

116TH CONGRESS
1ST SESSION

S. 869

To affirm the authority of the President to require independent regulatory agencies to comply with regulatory analysis requirements applicable to executive agencies, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 26, 2019

Mr. PORTMAN (for himself, Mr. JOHNSON, Ms. COLLINS, Ms. ERNST, and Mr. LANKFORD) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To affirm the authority of the President to require independent regulatory agencies to comply with regulatory analysis requirements applicable to executive agencies, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Independent Agency
5 Regulatory Analysis Act”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act—

1 (1) the term “Administrator” means the Ad-
2 ministrator of the Office of Information and Regu-
3 latory Affairs;

4 (2) the term “agency” has the meaning given
5 the term in section 3502(1) of title 44, United
6 States Code;

7 (3) the term “economically significant rule”
8 means any rule that the Administrator determines is
9 likely to—

10 (A) have an annual effect on the economy
11 of \$100,000,000 or more; or

12 (B) adversely affect in a material way the
13 economy, a sector of the economy, productivity,
14 competition, jobs, the environment, public
15 health or safety, or State, local, or Tribal gov-
16 ernments or communities;

17 (4) the term “independent regulatory agency”
18 has the meaning given the term in section 3502(5)
19 of title 44, United States Code; and

20 (5) the term “rule”—

21 (A) means a rule, as that term is defined
22 in section 551 of title 5, United States Code;
23 and

24 (B) does not include a rule of the Board
25 of Governors of the Federal Reserve System or

1 the Federal Open Market Committee relating to
2 monetary policy.

3 **SEC. 3. REGULATORY ANALYSIS BY INDEPENDENT AGEN-**
4 **CIES.**

5 (a) IN GENERAL.—The President may by Executive
6 order require an independent regulatory agency to comply,
7 to the extent permitted by law, with regulatory analysis
8 requirements applicable to other agencies, including the
9 requirements to—

10 (1) identify the problem that the agency intends
11 to address by a new rule (including, where applica-
12 ble, the failures of private markets or public institu-
13 tions that warrant new agency action) and assess
14 the significance of that problem;

15 (2) examine whether any existing rule (or other
16 law) has created, or contributed to, the problem that
17 a new rule is intended to correct and whether the ex-
18 isting rule (or other law) should be modified to
19 achieve the intended goal of the new rule more effec-
20 tively;

21 (3) identify and assess available alternatives to
22 direct regulation, including providing economic in-
23 centives to encourage the desired behavior, or pro-
24 viding information upon which choices can be made
25 by the public;

1 (4) consider to the extent reasonable in setting
2 regulatory priorities, the degree and nature of the
3 risks posed by various substances or activities within
4 its jurisdiction;

5 (5) design its rules in the most cost-effective
6 manner to achieve the regulatory objective and, in
7 doing so, consider incentives for innovation, consist-
8 ency, predictability, the costs of enforcement and
9 compliance (to the Federal Government, regulated
10 entities, and the public), flexibility, distributive im-
11 pacts, and equity;

12 (6) assess the costs and the benefits of the in-
13 tended rule and, recognizing some costs and benefits
14 are difficult to quantify, propose or adopt a rule only
15 upon a reasoned determination that the benefits of
16 the rule justify its costs;

17 (7) base its rulemaking decisions on the best
18 reasonably obtainable scientific, technical, economic,
19 and other information concerning the need for, and
20 consequences of, the intended rule;

21 (8) identify and assess alternative forms of reg-
22 ulation and, to the extent feasible, specify perform-
23 ance objectives, rather than specifying the behavior
24 or manner of compliance that regulated entities
25 must adopt;

1 (9) seek the views of appropriate State, local,
2 and Tribal officials before imposing regulatory re-
3 quirements that might significantly or uniquely af-
4 fect State, local, or Tribal governmental entities,
5 whenever feasible;

6 (10) avoid rules that are inconsistent or incom-
7 patible with, or duplicative of, other rules of the
8 independent regulatory agency or other agencies;

9 (11) tailor rules to impose the least burden on
10 society, including individuals, businesses of differing
11 sizes, and other entities (including small commu-
12 nities and governmental entities), consistent with
13 achieving the regulatory objectives, and taking into
14 account, among other factors, and to the extent
15 practicable, the cost of cumulative rules;

16 (12) draft each rule to be simple and easy to
17 understand, with the goal of minimizing the poten-
18 tial for uncertainty and litigation arising from un-
19 certainty; and

20 (13) periodically review its existing economically
21 significant rules to determine whether any such rules
22 should be modified, streamlined, expanded, or re-
23 pealed so as to make the regulatory program of the
24 agency more effective or less burdensome in achiev-
25 ing the regulatory objectives.

