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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 five 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 members of most regulatory boards and commissions can be removed only "for cause" (e.g., malfeasance or neglect of duty). The enabling statutes for two director-led financial regulators—FHFA and CFPB—also provided that their leaders could be removed only for cause. However, the Supreme Court held that each of these two provisions is unconstitutional.
- **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 R44918, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework*, by Marc Labonte.

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 Wall Street Reform and Consumer Protection Act (Dodd-Frank; P.L. 111-203).

[3] CRS Report R44918, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework*, by Marc Labonte, 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; CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey; and CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole.

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, which carried out 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

[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 also allow agencies to make decisions that might be unpopular—and politically risky—in the short run but are expected by technical experts to be beneficial in the long run. For example, this dynamic is often said to apply to the Fed's monetary policy decisions. Such independence arrangements might involve trade-offs between perceived public benefit and the potential for erosion of accountability by commissioners to elected officials, particularly the President.

[17] See Susan Bartlett Foote, "Independent Agencies under Attack: A Skeptical View of the Importance of the Debate," *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: prepared pursuant to S. Res. 71, to authorize a study of the purpose and current effectiveness of certain Federal agencies*, committee print, 95th Cong., 1st sess. (Washington: GPO, 1977), p. 28.

[21] Ibid.

> points, and these vantage points, along with their *policy preferences*, lead to disagreements about how the administrative state should be organized.[22]

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 to 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

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[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.]

[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, https://citeseer.ist.psu.edu/viewdoc/download?doi=10.1.1.486.6037&rep=rep1&type=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 https://www.archives.gov/federal-register/executive-orders/pdf/12866.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.

"economically significant" rules be subject to cost-benefit analysis. In contrast, the PRA requires that 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, Title 31, Section 321(c), of the *U.S. Code* 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 Title 12, 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.

[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 RL32388, *General Management Laws: Major Themes and Management Policy Options*, by Clinton T. Brass.

[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.

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 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, several independent agencies headed by a single administrator, such as the FHFA and the CFPB, have other structural characteristics similar to those of 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

[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, https://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*
(continued...)

a whole.[37] In cases where a chairman is popularly perceived as dominant relative to the board, that 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."

[Knoxville: University of Tennessee Press, 1977], pp. 131-132.) This study, of seven commissions, included only one financial regulator: the SEC.

[37] This principle was tested at the FDIC in late 2021. Three members of the FDIC board asserted that an FDIC board majority has the legal authority to circulate and vote on FDIC business without the consent of the FDIC chair. The chair and the agency's general counsel rejected the validity of the members' actions under this interpretation. Ultimately, the chair resigned from her post. (See Andrew Ackerman, "FDIC Control to Shift as Chief Resigns," *Wall Street Journal*, January 3, 2022.) The Office of Legal Counsel at the Department of Justice later published its opinion that the FDIC chair "does not have the authority to prevent a majority of the FDIC Board from presenting items to the Board for a vote and decision." (U.S. Department of Justice, Office of Legal Counsel, "Authority of Majority of the FDIC Board to Present Items for Vote and Decision," July 29, 2022, https://www.justice.gov/olc/file/1529481/download).

