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The Unfunded Mandates Reform Act of 1995*

I. INTRODUCTION

On March 22, 1995, President Bill Clinton signed into law the Unfunded Mandates Reform Act (Act),¹ which established a legislative and regulatory framework inhibiting the adoption of unfunded federal mandates. This framework requires various impact reports and statements, relating the costs and effects of the legislation, to accompany all proposed federal mandates. With these reports and statements, the federal government must then give full consideration to the fiscal burdens of its mandates on state and local governments.² As a result, Congress and federal agencies should hesitate before mandating orders and regulations without adequate funding.³ The Act may help to curtail the displacement of essential local services with costly unfunded federal laws and programs, and strengthen the relationship between the federal government and state and local officials.⁴

II. BACKGROUND

A. Complaints Against Unfunded Federal Mandates

Intergovernmental concerns over unfunded federal mandates are not new.⁵ This issue “has been important since the 1960s, and is presently ‘the number one intergovernmental issue in the United States due to the cumulative impact of state and federal mandates.’”⁶

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¹ Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (March 22, 1995) (codified as amended in scattered sections of 2 U.S.C.).

² *Id.* § 2, 109 Stat. at 48-49.

³ *Id.* § 2(3)-(5), 109 Stat. at 48.

⁴ *Id.*

⁵ Alexis de Tocqueville, *Democracy in America*, 30-31 (Encyclopedia Britannica, 2d ed. 1990) (tracing concerns over unfunded mandates as far back as the early 1800s when Tocqueville described how states were imposing responsibilities on local governments instead of performing such duties themselves).

⁶ David L. Markell, *The Role of Local Governments in Environmental Regulation: Shoring*

The move to drastically end unfunded mandates has won broad national support among state and local governments.⁷ Across the Nation, state and local officials,⁸ along with various representatives of private industries, have come together and rallied around this issue.

State and local governmental complaints over unfunded federal laws and programs culminated into the "National Unfunded Mandates Day" held on October 27, 1993.⁹ On that day, governors, mayors, and numerous other governmental officials from across the nation held simultaneous press conferences in their city halls and voiced anger over unfunded federal orders and regulations.¹⁰ This anger pressured Congress and the Executive branch to react. Shortly thereafter, President Bill Clinton issued several executive orders seeking to ease the fiscal burdens of federal mandates. One executive order required federal agencies to decrease the use of unfunded regulations, increase the number of waivers to such orders, and streamline the waiver process.¹¹ As a result, the Committee on Governmental Affairs scheduled full committee hearings on the issue.¹²

State and local officials testified that the federal government has not treated them as partners, "but rather as agents or extensions of the federal bureaucracy,"¹³ and unfunded federal orders and regulations are prime examples of that problem. State and local officials argued that such laws are "breach[es] [of] the underlying principles of federalism which assumes a working partnership and

Up Our Federal System, 44 SYRACUSE L. REV. 885, 889 (1993) (citing INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, ENVIRONMENTAL MANDATES TASK FORCE MEETING, Meeting Notes, at 1 (Mar. 5, 1993)); see also Shelley Emling, *Mandates Drying Up County Funds Enough*, ATLANTA J. & CONST., Aug. 24, 1993, at B1 (stating, "[g]ripes about unfunded federal mandates are not new, but they're growing louder as the demands grow more costly").

⁷ Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1368-69 (1993).

⁸ *Id.* at 1356; see also John D. Graham, *The Risk Not Reduced*, 3 N.Y.U. ENVTL. L. J. 382, 389 (1995) (stating that governors, mayors, and other local officials, with various business associations, wanted to send a message to the federal government to inform it of their complaints over unfunded federal mandates).

⁹ S. Rep. No. 1, 104th Cong., 1st Sess. 2 (1995).

¹⁰ PRICE WATERHOUSE, SURVEY, *Impact of Unfunded Federal Mandates on U.S. Cities*, A-2 (October 26, 1993).

¹¹ Exec. Order No. 12,875, reprinted in 58 Fed. Reg. 58,093 (1993).

¹² S. Rep. No. 1, *supra* note 9, at 2-4 (Committee held hearings on November 3, 1993, April 28, 1994, and January 5, 1995).

