, vol. 52, no. 4 (2000), p. 1136.

[25] 44 U.S.C. §3502(5).

[26] See, for example, Marshall Breger and Gary Edles, "Established by Practice: The Theory and Operation of Independent Federal Agencies," *Administrative Law Review*, vol. 52, no. 4, 2000; Administrative Conference of the United States, *Multi-Member Independent Regulatory Agencies*, May 1992. For an international comparison and effects of independence on regulation, see Steve Donzé, "Bank Supervisor Independence and the Health of Banking Systems: Evidence from OECD Countries," paper presented at International Political Economy Society Inaugural Conference, Princeton University, May 2006, at http://www.princeton.edu/~pcglobal/conferences/IPES/papers/donze_S130_1.pdf.

[27] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993. For an electronic copy of this executive order, see http://www.whitehouse.gov/omb/inforeg/eo12866.pdf. For more information on OIRA, see CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, coordinated by Maeve P. Carey.

OIRA review the information collection activities of all agencies, including independent regulatory agencies. [28]

Congressional oversight of independent agencies takes the form of statutory requirements to submit semi-annual or annual reports to Congress; testimony before Congress by agency officials (some are statutorily required to do so periodically); GAO audits and investigations, subject to some statutory limitations; and Senate confirmation of presidential nominees for top agency leadership. An agency's functional independence may also be influenced by whether it is funded through the appropriations process or through dedicated funding or fees.

The following sections discuss these traits in more detail with regard to financial regulators, noting variation among regulators where it exists.[29]

Located Outside an Executive Department

The President is able to exert authority over most agencies in part because the agency head answers directly to the President or the department's Secretary. With one exception (the OCC), financial regulators are not part of an executive department and do not report to a member of the President's Cabinet.[30] This arrangement is not necessary or sufficient to ensure agency *independence*, in the sense used in this report, however. For example, some so-called independent agencies located outside the departments, such as the SBA, generally adhere to the President's policies and priorities and are sometimes accorded the status of Cabinet rank.

Conversely, the OCC is considered independent from the Administration despite being the only financial regulator located within a department (the Treasury). One might say that the OCC is the exception that proves the rule.[31] Although it is part of the U.S. Department of the Treasury, 31 U.S.C. 321(c) reads "Duties and powers of officers and employees of the Department are vested in the Secretary except duties and powers-…(2) of the Comptroller of the Currency." and 12 U.S.C. Section 1 reads as follows:

> The Comptroller of the Currency shall perform the duties of the Comptroller of the Currency under the general direction of the Secretary of the Treasury. The Secretary of the Treasury may not delay or prevent the issuance of any rule or the promulgation of any regulation by the Comptroller of the Currency, and may not intervene in any matter or proceeding before the Comptroller of the Currency (including agency enforcement actions), unless otherwise specifically provided by law.

As explained below, despite its location within Treasury, the OCC has many of the same characteristics as other independent regulators. For example, its budget is determined separately from the rest of the

[28] 44 U.S.C. §§3501-3520.

[29] The characteristics examined in detail are not the only ones that influence independence. For example, various general management laws are likely to influence the nature of a federal organization. These laws pertain to, among other things, information and regulatory management; strategic planning, performance measurement, and program evaluation; financial management, budgeting, and accounting; organization and reorganization; procurement and real property management; intergovernmental relations management; and human resource management. Some of these laws would automatically apply to an agency unless it were statutorily exempt. In other cases, amendments to an existing statute might be necessary in order to include an agency under its provisions. In addition, some agencies have independent litigation authority, which refers to the level of authority a federal agency has to initiate and implement its own legal proceedings, and to defend its administrative actions. For more on general management laws, see CRS Report RL30795, *General Management Laws: A Compendium*, by Clinton T. Brass et al.

[30] The Federal Reserve is further removed from the executive branch because its 12 regional banks are privately owned. Private shareholders do not exercise management control and the Board, which sets policy centrally for the entire system, is a governmental entity, however.

[31] The CFPB is a bureau of the Fed, but is granted significant statutory autonomy from the Fed in terms of budget, personnel matters, rulemaking, supervision, and so on. Because the Fed is outside an executive department, so is the CFPB.

Treasury's budget. One former official described the relationship as follows: "It is said that the OCC is part of the Treasury, but that is a real estate statement since the OCC in policy-making is, by statute, independent of the Treasury."[32]

Agency Leadership Structure

Among federal financial regulators, the leadership structure varies from agency to agency. **Table 2** identifies whether each agency head is collegial (board or commission) or unitary (director) and how the leadership is chosen. For those agencies with a collegial leadership structure, **Table 2** also includes the size of the board, and the division of power between the chair and the board. **Table 3** details statutory requirements for leadership's party affiliations, pre-requisite qualifications, and restrictions on related activities. **Table 4** specifies lengths of terms, holdover provisions, and limitations on the President's power to remove incumbents. Many of these structural elements influence the agency's independence from the President and Congress. The provisions, and their effects on independence, are discussed in more detail below.[33]

Director vs. Board

Leadership powers can be vested in one individual (a director) or a collegially headed board or commission. Many of the independent regulatory agencies are collegially headed, like the SEC or FDIC. However, a number of independent agencies headed by a single administrator, such as the FHFA and the CFPB, have other similar structural characteristics to the collegially headed financial regulators. These differences in agencies with similar missions have led to congressional proposals to make leadership structures more uniform across agencies. Vesting power in a board arguably encourages a diversity of views to be represented. In contrast, vesting power in one individual might arguably create stronger, more unified leadership and a single point of accountability. The collegial structure itself is thought to increase the independence of an agency from the President.[34] Where an agency is headed by a single individual, the appointee's views are more likely to reflect the views of the appointing President and its party; the leadership is unitary and no consensus is necessary.[35] In each case where there is a board structure, the board has a chairman. In agencies without boards, the directors are supported by deputy directors, but those deputies do not necessarily have leadership authority analogous to board members.

Chairman's Responsibilities

On boards, the chairman may or may not have greater powers than the other board members.[36] Chairmen are typically vested with administrative authority whereas policymaking powers are vested in the board as a whole. In cases where a chairman is popularly perceived as dominant relative to the board, that

[32] Kenneth Dam, "The US Government's Approach to Financial Decisions," in *Globalization and Systemic Risk*, World Scientific, 2009, p. 403.

[33] For a Government Accountability Office (GAO) analysis of the National Credit Union Association's (NCUA's) leadership structure, see GAO, *Corporate Governance: NCUA's Controls and Related Procedures for Board Independence and Objectivity*, GAO-07-72R, November 30, 2006, at http://www.gao.gov/assets/100/94552.pdf.

[34] For a discussion, see Rachel Barkow, "Insulating Agencies: Avoiding Capture Through Institutional Design," *Texas Law Review*, vol. 89, no. 1 (November 2010), p. 15.

[35] Such an appointee's term might exceed the appointing President's, however, and his or her policy preferences might not match those of the incoming President.

[36] One empirical study of the power of independent regulatory commission governance found that "[a]ll in all, the influence of chairmen in regulatory processes may be characterized as extraordinary, placing them in a leadership position. Consequently the commissions are not true plural executive systems." (David M. Welborn, *Governance of Federal Regulatory Agencies* [Knoxville: University of Tennessee Press, 1977], pp. 131-132.) This study, of seven commissions, included only one financial regulator: the SEC.

dominance does not necessarily derive from statutory powers. **Table 2** includes the chairman's statutory powers, but the chairman may also have greater powers that are not of a statutory nature (e.g., power of the "bully pulpit").

