

113TH CONGRESS
2^D SESSION

H. R. 3863

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 HOUSE OF REPRESENTATIVES

JANUARY 14, 2014

Mr. BRADY of Texas introduced the following bill; which was referred to the Committee on the Judiciary

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 American industry
3 and impairs its international competitiveness.

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

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

11 (4) Some statutes prohibit consideration of
12 costs and benefits in rulemaking, although none pro-
13 hibit agency analysis of costs and benefits for in-
14 formative purposes.

15 (5) For independent regulatory agencies cost-
16 benefit analysis is not institutionalized. Executive
17 agencies perform cost-benefit analysis pursuant to
18 Executive order and under the purview of the Office
19 of Information and Regulatory Affairs (OIRA),
20 which takes direction from the President. No peer
21 review is required of analyses by either set of agen-
22 cies.

23 (6) There are no statutory standards for cost-
24 benefit analysis in Federal rulemaking and there are

1 no consistent, material consequences when rules are
2 based on faulty or inadequate analysis.

3 (7) Agencies conduct their own regulatory im-
4 pact analyses largely by methods of their own choos-
5 ing and only on a small fraction of the rules they
6 issue. Agencies use regulatory cost-benefit analysis
7 mainly in support of favored, preconceived rules
8 rather than as a decision tool. Common deficiencies
9 include—

10 (A) lack of a coherent theory by which to
11 define a problem, determine why it occurs, and
12 guide the agency to the most efficient response;

13 (B) lack of objective evidence that an ac-
14 tionable problem actually exists, what its di-
15 mensions are, and how they differ from accept-
16 able norms;

17 (C) lack of comprehensive analysis to de-
18 termine whether a market malfunction exists
19 and orient rulemaking to its causes, not its
20 symptoms;

21 (D) failure to set clear and realistic objec-
22 tives whose benefits justify the cost of achieving
23 them;

24 (E) objectives that are set disconnected
25 from costs and may be expansive and vague so

1 that any regulation can be made to appear ben-
2 efficient;

3 (F) agencies increasingly claiming inci-
4 dental benefits (so-called co-benefits) that are
5 not in furtherance of the stated objective and
6 even private (as opposed to public) benefits for
7 their rules;

8 (G) failure to develop regulatory options in
9 light of market analysis and rank them by how
10 efficiently they will improve the market process;

11 (H) inconsistent assumptions and meth-
12 odologies across agencies;

13 (I) invalid baselines for gauging regulatory
14 effects;

15 (J) omissions of important impacts, such
16 as on employment and international competi-
17 tiveness of U.S. firms;

18 (K) failure to reevaluate regulations after
19 implementation; and

20 (L) failure to consider the cumulative costs
21 of regulation by the various Federal, State,
22 local, and tribal agencies.

23 (8) Despite continually changing market condi-
24 tions, agencies do not regularly review their existing
25 regulations and regulatory regimes. They also do not

1 review the division of functions among different Fed-
2 eral agencies or among Federal, State, local, and
3 tribal agencies. Regulations lose their purpose, yet
4 linger and accumulate, imposing unnecessary costs
5 and slowing economic growth to the detriment of
6 material living standards and, to some extent, the
7 very social conditions that are the objects of regula-
8 tion.

9 (9) Agencies typically do not conduct regulatory
10 cost studies proactively and report to Congress un-
11 necessary costs that are not under the agencies' con-
12 trol because of the way laws are written. Agency rec-
13 ommendations on how to improve the efficiency of
14 regulation by modifying an existing statute could be
15 helpful to Congress.

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

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

19 “(f)(1) Prior to any rulemaking under this section,
20 an agency shall comply with the following:

21 “(A) The agency shall identify, in the con-
22 text of a coherent conceptual framework and
23 supported with objective data—

24 “(i) the nature and significance of the
25 market failure, regulatory failure, or other

1 problem that necessitates regulatory ac-
2 tion;

3 “(ii) the reasons why national eco-
4 nomic and income growth, advancing tech-
5 nology, and other market developments will
6 not obviate the need for the rulemaking;

7 “(iii) the reasons why regulation at
8 the State, local, or tribal level could not
9 address the problem better than at the
10 Federal level;

11 “(iv) the reasons why reducing rather
12 than increasing the extent or stringency of
13 existing Federal regulation would not ad-
14 dress the problem better; and

15 “(v) the particular authority by which
16 the agency may take action.