¹³ S. Rep. No. 1, *supra* note 9, at 4.

shared responsibilities between federal [sic], state and local governments."¹⁴ State and local officials also asserted that unfunded mandates force state and local officials to spend on programs which they may deem inappropriate and thus, divert funds away from other more essential local services.¹⁵ Additionally, unfunded mandates give the federal government vital fiscal control over state and local governments, violating state autonomy.¹⁶

When the federal government requires states to comply with costly programs without providing financial assistance, local governments are left to pay the bill. Often, state and local officials are forced to decrease funds from other crucial local services in order to meet federal requirements.¹⁷ This hinders their ability to set local priorities.¹⁸ Before local officials can even prioritize their budgets, federal decrees will have already dictated which programs are to be appropriated first. Regardless if such laws are of little or no value at the local level, unfunded federal orders and regulations force state and local officials to spend their limited resources on the mandated law or program.¹⁹

State and local officials further claim that the "growing mountain of unattainable, unfunded mandates"²⁰ imposed on states without an adequate level of federal aid²¹ contributes to the problem. State and local officials must then do more with less. They can try to obtain funds from other sources. However, "[i]n this era of budget stringency following widespread taxpayer revolts, the conjunction of mandated service requirements and restrictions on revenue raising powers makes local government finance more difficult."²² As a result,

¹⁴ Markell, *supra* note 6 (citing Dekalb County, Ga., Resolution (Aug. 10, 1993)).

¹⁵ MICHAEL FIX & DAPHNE A. KENYON, *COPING WITH MANDATES: WHAT ARE THE ALTERNATIVES?*, 2-3 (1990); *see also* S. Rep. No. 1, *supra* note 9, at 2-4 (stating that when coordination breaks down, the whole program suffers, whether it is environmental protection, better education, etc.); PRICE WATERHOUSE, *supra* note 10, at C-1.

¹⁶ PRICE WATERHOUSE, *supra* note 10, at C-1.

¹⁷ S. Rep. No. 1, *supra* note 9, at 2-4.

¹⁸ *Federal Mandate Reform Legislation: Hearing Before the Committee on Governmental Affairs*, 103d Cong., 2d Sess. 12 (1994) (testimony of Mayor Richard M. Daley of Chicago, Illinois on behalf of the United States Conference of Mayors).

¹⁹ *Id.*

²⁰ Fred Eames & Paul Gilmore, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. ON LEGIS. 395, 397 (1994) (citing letter from Rep. Pat Roberts (R-Kan.) to Vice President Al Gore, 1 (Sept. 21, 1993) (on file with the Harvard Journal on Legislation)).

²¹ S. Rep. No. 1, *supra* note 9, at 7-8.

²² FIX & KENYON, *supra* note 15, at 5; *see also* S. Rep. No. 1, *supra* note 9, at 2-3.

the fiscal burdens of unfunded federal mandates undermine the ability of state and local officials to perform their duties and responsibilities under state and local laws.²³

State and local governments also believe that unfunded federal mandates exemplify the growing unchecked powers of the federal government. They argue that federal orders and regulations, unsupported by adequate appropriations, permit Congress and federal agencies to control and micro-manage state and local policies.²⁴ Unfunded mandates represent the principle that the federal government knows what is best for states and localities and that it will set state and local policies through budgetary control.²⁵ Mayor Greg Lashutka of Columbus, Ohio best summed up that sentiment when he stated:

Others have called it spending without representation. Across this country, mayors and city councils and county commissioners have no vote on whether these mandated spending programs are appropriate for our cities. Yet, we are forced to cut other budget items or raise taxes or raise utility bills to pay for them because we must balance our budget at our level.²⁶

B. Focusing on Unfunded Environmental Mandates

State and local officials are also focusing their attention on environmental mandates. Such orders and regulations have garnered the most amount of anger and frustration from state and local officials.²⁷ They claim Environmental Protection Agency (EPA)

²³ FIX AND KENYON, *supra* note 15, at 5.

²⁴ Patricia E. Salkin, *National Performance Review: A Renewed Commitment to Strengthening the Intergovernmental Partnership*, 26 URB. LAW. 51, 57 (1994) (quoting President Clinton's statement that state and local officials need "more flexibility to desing solutions to the problems faced by citizens in this country without excessive micromanagement and unnecessary regulation from the Federal government").

²⁵ See generally ENVIRONMENTAL LAW REV. COMM., ENVIRONMENTAL LEGISLATION: THE INCREASING COSTS OF REGULATORY COMPLIANCE TO THE CITY OF COLUMBUS 12 (May 13, 1991) (stating that the high cost of compliance with unfunded federal programs forces state and local officials to spend on programs which they deem inappropriate and to cut funding from other more essential services).

²⁶ S. Rep. No. 1, *supra* note 9.

²⁷ S. Rep. No. 1, *supra* note 9, at 6.

mandates have not only required expenditures for nonexistent or nonthreatening problems,²⁸ but are also the most economically burdensome.²⁹ The major criticism against EPA regulations is that they frequently force state and local governments to pay for environmental programs that are of little or no benefit.³⁰ A prime example is the EPA mandate requiring all cities to keep atrazine levels in drinking water to three parts per billion.³¹ The EPA set the level based on the dosage found to be cancerous in rats.³² However, based on that dosage, humans would have to drink 3000 gallons of water per day to develop cancer.³³ State and local officials complain that the atrazine mandate and similar EPA directives are senseless and provide protection for fictitious and nonthreatening hazards.