Table 2. Leadership Structure

Regulator (Enabling Statute)	Type of Agency Head	Responsibilities of Director/Chairman	Selection of Officers
Commodity Futures Trading Commission (7 U.S.C. §2)	Five commissioners, one of whom is selected to be chairman.	Chairman is vested with executive and administrative functions, pursuant to policies, plans, priorities, and budgets approved by the commission.	Commissioners and chairman are presidentially appointed with Senate confirmation.
Consumer Financial Protection Bureau (12 U.S.C. §§5481 et seq.)	Director, deputy director, and two assistant directors. (Two assistant director positions have been provided for in statute [12 U.S.C. §5493]. Additional assistant director positions have been established administratively.)	The director heads, and is responsible for delegating powers vested in, the CFPB. Each assistant director heads an office to which specific responsibilities have been assigned by statute or delegated by the director.	The director is presidentially appointed with Senate confirmation. The deputy director and assistant directors are selected by the director.
Federal Deposit Insurance Corporation (12 U.S.C. §§1811 et seq.)	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 are presidentially appointed with Senate confirmation. The President designates the chair and vice chair from among the three appointees, also with the advice and consent of the Senate.
Federal Housing Finance Agency (12 U.S.C. §§4511 et seq.)	Director and three deputy directors.	All statutory duties are vested in the director. Each deputy director heads an office to which specific responsibilities have been assigned by statute or delegated by the director.	The director is presidentially appointed with Senate confirmation. The deputy directors are chosen by the director.
Federal Reserve Board of Governors (12 U.S.C. §§241 et seq.)	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 (12 U.S.C. §§1752a et seq.)	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 (12 U.S.C. §§2 et seq.)	Headed by the Comptroller, with up to four statutorily established Deputy Comptrollers. (As of June 2023, the office had a total of more than 30 officials with the title of Deputy Comptroller or Senior Deputy Comptroller.)	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.

Regulator (Enabling Statute)	Type of Agency Head	Responsibilities of Director/Chairman	Selection of Officers
Securities and Exchange Commission (15 U.S.C. §§78d et seq.)	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.	Commissioners are presidentially appointed with Senate confirmation. The President alone selects the chairman from among the commissioners.

Source: CRS. *U.S. Code,* accessed through http://www.uscode.house.gov, and agency websites.

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, Title 12, 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.[38] 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.

[38] 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	Agency-Specific 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.	Commissioners shall not accept employment or compensation from, or transact with, regulated entities.
Consumer Financial Protection Bureau	No requirements related to party affiliations.	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 the full term to which he or she was appointed.
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	Agency-Specific 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 terms have expired, sometimes after only a couple of years of service. One study found that, during their time in office, Presidents had been 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.[39]

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").[40]

Statutes typically do 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 a partial 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

[39] 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. This study, which drew on appointment data through the end of the presidency of George W. Bush, found that, on average, the President had been able to gain a majority for his party within a year of taking office and to appoint an absolute majority of boards' members within 26 months (pp. 469-470).

[40] On collegial boards and commissions, the members' terms are often staggered so that different members leave the commission at different times. Under this arrangement, 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, 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, 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.

President and Senate, who may hold views different from the President and Senate who first installed the appointee.

Staggering the members' terms helps to promote continuity and may also promote diversity of opinion. In the case of an agency with a single head, having the term not coincide with the President's term could promote greater independence.

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."[41] 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."[42]

Grounds for Removal

Unless otherwise specified in law, appointees to executive branch positions usually serve at the pleasure of the President. That is, they serve for an indeterminate period of time and can be removed by the President at any time.[43] By statute and practice, members of multi-member regulatory boards or commissions, including financial regulatory commissions, have rarely been removed by the President over policy differences. In contrast, under current constitutional interpretation and practice, single officials who head regulatory agencies are understood to serve at the pleasure of the President, notwithstanding statutory "for cause" removal provisions pertaining to tenure in these positions.

Multi-Member Financial Regulatory Commissions

As a matter of historical practice, members of multi-member regulatory boards and commissions, including financial regulatory commissions, have generally not been subject to "at will" removal by the President. Instead, most commission members have been understood to be protected from removal unless a higher "for cause" threshold is met. The constitutional foundation for this

[41] 15 U.S.C. §2053(b)(2).

[42] 7 U.S.C. §2(2).

[43] It has long been recognized that "the power of removal [is] incident to [the President's] power of appointment." *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

practice, which is not uniformly provided for in statute, has long been subject to nuanced federal court interpretation.[44]

For-cause removal provisions limit the ability of a President 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."[45] 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.'"[46]

For some independent regulatory commissions, their enabling statutes detail the permissible grounds for removal. For example, the President may remove a member of the Consumer Product Safety Commission for "neglect of duty or malfeasance in office but for no other cause."[47] In other cases, the for-cause removal standard for such commissions was not explicitly set out by Congress. Under long-standing practice, however, Presidents have rarely attempted to remove members of independent regulatory commissions.

