



Impact of the Independent Regulatory Analysis Act, S. 3468: Further Delaying Needed Safeguards for Our Economy

The Benefits of S. 3468 Do Not Outweigh Its Costs

It seems reasonable to ask that this law, which would give the Executive Branch the power to extend its version of cost-benefit analysis to independent agencies, show that its benefits are greater than its costs. A close analysis of the proposal's impact on the financial sector shows that it fails this test.

Costs of Legislation are Significant—Half a Year or more of Delay in Creating the Rules Needed to Protect the Safety and Soundness of the U.S. Economy

Today, four years after the crash of 2008 there are still no rules in place that would prevent it from happening again tomorrow. The vast majority of the rules needed to protect the safety and soundness of the U.S. economy from the shenanigans of the Wall Street bankers have already missed the deadlines established by Congress in the Dodd-Frank Act.¹ And this is without the Independent Regulatory Analysis Act.

If the Act were to become law, when independent agencies promulgate rules deemed "significant" they would be forced to wait up to 90 days as OIRA reviews proposed rules and another 90 days as it reviews final rules—a total of 180 days or half a year. In the case of rules criticized by OIRA, agencies would be likely to take additional time revising rules, adding additional delay to the process. Although the law does not require independent agencies to follow the dictates of OIRA, with the ever present threat of judicial review hanging over its rules, agencies would be likely to try to address OIRA's concerns.

The potential costs of delaying the rules needed to assure the soundness of our economy, another financial crash, are obviously enormous and should weigh heavily in our consideration of the merits of this Act.

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Benefits are Speculative

Independent Agencies Regulating the Financial Sector Already Carry Out Cost-Benefit Analysis. With the exception of the Federal Reserve, independent agencies regulating the financial sector are generally conducting cost-benefit analyses of the rules they promulgate because they are obligated to by statute, or they are voluntarily following the spirit of Executive Orders requiring cost-benefit analysis.²

Supporters of S. 3468 Misleadingly Describe Rules By Independent Agencies As Not Including Cost-Benefit Analyses. Senators Portman, Collins, and Warner misleadingly cite OMB's annual reports on regulations as indicating that independent agencies are failing to assess the cost and benefits of the rules they are creating.³ Portman, Warner and Collins claim that none of the 17 major rules created by independent agencies in each of the past two years, 2011 and 2010, included a cost-benefit analysis. This is a misleading representation of what the underlying report indicates. If we leave out rules issued by the Federal Reserve, all ten of the major rules issued by independent agencies in 2010 and 11 of the 13 rules issued in 2011 included information on costs or benefits. Seven of the 2010 rules "monetized" their costs--translated the cost of the rule into a dollar figure. What the agencies failed to do was translate the benefits of the rules into dollar figures.⁴

Financial Regulations Promulgated without Monetized Costs and Benefits Often Because Monetization Not Possible. Portman, Collins and Warner assume that subjecting independent agency rules to OMB review will lead to more thorough cost-benefit analyses, including completely monetized costs and benefits. However, this is unlikely. It is not a failure of will on the part of the independent agencies that has prevented them from monetizing the costs and benefits of the rules they develop. Particularly in the case of financial rules, it is often not possible.

Of the 17 rules issued by independent agencies in 2011, all but 2 were financial regulations. In 2010, all but one were financial regulations issued by the Federal Reserve or the Securities and Exchange Commission. The impartial Government Accountability Office notes, "the difficulty of reliably estimating the costs of regulations to the financial services industry and the nation has long been recognized and the benefits of regulation are regarded as even more difficult to measure."⁵

Financial Regulators Face Significant Barriers to Acquiring the Information Needed for More Thorough Cost-Benefit Analysis of their Rules. Much of the data that would be needed to conduct better cost-benefit analyses of financial regulations is proprietary and neither regulators nor financial firms want to see it made public. While independent agencies could, in theory, request information needed to conduct better cost-benefit analyses outside of the public rule making process, they face significant hurdles in doing so. Ironically, in an effort to lessen the burden on business from government intrusion, Congress enacted the Paperwork Reduction Act, which prohibits agencies from seeking information from 10 or more firms outside of the public rulemaking process without an extensive OMB approval of the request. Given the time constraints for developing rules under the Dodd-Frank Act, going through the OMB process in order to gather additional data is not feasible.

Agencies Have Limited Capacity to Conduct Additional Analysis. Another factor constraining agencies' ability to conduct additional cost-benefit analysis is that staff members with relevant expertise are "stretched thin."⁶

Financial Rules Already Face Multiple Reviews

U.S. Government Accountability Office (GAO) Review. The GAO is required by the Dodd-Frank Act to scrutinize the cost-benefit analyses conducted by agencies implementing the law.⁷

Court Review. Regulations implementing the Dodd-Frank Act are also subject to challenge in court. Last year, the Securities and Exchange Commission (SEC) saw one of its rulemakings thrown out after a federal court found that the agency's cost-benefit analysis was not sufficiently robust. The rule at issue – the "proxy access rule" – was designed to give shareholders more opportunity to influence the governance of public companies. The SEC conducted a cost-benefit analysis as directed by the statute, yet the court found that the analysis was inadequate.

Inspector General Review. Members of the U.S. Senate Banking Committee have asked, and the Inspector General of at least one agency has delivered, a detailed report describing how cost-benefit analysis was incorporated into its Dodd-Frank rulemaking process.⁸

Reject S. 3468: Its Costs Are Greater than Its Benefits

Even if one assumes that more extensive use of cost-benefit analysis would improve the quality of the rules implementing the Dodd-Frank Act, and this is an open question, the benefits of S. 3468 are illusory, and its downside costs are clear and significant. Given that independent agencies are already making extensive use of cost-benefit analysis, that their rulemakings are subject to extensive external and internal review to assure that cost-benefit analysis is being incorporated to the maximum extent possible, additional review by the OMB as called for by this legislation is unlikely to improve the quality of financial sector rules. This proposal would, however, delay the enforcement of rules under the Dodd Frank Act half a year or more. This is an outcome that is consistent with the goals of the financial services industry, which has sought to thwart the implementation of the Dodd-Frank Act since its passage by Congress.⁹

In the Dodd-Frank Act, Congress created tight timeframes for the agencies tasked with its implementation because Congress recognized the urgency of creating the protections we need for our economy. The Independent Regulatory Analysis Act would be a step backward for our country because it would prevent the timely implementation of the protections we need to keep our economy strong.

¹ Public Citizen, "Delayed and Diluted At Anniversary, Dodd-Frank Reforms Remain Unfulfilled Due to Industry Obstruction," August 2012.

² Government Accountability Office, "Dodd-Frank Act Regulations: Implementation Could Benefit from Additional Analyses and Coordination," November 2011, p 12.

³ "Independent Agency Regulatory Analysis Act, S. ___" <http://www.scribd.com/MarkWarner>, accessed August 27, 2012.

⁴ "2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," Executive Office of the President, Office of Management and Budget, p 32.

⁵ Government Accountability Office, "Dodd-Frank Act Regulations: Implementation Could Benefit from Additional Analyses and Coordination," November 2011," p. 19.

⁶ Securities Exchange Commission, "Follow-Up Review of Cost-Benefit Analysis," January 27, 2012, p 15.

⁷ Government Accountability Office, "Dodd-Frank Act Regulations."

⁸ Securities Exchange Commission, 2012.

⁹ Steven Sloan, "Cost-Benefit Analysis Puts the Brakes on Dodd-Frank," *Bloomberg*, May 7, 2012.