Exhibit A

New York Supreme Court

Appellate Division—Third Department

Case No.: 530047

In the Matter of the Application of,

INDEPENDENT INSURANCE AGENTS AND BROKERS OF NEW YORK, INC. and TESTA BROTHERS, LTD.,

Petitioners-Appellants,

– and –

PROFESSIONAL INSURANCE AGENTS OF NEW YORK STATE, INC. and GARY SLAVIN,

Petitioners,

For Judgment Pursuant to CPLR Article 78

– against –

THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES and MARIA T. VULLO, in her official capacity as Superintendent of the New York State Department of Financial Services,

Respondents-Respondents.

(For Continuation of Caption See Inside Cover)

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS-APPELLANTS

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In the Matter of the Application of,

THE NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – NEW YORK STATE, INC. and DONALD DAMICK,

Plaintiffs-Respondents,

– against –

THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES and MARIA T. VULLO, in her official capacity as Superintendent of the New York State Department of Financial Services,

Defendants-Respondents.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies, state and local chambers, and trade associations of every size, in every industry sector, and from every region of the country. The Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

Although the underlying dispute between the parties in this litigation concerns financial services, the Chamber is not participating because of the subject matter in issue. Rather, the Chamber is interested in this case, and files this brief, because this action raises the important question of whether an administrative agency may regulate wide swaths of the economy without quantifying the estimated costs of its proposed regulation. This question of administrative law matters greatly to the broader business community, as many – if not most – businesses are subject to at least some form of federal and state regulation. The Chamber therefore submits this brief in support of Petitioners-Appellants.

PRELIMINARY STATEMENT

Cost-benefit analysis serves an important function in modern administrative law. When performed rigorously, cost-benefit analysis assists an agency in

identifying public policies that best achieve the beneficial outcomes the agency is tasked with promoting while considering the costs of pursuing those objectives. The agency can then tailor its regulatory program to minimize unnecessary cost while maximizing social welfare. But to conduct this analysis, an agency must actually make an attempt to quantify the costs of its regulatory choices, and must weigh these costs against the likely benefits. It is not enough to simply describe potential downsides of regulatory action in prose.

Here, Respondents-Respondents the Department of Financial Services and Maria T. Vullo[1] (together, "DFS") failed to take the basic steps the law requires. DFS issued regulatory impact statements that alluded to certain costs associated with the regulatory action it was then considering, but never quantified those costs or measured them against the likely benefits. The Supreme Court upheld DFS's deficient regulatory process, finding – by shifting the burden inappropriately to the petitioners – "that the efforts of DFS [to comply with SAPA] are amply sufficient." R. 38.[2] This was error; DFS's failure to conduct the basic analysis that SAPA requires means the First Amendment to 11 N.Y.C.R.R. § 224 (the "Amendment") must be invalidated.

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[1] At the time the regulation in issue was promulgated, Maria T. Vullo served as the Superintendent of the Department of Financial Services. She has been replaced by Linda A. Lacewell.

[2] Citations to "R. __" refer to the Record on Appeal filed by the parties. Doc. Nos. 8-11.

The Chamber urges this Court to reverse.

ARGUMENT

I. The New York State Administrative Procedure Act Required The Department Of Financial Services To Consider And Quantify Costs, And There Are Sound Policy Reasons To Apply That Statutory Mandate Rigorously

A. SAPA Required DFS To Consider And Quantify The Costs Of The Amendment

New York's State Administrative Procedure Act ("SAPA") requires all regulating agencies including DFS to consider the costs imposed by their rules in Section 202-a(1):

> In developing a rule, an agency shall, to the extent consistent with the objectives of applicable statutes, consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons . . . directly or indirectly affected by it or upon the economy or administration of state or local governmental agencies.

To ensure compliance with this directive, SAPA also requires that all agencies promulgating regulations – with only limited exceptions not applicable here – issue a "regulatory impact statement" alongside any proposed rule. SAPA § 202-a(2). That impact statement must include, among other components, "[a] statement detailing the projected costs of the rule," including implementation costs, and it must set out "the information, including the source or sources of such information, and methodology upon which the cost analysis is based." SAPA § 202-a(3)(c). If estimating costs is difficult, SAPA directs the agency to say why

and also to apply its best efforts at quantifying them; specifically, if an agency "finds that it cannot fully provide a statement of . . . costs," it must provide "a statement setting forth its best estimate," and it must "indicate the information and methodology upon which such best estimate is based and the reason or reasons why a complete cost statement cannot be provided." SAPA § 202-a(3)(c)(iv).