17 “(B) Before the agency increases the ex-
18 tent or stringency of regulation based on its de-
19 terminations pursuant to subparagraph (A), it
20 shall—

21 “(i) set an achievable objective for its
22 regulatory action and identify the metrics
23 by which the agency will measure progress
24 toward the objective;

1 “(ii) issue a notice of inquiry seeking
2 public comment on the identification of a
3 new objective under clause (i); and

4 “(iii) give notice to the committees of
5 Congress with jurisdiction over the subject
6 matter of the rule.

7 “(C) The agency, if the agency is not seek-
8 ing to repeal a rule, shall develop at least 3 dis-
9 tinct regulatory options, in addition to not regu-
10 lating, that the agency estimates will provide
11 the greatest benefits for the least cost in meet-
12 ing the regulatory objective set under subpara-
13 graph (B) and, in developing such regulatory
14 options, shall apply the following principles:

15 “(i) The agency shall assume that in-
16 dividuals are rational and not qualify that
17 assumption unless the agency—

18 “(I) has conclusive evidence of a
19 detrimental systematic behavioral
20 bias; and

21 “(II) can devise behavioral regu-
22 latory options that do not preclude
23 any choices of market participants.

24 “(ii) The agency shall, to the extent
25 practicable, attempt to engage private in-

1 centives to solve a problem and not sup-
2 plant private incentives any more than nec-
3 essary.

4 “(iii) The agency shall consider the
5 adverse effects that mandates and prohibi-
6 tions may have on innovation, economic
7 growth, and employment.

8 “(iv) An agency’s risk assessment
9 shall be confined to its jurisdiction, subject
10 to specific regulatory authority. Agency as-
11 sessments of the risks of adverse health
12 and environmental effects shall follow
13 standardized parameters, assumptions, and
14 methodologies. An agency also shall pro-
15 vide analyses of increases in risks, what-
16 ever their nature, produced by the regu-
17 latory options under consideration.

18 “(v) The agency shall avoid incongru-
19 ities and duplication in regulation at the
20 Federal, State, local, and tribal levels.

21 “(vi) The agency shall compare and
22 contrast the regulatory options developed
23 and explain how each would meet the regu-
24 latory objective set pursuant to subpara-
25 graph (B).

1 “(D) The agency shall estimate the costs
2 and benefits of each regulatory option devel-
3 oped, notwithstanding any provision of law that
4 prohibits the agency from using costs in rule-
5 making, at least to the extent that the agency
6 is able to—

7 “(i) exclude options whose costs ex-
8 ceed their benefits;

9 “(ii) rank the options by cost from
10 lowest to highest;

11 “(iii) estimate the monetary cost of
12 any adverse effects on private property
13 rights, identify the categories of persons
14 who experience a net loss from a regu-
15 latory option, and explain why the negative
16 effects cannot be lessened or avoided;

17 “(iv) establish whether the cost of an
18 option exceeds \$50,000,000 for any 12-
19 month period, except that the dollar
20 amount shall be adjusted annually for in-
21 flation based on the GDP deflator, and the
22 President may order that a lower dollar
23 amount be used for a particular period;
24 and

1 “(v) identify the key uncertainties and
2 assumptions that drive the results and pro-
3 vide an analysis of how the ranking of the
4 options and the threshold determination
5 under clause (iv) may change if key as-
6 sumptions are changed.

7 “(E) The estimates pursuant to subpara-
8 graph (D) shall—

9 “(i) follow the methodology estab-
10 lished pursuant to paragraph (2)(A);

11 “(ii) to the maximum extent prac-
12 ticable, comply with any guidelines issued
13 by the Administrator of the Office of Infor-
14 mation and Regulatory Affairs pertaining
15 to cost-benefit analysis; and

16 “(iii) include, at a minimum—

17 “(I) agency administrative costs;

18 “(II) United States private sector
19 compliance costs;

20 “(III) Federal, State, local, and
21 tribal compliance costs;

22 “(IV) Federal, State, local, and
23 tribal revenue impacts;

24 “(V) impacts from the regulatory
25 options developed on United States in-

1 dustries in the role of suppliers and
2 consumers to each industry substan-
3 tially affected, especially in terms of
4 employment, costs, volume and quality
5 of output, and prices;

6 “(VI) nationwide impacts on
7 overall economic output, productivity,
8 consumer and producer prices;

9 “(VII) international competitive-
10 ness of United States companies; and

11 “(VIII) distortions in incentives
12 and markets, including an estimate of
13 the resulting loss to the United States
14 economy.

