

# ENHANCING THE REGULATORY PROCESS FOR INTERNATIONAL STANDARD-SETTING BODIES



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# **Enhancing the Regulatory Process for International Standard-Setting Bodies**

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The Committee is an independent 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations. The Committee's membership includes thirty-five leaders drawn from the finance, business, law, accounting, and academic communities. The Committee Co-Chairs are R. Glenn Hubbard, Dean of Columbia Business School, and John L. Thornton, Chairman of the Brookings Institution. The Committee's President is Hal S. Scott, Emeritus Nomura Professor of International Financial Systems at Harvard Law School and President of the Program on International Financial Systems.

Founded in 2006, the Committee undertook its first major report at the request of the incoming U.S. Secretary of the Treasury, Henry M. Paulson. Over ten years later, the Committee's research continues to provide policymakers with an empirical and non-partisan foundation for public policy.



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## Executive Summary<sup>1</sup>

### A. Background

International standard-setting bodies, specifically the Basel Committee on Banking Supervision (the “**Basel Committee**”), the Financial Stability Board (the “**FSB**”), the International Association of Insurance Supervisors (the “**IAIS**”), and the International Organization of Securities Commissions (“**IOSCO**”), play a critical role in the regulation of the global financial system. These bodies develop regulatory standards on issues ranging from capital requirements for banking institutions to the designation of global systemically important financial institutions.

U.S. regulators, including the Federal Reserve (the “**Fed**”), U.S. Treasury (the “**Treasury**”), Office of the Comptroller of the Currency (the “**OCC**”), Federal Deposit Insurance Corporation (the “**FDIC**”), U.S. Securities and Exchange Commission (the “**SEC**”), and U.S. Commodity Futures Trading Commission (the “**CFTC**”), are each members of at least one of these bodies and are expected to implement international standards through domestic regulation. The adequacy of the regulatory *process* used by the international standard-setting bodies is therefore of fundamental importance to domestic regulation, especially given the involvement of such bodies in critical aspects of financial-market regulation after the 2007-2008 global financial crisis.

The Committee on Capital Markets Regulation’s (the “**Committee**”) report analyzes three key attributes of the international standard-setting process: (1) *transparency*; (2) *public participation*; and (3) *cost-benefit analysis*. These attributes have been espoused by the Organization for Economic Cooperation and Development (the “**OECD**”) and the European Union (the “**EU**”). Randal Quarles, the new Chair of the FSB, noted in a February 2019 speech that “[standard setters] have a responsibility to seek input from and to provide information about our deliberations and actions” to the public and “[e]veryone around the world should understand that we only make recommendations once we have gathered and considered all points of view.”

Despite the positive developments at the FSB and IOSCO in recent months, the existing international standard-setting process has room for substantial improvement. For example, the right of the public to provide input on international standards is not guaranteed by the standard-setting bodies and cost-benefit analyses are not routinely published before standards are finalized. The Committee report proceeds in three parts. Part I describes the missions of the international standard-setting bodies, how they are organized, and the processes that they use to develop standards. Part II evaluates how the international standard-setting bodies’ processes diverge from the domestic regulatory processes in the United States and other national regulators. Part III provides recommendations for enhancing the international standard-setting bodies’ regulatory processes.

### B. The International Standard-Setting Bodies

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The international standard-setting bodies are empowered to adopt standards to achieve their mission and objectives and their member states are expected to implement those standards domestically. The international standard-setting bodies generally operate on a consensus basis when adopting standards. The day-to-day work of developing standards is carried out by working groups and committees that are composed of representatives from member states and full-time staff. While none of the standard-setting bodies has enforcement powers over its members, they exert other informal mechanisms to encourage compliance.

Part I of the report examines three critical characteristics of the standard-setting process: (1) transparency; (2) public participation; and (3) the use of cost-benefit analyses.

With respect to transparency, the report finds that the public is not fully informed about the proposals that are under consideration at the international standard-setting bodies or the existence of all working groups or committees that draft proposals, or which national authorities are participating in those groups. Second, the meetings of the decision-making bodies, including the committees, working groups, and task forces, are not required by the organizational or policy documents of the standard-setting bodies to be open to the public. And, in practice, they are not open to the general public, either in person or by webcast. Third, the international standard-setting bodies do not publish or disclose minutes, transcripts, or agendas of member meetings, including meetings of committees, working groups, or task forces.

As to public participation, international standard-setting bodies generally provide for “public consultations” about proposed standards and principles. However, their notice-and-comment procedures are limited in several respects. Standard-setting bodies retain significant discretion about when to seek public comment; when public input is sought it often occurs late in the standard adoption process; and the standard-setting bodies are not always required to consider or respond to the public comments that they receive.

Finally, the Basel Committee, FSB, and IAIS generally do not require a cost-benefit analysis prior to the adoption of standards. Moreover, in practice, these standard setters do not consistently publish cost-benefit analyses of their standards or guidelines. And where they have published such analyses (often referred to as “quantitative impact” studies or assessments), those assessments have generally been published *after* the proposal is closed for public comment.

### ***C. Procedural Requirements in the United States and Other Jurisdictions***

Part II describes the regulatory process in the United States, the United Kingdom and the European Union. Such processes can provide examples of how the international standard-setting bodies’ processes can be improved or reformed. In addition, if international standard-setting bodies adopt standards that member states are expected to implement with less transparency, public input, and cost-benefit analysis than at the domestic level, then the practical effect is that the general public is deprived of processes that they expect to be afforded. Even if regulators employ domestic processes to adopt rules implementing standards, the underlying standards themselves may not have been subject to those processes.

In the United States, transparency in the development of agency regulations is fostered by: (1) the Government in Sunshine Act of 1976; (2) the Freedom of Information Act of 1966; and (3) the Federal Advisory Committee Act of 1972. These statutory provisions impose open meeting requirements, allow the public access to agency records, and disclose the existence and workings of certain advisory committees or working groups. The requirements stand in stark contrast to international standard-setting body processes whereby meetings are closed to the public, votes are not published, minutes and transcripts are not made publicly available, and the composition of committees and working groups are not disclosed. In addition, the public is provided extensive opportunity to comment on proposed regulations in the United States, because the Administrative Procedure Act of 1946 requires U.S. regulatory agencies to provide the public with a proposed rule before it is adopted, accept the submission of public comments, and take those public comments into consideration in adopting a final rule.

In the United Kingdom and the European Union, the Committee finds that there is also generally a commitment to transparency, public participation, and the use of cost-benefit analysis in the adoption of regulatory requirements. For example, in the United Kingdom, proposed legislation and rules are made publicly available, the public is consulted through hearings and has the opportunity to submit written comments. Cost-benefit analysis is also a critical aspect of regulatory development and required in certain circumstances by the Financial Services Act of 2012. Moreover, the European Union is committed to generally transparent processes involving public input and cost-benefit analysis under its Better Regulation Guidelines and the authorizing legislation creating the European Banking Authority (the “**EBA**”) and the European Securities and Markets Authority (“**ESMA**”).

#### *D. Policy Reforms at the International Standard-Setting Bodies*

Part III sets forth specific policy recommendations that the international standard-setting bodies should adopt to further improve their processes with regards to transparency, public participation and cost-benefit analysis. The Committee also sets forth recommendations for how U.S. regulators can enhance international standard-setting processes. More detailed discussions of each recommendation can be found in Part III.

##### *1. Enhancing Transparency*

- Each standard-setting body should fully disclose on its website all existing committees, working groups, task forces, and similar groups, the national regulatory bodies that serve on each group, and a point of contact for the committee or working group.
- Each standard-setting body should disclose the substantive projects that are being worked on within the body.
- Each standard-setting body should provide public notice and publish a list of topics to be covered at any meeting of the decision-making organization, and any committee, working group, or task force working on standards that would be expected to be implemented by members if finalized.

- Each standard-setting body should increase the transparency about the discussions held at meetings of the body's decision-making organization, and committees, working groups, task forces, or similar groups.

## *2. Enhancing Opportunities for Public Input*

- Each standard-setting body should adopt policies requiring that it seek public comment on any proposed standards or other policy that is expected to be implemented by members if finalized.
- Each standard-setting body should include an explanation of how the body considered the comments received during the consultation period as part of the final release of any standard, principles, guidelines, or other policy expected to be implemented by its members.
- Each standard-setting body should seek public input prior to the publication of proposed standards or other policies expected to be implemented by members.

## *3. Enhancing the Use of Cost-Benefit Analysis*

- Each standard-setting body should conduct a cost-benefit analysis of any standard or policy expected to be implemented by its members and that analysis should be published with the proposed standard and subject to public notice and comment.
- The standard-setting bodies should conduct ex-post cost-benefit analyses of existing standards adopted after the financial crisis and work to identify and reduce conflicting or duplicative standards as part of those analyses.

## *4. How U.S. Regulators Can Enhance the Standard-Setting Process*

- U.S. regulators that are members of a standard-setting body should publish the proposed international standards, as well as the agency's views on the proposal, for comment in the United States.
- U.S. regulators should advocate for enhanced transparency, enhanced opportunity for public comment and enhanced cost-benefit analysis within the standard-setting bodies themselves.

## I. The International Standard-Setting Bodies

The Committee report concerns itself with four international standard-setting bodies most relevant to the global financial system and markets: the Basel Committee, FSB, IAIS, and IOSCO.<sup>2</sup> This part of the report will first describe the missions of these standard-setting bodies, the legal effect of their standards, and their membership. Second, it will explain each standard-setter's process for adopting standards. Third, it will examine process-related issues, including whether meetings are open to the public, the extent to which they are required to use cost-benefit analyses in developing standards, and the role the public plays in commenting on proposed standards.

### A. *The Missions of the International Standard-Setting Bodies*

Each of the international standard-setting bodies has a distinct mission and adopts standards and principles to achieve its mission. Although none of the standard-setting bodies has a formal compliance mechanism to penalize members that do not comply with their standards, these bodies exert pressure through reviews and evaluations of members' compliance with these standards. Consequently, regulators that are members of these bodies are often viewed as "beholden" to their decisions<sup>3</sup> as "regulatory consensus has been formed, trade-offs have been negotiated, commitments have been made, global understandings have been reached, with little room" for national regulators to deviate.<sup>4</sup> Importantly, each standard-setting body has adopted standards and principles central to the regulation of financial institutions and markets since the 2007-2008 financial crisis.

#### 1. *The Basel Committee*

The Basel Committee was established in 1974 by the central bank governors from the then-G-10 countries and is hosted by the Bank for International Settlements ("BIS").<sup>5</sup> While originally its membership consisted of representatives from 13 developed countries, almost exclusively in Europe and North America,<sup>6</sup> today, it has greater geographical and economic diversity and is

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<sup>2</sup> There are other international standard-setting bodies, such as the Committee on Payments and Market Infrastructure (the "CPMI"), which monitors and makes recommendations "about the safety and efficiency of payment, clearing, settlement and related agreements," that are relevant to the financial system. *CPMI – overview*, BANK FOR INT'L SETTLEMENTS, <https://www.bis.org/cpmi/about/overview.htm?m=3%7C16> (last visited Mar. 28, 2019). We do not focus on the CPMI in this Committee report, however, because the four standard-setting bodies described have a more direct impact on a greater proportion of the Committee's membership. Nevertheless, the issues of transparency, accountability, public participation, and cost-benefit analysis discussed in this Committee report are equally applicable to the CPMI.

<sup>3</sup> Jeremy Newell, *Rethinking the Internationalization of U.S. Bank Regulation*, THE CLEARING HOUSE PAYMENTS COMPANY L.L.C., <https://www.theclearinghouse.org/banking-perspectives/2016/2016-q2-banking-perspectives/articles/rethinking-bank-regulation-internationalization> (last visited Mar., 5, 2019).

<sup>4</sup> ALISON TOUHEY, AMERICAN BANKERS ASSOC., COMMENTS IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING - *NET STABLE FUNDING RATIO: LIQUIDITY RISK MEASUREMENT STANDARDS AND DISCLOSURE REQUIREMENTS* (Aug. 5, 2016).

<sup>5</sup> *History of the Basel Committee*, BANK FOR INT'L SETTLEMENTS, <https://www.bis.org/bcbs/history.htm?m=3%7C14%7C573%7C76> (last updated Apr. 14, 2018).

<sup>6</sup> At the time of the Basel Committee's first membership expansion in 2009 its membership included representatives from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland,

comprised of 45-member organizations from 28 jurisdictions.<sup>7</sup> Each member is a central bank or authority responsible for banking supervision in its jurisdiction.<sup>8</sup> The United States has four agencies with representatives on the 45-member Basel Committee—the Fed, Federal Reserve Bank of New York, FDIC, and OCC.<sup>9</sup>

The Basel Committee’s charter provides that it is to focus on harmonizing global prudential banking regulation to enhance financial stability.<sup>10</sup> It is the primary standard setter for the prudential regulation of banks<sup>11</sup> and is best known for its bank capital and liquidity standards, the most recent of which are part of what is known as the Basel III.<sup>12</sup> It also has worked jointly with IOSCO on adopting standards for margin requirements for non-centrally cleared derivatives, which apply to “financial firms and systemically important non-financial institutions.”<sup>13</sup>

To effect its mission, the Basel Committee publishes four different types of documents: standards, guidelines, sound practices, and implementation reports.<sup>14</sup> Standards are regulations that are expected to be implemented by members. Guidelines elaborate on and supplement standards to assist with implementation.<sup>15</sup> Sound practices documents describe observed global practices in banking and bank supervision. Implementation reports are the result of the BCBS’ monitoring of member implementation.<sup>16</sup> The Basel Committee also publishes quantitative impact studies in connection with the adoption of standards<sup>17</sup> and various reports about issues in banking regulation that may be relevant to regulators.<sup>18</sup> While all publications of international standard-setting bodies are important, this report primarily focuses on those that members are expected to implement. For

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the United Kingdom, and the United States. Press Release, Bank for Int’l Settlements, Expansion of membership announced by the Basel Committee (Mar. 13, 2009), <https://www.bis.org/press/p090313.htm>.

<sup>7</sup> *Basel Committee membership*, BANK FOR INT’L SETTLEMENTS, <https://www.bis.org/bcbs/membership.htm> (last updated Dec. 30, 2016). The countries and regions represented at the Basel Committee are: Argentina, Australia, Belgium, Brazil, Canada, China, European Union, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* In addition to the 45 members, the Basel Committee also includes “observer” representatives from other national bodies from Chile, Malaysia, and the United Arab Emirates, as well as representatives from other international supervisory groups and international agencies, including: the Bank for International Settlements (the BCBS’ institutional host organization), the European Commission, the European Banking Authority, and the International Monetary Fund (IMF).

<sup>10</sup> *Basel Committee Charter*, BANK FOR INT’L SETTLEMENTS, <https://www.bis.org/bcbs/charter.htm> (last updated June 5, 2018).

