

Intergovernmental Mandates in Federal Legislation

Federal law sometimes requires state, local, or tribal governments to spend money to achieve certain goals. In some cases, a requirement is imposed as a condition for receiving federal aid; in others, requirements can be imposed through the exercise of the federal government's sovereign power. The Unfunded Mandates Reform Act of 1995 (UMRA) focuses attention on requirements that are not conditions of aid. The law specifies which types of requirements should or should not be considered mandates, establishes procedures that govern Congressional consideration of such mandates, and directs the Congressional Budget Office (CBO) to estimate the mandates' costs.¹ (CBO estimates the costs of intergovernmental and private-sector mandates for virtually every bill reported from an authorizing committee. This brief focuses exclusively on intergovernmental issues.) UMRA's goal is to promote informed decisionmaking by the Congress as it considers questions about the appropriateness of federal mandates on other levels of government and about the desirability of providing financial assistance to cover the costs of intergovernmental mandates.

UMRA took effect in 1996; since then the Congress has enacted few federal mandates, as defined in the law, that have imposed significant costs on state and local governments. Although it has rarely used UMRA's explicit enforcement mechanism when considering bills, in some cases the Congress has changed legislation before enactment either to eliminate a mandate or to reduce its costs.

There can be questions, however, about which bills are covered by UMRA and about how the law defines an intergovernmental mandate. UMRA's application is limited in three ways:

- It does not apply to the broad policy areas of national security or constitutional rights (including voting rights) or to some segments of the Social Security program.
- In most cases, it does not consider that new conditions related to federal grant programs are mandates.
- It focuses on mandates with costs above a threshold—originally set at \$50 million; \$69 million in 2009—that is adjusted annually for inflation.

State and local officials could still view as burdensome some federal requirements that are not considered mandates under UMRA or that do not impose costs above the UMRA threshold. Among such obligations are provisions of the No Child Left Behind Act (NCLB) and the Individuals with Disabilities Education Act (IDEA) that must be met as a condition for receiving federal grants. The same applies to provisions of the Help America Vote Act that are designed to enforce the constitutional right of suffrage. Preemptions of state law and authority are mandates under UMRA that rarely result in states' incurring additional costs.

What Is an Intergovernmental Mandate?

UMRA outlines several forms of intergovernmental mandates:

- *An enforceable duty.* Any provision in legislation, statute, or regulation that would compel or explicitly prohibit action on the part of state, local, or tribal governments is a mandate unless the provision amounts to a duty that is imposed as a condition for receiving federal aid or that arises from participation in a voluntary federal program.

1. See Congressional Budget Office, *A Review of CBO's Activities in 2008 Under the Unfunded Mandates Reform Act* (2009), and other annual reports summarizing those estimates.

- *Certain changes in large entitlement programs.* A new condition on, or a reduction in, federal financial assistance can be a mandate in the case of a large entitlement program (one that provides \$500 million or more annually to a state, local, or tribal government), but only if the jurisdiction in question lacks the flexibility either to offset the new costs or to compensate by adjusting other parts of the program.
- *Reduced federal funding for an existing mandate.* A provision to reduce or eliminate federal funding authorized to cover the costs of an existing mandate would itself be considered a mandate under UMRA.

What Does UMRA Require?

UMRA's goal is to ensure that Members of Congress are informed—before enacting legislation—about the likely direct costs of federal mandates. CBO is required to notify authorizing committees about whether intergovernmental mandates contained in reported bills would impose costs on state, local, or tribal governments. If the direct costs of all mandates in a bill would be above UMRA's threshold in any of the first five fiscal years after the mandates take effect, CBO must provide estimates (if feasible) and present an assessment of whether the bill would authorize or otherwise provide funding to cover the costs of any new federal mandate.²

UMRA requires authorizing committees to publish CBO's mandate statements in their reports or in the *Congressional Record* before a bill is considered by the full House of Representatives or the Senate. Conference committees must ensure "to the greatest extent practicable" that CBO prepares statements for conference agreements or for amended bills that contain mandates that have not been considered by either chamber or that impose greater direct costs than those included in earlier versions.