Additionally, state and local officials stress that environmental mandates are the most financially burdensome.³⁴ For example, the city of Columbus, Ohio, complained that it would have to build a new \$80 million dollar water purification plant to comply with the EPA atrazine level.³⁵ Oregon asserted that \$80 million would be spent on protection from a nonhazardous risk, instead of on more essential local services and priorities.

These problems are then compounded by the growing costs of environmental compliance.³⁶ In a 1990 EPA report, the federal government estimated that the cost of environmental regulations from all levels of government "will rise (in constant 1986 dollars) from \$22.2 billion in 1987 to \$37.1 billion by the year 2000—A real increase of 67 percent."³⁷ After adjustments for inflation, the actual figure is \$44 billion by the year 2000, which represents a 48 percent increase on the states and a 70 percent increase on local

²⁸ Markell, *supra* note 6, at 895–896.

²⁹ S. Rep. No. 1, *supra* note 9, at 6.

³⁰ Markell, *supra* note 6, at 895.

³¹ National Primary Drinking Water Regulations, 40 C.F.R. § 141.61 (1993).

³² COLUMBUS HEALTH DEPARTMENT, OHIO METROPOLITAN REPORT GROUP, OHIO METROPOLITAN AREA REPORT FOR ENVIRONMENTAL COMPLIANCE 118 (Sept. 15, 1992).

³³ *Id.* (estimating based upon the Most Exposed Individual Risk Assessment, "which assumes a person is exposed to atrazine every day for seventy years" a person could "drink water containing 100 ppb [of atrazine] for 10 days or 50 ppb for 7 years with no adverse health effects! These levels are orders of magnitude greater than the [maximum containment level of 3 parts per billion]," the amount found to be cancerous in rats).

³⁴ S. Rep. No. 1, *supra* note 9, at 6.

³⁵ COLUMBUS HEALTH DEPARTMENT, *supra* note 32, at 118.

³⁶ S. Rep. No. 1, *supra* note 9, at 6.

³⁷ S. Rep. No. 1, *supra* note 6 (citing United States Environmental Protection Agency, *Environmental Investments: The Cost of a Clean Environment*, 49–51 (1990)).

governments.³⁸

State and local governments emphasize that they are not against environmental mandates.³⁹ They are simply tired of costly, inflexible environmental laws which have negligible effects on health, safety, and the natural environment.⁴⁰ State and local officials want the federal government to strike a balance between the public and the environment. If the federal government believes an environmental order or regulation is needed, then it should provide appropriate funding and ensure that such mandates provide protection from realistic health risks or environmental damage. But more importantly, the federal government must stop requiring cleanup to the "nth" degree of pollution at all costs.⁴¹

C. Prior Legislative Efforts

In 1993, during the 103d Congress, several bills were proposed to reform how the federal government mandated various laws and programs. None of those bills were ever adopted.⁴² However, parts and pieces of earlier proposals were later accepted by the 104th Congress and promulgated into the Act.

1. Senate Bill 563

One of the first attempts to inhibit the adoption of federal mandates was Senate Bill 563.⁴³ Sponsored by Senator Moseley-Braun, Senate Bill 563 required the Congressional Budget Office (CBO) to report the cost of state and local compliance with all proposed federal mandates, funded or not, and the extent to which the federal government could pay for compliance costs.⁴⁴ Congress would then be required to review the pecuniary impact of their proposed laws, and thus, evaluate the adoption of such mandates. However, this bill was never adopted because it failed to obtain

³⁸ S. Rep. No. 1, *supra* note 6 (citing Vice President Al Gore's National Performance Review Report on the EPA).

³⁹ Markell, *supra* note 6, at 893 n.17.

⁴⁰ Markell, *supra* note 6, at 895.

⁴¹ Markell, *supra* note 6, at 895.

⁴² S. Rep. No. 1, *supra* note 9, at 8.

⁴³ S. 563, 103d Cong., 1st Sess. (1993).

⁴⁴ *Id.* at § 1(i)(1)(a)-(b).

committee approval.⁴⁵

2. Senate Bills 648 and 993

Senate Bills 648,⁴⁶ proposed by Senator Gregg, and 993⁴⁷ proposed by Senator Kempthorne, presented the most restrictive approach towards unfunded federal mandates. Both of those bills would have required the federal government to cover any and all expenses associated with a mandate.⁴⁸ If the federal government failed to fund the total costs of its mandated orders and regulations, then state and local governments were not required to comply.⁴⁹ Both bills would have precluded unfunded and partially funded federal mandates. Due to their extreme nature, Congress never adopted the bills.