In short, SAPA required DFS to quantify and weigh the costs associated with the Amendment, and to provide in a regulatory impact statement both a measure of the costs associated with the regulatory action and an explanation of the method for calculating those costs or, at least, to explain why it is unable to do so and to make its best estimate.

B. SAPA's Requirement That Agencies Consider Costs Is Well Justified And Should Be Strictly Enforced

SAPA's dictate that New York agencies determine and consider the costs of their regulatory choices reflects sound policy. As federal and state executives of both parties have long recognized, cost-benefit analysis is an attractive, efficiency-promoting aspect of the regulatory process. That analysis, properly conducted, ensures that agencies promulgate effective regulations in a transparent manner that is easily reviewed by judges and understood by the public.

1. Cost-Benefit Analysis Promotes Efficient Outcomes, Regulatory Efficiency, and Accountability

It is generally accepted that federal and state "agencies should . . . promote the overall well-being of citizens." Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 Yale L. J. 165, 209 (1999). To achieve that objective, it is critical that agencies apply cost-benefit analysis, and that courts verify this has been done. *See id.* at 245 (concluding that cost-benefit analysis "is a useful decision procedure and it should be routinely used by agencies").

Cost-benefit analysis does not mandate that agencies pursue any particular regulatory goal or that they craft a particular regulatory regime – rather, it provides administrative agencies with a decisional framework that assists agencies in evaluating competing policy options and that helps ensure that agencies regulate on an informed basis. John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. Legal Stud. S63, S63 (2014) ("Cost-benefit calculation or economic analysis is widely agreed on as a useful conceptual framework for regulatory design and a commonly recommended process for agencies to voluntarily pursue."). As one prominent commentator – Professor Cass Sunstein, who served as the head of the White House Office of Information and Regulatory Affairs during President Obama's first term – explains, "[c]ost-benefit analysis is best understood as a way for agencies to ensure that their decisions are informed – that they are based on knowledge about likely consequences, rather than on

dogmas, intuitions, hunches, or interest-group pressures." *See* Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 Yale L.J. Forum 263, 263 (2015). And, cost-benefit analysis does not necessarily require agencies to forswear consideration of other qualitative or non-quantifiable benefits; it simply directs agencies to consider the costs of their regulations alongside other factors. Eric A. Posner, *Cost-Benefit Analysis as a Solution to a Principal-Agent Problem*, 53 Admin. L. Rev. 289, 291–93 (2001).

What's more, cost-benefit analysis helps ensure that final rules promote efficient outcomes – that is, that they "produce a net positive effect on society." Paul Rose & Christopher J. Walker, *Dodd-Frank Regulators, Cost-Benefit Analysis, and Agency Capture*, 66 Stan. L. Rev. Online 9, 11 (2013); *see also* Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 Yale J. Reg. 545, 547 (2017) ("Cost-benefit analysis is an important tool for the evaluation of the desirability of regulatory actions: Where all benefits and costs can be quantified and expressed in monetary units, it provides the decision makers with a clear indication of the alternative that generates the largest net benefits to society." (cleaned up)).

Simultaneously, because it provides an analytical framework that must be applied (even if that framework's results are not always adopted), cost-benefit analysis has the effect of "rationalizing and disciplining agency decision making,"

thereby "promot[ing] the regulatory efficiency as well as the political accountability of agencies."[3] Edward R. Morrison, Comment, *Judicial Review of Discount Rates Used in Regulatory Cost-Benefit Analysis*, 65 U. Chi. L. Rev. 1333, 1360 (1998); *see also* Rose & Walker, 66 Stan. L. Rev. Online at 11 (noting that cost-benefit analysis "requires an agency to consider the various economic effects of a particular regulation as opposed to possible alternatives, including the alternative of no regulation at all.").[4] By supplying a disciplining device, cost-benefit analysis helps strip away the cognitive biases affecting all decision-makers – including regulators – thus encouraging agencies to make policy choices based on evidence rather than heuristics, institutional norms, or self-serving biases. *See* Michael Abramowicz, *Toward a Jurisprudence of Cost-Benefit Analysis*, 100 Mich. L. Rev. 1708, 1714–17 (2002) ("Another virtue of the cost-benefit analysis . . . is its ability to overcome cognitive problems attributable to

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[3] Other methods of numerical regulatory analysis are available (including, for example "the use of quality adjusted life years" in the context of regulations bearing on public health), but as Professor Eric Posner explains, cost-benefit analysis subsumes all other numerical metrics, "account[ing] for the broadest range of welfare effects that a regulation might have." Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. Chi. L. Rev. 1137, 1144–45 (2001).