Selection Process

For all of the agencies covered in this report, as well as other free-standing executive branch agencies with significant legal authority, Senate confirmation is required for the agency's head (whether there is a director or multiple commissioners of a board). Subordinate officers (e.g., deputy directors) could be appointed by the President or agency head. If appointed by the President, the position may or may not be subject to Senate confirmation. The implications of Senate confirmation for congressional oversight are discussed in the section below entitled "Congressional Oversight and Influence."

Table 2. Leadership Structure

Regulator	Type of Agency Head	Responsibilities of Director/Chairman	Selection of Officers
Commodity Futures Trading Commission	Five commissioners, one of whom is selected to be chairman.	Chairman is vested with executive and administrative functions, including budgeting.	Commissioners and chairman are presidentially appointed with Senate confirmation.
Consumer Financial Protection Bureau	Director, deputy director, and four assistant directors.	The Director heads, and is responsible for delegating powers vested in, the CFPB. Each assistant director heads an office with specific responsibilities prescribed by statute.	The Director is presidentially appointed with Senate confirmation. The deputy director and four assistant directors are selected by the director.
Federal Deposit Insurance Corporation	Five-person board composed of three presidential appointees (one of whom is chair and one of whom is vice-chair), the Comptroller of the Currency, and the director of the CFPB.	Management is vested in the board.	The three appointees and the positions of chair and vice-chair are presidentially appointed with Senate confirmation.
Federal Housing Finance Agency	Director and three deputy directors.	All statutory duties are vested in the Director. Each deputy director heads an office with specific responsibilities prescribed by statute.	The Director is presidentially appointed with Senate confirmation. The deputy directors are chosen by the Director.
Federal Reserve Board of Governors	Seven-member board. From the board, a chairman and two vice chairmen are chosen.	Chairman is the active executive officer, subject to the board's oversight. All board members have one vote on the Federal Open Market Committee. One vice chair is responsible for supervision.	Governors, chair, and vice-chairs are presidentially appointed with Senate confirmation.
National Credit Union Administration	Three-member board with chairman.	Management of the NCUA is vested in the board. The chairman is responsible for directing the implementation of policies and regulations.	Presidentially appointed with Senate confirmation. Among the members, the President appoints the chairman.
Office of the Comptroller of the Currency	Headed by the Comptroller, with up to four Deputy Comptrollers.	The Comptroller is responsible for selecting staff and delegating duties to the staff. One deputy is First Deputy and one is responsible for federal savings associations.	The Comptroller is appointed by President with Senate confirmation. Deputy Comptrollers are selected by the Treasury Secretary.
Securities and Exchange Commission	Five commissioners, one of whom is the chairman.	Executive and administrative functions of the SEC are assigned to the chairman. The heads of the administrative units are chosen by the chairman, subject to the commissioners' approval.	Presidentially appointed with Senate confirmation.

Source: CRS. U.S. code accessed through http://www.uscode.house.gov.

Party Affiliation

Collegial bodies are usually, but not always, structured so as to require that their membership include representatives from more than one political party, and often members who are not of the President's party are selected with the advice of their party's congressional leadership. It could be argued that such requirements introduce partisan considerations into a selection process for a body that is intended to exercise expert judgment and be relatively independent of such political influences. As discussed below, however, public administration research suggests that it is virtually impossible to remove all political considerations from administrative activity. Arguably, political balance requirements attempt to ensure that, to the extent that such considerations influence agency decision making, a broader array of opinions will be introduced into the consensus-building process. Party balance requirements can enhance independence when that term is used synonymously with non-partisanship (or at least bipartisanship).

Qualifications

The statutory qualifications required of a nominee are often general or imprecise. In some cases, such as the CFTC, qualifications require the nominee to possess specialized knowledge of, or experience in, the industry of jurisdiction. In other cases, qualifications encourage a nominee with some outside perspective or, in the case of a commission structure, a diversity of experience and expertise. For example, 12 U.S.C. Section 241 states, "In selecting the members of the (Federal Reserve) Board, not more than one of whom shall be selected from any one Federal Reserve district, the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country." These kinds of qualifications might result in the appointment of officials who bring added expertise to its work. Qualifications that limit the pool of candidates unreasonably might diminish the quality of the resulting appointment, however, if otherwise worthy candidates were to be eliminated prematurely from consideration. In addition, constitutional issues might be raised if qualifications are drawn so specifically that only one or two individuals would qualify.[37] Conflicts concerning statutory qualifications have typically been resolved through the political process. Whether statutory qualifications legally bind the appointment process actions of the President or the Senate remains an open question. It is not clear what, if any, legal consequences might follow if either the President or Senate were to ignore such provisions.

Restrictions

Agency heads' activities are sometimes restricted. Restrictions can apply to activities or employment pursued during or after time of service, often regarding the industry that the agency is regulating. Typically, post-service restrictions are temporary (i.e., require a "cooling off" period). Sometimes, post-service restrictions do not apply to individuals whose term has expired, as is the case for the FDIC.

[37] For more, see CRS Report RL33886, *Statutory Qualifications for Executive Branch Positions*, by Henry B. Hogue.

Table 3. Qualifications and Restrictions

Regulator	Party Affiliations	Qualifications	Restrictions
Commodity Futures Trading Commission	Not more than three commissioners may be from the same political party.	Commissioners should have demonstrated, balanced knowledge of futures trading or its regulation, or in the areas of business overseen by the CFTC.	None.
Consumer Financial Protection Bureau	No requirements related to party affiliations.	The director must be a citizen of the United States.	Director or deputies may not hold any position in any Federal Reserve bank, Federal Home Loan Bank, or business overseen by CFPB.
Federal Deposit Insurance Corporation	No more than three members of the board may be from the same political party.	Presidential appointees must be U.S. citizens. One of the presidential appointees must have state bank supervisory experience.	A board member may not hold an office or stock in any depository institution or holding company, Federal Reserve bank, or Federal Home Loan Bank. Two-year ban on post-service employment in a depository institution if a board member does not fulfill a full term.
Federal Housing Finance Agency	No requirements related to party affiliations.	Director and deputies must be U.S. citizens with demonstrated understanding and expertise related to their areas of responsibility.	Director and deputies may not have a financial interest or employment in a regulated entity while at FHFA, or serve as an executive officer or director of any regulated entity three years prior to appointment.
Federal Reserve Board of Governors	No requirements related to party affiliations.	No more than one member from each Fed district. Members should represent the geographical and economic diversity of country. One appointee must have community bank experience.	Board members cannot have outside employment and cannot hold stock in banks. Two-year restriction on bank employment after leaving the Fed, unless the governor has served a full term.
National Credit Union Administration	No more than two members from the same party.	Board members must be "broadly representative of the public interest." The President "shall give consideration to individuals" with financial services education, training, or experience. (12 U.S.C. §1752a)	Not more than one member of the Board may have recently been a credit union director or employee.
Office of the Comptroller of the Currency	No requirements related to party affiliations.	None specified.	None.

Regulator	Party Affiliations	Qualifications	Restrictions
Securities and Exchange Commission	No more than three commissioners from the same political party, alternating appointments by party "as nearly as may be practicable." (15 U.S.C. §78d)	None specified.	Commissioners may not engage in other business or employment, nor participate in "transactions of a character subject to regulation by the Commission." (15 U.S.C. §78d)

Source: CRS. U.S. code accessed through http://www.uscode.house.gov.