Consideration is not "in order" for reported legislation—that is, for a bill that has committee approval for consideration by the full House or Senate—unless the committee has published a CBO mandate statement. The rules also preclude consideration of reported legislation that

contains intergovernmental mandates with direct costs above the threshold unless the legislation provides direct spending authority or authorizes appropriations that are sufficient to cover the costs. To be considered sufficient, authorized amounts must be specified for each year (up to 10 years) after the effective date of a mandate. The legislation also must provide a way to terminate or scale back the mandate if the federal agency implementing the legislation determines that the appropriated funds are insufficient to cover those costs.

UMRA prohibits the House from waiving the points of order established in the act as part of any rule for considering legislation. Because UMRA is part of the Congressional Budget and Impoundment Control Act of 1974, a rule that would waive all budget points of order under that act would itself be subject to a point of order under UMRA. (A point of order is a claim made by a Representative or Senator that an action that is being taken, or that is proposed, could be contrary to the rules of the body.)

UMRA's rules are not self-enforcing. A Member of Congress must raise a point of order to enforce them. If a point of order is raised in the House, the full House must vote on whether to consider the bill. A simple majority determines the outcome. If a point of order is raised in the Senate, the bill may not be considered unless the Senate waives the point of order or the presiding officer overrules it. In the past 13 years, CBO has identified 25 instances in the House and 2 cases in the Senate when a point of order pursuant to UMRA was raised.

How Many Intergovernmental Mandates Has the Congress Considered or Enacted Since UMRA Became Law?

Most legislation that the Congress has considered since 1996 has contained no intergovernmental mandates as UMRA defines them. Only 13 percent of the more than 7,600 bills and other legislative proposals CBO reviewed between 1996 and 2008 (most as they were reported out of committee) contained such mandates. And less than 9 percent of that number would have imposed costs above UMRA's threshold.

Eleven intergovernmental mandates have been enacted with costs above the threshold:

2. The law defines direct costs as the incremental amount that mandated entities would have to spend to comply with an enforceable duty, including amounts that states, localities, and tribes would be prohibited from raising in revenues.

- The minimum wage was increased twice (Public Law 104-188, enacted in 1996, and P.L. 110-28, enacted in 2007).³
- Federal funding for the Food Stamp program was reduced (P.L. 105-185, enacted in 1998).⁴
- State taxes on premiums for some prescription drug plans were preempted (P.L. 108-173, enacted in 2003).⁵
- State authority to tax some Internet services and transactions was temporarily preempted, and that preemption was later extended (P.L. 108-435, enacted in 2004; P.L. 110-108, enacted in 2007).⁶
- State and local governments were required to meet a set of standards for issuing driver's licenses, identification cards, and vital statistics documents (P.L. 108-458, enacted in 2004, authorized funding to help governments comply).⁷
- Matching federal payments for some child support spending were eliminated (P.L. 109-171, enacted in 2006).⁸
- State and local governments were directed to withhold taxes on certain payments for property and services (P.L. 109-222, enacted in 2006).⁹
- Two requirements were imposed on rail and transit owners and operators: One requires all public transit and rail carriers to train workers and submit reports to the Department of Homeland Security (P.L. 110-53, enacted in 2007).¹⁰ The other requires commuter railroads to install train control technology (P.L. 110-432, enacted in 2008).¹¹

Which Legislation Is Not Subject to UMRA?

