

Cost Benefit Analysis and *Business Roundtable*

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Business Roundtable as a Policy Decision

- The *Business Roundtable* Panel: Judges Ginsburg, Sentelle and Brown.
- The decision should be viewed less as a legal opinion and more as a policy statement.
- The opinion found that the SEC's shareholder access rule was arbitrary and capricious. This is probably the most common standard for challenging the validity of a rule.
- Lexis-Nexis search of the words "arbitrary and capricious" in the DC Circuit alone yielded 2046 cases; 297 Supreme Court opinions used the phrase

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- Despite the depth of authority, the court in *Business Roundtable* cited only four cases.
- One was to a single US Supreme Court case and cited for a very broad proposition.
- For the other three, the panel cited only to their own opinions. These included:
 - *American Equity Investment Life Insurance v. SEC*, 613 F.3d 166 (DC Cir. 2010) (opinion by Judge Sentelle)
 - *Chamber of Commerce v. SEC*, 412 F.3d 133 (DC Cir. 2005) (opinion by Judge Ginsburg)
 - *Public Citizens v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209 (DC Cir. 2004) (opinion by Judge Ginsburg)

Business Roundtable as a Policy Decision

- The decision also does not comport with the law.
 - The standard of review for arbitrary and capricious requires deference to the agency.
 - The word deference does not appear in the opinion.
- This standard is particularly necessary with respect to a rule that had:
 - an accompanying release of over 300 pages, including 80 pages of SEC cost-benefit analysis (22 of which were devoted to an analysis of the costs)
 - an administrative record containing thousands of comment letters, both from the 2009 proposal and the 2007 proposal.

Business Roundtable as a Policy Decision

- The decision contained flawed economic analysis.
 - One example concerned the analysis of the “costs” associated with the use of the rule by “special interest” investors (unions and state/local governments).
 - The court noted that commentators attributed to these investors an incentive to use access to “pursue self-interested objectives rather than the goal of maximizing shareholder value”
 - According to the court: “By ducking serious evaluation of the costs that could be imposed upon companies from use of the rule by shareholders representing special interests, particularly union and government pension funds, we think the Commission acted arbitrarily.”

Business Roundtable as a Policy Decision

- Two significant problems:
 - First, there is no evidence this has ever occurred. The letter from the Business Roundtable cited in the opinion merely noted that “**we believe** that union-affiliated funds will use the Proposed Election Contest Rules as a bargaining chip” (emphasis added)
 - Second, the court improperly conflated a discussion of unions and state/local governments with their pension plans. The latter have a fiduciary obligation to their beneficiaries. They for the most part cannot use rights belonging to beneficiaries to further the interests of other groups.

Reaction to *Business Roundtable*

- In the aftermath of the decision, some have called for a massive revamping of the approach used in cost/benefit analysis
 - Witnesses at a recent hearing before a House committee (titled “The SEC’s Aversion to Cost-Benefit Analysis) called for the addition of 150 to 200 economists to the SEC staff (with no increase in the SEC’s budget).
 - One witness described the decision in *Business Roundtable* as "remarkable" and noted that the opinion "lays out a veritable catalog of components to an acceptable cost-benefit analysis."

Reaction to Business Roundtable

- Litigants have and will continue to make use of the case. In *International Swaps and Derivatives Association v. CFTC*, the case was cited:
 - For having improperly relied on “two relatively unpersuasive studies”
 - For having failed to “respond to substantial problems raised by commenters.”
 - For “merely ‘considering’ relevant evidence in the sense of acknowledging it, without giving it due weight”
 - For having “d[one] nothing to estimate and quantify the costs it expected companies to incur; nor did it claim estimating those costs was not possible.”

Addressing a Policy Decision

- First, don't overreact. The decision is wrong. Agencies should not radically change their approach.
- The SEC has responded to the decision in a measured way.
 - Mary Schapiro has indicated that the SEC will take a number of steps including a modest increase in the use of, and number of economists employed by, the Division of Risk, Strategy, and Financial Innovation. See <http://www.sec.gov/news/testimony/2012/ts041712mls.htm>
 - Future releases will employ an “integrated economic analysis” of the rule rather than include a separate section titled “Cost Benefit Analysis”

Addressing a Policy Decision

- For litigants, be prepared to take on the decision and the analysis more directly.
 - The case conflicts with the admonishments by the Supreme Court in *Vermont Yankee* that it is not the role of the courts to rewrite the APA and force agencies to adopt additional procedural requirements.
 - In addition, there is plenty of contrary authority that can be used to rebut the *Business Roundtable* analysis.

The Longer Term Solution

- The issue may need to be addressed by the Supreme Court if lower courts continue to follow the reasoning in *Business Roundtable*.
- Alternatively, changes in the composition of the DC Circuit may bring about changes in the court's policy.
 - Judge Ginsburg, who wrote the *Business Roundtable* decision, has since taken senior status. As a result, the DC Circuit currently has three vacancies.
 - To the extent that the vacancies are filled by judges with a different perspective on these policy issues, cases such as *Business Roundtable* will become less frequent.