<sup>11</sup> *The Basel Committee – overview*, BANK FOR INT’L SETTLEMENTS, <https://www.bis.org/bcbs/index.htm> (last visited March 5, 2019).

<sup>12</sup> *Basel III: international regulatory framework for banks*, BANK FOR INT’L SETTLEMENTS, <https://www.bis.org/bcbs/basel3.htm?m=3%7C14%7C572> (last visited Dec. 5, 2018).

<sup>13</sup> BANK FOR INT’L SETTLEMENTS, MARGIN REQUIREMENTS FOR NON-CENTRALLY CLEARED DERIVATIVES (Mar. 2015).

<sup>14</sup> *The Basel Committee’s publication types*, BANK FOR INT’L SETTLEMENTS, [https://www.bis.org/bcbs/about/work\\_publication\\_types.htm](https://www.bis.org/bcbs/about/work_publication_types.htm) (last visited Dec. 5, 2018).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Policy development and implementation review*, BANK FOR INT’L SETTLEMENTS, [https://www.bis.org/bcbs/review\\_process.htm](https://www.bis.org/bcbs/review_process.htm) (last updated Apr. 14, 2018).

<sup>18</sup> *See, e.g.*, BANK FOR INT’L SETTLEMENTS, CYBER-RESILIENCE: RANGE OF PRACTICES (Dec. 2018).

example, in the case of the Basel Committee, members are expected to implement its published standards.

Under the Basel Committee's charter, members are "committed" to implementing Basel Committee standards in their own jurisdiction.<sup>19</sup> Although the Basel Committee has no legal authority to enforce compliance,<sup>20</sup> the Basel Committee uses informal forms of pressure to compel compliance. Specifically, it conducts regular compliance reviews through the Regulatory Consistency Assessment Programme (RCAP)<sup>21</sup> to assess the extent to which members have implemented agreed upon standards.

The Basel Committee has undertaken significant work since the financial crisis. Below is a non-exhaustive list of some of the standards it has adopted in the aftermath of the crisis.

- Core Principles for Effective Deposit Insurance Systems (published June 18, 2009);<sup>22</sup>
- Assessment Methodology for Global Systemically Important Banks (published November 4, 2011 and updated July 3, 2013);<sup>23</sup>
- Core Principles for Effective Banking Supervision (published September 14, 2012);<sup>24</sup>
- Framework for Dealing with Domestic Systemically Important Banks (published October 11, 2012);<sup>25</sup>
- The Liquidity Coverage Ratio (published January 7, 2013);<sup>26</sup>
- The Standardized Approach for Measuring Counterparty Credit Risk Exposure (published March 31, 2014);<sup>27</sup>
- Capital Requirements for Bank Exposures to Central Counterparties (published April 10, 2014);<sup>28</sup>
- Net Stable Funding Ratio (published October 31, 2014);<sup>29</sup>
- Margin Requirements for Non-Centrally Cleared Derivatives (published March 18, 2015);<sup>30</sup>

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<sup>19</sup> Basel Committee Charter, sec. 5(b), June 5, 2018, *available at Basel Committee Charter*, BANK FOR INT'L SETTLEMENTS, <https://www.bis.org/bcbs/charter.htm>.

<sup>20</sup> *Id.* at sec. 3.

<sup>21</sup> *Implementation of the Basel standards*, BANK FOR INT'L SETTLEMENTS, <https://www.bis.org/bcbs/implementation.htm> (last visited Dec. 5, 2018).

<sup>22</sup> BANK FOR INT'L SETTLEMENTS, CORE PRINCIPLES FOR EFFECTIVE DEPOSIT INSURANCE SYSTEMS (June 2009).

<sup>23</sup> BANK FOR INT'L SETTLEMENTS, GLOBAL SYSTEMICALLY IMPORTANT BANKS: ASSESSMENT METHODOLOGY AND THE ADDITIONAL LOSS ABSORBENCY REQUIREMENT (Nov. 2011).

<sup>24</sup> BANK FOR INT'L SETTLEMENTS, CORE PRINCIPLES FOR EFFECTIVE BANKING SUPERVISION (Sept. 2012).

<sup>25</sup> BANK FOR INT'L SETTLEMENTS, A FRAMEWORK FOR DEALING WITH DOMESTIC SYSTEMICALLY IMPORTANT BANKS (Oct. 2012).

<sup>26</sup> BANK FOR INT'L SETTLEMENTS, BASEL III: THE LIQUIDITY COVERAGE RATIO AND LIQUIDITY RISK MONITORING TOOLS (Jan. 2013).

<sup>27</sup> BANK FOR INT'L SETTLEMENTS, THE STANDARDISED APPROACH FOR MEASURING COUNTERPARTY CREDIT RISK EXPOSURES (Mar. 2014, rev. Apr. 2014).

<sup>28</sup> BANK FOR INT'L SETTLEMENTS, CAPITAL REQUIREMENTS FOR BANK EXPOSURES TO CENTRAL COUNTERPARTIES (Apr. 2014).

<sup>29</sup> BANK FOR INT'L SETTLEMENTS, BASEL III: THE NET STABLE FUNDING RATIO (Oct. 2014).

<sup>30</sup> BANK FOR INT'L SETTLEMENTS, MARGIN REQUIREMENTS FOR NON-CENTRALLY CLEARED DERIVATIVES (Mar. 2015).



- TLAC Holdings Standard (published October 12, 2016);<sup>31</sup>
- Finalization of Basel III Post-Crisis Reforms (published December 7, 2017);<sup>32</sup> and
- Minimum Capital Requirements for Market Risk (published January 14, 2019).<sup>33</sup>

## 2. FSB

The FSB was established in 2009 by the G-20 countries at the Pittsburgh Summit<sup>34</sup> during the global financial crisis as a successor to the Financial Stability Forum.<sup>35</sup> Since its creation, the FSB has grown from an informal organization representing 20 national jurisdictions to a formal non-profit association organized under Swiss law.<sup>36</sup> The FSB now has 68 members comprised of 58 ministries of finance, central banks, and supervisory authorities from 25 jurisdictions, as well as 10 international organizations, including the OECD, the BIS, the International Monetary Fund, the World Bank, the Basel Committee, IAIS, and IOSCO.<sup>37</sup> The United States is represented by three members (the Fed, SEC, and Treasury) at the FSB, while European nations comprise almost half of the membership.<sup>38</sup>

The FSB seeks to promote global financial stability by coordinating regulatory, supervisory, and other policies.<sup>39</sup> Most prominently, the FSB publishes vulnerabilities assessments, gauging weaknesses in the global financial system, as well as policy recommendations on discrete issues in international financial regulation, including regulating systemically important financial institutions (SIFIs), and adopting effective bank resolution procedures.<sup>40</sup>

The FSB has undertaken significant work since the financial crisis. Below is a non-exhaustive list of some of the standards it has adopted in the aftermath of the crisis.

- Principles for Sound Compensation Practices (published April 2, 2009);<sup>41</sup>

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<sup>31</sup> BANK FOR INT’L SETTLEMENTS, STANDARD: TLAC HOLDINGS (Oct. 2016).

<sup>32</sup> BANK FOR INT’L SETTLEMENTS, BASEL III: FINALISING POST-CRISIS REFORM (Dec. 2017).

<sup>33</sup> BANK FOR INT’L SETTLEMENTS, MINIMUM CAPITAL REQUIREMENTS FOR MARKET RISK (Jan. 2019, rev. Feb. 2019).

<sup>34</sup> *History of the FSB*, FIN. STABILITY BD., <http://www.fsb.org/history-of-the-fsb/> (last visited Mar. 5, 2019).

<sup>35</sup> The Financial Stability Forum was not a standard-setting body but facilitated discussion about supervision and surveillance of financial institutions.

<sup>36</sup> *History of the FSB*, *supra* note 34.

<sup>37</sup> *About the FSB*, FIN. STABILITY BD., <http://www.fsb.org/about/> (last visited Jan. 8, 2019); *FSB Members*, FIN. STABILITY BD., <http://www.fsb.org/about/fsb-members/#member> (last visited Jan. 8 2019). The national, territorial, and regional jurisdictions that are represented at the FSB are: Argentina, Australia, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Turkey, the United Kingdom, the United States, and the European Union.

<sup>38</sup> *FSB Members*, *supra* note 37.

<sup>39</sup> *Work of the FSB*, FIN. STABILITY BD., [www.fsb.org/work-of-the-fsb/](http://www.fsb.org/work-of-the-fsb/) (last visited Mar. 5, 2019).

<sup>40</sup> *Vulnerabilities Assessment*, FIN. STABILITY BD., <http://www.fsb.org/work-of-the-fsb/vulnerabilities-assessment/> (last visited Dec. 5, 2018); *Policy Development and Coordination*, FIN. STABILITY BD., <http://www.fsb.org/work-of-the-fsb/policy-development/> (last visited Dec. 5, 2018).

<sup>41</sup> FIN. STABILITY FORUM, FSF PRINCIPLES FOR SOUND COMPENSATION PRACTICES (Apr. 2, 2009).

- Annual Publication of List of Global Systemically Important Banks and Insurers (bank list first published in 2011 and insurer list first published in 2013);<sup>42</sup>
- Principles for an Effective Risk Appetite Framework (published November 18, 2013);<sup>43</sup>
- Guidance on Supervisory Interaction with Financial Institutions on Risk Culture (published April 7, 2014);<sup>44</sup>
- Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions (proposal published March 4, 2015);<sup>45</sup>
- Principles for Cross-border Effectiveness of Resolution Actions (including statements on cross-default protocols) (published November 3, 2015);<sup>46</sup>
- Total-Loss Absorbing Capacity Principles and Term Sheet (published November 9, 2015);<sup>47</sup> and
- Guiding Principles on the Temporary Funding Needed to Support the Orderly Resolution of a Global Systemically Important Bank (published August 18, 2016).<sup>48</sup>

The FSB “operates by moral suasion and peer pressure” to ensure implementation of internationally agreed-upon policies and minimum standards.<sup>49</sup> Indeed, a 2015 memo from Mark Carney to G-20 Finance Ministers and Central Bank Governors noted that the members had “agreed” to “full, consistent, and prompt” implementation of agreed to reforms. Like the Basel Committee, the FSB lacks formal enforcement mechanisms to compel members to implement its policy recommendations,<sup>50</sup> but it too uses non-legal mechanisms to exert pressure. This approach includes asking members to publish reviews of their compliance with agreed to standards.<sup>51</sup>

### 3. IAIS

The IAIS is a global standard-setting body primarily composed of insurance regulators and supervisors from more than 200 separate jurisdictions in which 97% of all insurance premiums are

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<sup>42</sup> *Global Systemically Important Financial Institutions (G-SIFIs)*, FIN. STABILITY BD., <http://www.fsb.org/work-of-the-fsb/policy-development/systematically-important-financial-institutions-sifis/global-systemically-important-financial-institutions-g-sifis/> (last visited Mar. 28, 2019).

<sup>43</sup> FIN. STABILITY BD., PRINCIPLES FOR AN EFFECTIVE RISK APPETITE FRAMEWORK (Nov. 18, 2013).

<sup>44</sup> FIN. STABILITY BD., GUIDANCE ON SUPERVISORY INTERACTION WITH FINANCIAL INSTITUTIONS ON RISK CULTURE (Apr. 7, 2014).

<sup>45</sup> FIN. STABILITY BD., ASSESSMENT METHODOLOGIES FOR IDENTIFYING NON-BANK NON-INSURER GLOBAL SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS (Mar. 4, 2015).

<sup>46</sup> FIN. STABILITY BD., PRINCIPLES FOR CROSS-BORDER EFFECTIVENESS OF RESOLUTION ACTIONS (Nov. 3, 2015).

<sup>47</sup> FIN. STABILITY BD., PRINCIPLES ON LOSS-ABSORBING AND RECAPITALISATION CAPACITY OF G-SIBS IN RESOLUTION (Nov. 9, 2015).

<sup>48</sup> FIN. STABILITY BD., GUIDING PRINCIPLES ON THE TEMPORARY FUNDING NEEDED TO SUPPORT THE ORDERLY RESOLUTION OF A GLOBAL SYSTEMICALLY IMPORTANT BANK (“G-SIB”) (Aug. 18, 2016).

<sup>49</sup> *About the FSB*, *supra* note 37.

<sup>50</sup> In fact, the charter of the FSB is an informal and nonbinding memorandum of understanding adopted by members rather than a legal form, so the FSB lacks any true formal enforcement power. DOMENICO LOMBARDI, BROOKINGS, THE GOVERNANCE OF THE FINANCIAL STABILITY BOARD (Sept. 2011).

<sup>51</sup> *Peer Reviews*, FIN. STABILITY BD., [http://www.fsb.org/what-we-do/implementation-monitoring/peer\\_reviews/](http://www.fsb.org/what-we-do/implementation-monitoring/peer_reviews/), (last visited Mar. 5, 2019).

issued.<sup>52</sup> The United States is represented at the IAIS by three members (the Fed, Treasury, and the National Association of Insurance Commissioners).<sup>53</sup>

The IAIS was established in 1994 and is the international standard-setting body responsible for developing policy related to the supervision of the insurance sector.<sup>54</sup> The mission of the IAIS is to promote globally consistent supervision of the insurance industry to benefit and protect policyholders and promote global financial stability.<sup>55</sup> The IAIS publishes policies to govern the supervision of insurance firms. Most notably, IAIS maintains “The Insurance Core Principles,” a 356-page manual that sets forth a “globally accepted framework for the supervision of the insurance sector”<sup>56</sup> and is currently in the process of adopting risk-based international insurance capital standards.<sup>57</sup>

Like the Basel Committee and the FSB, IAIS has implemented several important standards since the financial crisis. A non-exhaustive list of some of its representative work since the crisis is as follows:

- Global Systemically Important Insurers: Initial Assessment Methodology (published July 18, 2013);<sup>58</sup>
- Basic Capital Standards for Global Systemically Important Insurers (published October 23, 2014);<sup>59</sup>
- Higher Loss Absorbency Capital Requirements for Global Systemically Important Insurers (published October 5, 2015);<sup>60</sup>
- Insurance Capital Standards (field testing version published in July 2017 and updated version published for proposal in July 2018);<sup>61</sup> and
- Common Framework for the Supervision of Internationally Active Insurance Groups (work ongoing).<sup>62</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *IAIS Members*, INT’L ASSOC. OF INS. SUPERVISORS, <https://www.iaisweb.org/page/about-the-iais/iais-members> (last visited Mar. 5, 2019).

<sup>54</sup> *About the IAIS*, INT’L ASSOC. OF INS. SUPERVISORS, <https://www.iaisweb.org/page/about-the-iais/> (last visited Nov. 23, 2018).

<sup>55</sup> *Id.*

<sup>56</sup> INT’L ASSOC. OF INS. SUPERVISORS, INSURANCE CORE PRINCIPLES 5 (Nov. 2018).

