UNFUNDED MANDATES—A FIVE-YEAR REVIEW AND RECOMMENDATIONS FOR CHANGE

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON GOVERNMENT REFORM

AND THE

SUBCOMMITTEE ON TECHNOLOGY AND THE HOUSE

OF THE

COMMITTEE ON RULES

HOUSE OF REPRESENTATIVES

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UNFUNDED MANDATES—A FIVE-YEAR REVIEW AND RECOMMENDATIONS FOR CHANGE

THURSDAY, MAY 24, 2001

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS, COMMITTEE ON GOVERNMENT REFORM, JOINT WITH THE SUBCOMMITTEE ON TECHNOLOGY AND THE HOUSE, COMMITTEE ON RULES,

Washington, DC.

The subcommittees met, pursuant to notice, at 10:36 a.m., in room 2154, Rayburn House Office Building, Hon. Doug Ose (chairman of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs) presiding.

Present from the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs: Representatives Ose, Otter, and Tierney.

Present from the Subcommittee on Technology and the House: Representatives Linder and Sessions.

Staff present from the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs: Dan Skopec, staff director; Barbara Kahlow, deputy staff director; Regina McAllister, clerk; Elizabeth Mundinger, minority counsel; and Jean Gosa, minority assistant clerk.

Staff present from the Committee on Rules: Seth Webb, professional staff member; Don Green, staff director of Subcommittee on Technology and the House; and Adam Jarvis, clerk.

Mr. OSE. I want to call this meeting to order. I want to ask unanimous consent that the rules of the Rules Committee apply to today's joint hearing. Without objection, so ordered.

I also ask unanimous consent, when he is able to join us, that Mr. Portman be able to participate in today's hearing. Without objection, so ordered.

I want to call on the gentleman from Georgia for his opening statement.

Mr. LINDER. Thank you, Mr. Chairman. Thank you, Chairman Ose, for calling the joint hearing of our two subcommittees to order. I look forward to our hearing this morning for a couple of reasons.

First, it is the inaugural hearing of the Rules Subcommittee on Technology and the House for the 107th Congress. At the start of this Congress, we slightly altered the subcommittee's name to reflect the fact that we will continue to be active in longstanding areas of the subcommittee's original jurisdiction, such as unfunded mandates, and we will also look into higher profile issues, such as

examining how the technological advances of recent years affect the House as an institution and the legislative process.

In this respect, I am pleased that the subcommittee's first hearing in this Congress will take a look at the success story that we have had with regard to unfunded mandates reform over the past 5 years.

Second, I look forward to working with you, Chairman Ose, in your capacity as the chairman of the Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs. Our subcommittees share jurisdiction over certain portions of the Unfunded Mandates Reform Act.

As such, I believe that we share the common goal of today's hearing; namely, highlighting the success of UMRA over the last 5 years in reducing the number and scope of enacted laws that contain unfunded mandates and raising the consciousness level of our Members of the House and its standing committees, and our staffs, about unfunded mandates earlier in the legislative process so as to maximize our ability to either eliminate or greatly reduce unfunded mandates before such measures come to the House floor.

I believe that the key to our success over the last 5 years in either eliminating unfunded mandates from being enacted into law or greatly reducing their scope and cost has been the change that UMRA made to the rules governing the consideration of certain legislation on the House floor.

Specifically, Section 425 of the 1974 Congressional Budget Act establishes a point of order that lies against authorizing legislation contained in an unfunded intergovernmental mandate exceeding $56 million.

Furthermore, Section 426 of the Congressional Budget Act establishes a point of order that lies against a rule governing consideration of a measure containing an unfunded intergovernmental mandate exceeding this level, if the rule waives the initial point of order with respect to the underlying authorizing legislation.

In other words, with these two procedural safeguards, the full House of Representatives is required to debate, consider and ultimately pass judgment on either underlying legislation seeking to enact an unfunded mandate exceeding $56 million, or a rule that seeks to waive this point of order.

This represents a sharp break from the practices that were in effect prior to UMRA's enactment; namely, routinely moving legislation through the House of Representatives without even a moment's consideration as to whether or not it contained an unfunded intergovernmental mandate.

Given these difficult hurdles to overcome, is it any surprise that the CBO found in an annual report submitted in January 1997, February 1998, February 1999 and March 2000 that the number of legislative measures with unfunded intergovernmental mandates exceeding these levels were very, very small, usually about 1 percent of the legislation that the CBO reviewed under UMRA? And, the number of bills with such unfunded intergovernmental mandates that were finally enacted into law was an even smaller subset of these groupings.

Stated differently, in the years since UMRA was enacted, more than 99 percent of the legislation that we the Congress have en-

acted into law contained either no unfunded mandates at all or unfunded mandates that did not exceed UMRA's threshold levels.

I appreciate the fact that Dan Crippen is with us. Nice to see you again. He will release the report and I look forward to his remarks, as well as the testimony of OMB Director Mitchell Daniels. I also look forward to the other witnesses we will hear from this morning, including the National Governors' Association, the National Conference of State Legislatures, and the U.S. Chamber of Commerce, all of which will talk about their experience with UMRA and unfunded mandates over the last 5 years.

Mr. Chairman, thank you for the opportunity to make this statement. Today's hearing will be insightful, and I look forward to my subcommittee working with your subcommittee in the future.

[The prepared statement of Hon. John Linder follows:]

OPENING STATEMENT
REP. JOHN LINDER, CHAIRMAN
RULES SUBCOMMITTEE ON TECHNOLOGY AND THE HOUSE
MAY 24, 2001
"UNFUNDED MANDATES: A FIVE-YEAR REVIEW & RECOMMENDATIONS FOR CHANGE"

Thank you, Chairman Ose, for calling the joint hearing of our two subcommittees to order. I look forward to our hearing this morning for two reasons.

First, it is the inaugural hearing of the Rules Subcommittee on Technology and the House for the 107th Congress. At the start of this Congress, we slightly altered the Subcommittee's name to reflect the fact that we will continue to be active in longstanding areas of the Subcommittee's original jurisdiction, such as unfunded mandates, and we will also look to take a higher-profile role in examining how the technological advances of recent years affect the House as an institution, and the legislative process.

In this respect, I am pleased that the Subcommittee's first hearing in this Congress will take a look at the "success story" we have had with regard to unfunded mandates reform over the past five years.

Secondly, I look forward to working with you, Chairman Ose, in your capacity as chairman of the Government Reform Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs. Our Subcommittees share jurisdiction over certain portions of the Unfunded Mandates Reform Act, or ("UMRA").

As such, I believe that we share the common goal of today's hearing: namely, highlighting the success of UMRA over the last five years in reducing the number and scope of enacted laws that contain unfunded mandates, and raising the consciousness level of members of the House and its standing Committees, and our staffs, about unfunded mandates earlier in the legislative process so as to maximize our ability to either eliminate, or greatly reduce, unfunded mandates before such measures come to the House floor.

I believe that the "key" to our success over the last five years in either eliminating unfunded mandates from being enacted into law, or greatly reducing their scope and cost, has been the change that UMRA

made to the rules governing the consideration of certain legislation on the House floor.

Specifically, Section 425 of the 1974 Congressional Budget Act establishes a point of order that lies against authorization legislation containing an unfunded intergovernmental mandate exceeding $56 million.

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This represents a sharp break from the practices that were in effect prior to UMRA's enactment, namely, routinely moving legislation through the House of Representatives without even a moment's consideration to whether or not it contained an unfunded intergovernmental mandate.

Given these difficult hurdles to overcome, is it any surprise that the CBO found in annual reports submitted in January of 1997, February of 1998, February of 1999, and March 2000, that the number of legislative measures with unfunded intergovernmental mandates exceeding these levels was very, very small? – usually about 1 percent of the legislation that the CBO reviewed under UMRA. And, the number of bills with such unfunded intergovernmental mandates that were finally enacted into law was an even smaller subset of these groupings.

Or, stated a little differently, in the years since UMRA has been enacted, more than 99 percent of the legislation that the Congress has enacted into law contained either no unfunded mandates at all or unfunded mandates that did not exceed UMRA's threshold levels.

I very much appreciate the fact that CBO Director Crippen will releasing the CBO's newest report on UMRA at today's hearing, and I look forward to his remarks, as well as the testimony of OMB Director Daniels.

I also look forward to the other witnesses we will hear from this morning, including the National Governors' Association, the National Conference of State Legislatures, and the U.S. Chamber of Commerce, all of which will talk about their experiences with UMRA and unfunded mandates over the last five years.

Mr. Chairman, thank you for the opportunity to make this opening statement. Today's hearing will be quite insightful, and I look forward to my Subcommittee working with your Subcommittee in the future.

Mr. OSE. I thank the gentleman from Georgia. I want to explore a couple of things here. I know Mr. Tierney has an opening statement. I have an opening statement. Mr. Otter, do you have an opening statement?

Mr. OTTER. Yes.

Mr. OSE. Mr. Sessions, do you have an opening statement?

Mr. SESSIONS. Mr. Chairman——

Mr. OSE. I am just trying to determine whether or not you have one.

Mr. SESSIONS. The answer is, it would be brief.

Mr. OSE. OK. The question I have for the members is whether or not—given the vote and the time value for our witnesses, whether we ought to just submit our statements for the record so when we come back from the vote, we can go straight to the witness testimony.

Mr. TIERNEY. No objection on the minority side.

Mr. OSE. Would that be agreeable to the majority side?

All right, without objection we will submit our statements for the record. I appreciate that.

[The prepared statements of Hon. Doug Ose, Hon. C.L. "Butch" Otter, Hon. John F. Tierney, and Hon. Rob Portman follow:]

Chairman Doug Ose
Opening Statement
Unfunded Mandates - A Five-Year Review and Recommendations for Change
May 24, 2001

In defending the new Constitution, James Madison wrote, "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." He further noted, "The powers delegated by the proposed Constitution to the federal government are few and defined."

This original concept of "few and defined" powers has eroded over the last 200 years. Today, the twin powers of Spending and the Commerce Clause have magnified the Federal government's meddling far beyond our founding fathers' wildest imaginations. Mandates flow out of Washington like a thousand streams.

In some cases mandates are imposed directly by Congress, such as the minimum wage, health insurance portability, and clean air. Some mandates, however, come not from Congress, but out of agencies. For example, last year, the Environmental Protection Agency (EPA) issued a new rule designed to help clean our rivers, lakes and streams - popularly known as the TMDL (Total Maximum Daily Load) rule. According to the National Governors' Association (NGA), the TMDL rule will cost State governments between $1 and $2 billion simply to conduct the surveys required by the new EPA rule. Another example is Labor's ergonomics rule, which was intended to protect workers' health. Labor estimated that the rule would cost $4.5 billion annually but others estimated it would cost up to $100 billion annually - all of it a mandate and none of it funded by the Federal government.

In 1995, after an outcry about the unfairness and burden of unfunded mandates, Congress enacted the Unfunded Mandates Reform Act (UMRA). The Act was designed to ensure that the Federal government fully considers the effects of unfunded mandates - which levy new Federal requirements without Federal funding - before imposing them on State and local governments or the private sector. The Act established new procedures for both the Legislative and Executive Branches.

One of the principal questions facing us today is, after five years of experience, how well is UMRA working? Today's hearing will reveal the relative effectiveness of the provisions governing Congress, and the ineffectiveness of the provisions governing the Executive Branch.

In 1998, the General Accounting Office (GAO) issued a report on UMRA. GAO found that there were no written statements (including cost-benefit analyses) for 80 of the 110 economically significant rules issued during the first two years under UMRA. GAO also found that none of the four agencies - Agriculture, Health and Human Services (HHS), Transportation and EPA - examined changed their intergovernmental consultation process as a result of the passage of UMRA. I think the title of the report GAO report pretty well sums it up: "Unfunded Mandates - Reform Act Has Had Little Effect on Agencies' Rulemaking Actions."

Part of the reason for this "little effect" may be due to OMB's guidance and ineffective oversight. OMB's early guidance to the agencies was minimal and, worse, not enforced. For example, OMB's guidance states that "[i]ntergovernmental consultation should take place as early in the regulatory process as possible ... before publication of the notice of proposed rulemaking." Several of today's witnesses will discuss their experience with late or no consultation.

More disconcerting has been the fact the OMB oversight has not improved since the 1998 GAO report. For example, last summer, OMB approved EPA's costly TMDL rule. But, on July 28, 2000, GAO determined that EPA had incorrectly determined that its TMDL rule contained no intergovernmental or private-sector mandate of $100 million or more. Why did OMB turn a blind eye to such an obvious unfunded mandate? Several witnesses today will discuss recent rules with unfunded mandates not recognized by the agencies.

Also, OMB appears not to have rejected intergovernmental and private-sector proposed rules which did not include a reasonable number and range of regulatory alternatives or which did not provide a traditional cost-benefit analysis so that the agency could "select the least costly, most cost-effective or least burdensome alternative," as UMRA intended. Witnesses today will discuss if the alternatives they identified were fully analyzed or accepted by the agencies.

To date, CBO has issued four annual reports on experience under UMRA. These reports revealed 29 bills from 1996-1999 with an intergovernmental mandate over $50 million. Only two of these were enacted: an increase in the Federal minimum wage and a cap on the Federal contribution for administration of the Food Stamps program. There were 94 bills in the same four-year period with a private-sector mandate over $100 million. Of these, 16 were enacted.

To date, OMB has issued five annual reports on agency compliance with UMRA. These reports revealed from 13 to 17 proposed or final rules each year with a mandate over $100 million. EPA had more rules than all other agencies combined. Transportation imposed the next most, followed by HHS, Labor, Energy, and Agriculture.

Ultimately the central issue of unfunded mandates comes down to the allocation of scarce resources. This issue of allocating resources reminds me of how to divide the last piece of cake between my two daughters. There is always much less griping if I let one daughter cut the cake but let the other one choose the first piece. Implicit in this process is the principle that the decision-maker - the one cutting the cake - bears some cost when the decision is made.

I look forward to the testimony of our witnesses on how UMRA can work better. Panel I includes CBO Director Dan Crippen, who will testify about the Legislative Branch, and OMB Director Mitchell Daniels, who will testify about the Executive Branch. Panel II includes: Paul Mannweiler, Indiana State Representative and Immediate Past President, National Conference of State Legislatures; and Raymond Scheppach, Executive Director, NGA. Panel III includes: Scott Holman, President and Chief Executive Officer, Bay City, Inc., Bay Cast, Michigan and Chairman, Regulatory Affairs Committee, U.S. Chamber of Commerce; and William Kovacs, Vice President, Environment and Regulatory Affairs, U.S. Chamber of Commerce.

Statement of U.S. Representative C.L. "Butch" Otter
Joint Hearing Assessing the Unfunded Mandate Relief Act
House Subcommittee on Energy Policy,
Natural Resources & Regulatory Affairs
May 24, 2001

Thank you, Chairman Ose and Chairman Linder for calling this very important hearing to review the effectiveness and implementation of the Unfunded Mandates Relief Act that was passed by Congress in 1995 to provide relief to states, local governments, and small businesses burdened by federal mandates.

While I wish we could say that the Unfunded Mandates Relief Act has been a complete success, it is clear that there is much to be concerned about the way federal agencies have ignored the intent of Congress. The Unfunded Mandates law is a good law—former Senator and now current Governor of Idaho Dirk Kempthorne authored this important legislation. Unfortunately, it really has never been properly implemented.

Federal agencies in the previous Administration actually ignored provisions that would require them to be more accountable for the dozens of new rules and regulations they impose every year on rural towns, cities, counties, states, tribal governments, and small businesses. The growth of unfunded mandates strengthens the resolve of many of us in Congress to see that more of taxpayers' money should be given back to them through tax relief, rather than to federal agencies to devise more burdensome regulations with that money.

While Congress certainly shares some blame for federal mandates through laws it has passed over the years, since passage of the Unfunded Mandates Relief Act, Congressionally-imposed mandates have substantially decreased.

Unfortunately, the federal agencies--which are run by unelected officials accountable only to how many rules they create or enforce--have proposed thousands of new rules over the last five years since the Act passed. Of these, the Office of Management and Budget admits that federal agencies dumped **80** new unfunded mandates that will cost local, state, tribal, and businesses over $100 million to fulfill.

For example, the Environmental Protection Agency has imposed an average of eight stringent new regulations per year, each year, from 1996 to 2000, such as the Total Maximum Daily Load (TMDL) regulation. This rule creates a new federal bureaucracy to handle duties that the Clean Water Act delegated to the states, and authorizes EPA to require permits for cities, industrial and agricultural activities. Estimates have indicated that implementing TMDLs in all states would cost over $1.2 billion *per year*, a cost which in turn, will be passed to local governments and businesses nationwide.

Compliance costs for EPA's proposed air quality standards for fine particulate matter could tax states and local governments as much as $150 billion. In Idaho, highway safety maintenance and agricultural burning activities have literally been shut down by this regulation.

In the Pacific Northwest, citizens are paying for Endangered Species Act mandates to recover 14 species of listed fish through higher electricity rates, their taxes, relinquishment and spill over dams of their water, and millions of dollars caused by the delay of hundreds of activities that must be permitted by the National Marine Fisheries Service.

Thankfully, the Bush Administration and this Congress believe we must examine the costs and benefits of new regulations, and where appropriate, reject them. I was pleased to join my colleagues in this Congress with President Bush in stopping the Department of Labor's ergonomic rule--potentially a hugely expensive unfunded mandate.

Mr. Chairman, I look forward to hearing from the panelists today and working with you to see that the Unfunded Mandate Relief Act is fully implemented as Congress originally intended.

Statement of Rep. John Tierney
Ranking Minority Member
May 24, 2001 Hearing on Unfunded Mandates

Mr. Chairman, thank you for holding this hearing. The Unfunded Mandates Reform Act was enacted over five years ago in order to improve the relationship between the federal government and state and local governments.

State and local governments are our partners in serving the American public. It is important for the federal government to work with them when developing legislation and rules. And the federal government should be fully aware when it is considering imposing expensive requirements on state and local governments.

Title I of the Unfunded Mandates Reform Act requires Congressional committees to describe whether federal legislation would require state and local governments to spend money without providing federal funding to pay the costs. Furthermore, it allows members to raise a point of order against consideration of a bill if unfunded mandates are not adequately described or if the legislation would

require state and local governments to spend more than 50 million dollars in one year.

In the last two Congresses, we considered legislation that also would have created a point of order when legislation imposed responsibilities on the private sector that exceed 100 million dollars in one year without providing funding to pay the private sector for compliance. Similar legislation has been introduced this year as well. I am concerned that such a change would make it more difficult to pass legislation that is in the public interest -- such as environmental, public health, and labor protections. I am also concerned that it would create a presumption that taxpayers should pay companies to stop polluting and pay companies to fix defects in their products that pose a danger to children and others.

Mr. Chairman, Title II of the Unfunded Mandates Reform Act requires agencies to analyze unfunded mandates and to consult with state and local governments when developing regulations that impose significant unfunded mandates on them.

Three years ago, the General Accounting Office - or GAO - reviewed the agencies' compliance with Title II in a report entitled "Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions." The Title to the report refers to, among other things, GAO's conclusion that most of the requirements in Title II were already being fulfilled by agencies. Thus, passage of the Act did not change agency behavior. The Clinton Administration had already passed an Executive Order that required agencies to analyze the costs and benefits of rules – including their impact on state and local governments and an Executive Order that required agencies to consult with state and local governments when developing regulations.

However, Mr. Chairman, I don't believe that the GAO concluded that the Act was unnecessary. In fact, the Act ensures that other Administrations adopt similar policies.

Mr. Chairman, it is my understanding that a number of today's witnesses may refer to the title of this GAO report in their testimony as evidence that agencies did not comply with the Act's Title II requirements. However, the GAO found

that the agencies were generally in compliance with the Act. It found only one instance where an agency was not in compliance. In that case, the agency had done the required substantive mandates analyses for two clean air rules, but had failed to provide the analyses to the Congressional Budget Office.

Mr. Chairman, I ask unanimous consent to include the GAO report in the record in order to clear up any confusion about its conclusions. I would also like to include testimony and views of witnesses and members opposing the legislation that would create a point of order against legislation that imposes certain private sector mandates and other relevant materials.

Mr. Chairman, I strongly support efforts to ensure that the federal government is working with state and local governments to utilize taxpayer funds in a manner that best serves the American public. I hope that we learn that the Unfunded Mandates Reform Act has helped us move forward in this area. I look forward to hearing from the witnesses.

Statement of The Honorable Rob Portman

Before the

House Government Reform

Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs

and the

House Rules

Subcommittee on Technology and the House

May 24, 2001

Thank you, Mr. Chairman, and members of the Subcommittees for the opportunity to participate in today's hearing. As you will recall, 394 Members of the House and 91 Members of the Senate voted to pass the Unfunded Mandates Reform Act of 1995, also known as UMRA, which I was proud to have played a significant role in developing.

UMRA ensured that, for the first time, before the House voted on measures that imposed unfunded mandates 1) Congress understood the costs to state and local governments and the private sector; and 2) with regard to the public sector, had a separate debate and vote on whether to consider the legislation, notwithstanding the unfunded mandate. This additional requirement on the public sector doesn't eliminate mandates on states and local governments - but it does ensure we do so with complete information, a separate debate, and full accountability.

And, we have a good track record. The practical impact of the UMRA has generally

been to force committees to address the mandates issue long before bills reach the House floor. In the first key test case -- the Telecommunications Act of 1996 -- the threat of the point of order ensured that the Commerce Committee did not impose significant unfunded mandates on local governments. Knowing the Act would be subject to a point of order on the floor that would highlight the mandates issue, the Committee worked with us and local governments to address their concerns.

