

**Calendar No. 721**114<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION**S. 1607**

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.

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**IN THE SENATE OF THE UNITED STATES**

JUNE 18, 2015

Mr. PORTMAN (for himself, Mr. WARNER, Ms. COLLINS, Mr. LANKFORD, Mrs. ERNST, Mr. KIRK, and Mr. JOHNSON) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

DECEMBER 9, 2016

Reported by Mr. JOHNSON, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

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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.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Independent Agency  
3 Regulatory Analysis Act of 2015”.

4 **SEC. 2. DEFINITIONS.**

5 In this Act—

6 (1) the term “Administrator” means the Ad-  
7 ministrator of the Office of Information and Regu-  
8 latory Affairs;

9 (2) the term “agency” has the meaning given  
10 that term in section 3502(1) of title 44, United  
11 States Code;

12 (3) the term “economically significant rule”  
13 means any rule that the Administrator determines is  
14 likely to—

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

17 (B) adversely affect in a material way the  
18 economy, a sector of the economy, productivity,  
19 competition, jobs, the environment, public  
20 health or safety, or State, local, or tribal gov-  
21 ernments or communities;

22 (4) the term “independent regulatory agency”  
23 has the meaning given that term in section 3502(5)  
24 of title 44, United States Code; and

25 (5) the term “rule”—

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

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

8 **SEC. 3. REGULATORY ANALYSIS BY INDEPENDENT AGEN-**  
9           **CIES.**

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

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

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

1           (3) identify and assess available alternatives to  
2 direct regulation, including providing economic in-  
3 centives to encourage the desired behavior, or pro-  
4 viding information upon which choices can be made  
5 by the public;

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

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

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

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

1           (8) identify and assess alternative forms of reg-  
2           ulation and, to the extent feasible, specify perform-  
3           ance objectives, rather than specifying the behavior  
4           or manner of compliance that regulated entities  
5           must adopt;

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

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

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

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

1           (13) periodically review its existing economically  
2           significant rules to determine whether any such rules  
3           should be modified, streamlined, expanded, or re-  
4           pealed so as to make the regulatory program of the  
5           agency more effective or less burdensome in achiev-  
6           ing the regulatory objectives.

7           (b) **ECONOMICALLY SIGNIFICANT RULES.**—For any  
8           proposed or final rule identified by an independent regu-  
9           latory agency as, or determined by the Administrator to  
10          be, an economically significant rule, the President may by  
11          Executive order require the independent regulatory agency  
12          to provide to the Administrator and publish with the pro-  
13          posed and final rule the following information, to the ex-  
14          tent permitted by law:

15               (1) An assessment, including the underlying  
16               analysis, of benefits anticipated from the rule to-  
17               gether with, to the extent feasible, a quantification  
18               of those benefits.

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

23               (3) An assessment, including the underlying  
24               analysis, of costs and benefits of potentially effective  
25               and reasonably feasible alternatives to the rule, iden-

1       tified by the agencies or the public, including im-  
 2       proving existing regulations and reasonably viable  
 3       nonregulatory actions, and an explanation of why  
 4       the planned regulatory action is preferable to the  
 5       identified potential alternatives.

6       (c) REVIEW BY OFFICE OF INFORMATION AND REGU-  
 7       LATORY AFFAIRS.—

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

12               (A) any proposed economically significant  
 13       rule, either prior to publication of the notice of  
 14       proposed rulemaking or, if the head of the inde-  
 15       pendent regulatory agency elects, during the  
 16       general public comment period; and

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

19       (2) NONBINDING ASSESSMENT.—An Executive  
 20       order issued under this Act may require that, not  
 21       later than 90 days after the independent regulatory  
 22       agency submits a proposed or final economically sig-  
 23       nificant rule for review, the Administrator submit  
 24       for inclusion in the rulemaking record the assess-  
 25       ment of the Administrator of the extent to which the

1 independent regulatory agency has complied with  
2 any of the regulatory analysis requirements made  
3 applicable by Executive order.

4 (3) DETERMINATION AND EXPLANATION BY  
5 INDEPENDENT AGENCY.—An Executive order issued  
6 under this Act may require that, if the Adminis-  
7 trator concludes under paragraph (2) that the inde-  
8 pendent regulatory agency did not comply with 1 or  
9 more requirements of the Executive order with re-  
10 spect to a proposed or final economically significant  
11 rule, the head of the independent regulatory agency  
12 that issued the economically significant rule shall in-  
13 clude with the final rule—

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

17 (B) if applicable, an explanation why the  
18 independent regulatory agency did not comply  
19 with 1 or more of the specified requirements,  
20 based on the statutory provision authorizing the  
21 rule.

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

23 (a) IN GENERAL.—The compliance or noncompliance  
24 of an independent regulatory agency with the require-



1 ments of an Executive order issued under this Act shall  
2 not be subject to judicial review.

