Bipartisan Dodd-Frank Act corrections bill likely to pass in the 113th Congress

More work must be done on transparency, derivatives, and the Volcker Rule

113th Congress almost certain to tackle reform of the federal regulatory process

Cost-benefit analysis of a regulation at a threshold of $100 million has bipartisan support

The re-election of President Barack Obama and the retention of the Democratic majority in the U.S. Senate means that there will be no repeal of 2010’s landmark Dodd-Frank Wall Street Reform and Consumer Protection Act. However, a bipartisan Dodd-Frank Act corrections bill is very likely to pass in the 113th Congress that will convene in January, 2013 according to remarks by Senator Mark Warner (D-VA) at the Bipartisan Policy Center. Senator Warner, a key member of the Banking Committee and author of a number of Dodd-Frank provisions, said that while Dodd-Frank broadly got things directionally right, there are many sections of Dodd-Frank that he would like to change. Historically, with any major piece of federal legislation, Congress never gets it entirely right the first time and a corrections bill is needed a few years later. In addition, President Obama’s commitment to reforming the federal regulatory process, evidenced by the issuance of two significant Executive Orders during his first term, in addition to bipartisan Congressional efforts in this area, argue for the passage of significant legislation affecting the rulemaking process at independent agencies such as the SEC and CFTC.

Senator Warner had predicted that, regardless of the outcome of the November election, the Dodd-Frank Act would not be repealed. The repeal of Dodd-Frank would be extremely disruptive to the market, he warned, and would chill financial stability in the U.S. and globally. Instead, the Banking Committee will revisit Dodd-Frank in a rational way, he stated.

While Dodd-Frank only got the 60 votes needed to clear the Senate hurdle, he noted, many parts of the legislation received a much broader bipartisan consensus. For example, he observed that Titles I and II setting up the Financial Stability Oversight Council (FSOC) and an Orderly Resolution Authority were embraced by 85 Senators.

He added that there are lots of places in Dodd-Frank where Congress got it wrong. But as imperfect as Dodd-Frank may be, he continued, the U.S. acted in a comprehensive way and, as a result, financial markets are safer and banking institutions are stronger.

Specifically, when Congress revisits Dodd-Frank, he noted, more work must be done on transparency, derivatives, and the Volcker Rule. He called for a more principles-based Volcker Rule that is not as rules-based. He also said that many of the problems arising around swaps are due to regulatory overlap. The reality is that regulators protect their turf, he observed. Congress and the regulators must also recognize the diversity of U.S. financial institutions and not impose the same level of stringent regulations and capital standards on mid-size and smaller financial institutions that are applied to large global financial institutions.

Another concern is that the FSOC is an imperfect creation with no independent entity or person in charge. The FSOC has not become the arbiter of conflicting regulations that he envisioned it would be. Perhaps because the
CORRECTIONS BILL

Indeed, a number of Dodd-Frank pieces of correction legislation have passed the House in the 112th Congress with overwhelming bipartisan support. These pieces of legislation often had the support of the relevant oversight agency, such as the SEC, CFTC or CFPB. But the legislation was not taken up by the Senate.

These items are almost certain to be included in any Dodd-Frank corrections bill considered by the 113th Congress. For example, the House passed by voice vote bipartisan legislation, H.R. 2827, clarifying that Section 975 of Dodd-Frank requiring municipal advisors to register with the SEC does not include banks, investment advisers and members of municipal governing bodies. Also, by a vote of 357-36, the House passed legislation (H.R. 2779) exempting inter-affiliate swaps from derivatives regulation under Dodd-Frank. Without H.R. 2779, companies would face the prospect of having to post double margins on swap trades.

The House also passed by a vote of 370-24 the Business Risk Mitigation and Price Stabilization Act, H.R. 2682, to clarify the derivatives end-user exemption as part of Dodd-Frank. The House also passed by an overwhelming bipartisan margin the Small Business Credit Availability Act, H.R. 3336, amending the Commodity Exchange Act to clarify the insured depository institutions will not be swap dealers under Dodd-Frank. Without H.R. 2779, companies would face the prospect of having to post double margins on swap trades.

