

IMPROVEMENT OF CONSIDERATION BY THE COMMODITY
FUTURES TRADING COMMISSION OF THE COSTS AND
BENEFITS OF ITS REGULATIONS AND ORDERS

MAY 16, 2012.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. LUCAS, from the Committee on Agriculture,
submitted the following,

R E P O R T

[To accompany H.R. 1840]

[Including cost estimate of the Congressional Budget Office]

The Committee on Agriculture, to whom was referred the bill (H.R. 1840) to improve consideration by the Commodity Futures Trading Commission of the costs and benefits of its regulations and orders, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

BRIEF EXPLANATION

The bill amends Section 15(a) of the Commodity Exchange Act (CEA) to increase the legal standard by which the Commodity Futures Trading Commission (CFTC) must conduct cost-benefit analysis prior to promulgating a rule or Commission order.

PURPOSE AND NEED

In the 112th Congress, the Committee has held seven hearings, four Full Committee and three General Farm Commodities and Risk Management Subcommittee hearings to examine the implementation of Title VII of the Dodd-Frank Act and one Full Committee hearing to examine legislative proposals related thereto. The Committee took testimony from witnesses that represented a broad spectrum of participants in the derivatives markets. Across the spectrum of expertise, an overwhelming majority of witnesses expressed concerns that the CFTC was not adequately examining the costs and benefits of its proposed regulations, and as a result, many of the proposals could impose costs on market participants

that would far outweigh the benefits. Witnesses testified that the Commission would frequently make no attempt to quantify the costs and benefits, or the estimates they would provide were exponentially lower than cost estimates calculated by effected entities—in some cases 63 times lower.

Section 15(a) of the CEA sets forth requirements for the Commodity Futures Trading Commission (CFTC) to consider the costs and benefits of Commission actions. However, in boilerplate language in each proposed rule, the CFTC identifies the limitations of Section 15(a) in requiring cost benefit analysis by stating: “By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order to determine whether the benefits of the order outweigh the costs; rather, it requires that the Commission “consider” the costs and benefits of its actions” (http://www.agriculture.house.gov/pdf/reports/CFTC_IGreport.pdf).

Consequently, the CFTC’s Inspector General, at the request of the Chairman, conducted an investigation into the Commission’s cost benefit analysis. In its report issued in April of 2011, the Inspector General concluded: “. . . it is clear that the Commission staff viewed section 15(a) compliance to constitute a legal issue more than an economic one, and the views of the Office of General Counsel therefore trumped those expressed by the Office of the Chief Economist . . . We do not believe this approach enhanced the economic analysis performed.”

In early 2011, President Obama issued an Executive Order “Improving Regulation and Regulatory Review” (<http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>). The Executive Order laid forth specific and extensive instructions for federal agencies in performing cost benefit analysis associated with new regulations. However, the CFTC as an independent federal agency is not subject to the President’s Order, and when questioned in a hearing whether the CFTC would voluntarily comply, the Chairman of the CFTC, Gary Gensler, stated that it was inconsistent with the legal standard set forth in Section 15(a).

The Dodd-Frank Wall Street Reform and Consumer Protection Act drastically expanded the CFTC’s authority over the derivatives markets. The CFTC is now the principal regulator of the swaps markets—markets that are used by businesses of all shapes and sizes in every sector of the economy. New rules promulgated by the CFTC will have far more wide reaching impacts on the economy, and it is critical that the CFTC have clear legal directives that require it to thoroughly examine the costs and benefits of each of its actions.

H.R. 1840 raises the legal standard for cost-benefit analysis, incorporating the directives that were included in the President’s Executive Order. These include directives to quantify the costs and benefits, incorporate the Chief Economist in analyses and evaluate whether the regulations are inconsistent with or duplicative of other federal regulations. In addition, one of the standards in Section 15(a) requires the Commission to consider “the efficiency, competitive and financial integrity of futures markets.” Because Dodd-Frank gave the CFTC authority over swaps, H.R. 1840 extends the current law directive to cover the swaps markets as well.

SECTION-BY-SECTION

Section 1 amends the Commodity Exchange Act to require the CFTC, through the office of the Chief Economist, to assess the cost and benefits of a regulation or order before it's promulgated. In performing the assessment the Chief Economist shall consider protection of the market participants and the public; the efficiency, competitiveness and financial integrity of futures and swap markets; the impact on the futures and swap's market liquidity; price discovery; risk management practices; available alternatives to direct regulation; the degree and nature of the risks posed by various activities within the scope of the Commission's jurisdiction; whether the regulation or rule is tailored to impose the least burden on society; whether it is inconsistent or duplicative of other federal regulations; whether the approach taken maximizes net benefits and other public interest considerations.

COMMITTEE CONSIDERATION

I. HEARINGS

In the 112th Congress, the Committee has held seven hearings, four Full Committee and three General Farm Commodities and Risk Management Subcommittee hearings to examine the implementation of Title VII of the Dodd-Frank Act and one Full Committee hearing to examine legislative proposals related thereto, including H.R. 1840. The Committee took testimony from witnesses that represented a broad spectrum of participants in the derivatives markets.