3 (b) AGENCY RECORD.—When an action for judicial  
4 review of a rule promulgated by an independent regulatory  
5 agency is instituted, any determination, analysis, or expla-  
6 nation produced by the independent regulatory agency,  
7 and any assessment produced by the Administrator, pur-  
8 suant to an Executive order issued under this Act, shall  
9 constitute part of the whole record of agency action in con-  
10 nection with the review.

11 (c) RULE OF CONSTRUCTION.—Nothing in this sec-  
12 tion shall be construed to bar judicial review of any other  
13 impact statement or similar analysis required by any other  
14 provision of law if judicial review of such statement or  
15 analysis is otherwise permitted by law.

16 **SEC. 5. RULE OF CONSTRUCTION.**

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

20 **SECTION 1. SHORT TITLE.**

21 *This Act may be cited as the “Independent Agency*  
22 *Regulatory Analysis Act of 2015”.*

23 **SEC. 2. DEFINITIONS.**

24 *In this Act—*

1           (1) *the term “Administrator” means the Admin-*  
2 *istrator of the Office of Information and Regulatory*  
3 *Affairs;*

4           (2) *the term “agency” has the meaning given*  
5 *that term in section 3502(1) of title 44, United States*  
6 *Code;*

7           (3) *the term “economically significant rule”*  
8 *means any rule that the Administrator determines is*  
9 *likely to—*

10                   (A) *have an annual effect on the economy of*  
11 *\$100,000,000 or more; or*

12                   (B) *adversely affect in a material way the*  
13 *economy, a sector of the economy, productivity,*  
14 *competition, jobs, the environment, public health*  
15 *or safety, or State, local, or tribal governments*  
16 *or communities;*

17           (4) *the term “independent regulatory agency”*  
18 *has the meaning given that term in section 3502(5)*  
19 *of title 44, United States Code; and*

20           (5) *the term “rule”—*

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

23                   (B) *does not include a rule of the Board of*  
24 *Governors of the Federal Reserve System or the*

1           *Federal Open Market Committee relating to*  
2           *monetary policy.*

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

5           *(a) IN GENERAL.—The President may by Executive*  
6           *order require an independent regulatory agency, while*  
7           *maximizing net benefits and considering costs, to comply,*  
8           *to the extent permitted by law, with regulatory analysis re-*  
9           *quirements applicable to other agencies, including the re-*  
10          *quirements to—*

11           *(1) identify the problem that the agency intends*  
12          *to address by a new rule (including, where applicable,*  
13          *the failures of private markets or public institutions*  
14          *that warrant new agency action) and assess the sig-*  
15          *nificance 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 to the extent reasonable in setting*  
4        *regulatory priorities, the degree and nature of the*  
5        *risks posed by various substances or activities within*  
6        *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 com-*  
11       *pliance (to the Federal Government, regulated enti-*  
12       *ties, and the public), flexibility, distributive impacts,*  
13       *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 the*  
18        *rule justify its costs;*

19           *(7) base its rulemaking decisions on the best rea-*  
20        *sonably obtainable scientific, technical, economic, and*  
21        *other information concerning the need for, and con-*  
22        *sequences of, the intended rule;*

23           *(8) identify and assess alternative forms of regu-*  
24        *lation and, to the extent feasible, specify performance*  
25        *objectives, rather than specifying the behavior or*

1 *manner of compliance that regulated entities must*  
2 *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 affect*  
6 *State, local, or tribal governmental entities, whenever*  
7 *feasible;*

8 *(10) avoid rules that are inconsistent or incom-*  
9 *patible with, or duplicative of, other rules of the inde-*  
10 *pendent 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 communities*  
14 *and governmental entities), consistent with achieving*  
15 *the regulatory objectives, and taking into account,*  
16 *among other factors, and to the extent practicable, the*  
17 *cost of cumulative rules;*

18 *(12) draft each rule to be simple and easy to un-*  
19 *derstand, with the goal of minimizing the potential*  
20 *for uncertainty and litigation arising from uncer-*  
21 *tainty; and*

22 *(13) periodically review its existing economically*  
23 *significant rules to determine whether any such rules*  
24 *should be modified, streamlined, expanded, or re-*  
25 *pealed so as to make the regulatory program of the*

1        *agency more effective or less burdensome in achieving*  
2        *the regulatory objectives.*

3        *(b) ECONOMICALLY SIGNIFICANT RULES.—*

4            *(1) IN GENERAL.—For any proposed or final*  
5        *rule identified by an independent regulatory agency*  
6        *as, or determined by the Administrator to be, an eco-*  
7        *nomically significant rule, the President may by Ex-*  
8        *ecutive order require the independent regulatory agen-*  
9        *cy to provide to the Administrator and publish with*  
10       *the proposed and final rule the following information,*  
11       *to the extent permitted by law:*