The Congress determined that some types of legislation should not be subject to UMRA's requirements. UMRA therefore excludes legislation from review for possible mandates if it

- Enforces the constitutional rights of individuals,
 - Establishes or enforces statutory rights that prohibit discrimination,
 - Provides emergency aid at the request of another level of government,
 - Requires compliance with accounting and auditing procedures for grants,
 - Is designated as emergency legislation,
 - Is necessary for national security or the ratification of a treaty, or
 - Relates to title II of the Social Security Act (Old-Age, Survivors, and Disability Insurance benefits).
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3. The minimum wage provisions included in P.L. 104-188 were not included in versions of the bill that were reviewed by CBO for mandates. For information about the minimum wage increase in the 2007 law, see the *cost estimate for H.R. 2, the Fair Minimum Wage Act of 2007* (January 11, 2007).
 4. Congressional Budget Office, *cost estimate for S. 1150, the Agricultural Research Extension and Education Reform Act of 1997* (September 4, 1997).
 5. Congressional Budget Office, *cost estimate for H.R. 1, the Medicare Prescription Drug and Modernization Act of 2003* (July 22, 2003).
 6. Congressional Budget Office, *cost estimate for S. 150, the Internet Tax Nondiscrimination Act* (September 9, 2003) and *cost estimate for H.R. 3678, the Internet Tax Freedom Act Amendments Act of 2007* (October 12, 2007).
 7. Congressional Budget Office, *cost estimate for H.R. 10, the 9/11 Recommendations Implementation Act* (October 5, 2004).
 8. Congressional Budget Office, *cost estimate, letter to the Honorable Charles B. Rangel regarding child support provisions in the conference agreement for S. 1932, the Deficit Reduction Act of 2005* (January 31, 2006).
 9. The determination of the Joint Committee on Taxation is mentioned in a letter from CBO to the Honorable William M. Thomas. See Congressional Budget Office, *cost estimate for H.R. 4297, the Tax Increase Prevention and Reconciliation Act of 2005* (May 9, 2006).
 10. Congressional Budget Office, *cost estimate for H.R. 1, the Implementing the 9/11 Commission Recommendations Act of 2007* (February 2, 2007).
 11. Congressional Budget Office, *cost estimate for H.R. 2095, the Federal Railroad Safety Improvement Act of 2007* (July 3, 2007).

In most years, 1 percent to 2 percent of the bills that CBO reviews have provisions that are covered by those exclusions. Most involve national security, constitutional rights, or Social Security and would not impose costly requirements.

What Kinds of Federally Imposed Costs Are Not Considered Mandates Under UMRA?

Some federal requirements—including those that state and local governments might find onerous or not adequately funded—do not meet UMRA’s definition of a mandate. In particular, conditions for obtaining most federal grants, even new conditions on existing grant programs, are generally not considered mandates. In addition, although UMRA contains a special provision for large entitlement programs (such as Medicaid and Temporary Assistance for Needy Families) under which grant conditions or reductions in funding could be considered mandates, that provision has applied to few of the legislative changes to those programs.

Grant Conditions

Complying with the conditions of grants can be burdensome. In particular, states often consider that new conditions attached to existing grant programs constitute duties that are not unlike mandates.¹² Two often-cited examples are the requirements school districts must meet to qualify for federal funding under NCLB and IDEA. NCLB requires states to design and implement statewide achievement testing; IDEA requires schools to develop an individualized education plan for each student with a disability. The federal assistance involved can be substantial: About \$31 billion was allocated initially by the government in 2009 for elementary and secondary education programs, and an additional \$26 billion was provided through the American Recovery and Reinvestment Act of 2009.

CBO has identified hundreds of bills that impose requirements on state, local, or tribal governments that are not mandates as defined in UMRA because they are tied to

federal assistance. In most cases, however, the costs of those requirements would not be significant, according to CBO’s estimates, or the costs would be covered if the federal funding authorized in the bills was appropriated.