1 (b) ECONOMICALLY SIGNIFICANT RULES.—For any
2 proposed or final rule identified by an independent regu-
3 latory agency as, or determined by the Administrator to
4 be, an economically significant rule, the President may by
5 Executive order require the independent regulatory agency
6 to provide to the Administrator and publish with the pro-
7 posed and final rule the following information, to the ex-
8 tent permitted by law:

9 (1) An assessment, including the underlying
10 analysis, of benefits anticipated from the rule to-
11 gether with, to the extent feasible, a quantification
12 of those benefits.

13 (2) An assessment, including the underlying
14 analysis, of costs anticipated from the rule together
15 with, to the extent feasible, a quantification of those
16 costs.

17 (3) An assessment, including the underlying
18 analysis, of costs and benefits of potentially effective
19 and reasonably feasible alternatives to the rule, iden-
20 tified by the agencies or the public, including im-
21 proving existing regulations and reasonably viable
22 nonregulatory actions, and an explanation of why
23 the planned regulatory action is preferable to the
24 identified potential alternatives.

1 (c) REVIEW BY OFFICE OF INFORMATION AND REGU-
2 LATORY AFFAIRS.—

3 (1) REQUIREMENT TO SEEK REVIEW.—The
4 President may, by Executive order, require an inde-
5 pendent regulatory agency to submit to the Adminis-
6 trator for review—

7 (A) any proposed economically significant
8 rule, either prior to publication of the notice of
9 proposed rulemaking or, if the head of the inde-
10 pendent regulatory agency elects, during the
11 general public comment period; and

12 (B) any final economically significant rule,
13 prior to publication of the final rule.

14 (2) NONBINDING ASSESSMENT.—An Executive
15 order issued under this Act may require that, not
16 later than 90 days after the independent regulatory
17 agency submits a proposed or final economically sig-
18 nificant rule for review, the Administrator submit
19 for inclusion in the rulemaking record the assess-
20 ment of the Administrator of the extent to which the
21 independent regulatory agency has complied with
22 any of the regulatory analysis requirements made
23 applicable by Executive order.

24 (3) DETERMINATION AND EXPLANATION BY
25 INDEPENDENT AGENCY.—An Executive order issued

1 under this Act may require that, if the Adminis-
 2 trator concludes under paragraph (2) that the inde-
 3 pendent regulatory agency did not comply with 1 or
 4 more requirements of the Executive order with re-
 5 spect to a proposed or final economically significant
 6 rule, the head of the independent regulatory agency
 7 that issued the economically significant rule shall in-
 8 clude with the final rule—

9 (A) a determination that the rule complies
 10 with the specified requirement or requirements
 11 and an explanation of that determination; and

12 (B) if applicable, an explanation why the
 13 independent regulatory agency did not comply
 14 with one or more of the specified requirements,
 15 based on the statutory provision authorizing the
 16 rule.

17 **SEC. 4. LIMITATION ON JUDICIAL REVIEW.**

18 (a) IN GENERAL.—The compliance or noncompliance
 19 of an independent regulatory agency with the require-
 20 ments of an Executive order issued under this Act shall
 21 not be subject to judicial review.

22 (b) AGENCY RECORD.—When an action for judicial
 23 review of a rule promulgated by an independent regulatory
 24 agency is instituted, any determination, analysis, or expla-
 25 nation produced by the independent regulatory agency,

1 and any assessment produced by the Administrator, pur-
2 suant to an Executive order issued under this Act, shall
3 constitute part of the whole record of agency action in con-
4 nection with the review.

5 (c) RULE OF CONSTRUCTION.—Nothing in this sec-
6 tion shall be construed to bar judicial review of any other
7 impact statement or similar analysis required by any other
8 provision of law if judicial review of the statement or anal-
9 ysis is otherwise permitted by law.

10 **SEC. 5. RULE OF CONSTRUCTION.**

11 Nothing in this Act shall be construed to limit the
12 authority of the President with respect to independent reg-
13 ulatory agencies under any other applicable law.

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