The Independent Agency Regulatory Analysis Act

Politicizing Independent Agencies and Putting Americans in Harm's Way

The Independent Agency Regulatory Analysis Act would fundamentally change the way that independent agencies operate. Examples of independent agencies include, among others, the Consumer Financial Protection Bureau, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Nuclear Regulatory Commission, and the National Labor Relations Board. The Independent Agency Regulatory Analysis Act would strip these agencies of much of their independence, requiring them to spend limited resources completing detailed cost-benefit analyses – even when Congress has not required this – and then to submit their analyses for review by the Office of Information and Regulatory Affairs (OIRA).

Congress should not cede control of independent regulatory agencies to the president. Unlike executive agencies, independent agencies are accountable to Congress and not under the control of the president. Where executive agency heads serve at the pleasure of the president, independent agency heads have a defined tenure that is independent of the election cycle. Congress frequently chooses to establish independent agencies when, in its judgment, the policy area affected needs to be insulated from the political pressures associated with being part of the executive branch.

In many cases, independent regulatory agencies' independence has allowed them to respond nimbly to emerging crises. For example, on Aug. 15, 2012, the Consumer Product Safety Commission recalled 4 million Bumbo Baby Seats in response to evidence that babies had been injured while sitting in them. This is a stark contrast with executive agencies, which often need years to respond to hazards. For example, the CEO of S.C. Johnson said of the Environmental Protection Agency's ability to regulate even known carcinogens under the Toxic Substances Control Act, "Your child has a better chance of becoming a major league baseball player than a chemical has of being regulated."1

Independent regulatory agencies' ability to protect people's lives and well-being would be undercut by a cost-benefit analysis supermandate. Independent regulatory agencies are quite different from one another – in structure, in statutory authority, and in the requirements they must meet to regulate. Overriding Congress' direction to each agency and requiring instead a preeminent focus on economic impact is, simply put, bad policy. This is because cost-benefit analysis fails when benefits and costs cannot be properly quantified.

Any requirement for cost-benefit analysis across all independent regulatory agencies would limit their ability to protect Americans from nuclear meltdowns, keep lead paint off children's toys, and stand guard against another mortgage fiasco. For example, the Federal Aviation Administration (FAA) is an executive agency that works to protect the flying public. Since it has been so successful doing so, there have been relatively few plane accidents over the past decade. That very success has made it more difficult for the agency to keep its rules current because under the blanket cost-benefit analysis requirement, there has not been enough loss of life to justify safety improvements.2

The bottom line: The Independent Agency Regulatory Analysis Act would politicize independent regulatory agencies and make it harder for them to protect Americans.

COALITION FOR SENSIBLE SAFEGUARDS

The Independent Agency Regulatory Analysis Act

The following examples suggest ways that the Independent Regulatory Analysis Act would hamper independent agencies' ability to protect Americans from death, injury, illness, and other harm:

Consumer Financial Protection Bureau: The Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) to protect the financial security of American families from a wide range of predatory and deceptive lending practices. The CFPB is already required to subject its rules to a cost-benefit analysis, as well as an unprecedented set of checks on its authority. For example, the CFPB must proactively consult with federal banking agencies and other agencies to ensure that its proposals are not in conflict with those other agencies' rules, and the Financial Stability Oversight Council may stay or set aside CFPB standards. Subjecting CFBP's rulemakings to additional review by the Office of Information and Regulatory Affairs and to redundant cost-benefit analysis requirements will do nothing to improve its rules and will only add delay and uncertainty to the rulemaking process.

Securities and Exchange Commission: 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 part of Dodd-Frank and 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. The enhanced cost-benefit analysis requirements and judicial review provisions of the Independent Regulatory Analysis Act could similarly imperil other SEC rules, as well as those at other independent agencies.

Consumer Product Safety Commission: The Consumer Product Safety Commission (CPSC) was created after Congress found that litigation, industry self-regulation, and the existing system of federal, state, and local laws were inadequate to protect Americans from unreasonably dangerous products. In 2008, the Consumer Product Safety Improvement Act (CPSIA) empowered the agency to require that infant and children's products be safety-tested before being sold, to ban lead and phthalates in children's products, and to create the first publicly accessible, searchable database of consumer complaints. The agency oversees more than 15,000 different types of consumer products and, in addition to CPSIA, administers a range of laws that have been wildly successful in protecting Americans from death, injury, and illness. The agency has its own economic analysis requirements based on what type of product is being regulated and what type of risk is being addressed – recognizing, for example, the importance of ensuring that car seats and cribs are as safe as possible. Among its other regulatory efforts, the agency is currently working to ensure that safety tests and testing facilities are holding children's products to the appropriate standard under the law. Delaying these protections with a supplemental and inconsistent cost-benefit analysis supermandate could mean that American children would lack the protection Congress has provided.

Nuclear Regulatory Commission: The Nuclear Regulatory Commission (NRC) regulates nuclear reactors, nuclear materials, nuclear security, and radioactive waste. The agency's long-standing practice is that standards necessary for the "adequate protection" of the public do not require economic justification. Yet, when the agency realized in the wake of Japan's 2011 Fukushima Daiichi disaster that America's nuclear power plants were not adequately safeguarded and recommended a set of upgrades, the nuclear industry responded by citing the high cost of repairs and demanding a cost-benefit analysis of the changes. As a result, no changes have been made to date, and Americans are still not adequately protected from risks the agency has acknowledged to exist. Layering on a statutory requirement for cost-benefit analysis could further delay not only these critical changes, but would result in all of NRC's future regulatory efforts being evaluated on their economic, rather than their public safety, impact.