

INDEPENDENT AGENCY REGULATORY ANALYSIS ACT

Sponsored by Sens. Rob Portman, Ron Johnson, Susan Collins, James Lankford, and Joni Ernst

Key Provisions

1. Cost-Benefit Analysis

- This bill affirms the authority of the President to extend to independent agencies the same cost-benefit analysis requirements and other burden-reducing principles that long have governed executive agencies, including the requirements to:
 - Evaluate costs and benefits of new rules and adopt the least burdensome regulatory approach;
 - Examine whether existing regulations have contributed to the problem the agency seeks to address;
 - Base rules on the best available economic and scientific data; and
 - Consider alternatives to direct regulation, including incentives and public disclosure.
- For regulations that will have an annual economic impact of \$100 million or more, the bill authorizes the President to require agencies to produce a regulatory impact analysis that takes into account, among other things, the quantified costs and benefits of the proposed rule and less costly alternatives.

2. Accountability

- The bill sets up an innovative approach to hold agencies accountable by means of transparency and public scrutiny. Under the bill, the President could require independent agencies to submit significant proposed and final rules, along with supporting analysis, for review by the Office of Information and Regulatory Affairs (OIRA).
- Although OIRA would not have the power to reject a rule, it would evaluate the quality of the agencies' cost-benefit analysis and place its assessment in the public record. If OIRA found that an agency failed to comply with the new requirements, the agency would be obligated to respond to OIRA's assessment and justify its position and underlying analysis. Judicial review of the agency's compliance would not be permitted, but the exchange between OIRA and the agency would be included in the rulemaking record.

Background

For thirty years, presidents of both parties have required most federal agencies to analyze the costs and benefits of major new regulations and abide by other principles designed to filter out excessive red tape.¹ But this process carves out more than a dozen major regulators known as independent agencies, including the Securities & Exchange Commission, the Commodity Futures Trading Commission, the National Labor Relations Board, and the Federal Communications Commission, among others. These regulators exercise vast power over major sectors of our economy—from telecom, to agriculture, to financial services—but they are exempt from commonsense requirements including cost-benefit analysis of economically significant rules (those with annual impacts of \$100 million or more). They are also exempt from review by OIRA, which often provides a valuable check on the quality and soundness of agency rulemaking.

¹ Exec. Order No. 12,866, 3 C.F.R. 638 (1993); Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

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The Independent Agency Regulatory Analysis Act would close that gap by authorizing the President to bring independent agencies into the analysis and review process that governs executive agencies.

The need for this reform is evident from the recent track record of independent agencies. Out of the 8 major rules issued by independent agencies in FY 2015, none were based on a complete cost-benefit analysis. The same is true for all major rules issued by independent agencies going back to 2008—when, out of 11 rules issued in 2008, one was based on a complete cost-benefit analysis.²

Unsurprisingly, there is broad support for this basic reform of rulemaking by independent agencies. The President’s Jobs Council recommended in its January 2012 report:

Congress should require [independent agencies] to conduct cost-benefit analysis for economically significant regulations. A requirement that [independent agencies] must conduct regulatory impact analyses . . . would prompt [independent agencies] to perform better analyses and to issue better and smarter regulations.³

Clinton Administration OIRA Administrator Sally Katzen has made the same case:

One area where Congress can and should act would be to extend to independent agencies the requirements for cost-benefit analysis and centralized review that are currently contained in Executive Order 12866. . . . [I]ndependent agencies are not typically engaging in the analysis that has come to be expected as a form of governmental best practice for regulatory agencies.⁴

The nonpartisan Administrative Conference of the United States and American Bar Association have also long favored this reform.⁵

² OIRA and GAO annual reports; see also Curtis Copeland, *Economic Analysis & Independent Regulatory Agencies*, Report for the Administrative Conference of the United States, pp. 87-89 (Apr. 30, 2013) (reporting that out of the 21 major rules issued by independent agencies in 2012, only one rule was supported by a partial quantification of benefits and only 6 rules included a partial quantification of costs, aside from paperwork burdens).

³ The President’s Council on Jobs & Competitiveness, *Roadmap to Renewal* 45 (2012)

⁴ Sally Katzen, *Expand Centralized Regulatory Review to Independent Agencies*, U. Penn. Reg. Blog (August 9, 2011).

⁵ The ABA resolution is reprinted in Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 Admin. L. Rev. 181, 206-07 (1986) (appendix) (“The constitutional principles that justify presidential involvement in rulemaking activities are applicable to both the executive and the independent agencies. The executive orders should be extended to the independent agencies because of the need for presidential oversight of all administrative rulemaking activities.”); ACUS Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989), ¶ 2 (“As a matter of principle, presidential review of rulemaking should apply to independent regulatory agencies to the same extent it applies to the rulemaking of Executive Branch departments and other agencies.”).