Special Rule for Large Entitlement Programs

Although conditions for receiving federal grants are generally not mandates under UMRA, the law makes an exception for some large grant programs. Federal entitlement programs that provide \$500 million or more annually to state, local, or tribal governments receive special treatment. Specifically, any legislative proposal that would increase the stringency of conditions for or cap or decrease federal financial assistance under such a program would be a mandate if those governments lacked the authority to offset the new costs by amending their financial or programmatic responsibilities for the program. In general, that special definition of a mandate affects nine basic areas: Medicaid; Temporary Assistance for Needy Families; child nutrition programs; Food Stamps (now called the Supplemental Nutrition Assistance Program); Social Services Block Grants; Vocational Rehabilitation State Grants; foster care, adoption assistance, and independent living programs; family support payments for the Job Opportunities and Basic Skills program; and the Child Support Enforcement Program.

CBO has reviewed scores of proposals since UMRA’s enactment that affect large grant programs. In most cases, CBO’s conclusion has been that even if new conditions or reductions in federal financial assistance imposed significant costs, state or local governments generally had enough flexibility to offset those costs by changing benefit amounts or enrollment requirements. For example, H.R. 5613 (Protecting the Medicaid Safety Net Act of 2008) would have required states to electronically verify the assets of Medicaid enrollees. CBO determined that the new requirement would not constitute a mandate because states could offset additional costs by making programmatic changes. State governments could choose to curtail or eliminate support for prescriptions or dental care, for example, or cut services for some groups of beneficiaries, such as pregnant women whose family income is above some threshold. The options written into Medicaid’s rules give states substantial flexibility: Some estimates indicate that more than 60 percent of Medicaid spending by the states is for optional services or optional categories of beneficiaries. Even though the degree of flexibility varies from state to state and such programmatic changes often are politically unpalatable or run

12. See, for example, *Mandate Monitor*, a newsletter published by the National Conference of State Legislatures. The organization’s Web site states that it “uses a definition of ‘unfunded mandate’ that is broader than the one included in UMRA,” www.ncsl.org/StateFederalCommittees/BudgetsRevenue/MandateMonitorOverview/tabid/15850/Default.aspx.

counter to other policy goals, the additional costs stemming from federal actions—although quite real—could be offset by changes in state or local policies.

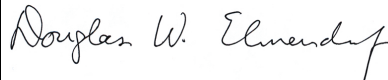
The Congress has considered, but has not enacted, legislation to change the definition of an intergovernmental mandate as it relates to large grant programs. Under one proposal, a change to an entitlement program that imposed new conditions on states or decreased federal funding by more than the UMRA threshold would constitute an intergovernmental mandate unless the bill making the change also gave states and localities new flexibility in the program to offset the new costs. Under that definition, the fact that states have significant flexibility under current law to reduce or eliminate optional services in most of those programs would not be considered in determining whether the proposed change was a new mandate.

How Does UMRA Treat Preemptions of State and Local Law?

In its mandate statements, CBO identifies explicit preemptions of state law as intergovernmental mandates. The number of mandate statements that identified preemptions has varied widely from year to year since 1996, but on average about half of the statements that identified mandates also identified preemptions. That

said, mandates with total direct costs below the statutory threshold—which is usually the case with preemptions of state law—are not subject to the point of order under UMRA that relates to the threshold, even if those mandates would restrict state and local authority. The legislative hurdles posed by UMRA have not greatly affected the consideration or enactment of such preemptions. (The exceptions involved preemptions that would significantly affect states' taxing authority, such as those in the Internet Tax Freedom Act of 1997 [extended twice, in 2004 and 2007] and the Medicare Prescription Drug and Modernization Act of 2003.) Consequently, UMRA generally has not affected the consideration of federal preemptions of state and local laws.

This document was prepared by Leo Lex of CBO's Budget Analysis Division to update *Identifying Intergovernmental Mandates* (2005), a CBO Economic and Budget Issue Brief written by Theresa A. Gullo. CBO's annual review of its activities under UMRA and its cost estimates, including mandate statements for individual bills, are available online at www.cbo.gov.



Douglas W. Elmendorf
Director