Public hearing to review implementation of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act: February 10, 2011

Public hearing to review implementation of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Part II: February 15, 2011

Defining the Market: Entity and Product Classifications Under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act: March 31, 2011

Implementing Dodd-Frank: A Review of the CFTC's Rule-making Process: Apr 13, 2011

Harmonizing Global Derivatives Reform: Impact on U.S. Competitiveness and Market Stability: May 25, 2011

Derivatives Reform: The View from Main Street: July 21, 2011

To review legislative proposals amending Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act: October 12, 2011

Public hearing to review the Commodity Futures Trading Commission 2012 Agenda: February 29, 2012

In each hearing, witnesses discussed concerns regarding inadequate or altogether absent cost-benefit analysis or proposed rules by the CFTC.

For example, on October 12, 2011, Ms. Brenda Boulton of Constellation Energy, representing the Coalition for Derivatives End-Users, testified:

“We firmly believe that rigorous cost-benefit analysis creates better rules. By first analyzing how a regulation will affect individuals, companies, other stakeholders, and the integrity of the overall market, a regulatory agency can avoid making the mistake of putting a rule in place that has adverse and unintended effects. The CFTC is subject to a cost-benefit analysis requirement, but it does not require the regulator to consider such key factors as available alternatives to regulation, whether the regulation is tailored to impose the least burden possible while achieving its goals, and whether the regulation maximizes net benefits. These and other factors would be required to be considered under the Conaway-Quigley bill.”

On April 13, 2011 Mr. James Overdahl, of the National Economic Research Associates testified:

“The CFTC does not have a formal requirement for including economic analysis in the rulemaking process, aside from the requirements of the Regulatory Flexibility Act and the cost benefit requirements of the Paperwork Reduction Act (PRA). However, the analysis required in the PRA applies only to a rule’s paperwork burden, and does not include an analysis of broader economic effects of a rule.”

On April 13, 2011 Mr. Terrence Duffy, of the CME Group testified:

“The explicit cost-benefit analysis included in the more than thirty rulemakings to date and the Commission’s testimony in a number of congressional hearings indicate that those responsible for drafting the rule proposals are operating under the mistaken interpretation that Section 15(a) of the CEA excuses the Commission from performing any analysis of the direct, financial costs and benefits of the proposed regulation. Instead, the Commission contends that Congress permitted it to justify its rule making based entirely on speculation about unquantifiable benefits to some segment of the market. The drafters of the proposed rules have consistently ignored the Commission’s obligation to fully analyze the costs imposed on third parties and on the agency by its regulations.”

II. FULL COMMITTEE

The Committee on Agriculture met, pursuant to notice, with a quorum present, on January 25, 2012, to consider H.R. 1840, to improve consideration by the Commodity Futures Trading Commission of the costs and benefits of its regulations and order, and other pending business. Chairman Lucas offered an opening statement, as did Ranking Member Peterson, Mr. Conaway and Mr. Boswell.

By unanimous consent, the Subcommittee on General Farm Commodities and Risk Management was discharged from further consideration and the bill, H.R. 1840 was placed before the Committee for consideration and without objection a first reading of the bill was waived and it was opened for amendment at any point.

There being no amendments, the Peterson motion to report the bill favorably to the House with the recommendation that it do pass was adopted by a voice vote.

The Committee then moved on to the other pending business, where at the conclusion of the meeting, Chairman Lucas advised Members that pursuant to the rules of the House of Representatives that Members have 2 calendar days to file such views with the Committee.

Without objection, staff was given permission to make any necessary clerical, technical or conforming changes to reflect the intent of the Committee.

Chairman Lucas thanked all the Members and adjourned the meeting.

REPORTING THE BILL—ROLLCALL VOTES

In compliance with clause 3(b) of rule XIII of the House of Representatives, H.R. 1840 was reported by voice vote with a majority quorum present. There was no request for a recorded vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Agriculture's oversight findings and recommendations are reflected in the body of this report.

BUDGET ACT COMPLIANCE (SECTIONS 308, 402, AND 423)

The provisions of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a)(1) of the Congressional Budget Act of 1974 (relating to estimates of new budget authority, new spending authority, new credit authority, or increased or decreased revenues or tax expenditures) are not considered applicable. The estimate and comparison required to be prepared by the Director of the Congressional Budget Office under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and sections 402 and 423 of the Congressional Budget Act of 1974 submitted to the Committee prior to the filing of this report are as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 9, 2012.

Hon. FRANK D. LUCAS,
*Chairman, Committee on Agriculture,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1840, a bill to improve consideration by the Commodity Futures Trading Commission of the costs and benefits of its regulations and orders.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure.

