II

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

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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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘‘Independent Agency Regulatory Analysis Act’’.

SEC. 2. DEFINITIONS.

In this Act—

(1) the term ''Administrator'' means the Administrator of the Office of Information and Regulatory Affairs;

(2) the term ''agency'' has the meaning given the term in section 3502(1) of title 44, United States Code;

(3) the term ''economically significant rule'' means any rule that the Administrator determines is likely to—

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

(B) adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

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

(5) the term ''rule''—

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

(B) does not include a rule of the Board of Governors of the Federal Reserve System or the Federal Open Market Committee relating to monetary policy.

SEC. 3. REGULATORY ANALYSIS BY INDEPENDENT AGENCIES.

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

(1) identify the problem that the agency intends to address by a new rule (including, where applicable, the failures of private markets or public institutions that warrant new agency action) and assess the significance of that problem;

(2) examine whether any existing rule (or other law) has created, or contributed to, the problem that a new rule is intended to correct and whether the existing rule (or other law) should be modified to achieve the intended goal of the new rule more effectively;

(3) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, or providing information upon which choices can be made by the public;

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

(5) design its rules in the most cost-effective manner to achieve the regulatory objective and, in doing so, consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the Federal Government, regulated entities, and the public), flexibility, distributive impacts, and equity;

(6) assess the costs and the benefits of the intended rule and, recognizing some costs and benefits are difficult to quantify, propose or adopt a rule only upon a reasoned determination that the benefits of the rule justify its costs;

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

(8) identify and assess alternative forms of regulation and, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt;

(9) seek the views of appropriate State, local, and Tribal officials before imposing regulatory requirements that might significantly or uniquely affect State, local, or Tribal governmental entities, whenever feasible;

(10) avoid rules that are inconsistent or incompatible with, or duplicative of, other rules of the independent regulatory agency or other agencies;

(11) tailor rules to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with achieving the regulatory objectives, and taking into account, among other factors, and to the extent practicable, the cost of cumulative rules;

(12) draft each rule to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from uncertainty; and

(13) periodically review its existing economically significant rules to determine whether any such rules should be modified, streamlined, expanded, or repealed so as to make the regulatory program of the agency more effective or less burdensome in achieving the regulatory objectives.

(b) ECONOMICALLY SIGNIFICANT RULES.—For any proposed or final rule identified by an independent regulatory agency as, or determined by the Administrator to be, an economically significant rule, the President may by Executive order require the independent regulatory agency to provide to the Administrator and publish with the proposed and final rule the following information, to the extent permitted by law:

(1) An assessment, including the underlying analysis, of benefits anticipated from the rule together with, to the extent feasible, a quantification of those benefits.

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

(3) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the rule, identified by the agencies or the public, including improving existing regulations and reasonably viable nonregulatory actions, and an explanation of why the planned regulatory action is preferable to the identified potential alternatives.

(c) REVIEW BY OFFICE OF INFORMATION AND REGULATORY AFFAIRS.—

(1) REQUIREMENT TO SEEK REVIEW.—The President may, by Executive order, require an independent regulatory agency to submit to the Administrator for review—

(A) any proposed economically significant rule, either prior to publication of the notice of proposed rulemaking or, if the head of the independent regulatory agency elects, during the general public comment period; and

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

(2) NONBINDING ASSESSMENT.—An Executive order issued under this Act may require that, not later than 90 days after the independent regulatory agency submits a proposed or final economically significant rule for review, the Administrator submit for inclusion in the rulemaking record the assessment of the Administrator of the extent to which the independent regulatory agency has complied with any of the regulatory analysis requirements made applicable by Executive order.

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

under this Act may require that, if the Administrator concludes under paragraph (2) that the independent regulatory agency did not comply with 1 or more requirements of the Executive order with respect to a proposed or final economically significant rule, the head of the independent regulatory agency that issued the economically significant rule shall include with the final rule—

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

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

SEC. 4. LIMITATION ON JUDICIAL REVIEW.

(a) IN GENERAL.—The compliance or noncompliance of an independent regulatory agency with the requirements of an Executive order issued under this Act shall not be subject to judicial review.

(b) AGENCY RECORD.—When an action for judicial review of a rule promulgated by an independent regulatory agency is instituted, any determination, analysis, or explanation produced by the independent regulatory agency, and any assessment produced by the Administrator, pursuant to an Executive order issued under this Act, shall constitute part of the whole record of agency action in connection with the review.

(c) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to bar judicial review of any other impact statement or similar analysis required by any other provision of law if judicial review of the statement or analysis is otherwise permitted by law.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in this Act shall be construed to limit the authority of the President with respect to independent regulatory agencies under any other applicable law.

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