Term in Office

Statutes specify term length, succession, and renewability. In some cases, terms are staggered with those of other members of a board or the President. All of the positions covered in this report have fixed terms, of varying length. Five-year terms are the most common among the agencies in **Table 4**, but some positions have longer terms. In some cases where the chair is chosen from the board, the chair's term is shorter than the board members' terms. For example, Fed governors have the longest terms (14 years), but leadership roles have four-year terms subject to renewal.

Fixed terms may promote independence from political influence because the expectation is that an appointee will serve out the term. In fact, in many instances, fixed terms are accompanied by statutory limits on the President's ability to remove an incumbent during his or her term (see "Grounds for Removal," below.) The length of the term may also influence the independence of the appointee. An official serving a short term may be more susceptible to presidential direction, especially if he or she might be reappointed by that President. In contrast, an official whose term of office is longer than that of the President who appointed him or her may be less likely to feel a sense of allegiance or commitment to a new President. It might be questioned, however, if fixed terms that exceed the duration of one presidency meet that expectation in practice, because incumbents might not serve the full length of the term. For example, most Fed governors step down before their term has expired, sometimes after only a couple of years of service. One study found that Presidents were able to appoint a majority of commissioners on independent commissions 90% of the time, and were able to obtain a party majority (between new appointees and holdovers) in all but one case.[38]

A fixed term, even without a restriction on grounds for removal, might lead to longer than average tenure and, in the context of a single-headed agency, greater continuity in a position. Also, by itself, such a fixed term might inhibit, but not prevent, the removal of an incumbent by the President, because it establishes the given period of time as the normal or expected tenure of an appointee. Even with a fixed term, incumbents in these positions may remain subject to close guidance and direction of the President, as well as to removal at the time of a presidential transition in the absence of "for cause" removal limitations (see "Grounds for Removal").[39]

Statute typically does not rule out the reappointment of incumbents for financial regulators, with the exception of Fed governors and NCUA board members (for both, members are allowed one full term and can be reappointed only if initially appointed to an expiring term). Some consider non-renewable terms to provide greater independence, reasoning that without the ability to reappoint, the President and Senate lose a tool of leverage over an appointee. In contrast, an appointee with a renewable term might chart an independent path in order to remain acceptable to a future President and Senate, who may hold views different from the President and Senate who first installed the appointee.

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[38] Neal Devins and David Lewis, "Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design," *Boston University Law Review*, vol. 88, 2008, p. 460.

[39] In the case of a commission, the longer the duration of the terms of its members, the lower the probability that one President will have the opportunity to appoint all of its members. If the terms are staggered so that different members leave the commission at different times, the commission might have more continuity and autonomy than if the entire membership turned over at the same time. In some agencies, such as the Equal Employment Opportunity Commission (EEOC), the term of each position runs continuously, regardless of whether or not it is occupied (42 U.S.C. §2000e-4). This arrangement leads to the staggered term expirations discussed above. In other agencies, such as the Chemical Safety and Hazard Investigation Board (CSB), the term runs for a fixed period from the time a member is appointed (42 U.S.C. §7412(r)(6)). Under this arrangement the terms of the various members might or might not be staggered, depending on the date of appointment for the incumbents.

For many agencies, the members' terms are staggered, which helps to promote continuity and may also promote diversity of opinion. In the case of an agency with a single head, the term might or might not coincide with the President's term.

Holdover Provisions

Statutes specifying fixed terms may also have "holdover provisions" that allow members to stay on past the expiration of their terms while awaiting the appointment of a successor. If such a provision allows for an indefinite holdover, it might be used by the President or other appointing authority to circumvent the need for a new appointment, particularly if Senate confirmation is required. Given this possibility, Congress sometimes places a time limit on a holdover provision. Some agencies, such as the National Labor Relations Board, have organic acts with no holdover provision; when a term expires, the member must leave office. Others, such as the Fed, have statutory authorities that permit a member whose term has expired to continue to serve until a successor takes office. Still other agencies have holdover provisions where an incumbent member may remain in office for a specified period, and where the duration of the post-term period is linked to the date the term ends. A commissioner for the Consumer Product Safety Commission, for example, "may continue to serve after the expiration of his term until his successor has taken office, except that he may not so continue to serve more than one year after the date on which his term would otherwise expire."[40] A final type of holdover provision allows incumbent members to remain in office for a specified period, where the duration of the post-term period is linked to congressional sessions. For example, a commissioner for the CFTC may serve past the end of his or her term "until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office."[41]

Grounds for Removal

Although not always specified in statute, it appears that the heads of financial regulators, in contrast with Cabinet Secretaries, typically do not serve at the pleasure of the President ("at will"). Instead, most regulators may be removed only if a higher "for cause" threshold is met. The one clear statutory exception is the OCC's Comptroller of the Currency, who "shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate."[42]

For cause removal limits the ability of a President to remove, or threaten to remove, an appointee solely for political reasons. According to one law review article, "The distinguishing feature of [independent] agencies is that their principal officers are protected against presidential removal at will."[43] According to another, "A requirement that members serve a fixed term of years is an essential element of independence, but alone is not sufficient. The critical element of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except 'for cause.'"[44]

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[40] 15 U.S.C. §2053(b)(2).

[41] 7 U.S.C. §2(2).

[42] 12 U.S.C. §2. For example, the Comptroller resigned at the request of President Kennedy in 1961. See "Post-Employment Restriction of 12 U.S.C. §1812(e)," 25 Op. O.L.C. 184 (2001).

[43] Geoffrey P. Miller, "Introduction: The Debate over Independent Agencies in Light of Empirical Evidence," *Duke Law Journal*, April 1988, p. 217.

[44] Marshall Breger and Gary Edles, "Established by Practice: The Theory and Operation of Independent Federal

Where the President is limited to removing an agency head only for cause, the agency head may have greater independence from the President and the President may have limited influence over the agency's agenda. Regulators may disagree with Administration's policy and pursue initiatives that are not part of, or are at odds with, the Administration's agenda without fearing removal.

For some financial regulators, their enabling statute details the acceptable grounds for removal (see **Table 4**). For example, the President may remove the director of the CFPB only for "inefficiency, neglect of duty, or malfeasance in office."[45] In other cases, the for cause removal standard for independent agency heads was not explicitly set out by Congress, but is understood to exist under legal precedent.[46] As a result, for cause does not have a precise meaning, but is understood to include factors such as malfeasance or neglect of duty.[47] Although the SEC enabling legislation is silent as to the removal of commissioners, reviewing courts have held that commissioners may not be summarily removed from office.[48] Tradition may also influence a President to allow a full term where there is no statutory for cause protection, as seems to typically be the case for the OCC.

Even where board members of financial regulators are subject to a for cause removal standard, however, it is possible for the chairman to serve in that capacity at the pleasure of the President, perhaps increasing presidential influence. In the case of the CFTC, for example, the President may replace the chairman at any time with another commissioner, with the advice and consent of the Senate, in which case the former chairman would remain a commissioner. For other collegially headed financial regulators, statute is silent on this issue.[49] This distinction between removal of commissioner and chairman is possible because the two roles are defined separately in statute, and the President fills them through separate appointments or designations. In practice, if a commissioner loses the chairmanship, he or she may choose to resign from the commission.

Agencies," *Administrative Law Review*, vol. 52, no. 4 (2000), p. 1138.

