



Insight

The House to Consider Unfunded Mandates Reform

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EXECUTIVE SUMMARY

- The House of Representatives is considering legislation to address unfunded mandates, which have long been a significant problem for state and local governments and private businesses.
- The bill would make several changes to the current process for addressing unfunded mandates, including expanding the number of agencies that must address unfunded mandates in their rulemaking and expanding judicial review.
- The House has passed similar legislation in each of the last four Congresses, but the Senate appears unlikely to take up this matter anytime soon.

INTRODUCTION

The House of Representatives will vote this week on legislation aimed at further curbing unfunded mandates. If enacted, the [Unfunded Mandates Information and Transparency Act](#) (UMITA) would make substantial changes to the regulatory process.

Unfunded mandates are requirements imposed without funding to offset the costs. For decades, a major criticism of the federal government has been that it imposes unfunded mandates on state, local, and tribal governments, as well as the private sector. Congress sought to address some of these criticisms in the Congressional Budget Act of 1974 and in the Unfunded Mandates Reform Act of 1995 (UMRA).

These laws did not require agencies to stop issuing unfunded mandates through their regulations. Rather, the reforms required agencies to issue a written statement showing that it analyzed likely unfunded mandates, considered regulatory alternatives to mitigate those mandates, and solicited input from affected state, local, and tribal governments.

Despite these laws, plenty of unfunded mandates persist. UMITA reforms the regulatory process through several specific changes: expanding the number of agencies that must comply with these requirements; requiring agencies analyze mandates using 10 principles; requiring agencies to work collaboratively with the private sector, in addition to state, local, and tribal governments; and allowing congressional committee leadership to require agencies to review a specific regulation retrospectively; and expanding judicial review of agency compliance with unfunded mandates requirements.

The effects of these potential reforms are below.

EXPANDED JUDICIAL REVIEW

The most important reform in UMITA might well be the last substantive section included in the bill that

expands judicial review of rules creating unfunded mandates. Section 13 allows federal courts to stay, enjoin, or invalidate a rule because of an agency's failure to comply with the written statements requirement for unfunded mandates. Currently, courts may require only that an agency go back and prepare a written statement if it fails to do so. Allowing courts to stop or overturn rules on this basis strengthens the incentive for agencies to analyze unfunded mandates more completely. This provision should lead agencies to adhere to the law more fully—albeit through more litigation.

EXPANDED AGENCY COVERAGE

Independent agencies are currently exempt from UMRA requirements. The legislation would require all agencies except the Federal Reserve Board, the Federal Open Market Committee, and the Consumer Financial Protection Bureau to comply with UMRA. Some critics of this bill argue that these independent agencies are exempt from UMRA to maintain their independence from the executive. While these agencies certainly are structured to insulate them from the president, they nevertheless are still regulatory agencies and thus subject to regulatory process requirements. Requiring independent agencies to perform the same analysis expected of executive agencies does not inhibit their independence and should lead to fewer unfunded mandates.

BETTER ACCOUNTING OF UNFUNDED MANDATES

UMITA lists 10 principles that agencies must analyze as part of their written statement. The principles are basic elements of a sound regulatory process and come from Executive Orders 12,866 and 13,563 issued by Presidents Clinton and Obama, respectively. The principles include clearly stating the problem the regulation is intended to solve, identifying possible alternatives to direct regulation, enacting regulations in the most cost-effective manner possible, and avoiding duplicative or overlapping regulation. Codifying these principles gives them more staying power than they have now, as an administration could quickly scrap them.

CONSULTING WITH THE PRIVATE SECTOR

Right now, UMRA requires covered agencies to consult with state, local, and tribal governments prior to the drafting of a proposed rule if the agency believes it is establishing a significant unfunded mandate (with “significant” defined as \$100 million or more in any one year). Notably, agencies do not have to consult with the private sector, even though Congress has acknowledged the need to limit unfunded mandates in this area. UMITA addresses this gap by requiring agencies to consult with impacted private-sector parties, including small businesses. Critics of the bill contend this provision would give regulated entities an advantage over the public in the regulatory process. Yet prior consultation with businesses gives agencies the same information they gain by consulting with state, local, and tribal governments: It allows agencies to identify unfunded mandates they may have missed and gain insight into on-the-ground conditions. By having a better grasp early in the regulatory process of how likely mandates will impact the regulated entities, an agency is more able to avoid unnecessary and unfunded costs before it drafts regulatory language.

RETROSPECTIVE REVIEW

One interesting provision in UMITA would require that an agency conduct a review of a specific existing regulation at the request of the chair or ranking member of a House or Senate committee. While this provision would allow Congress to focus an agency on a particular review, the lack of a clear penalty for noncompliance threatens to add this provision to the relatively toothless retrospective review requirements currently in place. It may also allow Congress to tie up agencies' resources in compliance with this provision instead of meaningful

regulatory or deregulatory action.

CONCLUSION AND OUTLOOK

If enacted, UMITA could reform the regulatory process to produce better, and perhaps fewer, government mandates. Yet the legislation appears unlikely to pass into law any time soon. Assuming the House passes the legislation this week as planned, it will mark the fourth time in as many Congresses it has advanced that far. The Senate, however, has yet to pass it. Due to the current state of partisanship and a quickly approaching mid-term election, one should not expect a different outcome this Congress.