



Cost-Benefit Analysis & Financial Reform: Overview

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What's at stake?

- The financial industry is trying to use cost-benefit analysis to kill the Dodd Frank Act and financial reform
 - They are doing this in a number of ways, including seeking **the de facto judicial nullification** of reform
- It is as lethal an attack as the one directed at health care reform, but it is being done indirectly
- In form, the legal attack is rule by rule, but by focusing on cost benefit analysis, decisions apply to most if not all rulemaking



Industry Strategy

- File lots of bills in Congress to impose onerous cost benefit analysis
- Hold lots of hearings to attack agencies & prevent them from doing their job by underfunding them
- Flood the regulatory agencies with a tidal wave of claimed costs on the industry for every rule – but very little actual data
- Insist the agencies do in depth cost benefit analysis irrespective of statutory obligations
- Regardless of what the agencies do, go to court claiming no matter what they did, it wasn't enough



Coordinated, Comprehensive Attack

- For example, CFTC Commissioner O'Malia recently sent a letter to the OMB complaining that the CFTC wasn't following Executive Orders on cost benefit analysis & asked for OMB to intervene
- Unprecedented & improper: violating the constitutional principle of separation of powers by seeking to subordinate an independent agency to the executive branch
- Better Markets wrote OMB detailing why it was wrong, they shouldn't do it, & that the CFTC had in fact done the proper cost benefit analysis per the statute



Court Cases so Far

- Business Roundtable v SEC (proxy access; decision July 2011)
- SIFMA/ISDA v CFTC (position limit rule; filed 11/11; pending DC District Court)
- Chamber of Commerce/ICI v CFTC (registration of CTAs and CTOs; filed 4/12; pending DC DC)



Results so Far

- Business Roundtable huge industry victory
 - Hear lots about that from other panelists soon
 - Key point: although it was an attack on one SEC rule relating to proxy access, it has effectively shut down all rulemaking at the SEC
 - And, it has chilled rulemaking at the other agencies who are threatened with similar suits every day and are now in a defensive crouch



Pending CFTC Case

- SIFMA/ISDA v CFTC challenging the position limit rule now pending in the DC District Court
 - Unlike SEC suits, CFTC rule challenges have to 1st go to the District Court before the Appeal Court
 - The rule is being challenged on many grounds
 - Better Markets filed an Amicus Brief focused solely on the cost benefit issues in the case
 - Case fully briefed with oral argument to be scheduled soon



The Industry's Cost Benefit Analysis Claim is Ridiculous

- Stripped of the rhetoric, the industry claims that financial reform rules cannot be put in place to protect the financial system, the economy, taxpayers and the treasury from the industry if the rules cost the industry too much money
- This is the very same industry that caused the financial collapse & economic crisis that necessitated the law
- This is also the only industry that threatens our financial system, economy, taxpayers, treasury, etc.
- Arguments that the industry shouldn't be required to bear these costs are really arguments that they shouldn't be regulated & that the public should continue to be at risk



The Industry's Bogus Claims of Costs

- Industry claims include that rules will “reduce market liquidity, capital formation and credit availability, and thereby hamper economic growth and job creation”
- This ignores the fact that the last financial collapse did – and the next financial collapse will do -- more damage to those concerns than any rule or reform possibly could:
 - in September 2008, there was **no** “market liquidity, capital formation [or] credit availability” and, since then, there has been little “economic growth” and even less “job creation,” due to the damage inflicted by the crisis their recklessness and greed created



Required Economic Analysis

Better Markets Report: Setting the Record Straight on Cost Benefit Analysis & Financial Reform (Forthcoming)

- The statutory language must govern & there is no requirement to do cost benefit analysis, as proved by legislative history
- The duty is to protect the public from the industry, not worry about costs to the industry of protecting the public
- Congress knows when & how to impose cost benefit requirements as evidenced in many other statutes, language it intentionally omitted from the DFA



Required Economic Analysis (Cont.)

- Any economic analysis must consider the costs to the public of the last financial collapse PLUS the benefits to the public of avoiding another collapse & economic crisis like the last one or worse: a Second Great Depression, which was barely avoided
- The entire DFA must be considered when evaluating any rules because it is an integrated whole, not a bunch of isolated rules
- Hundreds of billions of dollars in compliance costs and lost revenue to the industry were knowingly imposed by Legislative & Executive Branches in the DFA
- No agency has the authority to de facto overrule those decisions by using those costs as a reason not to pass required rules