

113TH CONGRESS
2D SESSION

S. 2099

To amend title 5, United States Code, to establish uniform requirements for thorough economic analysis of regulations by Federal agencies based on sound principles, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 10, 2014

Mr. COATS introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To amend title 5, United States Code, to establish uniform requirements for thorough economic analysis of regulations by Federal agencies based on sound principles, 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 “Sound Regulation Act
5 of 2014”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

1 (1) Growing Federal regulation that is highly
2 prescriptive in nature burdens and impairs the inter-
3 national competitiveness of industry in the United
4 States.

5 (2) Prescriptive regulation takes away flexi-
6 bility, is adversarial in nature, leads to unintended
7 consequences, and, especially as it proliferates, slows
8 economic growth and job creation.

9 (3) Despite evidence of increasing regulatory
10 costs, Federal agencies hold fast to the presumption
11 that their rules are in the public interest.

12 (4) Some statutes prohibit agencies from con-
13 sidering costs and benefits in rulemaking, although
14 no statutes prohibit agencies from analyzing the
15 costs and benefits of rules for informative purposes.

16 (5)(A) Cost-benefit analysis is not institutional-
17 ized for independent regulatory agencies.

18 (B) Executive agencies perform cost-benefit
19 analysis pursuant to Executive order and under the
20 purview of the Office of Information and Regulatory
21 Affairs (commonly referred to as “OIRA”), which
22 takes direction from the President.

23 (C) Peer review is not required for cost-benefit
24 analysis by independent regulatory agencies or exec-
25 utive agencies.

1 (6) There are no—

2 (A) statutory standards for cost-benefit
3 analysis in Federal rulemaking; or

4 (B) consistent, material consequences when
5 rules are based on faulty or inadequate anal-
6 ysis.

7 (7) Agencies—

8 (A) conduct their own regulatory impact
9 analysis—

10 (i) largely by methods of their own
11 choosing; and

12 (ii) only on a small fraction of the
13 rules they issue; and

14 (B) use regulatory cost-benefit analysis
15 mainly in support of favored, preconceived rules
16 rather than as a decision tool.

17 (8) Common deficiencies in the regulatory anal-
18 ysis used by agencies include—

19 (A) lack of a coherent theory by which
20 to—

21 (i) define a problem;

22 (ii) determine why the problem occurs;

23 and

24 (iii) guide the agency to the most effi-
25 cient response;

1 (B) lack of objective evidence that an ac-
 2 tionable problem actually exists, what its di-
 3 mensions are, and how they differ from accept-
 4 able norms;

5 (C) lack of comprehensive analysis to—

6 (i) determine whether a market mal-
 7 function exists; and

8 (ii) orient rulemaking to the causes,
 9 not the symptoms, of the market malfunc-
 10 tion;

11 (D) failure to set clear and realistic objec-
 12 tives whose benefits justify the cost of achieving
 13 the objectives;

14 (E) objectives that—

15 (i) are disconnected from costs; and

16 (ii) may be expansive and vague so
 17 that any regulation can be made to appear
 18 beneficial;

19 (F) agencies increasingly claiming—

20 (i) incidental benefits (also known as
 21 “co-benefits”) that are not in furtherance
 22 of the stated objective; and

23 (ii) even private, as opposed to public,
 24 benefits for rules;

25 (G) failure to—

1 (i) develop regulatory options in light
2 of market analysis; and

3 (ii) rank regulatory options by how ef-
4 ficiently they will improve the market proc-
5 ess;

6 (H) inconsistent assumptions and meth-
7 odologies across agencies;

8 (I) invalid baselines for gauging regulatory
9 effects;

10 (J) the omission of important impacts,
11 such as the impact on employment and on the
12 international competitiveness of United States
13 firms;

14 (K) failure to reevaluate regulations after
15 implementation; and

16 (L) failure to consider the cumulative costs
17 of regulation by the various Federal, State,
18 local, and tribal agencies.