[45] In 2016, a circuit court invalidated the "for cause" removal provision for the CFPB director. The CFPB has appealed the decision. For more information, see CRS Legal Sidebar WSLG1680, *UPDATE: D.C. Circuit Rules Consumer Financial Protection Bureau's Structure is Unconstitutional*, by Jared P. Cole and Todd Garvey.

[46] To the degree that a particular independent regulatory commission exercises quasi-judicial functions, it could be argued, based on a 1958 Supreme Court ruling, that its members would be protected from presidential removal even absent a specific provision to that effect. *Wiener v. United States*, 357 U.S. 349 (1958). For more information, see Reginald Parker, "Removal Power of the President and Independent Administrative Agencies," *Indiana Law Journal*, vol. 36, no. 1 (fall 1960), p. 63.

[47] For a discussion, see Marshall Breger and Gary Edles, "Established by Practice: The Theory and Operation of Independent Federal Agencies," *Administrative Law Review*, vol. 52, no. 4 (2000), p. 1144; Congressional Research Service, Constitution Annotated, Article II, Section 2, Clause 2.

[48] See SEC v. Blinder, Robinson & Co., Inc., 855 F.2d 677, 681 (10th Cir. 1988). In Blinder, while the court noted that the chairman of the SEC served at pleasure of the President and therefore may be removed at will, it determined that commissioners may be removed only for inefficiency, neglect of duty, or malfeasance in office. For more information, see Peter Williams, "Securities and Exchange Commission and the Separation of Powers: SEC v. Blinder, Robinson & Co.," *Delaware Journal of Corporate Law*, vol. 14, no. 1 (1989), p. 149.

[49] As noted above, the court determined that the SEC chairman serves at will. See SEC v. Blinder, Robinson & Co., Inc., 855 F.2d 677, 681 (10th Cir. 1988).

Table 4. Term of Office

Regulator	Term of Office	Holdover Provisions	Grounds for Removal[a]
Commodity Futures Trading Commission	Five-year staggered terms.	Commissioners may continue to serve after their term ends until a replacement takes office, but not past the end of the next session of Congress.	Statute not explicit for commissioners. The President may appoint a different commissioner as Chairman at any time, with the advice and consent of the Senate.
Consumer Financial Protection Bureau	The director has a five-year term.	The director may continue to serve after the term expires until a replacement is selected.	The President may remove the director "for inefficiency, neglect of duty, or malfeasance in office."[c] (12 U.S.C. §5491)
Federal Deposit Insurance Corporation	The appointed members have six-year terms. The Chairman and vice chairman have five-year terms.	Members may continue to serve after their term expires until a successor is appointed.	None specified.
Federal Housing Finance Agency	The director has a five-year term.	The director may serve until a successor is appointed.	The President may remove the director "for cause." (12 U.S.C. §4511)
Federal Reserve Board of Governors	Governors are appointed for 14-year, staggered terms; non-renewable unless appointed to a partial term. The chairman and vice-chairmen are appointed for four-year, renewable terms.	Governors may continue to serve until a successor is appointed.	The President may remove board members "for cause." (12 U.S.C. §241)
National Credit Union Administration	Six-year staggered terms; non-renewable unless appointed to a partial term.	A board member may continue to serve until a successor is appointed.	None specified.
Office of the Comptroller of the Currency	The Comptroller has a five-year term.	None specified.	The President may remove a Comptroller "upon reasons to be communicated by him to the Senate." (12 U.S.C. §2)
Securities and Exchange Commission	Staggered five-year terms.	Commissioners may continue to serve after the end of their term until a replacement takes office, but not past the end of the next session of Congress.	None specified.[b]

Source: CRS. U.S. code accessed through http://www.uscode.house.gov.

Notes: Where quotes are used, exact wording of statute is provided. Leadership of the Federal Reserve regional banks has different terms of office not shown in the table.

a. To the degree that a particular independent regulatory commission exercises quasi-judicial functions, it could be argued, based on a 1958 Supreme Court ruling, that its members would be protected from "at will" presidential removal, absent a specific provision to that effect. *Wiener v. United States*, 357 U.S. 349 (1958).

b. Although the SEC enabling legislation is silent as to the removal of commissioners, reviewing courts have held that commissioners may not be summarily removed from office. See SEC v. Blinder, Robinson & Co., Inc., 855 F.2d 677, 681 (10th Cir. 1988). In Blinder, while the court noted that the chairman of the SEC served at pleasure of the President and therefore may be removed at will, it determined that commissioners may be removed only for inefficiency, neglect of duty, or malfeasance in office.

c. In 2016, a circuit court invalidated the "for cause" removal provision for the CFPB director. The CFPB has appealed the decision.

OMB/Executive Oversight

Legislative proposals and congressional testimony by executive agencies are typically subject to the approval of the Office of Management and Budget (OMB), which is part of the Executive Office of the President.[50] In addition, many agencies are funded in such a way that gives the Administration significant input into the agency's size, scope, and activities. Agency budget requests are vetted and approved by OMB, where they are then integrated with the President's annual budget request. The President's budget request includes proposals for programs or activities within an agency to be created, expanded, reduced, or abolished.

In some agencies' enabling legislation, Congress has prohibited OMB from requiring these kinds of submissions from the agency or provided for simultaneous submission to OMB and Congress. Arguably, to the extent that the Administration is prevented from influencing an agency's appropriations requests or formal communications with Congress, an unmediated relationship between the agency and Congress might be facilitated, with Congress consequently having greater influence over the agency's actions.

Since 1974, the Administration or any agency has been prohibited from requiring the SEC, Fed, FDIC, FHFA,[51] and NCUA "to submit legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission ... to the Congress ..." if those documents include a statement that the views expressed within are the regulator's own.[52] The scope of the act includes budget submissions.[53] In 1994, the OCC was added to the statute. The Dodd-Frank Act includes parallel language for the CFPB.[54]

The CFTC is the only financial regulator that is covered by different statutory language. It is required to submit budget estimates and requests concurrently to congressional committees of jurisdiction and the President or OMB. Similarly, it must simultaneously submit legislative recommendations, testimony, and comments on legislation to the Administration and Congress. Furthermore, it may not be compelled to seek pre-submission comment on, or review of, these latter materials from any officer or agency, and it must report any such voluntary solicitations to Congress. Although the CFTC may not forgo OMB and presidential review of its communications with Congress entirely, as may other financial regulators, these statutory arrangements arguably provide the agency with greater freedom to express to Congress the point of view of the agency than is the case for most executive branch agencies.[55]

There is additional relevant statutory language for the FDIC. It is required to regularly provide financial reports to Treasury and OMB, but according to statute, the reporting requirements "may

[50] With regard to legislative coordination and clearance, see U.S. Office of Management and Budget, *OMB Circular A-19*, at http://www.whitehouse.gov/omb/circulars_a019/#agency; and, with regard to provisions pertaining to the executive branch budget submission process, in U.S. Office of Management and Budget, *OMB CircularA-11*, Sec. 22, "Communications with the Congress and the public and clearance requirements," at http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s22.pdf.

[51] The original act referenced one of the FHFA's predecessors, the Federal Home Loan Bank Board.

[52] Section 111 of P.L. 93-945 (12 U.S.C. §250).

[53] As discussed in the section below entitled "Funding," many federal financial regulators are not subject to the congressional budget process.

[54] 12 U.S.C. §5493(c)(4).