15 “(F) The agency shall publish for public
16 comment all analyses, documentation, and data
17 under subparagraphs (A) through (D) for a
18 public comment period of at least 30 days (sub-
19 ject to applicable limitations under law, includ-
20 ing laws protecting privacy, trade secrets, and
21 intellectual property) and correct deficiencies or
22 omissions that the agency becomes aware of be-
23 fore choosing a rule to propose.

24 “(2)(A) Beginning not later than the date that
25 is 180 days after the effective date of this section—

1 “(i) each agency shall, by rule, estab-
2 lish and maintain the specific cost-benefit
3 analysis methodology appropriate to the
4 functions and responsibilities of that agen-
5 cy and establish an appropriate period for
6 review of new rules to assess the cost effec-
7 tiveness of each such new rule at achieving
8 the objective identified under paragraph
9 (1)(B)(i) the new rule was intended to ad-
10 dress;

11 “(ii) the methodology so established
12 shall—

13 “(I) include the standardized pa-
14 rameters, assumptions, and meth-
15 odologies for agency assessments of
16 risk under paragraph (1)(C)(iv);

17 “(II) comply, to the maximum
18 extent practicable, with technical
19 standards for methodologies and as-
20 sumptions issued by the Adminis-
21 trator for the Office of Information
22 and Regulatory Affairs;

23 “(III) include the scope of bene-
24 fits and costs consistent with the
25 framework used and the metrics iden-

1 tified in the establishment of the regu-
2 latory objective under paragraph (1);

3 “(IV) not include consideration
4 of incidental benefits but only those
5 benefits that were considered in the
6 establishment of the regulatory objec-
7 tive;

8 “(V) limit consideration of costs
9 and benefits to costs and benefits that
10 accrue to the population of the United
11 States;

12 “(VI) constrain the agency from
13 presuming that continued augmenta-
14 tion or tightening of mandates and
15 additional prohibitions cause benefits
16 and costs to change linearly but deter-
17 mine at what point benefits will rise
18 less than, and costs will rise more
19 than, proportionally;

20 “(VII) include comparison of in-
21 cremental benefits to incremental
22 costs from any action the agency con-
23 siders taking and refrain from actions
24 whose incremental benefits do not ex-
25 ceed their incremental costs; and

1 “(VIII) include analysis of effects
2 on private incentives and possible un-
3 intended consequences; and

4 “(iii) the agency shall adhere to the
5 methodology so established in all
6 rulemakings.

7 “(B) If the agency does not select the
8 least-cost regulatory option as its proposed rule,
9 the agency shall justify its selection, explain-
10 ing—

11 “(i) how that selection furthers other
12 goals or requirements relevant to regu-
13 lating matters within the agency’s jurisdic-
14 tion and why these should override cost
15 savings; and

16 “(ii) why each of the other regulatory
17 options not chosen would not sufficiently
18 further such other goals or requirements.

19 “(C) If the agency makes a determination
20 under paragraph (1)(D) that the monetized cost
21 of a rule exceeds the applicable monetary limit
22 under clause (iv) of such paragraph for any 12-
23 month period, the agency head shall—

24 “(i) first issue an advanced notice of
25 proposed rulemaking;

1 “(ii) provide notice to the appropriate
2 Congressional committees and keep such
3 committees informed of the status of the
4 rulemaking; and

5 “(iii) ensure that—

6 “(I) the agency shall notify the
7 Administrator of the Small Business
8 Administration, the Director of the
9 Office of Management and Budget,
10 and affected parties, and provide each
11 such person with information on the
12 potential effects of the proposed rule
13 on affected parties and the type of af-
14 fected parties that might be affected;

15 “(II) not later than 15 days after
16 the date of receipt of the materials de-
17 scribed in subclause (I), the Director,
18 in consultation with the Adminis-
19 trator, shall identify representatives of
20 affected parties, 25 percent of which
21 shall represent small business con-
22 cerns (as such term is defined in sec-
23 tion 3(a) of the Small Business Act),
24 when possible, and all the major
25 stakeholders shall have the oppor-

1 tunity to obtain advice and rec-
2 ommendations about the potential ef-
3 fects of the proposed rule;

4 “(III) the agency shall convene a
5 review panel consisting wholly of full-
6 time Federal officers, employees, and
7 contractors in the agency responsible
8 for the proposed rule, the Director,
9 the Administrator, and the represent-
10 atives of affected parties identified
11 pursuant to subclause (II);

12 “(IV) the agency shall conduct a
13 detailed analysis of the costs and ben-
14 efits of the regulatory option it is ad-
15 vancing, and, in doing so—