12            *(A) An assessment, including the under-*  
13        *lying analysis, of benefits anticipated from the*  
14        *rule together with, to the extent feasible, a quan-*  
15        *tification of those benefits.*

16            *(B) An assessment, including the under-*  
17        *lying analysis, of costs anticipated from the rule*  
18        *together with, to the extent feasible, a quantifica-*  
19        *tion of those costs.*

20            *(C) An assessment, including the under-*  
21        *lying analysis, of costs and benefits of poten-*  
22        *tially effective and reasonably feasible alter-*  
23        *natives to the rule, identified by the agencies or*  
24        *the public, including improving existing regula-*  
25        *tions and reasonably viable nonregulatory ac-*

1            *tions, and an explanation of why the planned*  
2            *regulatory action is preferable to the identified*  
3            *potential alternatives.*

4            (2) *SUBMISSION TO ADMINISTRATOR.*—*An inde-*  
5            *pendent regulatory agency described in paragraph (1)*  
6            *may provide to the Administrator any assessment or*  
7            *underlying analysis that substantially meets the re-*  
8            *quirements described in subparagraphs (A), (B), and*  
9            *(C) of paragraph (1).*

10           (3) *FORMAT.*—*Nothing in this subsection shall*  
11           *require an assessment or underlying analysis to be*  
12           *provided or published under this subsection in a man-*  
13           *ner that conforms to any specific formatting stand-*  
14           *ard.*

15           (c) *REVIEW BY OFFICE OF INFORMATION AND REGU-*  
16 *LATORY AFFAIRS.*—

17           (1) *REQUIREMENT TO SEEK REVIEW.*—*The*  
18           *President may by Executive order require an inde-*  
19           *pendent regulatory agency to submit to the Adminis-*  
20           *trator for review—*

21           (A) *any proposed economically significant*  
22           *rule, either prior to publication of the notice of*  
23           *proposed rulemaking or, if the head of the inde-*  
24           *pendent regulatory agency elects, during the gen-*  
25           *eral public comment period; and*

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

3                   (2) *NONBINDING ASSESSMENT.*—An Executive  
4                   order issued under this Act may require that, not  
5                   later than 90 days after the independent regulatory  
6                   agency submits a proposed or final economically sig-  
7                   nificant rule for review, the Administrator submit for  
8                   inclusion in the rulemaking record the assessment of  
9                   the Administrator of the extent to which the inde-  
10                  pendent regulatory agency has complied with any of  
11                  the regulatory analysis requirements made applicable  
12                  by Executive order.

13                  (3) *DETERMINATION AND EXPLANATION BY INDE-*  
14                  *PENDENT AGENCY.*—An Executive order issued under  
15                  this Act may require that, if the Administrator con-  
16                  cludes under paragraph (2) that the independent reg-  
17                  ulatory agency did not comply with 1 or more re-  
18                  quirements of the Executive order with respect to a  
19                  proposed or final economically significant rule, the  
20                  head of the independent regulatory agency that issued  
21                  the economically significant rule shall include with  
22                  the final rule—

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



1           (B) if applicable, an explanation why the  
2           independent regulatory agency did not comply  
3           with 1 or more of the specified requirements,  
4           based on the statutory provision authorizing the  
5           rule.

6           (4) *FAILURE TO COMPLETE ASSESSMENT.*—An  
7           Executive order issued under this Act may provide  
8           that, if the Administrator does not complete an assess-  
9           ment under paragraph (2) within 90 days after the  
10          independent regulatory agency submits a proposed or  
11          final economically significant rule for review—

12                 (A) the independent regulatory agency shall  
13                 be deemed to have met the requirement for review  
14                 by the Administrator under paragraph (1); and

15                 (B) the independent regulatory agency may  
16                 publish the final economically significant rule  
17                 without inclusion of an assessment in the rule-  
18                 making record.

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

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

24           (b) *AGENCY RECORD.*—When an action for judicial re-  
25           view of a rule promulgated by an independent regulatory

1 *agency is instituted, any determination, analysis, or expla-*  
2 *nation produced by the independent regulatory agency, and*  
3 *any assessment produced by the Administrator, pursuant*  
4 *to an Executive order issued under this Act, shall constitute*  
5 *part of the whole record of agency action in connection with*  
6 *the review.*

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

12 **SEC. 5. RULES OF CONSTRUCTION.**

13       *Nothing in this Act shall be construed to—*

14           (1) *limit the authority of the President with re-*  
15 *spect to independent regulatory agencies under any*  
16 *other applicable law;*

17           (2) *limit, diminish, or otherwise affect the inde-*  
18 *pendence from the President of independent regu-*  
19 *latory agencies; or*

20           (3) *confer on the Administrator or the President*  
21 *any authority to affect the decisionmaking or regu-*  
22 *latory authority of independent regulatory agencies.*



**Calendar No. 721**

114<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

**S. 1607**

**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.

DECEMBER 9, 2016

Reported with an amendment