[4] *See also* Sunstein, 124 Yale L.J. Forum at 267 ("In many cases, the analysis turns out to discipline agencies, showing that certain conclusions are exceedingly difficult to justify, and that others are hard to resist."); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247, 253 (1996) (rejecting a regulatory standard aimed at achieving only economic efficiency, but advocating "cost-benefit analysis" as "an effort to require balancing rather than absolutism").

imperfections in how individuals think about risk."). And by forcing agencies to consider likely costs and externalities, "cost-benefit analysis reduces the risk of unintended consequences." Rose & Walker, 66 Stan. L. Rev. Online at 11.

In addition to encouraging the promulgation of more effective regulations that take account of all relevant information, cost-benefit analysis also works to "reduce agency capture" by "improv[ing] transparency" through the "public[ation] for public scrutiny agency estimates of regulatory effects." Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L. J. 1337, 1370 (2013). In an age where governance occurs through administrative agencies as much as (or more so than) legislation, transparency in the administrative state is essential.

And, cost-benefit analysis also permits generalist judges to review expert agencies with more ease, thus promoting public accountability and adherence to the rule of law. *See* Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. Chi. L. Rev. 935, 939–40 (2018) (noting that "[t]he major difference between judges and agency officials is that judges are generalists and agency officials are experts," and that "quantification forces regulators to put their decisionmaking into a format that can be evaluated by generalist superiors"). Indeed, although judges may have difficulty parsing an agency's written description of the benefits of its regulations – particularly regulations promulgated

in a technical subject area – "[r]eview of a subordinate's decisions is greatly eased when the decision is based on a procedure in which the advantages and disadvantages of a regulation are reduced to a numerical metric." Posner, 68 U. Chi. L. Rev. at 1144. The simplified review that comes with verifying that an agency in fact applied the cost-benefit framework required by law also increases the predictability of judicial proceedings. Posner, 53 Admin. L. Rev. at 295.

2. Cost-Benefit Analysis Has Been Widely Adopted

Given its virtues, it is entirely unsurprising that cost-benefit analysis has been favored by every President for nearly 40 years – it has been employed, in some form, by the administrations of Ronald Reagan,[5] George H.W. Bush,[6] Bill Clinton,[7] George W. Bush,[8] Barack Obama,[9] and Donald Trump,[10] and has become an important feature of the administrative state, Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 Chi. Kent L. Rev. 383, 383 (2019) ("Since

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[5] Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

[6] John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 Fordham Urb. L. J. 953, 963 (2006) (explaining that cost-benefit analysis continued under Executive Order No. 12,291).

[7] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[8] Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. Chi. L. Rev. 609, 615 n.21 (2014) ("President George W. Bush continued under the Clinton order, making only minor changes at the end of his term.").

[9] Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

[10] Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

the beginning of Ronald Regan's presidency, cost-benefit analysis . . . has been an integral part of the regulatory process."). Governor Cuomo has likewise incorporated cost-benefit analysis into at least one executive order. *See* N.Y. Exec. Order 131 (Apr. 9, 2014), available online at https://www.governor.ny.gov/news/no-131-establishing-commission-youth-public-safety-and-justice.

Courts have also recognized that cost-benefit analysis is of central importance to regulatory decision-making. In *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep't of Health & Mental Hygiene*, the New York Court of Appeals explained:

> [T]he promulgation of regulations necessarily involves an analysis of societal costs and benefits. Indeed, cost-benefit analysis is the essence of reasonable regulation; if an agency adopted a particular rule without first considering whether its benefits justify its societal costs, it would be acting irrationally.

