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Committee on Oversight and Government Reform

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Chairman Lankford and Ranking Member Connolly, thank you for inviting me to testify on “Unfunded Mandates and Regulatory Overreach.” I am Director of the George Washington University Regulatory Studies Center and Research Professor in the Trachtenberg School of Public Policy and Public Administration.¹ From April 2007 to January 2009, I oversaw the executive branch regulations of the federal government as Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

My testimony summarizes the responsibilities of Federal agencies and OMB under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), explores why it has not been more effective, and considers opportunities to further UMRA’s objectives.

**Title II of UMRA**

**Federal Agency Responsibilities**

Congress enacted UMRA to “curb the practice of imposing unfunded Federal mandates on States and local governments…” Title I addresses unfunded mandates in legislation, and Title II focuses on regulations. Title III required a review of federal mandates by the Advisory Commission on Intergovernmental Relations (which has since been disbanded) and Title IV provides for limited judicial review of agency compliance with the Act (see below).

Unless prohibited by law, Section 202 of UMRA requires executive branch agencies to “assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector...” For regulations that may result in “the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year,” Section 202(a) requires agencies to prepare statements containing:

1. an identification of the provision of Federal law under which the rule is being promulgated;

2. a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector, as well as the effect of the Federal mandate on health, safety, and the natural environment...，“

¹ The George Washington University Regulatory Studies Center raises awareness of regulations’ effects with the goal of improving regulatory policy through research, education, and outreach. This statement reflects my views, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University.
(3) estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of (A) the future compliance costs of the Federal mandate; and (B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector;

(4) estimates by the agency of the effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material; and

(5) (A) a description of the extent of the agency’s prior consultation with elected representatives … of the affected State, local, and tribal governments; (B) a summary of the comments and concerns that were presented by State, local, or tribal governments either orally or in writing to the agency; and (C) a summary of the agency’s evaluation of those comments and concerns.

UMRA further requires agencies to “identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule,” unless “the head of the affected agency publishes with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the objectives of the rule was not adopted; or (2) the provisions are inconsistent with law.” (Section 205)

**OMB Responsibilities under UMRA**

The Director of the Office of Management and Budget’s responsibilities are to “(1) collect from agencies the statements prepared under section 202; and (2) periodically forward copies of such statements to the Director of the Congressional Budget Office on a reasonably timely basis after promulgation of the general notice of proposed rulemaking or of the final rule for which the statement was prepared.” (Section 206) One year after the date of enactment, OMB was to provide Congress a written certification regarding agency compliance. (Section 205(c))

The Director of OMB has delegated these responsibilities to OIRA, which issued brief guidelines when UMRA became law in March 1995, and references UMRA requirements in Circular A-4, “Regulatory Analysis.”

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by UMRA. (In recent years these reports have been included in OIRA’s annual report to Congress on the benefits and costs of regulation.)  

Why UMRA has not been more effective

Despite high expectations when UMRA was enacted (one researcher at the time called the requirement that agencies choose the least burdensome alternative “quite important, perhaps even revolutionary”), most observers have been disappointed. As several reports from the Congressional Research Service (CRS) and Government Accountability Office (GAO) have observed, while UMRA may have improved consultation between federal agencies and other levels of government, it appears to have had little effect on agencies’ rulemaking.

The main reasons identified for its ineffectiveness are (1) limited coverage, and (2) lack of accountability.

Limited coverage

Section 4 of the Act lists seven exemptions (including, for example, for regulations that enforce constitutional rights of individuals, provide conditions for federal assistance, or are necessary for national security). UMRA’s title II provisions also do not apply to regulations issued by independent agencies, rules for which no proposal was issued, or rules implementing statutes that prohibit consideration of costs. Further, mandates are defined as “direct costs,” or amounts governmental or private sector entities “will be required to spend in order to comply with the Federal private sector mandate,” in contrast to the more encompassing term, “effects on the economy,” used in Executive Order 12866, which also governs regulatory analysis (see below).

A recent CRS report documented that between the effective date of UMRA to the end of fiscal year 2009, OMB reviewed 642 final rules with effects (costs or benefits) greater than $100 million. The majority (72 percent) of those rules did not meet UMRA’s definition of a mandate. The General Services Administration website, RegInfo.gov, classifies less than 15 percent of the economically significant final regulations issued by executive branch agencies between March 1995 and today as having unfunded mandates on other levels of government or the private sector.

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3 These annual reports are available at: [http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/](http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/)
4 Daniel Troy, 49 Admin. L. Rev. 139 1997
5 GAO 2005
7 OMB reviewed 777 regulations between March 22, 1995 and February 9, 2011. Of those, RegInfo identifies 113 of those as imposing unfunded mandates on the private sector, and 20 as imposing unfunded mandates on State, local or tribal governments.
Lack of accountability

This limited coverage is compounded by the fact that UMRA’s requirements for analyzing the effects of proposed regulations are largely informational. As GAO observed in 2005,

Although UMRA was intended to curb the practice of imposing unfunded federal mandates, the act does not prevent Congress or federal agencies from doing so. Instead, it generates information about the potential impacts of mandates proposed in legislation and regulations.