<sup>57</sup> *Public Consultation: Risk-based Global Insurance Capital Standard (ICS) Version 2.0*, INT’L ASSOC. OF INS. SUPERVISORS, <https://www.iaisweb.org/page/consultations/closed-consultations/2018/ics-version-20> (draft standards were published in July 2018 and comments were due from the public by October 31, 2018).

<sup>58</sup> INT’L ASSOC. OF INS. SUPERVISORS, GLOBAL SYSTEMICALLY IMPORTANT INSURERS: INITIAL ASSESSMENT METHODOLOGY (July 18, 2013).

<sup>59</sup> Press Release, Int’l Assoc. of Ins. Supervisors, IAIS Develops Basic Capital Requirements for Global Systemically Important Insurers (Oct. 23, 2014), <https://www.iaisweb.org/page/news/press-releases//file/34623/23-october-2014-iais-develops-basic-capital-requirements-for-global-systemically-important-insurers>.

<sup>60</sup> Press Release, Int’l Assoc. of Ins. Supervisors, IAIS Develops Higher Loss Absorbency (HLA) Requirement for Global Systemically Important Insurers (Oct. 5, 2015), <https://www.iaisweb.org/page/news/press-releases>.

<sup>61</sup> *Insurance Capital Standard (ICS)*, INT’L ASSOC. OF INS. SUPERVISORS, <https://www.iaisweb.org/page/supervisory-material/insurance-capital-standard> (last visited Mar. 28, 2019).

<sup>62</sup> *ConFrame*, INT’L ASSOC. OF INS. SUPERVISORS, <https://www.iaisweb.org/page/supervisory-material/common-framework> (last visited Mar. 28, 2019).

Members of IAIS are expected to implement the IAIS policies, which members commit to when joining the body.<sup>63</sup> Like the other international standard-setting bodies, IAIS subjects its members to a periodic formal review process that evaluates the extent to which members have implemented the organization's principles.<sup>64</sup>

#### 4. IOSCO

IOSCO's was established in 1983 and its membership regulates more than 95% of the world's securities markets in 115 jurisdictions, with diversity across both geographic regions and stages of capital markets development.<sup>65</sup> The organization has 129 full members. These members are either national securities commissions or governmental bodies with authority over securities or derivatives markets.<sup>66</sup> The United States is represented at IOSCO by two members (the CFTC and SEC).<sup>67</sup>

IOSCO is an organization that sets standards for the regulation of the securities markets intended to foster cooperation in "developing, implementing and promoting adherence to internationally recognized and consistent standards of regulation, oversight and enforcement," to "enhance investor protection," and encourage the exchange of information.<sup>68</sup> IOSCO publishes principles on various matters. For example, in May 2017, IOSCO published a release entitled "Objectives and Principles of Securities Regulation" outlining 38 adopted principles related to protecting investors, ensuring fair, efficient and transparent markets, and reducing systemic risk.<sup>69</sup>

In addition, post-financial crisis, IOSCO has published principles on topics like financial benchmarks and financial market infrastructure. A non-exhaustive list of principles adopted by IOSCO after the financial crisis are:

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<sup>63</sup> Int'l Assoc. of Ins. Supervisors By-Laws, arts. 6(6)(b)–(c), Nov. 8, 2018, *available at* <https://www.iaisweb.org/page/about-the-iais/by-laws>.

<sup>64</sup> INT'L ASSOC. OF INS. SUPERVISORS, IAIS PROCESSES FOR POLICY DEVELOPMENT AND IMPLEMENTATION REVIEW (Nov. 2015), *available at* <https://www.iaisweb.org/page/about-the-iais/policies-and-procedures//file/57536/iais-processes-for-policy-development-and-implementation-review-published-november-2015>.

<sup>65</sup> *About IOSCO*, INT'L ORG. OF SEC. COMM'NS, [https://www.iosco.org/about/?subsection=about\\_iosco](https://www.iosco.org/about/?subsection=about_iosco) (last visited Mar. 5, 2019) (Securities regulators in emerging markets make up more than 75% of IOSCO's membership).

<sup>66</sup> IOSCO refers to these members as "ordinary members." It also has two other categories of members, which do not have a vote on the adoption of principles. These are "associate members" and "affiliate members." Associate members are government regulatory bodies (or supranational or subnational regulatory bodies) that are not signatories to IOSCO's Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and Exchange of Information. Affiliate members are self-regulatory organizations, exchanges, financial market infrastructures, or international bodies that are not government organizations but have an interest in securities regulation.

<sup>67</sup> *Ordinary Members of IOSCO*, INT'L ORG. OF SEC. COMM'NS, <https://www.iosco.org/about/?subsection=membership> (last visited Mar. 5, 2019).

<sup>68</sup> Int'l Org. of Sec. Comm'ns Charter, preamble at p. 2, *available at* [https://www.iosco.org/library/by\\_laws/pdf/IOSCO-By-Laws-Section-1-English.pdf](https://www.iosco.org/library/by_laws/pdf/IOSCO-By-Laws-Section-1-English.pdf).

<sup>69</sup> INT'L ORG. OF SEC. COMM'NS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (May 2017), *available at* <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>.

- Principles for the Supervision of Financial Conglomerates (published September 24, 2012);<sup>70</sup>
- Principles for Financial Market Infrastructure (published December 14, 2012);<sup>71</sup>
- Principles for the Regulation of Exchange Traded Funds (published June 24, 2013);<sup>72</sup>
- Principles for Financial Benchmarks (published July 17, 2013);<sup>73</sup>
- Margin Requirements for Non-Centrally Cleared Derivatives (published March 18, 2015); and<sup>74</sup>
- Objectives and Principles of Securities Regulation (published May 31, 2017).<sup>75</sup>

IOSCO's bylaws specify that members are not legally bound to implement or adopt IOSCO principles.<sup>76</sup> However, members face reputational risk in not complying with the principles. IOSCO conducts reviews of members' compliance with the principles, and IOSCO's principles are used in the IMF and World Bank's joint Financial Sector Assessment Programs that assess, among other things, the quality of macroprudential and microprudential regulatory frameworks and the supervision of financial markets in individual countries.<sup>77</sup>

### ***B. Decision-Making Structure***

It is important to understand how decisions are made within the bodies for two reasons. First, the standard-setting bodies largely operate by consensus, which provides a source of pressure on members to implement agreed to standards. Second, it identifies points of the process where transparency and public input are needed.

In general, the standard-setting bodies adopt standards through consensus achieved among all of the members through a plenary-type body. The standards themselves are generally first developed through smaller committees, specialized working groups, and task forces. The membership of each of the standard-setting bodies and their committees and working groups are supported by professional staff known as a "Secretariat," which range in size from about 30 to 35 individuals depending on the particular standard-setting body.<sup>78</sup> In many instances, the

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<sup>70</sup> BANK FOR INT'L SETTLEMENTS, PRINCIPLES FOR THE SUPERVISION OF FINANCIAL CONGLOMERATES (Sept. 2012).

<sup>71</sup> INT'L ORG. OF SEC. COMM'NS AND BANK OF INT'L SETTLEMENTS, PRINCIPLES FOR FINANCIAL MARKET INFRASTRUCTURES (Apr. 2012).

<sup>72</sup> INT'L ORG. OF SEC. COMM'NS, PRINCIPLES FOR THE REGULATION OF EXCHANGE TRADED FUNDS FINAL REPORT (June 2013).

<sup>73</sup> INT'L ORG. OF SEC. COMM'NS, PRINCIPLES FOR FINANCIAL BENCHMARKS FINAL REPORT (July 2013).

<sup>74</sup> INT'L ORG. OF SEC. COMM'NS AND BANK OF INT'L SETTLEMENTS, MARGIN REQUIREMENTS FOR NON-CENTRALLY CLEARED DERIVATIVES (Mar. 2015).

<sup>75</sup> INT'L ORG. OF SEC. COMM'NS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (May 2017).

<sup>76</sup> Int'l Org. of Sec. Comm'ns By-Laws, part 15, available at [https://www.iosco.org/library/by\\_laws/pdf/IOSCO-By-Laws-Section-1-English.pdf](https://www.iosco.org/library/by_laws/pdf/IOSCO-By-Laws-Section-1-English.pdf).

<sup>77</sup> *About IOSCO*, supra note 65.

<sup>78</sup> The FSB Secretariat is comprised of 33 individuals, IOSCO 29, and IAIS 35. FIN. STABILITY BD., 4<sup>TH</sup> ANNUAL REPORT 30 (Dec. 27, 2017); INT'L ORG. OF SEC. COMM'NS, ANNUAL REPORT 2017 at 82; INT'L ASSOC. OF INS. SUPERVISORS, IAIS ANNUAL REPORT 2017 at 73. We cannot find data on the size of the Basel Committee's Secretariat. The annual expenses for the FSB, IOSCO and IAIS in their most recent annual reports were: 13.5 million Swiss francs, 4.5 million Euros, and 8.6 million Swiss francs. FIN. STABILITY BD., 4<sup>TH</sup> ANNUAL REPORT 27 (Dec. 27, 2017); INT'L ORG. OF SEC. COMM'NS, ANNUAL REPORT 2017 at 76; INT'L ASSOC. OF INS. SUPERVISORS, IAIS ANNUAL REPORT 2017 at 61. We could not find data regarding the Basel Committee on Banking Supervision.

composition of the committees, task forces, and working groups is not publicly disclosed. Details about the practices of each standard-setting body are set forth below.

The Basel Committee's ultimate decision-making body is known as the "Committee" and all members are represented on the Committee.<sup>79</sup> This Committee approves standards by consensus,<sup>80</sup> a term which is undefined by the Basel Committee or any other international standard-setting body. In general, consensus means wide agreement (though not unanimous)<sup>81</sup> and the Committee has been told by former Basel Committee staffers that a consensus typically requires the consent of all but one member. The Basel Committee conducts policy development through five standard-setting and research-focused subcommittees known as "groups." These groups are the Policy Development Group, Supervision and Implementation Group, Basel Consultative Group, Macroprudential Supervision Group, and the Accounting Experts Group.<sup>82</sup> Furthermore, the groups have specialized working groups and task forces that work under their direction. The Basel Committee's website does not disclose which members or specific individuals serve on the various groups, task forces, or working groups.<sup>83</sup> The work that the groups focus on, known as the "work programme," is approved by the Group of Governors and Heads of Supervision, an opaque, board-like entity that oversees the Basel Committee.<sup>84</sup>

The FSB follows a similar model. FSB decisions, including the adoption of standards, are made by the "Plenary." The Plenary consists of all members and makes decisions by consensus.<sup>85</sup> The Plenary also establishes the agenda for the FSB.<sup>86</sup> A Steering Committee provides operational

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<sup>79</sup> Basel Committee Charter, *supra* note 19, art. 8.

<sup>80</sup> *Id.*, art. 8.4 (the charter does not define "consensus", but the common understanding is that the Committee typically operates by unanimity).

<sup>81</sup> *Consensus*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/consensus>.

<sup>82</sup> *Basel Committee groups*, BANK FOR INT'L SETTLEMENTS, <https://www.bis.org/bcbs/mesc.htm?m=3%7C14%7C573%7C74> (last updated June 24, 2018). The Policy Development Group develops policy to promote a sound banking system, the Supervision and Implementation Group fosters and monitors implementation of standards by members, the Basel Consultative Group engages with supervisors from jurisdictions that are not members, the Macroprudential Supervision Group monitors systemic risk and develops policies to address issues in the macroprudential supervision framework, and the Accounting Experts Group develops international accounting standards.

<sup>83</sup> The Basel Committee's website does disclose the chair of each group and notes which members participate in the Basel Consultative Group. *See Id.*

<sup>84</sup> *The Basel Committee's work programme*, BANK FOR INT'L SETTLEMENTS, [https://www.bis.org/bcbs/bcbs\\_work.htm#workprogramme](https://www.bis.org/bcbs/bcbs_work.htm#workprogramme) (last updated Jan. 14, 2019); Basel Committee Charter, *supra* note 19, art. 6. The Basel Committee provides virtually no information in the public domain about the Group of Governors and Heads of Supervision (the "GHOS"). For example, the Basel Committee website does not disclose who sits on that governing body or how it is chosen. Article 6 of the Basel Committee's Charter, which is publicly available, states that the GHOS endorses major decisions and (1) approves changes to the Basel Committee's Charter; (2) provides general direction to the Basel Committee's work program; and (3) appoints the Basel Committee's chair from its own members.

<sup>85</sup> *Organisational Structure and Governance*, FIN. STABILITY BD., <http://www.fsb.org/about/organisation-and-governance/> (last visited Nov. 27, 2018).

<sup>86</sup> *See, e.g.*, Press release, Fin. Stability Bd., FSB discusses 2018 workplan and next steps on evaluations of effects of reforms (Oct. 6, 2017), available at <http://www.fsb.org/wp-content/uploads/R061017-1.pdf>; Press release, Fin. Stability Bd., Financial Stability Board agrees 2017 workplan (Nov. 17, 2016), available at <http://www.fsb.org/2016/11/financial-stability-board-agrees-2017-workplan/>.

guidance between meetings of the Plenary and therefore plays an influential role.<sup>87</sup> However, the substantive work of developing standards and principles is largely carried out by various committees and working groups established by the Plenary.<sup>88</sup> The FSB does not disclose the member composition of the committees or working groups on its website or in its annual report but does so when a working group publishes a report.

The IAIS' governing documents permit principles and standards to be adopted by either one of two bodies. First, the "General Meeting," which is comprised of all members, can adopt principles or standards by a two-thirds vote.<sup>89</sup> Second, the Executive Committee, commonly referred to as "ExCo," which is composed of up to 32 members elected by the General Meeting and operates as the principal decision-making body, sets the IAIS work agenda and approves standards or principles.<sup>90</sup> Traditionally, ExCo has done so through consensus.<sup>91</sup> Like the other standard-setting bodies, the IAIS relies on substantive committees, working groups and task forces, overseen by ExCo, to develop proposals and policies.<sup>92</sup> The members of each such committee and working group are published by IAIS.<sup>93</sup>

IOSCO's principles and standards are approved by the "President's Committee," which is composed of all the voting members.<sup>94</sup> IOSCO operates by consensus in practice, though its bylaws provide that the President's Committee can make decisions by majority vote.<sup>95</sup> The work stream of IOSCO is established by its Board, whose members are elected by the President's Committee.<sup>96</sup> Like the other standard-setting bodies, substantive work is carried out at a committee level or by working groups or task forces established by committees. For example, IOSCO has established eight policy committees dealing with issues such as the regulation of secondary markets, derivatives, and issuer disclosure, as well as a task force on financial benchmarks.<sup>97</sup> Like the IAIS, and unlike the Basel Committee and FSB, IOSCO discloses the composition of each

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<sup>87</sup> Narissa Lyngen & Clayton Simmons, *The Financial Stability Board: The New Face of International Financial Regulation*, 54 Harv. Int'l L.J. (2013) (online), available at <http://www.harvardilj.org/wp-content/uploads/2013/08/Lyngen-Simmons-to-publish1.pdf>.