23 N.Y.3d 681, 697 (2014) (noting that cost-benefit analysis must be conducted within the guidelines set by the legislature); *see also Nat'l Restaurant Ass'n v. N.Y.C. Dep't of Mental Health & Hygiene*, 148 A.D.3d 169, 176 (1st Dep't 2017) (noting "an administrative agency's necessary authority to make cost-benefit analyses"). Similarly, the United States Supreme Court – among other federal courts – has reached a similar conclusion, holding in *Michigan v. Environmental*

Protection Agency that it would not be permissible for an agency to impose substantial costs for only negligible benefit. 135 S. Ct. 2699, 2707 (2015).

II. Cost-Benefit Analysis Requires Agencies To Actually Try To Quantify Costs

Unsurprisingly, effective cost-benefit analysis requires agencies to actually attempt to quantify and to weigh the expected costs and benefits of their regulations. *See, e.g.*, Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1498 (2002) ("[C]ost-benefit analysis requires a full accounting of the consequences of an action, in both quantitative and qualitative terms."); *see also* Lisa Heinzerling, *Risking It All*, 57 Ala. L. Rev. 103, 113 (2005) ("[C]ost-benefit analysis requires numbers: it requires the analyst to first quantify the costs and benefits of a decision."); Livermore & Revesz, 101 Geo. L. J. at 1370 (describing "the cost-benefit standard, which requires, to the extent possible, that agencies identify and quantify the benefits and costs of proposed rulemakings").

Quantification is, in fact, a key aspect of the cost-benefit framework and of the policy reasons why the law requires agencies to apply it; by requiring interested parties, including government agencies, to measure and then to reduce the costs of regulations relative to the benefits, "[c]ost-benefit analysis forces parties to disclose, and open to scrutiny, the causal mechanisms by which they think

regulations operate." Cochrane, 43 J. Legal Stud. at S67. As Professor Sunstein explains, quantification is essential to achieve the salutary objectives of requiring agencies to conduct cost-benefit analysis – it "helps to promote accountability, transparency, and consistency, and it can also counteract both excessive and insufficient stringency." Cass R. Sunstein, *The Limits of Quantification*, 102 Calif. L. Rev. 1369, 1379 (2014).

Of course, in some regulatory areas, it can be difficult to quantify the expected costs and benefits of a regulation with precision. *See, e.g.*, Heinzerling, 57 Ala. L. Rev. at 113 (asserting that it is difficult to quantify the effects of environmental regulation). But, even though an agency's regulatory analysis need not be based on *perfect* information, it is essential that agencies try, and that they provide their thinking on the costs in writing for the public and the courts to see. *See* Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. Legal Stud. 1059, 1064 (2000) (noting that cost-benefit analysis is "a regulatory method that calls for regulators to identify, and make relevant for purposes of decision, the good effects and bad effects of regulation and to quantify those as much as possible"). Quantification, even if imperfect, requires the agency to identify and compare relevant and competing considerations, and it is in this task of public identification and comparison that the cost-benefit framework furthers the beneficial objectives the framework is designed to accomplish. Sunstein, 102 Calif. L. Rev. at 1379.

Indeed, uncertainty itself may be a factor in the cost-benefit analysis, and if there is no attempt at quantification, that uncertainty may not be identified or publicly disclosed.

III. DFS's Failure To Adequately Consider Costs Renders The Amendment Invalid

In light of the explicit statutory mandate to consider costs – and the sound policy reasons underlying that legislative directive – DFS's total failure to quantitatively evaluate the costs of the Amendment renders the rule invalid. Petitioners argue as much in their opening brief in this Court, Doc. No. 12 at 28-34, and they are right to do so.

A. DFS Made No Effort To Quantify Costs

Despite developing an administrative record spanning over 850 pages, including submissions attempting to quantify the costs of the Amendment, neither the initial regulatory impact statement (published on December 27, 2017), the regulatory impact statement that accompanied DFS's first revision to its proposed rule (published on May 16, 2018), nor the regulatory impact statement prepared in conjunction with the final version of the Amendment (published on August 1, 2018) attempted to analyze the Amendment's drawbacks. *See* R. 1208-10; 1712-48; 2035-79. Instead, throughout the process, DFS set out hunches – one of the very analytical issues a proper cost-benefit analysis avoids – claiming generically in the impact statement accompanying the revised draft of the rule that the

approach DFS planned to take was "expected to greatly minimize costs"; that "[t]he costs associated with" the Amendment "are expected to be minimal"; and that the "benefits of the regulation are expected to be substantial." R. 1719-20. DFS cited no statistical evidence in support of these claims, did not attempt to define the terms "minimal" and "substantial," and did not otherwise seek to identify or quantify the costs or their origins. DFS's threadbare *recitation* of the framework of cost-benefit analysis is hardly a meaningful *application* of it, much less the sort of rigorous analysis that the legislature contemplated and that courts require to ensure the promulgation of regulations that reflect a considered evaluation of all relevant facts.