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

This greater independence may be tempered by two additional factors, however. First, as a result of member turnover over time, the membership of the commission generally begins to favor the party of the sitting President and the President's policy preferences. Second, the President appoints the chair from among the members, sometimes with the advice and consent of the Senate (see **Table 2**). Some commission statutes explicitly authorize the President to remove a member from his or her role as chair. 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.[48] This distinction between removal of a CFTC commissioner and a CFTC chairman is possible because the two roles are defined separately in statute, and the President fills them through separate appointments or designations. For other collegially headed financial regulators, statutes are silent on this issue.[49]

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[44] See CRS, *Constitution Annotated*, Article II, Section 2, Clause 2, "Overview of Removal of Executive Branch Officers," https://constitution.congress.gov/browse/essay/artII-S2-C2-3-15-1/ALDE_00013107/.

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

[46] 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. 1138.

[47] 15 U.S.C. §2053.

[48] 7 U.S.C. §2(a)(2(B). "At any time, the President may appoint, by and with the advice and consent of the Senate, a different Chairman, and the Commissioner previously appointed as Chairman may complete that Commissioner's term as a Commissioner."

[49] See, for example, 12 U.S.C. §242, pertaining to the terms of Fed members and chair: "[E]ach member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President. Of the persons thus appointed, 1 shall be designated by the President, by and with the advice and consent of the Senate, to serve as Chairman of the Board for a term of 4 years." See, also, with regard to SEC member and chair removal, SEC v. Blinder, Robinson & Co., Inc., 855 F.2d 677, 681 (10th Cir. 1988). In *Blinder*, the court accepted the assertion of one of the parties that "it is commonly understood" that the commissioners enjoy removal protections. while it noted that the chairman of the SEC served at the pleasure of the President and therefore may be removed at will.

In practice, where a commissioner has lost the chairmanship, they have often elected to resign from the commission.

Single-Headed Financial Regulatory Agencies

Whereas members of multi-member financial regulatory commissions have typically been accorded for-cause protection, the heads of the three financial regulators that are led by single officials are not protected from at-will removal by the President by law or in practice. The enabling acts for the single-headed CFPB and FHFA include removal-limiting provisions for their heads, but the Supreme Court has found these provisions to be unconstitutional.[50] Consistent with the Supreme Court's decisions, directors of the CFPB and FHFA who had been appointed by President Donald Trump stepped down before their terms expired, reportedly at the request of President Joe Biden.[51] The OCC's Comptroller of the Currency may be "removed by the President, upon reasons to be communicated by him to the Senate."[52] In practice, removal of the Comptroller, although uncommon, has occurred.[53] Comptrollers of the Currency have sometimes served across presidencies.[54]

[50] CFPB's authorizing statute provides that the President may remove its director "for inefficiency, neglect of duty, or malfeasance in office" (12 U.S.C. §5491). In 2019, however, the Supreme Court found this "for cause" removal provision to be unconstitutional. See Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020). FHFA's authorizing statute provides that the President may remove its director "for cause" (12 U.S.C. §4511). In 2020, however, the Supreme Court found this provision to be unconstitutional. See Collins v. Yellen, 141 S. Ct. 1761 (2021).