19 (9)(A) Despite continually changing market
20 conditions, agencies do not—

21 (i) regularly review their existing regula-
22 tions and regulatory regimes; or

23 (ii) review the division of functions—

24 (I) among different Federal agencies;

25 or

1 (II) among Federal, State, local, and
 2 tribal agencies.

3 (B) Regulations lose their purpose, yet linger
 4 and accumulate, imposing unnecessary costs and
 5 slowing economic growth to the detriment of—

6 (i) material living standards; and

7 (ii) to some extent, the very social condi-
 8 tions that are the objects of regulation.

9 (10)(A) Agencies typically do not—

10 (i) proactively conduct regulatory cost
 11 studies; and

12 (ii) report to Congress on unnecessary
 13 costs that are not under the control of the
 14 agencies because of the way laws are written.

15 (B) Agency recommendations on how to im-
 16 prove the efficiency of regulation by modifying an
 17 existing statute could be helpful to Congress.

18 **SEC. 3. UNIFORM USE OF COST-BENEFIT ANALYSIS.**

19 Section 553 of title 5, United States Code, is amend-
 20 ed by adding at the end the following:

21 “(f)(1) Before an agency publishes or otherwise pro-
 22 vides notice of a notice of proposed rulemaking under this
 23 section, the agency shall comply with the following require-
 24 ments with respect to the proposed rule:

1 “(A) The agency shall identify, in the context
2 of a coherent conceptual framework and supported
3 with objective data—

4 “(i) the nature and significance of the
5 market failure, regulatory failure, or other
6 problem that necessitates regulatory action;

7 “(ii) the reasons why national economic
8 and income growth, advancing technology, and
9 other market developments will not obviate the
10 need for the rulemaking;

11 “(iii) the reasons why regulation at the
12 State, local, or tribal level could not address the
13 problem better than at the Federal level;

14 “(iv) the reasons why reducing rather than
15 increasing the extent or stringency of existing
16 Federal regulation would not address the prob-
17 lem better; and

18 “(v) the particular authority under which
19 the agency may take action.

20 “(B) Before the agency increases the extent or
21 stringency of regulation based on its determinations
22 pursuant to subparagraph (A), the agency shall—

23 “(i) set an achievable objective for its regu-
24 latory action and identify the metrics by which

1 the agency will measure progress toward the ob-
2 jective;

3 “(ii) issue a notice of inquiry seeking pub-
4 lic comment on the identification of a new ob-
5 jective under clause (i); and

6 “(iii) give notice to the committees of Con-
7 gress with jurisdiction over the subject matter
8 of the rule.

9 “(C) If the agency is not seeking to repeal a
10 rule, the agency shall develop not less than 3 distinct
11 regulatory options, in addition to not regulating,
12 that the agency estimates will provide the greatest
13 benefits for the least cost in meeting the regulatory
14 objective set under subparagraph (B) and, in devel-
15 oping such regulatory options, shall apply the fol-
16 lowing principles:

17 “(i) The agency shall, to the extent prac-
18 ticable—

19 “(I) attempt to engage private incen-
20 tives to solve a problem; and

21 “(II) not supplant private incentives
22 any more than necessary.

23 “(ii) The agency shall consider the adverse
24 effects that mandates and prohibitions may

1 have on innovation, economic growth, and em-
2 ployment.

3 “(iii)(I) The agency’s risk assessment shall
4 be confined to the jurisdiction of the agency,
5 subject to specific regulatory authority.

6 “(II) Agency assessments of the risks of
7 adverse health and environmental effects shall
8 follow standardized parameters, assumptions,
9 and methodologies.

10 “(III) The agency shall provide analyses of
11 increases in risks, whatever their nature, pro-
12 duced by the regulatory options under consider-
13 ation.

14 “(iv) The agency shall avoid incongruities
15 and duplication in regulation at the Federal,
16 State, local, and tribal levels.

17 “(v) The agency shall compare and con-
18 trast the regulatory options developed and ex-
19 plain how each would meet the regulatory objec-
20 tive set pursuant to subparagraph (B).