The process worked, and without it, the Committee was poised to go forward with provisions that would have imposed significant costs on local governments. In other cases, the point of order has been raised on the floor, forcing a debate over the mandate and the significant costs imposed on the public and private sectors. The point is simple -- UMRA has given state and local governments a valuable tool to get mandates issues considered and addressed at the committee level before they reach the floor – and, if that fails, to force a debate on the floor. But it is also flexible enough to permit the Congress to pass legislation imposing unfunded mandates when the merits of the bill override the negative impact of the mandates.

You also will recall that Title II UMRA requires that federal agencies prepare written statements that identify costs and benefits of a federal mandate to be imposed through the rule making process. The requirement applies to regulatory action determined to result in costs of $100 million or more in any one year. These assessments must identify the share of costs to be borne by the federal government and disproportionate costs on individual regions or the private sector. They must also include estimates of the effect on the national economy.

UMRA also requires that federal agencies consider a reasonable number of policy options and select the most cost-effective or least burdensome alternative.

Unfortunately, federal agencies have not been as effective as Congress in implementing UMRA. The legislation was meant to provide for consultation between the agencies and state and local governments regarding rulemaking. This simply has not materialized. Without this consultation, the Executive branch runs the risk of implementing rules that add unnecessary burdens to state and local governments. I am very pleased that this Administration has committed to making Title II of UMRA more effective. In fact, the President established an Interagency Working Group of Federalism to deal with, among other issues, better implementation of UMRA.

Mr. Chairman, I am pleased that the Congressional Budget Office has released its Five Year Report on UMRA and Unfunded Mandates and I applaud its continued efforts in informing Congress on the issue of unfunded mandates. I look forward to reviewing the report in greater detail and working with these Subcommittees to make UMRA even more effective.

Mr. Chairman, I sincerely appreciate all the cooperation and assistance we have received from these Subcommittees and staff over the last several years during consideration and implementation UMRA. Thank you again for allowing me to participate this morning.

Mr. TIERNEY. Mr. Chairman.

Mr. OSE. Yes, Mr. Tierney.

Mr. TIERNEY. I am happy to submit my statement into the record and only ask unanimous consent also to include the GAO report in the record. I think there is confusion as to what that report says, and I would like to make sure that it is in there for that purpose——

Mr. OSE. Without objection.

Mr. TIERNEY [continuing]. And also to include some testimony and views by witnesses and members in opposition to the legislation that would create a point of order against legislation that imposes private-sector mandates and other relevant materials.

Mr. OSE. Without objection, so ordered.

Mr. TIERNEY. Thank you.

[NOTE.—The GAO report entitled, "Unfunded Mandates, Reform Act Has Had Little Effect on Agencies' Rulemaking Actions," GAO/GGD–98–30, may be found in subcommittee files. The report may also be obtained from GAO by calling 202–512–6000.]

Mr. OSE. We are going to go ahead and recess so we can go vote. All our statements are going to be in the record. So when we get back here, we are going to hear from the both of you.

[Recess.]

Mr. OSE. Again, welcome everybody. I appreciate your joining us. We have three panels today testifying before us. Our first panel is composed of the Director of the Congressional Budget Office and Director of the Office of Management and Budget. That would be Mr. Dan L. Crippen and Mr. Mitchell E. Daniels, Jr., respectively, and we are very grateful for your joining us. And, let's see, Mr. Crippen, you are listed first, so we are going to give you the opportunity to proceed first. If you could summarize your statement, keeping it to 5 minutes, then we could get to our questions quickly.

Mr. Crippen.

STATEMENTS OF DAN L. CRIPPEN, DIRECTOR, CONGRESSIONAL BUDGET OFFICE; AND MITCHELL E. DANIELS, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Mr. CRIPPEN. Mr. Chairman. Mr. Chairman, and members of the subcommittees—I underline the plural nature of subcommittees. It is rare to appear before two at a time—I am pleased to be here today to discuss our report of the Unfunded Mandates Reform Act's first 5 years. In our view, UMRA has achieved its primary objective. It has informed the Congress about mandates included in legislation. That information has prompted a number of bills to be changed so as to reduce or eliminate the cost of mandates, and a few mandates, albeit ones that were less costly, were funded along the way.

Since 1996, CBO has provided mandate cost statements for nearly all the bills reported by authorizing committees. It has also given information about mandates to Members and congressional staff at other stages in the legislative process.

Over the past half decade, several patterns about Federal mandates and their costs have become clear, as these two posters suggest, Mr. Chairmen. Most of the legislation that the Congress considered between 1996 and 2000 did not contain Federal mandates

as defined by UMRA. Of the more than 3,000 bills and other legislative proposals we reviewed during that period, 12 percent contained intergovernmental mandates and 14 percent contained private-sector mandates.

Most of those mandates would not have imposed costs greater than the thresholds set by UMRA. Only 32 bills with intergovernmental mandates over these 5 years had annual costs of $50 million or more, and some 100 of the bills with private-sector mandates had costs of more than $100 million. Few of the bills with either kind of mandate, however, contained Federal funding to offset the costs.

Although the percentage of bills containing a Federal mandate stayed fairly constant over the past 5 years, the percentage of bills with mandates over the statutory thresholds declined. Bills with intergovernmental mandates above the threshold decreased from 2 percent in 1996 to less than 1 percent in 2000, and bills with private-sector mandates above the threshold dropped from 6 percent in 1996 to about 1 percent in 2000.

Last observation, Mr. Chairmen: Few mandates with costs over the UMRA thresholds were enacted in the past 5 years. Only two intergovernmental mandates with annual costs of at least $50 million became law. Sixteen private-sector mandates with costs over the $100 million threshold were enacted.

Mr. Chairmen, before I conclude, I want to take this opportunity to report on behalf of my colleagues here today and the rest of CBO that this is not particularly easy stuff. Determining what constitutes a mandate under the act can be complicated. For example, the law defines a mandate as "an enforceable duty, except, . . . a duty arising from participation in a voluntary Federal program."

Very often, those distinctions between what is voluntary and what is mandatory are far from clear. Even when we determine that a legislative proposal contains a mandate, we face numerous challenges in estimating the cost. In some cases, accurately determining how many State and local government entities or entities in the private sector would be affected by a mandate is next to impossible. In other cases, the entities that will be subject to a particular mandate are diverse and would not be affected uniformly. In other instances, it may be impossible to estimate the cost of a mandate at the legislative stage, before regulations to implement it have been developed.

Fortunately, UMRA requires us to determine whether the cost of complying with mandates would exceed specific thresholds. If, however, it required us to provide more detailed estimates for each mandate, we would have a much tougher time and expend considerably more resources. Unlike our estimates of impacts on the Federal budget, for which we have extensive models, data, history, and experience, it takes a considerable amount of time to put together just the relevant data in many of these cases. Frankly, we probably couldn't do it without the help of the affected governments and industries, who you will be hearing from today.

Despite these mitigating factors, you can imagine the effort required to examine every bill reported from every committee, and some that are not, to determine whether a mandate is included and then estimate its cost. As you can see from the list in our report,

there are at least 28 people, well over 10 percent of our work force, who get involved in one way or another in mandates assessment. In budgetary parlance, we dedicate 16 full time equivalents and over $2 million a year to mandates assessment.

It is a big effort and may well be worth it. Clearly the law and its requirements have changed the way Congress thinks about mandates, although it has not always altered the outcome for those with large costs.

Thank you, Mr. Chairmen.

[The prepared statement of Mr. Crippen follows:]

CBO TESTIMONY

Statement of
Dan L. Crippen
Director

CBO's Activities Under the Unfunded Mandates Reform Act

before the
Subcommittee on Technology and the House
Committee on Rules
and the
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives

May 24, 2001

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CONGRESSIONAL BUDGET OFFICE
SECOND AND D STREETS, S.W.
WASHINGTON, D.C. 20515

Mr. Chairmen and Members of the Subcommittees, I am pleased to be here today to discuss the activities of the Congressional Budget Office (CBO) under the Unfunded Mandates Reform Act (UMRA). CBO's report on UMRA's first five years is being released at this hearing, and my statement this morning will summarize that report's major conclusions.

The Unfunded Mandates Reform Act was designed to focus more attention on the costs of mandates that the federal government imposes on other levels of government and the private sector. UMRA's supporters had many goals for the legislation, including ensuring that the Congress had information about the costs of mandates before it decided whether to impose them, and encouraging the federal government to provide funding to cover the costs of intergovernmental mandates.

To accomplish those goals, title I of UMRA established requirements for reporting on federal mandates and set up new legislative procedures. Under the law, the House and Senate are prohibited from considering legislation that contains mandates unless certain conditions are met. For example, consideration of a reported bill is not in order unless the committee reporting the bill has published a CBO statement about the costs of any private-sector or intergovernmental mandates in the bill. In addition, Members of Congress may raise a point of order against legislation that would create an intergovernmental mandate over the cost threshold specified in UMRA, unless the legislation provides funding to cover those costs. Such procedural requirements do not stop the Congress from passing bills it wants to pass, but they can raise the stakes in deliberating unfunded mandates.

In the five years since UMRA took effect, both the amount of information about mandate costs and interest in that information have increased considerably. As a result, numerous pieces of legislation that originally contained significant unfunded mandates were amended to either eliminate the mandate altogether or lower the costs of the mandate. In many of those cases—such as a requirement that driver's licenses show Social Security numbers, a

moratorium on certain taxes on Internet services, preemptions of state securities fees, and requirements in the farm bill affecting the contents of milk—it was clear that information provided by CBO played a role in the Congress's decision to reduce costs. In that respect, as well as in increasing the supply of and demand for information about mandates, title I of UMRA has proved to be effective.

TRENDS IN FEDERAL MANDATES UNDER UMRA

Title I of UMRA requires CBO to prepare a mandate statement for bills approved by authorizing committees. The law requires CBO to address whether a bill contains federal mandates and, if so, whether the direct costs of those mandates would be greater than the thresholds established in UMRA. Those thresholds, which are adjusted annually for inflation, are costs of $50 million or more per year to the public sector (state, local, or tribal governments) or $100 million or more per year to the private sector in 1996 dollars.

Since 1996, CBO has provided mandate cost statements for nearly all of the bills reported by authorizing committees. It has also given information about mandates to Members and Congressional staff at other stages in the legislative process.

Over the past half decade, several patterns about federal mandates and their costs have become clear.

- Most of the legislation that the Congress considered between 1996 and 2000 did not contain federal mandates as UMRA defines them. Of the more than 3,000 bills and other legislative proposals that CBO reviewed during that period, 12 percent contained intergovernmental mandates and 14 percent contained private-sector mandates (see Table 1).

TABLE 1. NUMBER OF CBO MANDATE STATEMENTS FOR BILLS, PROPOSED AMENDMENTS, AND CONFERENCE REPORTS, 1996-2000

	1996	1997	1998	1999	2000	Five-Year Total
Intergovernmental Mandates						
Total Number of Statements Transmitted	718	521	541	573	706	3,059
Number of Statements That Identified Mandates	69	64	64	81	77	355
Mandate costs would exceed threshold[a]	11	8	6	4	3	32
Mandate costs could not be estimated	6	7	7	0	1	21
Private-Sector Mandates						
Total Number of Statements Transmitted	673	498	525	556	697	2,949
Number of Statements That Identified Mandates	91	65	75	105	86	422
Mandate costs would exceed threshold[a]	38	18	18	20	6	100
Mandate costs could not be estimated	2	5	9	13	7	36

SOURCE: Congressional Budget Office.

NOTE: The numbers in this table represent official mandate statements transmitted to the Congress by CBO. CBO prepared more intergovernmental mandate statements than private-sector mandate statements because in some cases it was asked to review a specific bill, amendment, or conference report solely for intergovernmental mandates. In those cases, no private-sector analysis was transmitted to the requesting Member or committee. CBO also completed a number of preliminary reviews and informal estimates for other legislative proposals that are not included in this table. Mandate statements may cover more than one mandate provision, and occasionally, more than one formal CBO statement is issued for each mandate topic.

a. The thresholds, which are adjusted annually for inflation, were $50 million for intergovernmental mandates and $100 million for private-sector mandates in 1996. They rose to $55 million and $109 million, respectively, in 2000.

- Most of those mandates would not have imposed costs greater than the thresholds set by UMRA. Only 32 of the bills with intergovernmental mandates had annual costs of $50 million or more, by CBO's estimate. (Over half of the intergovern-mental mandates that CBO identified were explicit preemptions of state or local authority. In most of those cases, the costs to comply with the preemptions were not significant.) Some 100 of the bills with private-sector mandates had costs of more

than $100 million a year. Few of the bills with either kind of mandate, however, contained federal funding to offset the costs of the mandates.

- Although the percentage of bills containing a federal mandate stayed fairly constant over the past five years, the percentage of bills with mandates over the statutory thresholds declined steadily. Bills with intergovernmental mandates above the threshold decreased from about 2 percent in 1996 to less than 1 percent in 2000, and bills with private-sector mandates above the threshold dropped from almost 6 percent in 1996 to less than 1 percent in 2000.

- Few mandates with costs over the UMRA thresholds were enacted in the past five years. Only two intergovernmental mandates with annual costs of at least $50 million became law—an increase in the minimum wage (in 1996) and a reduction in federal funding to administer the Food Stamp program (in 1997). Those enacted mandates represent less than 1 percent of the intergovernmental mandates that the Congress has considered since UMRA took effect.

  Sixteen private-sector mandates reviewed by CBO with costs over the $100 million threshold were enacted. Of those, eight involved taxes, three concerned health insurance (requiring portability of insurance coverage, minimum maternity stays, and changes in Medicare coverage), two dealt with regulation of industries (telecommunications reform and changes in milk pricing), two affected workers' take-home pay (increases in the minimum wage and in federal employees' contributions for retirement), and one imposed new requirements on sponsors of immigrants.

- In some cases, lawmakers have altered legislative proposals to reduce the costs of federal mandates before enacting them. Four intergovernmental and five private-sector mandates that CBO identified as having costs over the thresholds when they were approved by authorizing committees were amended before enactment to bring their costs below the thresholds.

THE NARROW SCOPE OF UMRA

The numbers presented here should be viewed in light of the fact that UMRA defines federal mandates narrowly. According to UMRA, the conditions attached to most forms of federal assistance (including most entitlement grant programs) are not mandates. In some cases, complying with such conditions of aid can be costly. For example, the Department of Transportation's appropriation act for fiscal year 2001 contained a provision known as the ".08 National Drunk Driving Standard." Under that provision, states will have four years to adopt a blood alcohol content of 0.08 as their standard for drunk driving without incurring penalties. If they do not adopt that standard by 2004, they will lose 2 percent of their federal highway funds, rising to 8 percent by 2007. In all, states could lose as much as several hundred million dollars in highway funds. Although such a requirement is clearly a condition for receiving federal assistance—and thus is not considered a mandate under UMRA—states often think of such new conditions on existing grant programs as duties not unlike mandates.

Between 1996 and 2000, CBO identified more than 450 bills that would impose those types of "nonmandate" costs on state, local, or tribal governments. In most cases, however, CBO estimated that such costs would not be significant. During that period, CBO also identified numerous bills that would benefit state, local, or tribal governments.

UMRA requires CBO to estimate the direct costs that entities affected by mandates will bear. But federal mandates also impose indirect costs, including the effects on prices and wages when the costs of a mandate imposed on one party are passed along to other parties, such as customers or employees. Those effects of federal legislation on other levels of government and the private sector are not subject to the requirements of UMRA. Nevertheless, CBO includes information about significant indirect effects in some of its cost statements for mandates over the threshold. When sufficient time and data are available, it also provides quantitative estimates of the size of those effects. For example, CBO analyzed the indirect effects of proposed mental health parity requirements, including possible reductions in workers' take-home pay, health insurance coverage, and fringe benefits. Similarly, CBO's analysis of proposed increases in the minimum wage included the possible impact on employment of low-wage workers.

The scope of UMRA is further narrowed by the fact that the law does not apply to legislative provisions that deal with constitutional rights, discrimination, emergency aid, accounting and auditing procedures for grants, national security, treaty ratification, and title II of Social Security (Old-Age, Survivors, and Disability Insurance benefits). Roughly 5 percent of the bills that CBO reviewed in the past five years contained provisions that fit within those exclusions. Many of them addressed constitutional rights or national security issues.

CHALLENGES TO CBO IN IMPLEMENTING UMRA

Determining what constitutes a mandate under UMRA can be complicated. For example, the law defines a mandate as "an enforceable duty except . . . a duty arising from participation in a voluntary federal program." Although an activity (such as sponsoring an immigrant's entry into the United States) may be voluntary, the federal program affecting

that activity (immigration laws) is not. In that case, a bill imposing new requirements on the sponsors of immigrants would constitute a mandate under UMRA. In contrast, other federal programs that are truly voluntary in nature may impose requirements on their participants that, by UMRA's definition, are not mandates. Those distinctions between what is voluntary and what is mandatory are not always clear.

Even when CBO determines that a legislative proposal contains a federal mandate, the agency faces numerous challenges in estimating the costs of the mandate. In some cases, accurately determining how many state and local governments or entities in the private sector would be affected by a mandate is impossible. In other cases, the entities that would be subject to a particular mandate are diverse and would not be affected uniformly, making it difficult to total the incremental costs of compliance for all parties that would be affected. In other instances, it may be impossible to estimate the costs of a mandate at the legislative stage, before regulations to implement it have been developed. Even the mandated parties may not be able to estimate costs reliably without knowing what the regulations to carry out the mandate will entail.

Fortunately, UMRA requires CBO to determine whether the costs of complying with mandates would exceed specific thresholds and to provide cost estimates only for mandates that would do so. If UMRA required CBO to provide more-detailed estimates for each mandate, the agency's job would be considerably more difficult and time consuming.

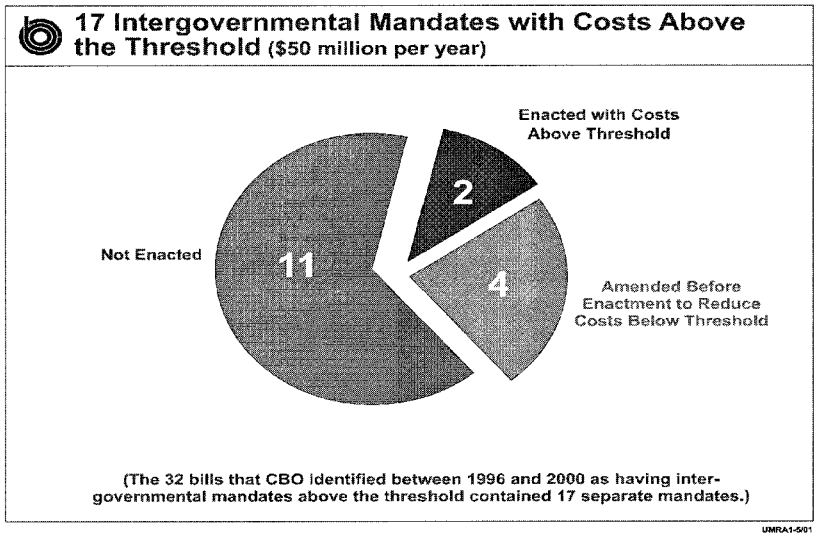
PROPOSALS TO EXPAND UMRA

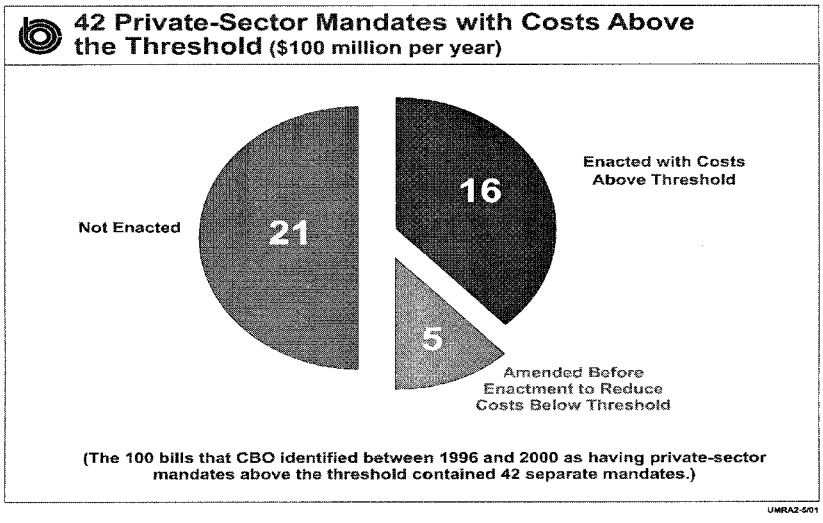
Since UMRA was enacted, lawmakers have proposed expanding title I in several ways. One proposal would build on UMRA's perceived success in focusing Congressional attention on unfunded intergovernmental mandates by expanding the law to include a point

of order against bills that contain private-sector mandates with costs over the statutory threshold (similar to the current point-of-order requirement for intergovernmental mandates). Other proposals would expand UMRA's definition of a mandate as it relates to large federal entitlement programs administered by state or local governments. Both of those proposals were included in the Mandates Information Act, which was considered by the Congress in 1998 and 1999 but never enacted.