<sup>88</sup> *Id.* These committees include a Steering Committee (which provides operational guidance between Plenary meetings), in addition to the Standing Committee on Assessment of Vulnerabilities (SCAV) (which monitors and assesses vulnerabilities in the global financial system and proposes actions to the Plenary to address them), the Standing Committee on Supervisory & Regulatory Cooperation (SRC) (which addresses key financial stability risks related to the development of supervisory and regulatory policy), the Standing Committee on Standards Implementation (SCSI) (which encourages adherence to the global standards), and the Standing Committee on Budget and Resources ("SCBR") (which reviews the annual and medium-term budget of the FSB) as well as various Working Groups and Regional Consultative Groups.

<sup>89</sup> Int'l Assoc. of Ins. Supervisors By-Laws, *supra* note 63, art. 11(1)–(2).

<sup>90</sup> *Id.* at arts. 9, 13–14.

<sup>91</sup> LIEVE LOWET, DIRECTORATE GENERAL FOR INTERNAL POLICIES: ECON. AND SCI. POLICY, THE EUROPEAN UNION'S ROLE IN INTERNATIONAL ECONOMIC FORA PAPER 8: THE IAIS 17 (Aug. 2015).

<sup>92</sup> Int'l Assoc. of Ins. Supervisors By-Laws, *supra* note 63, arts. 14–16.

<sup>93</sup> *Organisational Structure*, INT'L ORG. OF SEC. COMM'NS, <https://www.iaisweb.org/page/about-the-iais/organisational-structure> (last updated Jan. 2018).

<sup>94</sup> Int'l Org. of Sec. Comm'ns By-Laws, *supra* note 76, art. 26.

<sup>95</sup> *Id.* art. 36.1–4; Greg Medcraft, Chairman, Australian Sec. and Investments Comm'n, Challenges and Strategies for IOSCO (Sept. 4, 2012) (IOSCO works by strict consensus).

<sup>96</sup> Int'l Org. of Sec. Comm'ns By-Laws, *supra* note 76, arts. 37.1 & 40.2.

<sup>97</sup> INT'L ORG. OF SEC. COMM'NS, FACT SHEET (Oct. 2018), available at <https://www.iosco.org/about/pdf/IOSCO-Fact-Sheet.pdf>; *Board Level Task Force on Financial Benchmarks*, INT'L ORG. OF SEC. COMM'NS, [https://www.iosco.org/about/?subsection=display\\_committee&cmtid=21](https://www.iosco.org/about/?subsection=display_committee&cmtid=21) (last visited Mar. 7, 2019).

committee (and its Board), including the jurisdiction, title, and name of each individual on the committee on its website.<sup>98</sup>

The following table summarizes the key attributes of the international standard-setting bodies' decision-making structure.

**Table: Key Decision-making Attributes**

<b>Attribute</b>	<b>Basel Committee</b>	<b>FSB</b>	<b>IAIS</b>	<b>IOSCO</b>
<b>Decision-making Organ</b>	Committee	Plenary	General Meeting/ExCo	President's Committee
<b>Agenda Setter</b>	Group of Governors and Heads of Supervision	Plenary	ExCo	Board
<b>Vote to Adopt Standards</b>	Consensus	Consensus	Consensus (in practice)	Consensus (in practice)
<b>Uses Committees/Working Groups/Task Forces?</b>	Yes	Yes	Yes	Yes
<b>Disclosure of Members</b>	Yes	Yes	Yes	Yes
<b>Disclosure of Committee/Working Group/Task Force Composition</b>	No	No	Yes	Yes

<sup>98</sup> See, e.g., *Committee on Issuer Accounting, Audit and Disclosure*, INT'L ORG. OF SEC. COMM'NS, [https://www.iosco.org/about/?subsection=display\\_committee&cmtid=12](https://www.iosco.org/about/?subsection=display_committee&cmtid=12) (last visited Mar. 7, 2019).



### *C. Requirements Pertaining to Transparency, Public Input, and Cost-Benefit Analysis*

If members are expected to adopt and implement standards, then the robustness, comprehensiveness, and legitimacy of the process used to adopt those standards is of fundamental importance, especially given the involvement of the standard-setters in critical aspects of financial market regulation after the 2007-2008 global financial crisis. There are three key attributes of the standard-setting process that are worth analyzing. These are *transparency*, the *public participation*, and *cost-benefit analysis*. These characteristics have been espoused by the OECD and the European Union.<sup>99</sup> As Randal Quarles, the Fed’s Vice Chairman for Supervision who is also now the Chair of the FSB, recently noted in a February 2019 speech, “we have a responsibility to seek input from and to provide information about our deliberations and actions” to the public.<sup>100</sup>

#### *1. Transparency – Openness of Meetings*

When referring to transparency, this Committee report focuses on the issues of whether the public knows who is involved in making judgments and decisions and whether the public is privy to the policy debate taking place within the international standard-setting body. Transparency in the standard-setting process includes open meetings, the release of meeting transcripts, and the disclosure of meeting minutes.

So how transparent is the standard-setting process? The short answer is not very.

First, as described previously, the Basel Committee and the FSB do not disclose a list of all of the members of their various committees, subcommittees, working groups, and task forces. Moreover, as a former staffer at the Federal Reserve Bank of New York who worked with the Basel Committee and FSB notes, these standard-setting bodies do not list all existing committees, task forces, and working groups on their websites.<sup>101</sup>

Second, the meetings of the decision-making bodies, the committees, working groups, and task forces are not required by the organizational or policy documents of the international standard-

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<sup>99</sup> See, e.g., ORG. ECON. CO-OPERATION AND DEV., REGULATORY POLICY OUTLOOK 2018 (Oct. 2018), and ORG. ECON. CO-OPERATION AND DEV., INTERNATIONAL REGULATORY CO-OPERATION: THE ROLE OF INTERNATIONAL ORGANISATIONS IN FOSTERING BETTER RULES OF GLOBALISATION (Nov. 2, 2016). The OECD looks at “regulatory quality” as covering, among other things, the principles of consultation, transparency, accountability and evidence. The OECD states that regulations should have an empirical basis and produce benefits that justify costs and be implemented in a transparent way. REGULATORY POLICY OUTLOOK 2018 at 25 and 31. Similarly, the European Union sees “better regulation” as relying on evidence and a transparent process, which involves citizens and stakeholders throughout. *Better regulation: why and how*, EUR. COMM’N, [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en) (last visited Mar. 7, 2019).

<sup>100</sup> Randal K. Quarles, Chair, Fin. Stability Bd., Remarks at the Bank for Int’l Settlements Special Governors Mtg.: Ideas of Order: Charting a Course for the Financial Stability Board (Feb. 10, 2019).

<sup>101</sup> Lee Reiners, *Increasing Transparency at the Financial Stability Board and Basel Committee*, THE FINREG BLOG (Mar. 14, 2017), <https://sites.duke.edu/thefinregblog/2017/03/14/increasing-transparency-at-the-financial-stability-board-and-basel-committee/>.

setting bodies to be open to the public.<sup>102</sup> And, in practice, they are not open to the general public, either in person or by webcast.

Third, the international standard-setting bodies do not publish or disclose minutes, transcripts, or detailed agendas of the meetings of the members or the committees, working groups, or task forces. Instead, with regards to the decision-making body meetings, the organizations disseminate press releases announcing decisions and topics discussed.<sup>103</sup> The international standard-setting bodies also do not have policies mandating disclosure of how members vote if matters are brought to a vote.

The following table summarizes these key characteristics of transparency in tabular form.

**Table: Key Transparency Characteristics**

<b>Characteristic</b>	<b>Basel Committee</b>	<b>FSB</b>	<b>IAIS</b>	<b>IOSCO</b>
<b>Composition of Committees/Working Groups/Task Forces</b>	No	No	Yes	Yes
<b>Advance Agendas of Meetings Made Public</b>	No	No	No	No
<b>Meetings Open to Public or Webcast</b>	No	No	No	No
<b>Minutes or Transcripts of Meetings Published</b>	No	No	No	No
<b>Disclosure of Votes</b>	No	No	No	No

This opacity is problematic for myriad reasons. Critically, it denies the public the knowledge of what is occurring within international standard-setting bodies that are not accountable to voters or interested parties who can only exert influence through their domestic representatives. In addition, it hinders accountability. If voters and affected parties do not know what positions their own government officials are taking at international bodies, then it is more

<sup>102</sup> The Basel Committee charter provides that decisions made at Committee meetings are to be communicated to the public. Basel Committee Charter, *supra* note 19, art. 8.4. The FSB Procedural Guidelines likewise provides that the public should only be provided a press release of the Plenary’s policy decisions. FIN. STABILITY BD., FSB PROCEDURAL GUIDELINES H.3 (Oct. 22, 2018). IAIS General Meetings are generally closed to the public. Int’l Assoc. of Ins. Supervisors By-Laws, *supra* note 63, arts. 10 & 12. IAIS committee meetings cannot be opened to the public simply to keep stakeholders informed. INT’L ASSOC. OF INS. SUPERVISORS, POLICY FOR ATTENDANCE AT IAIS MEETINGS (Jan. 17, 2005), *available at* <https://www.iaisweb.org/page/about-the-iais/policies-and-procedures/file/47626/policy-for-attendance-at-iais-meetings>. IOSCO meetings are also not open to the public.

<sup>103</sup> *See, e.g., Annual Conference 2018*, INT’L ASSOC. OF INS. SUPERVISORS, <https://www.iaisweb.org/page/events/annual-conference>; Press Release, Int’l Assoc. of Ins. Supervisors, Key Achievements Mark Week of IAIS Committee Meetings, Annual General Meeting and 25th Annual Conference (Nov. 13 2018); FIN. STABILITY BD., FSB PROCEDURAL GUIDELINES H.3 (Oct. 22 2018); Basel Committee Charter, *supra* note 19.

difficult to hold these officials and their elected governments accountable for their role in decisions at the international level.

We do note that in a recent February 2019 speech, FSB Chair Quarles disclosed that the FSB would publish a work program of what it will work on in the coming year.<sup>104</sup> The FSB, did publish its work program on February 12, 2019 in a seven-page document outlining the FSB's priorities and a timeline for the publication of specific consultation papers, reports, and reviews.<sup>105</sup> In addition, in March 2019, IOSCO also published its work program for the first time.<sup>106</sup> These actions are a commendable and important incremental steps toward increasing transparency at these institutions.

## 2. Public Comment and Input

International standard-setting bodies generally provide for “public consultations” or what is commonly referred to in the United States as “public notice and comment” about proposed standards and principles. However, their notice and comment procedures are questionable for several reasons. For example, standard-setting bodies often retain significant discretion about when to seek public comment; when public input is sought it frequently occurs late in the standard adoption process; and international standard-setting bodies are not always required to consider or respond to the public comments they receive.

The Basel Committee's charter outlines its public comment requirements. Specifically, the charter requires that the adoption of standards, “will include a public invitation . . . to provide comments in writing,” typically during a 90-day window. In addition, public comments are supposed to be published on the Basel Committee's website, unless the commenter requests confidential treatment.<sup>107</sup> Importantly, public comment is only required for the adoption of standards and not for the adoption of guidelines or sound practices. Moreover, the Basel Committee is not required to respond to or address the comments it receives in the final adopting release of the standards or in any other form. For example, newly-adopted standards regarding minimum capital requirements for market risk<sup>108</sup> are based on a consultative document<sup>109</sup> published last March. BCBS published the comments to the consultative document that it received,<sup>110</sup> but did not publicly respond to those comments, describe whether it was taking or rejecting comments, nor note any changes in the final standards document compared with the consultative document that were based on those comments.

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<sup>104</sup> Randal K. Quarles, Chair, Fin. Stability Bd., Remarks at the Bank for Int'l Settlements Special Governors Mtg.: Ideas of Order: Charting a Course for the Financial Stability Board (Feb. 10, 2019).

<sup>105</sup> FIN. STABILITY BD., FSB WORK PROGRAMME FOR 2019 (Feb 12, 2019), available at <http://www.fsb.org/2019/02/fsb-work-programme-for-2019/>.

<sup>106</sup> INT'L ORG. OF SEC. COMM'NS, BOARD PRIORITIES - WORK PROGRAM FOR 2019 (Mar. 25, 2019), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD625.pdf>.

<sup>107</sup> Basel Committee Charter, *supra* note 19.

<sup>108</sup> BANK FOR INT'L SETTLEMENTS, MINIMUM CAPITAL REQUIREMENTS FOR MARKET RISK (Jan. 2019, rev. Feb. 2019), *supra* note 33.

<sup>109</sup> BANK FOR INT'L SETTLEMENTS, REVISIONS TO THE MINIMUM CAPITAL REQUIREMENTS FOR MARKET RISK (Mar. 2018).

<sup>110</sup> *Comments received on "Revisions to the minimum capital requirements for market risk"*, BANK FOR INT'L SETTLEMENTS, <https://www.bis.org/bcbs/publ/comments/d436/overview.htm> (last visited Jan. 15, 2019).

The FSB has long been subject to criticism for an opaque policy development process, especially because it does not have a mandated notice-and-comment process.<sup>111</sup> In fact, the FSB’s charter makes public consultation through a notice-and-comment process purely discretionary by the Plenary. When notice-and-comment processes are used, the FSB is supposed to provide a 60-day comment period, publish the comments on its website, and explain how the comments were addressed in the post-consultation version of the international standards.<sup>112</sup> In December 2018, the FSB announced that it will be making some changes to its processes. Specifically, its release stated that it will adopt “an explicit expectation that documents that may materially affect external stakeholders” should be subject to a 60-day comment period and routinely publish reports that summarize the comments and explain how they were addressed in the final policy document.<sup>113</sup> While this recent action is an important step forward and the Committee appreciates the FSB’s focus on increasing the opportunity for public input, this new process still leaves the FSB substantial discretion to determine is considered a “material effect.”

IAIS has adopted formal, publicly available procedures for the adoption of standards.<sup>114</sup> IAIS procedures impose requirements at several different stages of the policy development process. First, when the ExCo approves a new project to develop standards or guidelines, IAIS is required to publish a background note describing the project, why it is being undertaken, raise specific questions for stakeholder input, and identify to whom stakeholders may provide input.<sup>115</sup> Second, at least once before the IAIS adopts standards or guidelines, the standards or guidelines must be put out for a 60-day public comment period.<sup>116</sup> Comments are made publicly available and any comments received must be “resolved” by the relevant project committee.<sup>117</sup> Third, IAIS is required to publish a summary or table of substantive comments received and the IAIS’ responses to those comments.<sup>118</sup>

Although the IAIS has developed more extensive procedures than the Basel Committee or the FSB, there is still room for improvement. Most notably, stakeholders have noted that opportunities to provide comments are typically late in the policy-development process, minimizing their ability to affect the policies at issue.<sup>119</sup> The U.S. Treasury Department and Fed,

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<sup>111</sup> See, e.g., Michael S. Barr, *Who’s in Charge of Global Finance?*, 45 GEO. J. INT’L L. 1019–20 (2014).