21 “(D) The agency shall estimate the costs and
22 benefits of each regulatory option developed, not-
23 withstanding any provision of law that prohibits the
24 agency from using costs in rulemaking, at least to
25 the extent that the agency is able to—

1 “(i) exclude options whose costs exceed
2 their benefits;

3 “(ii) rank the options by cost from lowest
4 to highest;

5 “(iii) estimate the monetary cost of any
6 adverse effects on private property rights, iden-
7 tify the categories of persons who experience a
8 net loss from a regulatory option, and explain
9 why the negative effects cannot be lessened or
10 avoided;

11 “(iv) establish whether the cost of an op-
12 tion exceeds \$50,000,000 for any 12-month pe-
13 riod, except that the dollar amount shall be ad-
14 justed annually for inflation based on the GDP
15 deflator, and the President may order that a
16 lower dollar amount be used for a particular pe-
17 riod;

18 “(v) identify the key uncertainties and as-
19 sumptions that drive the results of the analysis
20 under clause (iv); and

21 “(vi) provide an analysis of how the rank-
22 ing of the options and the threshold determina-
23 tion under clause (iv) may change if key as-
24 sumptions are changed.

1 “(E) The estimates pursuant to subparagraph
2 (D) shall—

3 “(i) follow the methodology established
4 pursuant to paragraph (2)(A);

5 “(ii) to the maximum extent practicable,
6 comply with any guidelines issued by the Ad-
7 ministrator of the Office of Information and
8 Regulatory Affairs pertaining to cost-benefit
9 analysis; and

10 “(iii) include, at a minimum—

11 “(I) agency administrative costs;

12 “(II) United States private sector
13 compliance costs;

14 “(III) Federal, State, local, and tribal
15 compliance costs;

16 “(IV) Federal, State, local, and tribal
17 revenue impacts;

18 “(V) impacts from the regulatory op-
19 tions developed on United States industries
20 in the role of suppliers and consumers to
21 each industry substantially affected, espe-
22 cially in terms of employment, costs, vol-
23 ume and quality of output, and prices;

1 “(VI) nationwide impacts on overall
2 economic output, productivity, and con-
3 sumer and producer prices;

4 “(VII) international competitiveness
5 of United States companies; and

6 “(VIII) distortions in incentives and
7 markets, including an estimate of the re-
8 sulting loss to the United States economy.

9 “(F) The agency shall—

10 “(i) publish for public comment all anal-
11 yses, documentation, and data under subpara-
12 graphs (A) through (D) for a public comment
13 period of not less than 30 days (subject to ap-
14 plicable limitations under law, including laws
15 protecting privacy, trade secrets, and intellec-
16 tual property); and

17 “(ii) correct deficiencies or omissions that
18 the agency becomes aware of before choosing a
19 rule to propose.

20 “(2)(A)(i) Beginning not later than the date that is
21 180 days after the date of enactment of the Sound Regula-
22 tion Act of 2014, each agency shall, by rule—

23 “(I) establish and maintain a specific cost-ben-
24 efit analysis methodology appropriate to the func-
25 tions and responsibilities of the agency; and

1 “(II) establish an appropriate period for review
2 of new rules to assess the cost effectiveness of each
3 such new rule at achieving the objective that the new
4 rule was intended to address, as identified under
5 paragraph (1)(B)(i).

6 “(ii) The methodology established by an agency under
7 clause (i) shall—

8 “(I) include the standardized parameters, as-
9 sumptions, and methodologies for agency assess-
10 ments of risk under paragraph (1)(C)(iii);

11 “(II) comply, to the maximum extent prac-
12 ticable, with technical standards for methodologies
13 and assumptions issued by the Administrator for the
14 Office of Information and Regulatory Affairs;

15 “(III) include the scope of benefits and costs
16 consistent with the framework used and the metrics
17 identified in the establishment of the regulatory ob-
18 jective under paragraph (1);

19 “(IV) not include consideration of incidental
20 benefits but only those benefits that were considered
21 in the establishment of the regulatory objective
22 under paragraph (1);

23 “(V) limit consideration of costs and benefits to
24 costs and benefits that accrue to the population of
25 the United States;

1 “(VI) constrain the agency from presuming
2 that continued augmentation or tightening of man-
3 dates and additional prohibitions cause benefits and
4 costs to change linearly but instead determine at
5 what point benefits will rise less than, and costs will
6 rise more than, proportionally;

7 “(VII) include comparison of incremental bene-
8 fits to incremental costs from any action the agency
9 considers taking and refrain from actions whose in-
10 cremental benefits do not exceed their incremental
11 costs; and

12 “(VIII) include analysis of effects on private in-
13 centives and possible unintended consequences.