3. Senate Bill 1592

Senator Dorgan attempted to reach a middle ground between the previous proposals with Senate Bill 1592.⁵⁰ Similar to Senate Bill 563, Senator Dorgan's proposal also attempted to reduce the numbers of unfunded federal laws and programs by "improv[ing] Federal decisionmaking by requiring a thorough evaluation of the economic impact" of federal mandates on state and local governments.⁵¹ Senator Dorgan's bill required other various impact reports and statements on the proposed mandates, in addition to those proposed in Senate Bill 563.

The proposed impact analyses were to accompany all congressionally proposed mandates and a point of order would be established to ensure that the required analyses were considered prior to the adoption of such laws.⁵² Furthermore, all proposed intergovernmental mandates from federal agencies were to be accompanied by statements providing reasons for and the objectives

⁴⁵ COMMERCE CLEARINGHOUSE INC., 1 CONG. INDEX 21,012 (1993-94).

⁴⁶ S. 648, 103d Cong., 1st Sess. (1993).

⁴⁷ S. 993, 103d Cong., 1st Sess. (1993).

⁴⁸ *Id.* § 4; see also S. 648, 103d Cong., 1st Sess. §§ 4, 5.

⁴⁹ See S. 648, 103d Cong., 1st Sess. §§ 4, 5; S. 993, 103d Cong., 1st Sess. § 4.

⁵⁰ S. 1592, 103d Cong., 1st Sess. (1993).

⁵¹ *Id.*

⁵² *Id.* § 101(a) and (c).

of the order, cost estimates of compliance with the regulation,⁵³ and economic impact statements.⁵⁴ With all this information, the federal government could be informed of all adverse effects of its unfunded laws and programs.

Nonetheless, this bill was rejected because of the extreme workload imposed on the CBO.⁵⁵ Senate Bill 1592 required the CBO “to scour each and every bill reported by every Congressional committee to determine whether it met the criteria in the [proposed] bill for triggering analyses of potential economic impacts.”⁵⁶ The CBO would have required substantial manpower, resources, and finances to perform the additional impact analysis. Furthermore, the requirement of impact analyses on all congressional proposals would significantly slow the legislative process because of the time needed to perform such analyses.⁵⁷ “Based on CBO’s cost-estimating experience, it is hard to imagine that committees would have the flexibility or the patience to consistently tolerate the length of time required for economic studies of good quality.”⁵⁸

III. KEY PROVISIONS OF THE UNFUNDED MANDATES REFORM ACT

The Unfunded Mandates Reform Act changes the way Congress and federal agencies adopt unfunded laws and programs by establishing “a legislative and regulatory framework” suppressing the enactment of such mandates.⁵⁹ This framework is triggered when Congress or federal agencies propose to mandate any new law or program. Once triggered, the framework requires the committees, the CBO, or the affected federal agencies to provide additional information concerning the financial impact and adverse affects of the

⁵³ *Id.* § 201.

⁵⁴ *Id.* § 202.

⁵⁵ *Hearing Before the Committee on Governmental Affairs, supra* note 18, at 139 (statement of Robert D. Reischauer, Director of the Congressional Budget Office).

⁵⁶ *Hearing Before the Committee on Governmental Affairs, supra* note 18, at 139 (statement of Robert D. Reischauer, Director of the Congressional Budget Office).

⁵⁷ *Hearing Before the Committee on Governmental Affairs, supra* note 18, at 41 (statement of Robert D. Reischauer, Director of the Congressional Budget Office).

⁵⁸ *Hearing Before the Committee on Governmental Affairs, supra* note 18, at 42 (statement of Robert D. Reischauer, Director of the Congressional Budget Office).

⁵⁹ S. Rep. No. 1, *supra* note 9, at 9.

proposed mandate.⁶⁰ If the proposed mandate is not accompanied by the requisite reports and statements, then such proposals may be stricken out of order.⁶¹ The framework also requires federal agencies to formulate and consider regulatory alternatives to its proposed orders.⁶² Furthermore, to ensure that the framework applies to all federal mandates, the only exemptions are those explicitly listed within the Act.⁶³ Otherwise, all federal mandates, funded or not, will be subject to the Act.

A. *Defining a Mandate*

The Unfunded Mandates Reform Act applies to “any provision in legislation, statute, or regulation that . . . would impose an enforceable duty upon State, local, or tribal governments”⁶⁴ and the private sector.⁶⁵ This essentially includes any and all federal laws and programs directed at state and local governments and the private sector.

Nevertheless, the Act also provides exceptions to the above definition. If the enforceable duty is a condition for federal assistance⁶⁶ or is “a duty arising from participation in a voluntary federal program,”⁶⁷ then the duty is not considered a mandate triggering the framework of the Act. Thus, federal regulations and orders, which are conditions to any federal program or laws which the states and local governments and the private sector freely choose to comply with, are not covered under the Act.

However, those exceptions are considered mandates if they either relate to an existing federal entitlement program which provides at least \$500 million annually to state and local governments, or tighten the conditions of assistance under the program or limit or decrease the federal government’s responsibility in providing funds to such programs. Additionally, state and local governments must lack authority to dictate the amount of funding to

⁶⁰ S. Rep. No. 1, *supra* note 9, at 12–13.

