



**Comparison of the Independent Agency Regulatory Analysis Act (S. 3468) to Executive Order 12866**

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	<b>Strictly Codified Executive Order 12866</b>	<b>S. 3468</b>
Definition of “rules” covered	<p>Draws from APA definition of rule, except it clarifies that the definition to exclude guidance documents.</p> <p>The definition also excludes formal rules, rules pertaining to the military, internal agency rules, and any other category of rules the OIRA Administrator decides to exclude.</p>	<p>Draws from the APA definition, but does not contain same clarification. Thus, it appears to include guidance documents.</p> <p>The definition does not contain same exceptions.</p> <p>Instead, the definition excludes Federal Reserve rules affecting monetary policy.</p>
Definition of “economically significant rules” subject to cost-benefit analysis requirements	<p>Rule that either (1) has an annual economic impact of \$100 million or more or (2) “adversely affect[s] in a material way” some component of the economy.</p> <p>These two components are combined in one clause, though, so typically the definition has been based on the \$100 million threshold. I’ve never heard of a rule with an annual economic impact of less than \$100 million defined as “economically” significant based on the definition’s second component.</p>	<p>Uses identical language, but splits the two components into different clauses. This could elevate the significance of the definition’s second component, such that rules will be defined as “economically significant” based on this second component, even if they fall short of the \$100 million threshold.</p> <p>Though difficult to predict, the effect of this change could be to expand the universe of “economically significant” rules.</p>
Definition of “significant rules” subject to basic analytical requirements	<p>All economically significant rules, plus rules that:</p> <ol style="list-style-type: none"> <li>1. Interfere with rules of other agencies</li> <li>2. Materially affect entitlements, grants, user fees, or loan programs</li> </ol>	<p>All economically significant rules, plus rules that:</p> <ol style="list-style-type: none"> <li>1. Interfere with rules of other agencies</li> </ol> <p>The universe of significant rules is much smaller in this bill. In</p>

	<p>3. Raise a novel legal or policy question</p> <p>Historically, the third category of significant rules has been defined broadly to sweep in a lot of rules.</p>	<p>particular, it is significant that the definition doesn't include rules that raise a novel legal or policy question—a category of rules that has been defined broadly under Executive Order 12866 to sweep in a lot of rules</p>
<p>Determination of rule's "significant" or "economically significant" status</p>	<p>Either OIRA or the agency can make the determination that a rule is either "significant" or "economically significant."</p> <p>If this Executive Order were codified, it's not clear what would happen if OIRA and the agency disagreed about whether to classify a rule as "significant" or as "economically significant"</p>	<p>Either OIRA or the agency can make the determination that a rule is "economically significant." "The bill does not clarify who is authorized to determine if a rule is "significant" or not.</p> <p>The bill does not specify what would happen if OIRA and the agency disagree about whether a rule is "economically significant." This could be especially problematic, since the second component of the bill's definition of "economically significant" is vague and could allow for very different interpretations and applications.</p>
<p>Basic analytical requirements</p>	<p>Characterizes basic analytical requirements as 12 "principles of regulation" that all rules should adhere to "to the extent permitted by law and where applicable"</p> <p>Separately requires all existing "significant" rules to be periodically reviewed, but this provision has been largely ignored in practice. Not clear if codification of the Executive Order would lead to full implementation of this requirement.</p>	<p>Requires all rules be analyzed according to the 12 "principles of regulation" identified in Executive Order</p> <p>Also requires all existing "significant" rules to be periodically reviewed, as is required by Executive Order 13563.</p>
<p>Scope of centralized review requirement</p>	<p>All proposed and final "significant" rules must undergo OIRA review</p> <p>All preliminary regulatory action that might lead to a proposed</p>	<p>All proposed and final "significant" rules must undergo OIRA review</p>