[55] 7 U.S.C. §2(a)(10).

not be construed as implying any obligation on the part of the (FDIC) to obtain the consent or approval" of Treasury or OMB, respectively.[56]

Financial Stability Oversight Council: Fostering Inter-Agency Cooperation or Reducing Regulator Independence?

The Dodd-Frank Act (P.L. 111-203) created the Financial Stability Oversight Council (FSOC), which is composed of the heads of the federal financial regulators and representatives of other financial regulatory interests and headed by the Treasury Secretary.[57] Its purposes are to identify risks and respond to emerging threats to financial stability and promote market discipline regarding failing financial firms. Among the duties of the FSOC, it is responsible for recommending supervision priorities to agencies, facilitating coordination among agencies, offering non-binding resolutions to jurisdictional disputes, and reviewing accounting standards made by standard-setting organizations. The Council can also provide agencies non-binding recommendations to adopt new, or modify existing, prudential policies to reduce risk. This gives the Treasury Secretary (or other regulators) a forum to urge regulators to adopt Administration (or other regulators') priorities. Previously, the statutory role for Treasury in the policymaking of the financial regulators had been rare and minor.[58]

One possible outcome of the creation of the FSOC is to give the Treasury Secretary greater influence over the independent financial regulators. As chair, the Treasury Secretary is able to call meetings and set FSOC's agenda, according to the FSOC's bylaws. Certain decisions cannot be made without the Treasury Secretary's assent, such as the designation of systemically important non-banks and utilities, and whether to provide a stay for a CFPB regulation that another agency has requested to be set aside. Alternatively, FSOC may give the regulators a forum for influencing—or coalescing to thwart—Administration policy. The limited history of FSOC and limited public access to its deliberations make it difficult to evaluate its effects, if any, on regulator independence thus far.

Rulemaking Authority[59]

Federal rulemaking is one of the basic tools that federal agencies use to implement public policy. In enacting legislation, Congress often grants agencies rulemaking authority under which they are required or permitted to set standards and prescribe the details of certain federal policies and programs. When they issue those regulations, agencies are generally required to follow a certain set of procedures established by Congress. The most long-standing and broadly applicable federal rulemaking requirements are in the Administrative Procedure Act (APA) of 1946,[60] which applies to all executive agencies, including independent regulatory agencies. The APA contains rulemaking requirements and procedures for agency adjudications.[61] The APA also provides for judicial review of rulemaking and agency actions, under which courts can "set aside" an agency action if it is found to be unreasonable.[62]

[56] 12 U.S.C. §1827.

[57] For more information, see CRS Report R42083, *Financial Stability Oversight Council: A Framework to Mitigate Systemic Risk*, by Edward V. Murphy.

[58] As another example, under 12 U.S.C. §4513a, the FHFA director is advised "with respect to overall strategies and policies" by the Federal Housing Finance Oversight Board, which is composed of four members, including the Secretary of Treasury and the Secretary of Housing and Urban Development. The Board may not exercise executive authority or powers of the director, however. Other inter-agency councils involving financial regulators, such as the Federal Financial Institutions Examination Council, do not include any Treasury official.

[59] This section includes significant contributions from Maeve P. Carey, Specialist in Government Organization and Management.

[60] 5 U.S.C. §551 et seq.

[61] The APA's requirements for issuing rules generally include (with some exceptions) publication of a notice of proposed rulemaking, a comment period, publication of a final rule, and a minimum 30-day period from the rule's publication to its effective date.

[62] Specifically, a court may invalidate an agency action if it is found to be "(A) arbitrary, capricious, an abuse of

In addition to these statutory and judicial constraints on agency rulemaking, an additional set of procedures has been added by Presidents in various executive orders.[63] The requirements include, among other things, that agencies submit their rules to OMB's Office of Information and Regulatory Affairs (OIRA) for review.[64] OIRA review of rules was established in 1981 by President Ronald W. Reagan in Executive Order (E.O.) 12291,[65] and it was continued by President William J. Clinton under E.O. 12866.[66] OIRA review of draft rules gives the President more input into, and control over, the content of rules promulgated by federal agencies during the implementation of federal statutes.

Notably, however, the requirement for OIRA review does not apply to the independent regulatory agencies—Presidents have chosen to respect the independence of those agencies while imposing requirements on the executive agencies. This independence from presidential review of rulemaking is considered to be one of the hallmarks of agency independence. The independent regulatory agencies, as a group, are exempted from OIRA review under the terms of E.O. 12866 (as they were under E.O. 12291). E.O. 12866 specifically exempts agencies "considered to be independent regulatory agencies," under the Paperwork Reduction Act (PRA).[67] This list includes all of the agencies discussed in this report except for the NCUA.[68] The OCC and CFPB (upon creation) were added to the statutory list of independent regulatory agencies by the Dodd-Frank Act in 2010.[69] However, the Dodd-Frank Act creates a process by which FSOC may nullify CFPB regulations that they believe put the banking or financial system at risk. Under this process, another agency may request that a CFPB regulation be set aside. The Treasury Secretary then decides whether to issue a temporary stay delaying implementation of a CFPB regulation. After

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discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." See CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey and Daniel T. Shedd, for more information on judicial review of rulemaking.

[63] The most significant of these requirements is Executive Order 12866, which was issued by President William Clinton in 1993 and is currently still in effect. See Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993, at http://www.whitehouse.gov/omb/inforeg/eo12866.pdf.

[64] For more information on rulemaking by independent regulatory agencies, see Dominique Custos, "The Rulemaking Power of Independent Regulatory Agencies," *American Journal of Comparative Law*, vol. 54 (2006), p. 615. For background, see CRS Report R42821, *Independent Regulatory Agencies, Cost-Benefit Analysis, and Presidential Review of Regulations*, by Maeve P. Carey and Michelle D. Christensen and CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey. For a legal analysis of whether Presidents could impose requirements for OIRA review of rules on independent regulatory agencies, see CRS Report R42720, Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues, by Vivian S. Chu and Daniel T. Shedd (out-of-print report, but available to congressional clients from the author).

[65] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 19, 1981.

[66] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993. Executive Order 12866 repealed Executive Order 12291, although it contained many of the same basic requirements.

[67] See 44 U.S.C. §3502(5) for a list of these agencies.

[68] Besides the agencies listed, 44 U.S.C. §3502(5) exempts "any other similar agency.... " The NCUA identifies itself as an exempt independent agency for purposes of this requirement. See, for example, National Credit Union Administration, "Filing Financial and Other Reports," 78 *Federal Register* 64885, October 30, 2013.