⁶¹ Unfunded Mandates Reform Act of 1995, Pub. L. No.104–4, § 425(a), 109 Stat. 48, 56 (March 22, 1995).

⁶² *Id.* § 205, 109 Stat. at 66.

⁶³ *Id.* § 4, 109 Stat. at 49 and § 422, 109 Stat. at 53.

⁶⁴ *Id.* § 421(5)(A)(i), 109 Stat. at 51.

⁶⁵ *Id.* § 421(7)(A), 109 Stat. at 52.

⁶⁶ *Id.* § 421(5)(A)(i)(I), 109 Stat. at 51.

⁶⁷ *Id.* § 421(5)(A)(i)(II), 109 Stat. at 51.

the program.⁶⁸ In other words, mandates affecting federal programs run by state and local governments and costing the federal government at least \$500 million are generally considered federal mandates under the Act. Such mandates would include orders and regulations affecting the nine current existing entitlement programs: Medicaid, AFDC, Child Nutrition, Food Stamps, Social Services Block Grants, Vocational Rehabilitation State Grants, Foster Care, Adoption Assistance, and Independent Living, Family Support Welfare Services, and Child Support Enforcement.⁶⁹

B. Congressional Committee Reports

If a congressional committee introduces a bill or resolution containing a federal mandate, the Unfunded Mandates Reform Act requires the committee to provide additional information reporting the impact of its proposed law.⁷⁰ These reports include: the direct costs on the affected parties to comply with the mandate; qualitative and quantitative assessments on the cost-benefits of the mandate, especially relating to health and safety and protection of the natural environment; and the effects of the proposed bill on the competitive balance between the public and private sector.⁷¹ Furthermore, if the mandate is of an intergovernmental type, the report must also indicate whether the federal government would financially support the mandate and its reasons for doing so, if the proposed bill appropriates any funding from any existing federal financial assistance programs, and how the committee intends to implement the funding.⁷² In requiring these additional reports, the Act encourages congressional committees to examine all the positive and negative aspects of its proposed mandates and discourages the introduction of such laws until its impact is fully considered.⁷³

⁶⁸ *Id.* § 421(5)(B), 109 Stat. at 52.

⁶⁹ S. Rep. No. 1, *supra* note 9, at 10.

⁷⁰ Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, § 423, 109 Stat. 48, 53 (March 22, 1995).

⁷¹ *Id.* § 423(c), 109 Stat. at 53-54.

⁷² *Id.* § 423(d)(1)(C), 109 Stat. at 54.

⁷³ *Id.* § 2, 109 Stat. at 48-49.

C. Assistance from the Congressional Budget Office

The Unfunded Mandates Reform Act also requires the congressional committees to submit their reports on all proposed intergovernmental mandates to the CBO.⁷⁴ If the CBO determines that the cost of compliance with the proposed legislation is \$50 million or above in any one of five fiscal years for state and local governments,⁷⁵ or \$100 million or above in any one of five fiscal years for the affected private sector,⁷⁶ then the CBO must estimate the cost of compliance with the mandate.⁷⁷ The CBO must also determine whether federal funding will be allocated to cover such costs and the effect of that funding on the federal assistance programs.⁷⁸ Thus, if cost thresholds are met, the Act requires further reports and statements from the CBO and alerts Congress that a costly federal mandate is being introduced.

D. Federal Agency Requirements

The Unfunded Mandates Reform Act imposes a more restrictive framework on federal agency regulations. This framework does more than just require federal agencies to state the justifications for their orders. The Act also permits state and local officials to comment on the proposed orders⁷⁹ and requires federal agencies to provide regulatory alternatives.⁸⁰

If a federal agency proposes a mandate costing state and local governments or the private sectors \$100 million or more to comply in any one year,⁸¹ the agency must provide: (1) the provision in federal law allowing promulgation of the order;⁸² (2) a qualitative and quantitative assessment of the regulation's cost-benefits, especially

⁷⁴ *Id.* § 423(b), 109 Stat. at 54.

⁷⁵ *Id.* § 424(a)(1), 109 Stat. at 55.

⁷⁶ *Id.* § 424(b)(1), 109 Stat. at 55-56.

⁷⁷ *Id.* § 424(a)(2) and (b)(2), 109 Stat. at 55-56.

⁷⁸ *Id.*

⁷⁹ *Id.* §§ 203(a)(2), 204(a), 109 Stat. at 65-66.

⁸⁰ *Id.* § 205(a), 109 Stat. at 66.

⁸¹ *Id.* § 202(a), 109 Stat. at 64.