[51] Kathleen Kraninger was confirmed for a five-year term as CFPB director on December 6, 2018, and she served approximately two years and one month of her term. She resigned in January 2021 after Biden took office (Sylvan Lane, "Consumer Bureau Director Resigns after Biden's Inauguration," *The Hill*, January 20, 2021, https://thehill.com/policy/finance/535053-consumer-bureau-director-resigns-after-bidens-inauguration/). Mark Calabria was confirmed for a five-year term as FHFA director on April 4, 2019, and he served approximately two years and two months of his term. He stepped down shortly after Collins v. Yellen was decided in June 2021 (Rachel Siegel, Tyler Pager, and Robert Barnes, "White House Replaces Regulator Overseeing U.S. Mortgage Giants Following Supreme Court Ruling," *Washington Post*, June 23, 2021, https://www.washingtonpost.com/us-policy/2021/06/23/biden-fannie-freddie-fhfa-supreme-court/).

[52] 12 U.S.C. §2.

[53] 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).

[54] For example, John D. Hawke Jr. served from the last years of the Clinton presidency through the first years of the Bush presidency. See "Previous Comptrollers of the Currency," https://www.occ.gov/about/who-we-are/history/previous-comptrollers/index-previous-comptrollers.html.

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 enabling act includes a removal-limiting provision that the Supreme Court has found to be unconstitutional.[b]
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 enabling act includes a removal-limiting provision that the Supreme Court has found to be unconstitutional.[c]
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 terms until a replacement takes office but not past the end of the next session of Congress.	None specified.[d]

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

Notes: Where quotes are used, exact wording of statute is provided. Leaders of the Federal Reserve regional banks have different terms of office, which are 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. See Wiener v. United States, 357 U.S. 349 (1958).

b. CFPB's authorizing statute provides that the President may remove its director "for inefficiency, neglect of duty, or malfeasance in office." (12 U.S.C. §5491) In 2019, however, the Supreme Court found this "for cause" removal provision to be unconstitutional. See Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020).

c. FHFA's authorizing statute provides that the President may remove its director "for cause." (12 U.S.C. §4511) In 2020, however, the Supreme Court found this provision to be unconstitutional. See Collins v. Yellen, 141 S. Ct. 1761 (2021).

d. 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.

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.[55] 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,[56] 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.[57] The scope of the act includes budget submissions.[58] In 1994, the OCC was added to the statute. The Dodd-Frank Act includes parallel language for the CFPB.[59]

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.[60]

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

[55] With regard to legislative coordination and clearance, see OMB, *OMB Circular A-19*, https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-019.pdf. With regard to provisions pertaining to the executive branch budget submission process, see OMB, *OMB CircularA-11*, §22, "Communications with the Congress and the public and clearance requirements," https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf.

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

[57] Section 111 of P.L. 93-495 (12 U.S.C. §250).

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

[59] 12 U.S.C. §5493(c)(4).

[60] 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.[61]

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 is headed by the Treasury Secretary.[62] 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 FSOC 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.[63]

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. In practice, FSOC has never used its CFPB stay authority, has used its formal recommendation process only once, and has never been called on to formally resolve a dispute between member agencies. FSOC's agenda has shifted when the Administration has changed, but it is difficult to parse whether that is attributable to the Treasury Secretary's dominance of FSOC or because the new Administration has appointed like-minded heads to the member agencies.

Rulemaking Authority[64]

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,[65] which applies to all executive agencies, including independent regulatory agencies. The APA contains rulemaking requirements and procedures for agency adjudications.[66] The APA also provides for

[61] 12 U.S.C. §1827.

[62] For more information, see CRS Report R45052, *Financial Stability Oversight Council (FSOC): Structure and Activities*, by Marc Labonte.

[63] As another example, under Title 12, Section 4513a, of the *U.S. Code*, 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 officials.

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

[65] 5 U.S.C. §§551 et seq.