[69] Section 315 of P.L. 111-203. OCC exemption is relevant to other banking regulators because many banking regulations are prescribed jointly by all banking regulators. In addition, the Treasury Secretary may not delay or prevent the issuance of OCC regulations or intervene in an OCC proceeding, including enforcement actions under 12 U.S.C. §1.

deliberation, the regulation may be set aside by a vote of at least two-thirds of the members of FSOC.[70]

The PRA also contains special requirements for OIRA review of independent regulatory agencies' information collections. In general, if an agency is collecting information from 10 or more nonfederal persons, the agency must seek approval from OIRA before it can proceed with the information collection. The act requires independent regulatory agencies, like other agencies, to submit to OIRA their proposed information collections. Collegially headed independent regulatory agencies can, by majority vote, void any OIRA disapproval of a proposed information collection.[71]

Cost-Benefit Analysis

Independent agencies that are not subject to E.O. 12866's requirements for OIRA review of rules are also not subject to its requirement that agencies perform cost-benefit analysis, also subject to OIRA review, for "economically significant" rules. Recently, policymakers have debated the extent to which cost-benefit analysis should be mandated as part of the independent agency rulemaking process. Proponents of cost-benefit analysis consider it to be a reasonable check on arbitrary and capricious rulemaking; opponents of cost-benefit analysis requirements consider it to be too onerous, time-consuming, superfluous (when Congress has already required the agency to prescribe rules), and to make rules vulnerable to legal challenge. Of particular relevance to the issue of agency independence, cost-benefit requirements allow for greater executive influence (if OIRA review is required) or judiciary influence over the rulemaking process (for example, there have been recent court challenges to overturn certain rulemaking on cost-benefit grounds).[72]

A CRS analysis found that while six financial regulators currently provide some information about the costs or benefits of major rules, none provides quantitative estimates of monetized costs and benefits.[73] Although not subject to E.O. 12866, requirements in current law related to cost-benefit analysis that apply to all the federal financial regulators include the PRA (described above) and a requirement to estimate the impact of proposed regulations on "small entities," such as small businesses or small financial institutions.[74] The banking regulators must also consider the benefits and administrative burdens of new regulations on banks and their customers, "consistent with the principles of safety and soundness and the public interest."[75] In addition, certain statutory provisions related to cost-benefit analysis apply to individual financial regulators. According to 7 U.S.C. Section 15(a), "Before promulgating a regulation ... the (CFTC) shall consider the costs

[70] Section 1023 of P.L. 111-203.

[71] 44 U.S.C. §3507(f). The statute does not specify whether a single-headed agency may void an OIRA disapproval. For more information about the Paperwork Reduction Act, see CRS Report R40636, *Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates*, by Curtis W. Copeland and Vanessa K. Burrows. The authors of this report have since left CRS. Questions about its content from congressional clients should be directed to Maeve P. Carey, Analyst in Government Organization and Management.

[72] Better Markets, an interest group, has identified three recent rules issued by financial regulators that have been challenged in court on cost-benefit grounds—the SEC's proxy access rule, the CFTC's position limit rule, and the CFTC's rule on registration of commodity trading advisors and commodity pool operators. See Dennis Kelleher, *Cost-Benefit Analysis and Financial Reform: Overview*, available at http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2012/05/DENNIS-KELLEHER-PPT.pdf.

[73] For more information, see CRS Report R42821, *Independent Regulatory Agencies, Cost-Benefit Analysis, and Presidential Review of Regulations*, by Maeve P. Carey and Michelle D. Christensen.

[74] 5 U.S.C. §§601-612.

[75] 12 U.S.C. §4802(a).

and benefits" based on four considerations listed in statute. The SEC must consider "in addition to the protection of investors, whether the [regulation] will promote efficiency, competition, and capital formation"[76] and "the impact any [regulation] would have on competition," forbidding rules "which would impose a burden on competition not necessary or appropriate."[77] When prescribing a regulation, the CFPB "shall consider the potential costs and benefits to consumers and (consumer credit providers)," including the potential for reduced access to consumer financial products, and the impact on small depository institutions and rural consumers.[78]

Some have proposed extending cost-benefit requirements to additional agencies. Variations on this proposal that would place a greater restriction on autonomy include enumerating the factors that must be considered in performing the analysis, allowing rules to be implemented only if an agency finds that the benefits are likely to outweigh the costs, "monetizing" (i.e., providing quantitative estimates of) costs and benefits, and subjecting the agency's cost-benefit analysis to OIRA review.

Congressional Oversight and Influence

Each of the federal financial regulators discussed in this report have statutorily established characteristics that give them a greater level of independence from the direction of the President compared with most executive branch agencies. Some of the financial regulators also have a greater level of independence from congressional influence than is typical. Such reduced influence might result where Congress does not appropriate agency funds, where agency leaders serve for long periods without reconfirmation, or, indirectly, where the Administration is unable to influence agency action on behalf of Members.

Even where congressional influence arguably has been reduced, the regulators are still subject to the major forms of normal congressional oversight. These include requirements to testify and report, Senate confirmation, audits and investigation by GAO and inspectors general, and in some cases, congressional authorization and appropriation of funds.

Testimony and Reporting Requirements

Congress can request that agency heads testify before congressional committees, require that they submit reports to Congress on general or specific topics, and investigate their activities (including through subpoena). Typically, testimony and reports are submitted to the committees of jurisdiction. All of the federal financial regulators are required to submit annual or semi-annual written reports to Congress. Topics covered by the reports can include a summary of the agency's finances and activities. For some agencies, such as the Fed and the CFPB, the agency head is also required to regularly appear before the committees of jurisdiction. For those regulators, such as the SEC and the CFTC, whose funding is subject, in part or in total, to congressional appropriations, the appropriation process provides another regular forum for testimony and congressional oversight by House and Senate appropriations committees. In addition, ad hoc testimony or reports on specific topics can be requested or mandated, and agencies can also provide information to Congress on an informal basis.

[76] 15 U.S.C. §77b(b).

[77] 15 U.S.C. §78w(a).

[78] 12 U.S.C. §5512(b).

Congressional Review Act

When Congress disagrees with agency rulemaking, Congress might pass new legislation that would alter, reverse, or supersede policies that these agencies had made independently. Notably, the Congressional Review Act of 1996 requires agencies to submit their rules to GAO and Congress before they can take effect.[79] Upon receipt of the rules, Congress can pass a joint resolution of disapproval under expedited procedures to overturn an agency's rule, subject to presidential veto. These procedures are used infrequently, however—from 1996 to 2016, only one rule was successfully overturned. The act has been used to successfully overturn regulations in the 115th Congress, however.[80] Congress has considered expanding its role in the rulemaking process. For example, one proposal would require affirmation via an act of Congress before a regulation came into effect.

Senate Confirmation

In addition to the tools of influence available to both houses of Congress, the Senate may also influence agencies that have greater independence through its constitutional advice and consent role in the appointment of top agency leaders. This power might afford Senators the opportunity to influence the selection of a nominee, evaluate his or her qualifications and experience, solicit a policy commitment from the nominee, and assess his or her view of the relationship between the agency and the President or Congress. Senate confirmation can provide an outside judgment on the suitability of a nominee, although that judgment is not necessarily limited to whether the nominee meets the statutory qualifications. Sometimes the President's nominee is not confirmed because of opposition by Senators from either party.[81] A Senate confirmation process may require the President to choose candidates acceptable to the other party, especially when political party affiliations are required. For that reason, appointees confirmed by the Senate might be more likely to represent views that are acceptable to a broad range of policymakers.

Audits and Investigations

As is true for oversight of most executive agencies, Congress also employs the assistance of GAO and inspectors general to enhance its oversight of agencies that have greater independence. All of the federal financial regulators have inspectors general that conduct investigations and report findings.[82] All of the federal financial regulators are required to be audited, and are regularly audited, by GAO.

GAO audits and investigations can be required by statute (on a one-time or repeated basis) or ad hoc at the request of a member or committee of Congress. Congress may request that GAO investigate a topic based on a desire to raise awareness of a regulator's decision or activity that Congress supports or opposes. Typically, statutes lay out the terms and conditions under which GAO may access the agency's records, report findings, and so on. Reflecting the sensitive nature

[79] 5 U.S.C. §§801 et seq.