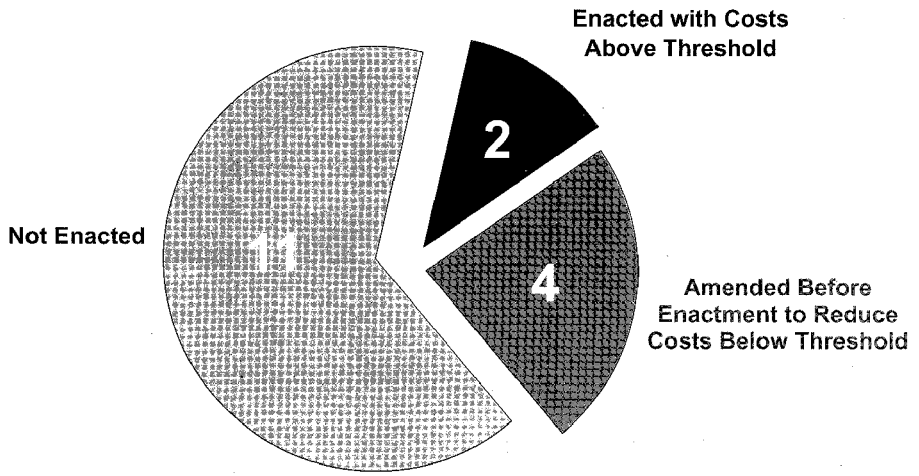
To date, lawmakers have made only one, relatively minor, change to UMRA. The State Flexibility Clarification Act of 1999 (Public Law 106-141) requires authorizing committees and CBO to provide more information in committee reports and mandate statements for legislation that would "place caps upon, or otherwise decrease, the federal government's responsibility to provide funding to state, local, or tribal governments" under certain large entitlement grant programs (such as legislation that would cap the federal contribution to Medicaid). In general, that requirement for additional information applies to few bills, and no legislation reported by authorizing committees since the requirement was enacted has been affected by it.

In closing, Mr. Chairmen, I would say that title I of UMRA has generally worked. It is clear that information provided by CBO about mandates has played an important role in the legislative process.


17 Intergovernmental Mandates with Costs Above the Threshold ($50 million per year)
Enacted with Costs Above Threshold
2
Not Enacted
11
4
Amended Before Enactment to Reduce Costs Below Threshold
(The 32 bills that CBO identified between 1996 and 2000 as having inter-governmental mandates above the threshold contained 17 separate mandates.)
UMRA1-5/01


42 Private-Sector Mandates with Costs Above the Threshold ($100 million per year)
Enacted with Costs Above Threshold
16
Not Enacted
21
5
Amended Before Enactment to Reduce Costs Below Threshold
(The 100 bills that CBO identified between 1996 and 2000 as having private-sector mandates above the threshold contained 42 separate mandates.)
UMRA2-5/01

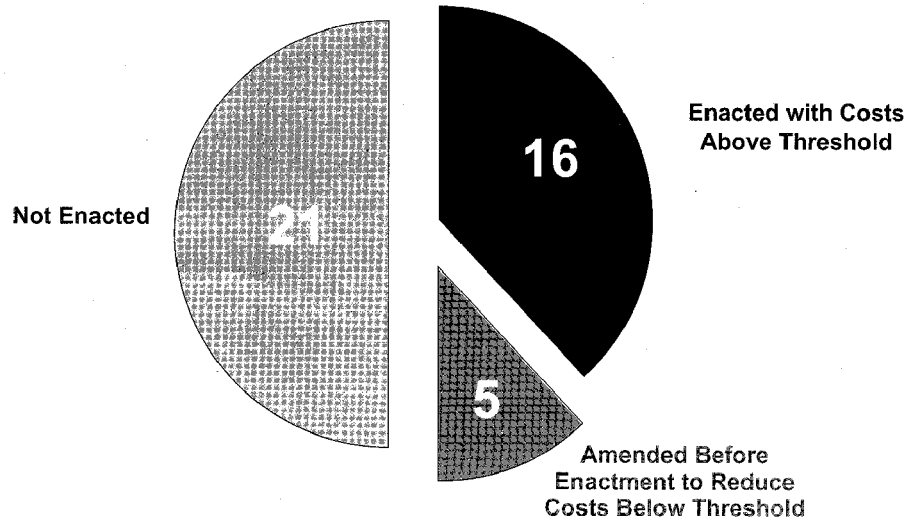
17 Intergovernmental Mandates with Costs Above the Threshold ($50 million per year)



(The 32 bills that CBO identified between 1996 and 2000 as having intergovernmental mandates above the threshold contained 17 separate mandates.)

UMRA1-5/01

42 Private-Sector Mandates with Costs Above the Threshold ($100 million per year)



(The 100 bills that CBO identified between 1996 and 2000 as having private-sector mandates above the threshold contained 42 separate mandates.)

UMRA2-5/01

Mr. OSE. Thank you, Mr. Crippen. Joining us now is the Director of Office of Management and Budget, Mr. Mitchell Daniels.

Mr. DANIELS. Thank you, Mr. Chairman. Mr. Chairman, a review of the experience to date suggests that the executive branch's implementation of the Unfunded Mandates Reform Act has been imperfect at best. Title II of the act has been regarded by some agencies as a perfunctory exercise, not as an opportunity to work in good faith with our non-Federal partners. Just this week, White House staff attended a meeting of the Governors' Washington representatives and asked which agencies were doing a good job consulting with the States, and the answer was none, that no Federal agency is consulting with State and local governments in the methodical way intended when the law was developed. States and localities report that many agencies think simply informing them of a rulemaking action is the equivalent of consultation, that consultation processes lack uniformity, does not occur early enough in the rulemaking process, and, on the rare occasions when consultation does occur, agencies often contact State and local counterparts, not the elected officials or chief appointed officials accountable to the public for running their respective governments.

This will not be accepted practice in this administration. We will require agencies to submit the dates at which stakeholders were contacted, and prior to review by the Office of Information and Regulatory Affairs of any new regulations, if there has not been adequate consultation as called for by the act, OMB will return regulations to the originating agency for completion of this responsibility.

As OMB has noted in five annual reports to the Congress, 80 rules have required the preparation of a mandate's impact statement in those 5 years. This number strains credulity. In fact, it appears that agencies have attempted to limit consultative processes and ignore potential remedies by aggressively utilizing or interpreting exemptions outlined in the act.

Let me cite one graphic example. Last June, the EPA issued a new regulation known as the total maximum daily load. It required States to develop and implement plans to clean up impaired waters, a reasonable and appropriate goal. But the agency estimated the incremental costs of compliance at $23 million per year, and, therefore, the regulation was not considered an unfunded mandate under the act.

But EPA completely excluded from its analysis the cost of pollution control measures that will clearly be imposed by the new regulation. These compliance costs are expected to run into the billions of dollars per year for the private sector and local governments, but EPA moved forward without deference to the requirements of the act. GAO, in reporting on the act's first 2 years in 1998, noted that there was a limited direct impact of the act on the agency's rulemaking, to say the least.

On behalf of the administration, I am prepared to make the following commitments to address these shortcomings: We will do more to involve State and local governments early in the rulemaking process. We will bring more uniformity to the consultation process. States and localities should have a clear point of contact in each agency, and agencies must understand that consultation

means more than making a telephone call the day before an action is published in the *Federal Register*.

Third, we will enforce the Unfunded Mandates Reform Act to ensure that agencies are complying with both the letter and the spirit of the law. I will direct, through OIRA, to return a rule not in compliance to the agency from whence it came. If an agency is unsure whether a rule contains a significant mandate, it should err on the side of caution and prepare a mandate's impact statement prior to issuing a regulation.

Mr. Chairman, the administration is committed to securing greater involvement with our intergovernmental partners in Federal decisionmaking and, more fundamentally, strict adherence to the letter of the statute you have passed.

President Bush has noted that federalism will be a priority in this administration, and we look forward to developing this partnership in concert with the Congress and making sure that it is a successful one. Thank you.

[The prepared statement of Mr. Daniels follows:]

STATEMENT OF MITCHELL E. DANIELS JR.
DIRECTOR
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEES ON
TECHNOLOGY, AND
ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS
May 24, 2001

Good Morning, Mr. Chairmen and distinguished Members. Thank you for the opportunity to discuss the effectiveness of the Unfunded Mandates Reform Act of 1995, and, in particular, Title II of the Act.

This Administration fully supports the principles that gave rise to the passage of the Unfunded Mandates Reform Act (the Act) in 1995. The Act was designed to ensure that Congress and Executive Branch agencies consider the impact of legislation and regulations on States, local governments, and tribal governments, and the private sector. With respect to States and localities, the Act was an important step in recognizing State and local governments as partners in our intergovernmental system, rather than mere entities to be regulated or extensions of the federal government through which to advance Washington's priorities. President Bush and his Administration are committed to working with State and local governments to advance these principles not just on paper, but in practice.

One of the purposes of the Unfunded Mandates Reform Act was to establish "a process to enable the elected and other officials of State, local and tribal governments to provide input when federal agencies are developing regulations." With improved communication and full consideration of State and local government concerns and suggestions, regulatory processes and program delivery systems can work more effectively. In addition, we should be able to eliminate unnecessary burdens and duplication of paperwork.

Unfortunately, experience to date suggests that the Executive Branch's implementation of the Unfunded Mandates Reform Act has not moved Federal agencies significantly closer to accomplishing these objectives. Indeed, it seems that Title II of the Act has been regarded by some agencies as a perfunctory exercise, rather than an opportunity to work in good faith with our non-federal partners.

Not only have agencies attempted to shirk the duties assigned them under the Act, I believe they have failed to consistently meet the goals set forth for intergovernmental consultation. Just this week, White House staff attended a meeting of the governors' Washington representatives and asked which agency or agencies were doing a good job consulting with the States; the answer was silence. No federal agency is consulting with State and local governments in the methodical way that was intended when the law was developed. States and localities report that many agencies think simply *informing* State and local governments of a rulemaking action is the equivalent of consultation. They have also indicated that consultation processes lack uniformity, that consultation does not occur early enough in the rulemaking process, and on

the rare occasions when consultation does occur, agencies often contact their State or local counterparts instead of the elected officials (or chief appointed officials) entrusted by the public with running the government.

The purpose of consultation with State and local governments, who are often in the position of enforcing federal rules in partnership with the federal government, is to find the rulemaking alternative that best accomplishes the objectives of the rule with minimum burden to all concerned. When agencies fail to solicit or consider the views of States and localities, they deny themselves the benefit of State and local innovation and experience. This will not be accepted practice in this Administration. I will require agencies to submit the dates at which stakeholders were contacted. Prior to OIRA's review of any new regulations, if there has not been adequate consultation as called for by the Act, OMB will return regulations to the originating agency for completion of this responsibility.

As OMB has noted in its five annual reports to Congress on the implementation of Title II of the Act, eighty rules have required the preparation of a mandates impact statement in the five years since the Act was passed. It is hard to imagine that only eighty regulations had significant impacts on State, local, or tribal governments, or the private sector. In fact, it appears that agencies have attempted to limit their consultative processes, and ignored potential alternative remedies, by aggressively utilizing the exemptions outlined in the Act.

For example, last June the EPA issued a new regulation known as the Total Maximum Daily Load (TMDL). The rule requires States to develop and implement plans to clean up impaired waters, which, of course, is a reasonable goal. The Agency estimated the "incremental" cost of complying with the additional planning requirements at $23 million per year. Therefore, the regulation was not considered an unfunded mandate. However, EPA completely excluded from its analysis the costs of the pollution control measures that will be imposed by the new regulation. Compliance costs are expected to run into the billions of dollars per year for the private sector and local governments. Yet, EPA moved forward without deference to the requirements of the Act.

This is just one flagrant example of an agency evading the cost-benefit analysis requirements set forth under the Act.

One of my priorities is to identify and close any loopholes that may have been created by agencies' interpretation of the law. It is not enough to comply merely with the letter of the law; President Bush expects the executive branch to comply with its spirit as well. In short, agencies should be preparing more mandates impact statements.

GAO, in reporting on the Act's first two years in 1998, noted that "There was a limited direct impact of the Act on agencies' rulemaking." It is clear that more can be done, with respect to the Unfunded Mandates Reform Act and beyond, to ensure that federal agencies consider the impact of rulemaking activities on States, local governments and the private sector.

President Bush, as a former governor, recognizes the need for more federal cooperation

with State, local, and tribal governments. On February 26, the President established an Interagency Working Group on Federalism. Devolving authority and responsibility to State and local governments, and to the People, is a central tenet of our management of the Executive Branch.

The Interagency Working Group is responding to President's call. The group consists of Cabinet secretaries, agency heads and senior White House staff, including myself. Their participation in the drafting of a new Executive Order will ensure that the Order signed by the President will result in action, rather than an Order on paper alone, unheeded and unenforced. The Working Group has welcomed the input of State and local government officials and others who share ideas to promote State and local innovation, flexibility and accountability. The President has directed the Working Group to present him with a Federalism Executive Order, and a report with recommendations to promote the principles of federalism, by the end of August.

In conclusion, the Unfunded Mandates Reform Act was an important step in restoring greater balance and mutual respect to the federal system. It has raised awareness of the importance of State, local and tribal government and private sector concerns among agency decisionmakers. However, more work is needed in order to achieve the goals of the Act.

On behalf of the Administration, I am prepared to make the following commitments:

- First, we will do more to involve State and local governments early in the rulemaking process. Consultation means little if it occurs after the opportunity to improve a rule is passed. Agencies should consult with State and local governments, including their elected officials and Washington representatives, before they have committed to any particular rulemaking alternative.
- Second, we will bring more uniformity to the consultation process to help both agencies and our intergovernmental partners know when, how and with whom to communicate. States and localities should have a clear point of contact in each agency, and agencies must understand that "consultation" means more than making a telephone call the day before a rulemaking action is published in the Federal Register.
- Third, we will enforce the Unfunded Mandates Reform Act to ensure that agencies are complying with both the letter and the spirit of the law. The Office of Information and Regulatory Affairs (OIRA) is under my direction, and I will direct OIRA to return a rule that is not in compliance with the Unfunded Mandates Reform Act to the agency from which it came. If an agency is unsure whether a rule contains a significant mandate, it should err on the side of caution and prepare a mandates impact statement prior to issuing the regulation.

Mr. Chairmen, the Administration is committed to securing greater involvement with our intergovernmental partners in Federal decisionmaking. As President Bush noted, I'm going to make respect for federalism a priority in this Administration." We look forward to developing this partnership, and to working with the Congress as well, to ensure it is a successful one.

Mr. OSE. Thank you, Mr. Daniels. I want to thank you for your clear and unequivocal statements. I had read your testimony last night. I am most appreciative of your efforts.

I am going to recognize the gentleman from Georgia for 5 minutes.

Mr. LINDER. Mr. Crippen, it is nice to see you again. I am pleased with your testimony and the success of UMRA. But one thing that wasn't clear to me was how many of the unfunded mandates, now that we have our eye focused on that, get caught at the subcommittee level and committee level and never get anywhere?

Mr. CRIPPEN. There are a fair number, Mr. Linder. We find that sometimes in consultation before legislation is introduced or marked up, as you suggest, we give informal assessments and advice about how we would look at things, as we do on the Federal cost side, too. But in this case, particularly, it has been quite notable that we have seen mandates disappear or be reduced below the threshold levels before the bills are further processed.

Mr. LINDER. Is it further true that most of the unfunded mandates that reach the floor against which a point of order is asserted ultimately pass?

Mr. CRIPPEN. Yes, they do, certainly in the House. The Rules Committee has been diligent, I must say, in making sure that if a point of order could lie, it is allowed to. That is to say, these points of order are not waived.

Mr. LINDER. That's right.

Mr. CRIPPEN. And that even though the rule may provide for waiving all other points of order, this point of order is not waived. So I think it is due to the Rules Committee's diligence in allowing the UMRA points of order to be raised that they have been voted on. Ultimately, the legislation involved has passed. But at a minimum, Members are made to confront the mandate that is in the legislation.

Mr. LINDER. And, while it is not perfect, it is a huge improvement over what we did have in terms of just ignoring the amount of dollars we are burdening States with or private businesses with?

Mr. CRIPPEN. Absolutely. It is much more information. And, I am a great believer that the more information you have, the better decision you can make. Clearly, mandates have been included in legislation since the beginning of the republic, but we are now only beginning to try to quantify them. Clearly, representatives of the other governments have in the past tried to promote this understanding but didn't have the rules behind them to do so.

Mr. LINDER. Mr. Daniels, you have said something this morning that is the most encouraging thing I have heard in years here, and that you are willing to look at even the EPA's respecting its imposition of costs down the road and ask it to pay attention to this rule. The TMDL is only a small part of it. EPA is proposing to impose co-permitting on feedlots, for example, and chicken growers, which will have huge costs, huge costs.

In fact, I represent a lot of chicken growers where the integrators bring the chicks to them, and they put up $500,000, $2 million for the buildings and grow these chicks out and turn them back to the integrators, and if the EPA forces the integrators, such as Gold Kist, for example, to assume an equal risk in respect of any pollu-

tion on the ground of that farmer, that farmer's land, I believe the integrators are going to walk away from that instantly, build their own chicken houses, and those folks all through north Georgia are going to be without any way to pay off their loans. These are a huge imposition of costs.

In Georgia the EPD does a wonderful job working with—not as an adversary but as a partner with businesses in cleaning up our environment. We have done a great job and the EPA tends to ignore that. If you are going to enforce the following of these mandate rules by the EPA, it will be the most well-received message Georgia can have.

Mr. DANIELS. Thank you, Congressman. To me, the comments and commitments that I have articulated this morning are not remarkable or, you know, really particularly praiseworthy, and I would just say two things. First of all, fundamentally they stem from a simple respect for the law and obligation to implement and enforce it faithfully. And that would be the case whether or not we agreed with the thrust of this policy, which the President, you know, clearly does as an advocate of federalism.

Second, I selected an example from the EPA, but I don't mean to single out any particular agency. I have an equally graphic example drawn to our attention by State and local information officers just in the last few days that has to do with HIPAA, the Health Insurance Portability and Accessibility Act, perhaps the most expensive rule, certainly one of them, promulgated in recent—the rules attached to that act in recent years. And, here too, we can find no evidence of sufficient compliance. So I don't mean to pick on any one agency, but the rule will be applied evenhandedly and to all.

Mr. LINDER. Mr. Daniels, I appreciate that. This is my 9th year and to have someone from the administration tell me that they are going to respect the rules of law is breathtaking, and I am grateful.

Thank you, Mr. Chairman.

Mr. OSE. Thank you, Mr. Linder. I recognize the gentleman from Idaho, Mr. Otter.

Mr. OTTER. Well, thank you, Mr. Chairman. Mr. Daniels, for a person who spent 14 years as a lieutenant Governor of a western State that has had all manner of agents come to harass our citizens and then eat out their substance, it is indeed a pleasure to hear that sort of directive from the office of the executive.

I would perhaps ask that both of you participate in this. So feel free to jump in wherever you see fit. But, you know, in the private sector, I was chief executive officer and other capacities in the private sector for 30 years, and, if I disobeyed the IRS laws or the EPA laws or affirmative action or the Labor Department or Health and Welfare, you name it, I went to jail, and not only that, my company was held economically responsible. In some cases, I was held personally economically responsible.

It seems to me, as I have heard so many times on the floor of legislative bodies, the only thing that is going to make this work is to have teeth in it. Would there be some satisfaction for your particular duties and responsibilities if these agency heads that sought to purposely mislead could go to jail or could be held personally and financially responsible? The TMDL loading 80,000

streams and tributaries to what is called navigable waters in a very loose sense of the U.S. Government, would cost the State of Idaho well in excess of $50 million a year, let alone $23 billion a year for the entire United States. That is drastically misleading. If I, as the president of my company, had misled any government agency to that extent, I could be—you know, they could be pumping sunlight to me right now, and perhaps I should have voted the other way on correctional institutions.

But, what I want to know is can we put some teeth into this thing. You know, I could have at least gotten fired by my board of directors if I would have subjected the company to that kind of economic cost. What can we do?

Mr. DANIELS. You or me?

Mr. CRIPPEN. I will start and you can think about it.

Mr. OTTER. Perhaps I should have asked this at another venue.

Mr. CRIPPEN. Probably, because we could both go to jail, and we don't want to. In fact, we refer often to the enforceability of the Budget Act, because it frustrates us sometimes when Congress will do what Congress wants to do. We say there are no go to jail provisions.

I am not sure how you would make it more enforceable in the way you have described. One thing, though, that I think Congress can do a better job of is simply oversight. You know, that is the role that Congress is designed to play over the executive branch, and clearly, when you don't have any cooperation, it is very difficult to do, but——

Mr. OTTER. Mr. Crippen, I would love that with the EPA. I would love that. I would love that sort of attitude, but, if it is so important for us to govern in that way, why isn't it important, then, for us to be governed that way as well?

Mr. CRIPPEN. Well, I would like to think that in your encounters with Federal agencies, you would get some benefit of the doubt. I am not sure that is always the case. But how to make government officials follow your intent, whether it is the letter of the law or not, has always been an issue and a problem for many Congresses and administrations. I don't know how to make people do what they would otherwise not do in that context, but I do think that you can help the process by thorough and extensive oversight. That is my only solution in our constitutional framework.

Mr. DANIELS. Congressman, first I move to say again, as I did with Congressman Linder, that while I appreciate your generous comments, I don't think they are particularly warranted. You know, where I am from, you don't get a merit badge for obeying the law. It is just expected behavior, and I think that is the answer to your question. I believe it is a matter of accountability, and it is principally, I think, the responsibility of the executive branch to hold its officers accountable for faithful, sincere compliance with this or any other applicable statute. I think you can count on President Bush, particularly in an area to which as a former Governor and an advocate of federalism, to pay close attention and to hold his officers accountable.

