Insight

Regulate First, Analyze Later

SAM BATKINS | MARCH 26, 2014

Late last week, the administration released an analysis of the "Volcker Rule," banning many aspects of proprietary trading. The analysis revealed annual costs could approach $4.3 billion, making it the second most expensive Dodd-Frank rulemaking. This might seem like a shockingly high figure, but the real problem is that the Volcker rule was finalized three months ago, not last week.

Supporters of the Volcker rule might note that the proposed rule was issued two years before the final rule and the public had plenty of time to comment during the rulemaking process. Sadly, it appears that regulators didn't even have adequate time to review and comment during the process.

According to Commissioner Scott O'Malia of the Commodity Futures Trading Commission, despite a lengthy rulemaking process, regulators were left in the dark until the very end:

> *"The Commission did not receive a near-final draft of the rule (with language agreed to by all five agencies) until just six days prior to the vote."*

In other words, regulators had six days to review an 892-page preamble and 71 pages of rule text. The regulatory agencies then took a perfunctory vote and the rule was final, all without a regulatory analysis examining the economic implications.

When the public finally received the rule, they found a broken link to the regulatory analysis. When the Volcker rule was published in the Federal Register, that link disappeared, along with any mention of an analysis. After three months of questions, there is now a relatively brief 24-page summary of the economic impacts.

This bungled process might be a trivial footnote, were it not for the profound impacts of the rule on the financial sector, the energy sector, and the U.S. economy as a whole. If regulators had done the analysis correctly the first time, they might have avoided issuing correcting amendments on the same day Volcker was formally published. Sticking with the theme of rushed rulemaking, there was no comment period for these amendments.

Part of the problem is that all of the regulatory entities are independent from White House review. Perhaps adding another layer of review would have spotted unintended consequences and regulators could have made an informed vote with the help of additional, or any, regulatory analysis. To date, only eight of Dodd-Frank's more than two hundred final rules have undergone White House review.

Sadly, employing the "Fire, Ready, Aim" approach to regulating is not an aberration. The administration recently published the employer mandate without White House review, omitting any regulatory analysis. Even the Small Business Administration found fault with the rulemaking, noting, "Specifically, the SBA Chief Counsel for Advocacy stated the proposed regulations imposed a collection because they require employers to maintain records." The administration disagreed and published the rule without an analysis.

From a public policy angle, it makes no sense to finalize rules without examining regulatory alternatives and refusing to scrutinize the costs and benefits. Yet lately, that appears to be standard practice rather than the exception.

Why not let the public have important policy debates about the substance of major regulations? At least follow the proper process and stop hiding the ball on regulatory costs. It's unlikely these missing or delayed documents will play a major role in the upcoming elections. However, evidence reveals the White House has been overly concerned with its image on regulation. Perhaps if they focused more on the substance of less burdensome rules, there would be no need to conceal regulatory analyses. Perhaps that's too much to ask.