Further, the analytical requirements are similar to those contained in Executive Order 12866, “Regulatory Planning and Review,” which has guided executive branch regulatory planning, analysis, and review since 1993. The Act allows agencies to prepare required statements “in conjunction with or as a part of any other statement or analysis, provided that the statement or analysis satisfies the provisions of subsection (a).” OMB Circular A-4 observes, “Your analytical requirements under Executive Order 12866 are similar to the analytical requirements under [UMRA], and thus the same analysis may permit you to comply with both analytical requirements.”

The judicial review provided for under Title IV of the Act is limited, and does not impose meaningful consequences for not complying with the informational requirements of Title II. A court may compel an agency to prepare the written statement required by section 202 if the agency fails to do so, but failure to comply “shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule.”

My Experience with UMRA

During my tenure as OIRA Administrator (from April 2007 to January 2009), executive branch agencies issued 108 economically significant final regulations, only 17 of which were classified as unfunded mandates. Not one of those seventeen was designated under UMRA because it imposed unfunded mandates on State, local or tribal governments, however; all were designated due to mandatory private sector expenditures above the $100 million threshold.

This does not mean that no regulations issued during my tenure imposed burdens on State, local or tribal governments, however. Indeed, EPA issued two national ambient air quality standards (NAAQS) during that period. The NAAQS for ozone and lead, with costs estimated in the billions, raised very serious concerns among the States that bear responsibility for implementing them. EPA did not classify these NAAQS as unfunded mandates, despite the significant burdens

8 President Clinton’s Executive Order 12866 replaced President Reagan’s Executive Order 12291, issued in 1981, which imposed similar analytical and review requirements on new federal regulations.
they imposed on State governments because (1) the costs to States did not fit the definition of “mandate” and (2) the Clean Air Act prohibits EPA from considering costs when setting primary NAAQS. More recent NAAQS for sulfur dioxide have argued further that it is the Clean Air Act itself that “imposes the obligation for States to submit [state implementation plans] to implement the SO2 NAAQS,” and that “EPA is merely providing an interpretation of those requirements.”

Another regulation issued during my tenure that a reasonable person might consider burdensome on State, local and tribal governments was a Health and Human Services rule eliminating reimbursement to States under Medicaid for school-based administration expenditures and certain transportation costs (CMS-2287-F). Despite the elimination of approximately $635 million in federal funding in the first year following implementation, the rule was not covered by UMRA because it did “not require States to replace that Federal funding with State funding or take any other particular steps.”

These illustrations show the limitations of UMRA. Though both UMRA and Executive Order 12866 exclude independent agencies and rely on thresholds of $100 million, UMRA covers a small fraction of what the Executive Order covers. The difference does not appear to be due to noncompliance with UMRA, rather that:

1. UMRA applies the $100 million threshold to mandated “spending” while Executive Order 12866 applies it to “effects,”

2. UMRA excludes regulations for which agencies did not issue a proposal, and

3. UMRA provides seven additional exemptions.

9 The preamble to the ozone NAAQS states: “This final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or Tribal governments or the private sector. The rule imposes no new expenditure or enforceable duty on any State, local or Tribal governments or the private sector, and EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Furthermore, as indicated previously, in setting a NAAQS EPA cannot consider the economic or technological feasibility of attaining ambient air quality standards, although such factors may be considered to a degree in the development of State plans to implement the standards. See also American Trucking Ass'ns v. EPA, 175 F. 3d at 1043 (noting that because EPA is precluded from considering costs of implementation in establishing NAAQS, preparation of a Regulatory Impact Analysis pursuant to the Unfunded Mandates Reform Act would not furnish any information which the court could consider in reviewing the NAAQS). Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.” at 73 Fed. Reg. 16,435.


12 Only 12 of those 108 regulations were issued without a proposal, so the definition of expenditures and the exemptions appears to explain most of the difference in coverage.
Not only does Executive Order 12866 cover more regulations than UMRA but it provides OMB 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.” (emphasis added)

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. The Executive Order calls for quantitative and qualitative analysis and decision factors similar to those contained in UMRA, and it also emphasizes consultation with “State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities.” It says each agency “shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives.” (emphasis added) In addition OMB has responsibility for ensuring agency compliance with Executive Order 13132, “Federalism.”

As a result, in my experience, the analytical and interagency review requirements of Executive Order 12866 provided 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).

**Opportunities to further UMRA Objectives**

UMRA expresses admirable goals, but its limited coverage and lack of enforcement mechanism limit its effectiveness. To broaden the coverage, Congress could consider aligning UMRA language with that of Executive Orders 12866 and 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, this Committee 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))

I am not aware of whether Congress has ever made such a request under Section 103, but it could yield interesting comparisons to inform Congress’s deliberation of (1) future legislation involving unfunded mandates and (2) whether agency regulations implementing statutory language are consistent with original Congressional intent.