16 “(aa) the agency shall con-
17 sider the cumulative and inter-
18 active costs of regulatory require-
19 ments of Federal, State, local,
20 tribal, and (where applicable)
21 international regulations; and

22 “(bb) the agency shall iden-
23 tify the key uncertainties and as-
24 sumptions that drive the results
25 and provide an analysis of how

1 the ranking of the regulatory op-
2 tions changes if the key assump-
3 tions are changed;

4 “(V) the panel shall review agen-
5 cy material prepared in connection
6 with this subsection, including any
7 draft proposed rule, and review the
8 advice and recommendations of each
9 affected party representative identi-
10 fied;

11 “(VI) not later than 60 days
12 after the date the agency convenes a
13 review panel pursuant to subclause
14 (III), the review panel shall report on
15 the comments of the affected party
16 representatives and its findings as to
17 issues related to the provisions of this
18 subsection, and such report shall be
19 made public as part of the rulemaking
20 record;

21 “(VII) where appropriate, the
22 agency shall modify the proposed rule
23 or the cost-benefit analysis under sub-
24 clause (IV) based on the report under
25 subclause (VI);

1 “(VIII) subject to applicable limi-
2 tations under law, including laws pro-
3 tecting privacy, trade secrets, and in-
4 tellectual property, the agency shall
5 publish for comment all analyses, doc-
6 umentation, and data under this para-
7 graph for a public comment period of
8 at least 30 days and correct defi-
9 ciencies or omissions that the agency
10 becomes aware of before adopting a
11 proposed rule; and

12 “(IX) affected parties, including
13 State, local, or tribal governments,
14 and other stakeholders may partici-
15 pate in the rulemaking by means such
16 as—

17 “(aa) the publication of ad-
18 vanced and general notices of
19 proposed rulemaking in publica-
20 tions likely to be obtained by af-
21 fected parties;

22 “(bb) the direct notification
23 of interested affected parties;

24 “(cc) the conduct of open
25 conferences or public hearings in-

1 including soliciting and receiving
2 comments over computer net-
3 works; and

4 “(dd) reducing the cost or
5 complexity of procedural rules to
6 ease participation in the rule-
7 making.

8 “(D) Every 4 years the agency shall con-
9 duct a review of all rules of the agency in effect
10 and determine based on objective data whether
11 its rules are working as intended, furthering
12 their objectives, imposing unanticipated costs,
13 and generating a net benefit or not, and shall
14 amend such rules if appropriate. The agency
15 shall report to Congress the findings of each
16 such review.

17 “(E) Any person may petition an agency to
18 amend an existing rule made prior to the estab-
19 lishment of methodology under this paragraph,
20 and, if the agency denies such a petition, that
21 denial shall be subject to review under chapter
22 7 of this title.

23 “(F) Notwithstanding any other provision
24 of law, including any provision of law that ex-
25 plicitly prohibits the use of cost-benefit analysis

1 in rulemaking, an agency shall conduct cost-
2 benefit analyses and report to Congress the
3 findings with specific recommendations for how
4 to lower regulatory costs by amending the stat-
5 utes prohibiting the use thereof.

6 “(3) For purposes of this subsection—

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

11 “(B) the term ‘private incentives’ means fi-
12 nancial gains or losses that motivate actions by
13 private individuals and businesses, and does not
14 include any law or regulation that prescribes
15 private actions or outcomes; and

16 “(C) the term ‘incidental benefit’ means a
17 claimed benefit outside the specific regulatory
18 objective or objectives identified under para-
19 graph (1)(B)(i) a rule is intended to address as
20 identified in paragraph (1)(A).

21 “(4) All determinations made under this sub-
22 section shall be subject to review under chapter 7.”.

23 **SEC. 4. CONGRESSIONAL REVIEW.**

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

1 “(C) The Comptroller General shall exam-
2 ine the cost-benefit analysis for compliance with
3 the requirements of section 553(f), including
4 the agency methodology established under sec-
5 tion 553(f)(2)(A).

6 “(D) The Comptroller General shall exam-
7 ine any risk analysis under section
8 553(f)(1)(C)(iv) pertaining to the cost-benefit
9 analysis for compliance with the requirements
10 of section 553(f).

11 “(E) The Comptroller General also shall
12 examine the agencies’ quadrennial regulatory
13 reviews for consistency with the requirements of
14 section 553(f) and report to Congress on the re-
15 sults.”.

○