[66] 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.

judicial review of rulemaking and agency actions, under which courts can "set aside" an agency action if it is found to be unreasonable.[67]

Presidential/OMB Review of Rules Under Executive Order 12866[68]

In addition to these statutory and judicial constraints on agency rulemaking, another set of procedures has been added by Presidents in various executive orders.[69] The procedures include, among other things, that most agencies submit their proposed and final rules to OMB's Office of Information and Regulatory Affairs for review and approval prior to issuance.[70] OIRA review of rules was established in 1981 by President Ronald Reagan in Executive Order (E.O.) 12291,[71] and it was continued by President Bill Clinton under E.O. 12866.[72] 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 in E.O. 12866 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).[73] This list includes all of the agencies discussed in this report except for the NCUA, although the NCUA appears to be considered an exempt independent regulatory agency for the purposes of this requirement.[74] The OCC and CFPB (upon creation) were added to the PRA's list of independent regulatory agencies by the Dodd-Frank Act in 2010.[75]

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[67] Specifically, a court may invalidate an agency action if it is found to be "(A) arbitrary, capricious, an abuse of 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." For more information on judicial review of rulemaking, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey; and CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney.

[68] Under the Congressional Review Act, the Office of Information and Regulatory Affairs (OIRA) at OMB is statutorily assigned the responsibility of determining for all agencies, including independent regulatory agencies, whether a rule is major. This separate mechanism for OIRA review of rules is addressed below. See "OIRA Review of 'Major' Rules under the Congressional Review Act."

[69] 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, https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf.

[70] 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; and "Current Cost-Benefit Analysis Requirements" in CRS Report R44813, *Cost-Benefit Analysis and Financial Regulator Rulemaking*, by David W. Perkins and Maeve P. Carey.

[71] E.O. 12291, "Federal Regulation," 46 *Federal Register* 13193, February 19, 1981.

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

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

[74] Besides the agencies listed, Title 44, Section 3502(5), of the *U.S. Code* exempts "any other similar agency." See, for example, NCUA, "Filing Financial and Other Reports," 78 *Federal Register* 64885, October 30, 2013.

[75] Section 315 of P.L. 111-203. OCC exemption is relevant to other banking regulators because many banking (continued...)

In 2019, during the Trump Administration, the Department of Justice's Office of Legal Counsel issued an opinion stating that the President had the legal authority to subject the independent regulatory agencies to OIRA review under E.O. 12866.[76] The memorandum stated that "OMB has proposed that the President eliminate that exception [for independent regulatory agencies] and require independent regulatory agencies to comply with all of EO 12866," and it concluded that the President did have the legal authority to amend E.O. 12866 to include the additional agencies. However, President Trump never amended the order, nor has President Biden.

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.[77] While the PRA is not a rulemaking statute per se, many regulations include information collections (such as financial disclosure requirements), and the PRA gives OIRA a significant amount of authority over this aspect of agency activities.

Cost-Benefit Analysis

Independent regulatory 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 for "economically significant" rules.[78] 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, and superfluous (when Congress has already required the agency to prescribe rules), and to make rules vulnerable to legal challenge.[79] Of particular relevance to the issue of agency independence, cost-benefit requirements may allow for greater executive influence (if OIRA review of the analysis is required) or judicial influence over the rulemaking process (for example, if a rule were to be challenged in court on cost-benefit grounds).[80]

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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. However, Section 1023 of P.L. 111-203 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 deliberation, the regulation may be set aside by a vote of at least two-thirds of the members of FSOC.

[76] U.S. Department of Justice, Office of Legal Counsel, "Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies," October 8, 2019, https://www.justice.gov/olc/opinion/extending-regulatory-review-under-executive-order-12866-independent-regulatory-agencies.

[77] 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. This archived report is available to congressional clients from the authors.

[78] "Economically significant" rules are defined in Section 3(f)(1) of E.O. 12866. For more information on the E.O.'s cost-benefit analysis, see CRS In Focus IF12058, *Cost-Benefit Analysis in Federal Agency Rulemaking*, by Maeve P. Carey.

[79] For a discussion of the pros and cons of cost-benefit analysis in rulemaking, see CRS Report R44813, *Cost-Benefit Analysis and Financial Regulator Rulemaking*, by David W. Perkins and Maeve P. Carey.

[80] Better Markets, an interest group, has identified three recent rules issued by financial regulators that have been (continued...)