The final impact statement is no better, even though commenters – including the Chamber of Commerce, R. 1780, 1783-84 – had pointed out that DFS's first impact statement failed to appropriately quantify or evaluate the costs associated with its proposed rule. In the final statement, DFS: asserted, without reference to any evidence, that its rule would "minimize any compliance costs"; rejected without elaboration contrary evidence as "gross overestimations"; reiterated that it believed administrative costs for market participants would be "minimal"; and made the naked assertion that the "tremendous benefits" of the Amendment would "easily outweigh the potential administrative costs." R. 2041-45.

DFS's failure to engage with the evidence and rely on actual data and calculations, or otherwise to seek to quantify the costs of promulgating the Amendment, renders DFS's action unquestionably unlawful without any reference to the actual soundness (or not) of the Amendment as a matter of policy. Indeed, DFS's failure to meaningfully attempt to quantify likely costs makes it exceedingly likely that the agency's regulation is based only on its own hunches and predispositions, Sunstein, 124 Yale L.J. Forum at 263, and that DFS has not meaningfully checked its own regulatory priors, *see id.* at 267. And, DFS has deprived the public, Supreme Court, and this Court of a record to permit the sort of review that the SAPA contemplated; without quantification, the agency's opaque assertions are hardly a basis for meaningful judicial evaluation. *See* Posner, 68 U. Chi. L. Rev. at 1144.

B. DFS Ignored Evidence Of Substantial Costs

DFS's failure to even attempt to quantify the costs of the Amendment is particularly notable in light of the record evidence of the Amendment's potential costs. As is evident from the record, the Amendment will require insurance agents to collect "fifteen categories" of information – a burden which, of course, may affect the sale of life insurance policies and requires additional documentation not called for by current law. R. 556-57. The Amendment also purports to extend agents' compliance burdens beyond the initial transaction, even covering an

insured's exercise of some policy right. *Id.* And, these costs are likely to be to the detriment of lower-income consumers – as one commenter explained, insurance agents faced with high compliance costs for selling "relatively low-premium and low-compensation term life" and more complex products aimed at higher-income consumers are likely to "abandon simple products," harming those consumers who could benefit from the protection term life insurance offers. R. 1581. But, aside from the conclusory assertion that the Amendment "was specifically designed to allow producers to leverage existing practices," R. 2043, the DFS did not meaningfully address any of these costs, let alone how they will be borne or when. That willful blindness was error.

These errors warrant vacatur of the DFS's rule. Of course, there is no basis for the Court to look past the agency's failure or determine, in its judgment, that the costs of the Amendment would not have changed the outcome. *In re Hudson Valley Cmty. Coll. (Hudson Valley Cmty. Coll. Faculty Ass'n)*, 121 A.D.3d 1385, 1387 (3d Dep't 2014) (a court reviewing an Article 78 petition "may not substitute its judgment for that of the administrative body"). And this is not a situation where the agency has made clear that its technical non-compliance with a statutory requirement would not have changed the outcome. *See, e.g.*, *City of Mt. Vernon v. OMRDD*, 56 A.D.3d 771, 772 (2d Dep't 2008) (disregarding error as "harmless" when the allegedly excluded evidence was accepted and, even if considered, would

not have made a difference in the outcome). Here, there is substantial, credible, un-addressed evidence of the Amendment's costs, and the Court should vacate the rule until the agency considers that evidence.

CONCLUSION

For the foregoing reasons, the Court should reverse the Supreme Court's decision, invalidate the Amendment, and enjoin Respondents from enforcing it.

Dated: May 4, 2020

Respectfully submitted,

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Dated: New York, New York
May 4, 2020

By: /s/ Vincent Levy
Vincent Levy