H.R. 1840—A bill to improve consideration by the Commodity Futures Trading Commission of the costs and benefits of its regulations and orders

Summary: H.R. 1840 would direct the Commodity Futures Trading Commission (CFTC) to assess both costs and benefits of a proposed regulation, adopting such regulation only if the agency determines that the estimated benefits justify the estimated costs. The bill also would broaden the items to consider in developing costs and benefits including, among other things, alternatives to direct regulation.

Based on information from the CFTC, CBO estimates that implementing H.R. 1840 would cost \$27 million over the 2013–2017 period, assuming appropriation of the necessary amounts. Enacting H.R. 1840 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 1840 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 1840 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—					
	2013	2014	2015	2016	2017	2013–2017
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	3	6	6	6	7	28
Estimated Outlays	3	6	6	6	6	27

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted before the end of 2012, the necessary amounts will be appropriated each year, and spending will follow historical trends for the affected activities.

H.R. 1840 would expand the analysis that the CFTC must perform in developing new regulations or issuing orders. Under current law, the agency undertakes an analysis of the estimated costs and benefits that would result from a proposed regulation; H.R. 1840 would require the agency to consider additional factors in this analysis and restrict the agency to adopting regulations only when the analysis determines that the benefits justify the costs.

Based on information from the CFTC, CBO estimates that the agency would need an additional 25 positions to handle the increased workload under the bill. CBO estimates that implementing H.R. 1840 would cost \$27 million over the 2013–2017 period, assuming appropriation of the necessary amounts.

Pay-As-You-Go Considerations: None.

Intergovernmental and private-sector impact: H.R. 1840 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Susan Willie; Impact on State, Local, and Tribal Governments: Elizabeth Cove Delisle; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Peter H. Fontaine, Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to improve consideration by the Commodity Futures Trading Commission of the costs and benefits of its regulations and others.

CONSTITUTIONAL AUTHORITY STATEMENT

The Committee finds the Constitutional authority for this legislation in Article I, section 8, clause 18, that grants Congress the power to make all laws necessary and proper for carrying out the powers vested by Congress in the Constitution of the United States or in any department or officer thereof.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee report incorporates the cost estimate prepared by the Director of the Congressional Budget Office pursuant to sections 402 and 423 of the Congressional Budget Act of 1974.

ADVISORY COMMITTEE STATEMENT

No advisory committee within the meaning of section 5(b) of the Federal Advisory Committee Act was created by this legislation.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104-1).

FEDERAL MANDATES STATEMENT

The Committee adopted as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104-4).

EARMARK STATEMENT REQUIRED BY CLAUSE 9 OF RULE XXI OF THE RULES OF HOUSE OF REPRESENTATIVES

H.R. 1840 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI of the Rules of the House Representatives.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMMODITY EXCHANGE ACT

* * * * *

SEC. 15. CONSIDERATION OF COSTS AND BENEFITS AND ANTITRUST LAWS.

(a) COSTS AND BENEFITS.—

[(1) IN GENERAL.—Before promulgating a regulation under this Act or issuing an order (except as provided in paragraph (3)), the Commission shall consider the costs and benefits of the action of the Commission.

[(2) CONSIDERATIONS.—The costs and benefits of the proposed Commission action shall be evaluated in light of—

[(A) considerations of protection of market participants and the public;

[(B) considerations of the efficiency, competitiveness, and financial integrity of futures markets;

[(C) considerations of price discovery;

[(D) considerations of sound risk management practices; and

[(E) other public interest considerations.]

(1) *IN GENERAL.—Before promulgating a regulation under this Act or issuing an order (except as provided in paragraph (3)), the Commission, through the Office of the Chief Economist, shall assess the costs and benefits, both qualitative and quantitative, of the intended regulation and propose or adopt a regulation only on a reasoned determination that the benefits of the intended regulation justify the costs of the intended regulation (recognizing that some benefits and costs are difficult to quantify). It must measure, and seek to improve, the actual results of regulatory requirements.*

(2) *CONSIDERATIONS.—In making a reasoned determination of the costs and the benefits, the Commission shall evaluate—*

(A) considerations of protection of market participants and the public;

(B) considerations of the efficiency, competitiveness, and financial integrity of futures and swaps markets;

(C) considerations of the impact on market liquidity in the futures and swaps markets;

(D) considerations of price discovery;

(E) considerations of sound risk management practices;

(F) available alternatives to direct regulation;

(G) the degree and nature of the risks posed by various activities within the scope of its jurisdiction;

(H) whether, consistent with obtaining regulatory objectives, the regulation is tailored to impose the least burden on society, including market participants, individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), taking into account, to the extent practicable, the cumulative costs of regulations;

(I) whether the regulation is inconsistent, incompatible, or duplicative of other Federal regulations;

(J) whether, in choosing among alternative regulatory approaches, those approaches maximize net benefits (includ-

*ing potential economic, environmental, and other benefits,
 distributive impacts, and equity); and
 (K) other public interest considerations.*

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