Although the federal financial regulators are not subject to the cost-benefit analysis requirement under E.O. 12866, they are sometimes subject to more narrow statutory analytical requirements to consider various economic impacts of their rules.[81] Some have proposed extending cost-benefit requirements to additional agencies or expanding their analytical requirements.

OIRA Review of "Major" Rules Under the Congressional Review Act

Although OIRA does not review independent regulatory agencies' rules pursuant to E.O. 12866, in 2019, the Trump Administration changed its interpretation of a provision of the Congressional Review Act (CRA) in a manner that increased the potential for OIRA influence over independent regulatory agencies' rules.[82] Specifically, the change in interpretation called for more direct OIRA involvement with independent regulatory agency rulemaking.

Although the relationship between OIRA and agencies in rulemaking is governed primarily by the aforementioned executive order and not by statute, under the CRA, Congress assigned OIRA the task of determining what rules are "major" for *all* agencies, including IRCs.[83] Until 2019, OIRA appears to have deferred to independent regulatory agencies' own determinations of whether their rules were major.[84] Under the terms of a memorandum that OMB issued in April 2019, however, OIRA would be making the determination itself, rather than relying on those agencies' determinations.[85] To assist with making the determination, the memorandum also required agencies to conduct and submit to OIRA an "analysis with each rule sufficient to allow OIRA to determine whether the rule is major under the criteria of Section 804(2) [of the CRA]."[86]

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*, http://ourfinancialsecurity.org/blogs/wp-content/ourfinancialsecurity.org/uploads/2012/05/DENNIS-KELLEHER-PPT.pdf.

[81] For example, requirements in current law related to cost-benefit analysis that apply to all the federal financial regulators include the PRA (described above), which requires agencies to estimate the paperwork burden expected to result from regulations. The Regulatory Flexibility Act (5 U.S.C. §§601-612) requires agencies to estimate the impact of proposed regulations on "small entities," such as small businesses or small financial institutions. The banking regulators are required under the Financial Institutions Regulatory Improvement Act (12 U.S.C. §4802(a)) to 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." In addition, certain statutory provisions related to cost-benefit analysis apply to individual financial regulators. According to Title 7, Section 15(a), of the *U.S. Code*, "Before promulgating a regulation … the (CFTC) shall consider the costs 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" and "the impact any [regulation] would have on competition," forbidding rules that "would impose a burden on competition not necessary or appropriate." When prescribing a regulation, the CFPB "shall consider the potential costs and benefits to consumers and (consumer credit providers) (12 U.S.C. §5512(b))," including the potential for reduced access to consumer financial products and the impact on small depository institutions and rural consumers.

[82] For more information on this change, see CRS Insight IN11122, *OMB Issues New CRA Guidance, Potentially Changing Relationship with Independent Agencies*, by Maeve P. Carey.

[83] 5 U.S.C. §804(2). Under the CRA, if a rule is "major," its effective date must be delayed at least 60 days (5 U.S.C. §801(a)(3)), and the Comptroller must write a report to Congress on the rule (5 U.S.C. §801(a)(2)(A)). Rules are subject to the CRA regardless of whether they are major.

[84] Cass R. Sunstein, "Trump White House Seeks New Power Over Agencies," *Bloomberg*, April 23, 2019.

[85] Russell T. Vought, acting director, OMB, "Guidance on Compliance with the Congressional Review Act" (M-19-14), memorandum to the heads of executive departments and agencies, April 11, 2019, https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf.

[86] Ibid, p. 5.

To date, no information about the memorandum's implementation appears to be publicly available.[87] As such, the degree to which this new review process has resulted in changes to the independent regulatory agencies' independence from OIRA for writing and issuing regulations is difficult to discern.

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).[88] 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.