[80] See CRS In Focus IF10023, *The Congressional Review Act (CRA)*, by Maeve P. Carey and Christopher M. Davis.

[81] Since 2013, confirmation of agency leadership positions has no longer required 60 votes for cloture, reducing the importance of gaining opposition support. See CRS Report R43331, *Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings*, by Valerie Heitshusen.

[82] The Fed's inspector general is also responsible for the CFPB. For more information on the role of inspectors general, see CRS Report 98-379, *Statutory Offices of Inspector General: Past and Present*, by Frederick M. Kaiser. For information on GAO, see CRS Report RL30349, *GAO: Government Accountability Office and General Accounting Office*, by Frederick M. Kaiser.

of financial supervisory authorities, statutes are more restrictive for the auditing of the banking regulators to ensure that confidential information about the financial condition of private banks remains private.[83]

The Federal Reserve has additional statutory restrictions, in recognition of the unique insulation of its monetary policymaking from congressional influence.[84] Until 2010, GAO could not audit the Fed's monetary policy or lender of last resort functions. Since the Dodd-Frank Act, it can audit those functions for waste, fraud, and abuse, but it cannot evaluate the merits of the Fed's decisions on policy grounds. Recent Congresses have debated removing those statutory restrictions.

Funding

Where an agency has been designed to have greater independence from the President and insulation from partisan politics, the annual appropriation processes and periodic reauthorization legislation provide Congress with opportunities to influence the size, scope, priorities, and activities of an agency.

Background on Congressional Budgeting

Congressional budgeting is generally a two-step process. First, Congress authorizes (permits) funding through authorizing legislation; this authorization can be permanent or temporary and subject to reauthorization. Then, in the case of discretionary spending, Congress appropriates (provides) funds, typically annually, for an agency to spend, subject to the terms of its authorization. In the case of mandatory spending, those funds are provided automatically once authorized, and appropriations are not necessary. The authorization process gives the committees of jurisdiction an opportunity to weigh in, while the appropriation process is guided by the appropriations committees.

Different funding structures across regulators with similar missions have led to congressional proposals to make funding structures more uniform. Most, but not all, financial regulators are not subject to the regular congressional appropriation and authorization processes. The two financial regulators whose funding is primarily determined through the appropriations process and who require periodic reauthorization are the CFTC and the SEC.[85] The CFTC's funding is provided directly from the Treasury's general fund. In contrast, the SEC is funded by fees it collects. The SEC's overall budget level, however, is largely set through the congressional appropriations process, with the SEC then setting the fees to approximately meet the funding level determined by Congress.[86]

This means that, for example, an amendment to an appropriations bill lowering the funding to the CFTC would be able to redirect this funding to another agency without changing the overall cost of the bill. Changing the funding for the SEC during the appropriations process, however, would not affect the resources available for other agencies. Thus, there may be slightly more pressure on

[83] 31 U.S.C. §714.

[84] Congress has recently considered changing these restrictions. For example, H.R. 459 passed the House on July 25, 2012. This bill would have removed all existing restrictions on GAO audits of the Fed from statute, including confidentiality restrictions, and, as passed, called for an audit within 12 months of enactment. Similar bills have been introduced in the 113th Congress. For more information, see CRS Report R42079, *Federal Reserve: Oversight and Disclosure Issues*, by Marc Labonte.

[85] The SEC is funded through the Financial Services and General Government (FSGG) appropriations bill. The CFTC funding is split, appearing in the FSGG bill in the Senate and the Agriculture appropriations bill in the House. The FDIC (for its inspector general) and NCUA (for the Community Development Revolving Loan Fund Program) also receive minor funding through the FSGG bill.

[86] The SEC was given some budgetary autonomy by Section 991 of the Dodd-Frank Act (P.L. 111-203), which created a Reserve Fund funded through agency fees. It grants the SEC the authority to spend up to $100 million a year "as the Commission determines is necessary to carry out the functions of the Commission."

the CFTC budget because it is effectively in competition for funding with the other agencies within an appropriations bill in a way that the SEC is not.

The appropriation and authorization process provides Congress a regular opportunity to evaluate an agency's performance. During this process, Congress also might influence the activities of these agencies by legislating provisions that reallocate resources or place limitations on the use of appropriated funds to better reflect congressional priorities. Through line-item funding, bill text, or accompanying committee report text, Congress can encourage, discourage, require, or forbid specific activities at the agency, including rulemaking. Alternatively, it can adjust an agency's overall funding level if it is supportive or unsupportive of the agency's mission or conduct. Thus, control over funding reduces independence from (and increases accountability to) Congress.

Other financial regulators have more autonomy to determine their own budgets, typically subject to some general language regarding proportionality of budget and mission. For example, the OCC: "may collect an assessment, fee, or other charge ... as the Comptroller determines is necessary or appropriate to carry out the responsibilities of the Office,"[87] whereas the CFPB is allowed funding in "the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law."[88] Even for such agencies, however, Congress may limit the size of the overall budget. The CFPB's funding is capped at a fixed amount (adjusted for inflation); if the CFPB wishes to further increase its budget, supplemental appropriations are authorized through 2014 (the CFPB has not yet requested such appropriations).[89]

Most financial regulators generate income from various sources, particularly fees or assessments on entities that they oversee. For example, the OCC and FHFA primarily generate income from fees levied on regulated entities, whereas the FDIC and NCUA primarily generate income from deposit insurance premiums. The Federal Reserve is unique in that its income is primarily derived from securities (including Treasury securities) that it purchased in the conduct of monetary policy; it also earns interest on loans and charges market prices for market services it offers (e.g., check clearing). Even when an agency's funding comes primarily from fees or assessments, however, the spending of these fees may be subject to congressional approval, as is the case for the SEC discussed above. The two financial regulators that do not largely raise their own revenues are the CFTC and the CFPB. As noted, the CFTC's funding comes from Treasury's general revenues and CFPB funding is transferred from the Federal Reserve's revenues.

Because of uncertainty about regulators' costs and income, an issue arises of what happens when a regulator collects more revenue than it spends. SEC revenues are added to Treasury's general revenues, except for revenues added to its reserve fund. The OCC, NCUA, FDIC, and FHFA are allowed to invest surpluses in Treasury bonds, available for use to cover any future budgetary shortfalls (caused by the resolution of failing financial institutions, for example).[90] The Fed's investment income regularly generates surpluses an order of magnitude larger than its expenses, and so it periodically remits the vast majority of these surpluses to Treasury (where they are added to the general fund), adding the rest to its surplus account.

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[87] 12 U.S.C. §16.

[88] 12 U.S.C. §5497.

[89] Supplemental appropriations were authorized by Section 1017 of the Dodd-Frank Act (P.L. 111-203).

[90] Some agencies, such as OCC and FHFA, invest in Treasury securities through on-budget federal trust funds, while others, such as NCUA and FDIC, invest in Treasury securities outside of the federal budget. In addition, some agencies, such as the NCUA and FDIC, maintain a standing right to draw on the Treasury up to a statutory limit (in order to strengthen the "full faith and credit" backing of their insurance, for example).