Mr. OTTER. Well, I am glad to hear you say that, Mr. Daniels, and I come to this question from a peculiar perspective and a personal perspective, and I just had a 6-year running battle with the

EPA and the Army Corps of Engineers on a modification of a half acre of swamp on my property to a 2.9-acre wetland, and the cost for that was $137,500 initially, and we now got it down to $50,000 because I didn't break the law. What I didn't do was fill out all the permit requests that I didn't know I needed. But anyway, I make that point, because the Army Corps of Engineers and the EPA consorted to do the very same thing in the State of Idaho in violation of State laws and State values, and yet suffered no consequences. Nobody went to jail. Nobody even got busted from sergeant to corporal, and so it seems just a little bit arrogant, maybe even King George the IIIrd-ish for us to be treating the citizens, the governed, this way. I want to do all I can in my short time here to make sure that if we are going to pass a law, then we better be prepared to enforce it and obey it.

Thank you.

Mr. OSE. Is the gentleman finished? The gentleman has finished the statement? Oh, you are looking for a response?

Mr. OTTER. No. I was just making—well, you can respond to that if you want. Thank you. Thank you, Mr. Chairman.

Mr. OSE. Turn off your mic, if you would, please. There you go. All right.

Mr. Daniels, I want to explore something. It is more of the arcane area. Under section 205, UMRA requires an agency to identify a reasonable number of regulatory alternatives, trying to make sure that the least costly, most cost-effective or least burdensome alternative is utilized. How is it that OMB is going to enforce that particular requirement?

Mr. DANIELS. I don't have a better answer than to say that we will insist on sound and complete analysis that makes costs and benefits as transparent and as credible as they can be and then weighs them as the law and good common sense suggest that they should be.

Mr. OSE. Which means that if they do not meet the standards OMB sets, they get returned to the agency for further work?

Mr. DANIELS. Yes. I think it will be our hope that this will happen rarely, and I hope that by being clear about our expectations and by working directly in advance with the agencies, just as we will insist in appropriate cases they work with States and localities, that the work will be done to appropriate standards from the beginning. I would hope it would be a rare instance in which the time at which OIRA is reviewing the rule, that deficiencies only then show up.

Mr. OSE. One of the things that I have always been intrigued by is that it is not always—or the preferred alternative is not necessarily the least expensive in terms of the long-term consequences. One of the requirements under UMRA is to attach an explanation of how you got to a determination of the best alternative, if you will.

Do you have any standards yet developed, or is that a case-by-case consideration?

Mr. DANIELS. Well, I certainly don't have an answer for you this morning, Mr. Chairman. I think standards will probably only take us so far in an area in which the variety of subject matter is almost infinite. We hope for the prompt confirmation of Dr. John Graham,

who was approved yesterday in the Senate committee, and clearly this will be among his very first tasks.

Mr. OSE. I do want to followup on that specific point, because I know that OMB is really struggling with the lack of confirmed appointees, and to the extent that I can help you with any of that and recognize the problem, I would be happy to lend what little weight my office has on this.

Another question that I want to ask has to do with—and I presume your answer is going to be very similar—the changes from, say, July 2000 to July 2001 in how you go about determining what needs to be sent back or what is adequate. Do you have any developed standards for that or agency regulatory proposals or, again, is that a case-by-case basis?

Mr. DANIELS. Well, none beyond the general guidance I tried to offer this morning, that we will want interpretations made fairly and where it is a close call, we will want to err on the side of observing the requirements of the act. I don't see the downside, you know. We have everything to gain in terms of better informed rules, and, you know, only our own efforts to expend against that gain. So that will be my guidance to Dr. Graham, and he will have to fill in the details.

Mr. OSE. OK. Mr. Linder for 5 minutes.

Mr. LINDER. I would like to get both of you to comment on this. In the past year, we passed a similar unfunded mandates bill with respect to mandates on private businesses with the threshold being $100 million. It passed the House. It failed in—it didn't move in the Senate.

Mr. Crippen, first, what is your comment? Do you think we should pursue an unfunded mandates legislation on private businesses as well as intergovernmental?

Mr. CRIPPEN. We now, Mr. Linder, provide our estimate of the private-sector impacts when a mandate is included. Perhaps part of the difference in the effectiveness is that no points of order lie. That has been considered in the House in the past couple of years and certainly could not hurt to have a point of order lie against a bill that exceeds the privte-sector threshold, as much as it does with State and local mandates.

I expect, too, that part of the reason that the unfunded intergovernmental mandate has been more effective in some ways—that is, we see less of them and we talk about them more—is the effectiveness of the governmental organizations, in keeping everyone abreast and helping us in how we think about the impact.

So it is a combination of things that have made the intergovernmental impact statements better and more effective, I think. Obviously, the private sector is bigger and it is harder ti estimate impacts. And, there is a different constitutional relationship that the Congress has with the private sector. But certainly, expanding the point of order to apply to such a mandate would be useful, particularly if the diligence of the Rules Committee continues.

The Senate has never raised a point of order, even against intergovernmental unfunded mandates. So most of the action is in your body, but as I said, I can't imagine that allowing a point of order to lie could hurt anything. I mean, it would help enforce the intent.

Mr. LINDER. Mr. Daniels, do you have a comment on that?

Mr. DANIELS. I think it would be presumptuous of me to advise the Congress on this point. I do think it is imperative that, before our legislators vote, they have credible evidence of the consequences, and it appears to me that, through Dan's good offices and perhaps others, that information is available, but I think I will confine my remarks to the area of accountability in which I feel an acute responsibility.

Mr. LINDER. Thank you.

Mr. OSE. Mr. Otter.

Mr. OTTER. Thank you, Mr. Chairman. Mr. Crippen, you said during your testimony that you were many times unable at the legislative stage to assess what the cost was going to be, either local or State governments, and that it was probably more at the promulgation of the rules and the regulation stage that those should be assessed. Is there anything—is there any mechanism that we have available to us that when the rules and regulations—I understand the point of order on the floor at the legislative stage, but is there anything available to us other than just simple oversight to assess at the rules and regulations stage what these are going to cost?

Mr. CRIPPEN. That comment, Mr. Otter, applies mostly to the private-sector impacts. But you have available an additional authority, the regulatory review ability the Congress passed a couple of years ago. In fact, you exercised that authority this year for the first time, the ability to review and change or revoke or revise a regulation. So you have that ability as well.

It is simply a case where Congress needs to delegate to an expert agency the implementation of legislation in the regulatory process. It is impossible for us to say how this is going to work, and that is precisely what Director Daniels has committed to you today—to do a better job in the regulatory process of analyzing the mandates, making sure that assessment gets done when they make regulations.

Mr. OTTER. Thank you.

Mr. Daniels, in a possible deterrent to misleading—purposely misleading—underbidding, so to speak, we had a tremendous example of that in the Coeur d'Alene mining region of Idaho, where the EPA said in 3 years and for $28 million they could clean up the Superfund site, and that was $280 million and 17 years ago. I know that was before the Unfunded Mandates Reform Act, but that was an ability or perhaps an example of their ability to estimate things.

Could we make the agencies live within a percentage of their estimate? Let's say, OK, you have got 10 percent more than what you say, and that is it. That is all you are going to get. You are not going to get any more. Is there some way that we can bring some truth, maybe even more important, some integrity back into our system of government?

Mr. DANIELS. I think the integrity that is important is in the data. I am sure it is not in the people involved. Let's postulate that everyone is behaving in good faith, but the data must have integrity so that we all know—that all parties know the real costs that are about to be imposed. To me this is a mission of taxpayer protection, if we are talking in the intergovernmental context. A rule,

once promulgated by the Federal Government, that mandates activity by a State has imposed a tax, very directly on the citizens of that State, and it ought to be—the amount of that and the fact of that ought to be held up to scrutiny, just as it would be if you were voting here on an explicit Federal tax increase.

The same is true, incidentally, on the private-sector side in which I believe ours is a consumer protection mission, because these rules, all of which pursue important goals, do so at a real cost to consumers, and, therefore, I think it is the integrity of the data on which a decision is finally made that is most important to get it right and to hold it up in plain view for the inspection of all stakeholders.

Mr. OTTER. Do we have any exit interviewing on the rules and regulations that we promulgated and how close we were to assessing the actual value? Have we done any audits on—we passed this rule 5 years ago, and here is what we estimated it was going to cost and here is what it actually cost?

Mr. DANIELS. I believe there have been a number of analyses done by scholars and by independent actors. It is an interesting question that I will have to reserve to find out how recently, if at all, the Federal Government has sort of audited the consequences of its own actions, but that is a great suggestion and one we will take up.

Mr. OTTER. Thank you. Thank you, Mr. Chairman.

Mr. OSE. Thank you, Mr. Otter.

Mr. Daniels, going back to section 204 on the meaningful and timely input from local and State governments on any proposed regulatory proposals, do you have any or have you developed yet any standards by which OMB might respond to—I think what your testimony characterized as inadequate consultation with such levels of government, or are those under development?

Mr. DANIELS. Again, I hope we can operate mainly in a preventative mode by being very, very clear with agencies that this is expected, what is expected, and as I mentioned, putting them on notice that we would like an accounting of their observance of these rules to accompany the rule itself.

I would hope that if we are simply plain spoken enough about that, that behavior will adapt where it needs to and that we won't have to too often be in the position of marking something incomplete or, even further, suggesting some criticism or sanction of the accountable officers.

Mr. OSE. One of the things in your testimony they thought was most appropriate—or most telling was the early and frequent visits with local and State governments, and I would heartily encourage that under UMRA just so that we can make sure we have an adequate understanding of the impact of anything we do here.

Mr. DANIELS. I quite agree, although I want to add that I think all parties need to use some common sense, and I have had these conversations already, and, again, this morning with some representatives of State and local governments. We want to find the right balance point. We don't seek to introduce further undue delay in the process of advancing public policy, and we would not want to find, for whatever reason, people using this quite appropriate procedural step to just simply slow down or impede a rule that

they opposed for substantive reasons. But it ought to be possible to apply common sense and to—in the cases where rules are significant—and here I think the eye of the beholder rule ought to have some application, and where in the eyes of Governors or other key officials a rule seems destined to impose substantial costs, then we ought to engage on it and do so early. And I have to believe that can be done without being unduly burdensome or time-consuming on anybody.

Mr. OSE. Mr. Linder, Mr. Otter, anything further?

I want to thank both of you for appearing today. I appreciate your taking the time to come down, and I know, Mr. Daniels, you are very humble in terms of your remarks, but I must say, speaking for the others, it is a pleasure to have an unequivocal commitment to complying with UMRA. And, I thank you for that.

Mr. DANIELS. Yes.

Mr. OSE. Thank you, Mr. Crippen.

We are going to now call up our next panel of witnesses. Joining us in the second panel is the Honorable Paul S. Mannweiler. He is an Indiana State Representative and immediate past president of the National Conference of State Legislatures; and Dr. Raymond C. Scheppach, who is the executive director of the National Governors' Association.

Gentlemen, if you would summarize your testimony in 5 minutes each, then we will be able to get to questions. The gentleman from Indiana.

STATEMENTS OF PAUL S. MANNWEILER, INDIANA STATE REPRESENTATIVE AND IMMEDIATE PAST PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES; AND DR. RAYMOND C. SCHEPPACH, EXECUTIVE DIRECTOR, NATIONAL GOVERNORS' ASSOCIATION

Mr. MANNWEILER. Thank you, Mr. Chairman, distinguished members of the subcommittees. I appreciate this opportunity to appear before you and speak on UMRA. Having been a member of the General Assembly in Indiana for 20 years and either been the speaker, co-speaker or the minority leader over a 14-year period, I have to comment that when I first came to the legislature, it seemed like every time Indiana would come into session we had to figure out how to pay for some program which the Federal Government had passed in a previous session, and during that period of time, the State legislatures, NCSL, would publish a mandate, monitor on a monthly basis and send it out to State legislators, and sometimes that would be 15 to 30 pages long just informing State legislators about mandates that were pending in Congress. And during that period, people became very upset to the point where they talked about a Constitutional Convention to try to bring some balance back into the Federal system.

I would have to say all that has subsided because of UMRA. I think particularly my executive summary of my testimony would be Title I has worked very well, mainly and partly because of the Congressional Budget Office being the gatekeeper and the enforcer. And, Title II has not worked very well, and having heard Director Daniels' comments this morning, I was very pleased by his comments. I also have to say that I am not surprised, because Mitch

and I worked together in Mayor Lugar's office in 1970 or 1968 when we were in college. I have known him a long time and was not surprised by his comments.

Just quickly on Title I, I think the predictions when this bill was passed that this would end Western Civilization as we knew it, that it would tie up legislation, that it would impede legislation expeditiously moving through Congress has not occurred. I think it has been used sparingly, and someone said this morning that I believe there have been 11 occurrences where the point of order has been utilized in the House. It has never been utilized in the Senate. But I think that the point of order has served as a deterrent to legislators. Once they receive that intergovernmental cost estimate, they then work with State and local officials to try to reduce the effect of the legislation which they are proposing.

I think Mr. Crippen made the comment and also Director Daniels, that as long as you have the essential information, you are going to make a much better decision. That has been my experience at the State level. I think that has been the experience under UMRA, that when you have this important information, you then will make a better decision, and I think that compels the Members to look at those intergovernmental cost estimates.

One suggestion we would have in this area would be timely access, and I just give you the example last month on H.R. 1, the Elementary and Secondary Education Act, there was less than 24 hours for local and State governments to come up and help with that cost estimate. So we think that this is a very good program and have been very, very much in favor of it.

Under Title II, we do have a new administration. We have had three primary concerns. The enforcement has really been nonexistent over the first 5 years. Agency consultation, many times they send us notice of regulatory changes, and they consider that to be equal to consultation. And, as I said, if OMB would act—or excuse me, if Director Daniels' agency would act as sort of the gatekeeper in the White House on this regulation, as he has indicated this morning, we think that has gone a long way to solving some of the problems which we have had.

The agencies sometimes—for example, on TANF's last implementation of regulations under TANF, we had a great deal of participation and consultation with State and local governments. Other times we get almost absolutely no consultation. So we think with the support or the efforts very much of Congress, what they have done, this Intergovernmental Working Group on federalism which the President has announced is something we are very encouraged by, and I would just like to thank you for this opportunity to share our experiences at the State level with you this morning. Thank you.

[The prepared statement of Mr. Mannweiler follows:]

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Testimony of Representative Paul Mannweiler
Immediate Past President, NCSL
Indiana House of Representatives

On Behalf of the National Conference of State Legislatures

"Unfunded Mandates – A Five-Year Review and Recommendations for Change"

Before the House Committee on Rules, Subcommittee on Technology and the House and the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs

May 24, 2001

Mr. Chairmen, distinguished members of the subcommittees, I am Paul Mannweiler, immediate past president of the National Conference of State Legislatures and a member of the Indiana House of Representatives. Thank you for the opportunity to testify before you about the successes of the **Unfunded Mandates Reform Act of 1995** (UMRA) and issues still requiring further action. I believe the first five years of implementing UMRA provide valuable instruction for its continued implementation.

The National Conference of State Legislatures represents the legislatures of the 50 states and the nation's commonwealths and territories. Since its inception, NCSL has been outspoken about the need to maintain and strengthen our federal system of government and to enhance intergovernmental relations. Most of NCSL's policies and advocacy activities focus on preserving state authority, providing flexibility to carry out state-federal partnerships, strengthening intergovernmental relations and avoiding costly unfunded federal mandates. Naturally, we are strong supporters of the Unfunded

Mandates Reform Act. Title I of UMRA has deterred and reduced the number and magnitude of unfunded mandates imposed through legislation on state and local governments. Title II, on the other hand, has had little effect.

Title I: Legislative Accountability and Reform

The Unfunded Mandates Reform Act has raised awareness of the problems associated with unfunded federal mandates, improved federal accountability and enhanced consultation between the federal government and states and localities. Overall, the National Conference of State Legislatures is pleased with the implementation and effectiveness of Title I of UMRA, regarding Legislative Accountability and Reform. That said, I would like to provide an overview of key components of UMRA and suggestions for strengthening these components.

The positive effects UMRA has had on the legislative process and on federalism are often intangible and not easily measured. When UMRA was introduced in 1995, concerns were raised that UMRA would obstruct the legislative process, would impede expeditious movement of legislation and would weaken congressional authority to address pressing concerns. None of these concerns have materialized into real threats to the legislative process. In fact, Title I of the Act has provided a host of intangible benefits to both the Congress and to states and localities—not the least of which is increased communication between members of Congress and their staff with state and local officials and their representative national organizations on issues related to the imposition of unfunded federal mandates.

Intergovernmental Cost Estimates provide powerful information and create awareness of unfunded mandates. Cost estimates, prepared by the State and Local Government Cost Estimates Unit of the Congressional Budget Office, provide essential information illuminating the cost of federal unfunded mandates on state and local government. These estimates have significantly reduced the number of unfunded federal mandates passed by Congress. A score above the threshold defined in the law will often compel a member of Congress to make adjustments in legislation to avoid the appearance of an unfunded federal mandate. The work of the State and Local Government Cost Estimates Unit is laudable. NCSL appreciates the commitment and expertise of the staff at CBO.

NCSL believes the work of the Unit would be enhanced by more timely access to bills and joint resolutions that may impose unfunded federal mandates. While UMRA stipulates that CBO prepare a cost estimate for each bill or joint resolution reported by any committee, the speed at which legislation may move through the legislative process often precludes the meaningful development and use of these statements. Statements are often required for use during the next stage of the legislative process so quickly that there is often insufficient time for state and local officials and their designated

representatives to provide meaningful assistance to the CBO in arriving at cost estimates.

> *For example, in preparing the cost estimate for H.R. 1, providing for reauthorization of the Elementary and Secondary Education Act, earlier this month, the Unit had less than 24 hours to prepare its estimate. Consequently state and local elected officials and their representative national organizations had only a few hours in which to assist CBO staff with its cost estimate. Perhaps on a minor issue this amount of time would have been sufficient to address the impact on state and local government. Given the magnitude of the potential impact H.R. 1 will have on state and local governments, additional time was warranted.*

Every effort should be made to forward bills and resolutions that have a high probability of committee review, and which are thought to contain unfunded intergovernmental mandates, to CBO for review prior to committee consideration.

I would be remiss if I did not mention the monthly meetings for staff of organizations representing state, local and tribal governments organized by the CBO State and Local Government Cost Estimates Unit. These meetings, while not formally defined in UMRA, provide a valuable collaborative opportunity for our staff to discuss legislation that may contain unfunded federal mandates and preemption of state authority, with both CBO and state and local staff bringing issues to the table. Further, these monthly meetings provide an opportunity for state and local staff to forward information and contacts that are useful to CBO staff in completing cost estimates. These meetings provide an excellent model for consultation under Title II.

The true value of the "point of order" is in its role as a deterrent. While the unfunded federal mandates point of order has been infrequently used in the House and has never been used on the Senate floor, the true value of an UMRA point of order lies in its role as a deterrent to the imposition of unfunded federal mandates. While we cannot attest with any certainty or conclusive evidence that the point of order has reduced the number of unfunded mandates enacted by the Congress, anecdotal evidence of UMRA's deterrent role, particularly threats that a point of order may be raised against legislation, have improved the process of consultation among Congress, CBO and states and localities. The nation's state legislators believe that the threat of a point of order against a legislative proposal has caused members and staff to rethink and revise many proposals that would have likely imposed unfunded federal mandates on the states in excess of the threshold set in the law.

Broad exceptions and exclusions, as well as interpretations of law, expose state and local government to potentially large unfunded mandates not addressed in UMRA. Many of the broad exceptions and exclusions defined in UMRA have the effect of eliminating from the review process many legislative proposals that shift costs to the states and preempt state authority. I draw your attention to a few examples that

illustrate our concerns. The definition of "federal intergovernmental mandate" requires that provisions impose an "enforceable duty" on state and local government. Enforceable duty, however, is not defined under the law. Further, it is rare that interpretations of what constitutes "enforceable duty" err on the side of state and local government. Thus, many legislative proposals considered by Congress that would impose a cost shift or preemption go unaddressed under UMRA.

> *Recently, NCSL joined the National Governors' Association in opposition to a provision in the Senate reconciliation bill, that would reduce and eventually eliminate the state pick-up portion of the federal estate tax on a schedule inconsistent with repeal of the federal portion of the tax. The Senate bill would eliminate the state tax over five years, while keeping the federal portion of the tax in place for ten years. Both groups had hoped to raise a point of order against the provision, estimating the cost to states of the accelerated repeal in excess of $50-100 billion over ten years. The accelerated elimination of the state portion of the tax, to our understanding, was designed to provide additional resources for other provisions of the Senate bill. Although the provision was anticipated to cost state governments revenues far in excess of the thresholds set in UMRA, it was ruled not to violate UMRA because the accelerated repeal does not constitute an enforceable duty on the states! Since 1924, the states have shared revenues resulting from the estate tax with the federal government. The loss of this revenue to the states, should the Senate prevail in conference, will create a severe long-term disruption in state fiscal systems. Given the eventuality of the loss, NCSL has argued that any reduction or repeal be accomplished equitably and proportionately—as the House bill, H.R. 8, does.*

This example provides clear evidence that while UMRA, as enacted and enforced, addresses a multitude of cost shifts and preemptions of state law, under its current construction, it cannot address all significant and costly shifts to the states resulting from congressional action.