Congressional Review Act

When Congress disagrees with an agency's rulemaking, Congress can use its general legislative power to pass new legislation that would alter, reverse, or supersede the policy established by the rule. One way for Congress to do this is by using the Congressional Review Act, which created a disapproval mechanism for Congress to overturn agency rules or guidance.[89] The CRA requires

[87] Although it was issued during the Trump Administration, the memorandum does not appear to have been repealed by the Biden Administration.

[88] Leaders of executive branch agencies, including independent regulatory agencies, are sometimes slow to respond to such congressional requests. In such cases, congressional committees have employed a range of enforcement mechanisms. See "Enforcement and Reluctant Witnesses" in CRS Report R47288, *Statutory Testimony Requirements: Background and Issues for Congress*, by Ben Wilhelm.

[89] 5 U.S.C. §§801 et seq. For an overview of the CRA, see CRS In Focus IF10023, *The Congressional Review Act (CRA): A Brief Overview*, by Maeve P. Carey and Christopher M. Davis; and CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis. Notably, the CRA uses (continued...)

agencies to submit their rules to GAO and Congress before they can take effect.[90] Once a rule is received, a set of time periods becomes available during which Congress can consider a joint resolution of disapproval under fast-track procedures to overturn the rule. The primary advantage of using the CRA is these fast-track procedures, particularly in the Senate, where the measure cannot be filibustered. Like regular legislation, both chambers of Congress must pass a CRA joint resolution of disapproval and the President must sign it, or Congress may override the President's veto. If a rule is overturned using the CRA, it is immediately taken out of effect, it is to be treated as though it had never been in effect, and the agency is prohibited from reissuing a rule in "substantially the same form" unless Congress authorizes a substantially similar rule in statute.[91]

To date, a total of 20 agency rules have been overturned using the CRA, including four rules that were issued by the financial regulators.[92] Congress has considered further expanding its role in the rulemaking process (see the section below).

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.[93] 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.[94] All of the federal financial regulators are subject to GAO audits and investigations and

a very broad definition of *rule* that can include agency guidance documents. For more information on the scope of the CRA, see CRS Report R45248, *The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress*, by Valerie C. Brannon and Maeve P. Carey.

[90] 5 U.S.C. §801(a)(1)(A).

[91] 5 U.S.C. §801(b), §801(f).

[92] For a list of overturned rules, see the Appendix in CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

[93] 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 of November 21, 2013*, by Valerie Heitshusen.

[94] The Fed's inspector general is also responsible for the CFPB. For more information on the role of inspectors general, see CRS Report R45450, *Statutory Inspectors General in the Federal Government: A Primer*, by Ben Wilhelm.

are regularly audited or investigated by GAO. Some agencies (such as the CFPB, FHFA, and SEC) are subject to annual financial audits by GAO.[95]

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 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.[96]

The Federal Reserve has additional statutory restrictions, in recognition of the unique insulation of its monetary policymaking from congressional influence. 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. (For more information, see CRS Report R46497, *Authorizations and the Appropriations Process*, by James V. Saturno.)

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.[97] 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.[98]

[95] For the CFPB, this is required by Title 12, Section 5497(a)(5), of the *U.S. Code*. For the FHFA, this is required by Section 4516(h)(2). GAO is required to audit the FDIC's Deposit Insurance Fund (12 U.S.C. §1827).

[96] 31 U.S.C. §714.

[97] 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.

[98] The SEC was given some budgetary autonomy by Section 991 of the Dodd-Frank Act which created a Reserve Fund (continued...)

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 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,"[99] 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."[100] 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).[101]

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. The CFPB's funding is transferred from the Federal Reserve's revenues, an arrangement that is currently subject to a court challenge.[102]

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

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."

[99] 12 U.S.C. §16.

[100] 12 U.S.C. §5497.

[101] In addition to the funding through the Federal Reserve, Section 1017 of the Dodd-Frank Act authorized the CFPB to request supplemental appropriations until 2014. The CFPB did not actually request such appropriations.

