

Regulatory Paralysis after *Business Roundtable*

A preview of the impact of “regulatory
reform” legislation?

Cost-Benefit Analysis at the SEC

Current Law:

- “Whenever pursuant to this chapter the Commission is engaged in rulemaking...the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”

15 U.S.C. § 78c(f)

Cost-Benefit Analysis at the SEC

SEC Regulatory Accountability Act (HR 2308):

- “Before promulgating a regulation under the securities laws...the Commission shall...propose or adopt a regulation or order only on a reasoned determination that the benefits of the intended regulation or order justify the costs of the intended regulation or order.”

§ 2(e)(1)(B)

Cost-Benefit Analysis at the SEC

HR 2308, cont'd:

- “...Commission shall assess the costs and benefits of available regulatory *alternatives*, including the alternative of not regulating.”
- Commission “may” take following into consideration:
 - “assess the best ways of protecting market participants and the public”
 - “take into consideration investor choice”
 - “consider the impact on capital formation”
 - “consider the impact on market liquidity in the securities markets”
 - “determine whether...the regulation is tailored to impose the least burden on society...taking into account, to the extent practicable, the cumulative costs of regulations”

§ 2(e)(2)

Cost-Benefit Analysis at the CFTC

Current Law:

(1) In general

“Before promulgating a regulation under this chapter or issuing an order...the Commission shall consider the costs and benefits of the action of the Commission.”

(2) Considerations

“The costs and benefits of the proposed Commission action shall be evaluated in light of--

- (A)** considerations of protection of market participants and the public;
- (B)** considerations of the efficiency, competitiveness, and financial integrity of futures markets;
- (C)** considerations of price discovery;
- (D)** considerations of sound risk management practices; and
- (E)** other public interest considerations.”

7 U.S.C. § 19

Cost-Benefit Analysis at the CFPB

Current Law:

- “In prescribing a rule under the Federal consumer financial laws—
(A) the Bureau shall consider—

(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and

(ii) the impact of proposed rules on [depository institutions with assets of less than \$10 billion] and the impact on consumers in rural areas”

Dodd-Frank Act § 1022

Cost-Benefit Analysis at the CFPB

Current Law, cont'd:

- CFPB is a “covered agency” under the Small Business Regulatory Fairness Enforcement Act (SBREFA):
 - CFPB must consider “*any* projected increase in the cost of credit” for small business
 - CFPB must describe “*any* significant alternatives to the proposed rule” that accomplish the rule’s objectives and minimize the increase in cost of credit for small business
 - CFPB must participate in SBREFA Review Panels:
 - Prior to publication of proposed rule
 - Feedback from SBA Chief Counsel ,OMB, and select small businesses impacted by the rule
 - Typically a time-consuming process

Financial Regulatory Responsibility Act of 2011 (S. 1615)

- Introduced by Sen. Shelby (R-AL), Ranking Member-Senate Banking:
 - “An agency may not publish a notice of final rulemaking if the agency, in its analysis...determines that the *quantified* costs are greater than the *quantified* benefits...”(emphasis added).
- § 3(b)(4)(A)
 - Congressional Waiver: Congress can waive this prohibition by adopting a joint resolution of *approval* under the Congressional Review Act procedures.
 - In other words, rules whose quantified benefits are not shown to exceed quantified costs must be affirmatively approved by both houses of Congress within 60 legislative days, or cannot be finalized.

Financial Regulatory Responsibility Act of 2011 (S. 1615)

- “An agency may not issue a notice of proposed rulemaking unless the agency includes...an analysis that contains”
 - “a quantitative and qualitative assessment of all anticipated direct and *indirect* costs and benefits of the regulation including (emphasis added):
 - Effects on economic activity, net job creation (excluding jobs related to ensuring compliance with the regulation), efficiency, competition, and capital formation.
 - If quantified benefits do not outweigh quantified costs, a justification for the regulation.”
 - § 3(a)(4)(B) & § 3(a)(5)
 - Judicial Review: “A person that is adversely affected or aggrieved by the regulation is entitled to bring an action in the United States Court of Appeals for the District of Columbia Circuit for judicial review of agency compliance with the requirements of Section 3.”

The Regulatory Accountability Act (HR 3010, S. 1606)

- Passed House last December, bi-partisan sponsors in Senate:
 - Imposes a cost-benefit “super-mandate” on all significant rules at all agencies:
 - “the agency shall adopt the least costly rule considered during the rule making...that meets relevant statutory objectives”
§ 3(f)(3)(A)
 - Judicial Review:
 - “The court shall not defer to the agency’s:
 - Determination of the costs and benefits or other economic or risk assessment of the regulatory action, if the agency failed to conform to guidelines...established by the Office of Information and Regulatory Affairs.”
§ 7(b)(1)

The Regulatory Accountability Act (HR 3010, S. 1606)

- “The agency must also consider the following:
 - The potential costs and benefits of potential *alternative* rules...including:
 - Indirect costs and benefits
 - Cumulative costs and benefits
 - Estimated impact on jobs
 - Estimated impact on economic growth
 - Estimated impact on innovation
 - Estimated impact on economic competitiveness”
- § 3(b)(6)