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The House unanimously approved H.R. 4014 by voice vote legislation that would protect confidential bank examination information provided to the Consumer Financial Protection Bureau. In this instance, Senator Tim Johnson (D-SD), Chair of the Banking Committee and Senator Richard Shelby (R-AL), the Committee’s Ranking Member, introduced it as a companion bill.

INDEPENDENT REGULATORY ANALYSIS

The 113th Congress is almost certain to also tackle the reform of the federal regulatory process. One vehicle could be the bipartisan Independent Regulatory Analysis Act, S. 3468, which has garnered key bipartisan support. Introduced by Senator Warner, with Senators Rob Portman (R-OH) and Susan Collins (R-ME), S. 3468 would require independent federal agencies, such as the SEC and CFTC, to conduct a cost-benefit analysis of new regulations and tailor new regulations to minimize unnecessary burdens on the economy. The bill would also provide for review by the Office of Information and Regulatory Affairs (OIRA) of every proposed and final economically significant regulation, pegged at economic impact of $100 million or more, followed by a public exchange of views between OIRA and the independent agency concerning the quality of the agency’s cost-benefit analysis. Although OIRA would not have the power to reject a regulation, it would place its evaluation of the agency’s cost-benefit analysis in the public record.

The idea that there should be a cost-benefit analysis of a regulation at a threshold of $100 million is supported by heads of both Democratic and Republican Administrations.

Recently, a bipartisan group of former OIRA Administrators from the Clinton, Reagan and Bush 41 and 43 Administrations sent a letter to Senator Joseph Lieberman (I-CT), Chair of the Homeland Security and Government Affairs Committee, which is considering the legislation, expressing their strong support for S. 3468. The former OIRA chiefs noted that for 30 years Presidents of both parties have required executive agencies to consider regulatory impact, including a cost-benefit analysis, when crafting new regulations, with review by OIRA. These requirements have not been imposed on independent federal agencies, and the OIRA heads fear that independent agencies have typically not engaged in the economic analysis that has come to be expected from executive agencies. These agencies are independent not because their method of regulation differs from executive agencies, noted the former OIRA Administrators, but rather because Congress has limited the power of the President to remove their top officials, either by statute or tradition.

With regard to a cost-benefit analysis of federal regulations, Senator Warner said that the notion that there should be a distinction between independent federal agencies like the SEC and CFTC and executive agencies does not pass muster. Senator Warner added that he does not trust most cost-benefit analyses of federal regulations currently being done by either the federal agencies or the industry. Further, he noted that there is currently no independent retrospective review of the federal regulatory structure. There should be a look-back mechanism of three to five years to ascertain if the regulation is accomplishing its goal. The Senator said he wants regulatory effectiveness, not a regulatory moratorium.
President Obama has been a strong champion of reform of the federal regulatory process. This was evidenced by two Executive Orders issued during his first term: Executive Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) and Executive Order No. 13579, 76 Fed. Reg. 41,587 (July 14, 2011).

Executive Order No. 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. It also reaffirmed that executive agencies should conduct a cost-benefit analysis of regulations. Executive Order No. 13579 states that independent regulatory agencies should follow Executive Order No. 13563.

To facilitate the periodic review of existing significant regulations, Executive Order No. 13579 said that independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outdated, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.

There is debate over whether Executive Order No. 13579 directed independent regulatory agencies to conduct a cost-benefit analysis of regulations. The use of the word “should” in the Executive Order has led some to conclude that it is not mandatory. This fuels the need for federal legislation to codify that independent regulatory agencies must conduct a cost-benefit analysis of regulations. Given the President’s issuance of these two Executive Orders and his commitment to regulatory reform, it is quite likely that the Administration will support some form of S. 3468.

About the Author

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