<sup>112</sup> Also FIN. STABILITY BD., FSB PROCEDURAL GUIDELINES I(88)-(89) (Oct. 22, 2018).

<sup>113</sup> *FSB completes a review of its processes and transparency to maximize its effectiveness*, FIN. STABILITY BD., <http://www.fsb.org/2018/11/fsb-completes-a-review-of-its-processes-and-transparency-to-maximise-its-effectiveness/> (Nov. 27, 2018).

<sup>114</sup> INT’L ASSOC. OF INS. SUPERVISORS, POLICY FOR CONSULTATION OF STAKEHOLDERS (Feb. 13, 2015), available at <https://www.iaisweb.org/page/about-the-iais/policies-and-procedures//file/47624/policy-for-consultation-of-stakeholders>.

<sup>115</sup> *Id.* at 5.

<sup>116</sup> *Id.* at 6.

<sup>117</sup> *Id.* at 6.

<sup>118</sup> *Id.* at 7. See, e.g., INT’L ASSOC. OF INS. SUPERVISORS, SUMMARY OF MAIN COMMENTS ON DRAFT REVISED ICP 20 RECEIVED DURING 29 JUNE 2018 – 28 AUGUST 2018 CONSULTATION AND THEIR RESOLUTION (Nov. 8, 2018), available at <https://www.iaisweb.org/page/consultations/closed-consultations/2018/icps-6-and-20/file/77770/summary-of-main-public-consultation-comments-with-their-resolutions-icp-20>.

<sup>119</sup> TREASURY AND FED. RES., REPORT TO THE CONGRESS: EFFORTS TO INCREASE TRANSPARENCY AT MEETINGS OF THE INTERNATIONAL ASSOCIATION OF INSURANCE SUPERVISORS 10 (Nov. 2018).

commendably, are advocating for consultations at multiple stages in the policy-development process.<sup>120</sup>

Finally, IOSCO has adopted consultation policies and procedures, which provide IOSCO extensive discretion in deciding when to seek public input. More specifically, IOSCO “maintain[s] a flexible approach” about whether to seek public input that takes into consideration: the scope and applicability of the project; the extent to which application of the work will affect business practices of regulated entities; the extent to which technical or industry-specific information is necessary; the likelihood that other international or domestic bodies are considering similar issues; the degree to which public comment will contribute to the objectives of the project; and the practicality of requesting comments and the urgency of the need for an IOSCO response.<sup>121</sup>

When IOSCO chooses to seek public comment, its policies provide that the comment period should generally last for three months, that comments received should be made publicly available, and that at the end of the comment period, IOSCO will “normally publish a final report” and a “summary explanation of the manner in which public comments received have been addressed.”<sup>122</sup>

The following table summarizes the key characteristics of the international standard-setting bodies’ notice-and-comment processes.

**Table: International Standard-Setting Bodies’ Notice-and-Comment Processes**

<b>Characteristic</b>	<b>Basel Committee</b>	<b>FSB</b>	<b>IAIS</b>	<b>IOSCO</b>
<b>Public Notice-and-Comment Required for Standards</b>	Yes	Discretionary	Yes	Discretionary
<b>Length of Comment Period</b>	90 days	60 days	60 days	90 days
<b>Comments Published</b>	Yes	Yes	Yes	Yes
<b>Responses to Comments Required</b>	No	Yes	Yes	Yes

In sum, standard-setting bodies have significant discretion about whether to seek public comment and at what stage in the process to seek public comment. And while their policies

<sup>120</sup> *Id.* at 10–11.

<sup>121</sup> EXEC. COMM. INT’L ORG. OF SEC. COMM’NS, IOSCO CONSULTATION POLICY AND PROCEDURE (Apr. 2005), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD197.pdf>.

<sup>122</sup> *Id.*; See, e.g., THE BD. OF THE INT’L ORG. OF SEC. COMM’NS, MECHANISMS USED BY TRADING VENUES TO MANAGE EXTREME VOLATILITY AND PRESERVE ORDERLY TRADING - FINAL REPORT at Appendix B (2018), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD607.pdf>.

typically state that they should explain how they have responded to comments, there is no mechanism to ensure that it occurs or that comments are considered in a serious and robust manner. As a result, impacted market participants are denied the ability to provide input on standards, guidelines, and policies that affect their business practices, product offerings, operations, and clients. Moreover, policymakers are deprived of relevant data, information, and expertise necessary to make sound public policy decisions. If the public and market participants do not believe their views are being considered or heard, then the legitimacy of and confidence in international bodies is compromised.

### 3. Cost-Benefit Analysis

Despite the benefits of ex ante cost-benefit analysis,<sup>123</sup> Basel Committee, FSB, and IAIS generally do not require a cost-benefit analysis prior to the adoption of standards. Moreover, in practice, these standard setters do not consistently publish cost-benefit analyses of their standards or guidelines.<sup>124</sup> And where they have published such analyses (often referred to as “quantitative impact” studies or assessments), those assessments have been published after the proposal is closed for public comment. For example, the FSB issued a set of proposals on total-loss absorbing capacity in November 2014 and then finalized them in November 2015. FSB published impact assessments with the final standards, not at the time of the proposal.<sup>125</sup>

Conducting cost-benefit analyses or impact assessments after policy development is substantially underway undercuts the benefits of such an undertaking. First, the fact that a decision has already been made to implement policy reforms could affect judgments made in the cost-benefit analysis that skew its results. Second, without conducting an ex ante analysis, policymakers do not have the benefit of knowing the magnitude of the problem being solved for or the costs or benefits of different possible policy options to help them make informed decisions. Third, when the analysis is released after the substantive proposal is released, the public is not provided an opportunity to evaluate the analysis as part of the comment process.

These problems and the central importance of ex ante cost-benefit analysis are understood by IOSCO, as evidenced by its Impact Assessments Guidelines. The IOSCO guidelines provide that impact assessments are a “key tool” in ensuring regulations are “based on sound analysis” and

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<sup>123</sup> See, e.g., COMM. ON CAP. MKTS. REG., A BALANCED APPROACH TO COST-BENEFIT REFORM 10 (Oct. 2013), available at <https://www.capmktreg.org/wp-content/uploads/2018/10/A-Balanced-Approach-to-Cost-Benefit-Analysis-Reform.pdf> (noting that cost-benefit analysis reduces unjustified regulatory burdens and costs and is a commonsense approach).

<sup>124</sup> See, e.g., Letter from Michael R. Granito, Chief Risk Officer, Federated Investors, Inc., to Secretariat of the Fin. Stability Bd., at fn. 3 (Sept. 21, 2016), available at <http://www.fsb.org/wp-content/uploads/Federated-Investors1.pdf> (noting that the proposal was not supported by a cost-benefit analysis and arguing that it would face legal problems if implemented in the United States); COMMENTS IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING - *NET STABLE FUNDING RATIO*, *supra* note 4 (noting that “Sufficient empirical justification for a given standard is often not provided” by Basel Committee’s processes).

<sup>125</sup> FIN. STABILITY BD., ADEQUACY OF LOSS-ABSORBING CAPACITY OF GLOBAL SYSTEMICALLY IMPORTANT BANKS IN RESOLUTION (Nov. 10, 2014) (proposal stating that a quantitative impact study would commence in early 2015 despite the proposal being released in November 2014); Press Release, Fin. Stability Bd., FSB issues final Total Loss-Absorbing Capacity standard for global systemically important banks (Nov. 9, 2015) (press release announcing the final standards stating that several impact assessments were simultaneously published with the final standards).

“provide a framework that ensures that policy proposals are justified.”<sup>126</sup> IOSCO’s policy states that these assessments should be “prepared as a matter of course when “a new policy initiative with structural and cost implications is proposed.”<sup>127</sup> Moreover, its policy provides that the public report released to seek public comment and input on policy proposals should report on the cost-benefit analysis work done on the proposed policy options.<sup>128</sup> The Committee commends IOSCO for recognizing the importance and centrality of cost-benefit analysis to regulatory policymaking and the need to conduct and disclose that analysis prior to the release of policy proposals.

The following table summarizes the key characteristics of the international standard-setting bodies’ cost-benefit analysis practices.

**Table: Cost-Benefit Analysis Practices**

<b>Characteristic</b>	<b>Basel Committee</b>	<b>FSB</b>	<b>IAIS</b>	<b>IOSCO</b>
<b>Cost-Benefit Analysis Required to Adopt Standard</b>	No	No	No	Yes
<b>Cost-Benefit Analyses Conducted in Practice</b>	Yes	Yes	Yes	Yes
<b>Cost-Benefit Analyses Regularly Released for Comment Simultaneously with Proposed Standard</b>	No	No	No	Yes

<sup>126</sup> INT’L ORG. OF SEC. COMM’NS, IMPACT ASSESSMENT GUIDELINES 5 (July 2011).

<sup>127</sup> *Id.* at 16.

<sup>128</sup> *Id.* at 34.

## II. Procedural Requirements in the United States and Other Jurisdictions

Over several decades the United States has developed a relatively robust regulatory system. Three different legally mandated process requirements in the United States are worthy of highlighting and demonstrate the difference in approach at the international standard-setting body level and the U.S. regulatory agency level: (1) sunshine in government laws, (2) notice-and-comment requirements, and (3) cost-benefit analysis requirements.

Moreover, other jurisdictions also have well-developed processes that provide for transparency, public participation, and cost-benefit analyses when implementing laws and regulations domestically. This is particularly true in the United Kingdom and the European Union generally.

One might ask why are procedural requirements and practices in the United States, the United Kingdom and the European Union relevant to a discussion and examination of the processes employed by international standard-setting bodies?

First, such processes can provide examples of how the international standard-setting bodies' processes can be improved or reformed. Second, if international standard-setting bodies adopt standards that member states are expected to implement— in an opaque manner with less public input and cost-benefit analysis than at the domestic level, then the practical effect is that the general public is deprived of processes that they expect to be afforded. Even if regulators employ domestic processes to adopt rules implementing standards, the underlying standards themselves may not have been subject to these processes. And the member states are expected to implement these standards (and many often do, using the international standards as a shield) even if there are potential issues that arise within the member jurisdictions.

Therefore, this part of the Committee report will first summarize the procedural requirements imposed on U.S. regulators and then describe similar approaches in the United Kingdom and the European Union.

### A. U.S. Procedural Requirements and Practices

#### 1. *Fostering Transparency Through Sunshine in Government and Freedom of Information*

Transparency in the development of agency regulations in the United States is fostered by: (1) the Government in Sunshine Act of 1976;<sup>129</sup> (2) the Freedom of Information Act of 1966;<sup>130</sup> and (3) the Federal Advisory Committee Act of 1972.<sup>131</sup> As further detailed in the following paragraphs, these provisions impose open meeting requirements, allow the public access to agency records, and disclose the existence and workings of certain advisory committees or working groups.

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<sup>129</sup> 5 U.S.C. § 552b.

<sup>130</sup> 5 U.S.C. § 552.

<sup>131</sup> 5 U.S.C. App.



First, when a federal agency like the Fed, SEC, or CFTC holds meetings of its board of governors or commissioners, those are generally required to be open to the public, except in certain limited circumstances.<sup>132</sup> In practice, not only are these meetings open to the public, but agencies provide webcasts on their websites of the meetings. In addition, the agencies are typically required to make a public announcement of the time, place, and subject matter of a meeting of the agency heads at least one week before the meeting.<sup>133</sup> And, even when a meeting is permitted to be closed to the public under statutorily enumerated exceptions, the agency is required to maintain a recording, transcript, or minutes of the meeting and can be required to disclose those materials by the public.<sup>134</sup>

Second, the public is able to request access to internal agency documents and information that can help inform the public about the agency's workings. As explained by the Congressional Research Service, the Freedom of Information Act "established, for any person – corporate or individual, citizen or otherwise – presumptive access to existing, unpublished agency records on any topic."<sup>135</sup> Importantly, the law requires that any agency with a commission or board structure is required to maintain and make available to the public a record of the votes of each member in every agency proceeding.<sup>136</sup>

Third, any committee, panel, task force, or similar group created or used by the President or any agency to provide advice or recommendations is generally required to be disclosed and a charter detailing the committee's purposes and duties is filed with the Library of Congress.<sup>137</sup> Meetings of such committees are generally required to be open to the public and the committee's agenda, minutes, transcripts, and other documents prepared for or by the committee are subject to public inspection.<sup>138</sup>

These various requirements provide the public the opportunity to know what a particular agency or working group is working on, the policy debate and considerations being analyzed, and the positions and votes taken by commissioners or similar officials. Such information is crucial to enabling private parties to engage policymakers in policy debates and to know who to hold accountable for various actions. They stand in stark contrast to international standard-setting body processes, whereby meetings are closed to the public, votes are not published, minutes and transcripts are not made publicly available, and the composition of committees and working groups are not disclosed.

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<sup>132</sup> 5 U.S.C. § 552b(b)–(c).

<sup>133</sup> *Id.* § 552b(e).

<sup>134</sup> *Id.* § 552b(f)(1)–(2).

<sup>135</sup> Wendy Ginsberg & Michael Greene, CONG. RESEARCH SERV., RL 7-5700, ACCESS TO GOVERNMENT INFORMATION IN THE UNITED STATES: A PRIMER 2 (Mar. 18, 2016). The law does include nine categories of documents that are exempted from disclosure.

<sup>136</sup> *Id.* § 552(a)(5).

<sup>137</sup> 5 U.S.C. App. §§ 6, 9.

<sup>138</sup> *Id.* App. § 10.

## 2. Notice-and-Comment Obligations

Another characteristic of the U.S. administrative state is the obligation of agencies to provide the public with a proposed rule before it is adopted, accept public comments, and take those public comments into consideration in adopting a final rule.

Under the Administrative Procedure Act of 1946 (“**APA**”), substantive agency rules must first be published in the Federal Register as proposed rules.<sup>139</sup> After publication of the proposed rule, the public must be given “the opportunity to participate in the rule making through submission of written data, views, or arguments.”<sup>140</sup> While the statute does not delineate a minimum period of time for the solicitation of public comments, courts have held that they will ensure the public has an “adequate” opportunity to comment, and a President Clinton-era executive order stated that 60-days should generally be the minimum period of time.<sup>141</sup> Agencies are required to “consider” the relevant information presented.<sup>142</sup> This requirement has been construed by courts as obligating agencies to respond to “significant” comments, which are understood to be comments that, if true, would require a change in the proposed rule.<sup>143</sup>

Additionally, agencies are not permitted to put out a proposed rule for comment, receive comments, and then publish a final rule that has been revised in an unpredictable way. U.S. courts have held that if the revised rule is not a “logical outgrowth” of the proposal, then the revised rule must be reopened for comment.<sup>144</sup>

These requirements are enforceable under the APA statutory scheme. A person adversely affected by the adoption of a rule can seek judicial review of the agency action and courts are instructed to set aside a rule that is not adopted in accordance with the law.<sup>145</sup>

The notice-and-comment requirement differs substantially from the policies adopted by international standard-setting bodies. Most obviously, they are enforceable, whereas there are no legal consequences if a standard-setting body fails to follow its procedural requirements. But perhaps more relevant, the obligation to seek public input is mandatory – it is not left up to the discretion of the agency or a determination about whether the rule will have a material or substantial effect on private actors. U.S. regulators must show that they considered the comments, something that not all standard-setting bodies are required to do under their published policies, most notably the Basel Committee.