[102] See CRS Legal Sidebar LSB10891, *Fifth Circuit: CFPB's Funding Authority is Unconstitutional*, by Sean M. Stiff and David H. Carpenter.

shortfalls (caused by the resolution of failing financial institutions, for example).[103] 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.[104]

Table 5.Financial Regulatory Agency Funding

Regulator	Agency Spending ($mil/yr)	Subject to Annual Appropriations/Periodic Reauthorization	Primary Revenue Source
Commodity Futures Trading Commission	$365 (FY2023; P.L. 117-328)	Yes/Yes, latest authorization expired Sept. 30, 2013.	Treasury general fund per congressional appropriation.
Consumer Financial Protection Bureau	$653 (FY2023)	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 do so.
Federal Deposit Insurance Corporation	$2,409 (CY2023)	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	$338 (FY2022)	No/No	Fees and assessments on regulated institutions. Amounts determined by FHFA.
Federal Reserve	$8,459 (CY2022)	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	$360 (CY2023)	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	$1,768 (FY2023)	No/No	Fees on regulated institutions. Amounts determined by OCC.
Securities and Exchange Commission	$2,210 (FY2023)	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 and SEC appropriated amounts from P.L. 117-328; CFPB, *Annual Performance Plan and Report, and Budget Overview,* p. 8, https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy23.pdf; FDIC, *FDIC Board Approves 2023 Operating Budget*, https://www.fdic.gov/news/press-releases/2022/pr22084.html; FHFA, FY2022 Performance and Accountability Report, p. 24, https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA-2022-PAR.pdf; Federal Reserve, press release, January 13, 2023, https://www.federalreserve.gov/newsevents/pressreleases/other20230113a.htm; NCUA, *Board Approves NCUA*

[103] 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).

[104] For more, see CRS Insight IN12081, *Why Is the Federal Reserve Operating at a Loss?*, by Marc Labonte.

2023–2024 Budget, p. 45, https://ncua.gov/newsroom/press-release/2022/board-approves-ncua-2023-2024-budget-issues-proposed-rule-financial-innovation; OCC, *Congressional Budget Justification FY2024*, https://home.treasury.gov/system/files/266/25.-OCC-FY-2024-CJ.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.

Selected Legislation During the 118th Congress

Recent Congresses have considered legislation that would alter the structure and design of some of the federal financial regulators. During the 118th Congress, the following legislation has seen congressional action:

- H.R. 2798, ordered to be reported in the nature of a substitute by the House Financial Services Committee on April 26, 2023, would, among other things, change the CFPB's leadership structure from a single director to a board, make the CFPB subject to the appropriations process, and create an Office of Economic Analysis within the CFPB and require it to perform cost-benefit analyses of CFPB rules.
- H.R. 2798, ordered to be reported in the nature of a substitute by the House Financial Services Committee on April 26, 2023, would, among other things, provide the CFPB with its own inspector general. (The CFPB currently shares an inspector general with the Fed.)
- H.R. 277, passed by the House on June 14, 2023, would require affirmation via an act of Congress before a "major" regulation issued by any agency (including independent federal financial regulators), as defined by the bill, goes into effect. The bill would also require rules already in effect to be approved by Congress.
- H.R. 3556, ordered to be reported in the nature of a substitute on May 24, 2023, by the House Financial Services Committee, would enhance reporting requirements, testimony requirements, and transparency for the banking regulators and FSOC.
- S. 2190, reported by the Senate Banking, Housing, and Urban Affairs Committee on June 22, 2023, would, among other things, enhance bank regulators' reporting requirements and inspector general oversight related to large bank failures and supervision.

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 OCC (1863), 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.[105] Finally, Congress could elect to assess the degree to which the agency's operations are subject to governmental checks and balances.

[105] 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," *CESifo Economic Studies*, vol. 49, no. 2 (2003), p. 259. 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, http://www.princeton.edu/~pcglobal/conferences/IPES/papers/donze_S130_1.pdf.

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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