



Unfunded Mandates

Regulatory Policy Commentary

February 15, 2011

by Susan E. Dudley, Director

[The George Washington University Regulatory Studies Center](#)

The [House Oversight and Government Reform Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform](#) held [hearings](#) this week on the [Unfunded Mandates Reform Act](#) of 1995 (UMRA). Congress enacted UMRA to “curb the practice of imposing unfunded Federal mandates on States and local governments,” but [observers](#) agree that its effects have been limited due to (1) narrow coverage, and (2) lack of accountability.

The analytical requirements of Title II of UMRA are similar to those in [Executive Order 12866](#), which was issued two years earlier and governs regulatory planning, analysis, and review. They both ask executive branch agencies to “assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector,” and “select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.” But UMRA’s coverage is much more limited than that of the Executive Order, so that, according to a recent [CRS report](#), 72 percent of the economically significant rules covered by the Executive Order are not covered by UMRA.

This limited coverage is compounded by the fact that UMRA’s requirements for analyzing the effects of proposed regulations are largely informational and judicial review does not impose meaningful consequences for noncompliance. Not only does Executive Order 12866 cover more regulations than UMRA but it provides the Office of Information and Regulatory Affairs (OIRA) more authority to hold agencies accountable for conducting analysis and basing regulatory policy on the results of that analysis.

UMRA Section 202(a)(4) only requires analysis if an agency “*in its sole discretion* determines that accurate estimates are reasonably feasible and that such effect is relevant and material.” In contrast, OIRA determines whether a regulation is subject to Executive Order 12866, and whether agencies’ regulations and supporting analysis meet the principles expressed in the Order. As a result, the analytical and interagency review requirements of Executive Order 12866 provide OIRA a more effective mechanism for holding agencies accountable for the objectives expressed in UMRA (i.e., both conducting analysis to understand the effects of regulations, and choosing the most cost-effective regulatory approach from among alternatives).

To broaden UMRA’s coverage, Congress could consider aligning UMRA language with that of Executive Order 12866 and President Obama’s recent [Executive Order 13132](#), and/or extending it to include independent regulatory agencies (which are not currently bound by those Executive

Orders). To make the executive branch more accountable for the goals of UMRA, Congress could provide OMB oversight authority beyond certifying and reporting on agencies' actions. OMB, with its government-wide perspective and institutional regulatory and budget oversight role, might be in a good position to serve as a check on agencies' analysis and decision-making.

Congress might also want to expand judicial review under UMRA so that, for example, an agency's failure to justify not selecting the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule," could be grounds for "staying, enjoining, invalidating or otherwise affecting such agency rule." Congress might consider going further, for example, by making compliance with mandates discretionary for State, local & tribal governments, unless funding is provided.

Without amending the statute, Congress has options for increasing knowledge of the extent of unfunded mandates. Section 103(a) expresses the "sense of Congress that Federal agencies should review and evaluate planned regulations to ensure that the cost estimates provided by the Congressional Budget Office will be carefully considered as regulations are promulgated." It provides that:

At the request of a committee chairman or ranking minority member, the [CBO] Director shall [with the cooperation of OMB], to the extent practicable, prepare a comparison between (1) an estimate by the relevant agency, prepared under section 202 of this Act, of the costs of regulations implementing an Act containing a Federal mandate; and (2) the cost estimate prepared by the Congressional Budget Office for such Act when it was enacted by the Congress. (Section 103(b))

If Congress were to make such a request under UMRA, it could yield interesting comparisons to inform its deliberation of (1) future legislation involving unfunded mandates and (2) whether agency regulations implementing statutory language are consistent with original Congressional intent.

Susan Dudley testified before the House Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform. Her full testimony is available [here](#).