We reviewed a sample of key international standards adopted by the Basel Committee and the FSB and examined the timing of the release of the standards and compared this to when the

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<sup>139</sup> 5 U.S.C. § 553(b).

<sup>140</sup> *Id.* § 553(c).

<sup>141</sup> *N.C. Growers’ Ass’n v. UFW*, 702 F.3d 755, 770 (4<sup>th</sup> Cir. 2012); Exec. Order No. 12,866 § 6(a) (1993); *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>142</sup> 5 U.S.C. § 553(c).

<sup>143</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015), *Louisiana Federal Land Bank Ass’n, FCLA v. Farm Credit Administration*, 336 F.3d 1075, 1080 (D.C. Cir. 2003), *Am. Mining Cong. v. EPA*, 965 F.2d 759, 771 (9<sup>th</sup> Cir. 1992).

<sup>144</sup> *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1<sup>st</sup> Cir. 1974).

<sup>145</sup> 5 U.S.C. §§ 701–706.

U.S. banking regulators sought comment on the proposed U.S. rules implementing the corresponding standard. The following table shows that in each instance, the U.S. banking regulators put out proposals for comment *after* the international standards were already finalized and agreed to. The Committee is discouraged by the fact that U.S. regulators have not recently sought comment on proposed international standards, as the U.S. banking agencies did in 2003 to help inform the positions that they would take in negotiating the final set of Basel II standards.<sup>146</sup> Doing so could help mitigate for procedural shortcomings at the standard-setting body level.

**Table: Order of International Standard Adoption and U.S. Agencies’ Request for Public Comment**

<b>Standard</b>	<b>Date Adopted at Standard-setting body</b>	<b>Date of U.S. Banking Regulators’ Proposal for Public Comment</b>
<b>BCBS: Net Stable Funding Ratio</b>	December 2010	May 3, 2016 <sup>147</sup>
<b>BCBS: Liquidity Coverage Ratio</b>	December 2010	November 2013 (finalized 2014)
<b>BCBS: G-SIB Capital Surcharge</b>	December 2010	December 2014 (finalized 2015)
<b>BCBS: Leverage Ratio</b>	December 2010	August 2012 (finalized 2013)
<b>FSB: Sound Compensation Practices</b>	April 2, 2009	October 2009 (finalized 2010) <sup>148</sup>

### 3. Cost-Benefit Analysis Obligations

The Committee has previously written about the need for improvements in the cost-benefit analysis requirements in the United States, particularly with respect to the requirements imposed on capital markets and banking regulators.<sup>149</sup> However, the existing requirements and practices are still instructive. We discuss U.S. cost-benefit analysis practices here, and in the following section we include a discussion of cost-benefit analyses in the United Kingdom and European Union in a larger discussion about their commitments to transparency, public input, and analytical rigor.

The primary cost-benefit requirement that applies to U.S. agencies is the mandate under Executive Order 12866. If a proposed rule is expected to have an annual economic impact of more than \$100 million, an agency must assess the anticipated costs and benefits of the rule, as well as the costs and benefits of reasonable feasible alternatives.<sup>150</sup> However, these requirements do not apply to “independent agencies” (those with multiple member governing bodies), including the SEC, CFTC, Fed, FDIC, and OCC. Nonetheless, these agencies have been encouraged to apply

<sup>146</sup> Risk-Based Capital Guidelines; Implementation of New Basel Capital Accord, 68 Fed. Reg 45,900, 45,901 (Aug. 4, 2003) (requesting comment on the banking agencies’ views on the Basel II proposal to inform the agencies about how to implement the accord and modifications to seek in the accord during final negotiations).

<sup>147</sup> No rule has been finalized.

<sup>148</sup> Consisted of guidelines. The Fed put rules out for comment in 2011 and 2016 but has not finalized them.

<sup>149</sup> A BALANCED APPROACH TO COST-BENEFIT REFORM, *supra* note 123.

<sup>150</sup> Exec. Order No. 12,866, *supra* note 141, at §§ 3(f), 6(a)(3)(C).

these cost-benefit analysis requirements by executive branch officials,<sup>151</sup> and some agencies are subject to separate statutory cost-benefit analysis requirements. For example, when the SEC is engaged in rulemaking and is required by statute to determine if the rule is necessary or appropriate in the public interest, it must consider the impact of the rulemaking on efficiency, competition and capital formation.<sup>152</sup> The CFTC is also statutorily required under the Commodity Exchange Act to consider the costs and benefits of its regulatory actions.<sup>153</sup> While U.S. banking regulators – the Fed, FDIC, and OCC – are subject only to statutory requirements with a limited focus on the “administrative burden”<sup>154</sup> of regulations and impacts on small businesses,<sup>155</sup> approximately 50% of these agencies’ Dodd-Frank Act regulations analyzed in the Committee’s 2013 report on cost-benefit analysis included a quantitative or qualitative cost-benefit analysis. When agencies conduct cost-benefit analyses, they are included in the proposal published for public notice and comment.

## ***B. United Kingdom and European Union Procedural Requirements and Practices***

It is useful to consider the regulatory approaches elsewhere. In this section we look at the United Kingdom, the world’s second largest financial center,<sup>156</sup> as well as the European Union, as EU-level regulation is a major source of financial regulation for financial centers across Europe (including, for now, the United Kingdom). Furthermore, the European Union process is useful to consider because it is somewhat analogous to an international standard-setting body<sup>157</sup> in that member states are bound by (in the case of “Regulations,” which are automatically applicable) or obligated to implement (in the case of “Directives,” which require implementation by member states) European Union laws.

### *1. The United Kingdom*

In the United Kingdom’s processes, the characteristics of transparency, public participation, and cost-benefit analysis are evident. We address both legislation and regulatory measures, because implementation of international standards may require primary<sup>158</sup> or secondary<sup>159</sup> legislation and/or regulatory rules.<sup>160</sup> This is unlike the United States where international standards are generally implemented solely through agency rulemaking.

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<sup>151</sup> See, e.g., Memorandum from Cass R. Sunstein, Administrator of Office of Info. and Reg. Affairs, *Executive Order 13563, “Improving Regulation and Regulatory Review”* (Feb. 2, 2011).

<sup>152</sup> 15 U.S.C. §§ 77b(b), 78c(f), 80a-2(c) & 80b-2(c).

<sup>153</sup> 7 U.S.C. § 19(a)(2). The statute enumerates specific categories of costs and benefits to be considered, which are: “considerations of protection of market participants and the public; considerations of the efficiency, competitiveness, and financial integrity of futures markets; considerations of price discovery; considerations of sound risk management practices; and other public interest considerations.”

<sup>154</sup> Riegle Community Development and Regulatory Improvement Act of 1994 § 302, 12 U.S.C. § 4802 (1994).

<sup>155</sup> Paperwork Reduction Act of 1980, 5 U.S.C. §§ 601–12 (1980).

<sup>156</sup> Kate Allen, *UK finance industry dominates European scene*, FIN. TIMES (Sept. 5, 2018), <https://www.ft.com/content/88cdec40-b03c-11e8-8d14-6f049d06439c>.

<sup>157</sup> The European Union itself is expected to implement the standards adopted by international standing setting bodies that it is a member of, such as the Basel Committee and FSB.

<sup>158</sup> An Act of Parliament, which is the equivalent of a statute in the United States.

<sup>159</sup> Government promulgated implementation measures to enable the primary legislation to be enforced and operate in daily life.

<sup>160</sup> Implementation measures adopted by industry regulators.

In the United Kingdom, the lawmaking and rulemaking processes are relatively transparent. For example, all proposed legislation and regulatory measures are available online. With respect to legislation, there are scrutiny committees in both Houses of Parliament (“**Parliament**”), which review proposed legislation. Details of the membership of those committees are available on the Parliament’s website. Committees may hold hearings on certain issues that inform policy development,<sup>161</sup> and call witnesses. Such proceedings can generally be viewed live,<sup>162</sup> and a report setting out the evidence heard, and the conclusions reached is made publicly available. And with respect to regulatory measures, public consultation by industry regulators, as discussed later, advances the aims of transparency.

Public consultation is an important part of the regulation development process.

First, a need for legislation to implement an international standard may be initially addressed by the work of one of the Law Commissions (for England & Wales,<sup>163</sup> or for Scotland).<sup>164</sup> A key aspect of the Law Commissions work is public consultation before developing a report that is submitted to the relevant Minister.<sup>165</sup> Details of all the consultations are available online, including the expected impact of the proposals.

Second, the U.K. government seeks public input on legislation before legislative text is proposed for adoption. During each parliamentary year, the U.K. government publishes a number of draft Bills (not the actual legislative proposals), to enable consultation and pre-legislative scrutiny, before introducing those proposals to Parliament, as draft legislation. Examples of these types of Draft Bills are Green Papers, which set out general ideas for future government policy, and White Papers which state more definite and detailed intentions for government policy.<sup>166</sup> The consultation details are available online. Once the consultation is closed, the U.K. government publishes its response.<sup>167</sup>

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<sup>161</sup> See, e.g., E.U. ECON. AND FIN. AFFAIRS SUB-COMMITTEE, HOUSE OF LORDS, HL PAPER 28, MiFID II: GETTING IT RIGHT FOR THE CITY AND EU FINANCIAL SERVICES INDUSTRY (July 3, 2012).

<sup>162</sup> See, e.g., House of Lords, *Monday 11 February 2019 Meeting started at 2.35pm, ended 7.49pm*, PARLIAMENTLIVE.TV (Feb. 11, 2019), <https://www.parliamentlive.tv/Event/Index/9dc1027b-2336-4959-834a-fdf9475303f1>.

<sup>163</sup> The protocol between the Lord Chancellor (on behalf of the U.K. Government) and the Law Commission of England & Wales (LAW COM No 321, Mar. 29, 2010), together with the Welsh Protocol, dated July 10, 2015, set out government responsibilities once a Law Commission report is published.

<sup>164</sup> Due to budgetary pressures within the Department of Justice, the Northern Ireland Law Commission has been non-operational since April 2015.

<sup>165</sup> For England & Wales, see *How we work*, LAW COMM’N – REFORMING THE LAW, <https://www.lawcom.gov.uk/about/how-we-work/> (last visited Mar. 5, 2019); For Scotland, see *Flow chart of a law reform project*, SCOTTISH LAW COMM’N – PROMOTING LAW REFORM, <https://www.scotlawcom.gov.uk/about-us/flow-chart-law-reform-project/> (last visited Mar. 5, 2019).

<sup>166</sup> For more information, see *What is a draft bill?*, UK PARLIAMENT, <https://www.parliament.uk/about/how/laws/draft/> (last visited Mar. 5, 2019).

<sup>167</sup> For examples, see *Draft Bills before Parliament*, UK PARLIAMENT, <https://www.parliament.uk/business/bills-and-legislation/draft-bills/> (last visited Mar. 5, 2019).

Third, industry regulators, such as the Financial Conduct Authority (“FCA”)<sup>168</sup> or the Prudential Regulatory Authority (“PRA”),<sup>169</sup> likewise consult widely on the measures they propose to implement. The FCA lists members of their committees,<sup>170</sup> discloses all consultations on its website,<sup>171</sup> as well as impact assessments of proposed regulations.<sup>172</sup> While its consultations are in writing, it also holds public meetings in different parts of the country to gather opinions on its regulation in general. Likewise, the PRA consultation papers are published online,<sup>173</sup> as is the composition of its Regulation Committee<sup>174</sup> and the Practitioner Panel.<sup>175</sup>

Finally, as noted in the Committee’s 2013 report on cost-benefit analysis, cost-benefit analysis is a critical component of regulatory development in the United Kingdom.<sup>176</sup> Indeed, the regulatory approach is informed by the U.K. government’s commitment to follow “better regulation” policies<sup>177</sup> and impact assessments (which use a cost-benefit analysis) that are central to such policies. Moreover, the Financial Services Act of 2012 mandates that financial regulators conduct a quantitative cost-benefit analysis if possible, and a qualitative one if a quantitative one is impractical.<sup>178</sup>

All new government policies, programs and projects are expected to be subject to a proportionate assessment of costs and benefits, so that anyone commenting on the proposal or scrutinizing it has enough information.<sup>179</sup> For certain measures that impact business<sup>180</sup> and whose impact is estimated to be above a certain threshold, a full regulatory impact assessment (“RIA”)

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<sup>168</sup> Conduct regulator for financial services firms and financial markets in the United Kingdom, and prudential regulator for some of those firms.

<sup>169</sup> Responsible for prudential matters ensuring financial stability of larger organizations.

<sup>170</sup> *Committees*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/about/committees> (last updated Jan. 25, 2019).

<sup>171</sup> *See, e.g.*, FIN. CONDUCT AUTH., FINANCIAL SERVICES COMPENSATION SCHEME – MANAGEMENT EXPENSES LEVEY LIMIT 2019/20 (Jan. 2019), *available at* <https://www.fca.org.uk/publication/consultation/cp19-09.pdf>; *see generally*, *Publications search results – Consultation papers*, FIN. CONDUCT AUTH., [https://www.fca.org.uk/publications/search-results?p\\_search\\_term&start=1&np\\_category=policy%20and%20guidance-consultation%20papers](https://www.fca.org.uk/publications/search-results?p_search_term&start=1&np_category=policy%20and%20guidance-consultation%20papers).

<sup>172</sup> *See generally*, *Publications search results – Impact assessments*, FIN. CONDUCT AUTH., [https://www.fca.org.uk/publications/search-results?np\\_category=corporate%20documents-impact%20assessments&start=1](https://www.fca.org.uk/publications/search-results?np_category=corporate%20documents-impact%20assessments&start=1).

<sup>173</sup> *Open Prudential Regulation Authority consultations*, BANK OF ENGLAND, <https://www.bankofengland.co.uk/prudential-regulation/publication/open-pra-consultations> (last visited Mar. 5, 2019).

<sup>174</sup> *Prudential Regulation Committee*, BANK OF ENGLAND, <https://www.bankofengland.co.uk/about/people/prudential-regulation-committee> (last visited Mar. 5, 2019).

<sup>175</sup> *Practitioner Panel*, BANK OF ENGLAND, <https://www.bankofengland.co.uk/prudential-regulation/practitioner-panel> (last visited Mar. 5, 2019).