⁸² *Id.* § 202(a)(1), 109 Stat. at 64.

those relating to health and safety and the natural environment,⁸³ (3) state and local compliance costs⁸⁴ and the extent of federal support,⁸⁵ and (4) the effect of the mandate on the national economy and growth.⁸⁶ The Act also allows state and local officials to meet with agency representatives and “to provide meaningful and timely input into the development of [the agency’s] regulatory proposals.”⁸⁷ Furthermore, federal agencies must formulate and consider regulatory alternatives to its proposed mandates.⁸⁸ By imposing these agency requirements, the Act attempts to reduce the number of agency mandates and encourage more cost-effective alternatives.

E. Point of Order Against Unfunded Mandates

All congressional proposed mandates are subject to a point of order.⁸⁹ Neither the Senate nor the House of Representatives may consider any federal mandate above the cost threshold, unless such bills are accompanied by the Act’s requisite information.⁹⁰ Additionally, it will be out of order for the Senate to consider any bill or joint resolution without the CBO impact reports and statements.⁹¹ This ensures that the requisite information is produced and prevents consideration of any mandate lacking such information. Otherwise, bills or resolutions lacking the requisite information will be stricken and will not be considered until the required CBO analysis is provided.

F. Regulatory Alternatives

One of the more important provisions of the Act requires federal agencies to provide alternatives to its proposed mandates.⁹²

⁸³ *Id.* § 202(a)(2), 109 Stat. at 64.

⁸⁴ *Id.* § 202(a)(2)(A), 109 Stat. at 64–65.

⁸⁵ *Id.* § 202(a)(2)(B), 109 Stat. at 65.

⁸⁶ *Id.* § 202(a)(4)(A), 109 Stat. at 65.

⁸⁷ *Id.* §§ 203(a), 204(a), 109 Stat. at 65–66.

⁸⁸ *Id.* § 205(a), 109 Stat. at 66.

⁸⁹ *Id.* § 425(a), 109 Stat. at 56.

⁹⁰ *Id.*

⁹¹ *Id.* See also S. Rep. No. 2, 104th Cong., 1st Sess. 12–14 (1995) (analyzing the point of order in the U.S. Senate).

⁹² *Id.* § 425(a), 109 Stat. at 56. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4, § 205, 109 Stat. 48, 66 (March 22, 1995).

Before issuing an order, federal agencies must identify and consider other regulatory alternatives.⁹³ From those alternatives, the federal agencies must “select the least costly, most cost-effective or least burdensome [regulatory] alternative that achieves the [same] objectives of the [proposed] rule.”⁹⁴ This provision is triggered only when federal agencies propose a mandate that would cost the public or private sectors at least \$100 million to comply with, in any one of five fiscal years.⁹⁵

Once triggered, the Act reduces costly federal agency mandates and encourages more cost-effective orders and regulations. If no regulatory alternatives are available or can achieve the same goals as the proposed regulation, then no such alternatives need to be considered.⁹⁶ The director of the federal agency, however, must explain why the alternatives were inadequate.⁹⁷

G. Exemptions

State and local officials feared that the Unfunded Mandates Reform Act could be construed to provide exemptions for mandates where none was intended. As a result, the Act specifically exempts legislation on: constitutional and civil rights, anti-discrimination, federal auditing and accounting procedures, emergency relief, national security, international treaties, and Title II of the Social Security Act.⁹⁸ If the Act's integrity of inhibiting new unfunded mandates is to be maintained, then the exempted federal law or program must “completely fit[] within the confines of the [permissive] exclusion.”⁹⁹ Otherwise, such proposed bills or resolutions cannot be interpreted as an exemption to the Act.

⁹³ *Id.* § 205, 109 Stat. at 66.

⁹⁴ *Id.*

⁹⁵ *Id.* § 205(a), 109 Stat. at 64.

⁹⁶ *Id.* § 205(b)(1), 109 Stat. at 66.

⁹⁷ *Id.*

⁹⁸ *Id.* § 4, 109 Stat. at 49.

⁹⁹ S. Rep. No. 2, *supra* note 91, at 8.

IV. ANALYSIS

A. Impacts Upon the Congressional Budget Office

The Unfunded Mandates Reform Act requires the CBO to provide additional information reporting the fiscal impact of federally proposed laws and programs. Congressional committees could then better understand the financial burdens of its proposed legislation on the affected parties. However, under the State and Local Government Cost Estimate Act (SLGCEA),¹⁰⁰ the CBO is already reporting such information.¹⁰¹ The Act merely lowers the cost threshold, triggering CBO's required estimate.

Under SLGCEA, if a proposed legislation would cost state and local governments \$200 million, then the CBO would have to perform such cost estimates and other similar assessments.¹⁰² The Act lowers that threshold to \$50 million on the affected state and local governments and \$100 million on the affected private sectors.¹⁰³ With the lower cost threshold, the CBO will be performing more impact analyses and assessments. However, this does not mean that congressional committees will better understand the financial impact of its proposed laws. The CBO will still not have adequate time to perform the several required cost estimates. Cost estimates based on the proposed language of a bill or resolution could be different from the cost estimates of the final adopted legislation.