14 “(iii) Each agency shall adhere to the methodology
15 established by the agency under this subparagraph in all
16 rulemakings.

17 “(B) If an agency does not select the least-cost regu-
18 latory option as its proposed rule, the agency shall justify
19 its selection, explaining—

20 “(i) how that selection furthers other goals or
21 requirements relevant to regulating matters within
22 the jurisdiction of the agency and why these should
23 override cost savings; and

1 “(ii) why each of the other regulatory options
2 not chosen would not sufficiently further such other
3 goals or requirements.

4 “(C) Any person may petition an agency to amend
5 an existing rule made prior to the establishment of meth-
6 odology under this paragraph, and, if the agency denies
7 such a petition, that denial shall be subject to review under
8 chapter 7 of this title.

9 “(3) If an agency makes a determination under para-
10 graph (1)(D) that the monetized cost of a rule exceeds
11 the applicable monetary limit under clause (iv) of such
12 paragraph for any 12-month period—

13 “(A) the head of the agency shall—

14 “(i) first issue an advanced notice of pro-
15 posed rulemaking;

16 “(ii) provide notice to the appropriate Con-
17 gressional committees; and

18 “(iii) keep the committees described in
19 clause (ii) informed of the status of the rule-
20 making;

21 “(B) the agency shall—

22 “(i) notify—

23 “(I) the Administrator of the Small
24 Business Administration (referred to in
25 this paragraph as the ‘Administrator’);

1 “(II) the Director of the Office of
2 Management and Budget (referred to in
3 this paragraph as the ‘Director’); and

4 “(III) affected parties; and

5 “(ii) provide each person described in
6 clause (i) with information on—

7 “(I) the potential effects of the pro-
8 posed rule on affected parties; and

9 “(II) the type of affected parties that
10 might be affected;

11 “(C) not later than 15 days after the date of
12 receipt of the information described in subparagraph
13 (B)(ii), the Director, in consultation with the Ad-
14 ministrator, shall—

15 “(i) identify representatives of affected
16 parties, not less than 25 percent of which shall,
17 when possible, represent small business con-
18 cerns (as such term is defined in section 3(a)
19 of the Small Business Act (15 U.S.C. 623(a)));
20 and

21 “(ii) provide each major stakeholder with
22 the opportunity to obtain advice and rec-
23 ommendations about the potential effects of the
24 proposed rule;

1 “(D) the agency shall convene a review panel
2 that consists wholly of—

3 “(i) full-time Federal officers, employees,
4 and contractors in the agency;

5 “(ii) the Director;

6 “(iii) the Administrator; and

7 “(iv) the representatives of affected parties
8 identified under subparagraph (C)(i);

9 “(E) the agency shall—

10 “(i) conduct a detailed analysis of the costs
11 and benefits of the regulatory option that the
12 agency is advancing; and

13 “(ii) in conducting the detailed analysis
14 under clause (i)—

15 “(I) consider the cumulative and
16 interactive costs of regulatory requirements
17 of Federal, State, local, tribal, and, where
18 applicable, international regulations;

19 “(II) identify the key uncertainties
20 and assumptions that drive the results of
21 the analysis; and

22 “(III) provide an analysis of how the
23 ranking of the regulatory options changes
24 if the key assumptions identified under
25 subclause (II) are changed;

1 “(F) the review panel convened under subpara-
2 graph (D) shall review—

3 “(i) all agency material prepared in con-
4 nection with this subsection, including any draft
5 proposed rule; and

6 “(ii) the advice and recommendations of
7 each representative of an affected party identi-
8 fied under subparagraph (C)(i);