<sup>176</sup> A BALANCED APPROACH TO COST-BENEFIT REFORM, *supra* note 123, at 15–16.

<sup>177</sup> DEPT. FOR BUSINESS, ENERGY & IND. STRATEGY, BETTER REGULATION FRAMEWORK GUIDANCE (Aug. 2018), *available at* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/735587/better-regulation-framework-guidance-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/735587/better-regulation-framework-guidance-2018.pdf).

<sup>178</sup> A BALANCED APPROACH TO COST-BENEFIT REFORM, *supra* note 123, at 15–16 (citing Financial Services Act 2012, ch. 21 §§ 9S(3), 138J, 138I (U.K.)).

<sup>179</sup> BETTER REGULATION FRAMEWORK, *supra* note 177.

<sup>180</sup> With certain specified exceptions. Qualifying regulatory provisions and non-qualifying regulatory provisions are defined at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-03-03/HCWS574/>

must be produced. Such statements are examined by the Regulatory Policy Committee (“**RPC**”), an advisory body sponsored by the Department for Business, Energy and Industrial Strategy.<sup>181</sup> RPC opinions on RIAs are published.<sup>182</sup> Original impact assessments are updated, if the legislative proposals have been changed significantly following the consultation stage, in order to create the final RIA for a particular piece of legislation.<sup>183</sup> If Parliament heavily amends the legislative proposal during its adoption process, a new ‘enactment RIA’ is prepared and published after the legislation is enacted.<sup>184</sup>

The United Kingdom also conducts *ex ante* impact assessments, in the context of proposed European Union Regulations and Directives.<sup>185</sup> Such assessments are conducted in order to inform the U.K.’s government decision-making throughout the EU process. From 2013 onwards, the RPC has been validating the cost to business for the transposition of all significant EU regulatory measures that affect business.<sup>186</sup>

Finally, and significantly, there is an obligation whenever a statute contains a review clause or a commitment to do so has been made by the government (e.g., in a ministerial statement) to produce post-implementation reviews,<sup>187</sup> to assess the accuracy of the original impact assessments, and to judge whether it is appropriate to continue implementing a particular measure. Thus, it is common that *ex post* cost-benefit style analyses are required to be undertaken in the United Kingdom.

## 2. *The European Union*

The European Union demonstrates commitment to transparency, public participation, and cost-benefit analysis in the development of regulation. It has in place “Better Regulation Guidelines”,<sup>188</sup> covering issues such as stakeholder consultations,<sup>189</sup> impact assessments, and implementation monitoring. The implementation of these procedures is best seen through an explanation of how legislation and technical standards are developed and adopted in the European Union.<sup>190</sup> This is again, unlike the United States where international standards are generally implemented through a regulatory agency rulemaking. In the European Union, international

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<sup>181</sup> See BETTER REGULATION FRAMEWORK, *supra* note 177, Principles para. 18 & Independent Scrutiny para. 1.3.

<sup>182</sup> *Id.* at Publication para. 1.6.

<sup>183</sup> *Id.* at para. 1.2.10.

<sup>184</sup> *Id.* at para. 1.2.15.

<sup>185</sup> See HM GOV’T, GUIDING PRINCIPLES FOR EU LEGISLATION, BIS/13/774 (2013); ORG. ECON. CO-OPERATION AND DEV., BETTER REGULATION IN EUROPE: UNITED KINGDOM 134 (2010).

<sup>186</sup> REG. POLICY COMM., SECURING THE EVIDENCE BASE FOR REGULATION: REGULATORY POLICY COMMITTEE SCRUTINY DURING THE 2010 TO 2015 PARLIAMENT (Mar. 2015).

<sup>187</sup> OECD recommends “*ex post* reviews” to complete the regulatory cycle. REGULATORY POLICY OUTLOOK 2018, *supra* note 99, at 67.

<sup>188</sup> *Better regulation: guidelines and toolbox*, EUR. COMM’N, [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en) (last visited Mar. 7, 2019); EUR. COMM’N, COMMISSION STAFF WORKING DOCUMENT: BETTER REGULATION GUIDELINES, SWD (2017) 350 (July, 7, 2017). The current Guidelines, dated July 7, 2017, replace the previous standalone guidelines on impact assessment, evaluation and implantation, and add new guidance on planning and stakeholder consultation. See BETTER REGULATION GUIDELINES at 5.

<sup>189</sup> The European Commission has specific duties, under Article 11 of the Treaty on European Union and Protocol No. 2 of it, to consult widely.

<sup>190</sup> It is possible to seek exceptions from the Guidelines, if other procedures are considered more appropriate.

standards may need to be implemented through regulatory proposals adopted through the standard legislative processes described below and/or delegated acts, regulatory technical standards or implementing technical standards in relation to which independent authorities such as the European Securities and Markets Authority (“**ESMA**”) or the European Banking Authority (“**EBA**”) either provide input to the European Commission,<sup>191</sup> or provide regulatory guidelines and recommendations.

European Union regulatory proposals originate with the European Commission (the “**Commission**”), which is the EU executive. Once the Commission has finalized a regulatory proposal, it is then submitted to the European Parliament and the Council of the European Union (the “**Council**”),<sup>192</sup> who act as co-equal parties.<sup>193</sup>

When the Commission has a new regulatory proposal that is expected to have a significant impact, it is outlined first in documents called roadmaps and inception impact assessments.<sup>194</sup> Once published, there is a 4-week consultation period for the public to provide comments. After that initial feedback period, and once the proposal has been further formulated and backed up by a full regulatory impact assessment, the Commission must conduct a further 12-week (minimum) long consultation exercise, done through a tailored questionnaire. Non-confidential contributions to a consultation are published. The responses are analyzed, and a short summary of the consultation results is published online within a month of the consultation closing, with a qualitative analysis synopsis report being published online at a later date.<sup>195</sup> Commission impact assessments are verified by an independent body, the Regulatory Scrutiny Board.<sup>196</sup>

Once the Commission has finalized its proposal and all comments from their consultation are passed on to the European Parliament and the Council, there is another 8-week consultation period.<sup>197</sup> The proposal is further reviewed and discussed in committees of the European Parliament and the Council. The European Parliament has 20 standing committees.<sup>198</sup> The details of the members of each of those committees, their meeting dates, meeting documentation, are all

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<sup>191</sup> For example, when implementing Basel III, the European Union adopted a legislative package consisting of Regulation (EU) No. 575/2013 and Directive 2013/36/EU. Since June 2011, the EBA has been monitoring the impact of Basel III proposals on a sample of institutions; its two latest reports, published in October 2018, measure the impact of implementing Basel III reforms and the current implementation of liquidity measures in the EU. *EBA publishes the preliminary impact of the Basel reforms on EU banks capital and updates on liquidity measures in the EU*, EUR. BANKING AUTH., <https://eba.europa.eu/-/eba-publishes-the-preliminary-impact-of-the-basel-reforms-on-eu-banks-capital-and-updates-on-liquidity-measures-in-the-eu> (Oct. 4, 2018).

<sup>192</sup> Not to be confused with The European Council, which defines the EU’s overall political direction and procedures. It does not negotiate or adopt laws.

<sup>193</sup> This is the “ordinary” legislative procedures. In certain cases, treaties specify different procedures.

<sup>194</sup> For more detail on planning EU legislation, see *Planning and proposing law*, EUR. COMM’N, [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law_en) (last visited Mar. 5, 2019).

<sup>195</sup> For more detail on Commission consultation processes, see *Have your say*, EUR. COMM’N, <https://ec.europa.eu/info/law/better-regulation/have-your-say> (last visited Mar. 5, 2019).

<sup>196</sup> *Regulatory Scrutiny Board opinions on evaluations and fitness checks*, EUR. COMM’N, [https://ec.europa.eu/info/regulatory-scrutiny-board-opinions-evaluations-and-fitness-checks\\_en](https://ec.europa.eu/info/regulatory-scrutiny-board-opinions-evaluations-and-fitness-checks_en) (last visited Mar. 5, 2019).

<sup>197</sup> See GUIDING PRINCIPLES FOR EU LEGISLATION, *supra* note 185.

<sup>198</sup> *About committees*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/committees/en/about-committees.html> (last visited Mar. 6, 2019). Parliament can also set up sub-committees and special temporary committees to deal with specific issues.



available on the European Parliament’s website.<sup>199</sup> Their meetings are held in public and streamed online. The Council has more than 150 working parties and committees (known as the Council’s Preparatory bodies). Some details of those committees are available online,<sup>200</sup> although not the membership details. The results of Council votes are automatically made public when the Council acts in its capacity as legislator; if a member wants to add a note to the vote, that note will also be made public.<sup>201</sup> When acting as a legislator, meetings of the Council are also open to the public,<sup>202</sup> though working party and committee meetings are not generally open to the public. Thus, the public is provided some means to observe how the proposals are crafted into final form.

ESMA and the EBA also play a role in the regulation of financial markets and institutions in the EU and their practices also evince a strong policy in favor of transparency and public input. ESMA and the EBA were each established in 2010 and are each an EU “independent” authority that is accountable to the European Parliament and Council.<sup>203</sup> They are authorized to develop “technical standards” (i.e., EU rules) and guidelines and recommendations to national authorities only when they have been granted such power in specific legislative acts of the Commission, Parliament and Council.<sup>204</sup> They also issue interpretative guidance of their regulations in the form of “Questions and Answers” documents<sup>205</sup> and provide opinions to competent authorities to build and promote a common supervisory culture and consistent supervisory practices.<sup>206</sup>

The legislation establishing ESMA and the EBA requires that technical standards generally be subject to open public consultation and cost-benefit analyses,<sup>207</sup> and that guidelines and recommendations to national authorities be subject to such consultation and cost-benefit analyses “where appropriate.”<sup>208</sup> In practice, both ESMA and the EBA post the proposals, questions for

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<sup>199</sup> *Committees home*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/committees/en/home.html> (last visited Mar. 6, 2019).

<sup>200</sup> *Council preparatory bodies*, THE COUNCIL OF THE EUR. UNION, <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/> (last visited Mar. 6, 2019).

<sup>201</sup> *Voting system*, THE COUNCIL OF THE EUR. UNION, <https://www.consilium.europa.eu/en/council-eu/voting-system/> (last visited Mar. 6, 2019).

<sup>202</sup> THE COUNCIL OF THE EUR. UNION, *General Secretariat of the Council of the EU - Information Sheet – Openness and transparency of Council proceedings* (July 2011), available at <https://www.consilium.europa.eu/media/29361/sn02860-re01en11-pub.pdf>.

<sup>203</sup> Eur. Sec. and Mkts. Auth. Founding Regulation, arts. 1 & 3, Nov. 24, 2010, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1095&from=EN>; EBA Founding Regulation, arts. 1 & 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010R1093-20160112&from=EN>.

<sup>204</sup> *Id.* at art. 1(2); Eur. Banking Auth. Founding Regulation, art. 1(2), Nov. 24, 2010, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1395835434589&uri=CELEX:32010R1093>.

<sup>205</sup> E.g., EUR. SEC. AND MKTS. AUTH. FOUNDING REGULATION, QUESTIONS AND ANSWERS ON MiFID II AND MiFIR INVESTOR PROTECTION AND INTERMEDIARIES TOPICS (May 29, 2019), available at [https://www.esma.europa.eu/sites/default/files/library/esma35-43-](https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_gas_on_investor_protection_topics.pdf)

[https://eba.europa.eu/single-rule-book-qa?jsessionid=FD716AE005DC14AB580AB7E2A2C4F994?p\\_p\\_id=questions\\_and\\_answers\\_WAR\\_questions\\_and\\_answersportlet&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-](https://eba.europa.eu/single-rule-book-qa?jsessionid=FD716AE005DC14AB580AB7E2A2C4F994?p_p_id=questions_and_answers_WAR_questions_and_answersportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_pos=1&p_p_col_count=2&questions_and_answers_WAR_questions_and_answersportlet_jspPage=%2Fhtml%2Fview.jsp&questions_and_answers_WAR_questions_and_answersportlet_viewTab=1)

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<sup>206</sup> Eur. Sec. and Mkts. Auth. Founding Regulation, art. 29; Eur. Banking Auth. Founding Regulation, art. 29.

<sup>207</sup> ESMA Founding Regulation, arts. 10 & 15; EBA Founding Regulation, arts. 10 & 15.

<sup>208</sup> ESMA Founding Regulation, art. 16; EBA Founding Regulation, art. 16.

consultation, and the accompanying cost-benefit analysis on their websites, along with any comments that they receive.<sup>209</sup> They also hold public open hearings on consultations. Moreover, ESMA and EBA are required to have a Securities Market Stakeholders Group and a Banking Stakeholders Group, respectively, that are to be consulted on draft technical standards.<sup>210</sup> These stakeholder groups are comprised of 30 members who represent industry, academia, consumers, and users of financial services and banking services.<sup>211</sup> The members of these groups are disclosed, as are minutes or summaries of their meetings.<sup>212</sup>

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<sup>209</sup> *Calendar*, EUR. BANKING AUTH., [https://eba.europa.eu/news-press/calendar?p\\_p\\_id=8&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=1&\\_8\\_struts\\_action=%2Fcalendar%2Fview&\\_8\\_month=1&\\_8\\_day=20&\\_8\\_year=2019&tabs1=events](https://eba.europa.eu/news-press/calendar?p_p_id=8&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&_8_struts_action=%2Fcalendar%2Fview&_8_month=1&_8_day=20&_8_year=2019&tabs1=events) (last visited Mar. 6, 2019); *Consultations*, EUR. SEC. AND MKTS. AUTH., <https://www.esma.europa.eu/press-news/consultations> (last visited Mar. 6, 2019).

<sup>210</sup> ESMA Founding Regulation, arts. 10, 15 & 37; EBA Founding Regulation, arts. 10, 15 & 37.

<sup>211</sup> ESMA Founding Regulation, art. 37; EBA Founding Regulation, art. 37.

<sup>212</sup> *Securities and Markets Stakeholders Group*, EUR. SEC. AND MKTS. AUTH., <https://www.esma.europa.eu/about-esma/governance/smsg> (last visited Mar. 6, 2019); *Banking Stakeholder Group*, EUR. BANKING AUTH., <https://eba.europa.eu/about-us/organisation/banking-stakeholder-group> (last visited Mar. 6, 2019).

### III. Policy Reforms at the International Standard-Setting Bodies

In the Committee's view there is a fundamental need and vast room for improvement in the standard development process used by international standard-setting bodies to further improve their processes with regard to transparency, public input, and cost-benefit analysis. Reforms to improve such processes will make the standard development process more robust, rigorous, rational, and legitimate. As the Council on Global Financial Regulation has said, greater "formality, regularity, and transparency" in decision-making processes "are the hallmarks of well-run public and private organizations" and should "enhance the credibility" of the bodies' standard-setting processes.<sup>213</sup> The Committee encourages the international standard-setting bodies and U.S. regulators to adopt the following policy proposals to enhance international standard-setting processes.