Performing cost estimates takes time.¹⁰⁴ The CBO cannot always provide the estimates in time for consideration. Committee reports are frequently requested within a few hours or a few days of when such reports are due.¹⁰⁵ To perform the estimates correctly and accurately, more time will often be needed. If the estimates are

¹⁰⁰ Pub. L. No. 97-108, 95 Stat. 1510 (Dec. 23, 1981) (codified as amended in scattered sections of 31 U.S.C.).

¹⁰¹ *Hearing Before the Committee on Governmental Affairs, supra* note 18, at 128 (from the prepared statements of Robert D. Reischauer, Director of the CBO).

¹⁰² *Hearing Before the Committee on Governmental Affairs, supra* note 17, at 128.

¹⁰³ Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, § 424, 109 Stat. 48, 55 (March 22, 1995).

¹⁰⁴ *Id.* § 424, 109 Stat. at 135.

¹⁰⁵ *Id.*

rushed, wrong figures could result and proposed legislation could be approved or denied based on the inaccurate data. The process in preparing such estimates "is not well suited to the normal time frame for providing [costs] of pending legislation."¹⁰⁶

Another problem with the CBO requirements is that the proposed legislation may not provide sufficient detail to perform the cost estimates.¹⁰⁷ The proposed language of a bill or resolution often changes during the extensive process of finalizing them.¹⁰⁸ A cost estimate based on the proposed language of a bill or resolution could incorrectly represent the estimates of later adopted, but very different, legislation. It is, thus, almost impossible for the CBO and state and local governments to predict how to comply with the final draft of legislation and to anticipate its cost of compliance.¹⁰⁹

B. Impacts Upon Federal Agencies

The Unfunded Mandates Reform Act requires federal agencies to perform additional impact analyses and assessment to justify its orders and regulations. As a result, agencies are more knowledgeable about proposed mandates and, thus, are better able to mandate laws and programs that are more cost-effective and provide realistic benefits. However, reporting and stating the additional analyses and assessments will be extremely difficult. There is also no guarantee those analyses and assessments will provide a better view of a mandate's impact or that the agencies will be more educated about its orders and regulations.

Federal agencies must perform qualitative and quantitative assessments of the cost and benefits of its proposed mandates.¹¹⁰ However, quantifying the cost and benefits of a proposed mandate is highly complicated, especially if such proposals are complex and technical, like environmental mandates. Depending on the type of regulation and the geographic region to which it is applied, the impact of an agency order and regulation will vary greatly from region to region. As a result, predicting an accurate impact analysis of the order and regulation could be extremely difficult.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 424, 109 stat at 134.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* § 202(a)(2), 109 stat. at 64.

Similarly, obtaining the true cost of compliance with an agency regulation is just as difficult. No two states or cities are exactly the same, so the cost of compliance with a federal agency mandate will likely vary with the locality. State and local officials can only make educated guesses concerning their compliance costs and hypothesize about the possible benefits, especially those relating to health and safety and the natural environment.

There is also no guarantee that such analyses and assessments will better educate the federal agencies about their orders and regulations. The EPA and other federal agencies are already required to justify its orders and regulations with similar procedures.¹¹¹ If they fail to comprehend the impact of their mandated orders and regulations using such information, then there is no guarantee that the Act's additional impact reports and statements will better educate

¹¹¹ The National Environmental Policy Act (NEPA) requires all federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to draft a detailed Environmental Impact Statement (EIS). 42 U.S.C. § 4332(c) (1994). If the proposed regulation does not significantly affect the human environment, then an "environmental assessment" would generally be made. *See* 18 C.F.R. § 380.5(b)(12) (1995) (Federal Energy Regulatory Comm.); 21 C.F.R. § 25.22(a)(6) (1995) (FDA); 40 C.F.R. § 1507.3(b) (1995); 49 C.F.R. § 1101.6(b)(6) (1995) (ICC); *see also* Illinois Commerce Comm. v. ICC, 48 F.2d 1246, 1257 (D.C. Cir. 1988) (stating, "[I]t is not at all apparent that a change in procedure alone will not affect the environment—the new procedure may, for example, lessen the opportunity for environmental groups to influence the agency's final decision. The procedural nature of a regulation does not, therefore, exempt an agency from complying with NEPA and preparing an environmental assessment (EA) or environmental impact statement (EIS) where appropriate").

Under the Regulatory Flexibility Act, all federal agencies must consider the impact of its regulations on small businesses and other small entities and formulate regulatory alternatives to its proposed regulations. 5 U.S.C. §§ 601–12 (1994). The Act also requires an assessment of the number of affected small entities, description of the compliance requirements, and formulation and consideration of regulatory alternatives and the reasons for rejecting them. *Id.* § 603(b), (c).

