

The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority

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The Review Standard:

“The Commission shall . . . consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”

Business Roundtable v. Securities and Exchange Commission, 647 F.3d 1144 (D.C. Cir. 2011)

“Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.”

Judge Douglas Ginsburg faults the SEC's cost-benefit assessments because they **“had no basis beyond mere speculation”** or because the SEC failed **“to estimate and quantify identifiable costs that should have weighed in the balance.”**

Based on these identified failings, the D.C. Circuit observed that **“the Commission has not sufficiently supported its conclusions that increasing the potential for election of directors nominated by shareholders will result in improved board and company performance and shareholder value.”**

In areas where the SEC discounted the costs associated with its rule, the D.C. Circuit condemned that reasoning as **“illogical and, in an economic analysis, unacceptable.”**

A good illustration of the opinion’s requirement that costs and benefits be assessed is its rebuke of the SEC for failing to consider, **“[i]n weighing the rule’s costs and benefits,”** the extent to which the new rule would take the place of traditional proxy contests. As the court explained, **“[w]ithout this crucial datum, the Commission has no way of knowing whether the rule will facilitate enough election contests to be of net benefit.”**

Earlier Reversals of SEC in D.C. Circuit:

- * American Equity Investment Life Ins. Co. v. Securities and Exchange Commission, 572 F.3d 923 (D.C. Cir. 2009)
- * Chamber of Commerce of the U.S. v. Securities and Exchange Commission, 412 F.3d 133 (D.C. Cir. 2005)

Legislative History of Review Standard

- * National Securities Markets Improvement Act of 1996 expanded items to consider to include “efficiency,” “competition,” and “capital formation.”
- * Rejected Senate’s version of Review Standard that called on extensive economic assessments by the SEC’s Chief Economist

Legislative History of Review Standard


- * House Report: “The legislation also seeks to promote efficiency, completion, and capital formation in the capital markets without compromising investor protection by . . . requiring the consideration of efficiency, competition, and capital formation whenever” the SEC adopts a rule.
- * Added same standard to Investment Advisers Act in 1999 via the Graham-Leach-Bliley Act while at same time imposing demanding cost-benefit standard on the CFTC.

Administrative Procedure Act = “Arbitrary and Capricious” Standard

Hard Look Review:

Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983):

“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”



Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)(reviewing court cannot create a new standard).

“Mirror Mirror on the Wall, Who’s the Fairest of All”

Most vulnerable feature of Business Roundtable is its reliance on Chamber of Commerce because of its reliance on Public Citizen v. Federal Motor Carrier Safety Administration, 374 F.3d 1209 (D.C. Cir. 2004)

Parsing the Cases

American Equity Investment = correctly
decided

Business Roundtable = ignored what
Congress had done

Chamber of Commerce = Play with fire, burn
by fire

Strategies Going Forward

1. Staging regulation
2. Examples: Uptick rule, Off Board Trading
3. Scaling regulation
4. Once size does not fit all
5. Stop finding, be analytical, and make the case