> *Similarly, in response to the uncertainty surrounding the 2000 presidential election, dozens of bills addressing election reform have been introduced in the 107th Congress. All of the bills require states to radically alter current election procedures. While none of these bills has been scored by CBO, many of these proposals would require states to investment millions, perhaps billions, of dollars in order to comply with the provisions contained in the bills.*

NCSL is concerned that the exclusion of bills which enforce the constitutional rights of individuals, particularly voting rights, may be used to usurp the role of states and localities in election management and may provide opportunities to impose burdensome and costly unfunded mandates on the states.

> *Further, provisions related to Social Security and payroll taxes are excluded from consideration under UMRA. NCSL remains concerned that, as the federal*

government explores options for reforming Social Security and extending the solvency of the program, opportunities to shift the cost of solvency and reform to the states will become increasingly attractive. Chiefly, NCSL is concerned that the federal government will extend mandatory Social Security coverage to newly hired state and local employees. Such an action by the federal government would result in a cost shift to state and local governments in excess of $25 billion over five years, again well in excess of the thresholds defined in UMRA.

Given the underlying success of UMRA, I believe it is worthy of our collective attention to assess whether the exclusions were excessive and perhaps unnecessary.

Title II: Regulatory Accountability and Reform

Title II, regarding Regulatory Accountability and Reform, requires administrative agencies to consult with state and local government officials and their designees and provides for regulatory accountability and reform. It has been only marginally effective in reducing costly and administratively cumbersome regulations on states and localities.

We have three primary concerns related to Title II:

1. Enforcement of Title II has been non-existent.
2. Agency consultation with state and local elected officials and their designated representatives is haphazard and inconsistent.
3. Agency compliance in preparing and disseminating federalism assessments is rare.

The National Conference of State Legislatures believes that all of these shortcomings merit attention. We maintain that each of these deficiencies is repairable without further statutory changes at this time.

Consultation. The consultation process can, and should be, improved dramatically. State and local governments should expect no less than a uniform and predictable process for consultation throughout all federal agencies. Consultation is inconsistent across agencies. Approaches vary. Levels of commitment vary. There are, however, enough worthwhile practices across federal agencies to create the foundation for a uniform consultation process.

Consultation must include collaboration with state elected officials and their representative national organizations. Too often, agencies have ignored elected officials and their representative national organizations and focused instead on outreach to state and local agency representatives. State and local elected officials clearly bear the burden of addressing the fiscal impacts of federal unfunded mandates and must be included in consultation.

Additionally, too often federal agencies have assumed that mere notice of proposed rulemaking constitutes consultation. While we appreciate the opportunity to participate

in stakeholder meetings and receive updates on the regulatory process from agency staff, these updates do not sufficiently address the role of state and local governments as partners with the federal government. State and local government elected officials and their national representative organizations are not merely another interest group. We are partners. We should be consulted throughout the regulatory process to respond to agency proposals and provide feedback on various options for implementing regulations.

NCSL does not believe that consultation is meaningful only if state and local government get exactly what they want. One of the best examples of agency consultation that improved over time involves proposed and final rules related to the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which implemented regulations for the TANF program. As you may recall, the interim TANF regulations were not well-received by state government officials and their representative national organizations. NCSL felt, as did others, that the interim rules strayed from congressional intent and were far more prescriptive than necessary. Following the release of the interim rules, the Department of Health and Human Services worked diligently to understand and address the concerns of state and local elected officials and their representative national organizations. The final rules related to TANF provide an excellent example of one agency's attempt to participate in meaningful consultation with the states. Did we get everything we wanted? No. Does NCSL believe the process worked? Absolutely.

On the other hand, the Environmental Protection Agency (EPA) in 1996 and 1997 repeatedly refused to address our concerns regarding implementation of revised ozone and particulate matter standards. Although, we did not address the substance of these revisions because of regional and other differences that divided our organization, we were unanimous in the call for more thorough cost-benefit analysis and for attention to Title II's intent regarding unfunded regulatory mandates.

Federalism Assessments: Title II requires agencies to prepare and disseminate assessments as to the cost of proposed regulations on state and local government. A February 1998 report by the Government Accounting Office confirmed what state and local governments already knew to be true—these assessments are rarely, if ever, done. In order for Title II to truly assist in managing the imposition of unfunded federal mandates and preemption on the states these assessments must be completed.

The National Conference of State Legislatures suggests that the role of the OMB be expanded in order to ensure agency compliance in preparing federalism assessments and in communicating with state and local government. NCSL further recommends that this enforcement authority provide regular opportunities for consultation on proposed regulations with state and local elected officials and their representative national organizations, akin to the monthly meetings organized by the CBO. And, all of us must make the regulatory agenda manageable. Major rules and others borne out of legislation in which states have a primary role are those of priority concern to the NCSL.

The National Conference of State Legislatures supports the efforts of Congress and the Bush administration to address the shortcomings of UMRA. In particular, NCSL welcomes the administration's **Interagency Working Group on Federalism**, which we hope will address many of the concerns we have raised with regard to Title II. It is our intention to provide this group with recommendations, a process we started on February 27, 2001—one day after the president announced the group's formation. NCSL believes, at this time, that the problems associated with Title II can be fixed without legislative changes—but only with a strong and enduring commitment from the administration. Should the working group not address the concerns we have raised, we would be happy to work with you and your staff to draft legislation that might address our concerns.

I thank you for the opportunity to share our experiences with regard to the first five years of implementation of the Unfunded Mandates Reform Act. I look forward to responding to your questions.

Mr. OSE. Thank you. Is it Representative Mannweiler? Is that how you are addressed?

Mr. MANNWEILER. Correct.

Mr. OSE. Dr. Scheppach for 5 minutes.

Mr. SCHEPPACH. Thank you, Mr. Chairman. I am grateful for the opportunity to appear before you on behalf of the Nation's Governors on the 5-year review of the Unfunded Mandates Reform Act. Essentially we are very pleased, particularly with what has happened around Title I. Much credit is due, not only to the two committees, but also to the superb work of CBO. The very threat of a CBO report has engendered committees to reach out to us before the fact instead of after. It has essentially changed the nature of the intergovernmental discussions in a very positive way.

However, we must also admit that the scope of UMRA is relatively restricted. Let me give you three examples of legislation that would have had a major impact on State and local governments but are exempted from the definition. The first is in the Senate tax bill that was recently passed, there is a provision that takes the State estate tax credit and accelerates it and phases it out, much more quickly than the Federal estate tax. This cost States $75 billion over 10 years.

Provisions like this swamp the impacts on the expenditure side of mandates if it were ever to end up in the final bill. It was exempt from any kind of CBO estimate.

Second, Medicaid, which is our Nation's primary health and long-term care program for the elderly and low-income individuals, currently serves 40 million people at a cost to both the State and Federal Government of over $200 billion. Yet, Medicaid is exempt from UMRA. The problem is, is that about 50 to 60 percent of the benefits are considered optional benefits. Technically that is true, and so, if you have an unfunded mandate, the view of CBO, and I think it is consistent with the legislation, says that you can go back and adjust some of those voluntary or optional benefits.

That may be true technically, but politically it is very hard to go back, for example, in Medicaid, and cut the pharmaceutical benefit of a particular program. So in reality, those are not really optional benefits. They are mandatory.

I would argue if you look over time in dollar impacts, most of mandates of the last 15 to 20 years have, in fact, been in Medicaid.

The third example was one that was mentioned previously, and that is the whole question of HIPPA. There, again, I think the intent of the legislation was very positive, which was to develop forms that were consistent in the health care area. However, we now feel that it is probably the largest unfunded mandate out there, and yet because it is a modification, again, to Medicaid and to some extent, SCHIP, it also is exempt from the legislation.

So in these three areas that have been exempted, they all have huge impacts. So, again, if you look at Title I, we would argue that the intent of the law has worked very, very effectively, but we have to remember that it is a relatively narrow definition.

Potential modifications to Title I: From a federalism standpoint, the world has shifted considerably over the last 5 years. Essentially the nature of mandates has changed, and preemption of State regulatory authority has now superseded mandates as a major problem.

Specific changes are as follows that you may want to consider: First, recent legislative proposals such as the Internet tax moratorium and the Senate proposed accelerated repeal of State credit on a State tax indicate that the Federal Government will increasingly intrude or restrict State tax sources. For well over 200 years, Congress has respected the sovereign right of States to enact their own revenue systems. Recent tax initiatives in Congress are changing this critical precedent.

Second, Medicaid-related programs are becoming an increasing proportion of both State and Federal funding. To continue to exempt this program substantially reduces the effectiveness of UMRA.

Third, the Federal Government is increasingly preempting State and regulatory authority when no costs are involved. From health care to banking to telecommunications, State regulatory power is being widely preempted in the name of interstate commerce. This is a scary trend for our federalism form of government. So I think, if you are going to look at this legislation in terms of Title 1, those are three broad areas that you may want to consider for modification.

I pretty much agree with other comments about Title II. This section of the law has been ineffective at best and a failure at worst. There has been relatively no consultation with State and local governments with respect to agency rules and regulations. However, we are hopeful. President Bush has created a task force on federalism. We will be working with him closely. He has indicated that he will be having a new Executive order released prior to August 26th.

So our hope is to work with the President in terms of some overall guidelines that we might provide to the administration, I think there is three areas. First, enforcement is the key. Executive orders by the last three administrations have never been enforced. They sounded good on paper, but agencies rarely complied with the directives.

Second, there needs to be several staff members within either the Office of Management and Budget or the White House who will meet on a regular basis with State and local governments and enforce any Executive order. The CBO model has worked quite effectively, but I think the key is that there is a small staff whose responsibility is to coordinate and make sure the reports are submitted.

Third, the activity must be highly focused or targeted. For example, we are most interested in the top 20 to 40 legislative initiatives. The seven State and local groups will be willing to sit down with the new administration and agree on which ones where consultation is necessary. We do not want to impede their work. We really want to have it highly focused on those areas, with significant costs to State and local governments.

Thank you, Mr. Chairman. I would be happy to answer any questions.

Mr. OSE. Thank you, Dr. Scheppach.

[The prepared statement of Mr. Scheppach follows:]

Statement of

Raymond C. Scheppach
Executive Director

before the

Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs
and
Committee on Rules, Subcommittee on Technology

U.S. House of Representatives

on

Unfunded Mandates
A Five-Year Review and Recommendations for Change

on behalf of

The National Governors Association

May 24, 2001

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Good morning. I am grateful for the opportunity to testify on behalf of the nation's Governors on a five-year review of the Unfunded Mandates Reform Act (UMRA).

The Unfunded Mandates Reform Act – The Successes

When the Unfunded Mandates Reform Act was first enacted, many expressed fears that it would interfere with the efficiency of Congress, that it would not change congressional decisions, and that it lacked sufficient enforcement. Those apprehensions were misplaced. The work of the Congressional Budget Office (CBO) has not obstructed committee action, but rather has served to enhance congressional decision-making through better information. Much credit is due not only to both of your committees, which were so essential to the enactment of UMRA, but also to the superb work at CBO.

Direct mandates have declined sharply in the wake of the Act. But I would venture that UMRA has had an even greater intangible benefit. As Congressman Portman once told us, he was certain this would be one of those bills that he could frame and hang on his wall, and it would become just another relic of history. But, to his surprise, the Act has led—time and again—to members asking his advice: "Do you think this bill will cause an UMRA problem? With whom should I work?" The very threat of a CBO report has engendered efforts to reach out to state and local leaders before the fact—instead of after. It has changed the nature of our intergovernmental discussion in a very positive way.

When UMRA was enacted in 1995, its purpose was to curb the practice of imposing unfunded federal mandates on state and local governments and to strengthen our intergovernmental partnership. UMRA was clearly intended as a means of reducing the fiscal and programmatic impact of purely federal decisions on state administered or financed programs. In deference to the principles of federalism, UMRA recognized that federal legislation should not impose unnecessary burdens on state and local governments. The Act established new procedures designed to ensure that both the legislative and executive branches fully consider the potential fiscal impact of unfunded federal mandates before imposing them on state and local governments or the private sector. Title I of the Act amended the Congressional Budget and Impoundment Control Act, setting forth requirements for committees and CBO to study and report on the magnitude and impact of federal mandates proposed in legislation, including for private-sector mandates over $100 million. UMRA established a point of order against the consideration of legislation if it contains an unfunded intergovernmental mandate exceeding $50 million or if a committee, when reporting a bill or joint resolution, fails to include in either the committee report or the Congressional Record a statement from CBO estimating the direct costs of any mandate contained in the legislation. The new procedures have largely succeeded in ensuring debate and accountability during the consideration of legislation containing unfunded intergovernmental mandates.

Exemption from UMRA – A Growing Problem

While the Governors believe that UMRA has led to a significant improvement in Congress, its very success has demonstrated areas where the spirit of the law has been circumvented, notwithstanding extraordinary impacts on states. Let me provide three examples.

The Senate tax bill. Even though the state estate tax provision in the Senate version of the tax bill would result in a cost shift to the states of between $50-$100 billion over the next ten years from the accelerated cut and elimination of the state death tax credit, thereby creating a severe, disproportional impact on states compared to the federal government, the provision has been determined not to violate UMRA because the change in federal law would create no "enforceable duty" on the states. This change, if agreed to by the conferees, would impose an unprecedented mandate on states; yet it is defined in such a way that it avoids the clear purpose of the law to ensure discussion with states, debate, and accountability.

Medicaid. Enacted in 1965 as the nation's primary health and long-term care program for the poor, Medicaid is state administered and jointly financed by the states and the federal government. Currently serving approximately 40 million individuals at a total annual cost of $200 billion, Medicaid spending is very sensitive to both federal legislation and regulation. Its legislative history in recent years has been one of congressionally mandated expansions, reimbursement requirements, and other dictates. It is interesting therefore that the most important state-federal program in existence, Medicaid, is exempt from UMRA.

There are two primary reasons why Congress has exempted Medicaid from consideration under UMRA. The reasons are quite different but neither is completely convincing from a public policy standpoint.

The first reason is that given the sheer size of Medicaid, there are very few decisions that could be made at the federal level that would not cause state spending to increase by at least $50 million—the threshold in UMRA. Fairly minor eligibility expansions, benefits requirements, reimbursement changes, or systems changes can easily total hundreds of millions—if not billions—of dollars in increased spending. Therefore, many in Congress do not want to have UMRA apply to Medicaid for the simple reason that it would make it very difficult to make changes to the program.

The second is that some in Congress believe that UMRA can never truly apply to Medicaid simply because of the nature of the program. In order to operate a Medicaid program, each state must provide a certain number of mandatory services to mandatory populations. Beyond those minimum federal requirements, however, there are

a large number of eligibility and benefits options that states may choose. States have embraced many of these options, such as prescription drug coverage, home and community-based long-term care, and expansions of coverage to low-income pregnant women and children, and to seniors living in poverty.

The rationale of this second reason is that because so much (approximately 60 percent on average) of any given state's Medicaid budget is taken up by optional services and/or optional populations, these options could be eliminated or reduced in a budget crunch. Once implemented, these optional benefits become very difficult to eliminate.

Therefore, it becomes obvious that new requirements on Medicaid cannot simply be absorbed by eliminating other categories of Medicaid spending. New requirements serve only to increase the Medicaid baseline and truly do constitute unfunded mandates.

UMRA should be a vehicle to help us all rethink this program—which now constitutes more than 20 percent of state budgets. Rethinking this federal-state program so that it makes sense and works is one of the Governors' highest priorities.

The Health Insurance Portability and Accountability Act (HIPAA). NGA policy on this Act is clear: "HIPAA represents one of the largest unfunded federal mandates in recent history, as no federal dollars were explicitly committed to the implementation of this federal law."

The main goal of the Health Insurance and Portability Act is administrative simplification. HIPAA standardizes data collection and processing across all sectors of the health insurance industry, including Medicaid, State Employee Benefits Programs, and other related state agencies. In practice, every insurer and provider will be required to 1) use standardized codes for billing and reporting, and 2) convert to compatible electronic computing systems. In theory, once fully implemented, a doctor or hospital would fill out the same electronic form for private health insurance as they would for Medicaid.

While it has been very difficult for NGA to ascertain how much HIPAA will cost the states, anecdotal evidence suggests that HIPAA is easily the largest single unfunded mandate on states in quite some time. While HIPAA has an opt-out for self-funded state plans, it will be practically impossible for states to remain the only purchaser not utilizing these uniform standards.

Because HIPAA applies to Medicaid, CBO has determined that there cannot be mandates under UMRA since states could always eliminate optional services or populations to pay for the new mandated requirements.

Again, this clearly circumvents at least the spirit of UMRA.

Potential Modifications to Title I

From a federalism standpoint the world has shifted considerably over the last five years. Essentially, the nature of mandates has changed and preemption of state authority has superceded mandates as the major problem. Specific changes are as follows.

- First, recent legislative proposals such as the Internet tax moratorium and the Senate-proposed accelerated repeal of the state credit on the estate tax, indicate that the federal government will increasingly intrude or restrict state tax sources. For well over 200 years Congress has respected the sovereign right of states to enact their own revenue systems. Recent tax initiatives in Congress are changing this critical precedent.

- Second, Medicaid and related programs are becoming an increasing proportion of both state and federal spending. To continue to exempt this program substantially reduces the effectiveness of UMRA.

- Third, the federal government is increasingly preempting state regulatory authority when no costs are involved. From health care to banking to telecommunications, state regulatory power is being widely preempted in the name of interstate commerce. This is a scary trend for our federalism form of government.

It is critical to amend UMRA and expand its scope to cover these important issues.

Title II of UMRA

Title II of UMRA requires agencies to assess the effects of proposed and final federal rules on state and local governments and the private sector, and to prepare a statement for any mandate requiring an expenditure of $100 million or more in any one year. The title also requires agencies, for rules with an intergovernmental or private sector mandate, to identify and consider a reasonable number of regulatory alternatives and to "select the least costly, most cost-effective, or least burdensome alternative" or explain why not.

This section of the law has not been as effective. Over the last five years, there has been relatively little consultation with state and local governments.

President Bush has recently created a task force on federalism to focus on this issue and federalism in general. The task force has a goal to complete a new executive order by August 26, 2001.

Our recommendation at this time is to not make changes to Title II but to wait and see what the Administration does with a new executive order and then determine its effectiveness. Some general guidelines to the Administration would be as follows.

- First, enforcement is the key. Executive orders by the last three Administrations have never been enforced. Most sounded good on paper, but agencies rarely complied with the directives.

- Second, like CBO, there needs to be several staff individuals within the Office of Management and Budget or the White House that coordinate, meet on a regular basis with representatives of states and local governments, and enforce any Executive Order.

- Third, the activity must be highly focused or targeted. For example, we are most interested in the top 20-40 legislative or rule initiatives. The seven state and local groups would be willing to help the Administration focus on the key issues.

Mr. Chairman, thank you and I would be happy to answer any questions.

Mr. OSE. Mr. Linder.

Mr. LINDER. Mr. Mannweiler, you talked about the lack of any formal consultation, and then there was recently formed, you said an intergovernmental working group on federalism. Would you recommend a formalized consultation group, and who would do it? How would you arrange that?

Mr. MANNWEILER. Well, our recommendation under Title II with administrative regulations has been that the Office of Management and Budget act as a gatekeeper, and I think with the comments which Director Daniels made this morning, I think that would be sufficient enforcement. Obviously that did not occur over the past 4 or 5 years, and so if you wanted something in States, that may be necessary to have that consultation maybe continue.

Mr. LINDER. Isn't it a fact that within the last 5 years, Title II was just ignored.

Mr. MANNWEILER. Excuse me?

Mr. LINDER. Isn't it a fact that in the last 5 years Title II was just ignored?

Mr. MANNWEILER. Sometimes it has been. It is been a very checkered record. As I mentioned, we had a very good record on reauthorization of some TANF regulations in which they issued the regulations. The State and local government disagreed vehemently. They consulted with us and eventually it was changed, but on the whole, it has not been very effective.

Mr. LINDER. Dr. Scheppach, give me an example of the preemption of State regulatory authority that you are referring to.

Mr. SCHEPPACH. Oh, well, in the whole telecommunications area, there has been preemption. We did a report, which I can make available to you, that really traces the preemption. We did it last year, and it is pretty comprehensive. I would be glad to make it available to you.

Mr. LINDER. Please do. You referred to the Congress passing a bill——

Mr. OTTER [presiding]. My apologies. Mr. Linder, did you want that put in the record?

Mr. LINDER. Good idea. Put it in the record.

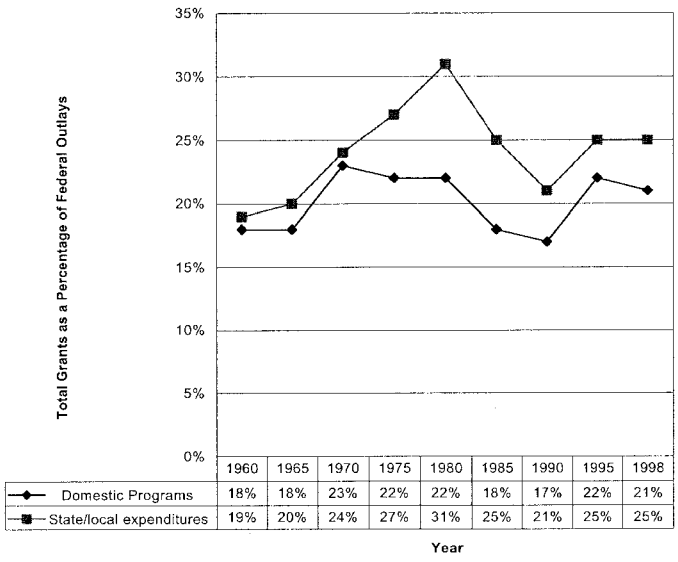
[The information referred to follows:]

APPENDIX 2: FEDERAL-STATE RELATIONS IN THE 1990S

Few issues have been more enduring since the birth of this nation than the tension between the federal government and the states. It was at the heart of the debate about whether to adopt articles of confederation or the Constitution. Ultimately, the founders created a dual system of governance that allocates power between the federal government and the states. The Supremacy Clause states that federal laws made pursuant to the Constitution are the supreme law of the land. The Tenth Amendment makes clear that states retain all governmental power not granted to the federal government by the Constitution. The founders created the Supreme Court to serve as a balancing scale.

