

112TH CONGRESS
2D SESSION

S. 3468

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

AUGUST 1, 2012

Mr. PORTMAN (for himself, Mr. WARNER, and Ms. COLLINS) 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 of 2012”.

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 same meaning as
5 in section 3502(1) of title 44, United States Code;

6 (3) the term “independent regulatory agency”
7 has the same meaning as in section 3502(5) of title
8 44, United States Code;

9 (4) the term “rule”—

10 (A) means a rule, as that term is defined
11 in section 551 of title 5, United States Code;
12 and

13 (B) does not include a rule of the Board
14 of Governors of the Federal Reserve System or
15 the Federal Open Market Committee relating to
16 monetary policy; and

17 (5) the term “significant rule” means any rule
18 that the Administrator determines is likely to—

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

21 (B) adversely affect in a material way the
22 economy, a sector of the economy, productivity,
23 competition, jobs, the environment, public
24 health or safety, or State, local, or tribal gov-
25 ernments or communities; or

1 (C) create a serious inconsistency or other-
2 wise interfere with an action taken or planned
3 by another agency.

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

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

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

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

22 (3) identify and assess available alternatives to
23 direct regulation, including providing economic in-
24 centives to encourage the desired behavior, or pro-

1 viding information upon which choices can be made
2 by the public;

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

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

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

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

23 (8) identify and assess alternative forms of reg-
24 ulation and, to the extent feasible, specify perform-
25 ance objectives, rather than specifying the behavior

1 or manner of compliance that regulated entities
2 must adopt;

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

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

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

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

22 (13) periodically review its existing significant
23 rules to determine whether any such rules should be
24 modified, streamlined, expanded, or repealed so as to
25 make the agency's regulatory program more effective

1 or less burdensome in achieving the regulatory objec-
2 tives.

3 (b) ECONOMICALLY SIGNIFICANT RULES.—For any
4 proposed or final rule identified by an independent regu-
5 latory agency as, or determined by the Administrator to
6 be, a significant rule described in subparagraph (A) or (B)
7 of section 2(5), the President may by Executive order re-
8 quire the independent regulatory agency to provide to the
9 Administrator the following information, to the extent per-
10 mitted by law:

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

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

19 (3) An assessment, including the underlying
20 analysis, of costs and benefits of potentially effective
21 and reasonably feasible alternatives to the rule, iden-
22 tified by the agencies or the public, including im-
23 proving existing regulations and reasonable non-
24 regulatory actions, and an explanation why the

1 planned regulatory action is preferable to the identi-
2 fied potential alternatives.

3 (c) REVIEW BY OFFICE OF INFORMATION AND REGU-
4 LATORY AFFAIRS.—

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

9 (A) any proposed significant rule, prior to
10 publication of the notice of proposed rule-
11 making; and

12 (B) any final significant rule, prior to pub-
13 lication 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 significant rule
18 for review, the Administrator submit for inclusion in
19 the rulemaking record the Administrator's assess-
20 ment of the extent to which the agency has complied
21 with the regulatory analysis requirements made ap-
22 plicable by Executive order.

23 (3) DETERMINATION AND EXPLANATION BY
24 INDEPENDENT AGENCY.—An Executive order issued
25 under this Act may require that, if the Adminis-

1 trator concludes under paragraph (2) that the inde-
 2 pendent regulatory agency did not comply with one
 3 or more requirements of the Executive order with re-
 4 spect to a proposed or final significant rule, the head
 5 of the agency that issued the significant rule shall
 6 include with the proposed and final significant
 7 rule—

8 (A) a determination that the rule complies
 9 with the requirements and an explanation of
 10 that determination;

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

15 (C) a clear statement of the issues on
 16 which the agency agrees or disagrees with the
 17 Administrator’s assessment of the rule.

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

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

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

1 nation produced by the agency, and any assessment pro-
2 duced by the Administrator, pursuant to an Executive
3 order issued under this Act, shall constitute part of the
4 whole record of agency action in connection with the re-
5 view.

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

11 **SEC. 5. RULE OF CONSTRUCTION.**

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

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