	<p>“significant” rule must undergo OIRA review</p>	
<p>Cost-benefit analysis requirements</p>	<p>For “significant” rules, requires an informal assessment of costs and benefits</p> <p>For “economically significant” rules, requires a fully quantified and monetized (to the extent feasible) cost-benefit analysis of the rule and any “potentially effective or reasonably feasible alternatives” identified by the agency or the public. The agency must also explain why the planned rule was selected instead of the alternatives.</p>	<p>No cost-benefit analysis requirement for “significant” rules.</p> <p>For “economically significant” rules, requires the same fully quantified and monetized (to the extent feasible) cost-benefit analysis of the rule and any “potentially effective or reasonably feasible alternatives” identified by the agency or the public. The agency must also explain why the planned rule was selected instead of the alternatives.</p>
<p>Deadline for OIRA review</p>	<p>In most cases, OIRA must complete the review in 90 days with a one-time extension of 30 days. (Relying on an extravagant interpretation of the Executive Order former OIRA official Michael Fitzpatrick asserts no such deadline exists.)</p> <p>In a few rare cases, the deadline is either 10 days or 45 days depending on circumstances.</p> <p>OIRA routinely flouts these deadlines, and it is unclear whether codification of the Executive Order would prevent deadline violations from continuing to occur.</p>	<p>OIRA must complete a non-binding assessment within 90 days after the review begins (and there is no mention of any one-time extensions)</p> <p>It is not clear what the consequences are if OIRA does not issue an assessment within 90 days</p> <p>It is not clear whether OIRA can continue “reviewing” the rule even after it has issued its assessment. In other words, it is not clear if issuing the assessment, without more, terminates the review.</p>
<p>Post-review disclosure requirements – Agency</p>	<p>For “significant” and “economically significant” rules, the draft proposed or draft final rule that undergoes review</p> <p>For “significant” rules, the informal cost-benefit analysis for the draft proposed rule and the cost-benefit analysis for the draft</p>	<p>No clear disclosure requirements</p>

	<p>final rule</p> <p>For “economically significant” rules, the formal cost-benefit analysis for the draft proposed rule and the cost-benefit analysis for the draft final rule</p> <p>Any changes made to the draft rules or draft cost-benefit analyses (either formal or informal) along with an indication of whether the changes were made at the suggestion of OIRA</p>	
Post-review disclosure requirements – OIRA	“All documents” exchanged between the agency and OIRA during the review	No clear disclosure requirements
Reporting requirements on completion of review – Agency	When OIRA returns a rule under review, if the agency disagrees with some or all of the basis for the return, then a written statement indicating such disagreement	<p>When OIRA’s assessment finds that the agency’s analysis did not comply with some or all of the analytical requirements, then a report that:</p> <ol style="list-style-type: none"> <li>1. Explains that the analysis did meet the requirements.</li> <li>2. If applicable, explains why the agency did not comply with the requirements</li> <li>3. States the issues on which the agency and OIRA disagree</li> </ol>
Reporting requirements on completion of review – OIRA	When OIRA returns a rule under review, a written statement explaining what analytical requirements of the Executive Order that the agency failed to meet	For all rules reviewed, an assessment of the extent to which the agency complied with all of the analytical requirements
Meetings and communications between OIRA and groups outside of Executive Branch during rule reviews	<p>Meetings and communications explicitly permitted</p> <p>A representative of the agency must be invited to all meetings</p> <p>Written communications must be forwarded to the agency</p> <p>OIRA must maintain a publicly available log of all meetings and</p>	Meetings and communications are not addressed; no explicit requirements for how such meetings and communications must be carried out if they are permitted

	written and oral communications	
Effect on agency authority	<p>Repeatedly states that agencies are supposed to carry out its requirements consistent with applicable law</p> <p>Contains a separate clause clarifying that the Executive Order does not displace agency authority or responsibilities under any other law</p>	<p>Does not require the President to issue the underlying Executive Order; only says that the President “may” issue an Executive Order containing the analytical requirements specified in the bill. By implication, the bill suggests that the President could not issue an Executive Order that imposes analytical requirements not specified in the bill.</p> <p>Repeatedly states that the agencies are supposed to carry out the analytical requirements to extent permitted by law</p> <p>OIRA’s assessment of the agency’s compliance with the analytical requirements is non-binding</p>
Effect on judicial Review	<p>Contains a separate clause clarifying that the Executive Order does not affect any other judicial review</p> <p>Contains a separate clause stating that the Executive Order does not create any new rights or benefits that are enforceable at law</p>	<p>Contains a separate clause clarifying that agency compliance with the specified analytical requirements cannot be subjected to judicial review</p> <p>Specifies that any analyses performed or determinations made by agencies in accordance with the bill must be included in the rulemaking record to be considered in judicial review if the rule is challenged. The role such analyses and determinations play in judicial review will depend on whether and to what extent the reviewing court finds they are relevant under applicable law. The DC Circuit Court’s decision in <i>Business Roundtable v. SEC</i> suggests that some</p>

		<p>reviewing courts will be very active in finding cost-benefit analyses requirements in agencies' authorizing statutes even where they don't clear exist. In this case, the analytical requirements of the bill could have a profound effect on judicial review of rules issued under those authorizing statutes.</p> <p>Specifies that any assessment performed by OIRA in accordance with the bill must be included in the rulemaking record to be considered in judicial review if the rule is challenged. The role such assessments play in judicial review will depend on whether and to what extent the reviewing court finds they are relevant under applicable law. As noted above, the extent to which courts unilaterally find cost-benefit analyses requirements in agencies' authorizing statutes will determine how profound an effect the analytical requirements of the bill will have on judicial review of rules issued under those statutes.</p>
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