To determine what governance in the new century should look like, it is important to look at trends in federal grants to state and local governments during past decades, especially the last decade (see Figure 1) Were there significant changes in how states and the federal government worked together? If so, what were they? Do they offer lessons for the significant changes that will be necessary for the future?

Figure 1: Trends in Federal Grants to State and Local Governments



	1960	1965	1970	1975	1980	1985	1990	1995	1998
Domestic Programs	18%	18%	23%	22%	22%	18%	17%	22%	21%
State/local expenditures	19%	20%	24%	27%	31%	25%	21%	25%	25%

Source: Office of Management and Budget, *Budget of the U.S. Government, FY 2000* (Washington, D.C.: U.S. Government Printing Office, February 1999)

Assaying the federal-state balance has been central to the history of this nation, confronting not only the executive, legislative, and judicial branches with fundamental issues, but also testing the measure of the nation through one of the most grueling wars in history. Those tensions have manifested themselves in the ebb and flow of federal mandates, devolution, funding, and preemption. What is changing is the pace of change and the pressure it imposes on what historically has been mainly reactive governance. The shift in the economy from one that was site-based to one that is increasingly borderless raises hard questions about the role of government and whether that role can even be based on the experiences of the last decade.

During the 1990s, the federal-state relationship did not change very much. Federal unfunded mandates to states have become a diminishing problem. In welfare, health care, education, and drinking water, there has been a genuine step forward to devolve authority and flexibility to states. Yet a countervailing force to this constructive development is the propensity of the federal executive and legislative branches to preempt traditional state authority. Federal actions affecting or limiting state tax authority are on the increase.

In a less overt way, federal-state relations in the 1990s were distinguished by an increasing and dominant part of the federal budget being earmarked for entitlement programs. These changes have caused federal funding not to keep up in areas as diverse as crime, transportation, and education, because of the federal government's growing role in entitlement programs affecting the elderly. Although these changes have occurred largely through inaction, they are no less important to the federal-state relationship.

UNFUNDED MANDATES: A DIMINISHING PROBLEM

The federal government's imposition of unfunded mandates posed a significant problem for the states in the early part of the 1990s. Faced with growing budget deficits, the federal government increasingly sought to achieve its policy agenda by creating new programs and imposing the responsibility for implementing and paying for them on state and local governments. Twenty-five states responded to an Advisory Commission on Intergovernmental Relations' survey on existing mandates, identifying more than 200 mandates. The commission identified fourteen of the most onerous existing mandates in its January 1996 preliminary report. As expected, the most costly unfunded mandates concerned the environment, labor relations, and health care.[11]

CONGRESSIONAL ACTION

In response to this disturbing trend, state and local governments achieved passage of the Unfunded Mandates Reform Act of 1995 (UMRA). This act does not prevent the federal government from imposing unfunded mandates on states, but it does increase its accountability for doing so.

- The act requires the Congressional Budget Office (CBO) to provide an analysis of legislation that would impose costs of greater than $50 million on states.
- It allows legislators to raise a point of order, which can be overcome by a simple majority vote, against legislation that exceeds the $50-million threshold.

UMRA is at least partially responsible for the significant decline in the number of unfunded mandates imposed by Congress during the years since the passage of this legislation. CBO cost

studies have played an important role in reducing these mandates by making legislators aware of the fiscal impact that proposed legislation may have on states. Unfunded mandates are now questioned regularly in Congress, and there have been only a few new regulatory mandates in recent years.

The Congressional Budget Office is thoroughly analyzing the effects of unfunded mandates on states. CBO completed 718 cost estimates that affect state and local governments and 673 that affect business for legislation reported by congressional committees in 1996. Of the 718 government impact bills, sixty-nine contained mandates and only eleven mandates had cost impacts of more than $50 million. Of these eleven mandates, seven were in the minimum wage bill and the other four—immigration reform, securities reform, mental health parity, and occupational health and safety—were amended to reduce the costs of the mandate below $50 million. Members requested cost estimates for 10 percent of state and local mandates before committee action and for 5 percent after committee action, which shows CBO's constant surveillance of new mandates before and after committee action.[12]

The threat of a point of order on the floor gives new enforcement powers to the law, and it has changed congressional consideration of mandates. The new unfunded mandates law has been used successfully in discussions on telecommunications, immigration, crumb rubber, speed limits, trip reductions, an Indian gaming commission, occupational safety and health, and the minimum wage. Only on the minimum wage issue was the point of order on the mandates rejected. This was partially because most state and local governments did not weigh in on the discussions. Moreover, some local governments supported the new mandate, which will cost state and local governments $1 billion during the next five years.

The fact that a point-of-order procedure is available against new mandates has sensitized members of Congress. It causes them to reflect on the impact of their proposals beyond the Beltway, the special interest groups, and the cost to taxpayers. More members than ever are asking CBO to review proposals before committee action.

The Unfunded Mandates Reform Act of 1995 has affected specific issues, including the following.

- *Telecommunications.* The threat of a point of order caused conferees to modify preemptive language over state authority in collecting fees and local participation in locating new towers.
- *Indian Gaming Commission.* CBO ruled that giving the commission subpoena powers creates a mandate. However, the cost estimate was less than the $50 million needed for a point of order. The key point is that the new law was used to evaluate a semijudicial procedure.
- *Minimum Wage.* Although the CBO cost estimate for state and local governments was $1 billion over a five-year period, a point of order against the mandate failed by a vote of 161 to 267. UMRA does not prevent new mandates, but it gives members of Congress the option to ask for a roll-call vote that cannot be denied by other rules and procedures.
- *Immigration.* The CBO cost estimate of between $80 million and $200 million to reformulate drivers' licenses caused the Senate to amend its bill with a less onerous mandate and add a six-year transition period for implementation. CBO did not estimate the costs to state and local governments of implementing the "deeming" requirements in the bill because of the

scope and complexity of the affected programs. However, CBO acknowledged that these costs could be significant.

- *Highway Mandates.* Requirements related to crumb rubber, speed limits, motorcycle helmets, and trip reduction were all eliminated, primarily because they were identified as some of the most costly mandates.

Agency Regulatory Review and Compliance

Title II of the Unfunded Mandates Reform Act of 1995 requires federal agencies to develop a process for obtaining meaningful and timely cost estimates after consultations with state, local, and tribal governments, especially small governments. This process is required for any regulations costing more than $100 million to governments or private businesses. An Office of Management and Budget (OMB) publication notes that agencies have completed two reports on government impacts and fourteen on private-sector impacts as well as developed pilot projects on increasing flexibility for small governments. OMB indicates that only two regulations have exceeded the $100-million threshold for review.[13] (Regulations on welfare reform, safe drinking water, and telecommunications were developed in consultation with state and local officials.)

The President's new Executive Order on Federalism, No. 13132, issued on August 4, 1999, and effective on November 2, 1999, emphasizes consultation with elected officials of state and local governments and sets forth fundamental principles of federalism, federalism policymaking criteria, special requirements for preemption, special requirements for legislative proposals, specific procedures for intergovernmental consultation, and increased flexibility for state and local waivers.[14] It covers all federal agencies, except independent ones, such as the Securities and Exchange Commission and Federal Communications Commission.

The new order on federalism covers deference to state laws and procedures, an expedited waiver process, prior consultation with state and local elected officials, written certification of compliance, and a summary of the comments printed in the preamble of the proposed rule. The order is only now being implemented, so it is too soon to determine whether the order will have a constructive impact on agency regulatory review and compliance.

Devolution: A Major Step Forward

Along with the recognition that mandates from Washington, D.C., impose costs and burdens on the public and private sectors, there is recognition that a vital partnership must involve both levels of government. In welfare, health care, education, and drinking water, there has been genuine progress in devolving responsibilities and providing flexibility to states. In all of these areas, the federal government has retained a key role in setting national standards but recognized that different circumstances require implementation at the state level. Legislation enacted during the 1990s demonstrates that the federal government can build in incentives for adaptability and performance and delegate substantial decisionmaking authority to the level of government best equipped to respond.

Welfare Reform

Perhaps the most significant example of devolving program responsibilities from the federal government to state governments is the 1996 welfare reform law. This law resulted from the strong leadership role played by states and the pressure exerted to implement a federal waiver

process to develop innovative welfare reform approaches. The 1996 law repealed the Aid to Families with Dependent Children (AFDC) program, which had existed for more than thirty years, and created a new Temporary Assistance for Needy Families (TANF) block grant. Under AFDC, individuals were entitled to a federal welfare payment under federally prescribed rules. TANF affords Governors the flexibility, within certain federal guidelines, to make decisions about how to run welfare programs in their state and how to distribute assistance to individuals.

Rather than receiving federal funds based on their welfare caseloads, states agreed to accept level funding for TANF in exchange for flexibility in program administration. Today, states are primarily responsible for welfare programs because of the 1996 law. However, this historic agreement is based on mutual trust, and the continued success of TANF depends on a strong federal-state partnership. Congressional threats to cut the federal financial commitment to TANF could damage this promising example of devolution.

Health Care

Significant devolution of health care responsibilities has occurred through state innovations in the Medicaid program using Section 1115 waivers. Although the Medicaid program allows for state-by-state variation, comprehensive changes require a waiver of program requirements that have remained unchanged since the program's enactment in 1965. States were allowed to make substantial program improvements in the mid-1990s, including enhanced eligibility, modifications to the traditional benefits package, and wide-scale adoption of managed care as a delivery system. Waivers have become the norm, rather than the exception, with every state having at least one and often multiple waivers of various federal standards. This explosion of state innovation has kept the Medicaid program attuned to the needs and demands of the modern health care system.

With the passage of the State Children's Health Insurance Program (SCHIP) in the Balanced Budget Act of 1997, Congress recognized that the best way to improve health care access and outcomes for children is to empower states. Rather than simply allowing states to expand Medicaid with an enhanced federal match, Congress gave them considerable flexibility to design programs that more closely match private insurance plans but still meet the goals of improving access and outcomes. States have always been laboratories of democracy, especially in health care. A potential benefit of SCHIP is national recognition that devolving responsibility for health care to states can improve health care access and outcomes more effectively than a one-size-fits-all federal approach.

Education

Another small step toward devolving authority and flexibility came on April 29, 1999, when the President signed the conference agreement on the Education Flexibility Partnership Act of 1999 to expand the Education Flexibility Demonstration (Ed-Flex) to all states. The new statute allows the U.S. secretary of education to waive certain federal statutory or regulatory requirements in exchange for states waiving comparable state regulations. States that are in compliance with Title One and have a comprehensive school improvement plan that has been approved by the secretary may apply for Ed-Flex. The Department of Education has released draft guidance on the expanded program, and several states are developing applications to become Ed-Flex states.

DRINKING WATER

In 1996 Congress passed, and the President signed into law, amendments to the Safe Drinking Water Act. This legislation is another milestone in devolving authority and flexibility. Recognizing the extraordinary differences in watersheds and aquifers, the law authorizes a primacy state to establish treatment requirements. It also grants a state primary enforcement responsibility for systems during any period for which the administrator of the U.S. Environmental Protection Agency (EPA) determines that such state has drinking water regulations that are no less stringent than the federal regulations; two-year extensions are permitted under specified circumstances. In addition, the law created a program to provide financial assistance to facilitate compliance with the national standards and for projects to further the health protection objectives of the act. It directs EPA to enter into agreements to make capitalization grants to eligible states, contingent on their establishing a drinking water treatment revolving loan fund.

ADDITIONAL RESTRICTIONS: A GROWING CONCERN

Notwithstanding the progress on the devolution front, there has been increasing federal pressure on states to meet rigorous performance standards and detailed reporting requirements. For example, the Food Stamp program is a federally funded, state-administered human service entitlement program that affords states little flexibility and has a burdensome quality control system that is not appropriately linked with desired outcomes. In addition, although states have substantial flexibility to administer welfare programs through TANF, excessive data reporting requirements are a burden.

The elimination of one federal entitlement program (AFDC) and creation of two state entitlement programs (TANF and SCHIP) could signal an important change in the long-term direction of federal-state relations on entitlement programs. Such actions leave important questions of resources and flexibility in the delivery of those resources for important health and human service programs focused on the next generation of corporate and government leaders.

PREEMPTION: A SERIOUS THREAT

The number of unfunded mandates has significantly declined during the past several years, partially as a result of the passage of UMRA and partially as a result of improved federal fiscal health. However, federal preemption of state laws has increased. In some instances, it threatens the states' role in the American system of government and Governors' ability to conduct a wide range of activities, ranging from protecting citizens to promoting economic development within state borders. More than half of the federal preemptions have been enacted since 1969, and the frequency of preemptions has accelerated since the mid-1990s. This acceleration has not been accompanied by a concomitant increase in analyses of potential impact; of 11,414 federal rules promulgated between 1996 and 1998, only five included a federalism assessment.[15] If the trend continues, state and local governments will be forced to settle for a radically altered role in the American federal system.

Preemption has taken place in a wide range of areas, including international trade telecommunications, health care, financial services, and revenue generation. Preemption can

prohibit economic regulation and other activities by state and local governments. It can also require states to enforce federal laws, conform their laws to federal standards, and take on new responsibilities. Perhaps most critically, preemption can undermine political accountability, effectively shifting power from state and local elected officials to federal bureaucrats and courts.

In some cases, Governors have agreed with the need for federal action and supported preemption. For example, Governors supported the Health Insurance Portability and Accountability Act, also known as Kennedy-Kassebaum, even though it expanded the federal government's role in insurance regulation. Nonetheless, Congress has passed several bills and considered many others during the past several years that preempt state laws.

- *International Trade.* The federal government has adopted comprehensive trade measures that preempt numerous state laws. The North American Free Trade Agreement (NAFTA) and General Agreement on Tariffs and Trade (GATT) are major initiatives that Governors supported. Yet, to accommodate the needs and desires of international trade partners who would rather deal with one uniform policy governing trade than fifty different state laws, NAFTA and GATT supersede many state laws. These agreements downgrade the status of state laws from actions that derive from constitutionally determined powers to trade barriers that international agreements can obviate.

- *Financial Services.* The National Securities Markets Improvements Act of 1996 preempted states' authority to license nationally traded securities, mutual funds, and large investment advisers. Despite preserving states' ability to collect licensing fees, they lost their historical power to regulate many aspects of securities activities within their boundaries. The Securities Litigation Uniform Standards Act of 1998 has similar adverse implications for states' rights. In addition to prohibiting class action suits based on the violation of state laws, the act permits viable class action suits to be moved from state courts to federal district courts.

- *Food Inspections.* The Food Quality Protection Act of 1995 preempted state regulation of pesticides in the shipping, handling, and production of food.

- *Telecommunications.* The Telecommunications Act of 1996 overhauled the regulation of local telecommunications services. The act ostensibly sought to deregulate the local telephone industry, but it effectively reregulated the industry by stripping state and local regulators of their traditional authority over local telephone service and transferring this power to the Federal Communications Commission (FCC). Consequently, the federal legislation eliminated or seriously impaired states' ability to control the range, quality, and affordability of telecommunications services available to their citizens. Historically, state public utilities commissions had the responsibility for ensuring that essential telecommunications services were available to businesses and citizens in their states at a reasonable cost. The 1996 act transferred this function to the FCC, centralizing responsibility at the federal level for ensuring that consumers receive adequate *local* telecommunications services. The legislation significantly weakened states' authority to enforce zoning restrictions for television antennas, wireless transmission towers, and small satellite dishes. The FCC gained authority to preempt state and local zoning regulations that conflict with the Telecommunications Act, again transferring power over inherently local issues to federal decisionmakers. Moreover, House-

passed telecommunications legislation dealing with the practice of "slamming"—the unauthorized switching of a consumer's long-distance provider—would have preempted state laws that were stronger than the standards the bill would have required.

REVENUES RESTRICTIONS: A GROWING CONCERN

What distinguishes this nation from almost any other is states' sovereign authority to create and change their tax systems to raise the revenues their citizens determine are necessary to meet investment needs and priorities. Similarly, some local governments have home rule or other state-granted independent authority. Yet this very independence creates tension, because federal, state, and local taxes apply to all citizens and businesses.

Perhaps more than any other area of governance, taxes and revenues have evolved on separate trajectories (see The Three-Legged Stool of State and Local Revenue Systems). The federal tax system has added thousands of provisions to become a complex maze confounded by thousands of dense regulations to implement changes for special interests that have been incorporated into the code during the past decade. These changes bear little relationship to the systems of the United States' major international trading partners or to state tax systems. State and local tax systems have similarly continued to evolve in response to parochial needs and priorities, with little concern about consistency with changes in other states and localities. The result is more than 7,000 state and local tax systems that neither recognize the deregulation of the financial services, telecommunications, or technology industries, nor the critical need to achieve greater simplicity and conformity in a global economy.

THE THREE-LEGGED STOOL OF STATE AND LOCAL REVENUE SYSTEMS

Since the nation's founding, state and local governments have sought revenue-raising structures that balance citizens' desire for minimal taxation and demand for tax fairness with the need to generate sufficient revenue for essential services. In the nineteenth century, this search led state and local governments to the property tax as a primary revenue source, because most of the nation's wealth was concentrated in real property. As the nation became more mobile and industrialized and antiproperty tax sentiment increased, it became clear that a property-intensive tax structure could not provide sufficient revenue to serve the needs of the rapidly growing population. The search for balancing the base and addressing potential revenue erosion led to increased state adoption of the personal income tax and the general sales tax, which came of age in the 1930s. The share of state-local revenue accounted for by property taxes has fallen from nearly one-half to less than one-third since 1970, while the personal income tax share has doubled from less than 10 percent of state-local tax revenues in 1965 to just more than 20 percent by 1994. The sales tax also grew as a portion of state-local revenue during this period, from 33.4 percent in 1965 to 35.8 percent in 1994.

Source: Scott Mackey, *State and Local Tax Levels* (Denver, Colo.: National Conference of State Legislatures, November 1998).

For most of the twentieth century, state and federal tax systems were guided by a doctrine of reciprocal immunity, meaning that states could not tax the federal government and vice versa. This doctrine has generally referred to the bonds issued by the respective levels of

government, but it has accrued wider construction; there has been a greater acceptance of noninterference with revenues that states or the federal government collect to provide services.

The doctrine of reciprocal immunity originated with the creation of the federal income tax in 1913, as states and the federal government took into account the potential competition for revenues from the same sources. The rapidly evolving global, information-based economy threatens to increase this competition and undermine accountability to taxpayers at all levels.

The significant trends in taxes and revenues during the past decade reflect decisions that occurred in a noncomprehensive forum. Unlike unfunded mandates, there has been less effort to consider the impact of federal revenue changes on state and local tax systems. Unlike devolution, revenue decisions have increasingly been characterized by preemption. With the advent of the new economy, this issue has become more serious. Federal declarations to make the Internet free of taxation and regulation have, at least so far, applied only to state and local taxes and regulations, not to federal taxes or regulations. Such interference does not contribute to a constructive rethinking of what kinds of revenue systems have to work together to complement the new information-based economy. It threatens revenues for investments in human and physical infrastructure that are fundamental to long-term growth. Particularly in the areas of telecommunications and the Internet, the past decade witnessed potentially ominous changes.

Telecommunications

The Telecommunications Act of 1996 overhauled the regulation of local telecommunications services and preempted local authority to tax satellite television. This action signaled significant interference with another level of government's tax authority as well as reflected intrusion by nontax committees in Congress. The act did not bar, or propose any changes to, federal taxes.

The Internet

When Congress passed the Omnibus Appropriations Act for fiscal 1999, it included the Internet Tax Freedom Act (ITFA). The federal tax legislation sets no restrictions on whether states can tax sales over the Internet. However, it prohibits state and local governments, during a three-year moratorium from October 1, 1998, to October 1, 2001, from adopting *new* taxes on Internet access charges. As enacted, the federal tax legislation imposes no moratorium or limitations on any existing or new federal taxes on the Internet. ITFA also established an advisory commission on electronic commerce to explore issues related to state and local taxation of the Internet and telecommunications.

The Budget Intersection

The nation is reaching a "budget intersection" by means of a silent revolution that is gradually but significantly shifting federal expenditures from means-tested programs to nonmeans-tested entitlements. The bulk of federal funding used to go to states for physical infrastructure investment. Today, more and more federal dollars go directly to individuals, including those above age sixty-five and those who are leaving or have left the workforce (see Figure 2).

The share of discretionary funding as a percentage of the federal budget has declined sharply. During the past two decades, the share of federal funding for state-run entitlement programs—programs that mainly provide services to low-income families and children—has

Mr. OTTER. Would you provide that to the committee?

Mr. SCHEPPACH. I would be happy to.

Mr. OTTER. Thank you.