#### A. *Enhancing Transparency*

- **Each standard-setting body should fully disclose on its website all existing committees, working groups, task forces, and similar groups, the national regulatory bodies that serve on each group, and a point of contact for the committee or working group.**<sup>214</sup> The public deserves to know the various committees and groups of the standard-setting bodies and their compositions and have the ability to engage with such groups. Such a reform could also help the standard-setting bodies and their members operate more effectively. Lee Reiners, a former official at the Federal Reserve Bank of New York who worked on matters pertaining to the Basel Committee and FSB, has noted that such reforms "would actually assist standard-setting bodies and their member organizations, who for the first time would be able to holistically assess the organizations they are a part of and contribute to. The [Basel Committee] for instance, could use the information to determine if their committee structure has grown too unruly and decide to streamline their [decision-making] process. U.S. regulators could use the information to assess U.S. contributions to international committees and whether that's the best use of their staff's time and energies. U.S. agencies could also use the information to better coordinate with each other ahead of critical committee meetings."<sup>215</sup> The Committee agrees with this assessment.
- **Each standard-setting body should disclose the substantive projects that are being worked on within the body.** The public and financial sector participants should be aware of projects in the pipeline. Such knowledge allows them to prepare for potential regulatory changes, begin to evaluate potential policy changes before they are proposed, and attempt to engage with policymakers earlier in the process about whether policy reforms are desirable or how they should be structured or implemented. This practice has begun to be adopted by certain standard-setting bodies. The IAIS already announces when new

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<sup>213</sup> Hal S. Scott, Co-Chairman, Council on Global Fin. Reg., Financial Stability Board Roundtable Speech: A Medium Term (5-10 Year) Vision for the Financial Stability Board (Apr. 13, 2012).

<sup>214</sup> A similar recommendation has been made by Lee Reiners, a former official at the Federal Reserve Bank of New York who is now at Duke Law School. *Increasing Transparency at the Financial Stability Board*, *supra* note 101.

<sup>215</sup> *Id.*

projects are approved and provides a description of them and the FSB, in February 2019, and IOSCO, in March 2019, each for the first time, commendably published their respective annual work programs. However, none of the standard-setting bodies currently have webpages that, in one place, disclose the projects the body and each of its committees, task forces, or working groups are working on.

- **Each standard-setting body should provide public notice and publish a list of topics to be covered at any meeting of the decision-making organization, and any committee, working group, or task force working on standards that would be expected to be implemented by members if finalized.**<sup>216</sup> Currently such disclosures are not made by the standard-setting bodies. Such a reform would provide the public more information about what the standard-setting bodies are working on, the progress they are making, and enhance public confidence in the deliberative nature of the standard-setting bodies.
- **Each standard-setting body should increase the transparency about the discussions held at meetings of the body's decision-making organization, and committees, working groups, task forces, or similar groups.**<sup>217</sup> As described earlier, none of the standard-setting bodies open their meetings to the general public, publish a list of meeting attendees, or post high-level summaries of all issues discussed during all meetings. Reforms, including through the posting of high-level summaries of meetings within one month of their being held, disclosing the attendees of the meetings, and opening certain meetings to the general public or streaming them live online would enable the public to understand the positions being taken by various members and increase accountability in their home jurisdictions by knowing what positions the officials advocated for and how strenuously. The exact mechanism used to increase transparency may depend on the topic being addressed or the stage of deliberations. For example, if discussions could result in disruptive market speculation, there could be reasons to delay release of some information for a period of time or provide in redacted form. In the United States, for example, Federal Open Market Committee meetings that set interest rates are not streamed live. Nevertheless, policy statements are released immediately after the meetings, minutes are released three weeks later, and full transcripts are released five years after the meeting.<sup>218</sup> In any event, more light should be shone on what is actually said and debated in meetings of standard-setting bodies where policy is being developed.

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<sup>216</sup> Similar proposals have been made by others. See *Rethinking the Internationalization of U.S. Bank Regulation*, *supra* note 3; Eric Helleiner, *FSB Governance*, in GLOBAL FINANCIAL GOVERNANCE & IMPACT REPORT 2013 (Nathan Coplin ed., New Rules for Global Finance).

<sup>217</sup> A similar proposal has been made by both Jeremy Newell and Eric Helleiner. See sources cited, *supra* note 216.

<sup>218</sup> Mark A. Wynne, *A Short History of FOMC Communication*, FED. RES. BANK OF DALLAS (Sept. 2013), <https://www.dallasfed.org/research/eclett/2013/el1308.cfm> (statements released starting in 1994); Deborah J. Danker & Matthew M. Luecke, *Background of FOMC Minutes*, in Federal Reserve Bulletin 175 (Spring 2015); Nancy Watzman, *Federal Reserve delays release of transcripts of major meetings*, SUNLIGHT FOUNDATION (Oct. 28, 2011) [https://sunlightfoundation.com/2011/10/28/fed\\_delays\\_release/](https://sunlightfoundation.com/2011/10/28/fed_delays_release/).

## ***B. Enhancing Opportunities for Public Input***

- **Each standard-setting body should adopt policies requiring that it seek public comment on any proposed standards or other policy that is expected to be implemented by members if finalized.**<sup>219</sup> Each of the standard-setting bodies recognizes, to some extent, the value of providing the public the opportunity to comment on policies that the body expects its members to implement. The FSB's 2018 announcement that it will establish an expectation of a comment period of at least 60 days when seeking public input on a proposal was a welcome move. Yet, the FSB and IOSCO retain significant discretion about choosing whether to seek input. Public comment should be sought in all matters where policies are being developed that members will be expected to implement. Notice-and-comment procedures should not be discretionary. Indeed, if global standards are so important that international bodies believe they need to be adopted, it is only logical to conclude that those standards will be material and impact markets, institutions, and consumers, who should all be provided ample opportunity to provide input on standards that will affect them.
- **Each standard-setting body should include an explanation of how the body considered the comments received during the consultation period as part of the final release of any standard, principles, guidelines, or other policy expected to be implemented by its members.** Public input is only valuable to the extent that it is considered and addressed. Yet, the Basel Committee is not required by any of its policies to respond to public comments and demonstrate that they have been seriously considered. To ensure standard-setting bodies are seriously wrestling with public comments, the Basel Committee should provide a narrative explanation of how comments were addressed in final standards, and if a comment did not result in a change, why it did not. The standard-setting bodies could look to the United States as an example, where the preamble of the announcement of the text of a final rule includes discussion of how comments submitted were incorporated or not into the final rule.
- **Each standard-setting body should seek public input prior to the publication of proposed standards or other policies expected to be implemented by members.** Even where policies that are expected to be adopted domestically are subject to public notice and comment at the stage the proposal is published, there are still legitimate concerns that such input might be provided too late in the process and standard-setters could become invested in the proposals they have made.<sup>220</sup> Public participation earlier in the process might inform the standard setter about whether an international policy on the topic is necessary, alternative regulatory approaches, or facts that might influence the proposal's approach or framework. Public input should be sought during the development of the proposal itself. Even if regulators substantially revise proposals submitted for comment at a later stage based on the public comments received,<sup>221</sup> earlier public consultation would

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<sup>219</sup> See *Rethinking the Internationalization of U.S. Bank Regulation*, *supra* note 3.

<sup>220</sup> REPORT TO THE CONGRESS: EFFORTS TO INCREASE TRANSPARENCY, *supra* note 119, at 10.

<sup>221</sup> For example, the FSB's proposal for designating asset managers as systemically important financial institutions had to be reworked after opposition emerged to its original proposal. See Huw Jones, *Global watchdog finalizes proposed rules to tackle asset management risks*, REUTERS (Jan. 12, 2017), <https://www.reuters.com/article/us-g20->

make the process more efficient by incorporating the public’s perspective into the original proposal. The international standard-setting bodies do this on some occasions, but not consistently. For example, the IAIS published an “interim consultation” in December 2017 on developing an activities-based approach to evaluating and mitigating systemic risk in the insurance sector,<sup>222</sup> and an IOSCO task force on Financial Market Benchmarks published a consultation document posing questions relevant to the development of principles for regulating benchmarks before the task force had developed specific principles.<sup>223</sup> Standard-setting bodies could regularly request input by the public at the beginning of the standard-setting process or during the process before proposed standards are announced in several ways. One way to get earlier public input could be by announcing that a proposal is being developed and identifying a contact that interested parties could communicate with on the matter. Alternatively, a more formal approach could be used where an interim consultation request is published prior to the disclosure of the particulars of a proposal that asks for responses on numerous questions relevant to the development of the proposal. The approach chosen may depend on the particular facts and circumstances of the issue at hand.

### C. *Enhancing the Use of Cost-Benefit Analysis*

- **Each standard-setting body should conduct a cost-benefit analysis of any standard or policy expected to be implemented by its members and that analysis should be published with the proposed standard and subject to public notice and comment.** To analyze whether standards are advisable and necessary, standard-setting bodies should conduct cost-benefit analyses before releasing any proposed standards. Only IOSCO has policies in place requiring the use of cost-benefit analysis in the adoption of a standard and to include that analysis in the proposal itself. As previously noted, the FSB and Basel Committee often conduct a quantitative impact study and disclose it after a proposed standard has been put out for public comment. Consistently conducting cost-benefit analyses and subjecting them to the public notice-and-comment process will enable standard-setting bodies to compare the costs and benefits of alternative regulatory approaches. Such analyses should be conducted on all standards, principles, or guidelines expected to be implemented by members without a materiality threshold. It is impossible to truly know the impact of a proposal unless it has been studied, and if an issue is vital enough to be raised at the international level, the presumption should be that its impacts will be significant. Finally, subjecting the cost-benefit analyses to public notice and comment enables the analysis, assumptions, and data to be reviewed by outsiders.

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funds-regulations/global-watchdog-finalizes-proposed-rules-to-tackle-asset-management-risks-idUSKBN14W2HJ. Another example is the Basel Committee’s proposal on capitalization of bank exposures to central counterparties, in which the Basel Committee published a proposal for comment in December 2010 and a revised proposal in November 2011 to reflect changes made based on comments. BANK FOR INT’L SETTLEMENTS, CAPITAL REQUIREMENTS FOR BANK EXPOSURES TO CENTRAL COUNTERPARTIES (July 2012).

<sup>222</sup> *Public Consultation: Activities-based Approach to Systemic Risk*, INT’L ASSOC. OF INS. SUPERVISORS, <https://www.iaisweb.org/page/consultations/closed-consultations/2018/activities-based-approach-to-systemic-risk> (last visited Mar. 6, 2019).

<sup>223</sup> THE BD. OF THE INT’L ORG. OF SEC. COMM’NS, FINANCIAL BENCHMARKS CONSULTATION REPORT (Jan. 2013), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD399.pdf>.

- **The standard-setting bodies should conduct ex-post cost-benefit analyses of existing standards adopted after the financial crisis and work to identify and reduce conflicting or duplicative standards as part of those analyses.** At the time standards are proposed, it can be difficult to predict the costs and benefits of the new standards and to correctly predict the types and magnitude of first- and second-order effects of the proposal. It also can take time for the costs and benefits to manifest themselves. As the OECD has stated, “[r]egulations should be periodically reviewed to ensure that they remain fit for purposes” because “not all effects can be known with certainty in advance,” and “[m]any of the features of an economy or society of relevance to particular regulations will change over time.”<sup>224</sup> In addition, different standards may be adopted at various times to address different issues, which may result in unintended conflicts or duplication of standards. Indeed, FSB Chair Quarles has stated that post-crisis reforms should be evaluated to ask whether they have had their intended effects, any unintended effects, and if there are “more efficient, simple, transparent, and tailored,” standards that can be adopted after conducting a thorough review of recently adopted standards.<sup>225</sup> The Committee therefore recommends that within several years after a standard is implemented, a formal cost-benefit analysis be conducted and published to determine the actual (rather than predicted) costs and benefits and determine if any revisions or recalibrations are necessary, including whether the standard conflicts with others or is duplicative in light of other adopted standards.

#### *D. How U.S. Regulators Can Enhance the Standard Setting Process*

- **U.S. regulators that are members of a standard-setting body should publish the proposed international standards, as well as the agency’s views on the proposal, for comment in the United States.**<sup>226</sup> This is a practice that U.S. banking regulators used in the development of Basel II capital standards<sup>227</sup> but have not used in recent years. Adoption of this practice would ensure that U.S. agencies are informed by public input before agreeing to any final international standards, principles, or guidelines. It would provide U.S. interested parties an avenue to comment on proposed international standards even if the standard-setting body does not engage in a notice-and-comment process. Given that U.S. regulators may feel obliged or pressured to implement international standards, taking comments at this earlier stage could help ensure that comments disagreeing with an international standard are considered and not rejected outright because it is submitted in response to a proposed domestic rulemaking that is merely meant to implement an already agreed upon standard. Public comment earlier in the process reduces the potential for domestic gold plating of agreed upon international standards, because public input could provide a justification and grounds for U.S. regulators to push for heightened international standards within an international body if U.S. firms and the U.S. public support more stringent standards. Gold plating can put U.S. firms, markets, and the economy at a competitive disadvantage. Therefore, U.S. regulators should aim to incorporate more

<sup>224</sup> REGULATORY POLICY OUTLOOK 2018, *supra* note 99, at 67.

<sup>225</sup> Randal K. Quarles, Chair, Fin. Stability Bd., Remarks at the Bank for Int’l Settlements Special Governors Mtg.: Ideas of Order: Charting a Course for the Financial Stability Board (Feb. 10, 2019).

<sup>226</sup> The American Bankers Association has made similar recommendations. *See, e.g.*, COMMENTS IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING - *NET STABLE FUNDING RATIO*, *supra* note 4, at 7 (encouraging U.S. agencies to seek comment at the beginning stages of the development of international standards).

<sup>227</sup> Implementation of New Basel Capital Accord, 68 Fed. Reg at 45,901.

stringent standards that they support for U.S. markets into the relevant international standard so that they are applied equally across markets and jurisdictions. Moreover, obtaining and considering input on international standards can increase the credibility of those standards upon adoption and domestic implementation. This provides room for U.S. regulators to permit substituted compliance for comparable rules in other jurisdictions given that rules in foreign jurisdictions would be substantially equivalent to U.S. rules.

- **U.S. regulators should advocate for enhanced transparency, enhanced opportunity for public comment and enhanced cost-benefit analysis within the standard-setting bodies themselves.** The United States holds considerable sway within these international standard-setting bodies as one of the world's largest economies and as a global financial and banking center. The Fed's Vice Chairman of Supervision currently is the Chair of the FSB, the chairmen of the SEC and CFTC each sit on the IOSCO board, and the Fed has a representative on the Executive Committee of the IAIS. U.S. agencies should use their power and influence within the standard-setting bodies to increase transparency and public participation in the development of international standards.