9 “(G) not later than 60 days after the date on
10 which the agency convenes the review panel under
11 subparagraph (D)—

12 “(i) the review panel shall report on—

13 “(I) the comments of each representa-
14 tive of an affected party identified under
15 subparagraph (C)(i); and

16 “(II) the findings of the review panel
17 as to issues related to the provisions of this
18 subsection; and

19 “(ii) the report under clause (i) shall be
20 made public as part of the rulemaking record;

21 “(H) if appropriate, the agency shall modify the
22 proposed rule or the cost-benefit analysis under sub-
23 paragraph (E) based on the report under subpara-
24 graph (G);

1 “(I) subject to applicable limitations under law,
2 including laws protecting privacy, trade secrets, and
3 intellectual property, the agency shall—

4 “(i) publish for comment all analyses, doc-
5 umentation, and data under this subsection for
6 a public comment period of not less than 30
7 days; and

8 “(ii) correct deficiencies or omissions that
9 the agency becomes aware of before adopting a
10 proposed rule; and

11 “(J) the agency shall ensure that affected par-
12 ties, including State, local, or tribal governments,
13 and other stakeholders, may participate in the rule-
14 making, by means such as—

15 “(i) the publication of advanced and gen-
16 eral notices of proposed rulemaking in publica-
17 tions likely to be obtained by affected parties;

18 “(ii) the direct notification of interested af-
19 fected parties;

20 “(iii) the conduct of open conferences or
21 public hearings, including soliciting and receiv-
22 ing comments over computer networks; and

23 “(iv) reducing the cost or complexity of
24 procedural rules to ease participation in the
25 rulemaking.

1 “(4) Every 4 years, each agency shall—

2 “(A) conduct a review of all rules of the agency
3 that are in effect; and

4 “(B) determine based on objective data whether
5 the rules are—

6 “(i) working as intended;

7 “(ii) furthering their objectives;

8 “(iii) imposing unanticipated costs; or

9 “(iv) generating a net benefit or not;

10 “(C) amend the rules if appropriate; and

11 “(D) report to Congress the findings of the re-
12 view conducted under this paragraph.

13 “(5) Notwithstanding any other provision of law, in-
14 cluding any provision of law that explicitly prohibits the
15 use of cost-benefit analysis in rulemaking, an agency shall
16 conduct cost-benefit analyses and report to Congress the
17 findings with specific recommendations for how to lower
18 regulatory costs by amending the statutes prohibiting the
19 use thereof.

20 “(6) For purposes of this subsection—

21 “(A) the term ‘regulatory options’ means any
22 action an agency may take to address an objective
23 identified under paragraph (1)(B)(i), including the
24 option not to act;

25 “(B) the term ‘private incentives’—

1 “(i) means financial gains or losses that
 2 motivate actions by private individuals and
 3 businesses; and

4 “(ii) does not include any law or regulation
 5 that prescribes private actions or outcomes; and

6 “(C) the term ‘incidental benefit’ means a
 7 claimed benefit outside the specific regulatory objec-
 8 tive or objectives that a rule is intended to address,
 9 as identified under paragraph (1)(B)(i).

10 “(7) All determinations made under this subsection
 11 shall be subject to review under chapter 7.”.

12 **SEC. 4. CONGRESSIONAL REVIEW.**

13 Section 801(a)(2) of title 5, United States Code, is
 14 amended by adding at the end the following:

15 “(C) The Comptroller General shall—

16 “(i) examine the cost-benefit analysis for com-
 17 pliance with the requirements of section 553(f), in-
 18 cluding the agency methodology established under
 19 section 553(f)(2)(A);

20 “(ii) examine any risk analysis under section
 21 553(f)(1)(C)(iii) pertaining to the cost-benefit anal-
 22 ysis for compliance with the requirements under sec-
 23 tion 553(f); and

24 “(iii)(I) examine the agencies’ quadrennial reg-
 25 ulatory reviews conducted under section 553(f)(4)

1 for consistency with the requirements under section
2 553(f); and
3 “(II) report to Congress on the results of the
4 examination under subclause (I).”.

○