Mr. LINDER. You made a reference to Congress passing a bill prohibiting Internet taxation, but all we passed, as I recall, was a bill prohibiting Internet taxation on a per—access to the Internet. For example, today, you can still provide—you can still impose sales taxes on Internet sales per county, per State, just as you can catalog sales. Isn't that correct?

Mr. SCHEPPACH. No, we can't, because the Supreme Court basically said that we could not force out-of-state sellers to, in fact, collect the tax. So even though residents have a State obligation, you cannot compell sellers——

Mr. LINDER. To pay the tax.

Mr. SCHEPPACH. You cannot enforce it. So you can't do it on mail order or Internet. You are right.

Mr. LINDER. It is just on access, though, to the Internet.

Mr. SCHEPPACH. That's right. The law that you passed a few years ago was just on access. The States actually had about $50 million taxes on that, which were grandfathered in the legislation, but the legislation that was passed by the House last year—that was not accepted by the Senate—attempted to get rid of the grandfathering. So that is an issue. Plus, the problem on the Internet access now is that this is a very big issue, because it is not just access. Under the current definition, most content that is sold over the Internet would in fact be exempt. We have got telephone calls going over the Internet now. So it is not a very simple issue, because you can't really define access.

Mr. LINDER. Thank you both very much.

Mr. OTTER. I guess the chairman is not back yet, so I guess I will go ahead and proceed.

Mr. Mannweiler, Mr. Speaker, did your State ever bring suit against the Federal Government either through Title I or Title II to enforce the unfunded mandates?

Mr. MANNWEILER. No. I don't believe that any State, to the best of my knowledge, has brought suit under Title I or Title II.

Mr. OTTER. Mr. Scheppach, has any State in your organization brought——

Mr. SCHEPPACH. Not to my knowledge. I think the only place you can do it is on the procedure of judicial review, which is very limited.

Mr. OTTER. It probably would have been ineffective then.

Mr. SCHEPPACH. That's right. Again, you would be doing it after the fact.

Mr. OTTER. See. That is the problem that I have. Being a country of laws, rather than individuals, and when the chief executive and his department heads ignore a law, absent a clear definition of a law in place that says this is the punishment for it, what do you do? So, I am perplexed here a little bit, because there seems to be—or at least with the last panel, there was some reluctance to suggest that perhaps we ought to put some teeth in the law for disobeying the law. And would the Governors' Association have an opinion on that, Mr. Scheppach?

Mr. SCHEPPACH. I don't think we have a policy, but that was considered the last time, this whole issue of judicial or court enforcement. Most administrations of course have opposed it because they are afraid it will tie up their decisionmaking process, but it is something that we discussed with previous administrations.

Mr. OTTER. Mr. Mannweiler, what about State legislatures?

Mr. MANNWEILER. Well, I do not believe we have a policy currently on that, but certainly that would be a good way to enforce Title II. I mean, we have—as we have said, we have seen very good compliance from Title I, particularly because of Congressional Budget Office consultation with the national organizations such as ours. If there was something to—even if you statutorily require consultation, how meaningful is that going to be if the spirit is not there to try to resolve some differences?

Mr. OTTER. I know what confuses me—or continues to confuse me about the entire process is that we have found ways to make those in the private sector be responsible for those areas that we think, whether it is the environment or whether it is how they handled employees or how they treat labor unions and that sort of thing. And with great dispatch and tremendous enthusiasm, we have been able to go forward and create all manner of rule and regulation that has every board room in the United States shaking in their boots. Yet we find it impossible to make those who we would send out with the integrity of this government to be deserving of that integrity.

That is the thing that I keep driving at. One of the reasons is because—I am extremely proud that it was now Governor Kempthorne, then Senator Kempthorne that brought the whole idea of unfunded mandates to the Congress, and he worked at it very hard and was finally successful and it was signed by the previous administration as the first Senate bill passed that year. He arrived at those conclusions and the necessity for that kind of limitation, having served as the mayor of the largest—the capital city of Idaho and seeing all the unfunded mandates that came at his level of government, and then later on, of course, at the State level of government. Now he is suffering under the unfunded mandates as Governor of the entire State instead of just a single city.

So I think it is—in some small and modest way, that there is something that the Congressman from the First Congressional District of Idaho can do to put some teeth into this thing and make it workable. I don't think Congress, in all of its wisdom, would dare throw out a piece of legislation like this without our ability to enforce it. Yet, we have done just that, with a false promise, a false floor here to the taxpayers and to the local units—those governments we seek as being subservient to us as being protected in some way. We need some protection. I would appreciate it very much, Mr. Speaker, if the Council of State Governments would go to work and put together some boilerplate legislation that we could then introduce and provide for somebody being held responsible. And generally it has got to be the enforcers, so with that, I would now recognize Mr. Portman.

Mr. Portman.

Mr. PORTMAN. Thank you, Mr. Chairman, for allowing me to sit at the dais.

Mr. OTTER. Mr. Portman, Mr. Linder and I have just finished our 5 minutes with these witnesses. Mr. Mannweiler represents sort of the local units of government, the legislative process, and Mr. Scheppach represents the National Governors Association, or pretty close to that.

Mr. SCHEPPACH. Pretty close to that.

Mr. OTTER. Not having been a Governor yet, I am not sure what I would have belonged to.

So Mr. Portman.

Mr. PORTMAN. Again, thank you, Mr. Chairman, for allowing me to be here today. I have had the pleasure of working with our panelists, particularly Mr. Scheppach, over the years on this issue, and also worked, Mr. Chairman, with your colleague, former Senator, now Governor of Idaho on this issue, who was the House sponsor of the Unfunded Mandates Reform Act. I was the House sponsor, and I think this is a wonderful opportunity for us to look back and see what has worked and what hasn't with regard to legislation on this, also to have an opportunity to talk about Title II and what has worked and not worked in the administration, and I think we will have a chance here to redouble our efforts to be sure that the cost-benefit analyses and the other element of the legislation can be fully implemented.

But, I am very pleased with the fact that when you look back over the 5 years or 10 years or 15 years prior to enactment and then look over the past 5 years, that you see a distinctly different approach to legislating here on the Hill. It is not just the fact that we have had fewer mandates come to the floor and that we have been able to have fewer mandates, therefore, enacted into laws. But more importantly, Mr. Chairman, is the fact that every committee now is going through this process, providing information to members, and as CBO has testified, they get lots of calls from staffers from committees, important committees of this Congress, saying how can we rewrite this legislation to avoid imposing an unfunded Federal mandate as defined under UMRA? And that to me is important, as any aspect of this legislation, that it is acting to prevent committees from enacting additional unfunded mandates through the legislative process.

So, again, I appreciate your allowing me to be here today. I have no further questions for the witnesses, but I really want to tell you that this is legislation that I think will—won't go as far, Mr. Chairman, as perhaps many would like in terms of stopping every unfunded mandate, is a good example of what we can do up here that really does make a difference in our State and local governments. Thank you.

Mr. OTTER. Thank you very much, Mr. Portman, for those comments. I, as a State official then and operating for 2 years as Governor Kempthorne's lieutenant Governor, I appreciate your efforts on behalf of the House. But I also probably would put us all on notice in this committee, as Members of Congress, that perhaps we should look to more points of order on the floor, and the opportunity to bring them up so as to sort of offer notice to anybody else that would bring unfunded mandates to the floor of the House, that that could happen on a regular, and probably more-often basis.

If there is no further questions of the second panel, Mr. Mannweiler, Mr. Scheppach, I thank you very much for being here today, and we look forward to receiving the information that we requested. Thank you.

Mr. MANNWEILER. Thank you.

Mr. SCHEPPACH. Thank you, Mr. Chairman.

Mr. OTTER. Our third panel today is going to be Mr. Scott Holman, Senior, who is the chief executive officer for Bay Cast, Inc., from Michigan, and chairman of the Regulatory Affairs Committee of the U.S. Chamber of Commerce.

With him will be Mr. William L. Kovacs, vice president, Environmental and Regulatory Affairs of the U.S. Chamber of Commerce.

Gentlemen, could we get somebody to change the name cards?

We will momentarily be changing that name card, Mr. Holman, so we know who you are. We thank you both very much for being here today. Mr. Holman, you have the floor.

STATEMENTS OF STEVE HOLMAN, SR., PRESIDENT AND CHIEF EXECUTIVE OFFICER, BAY CAST, INC., CHAIRMAN, REGULATORY AFFAIRS COMMITTEE, U.S. CHAMBER OF COMMERCE; AND WILLIAM L. KOVACS, VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE

Mr. HOLMAN. Thank you very much, Mr. Chairman, and members of the two committees, my name is Scott Holman, and I am owner and president and chief executive officer of Bay Cast, Inc. of Bay City, MI. My company is a manufacturer of large custom steel castings for the automotive tooling, machining, steel mill and construction industries. I am also regional vice chair of the U.S. Chamber of Commerce and chair of the Chamber's Regulatory Affairs Policy Committee. My testimony will focus on the private-sector mandate requirements of UMRA.

UMRA is successful at the congressional level. Rather than restating much of what is in my written testimony, let me go directly to the U.S. Chamber's suggestions for changes to UMRA. Title I of UMRA has been generally successful. However, the U.S. Chamber has one recommendation for amending Title I, specifically in the 106th Congress by a large margin, the House passed the Mandates Information Act sponsored by Representative Gary Condit. This legislation would treat private-sector mandates the same as intergovernmental mandates. The U.S. Chamber supported this bill last year and would once again strongly support similar legislation this session.

Agencies are not held to the same high standards that the Congress has set for itself. Under Title II, agencies must prepare an UMRA statement for all rules that would impose Federal mandates exceeding 100 million to State, local and trilateral governments or to the private sector. Moreover, section 205 requires that agencies consider several alternatives when proposing regulations and select the least costly, the most cost-effective or the least burdensome alternative.

Congress clearly intended that regulatory agencies comprehensively identify and quantify regulatory mandates in a manner similar to CBO analysis of potential legislative mandates. In certain in-

stances, however, agency actions have prevented the policy of Congress from being achieved, unlike Title I, which requires independent CBO statement describing potential legislative mandates. Title II does not require an independent review of potential regulatory mandates.

Due to lack of independent review, an agency may deliberately underestimate the cost of a proposed rule or conclude that UMRA does not apply because of other statutory provisions. In these instances, the agency controls both the information and the debate and its determination is virtually unreviewable. Federal regulatory agencies should not be allowed to avoid congressional mandates by mischaracterizing the cost of a rulemaking. New provisions should be enacted to address this deficiency. To this end, the U.S. Chamber provides the following two recommendations for revising Title II of UMRA.

First, Title II should be amended to establish independent analysis of UMRA statements conducted by agencies when considering mandates and independent bodies, such as the Office of Management and Budget or GAO, should be charged with reviewing the agency's mandate analysis.

The second recommendation is to permit early judicial challenges to an agency's failure to prepare UMRA statements that accurately estimate costs and benefits. In my written testimony, I provide two examples of agency abuse of the UMRA process. The first example involves the TMDL water quality rule, in which EPA estimated the cost about $23 million a year and the cost asserted by the State environmental profession was $1.2 billion annually, $1.2 billion, with a B, annually.

My second example involves EPA's national ambient air quality standards. Estimates of annual compliance costs range from $45 billion to $150 billion, despite the significant mandates, EPA claimed, because the Clean Air Act prohibits EPA when setting the NOx from considering the types of estimates and assessments described in Section 202. UMRA does not require EPA to prepare a written statement under 202. However, nothing in the Clean Air Act, UMRA or the Supreme Court decision prohibits EPA from fully describing the costs and benefits of its regulations for the public debate in this issue. Therefore, a multibillion dollar regulation went into effect without significant information about the costs, the benefits or the alternatives to the proposal.

Requiring better information through UMRA will have a tremendous impact on how agencies develop regulations. For example, UMRA section 205 requires that agencies consider many alternatives when proposing regulations. From these alternatives, section 205 also requires agencies to select the least costly, most cost-effective or least burdensome alternatives that achieve the objectives of the rule or explain why more burdensome options are necessary.

However, 205 is not operative unless an UMRA analysis, as specified in section 202, is required. Therefore, when the agencies circumvent section 205 by concluding an UMRA analysis is not required or by grossly underestimating the cost of UMRA, the agency thwarts the intent of Congress. It is for these reasons that the Chamber recognizes that, No. 1, the Mandates Information Act be

enacted to prevent so that private-sector mandates are treated the same as intergovernmental mandates.

No. 2, that OMB or GAO be authorized to undertake a role in Title II of UMRA similar to the CBO rule in Title I of UMRA and, No. 3, that agency abuse of UMRA requirements be subject to early judicial review.

Finally, Members of Congress, especially the members of these committees, deserve great credit for their leadership and generally bipartisan support for several other measures to improve the regulatory process. These measures include the Truth in Regulating Act, the Congressional Review Act, the measures on data access and data quality, and these measures require rulemaking to contain a minimum standard of integrity. But, the foundation to all of these efforts would be a strong UMRA, one that treats mandates in the private sector with the same attention and analysis as mandates in the public sector are.

I thank you for letting me testify. I am certainly happy to answer any questions, bearing in mind that my expertise is in running a foundry and complying with regulations and I may defer to Bill on some of the details of which he deals with on a daily basis and in the language that he deals with on a daily basis.

Mr. OTTER. Thank you very much, Mr. Holman.

[The prepared statement of Mr. Holman follows:]

Statement of the U.S. Chamber of Commerce

ON: **THE EFFECTIVENESS OF THE UNFUNDED MANDATES RELIEF ACT OF 1995**

TO: **THE SUBCOMMITTEE ON TECHNOLOGY AND THE SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS**

DATE: **MAY 24, 2001**

BY: **SCOTT L. HOLMAN**

Testimony of
Scott L. Holman
President and Chief Executive Officer
Bay Cast, Inc.
On behalf of the
U.S. Chamber of Commerce
Before the
Joint hearing of the
Rules Subcommittee on Technology
And the
Government Reform Subcommittee on
Energy Policy, Natural Resources and Regulatory Affairs
On the
Effectiveness of the
Unfunded Mandates Relief Act of 1995
May 24, 2001
10:30 a.m.

Thank you Chairman Linder, Chairman Ose, Ranking Member Tierney, Ranking Member Hall, and members of the Rules Subcommittee on Technology and the Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs. My name is Scott L. Holman, and I am owner, President and Chief Executive Officer of Bay Cast Inc. of Bay City, Michigan. My company is a manufacturer of large custom steel castings for the automotive tooling, machine tool, steel mill and construction industries. I am also Regional Vice Chair of the U.S. Chamber of Commerce, and Chair of the U.S. Chamber's Regulatory Affairs Committee.

I am pleased to share some thoughts about the Unfunded Mandates Relief Act of 1995 (UMRA) on behalf of the U.S. Chamber – the world's largest business federation representing three million members of every size, sector and region.

My testimony will focus on private sector mandate requirements – primarily those contained in UMRA Title II related to rulemakings conducted by federal agencies. The U.S. Chamber believes that UMRA has been successful at reducing Congressionally imposed mandates through Title I requirements. However, after five years of experience with Title II, there are some changes that the committees should consider to address the deficiencies in the structure of Title II.

UMRA is successful at the Congressional level.

UMRA is a significant legislative achievement. The Act provides members of Congress and the general public with important data concerning the scope and cost of federal mandates. Moreover, Congress imposed discipline on itself by mandating that the House and Senate examine the costs of potential laws before legislating.

UMRA Title I establishes requirements for Congress with respect to proposed legislative mandates to state and local governments and the private sector. The Congressional Budget Office (CBO) must provide written statements to authorizing committees indicating whether legislation contains federal mandates. Title I also establishes thresholds for further CBO review. CBO will prepare detailed estimates of the cost of mandates for any intergovernmental mandate exceeding $50 million or private sector mandate exceeding $100 million.[1] Any legislation exceeding UMRA thresholds must be accompanied by a CBO report or it is subject to a point of order.

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[1] UMRA specifies that mandate thresholds are to be annually adjusted for inflation. *See* 2 USC 638 (5)(B), 658c(a)(1) and (b)(1), and 1532(a).

The independent CBO review is key to the success of UMRA. CBO's statements provide advocates and opponents with a nonpartisan, thorough analysis of the potential impacts of legislation. Furthermore, point of order procedures ensure that debate in Congress considers the direct costs of any mandate contained in the legislation being considered.

UMRA's Title I success has been quantified. According to CBO, few intergovernmental mandates have been enacted since UMRA was enacted five years ago, and in 1999, no legislation that contained an intergovernmental mandate on state or local governments exceeding the UMRA thresholds became law.[2]

The U.S. Chamber does, however, have one recommendation for amending Title I. As you all know, the U.S. Chamber for several years has supported legislation, which, if enacted, would extend the comprehensive CBO review of mandates to include the private sector and would authorize point of order provisions when such requirements are not complied with. Specifically, H.R. 350 from the 106th Congress, The Mandates Information Act sponsored by Representative Gary A. Condit, would improve Congressional review of proposed federal private sector mandates included in legislation. The measure passed the House February 10, 1999, 274-149, but was not considered in the Senate. The U.S. Chamber would once again strongly support similar legislation this session.

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[2] Congressional Budget Office, "An Assessment Of The Unfunded Mandates Reform Act In 1999," (March 2000) at 2.

Agencies are not held to the same high standards that Congress set for itself.

Under Title II, agencies must prepare an UMRA statement for all rules that would impose a federal mandate exceeding $100 million to state, local and tribal governments, or the private sector. The UMRA statements must identify the statutory basis for a rule, assess the costs and benefits of a rule, estimate the scope of a mandate and its impact on the national economy, and describe the outreach an agency has conducted with state and local officials. Moreover, Section 205 requires that agencies consider several alternatives when proposing regulations, and select the least costly, most cost-effective or least burdensome alternative.

This overview of Title II describes a potentially powerful statute for identifying and avoiding costly regulatory mandates to state and local governments and the private sector. Congress clearly intended that regulatory agencies comprehensively identify and quantify regulatory mandates in a manner similar to CBO analysis of potential legislative mandates.

In certain instances, however, agency actions have prevented the policy of Congress from being achieved. Unlike Title I, which requires an independent CBO statement describing potential legislative mandates, Title II does not require an independent review of potential regulatory mandates. Therefore, Title II enables federal rulemaking agencies to propose regulations that impose significant federal mandates without providing the information necessary to debate or scrutinize the costs and benefits of the proposed rule. As structured, Title II authorizes an agency to be the final determinator over whether the regulations it proposes are mandates or not, and whether the agency's own analysis adequately describes the costs and

impacts of the mandate. Under this process, Congress, the Administration, and the American people are often deprived of the information needed to ensure that federal agencies regulate in the most cost effective, least burdensome manner.

Due to the lack of independent review, an agency may deliberately underestimate the costs of a proposed rule or conclude that UMRA does not apply because of other statutory provisions. In these instances, the agency controls both the information and debate, and its determination is virtually unreviewable.

By clearly setting forth the estimates of the costs of a proposed regulation, Congress is provided the information necessary to conduct oversight of rulemaking activities. This is a consistent Congressional policy. For example, the *Congressional Review Act* (CRA)[3] authorizes Congress to review and repeal any final regulation within 60 session days of its official publication. The vehicle for this repeal is a joint resolution of disapproval that must be passed by both the House and Senate. Vital to this review is a determination of whether a rulemaking exceeds the $100 million major rule threshold.[4]

Under both UMRA and CRA, Congress clearly demands that agencies provide accurate information regarding the impacts of proposed or final rules. But Title II has been ineffective at ensuring agencies provide this data. The title of a 1998 General Accounting Office (GAO)

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[3] *See* P.L. 104-121 Subtitle E.

[4] 5 U.S.C. 801.

report says it all: "Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions."[5]

Federal regulatory agencies should not be allowed to avoid congressional mandates by mischaracterizing the cost of a rulemaking. New provisions should be enacted to address this deficiency. To this end, the U.S. Chamber provides the following two recommendations for revising UMRA.

First, Title II should be amended to establish independent analysis of UMRA statements conducted by agencies when considering mandates. An independent body – such as GAO or the Office of Management and Budget – should be charged with reviewing the assumptions and policy decisions contained in mandates analyses. This will help ensure that mandates to both the public and private sector will be fully considered before regulations are finalized.

Alternatively, the recently enacted Truth in Regulating Act (TIRA) could also be revised to enact this change. I will discuss this in greater detail later.

The second recommendation is to permit early judicial challenges to an agency's failure to prepare UMRA statements. Section 401 of UMRA states that an agency can be compelled to prepare the necessary statements, but only when the final rule has been promulgated. A rule cannot be stayed, enjoined or invalidated solely because an agency did not prepare an UMRA

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[5] U.S. General Accounting Office, "Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions, GAO/GGD-98-30" (February, 1998), at 3.

analysis.[6] For this reason, the rulemaking proceeding is permitted to continue when analysis of the costs involved might otherwise be grounds to terminate the proceeding. By removing this provision and allowing a court to potentially invalidate a rule at an early stage because of a missing or deficient UMRA analysis, regulatory agencies will hopefully be more likely to prepare accurate UMRA statements.

The U.S. Chamber believes these changes to UMRA are prudent. Since the goal of UMRA is to generate data, these changes will ensure that agencies provide more comprehensive information. Generally, the U.S. Chamber does not advocate new provisions of law to encourage lawsuits. However, this type of action may be necessary to ensure agencies fully comply with UMRA requirements.

There are several examples of UMRA Title II flaws.

We have spent several minutes discussing the deficiencies of Title II, and strategies for fixing it, but most of this discussion is theoretical. Let me share two real-world examples.