Sections 556 and 557 of the Federal Administrative Procedures Act (APA) requires all agencies to support its proposed rule with substantial evidence in an exclusive rulemaking record. 5 U.S.C. §§ 556(d), (e), 557(c) (1994). Additionally, section 553 requires: (1) a notice of the proposed rule to be published in the Federal Register; (2) an opportunity to those interested persons to submit data, views, and arguments about the proposal; (3) a statement of the legal authority permitting the rule; and (4) a statement of the basis and purpose of the rule. *Id.* § 553(b)–(d).

There is also an executive order requiring federal agencies to consider issues of federalism. It requires the director of each agency to appoint someone to prepare a "Federalism Assessment" on all proposed orders and regulations with "sufficient federalism implications." Executive Order No. 12,612, § 6(a), (b) (Oct. 26, 1987); 3 C.F.R. § 252 (1987). All executive branch agencies are required to prepare and send to the Office of Management and Budget (OMB) a regulatory impact analysis of all proposed rules that could have an effect of \$100 million or more on the national economy, or significant adverse effects on the economy. Executive Order No. 12,291, §§ 1(b), 3(c), 8 (Feb. 17, 1981).

the agencies about its proposed mandates. The only guarantee is that performing these procedures would cost a great deal of extra time, money, and man power.

C. House Waiver of the Point of Order

The Unfunded Mandates Reform Act established a point of order to prevent congressional circumvention of the Act's required procedures.¹¹² However, there is language within the Act which could possibly allow the House of Representatives to waive that point of order. Section 107 of the Act amends Clause 5 of Rule XXIII of the Rules of the House of Representatives. It adds to the end of that clause:

(c) In the consideration of any measure for amendment in the Committee of the Whole containing any Federal mandate the direct costs of which exceed the [cost] threshold ... of the Unfunded Mandates Reform Act of 1995, it shall always be in order, unless specifically waived by terms of rule governing consideration of that measure, to move to strike such Federal mandate from the portion of the bill then open to amendment.¹¹³

The language of section 107 indicates that a House waiver of the point of order is available. If the House Committee of the Whole House on the State of the Union (Committee of the Whole) considers a bill or resolution containing a mandate without the requisite reports and analysis, then such bills and resolutions may be moved out of order. However, this provision does not apply if there is a "special rule" for considering the bill or resolution despite lacking the requisite reports.¹¹⁴

The "special rule" waiving the applicable point of order comes from the House Committee on Rules.¹¹⁵ If the Rules Committee believes a point of order waiver is needed on a particular bill or

¹¹² Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, § 425, 109 Stat. 48, 56.

¹¹³ *Id.* § 107(a), 109 Stat. at 63 (emphasis added).

¹¹⁴ H.R. Conf. Rep. No. 76, 104th Cong., 1st Sess. 37 (1995).

¹¹⁵ The Rules Committee schedules consideration of proposed legislation and the terms of such consideration for the Committee of the Whole and the entire House itself. Abner J. Mikva & Eric Lane, *LEGISLATIVE PROCESS* 284 (Little, Brown and Co. 1995).

resolution, then the Committee must introduce a House Resolution (HR) on the waiver to be considered by the House.¹¹⁶ The waiver is then treated like a separate piece of legislation.¹¹⁷ It must be approved by the House prior to consideration of the bill or resolution to which the point of order waiver addresses.¹¹⁸ In other words, section 107 of the Act would permit a point of order waiver if the House approves the HR on the waiver from the Rules Committee.

V. CONCLUSION

State and local officials believe that the passage of the Unfunded Mandates Reform Act was long overdue. For years, they have been complaining about the increased number of costly unfunded federal laws and programs. State and local officials were tired of paying for mandates which they did not ask for and which were often not needed. Essential local services were curtailed and taxes raised to cover the cost of compliance with such laws and programs. However, it was not until the passage of this Act that the angers and frustrations over unfunded federal mandates dissipated.

The Act establishes a framework inhibiting the adoption of unfunded federal laws and programs. This framework requires additional reports and statements relating the impact of a proposed mandate, and provides for a point of order to strike out any proposals not accompanied by the requisite impact analyses. The Act further requires federal agencies to provide and consider more cost-effective regulatory alternatives that could achieve the same goals as the proposed mandate. However, there is no guarantee that the additional reports will provide a better impact analysis or better educate the federal government about its proposed laws and programs.

Despite these possible problems, the full implication of the Act is not yet known. Many state and local officials believe that the days of unfunded federal mandates are over. Only time will tell if that is accurate. The Nation will have to wait and see the true benefits and problems of the Act.

¹¹⁶ *Id.* at 285.

¹¹⁷ *Id.*

¹¹⁸ *Id.*