Table 5. Financial Regulatory Agency Funding

Regulator	Agency Spending ($mil/yr)	Subject to Annual Appropriations/Periodic Reauthorization	Primary Revenue Source
Commodity Futures Trading Commission	$250 (FY2016)	Yes/Yes, latest authorization expired Sept. 30, 2013.	Treasury general fund per congressional appropriation.
Consumer Financial Protection Bureau	$576 (FY2016)	No/No	Transfer from Federal Reserve System limited to 12% of the Fed's operating expenses. Authorized to request additional appropriations until FY2014, but did not.
Federal Deposit Insurance Corporation	$1,715 (CY2016)	No/No	Deposit insurance premiums determined by FDIC in order to meet a reserve ratio set by FDIC (with a statutory minimum of 1.35% of insured deposits).
Federal Housing Finance Agency	$253 (FY2016)	No/No	Fees and assessments on regulated institutions. Amounts determined by FHFA.
Federal Reserve	$5,410 (CY2016)	No/No	Income on securities and loans held by Fed. The Fed also charges fees to cover the costs of business services it offers.
National Credit Union Administration	$268 (CY2015)	No/No	Deposit insurance premiums determined by NCUA in order to meet a reserve ratio set by NCUA (with a statutory minimum of 1.2% of insured deposits).
Office of the Comptroller of the Currency	$1,109 (FY2016)	No/No	Fees on regulated institutions. Amounts determined by OCC.
Securities and Exchange Commission	$1,736 (FY2016)	Yes, except for $100 million reserve fund/Yes, latest authorization expired Dec. 31, 2015.	Fees and assessments on regulated entities. Amounts set to meet congressional appropriation.

Source: CFTC FY2017 Budget, p. 10 at http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/cftcbudget2017.pdf; CFPB FY2014 Report to Congress, p. 16 at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201612_cfpb_1017-e-4-appropriations-report.pdf; FDIC 2016 Annual Report, p. 85 at https://www.fdic.gov/about/strategic/report/2016annualreport/2016AR_Final.pdf; FHFA 2016 Performance and Accountability Report, p. 29 at https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA-2016-PAR.pdf; Federal Reserve press release, Jan. 10, 2017 at https://www.federalreserve.gov/newsevents/press/other/20170110a.htm; NCUA 2015 Annual Report, p. 45 at https://www.ncua.gov/Legal/Documents/Reports/annual-report-2015.pdf; OCC Annual Report FY2016, p. 36 at https://occ.gov/publications/publications-by-type/annual-reports/annual-report-2016.pdf; SEC FY2016 Summary of Performance and Financial Information, p. 15 at https://www.sec.gov/reportspubs/annual-reports/sec-summary-of-performance-and-financial-info-fy2016-.pdf; U.S. code accessed through http://www.uscode.house.gov.

Notes: FY = fiscal year. CY = calendar year. The FDIC (for its inspector general) and NCUA (for the Community Development Revolving Loan Fund Program) also receive minor funding through appropriations. Agency spending does not include claims for deposit insurance through the FDIC or NCUA or interest expenses for the Fed.

Concluding Thoughts

In the late 19th century, Congress began to establish certain federal agencies with organizational characteristics that gave them a greater degree of independence from presidential direction than would otherwise have been the case. Some of the earliest agencies structured in this way were those with financial regulatory responsibilities, including the Fed (1913), the FDIC (1933), and the SEC (1934). Over time, Congress has, in certain cases, given agencies organizational characteristics that resulted in a greater degree of independence from Congress, as well. Several rationales for doing so have been identified, and these include the perceived need to insulate officials carrying out quasi-legislative or quasi-judicial functions from the direction of the President; the perception that insulation from partisan politics might yield better decisionmaking and policymaking based on technical expertise; and institutional rivalries between Congress and the President over control of the federal bureaucracy.

Congress has continued to establish independent financial regulatory agencies into the 21st century. For example, FHFA was established in 2008, and CFPB was established in 2010. The continuing use of the independent regulatory agency model, in one form or another, suggests that Congress continues to find agency independence to be appropriate under certain circumstances. Legislative proposals in recent Congresses indicate that Congress is still deliberating over the right regulatory structure to balance independence and accountability.

In view of the use of the independent regulatory model for the design of federal financial regulatory agencies, several questions might arise. First, what is the relative level of independence among these agencies? Second, what is the effect of independence on the functioning of these agencies? Relatedly, what are the positive and negative consequences, in practice, of giving these agencies greater independence from the President and from Congress?

Congress has granted federal financial regulators independence in ways obvious ("for cause" removal, self-financing) and subtle (exemption of agency testimony and budget requests from OMB review). No two independent agencies have exactly the same structure. It might be impractical to assess the relative levels of independence among agencies on the basis of the number or type of characteristics of independence an agency has. As Congress has established additional agencies with these kinds of independence, it has used various combinations of organizational features to address a variety of policy contexts and preferences, and this makes comparisons difficult. These differences could reflect the differences in the roles and responsibilities of the various regulators, or simply reflect historical accident. Federal financial regulators that are relatively more independent in some areas are relatively less independent in others. For example, the OCC is located within the Department of the Treasury and the Comptroller does not have for cause protection, but has greater budgetary independence than the SEC or CFTC. That said, the Fed has been given the most independence of any financial regulator on all the measures considered in this report (where differences exist), presumably in deference to its monetary policy responsibilities. Besides structural characteristics, the culture and traditions of an agency and the relationships between its leadership and the President can also influence the relative independence of the agency during a particular period.

Arguably, a more relevant assessment might evaluate the degree to which specific features of independence at particular agencies serve current policy contexts and preferences. Congress might, as part of its oversight of federal regulators, choose to investigate the impact of these features on the relationships between the agency and the President, the agency and Congress, and the agency and the regulated industry. It might also assess the character of the policymaking that

such independence allows.[91] Finally, Congress could elect to assess the degree to which the agency's operations are subject to governmental checks and balances.

An assessment of a financial regulator, like that of any independent regulatory agency, might examine not only the level of independence accorded to that organization, but also the responsibilities and authorities that have been vested in its leadership. Arguably, the degree of autonomy and power together might have the greatest impact on the integrity of the policymaking process and policy outcomes, as well as the preservation of democratic accountability.

Agency independence is traditionally viewed relative to the President, but the structural features discussed in this report can also increase or decrease independence from Congress. Agencies that are more independent from the President can sometimes become more congressionally dependent for resources and power. In contrast, where Congress is successful in limiting the President's authority over an agency, this might indirectly reduce the influence of Members over that agency. Some agency characteristics that more directly shield an agency from congressional control and presidential direction, such as funding the agency outside of the appropriations process, might further insulate the agency from partisan political influence. Although the agency would be constrained by a statutory framework and institutionalized oversight mechanisms, such insulation from partisan influence might lead to more limited accountability by the agency to, as well as less control of agency activities by, elected officials. In short, decisions about the degree of independence to accord an agency might involve tradeoffs among various values and goals.

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[91] An appraisal of whether independence improves regulator performance is beyond the scope of this report. For the case in favor of the proposition, provided there is adequate accountability, see Marc Quintyn and Michael W. Taylor, "Regulatory and Supervisory Independence and Financial Stability," International Monetary Fund, Working Paper WP/02/46, March 2002, http://www.imf.org/external/pubs/ft/wp/2002/wp0246.pdf. One cross-country empirical study claims that "independent bank supervisors have a higher credibility in banking markets, and market reaction to higher independence is reflected in higher ratings of banking system soundness." See Steve Donzé, "Bank Supervisor Independence and the Health of Banking Systems: Evidence from OECD Countries," paper presented at International Political Economy Society Inaugural Conference, Princeton University, May 2006, available at http://www.princeton.edu/~pcglobal/conferences/IPES/papers/donze_S130_1.pdf.

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