First is the Total Maximum Daily Load (TMDL) example.

Last summer, the U.S. Environmental Protection Agency (EPA) finalized the TMDL surface water quality regulation.[7] This rule was initially proposed in August 1999. It amends

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[6] *See* 2 USC 1571.

[7] *See* 65 FR 43586 (July, 13, 2000).

water quality and permitting requirements by federalizing water discharge and restoration programs delegated to states by the Clean Water Act. EPA's proposals would create an expensive, burdensome water regulation bureaucracy that, among other things, would ban certain new and expanded industrial development, and commandeer the authority of states to solve their local water quality problems. The rule would also create new EPA oversight of certain industrial, municipal and agricultural activities. In short, this regulation would eliminate jobs and stunt economic development in communities throughout the nation.

Despite these clear costs and mandates, EPA, in its UMRA statement, determined that the TMDL rules would impose costs of less than $25 million per year on states and local governments, and zero to the private sector. EPA declared: "Thus, today's proposal is not subject to the requirements of section 202 and 205 of UMRA."[8]

At best, EPA's UMRA analysis was disingenuous. According to EPA, states would be required to prepare approximately 40,000 TMDL waterbody restoration plans over a period of 10 to 15 years. Estimates indicate that a state's development cost for a single TMDL plan typically ranges from $300,000 to $1 million. Additionally, the association representing state professionals that would be required to implement these plans estimated that costs would soon reach as much as $1.2 billion per year – many times greater that EPA's UMRA estimate and well above the UMRA thresholds. These would be direct costs to states to implement the federalized

[8] 64 FR 46043 (August 23, 1999).

EPA TMDL regime. Other costs would be passed along to the private sector in the form of new regulatory and permit requirements for water discharges, and lost economic development as facilities were driven out of business, or eliminated expansion to meet the new TMDL regulatory regime. EPA failed to even briefly consider these costs.

The U.S. Chamber and representatives of states, other industry associations, and the agricultural sector strongly criticized EPA's proposals and the shortcomings of the economic analysis. Various committees in both the House and Senate held oversight hearings and many members of Congress criticized various provisions of the proposals.

In an analysis of the TMDL rule, GAO raised questions about EPA's UMRA determination and the reasonableness of EPA's assessment of the rule's potential costs.[9]

Nevertheless, EPA remained undeterred and sought to finalize the rules during the summer of 2000. In response, last June, Congress approved a provision of the Military Construction appropriation to bar EPA from implementing the TMDL rule. [10]

Before President Clinton signed this measure into law on July 13, 2000, EPA Administrator Carol M. Browner finalized the TMDL rule. The U.S. Chamber called this move "willful contempt of Congress." EPA's action ignored the GAO analysis of the shortcomings of EPA's UMRA analysis.

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[9] U.S. General Accounting Office, "Clean Water Act: Proposed Revisions to EPA Regulations to Clean Up Polluted Waters, B-285593" (June 21,2000).

[10] P.L. 106-246, at 57.

Congress ultimately included in EPA's annual appropriation a requirement that EPA reassess the cost effectiveness of the TMDL rule to better quantify state resources needed to develop and implement TMDLs. Congress also required the National Academy of Science (NAS) to review the quality of science and methodologies used to develop and implement TMDLs, assess cost, and analyze monitoring data for TMDLs.[11]

The TMDL example demonstrates the weakness of UMRA Title II. EPA was determined to promulgate a regulation – regardless of the costs, impacts or mandates. Had UMRA been stronger, a thorough analysis of the impact to state and local governments and the private sector would have taken place long before EPA finalized the rule. As a result, the rule is final, although not effective until October 1, 2001, and we all await the results of the NAS study and EPA cost analysis. Without Congress' leadership in prohibiting EPA's implementation of this rule during this appropriations cycle, EPA would have implemented this costly, burdensome regulation with no consideration of the mandates to state and local governments and the private sector whatsoever.

The new National Ambient Air Quality Standards example.

In 1997, EPA proposed new National Ambient Air Quality Standards (NAAQS) for ozone and fine particulate. These regulations would impose a significant mandate on state and local governments and the private sector. Pursuant to the Clean Air Act, states and EPA are required to classify areas that do not meet NAAQS standards as being in "nonattainment."

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[11] *See* Senate Report 106-410, at 81, and Conference Report 106-988, at 130.

EPA's revised NAAQS requirements would have caused communities throughout the nation to be classified as nonattainment, compelling communities in these nonattainment areas to meet a series of restrictive air permitting requirements. Federal highway funding could be terminated for communities that did not develop EPA-approved plans to attain these NAAQS standards.

By all accounts, the costs of these regulations would be severe. Estimates of annual compliance costs ranged from $45 billion to $150 billion.[12] Despite these significant mandates, EPA claimed:

> Because the Clean Air Act prohibits EPA, when setting the NAAQS, from considering the types of estimates and assessments described in section 202, UMRA does not require EPA to prepare a written statement under section 202.[13]

Furthermore, EPA refused to release the scientific information on which the regulations were based.

The U.S. Chamber and other trade associations have been involved in litigation on this regulation since 1997. The Supreme Court recently ruled that the Clean Air Act precludes EPA from considering the costs when establishing NAAQS standards. However, nothing in the Clean Air Act, UMRA, or the Supreme Court's decision prohibits EPA from fully describing the costs

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[12] The $45 billion estimate was prepared by EPA, the $150 billion estimate by Reason Foundation.

[13] 62 FR 38892 (July 18, 1997). Although the quoted passage is from the particulate matter rulemaking, a near-identical provision is included in the Ozone rulemaking. *See* 62 FR 38707 (July 18, 1997).

and benefits of its regulations for the debate on this issue.[14] Therefore, a multi-billion dollar regulation went into effect without significant information about the costs, benefits or alternatives of the proposal.

A full and honest debate about the true benefits and true costs of regulations and mandates is all that the business community asks.

Statement of regulatory alternatives would unleash the power of UMRA Section 205.

Requiring better information through UMRA will have a tremendous impact on how agencies develop regulations. For example, UMRA Section 205 requires that agencies consider many alternatives when proposing regulations. From these alternatives, Section 205 also requires agencies to "select the least costly, most cost-effective or least burdensome alternatives that achieves the objectives of the rule" or explain why more burdensome options are necessary.[15] However, Section 205 is not operative unless an UMRA analysis, as specified in Section 202, is required. Therefore, when agencies circumvent Section 205 by concluding an

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[14] UMRA Section 202(a) states:

> "Unless otherwise prohibited by law, before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate 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, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written [UMRA] statement..." (2 U.S.C. 1532)

Although this section precludes agencies from preparing UMRA statements when "prohibited by law," this prohibition does not apply to NAAQS standards. In *Whitman v. American Trucking Associations, Inc.*, the Supreme Court found "EPA may not consider implementation costs in setting primary and secondary NAAQS under §109(b) of the CAA." (at 26). However, EPA is not barred from describing mandates and cost information in the UMRA statement.

[15] 2 U.S.C. 1535

UMRA analysis is not required or by grossly underestimating the cost of UMRA, the agency thwarts the intent of Congress.

Section 205 is good government – why would we ever want government regulations more burdensome than necessary? Yet, we have provided two examples of EPA actions designed to circumvent a congressional mandate to provide Congress, the regulated community, and the public with information to ensure vigorous debate on issues of great public concern.

Title I encourages members of Congress to discuss the costs and benefits of new mandates before legislation is finally enacted. The TMDL and NAAQS examples demonstrate the consequences of the Title II limitation: without information, there is no informed public policy debate. Instead of exploring opportunities for improving environmental protection, debate on the TMDL and NAAQS rules focused on lawsuits, legal technicalities, and appropriations riders.

With a workable Title II, UMRA statements on the TMDL and NAAQS rules would have included important information to frame the debate on water and air quality issues for the private sector, state and local governments, Administration officials, and members of Congress. The failure of UMRA in these and many other instances represents squandered opportunities.

Other recent statutes improve the efficiency of the regulatory process.

As I have stated, Title II of UMRA has deficiencies, but they can be remedied. The key to the remedy is developing good quality information and making it available to Congress, the

regulated community and the public. This information is necessary for the debate over how to ensure the most efficient, cost effective regulations. However, Congress has recently enacted other important statutes for increasing information used by federal agencies when preparing and justifying regulations. Some of the other statutes that have a relationship to UMRA are set forth herein:

Truth in Regulating Act – Congress has recognized that greater oversight of agency rulemakings is needed. Last session, Congress took an important step in this direction by passing TIRA. This measure implemented a three-year pilot program that enhanced Congress' ability to monitor the administrative rulemaking process by empowering GAO to analyze economically significant rules with impacts to state and local governments and the private sector of $100 million or more, or regulations that would adversely affect the economy, productivity, competition, jobs, the environment, public health and safety, or state or local governments. A TIRA review is triggered by a request from the chair or ranking member of a committee of jurisdiction.

TIRA does not require GAO to conduct new analysis – instead, TIRA requires GAO to assess the quality of an agency's information provided as part of a rulemaking. TIRA review encompasses an independent evaluation of the agency's assessment of costs and benefits of a rule, alternative approaches considered by an agency, and the quality of regulatory impact.

TIRA will enable Congress to better assess agency compliance with UMRA Title II mandate analysis requirements. This is likely to deter agencies from circumventing UMRA and willfully ignoring Congress as EPA did in the TMDL and NAAQS rulemakings.

TIRA received widespread, bipartisan support in the House and Senate. It passed the Senate with unanimous consent and was approved by the House under suspension of the rules. Although TIRA has become law, it will not become effective unless $5.2 million is appropriated to fund the three-year pilot program. The U.S. Chamber believes TIRA funding should be included in this year's appropriations.

Moreover, as I mentioned earlier, TIRA could be revised in two ways to incorporate the independent review of UMRA statements that the U.S. Chamber recommends.

First, TIRA could be established and fully funded as permanent, instead of as a pilot program. Second, TIRA could be amended to require GAO to undertake a review of all regulations that potentially impose direct costs in excess of $100 million to ensure that Title II requirements are fully addressed.

This additional responsibility would not overwhelm GAO. In the book *Ten Thousand Commandments,* the Competitive Enterprise Institute (CEI) reports that although agencies issue more than 4,000 regulations annually, only a few are estimated to cost more than $100 million. For 1999, the last year for which statistics are available, only 46 major rules were enacted.[16]

The U.S. Chamber concedes that with independent review of federal regulations and better quality cost and mandate analyses, more rules are likely to be characterized as major.

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[16] Crews and Competitive Enterprise Institute, "Ten Thousand Commandments: An Annual Policymaker's Snapshot of the Federal Regulatory State," at 27-28 (April 2000).

However, the number of reviews GAO would have to complete would not significantly increase. CEI examined all regulations currently in the promulgation process. Of the thousands of rules that have been proposed, CEI identifies only 116 as pending major rules with costs exceeding $100 million. Since it is also important to obtain an independent review of all proposed major rules, GAO would likely be required to review a few additional proposed rules that an agency may claim are not major rules. For example, EPA claimed TMDL and NAAQS were exempt from UMRA review.

Congressional Review Act – As stated, CRA enables Congress to repeal final federal regulations within 60 days of publication by means of a joint resolution of disapproval. Since the President can veto a CRA resolution, and since a President is unlikely to approve a measure to kill a regulation that the President's administration had sought to promulgate, successful CRA petitions typically require enough Congressional support to override a veto.

In the five years since CRA has been in place, Congress has disapproved only one rulemaking – the Occupational Health and Safety Administration's ergonomics regulation. The U.S. Chamber described this rule as one of the most costly regulations ever proposed.[17]

[17] The ergonomics rule was repealed because it was overreaching and prohibitively costly. The standard, which OSHA claimed would alleviate musculoskeletal disorders (MSDs) caused by workplace activity, covered 102 million employees, 18 million jobs and 6.1 million businesses of all types and sizes. It was projected to cost businesses nearly $100 billion a year, resulting in higher consumer prices for products and services. The Clinton administration issued the rule despite agreement by leading scientists and medical practitioners that not enough is known about ergonomics injuries – what causes them and how to prevent them – to warrant a regulation of this size and scope.

The relationship between UMRA and CRA is clear. Congress requires specific information about costs and benefits of major rules whether the rules be proposed or final.

Data Access – As part of the 1999 Omnibus Appropriations Act,[18] new standards were imposed governing access to data generated by taxpayer-funded research on which regulations are based. Often referred to as the "Shelby amendment," the data access provision required federal regulatory agencies to provide public access to federally funded research data collected through grants and agreements with research universities, hospitals, and other non-profit organizations.

The purpose of the data access provision is to ensure that Congress, the regulated community and the general public have access to the data used by federal agencies to develop regulations. This data frames the debate over the costs and benefits of rules. Yet, some of this data was not made available to the public, even though agencies relied upon this publicly funded research as a basis for major rulemakings, including the NAAQS rules.

Therefore, in a situation like NAAQS – when an agency refuses to prepare an UMRA statement or to release data forming the basis of a rule – Congress, the private sector, state and local governments and the public are at a significant disadvantage. The federal agency controls both the data and the debate. This is not appropriate in a democracy.

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[18] P.L. 105-277 (October 21, 1998).

Data Quality – The data quality law was included in the FY 2001 Consolidated Appropriations Act.[19] It requires OMB to establish guidelines to ensure that agencies maximize the quality, objectivity, utility of information on which regulations are based. A continuation of the data access concept, the data quality provisions ensure Congress, the private sector and the public that agencies use the best possible information as the basis for federal regulations. It also provides a process by which inaccurate or incomplete federal data can be corrected. Therefore, the data quality provision further ensures that the data issued by and disseminated by an agency is of good quality, objective, useful, and has integrity.

UMRA and other regulatory reform statutes should be integrated.

Various regulatory reform statutes help to improve the rulemaking process and the data used and disseminated by federal agencies. Yet, these regulatory reform statutes – although complementary – are balkanized. By revising UMRA as the U.S. Chamber recommends, Congress would integrate and harmonize UMRA and TIRA. The committees may want to consider harmonizing all of the regulatory reform provisions into a simple, integrated statute. This integrated statute would provide a single source of information regarding the benefits, costs, and mandates associated with rulemakings, the release of data used by the agency in the rulemaking, and procedures to ensure that agencies rely on the best possible scientific and technical data, and that the regulated community be able to review the data.

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[19] P.L. 106-554 (December 21, 2000).

Moreover, an independent review process in Title II of UMRA would help provide information necessary when the rulemaking process breaks down as it did in the TMDL and NAAQS examples, thereby providing Congressional oversight committees the necessary tools to determine whether an agency selected the least burdensome alternatives to achieve congressional goals.

The U.S. Chamber believes changes to UMRA are necessary, prudent and responsible measures to meet Congress' goal for UMRA – to ensure a high quality, comprehensive analysis of the potential impact of regulations to state and local governments and the private sector.

Finally, members of Congress – especially the members of these committees – deserve great credit for leadership and generally bipartisan support for measures to improve the regulatory process. With the few tweaks to UMRA recommended by the U.S. Chamber, Congress will take another leap towards this goal. The U.S. Chamber looks forward to assisting in this endeavor in any way we can.

Thank you. I would be pleased to answer any of your questions.

Mr. OTTER. Mr. Kovacs.

Mr. KOVACS. Thank you, Mr. Chairman and members of the two subcommittees. My name is Bill Kovacs, and I am the vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber. In that role, I am the primary officer for developing Chamber policy in the areas of environment, energy, natural resources, agriculture, food safety, regulatory affairs and technology. So I see a lot of rulemaking.

I would like to say I fully concur with both our—the very extensive written statement that we have filed—filed by Scott, as well as this oral testimony. And I have very little to add. However, I would like to say just a few things, just a few points, and then I would be willing to take questions along with Scott. One is, there were a few statements that were made by Director Daniels that, you know, he made fleeting that were very, very important. One is the data must have integrity and quality.

We now have the Data Quality Act that was put into the last appropriations bill, and that does require integrity in all the data that are used and disseminated by the government. That is the first time in the history that we have ever had anything that requires data quality. And, that includes statistical and economic information.

The second is, he made a point of saying a lot of these costs are known very early on in the regulatory process. You know, the second the rule comes out, we know what it is going to cost. We have committees. We have a very good handle on the rule and the agencies do, too, and that information is communicated to the agency. So when the agency decides that it is not going to present the economic data in a way in which might be—might have integrity, they know what they are doing.

And, third—and we have it as part of our—of our written statement, the TMDL example is the case—the case law for this issue, because there you can go right from the preliminary rule that was filed. You can go into the thousands of pages of comments that were filed on the economics of the issue, both by the private sector and by the States. You then go into the GAO report, the comments by EPA to the GAO report. And, then the comments by GAO to the EPA report and then to a final rule, and nothing changed in between from the preliminary UMRA assessment to the final UMRA assessment, nothing changed. That is the textbook example of what it is.

Mr. Otter, Congress did do something. They at least put in a rider on the VA, HUD and military construction appropriations, and they did cutoff EPA's ability to fund the project, and that may in the end be the ultimate. So thank you very much, and I will answer any questions.

[The prepared statement of Mr. Kovacs follows:]

Statement of the U.S. Chamber of Commerce

ON: **THE EFFECTIVENESS OF THE UNFUNDED MANDATES RELIEF ACT OF 1995**

TO: **THE SUBCOMMITTEE ON TECHNOLOGY AND THE SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS**

DATE: **MAY 24, 2001**

BY: **WILLIAM L. KOVACS**

Testimony of
William L. Kovacs
Vice President
Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce
Before the
Joint hearing of the
Rules Subcommittee on Technology
And the
Government Reform Subcommittee on
Energy Policy, Natural Resources and Regulatory Affairs
On the
Effectiveness of the
Unfunded Mandates Relief Act of 1995
May 24, 2001
10:30 a.m.

Thank you Chairman Linder, Chairman Ose, Ranking Member Tierney, Ranking Member Hall, and members of the Rules Subcommittee on Technology and the Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs. My name is William L. Kovacs and I am the Vice President of Environment, Technology & Regulatory Affairs at the U.S. Chamber of Commerce. In this role, I am the primary officer responsible for developing U.S. Chamber policy on environment, energy, natural resources, agriculture, food safety, regulatory, and technology issues.

I fully concur with the testimony provided by Scott L. Holman on behalf of the U.S. Chamber, and I have little to add by way of a formal statement. However, during my U.S. Chamber tenure, I have been involved in many activities to support enactment of regulatory reform statutes such as the Mandates Information Act, Truth in Regulating Act, and Data Access provisions. I look forward to sharing any information I can with the members of the subcommittees regarding technical issues of the Unfunded Mandates Relief Act of 1995 or other regulatory statutes.

Thank you. I would be pleased to answer any of your questions.

Mr. OTTER [presiding]. Thank you very much, Mr. Kovacs, for your testimony, and I would ask Chairman Linder to begin his questioning.

Mr. LINDER. Mr. Kovacs, did you work through the Chamber with the Senate? Trying to get them to take the bill up on the calendar when we passed it last year?

Mr. KOVACS. The truth in regulating?

Mr. LINDER. H.R. 350.

Mr. KOVACS. Oh, yes.

Mr. LINDER. Did you work with the Senate?

Mr. KOVACS. I didn't personally, no, but our lobbyists did, yes.

Mr. LINDER. And, their response was?

Mr. KOVACS. We weren't having much luck. Thanks to the help of your counsel, at the end of the last session, we were able to negotiate getting the Truth in Regulating Act to the Senate. But, we had the same difficulties there that we had with UMRA.

Mr. LINDER. When you talk about the integrity of information and data quality and, Mr. Holman, you talk about agencies deliberately underestimating and their estimates were unreviewable. What my ears heard is that you think that we have some agencies that are deliberately lying to us. Care to comment?

Mr. HOLMAN. I think not to characterize the intent, but certainly at best, they have not taken the care to review all of the information available from the agencies, from the public sector and even pay attention to it. And proceeded——

Mr. LINDER. Excuse me for interrupting, but I think Mr. Kovacs said they had the opportunity to review all that in the TMDL rule and they ignored it.

Mr. HOLMAN. Then the answer to your question is maybe yes.

Mr. LINDER. Has anybody done a real estimate of the costs of the new clean air rules? Is there any private-sector cost of that?

Mr. KOVACS. There are—you know, when you talk about economic studies, it depends what your assumptions are and I am not an economist. But the numbers seem to range from about $45 billion, which is EPA's number, and they started out at about $5 billion and it worked its way up. The Reason Foundation estimates that it could go as high as $150 or $160 billion annually. These are annual costs.

Mr. LINDER. Per year. Just to make one final point that is entirely parochial, we have a—we cannot build any more highways because we are under a court order in Atlanta, and so we have millions of cars sitting at 15 miles an hour instead of going through town and that is probably worse for the environment than if they were to move through town. But, we have cleaner air than we had 10 years ago, and 10 years ago we had cleaner air than we had 20 years ago. But, it seems to me that the EPA has discovered a new piece of equipment that measures smaller particles, and that becomes a new standard. Has anybody taken issue with them on these issue—on that clear air rules?

Mr. HOLMAN. Well, we, too—we in my business as the foundry manager, have paid close attention to the particulate matter, and where you go from 0.10 to 0.02 particulate matter, you can hardly walk through the shop without having that enter the air. So that is a very serious problem for us, and I think we became involved

at the U.S. Chamber with this because of the impact. It was—as I understand it—deferred for a while, but it is still standing out there waiting for us to deal with that down the road. So I still have a concern about that.

Mr. KOVACS. Congressman, as you very well know, the U.S. Chamber was one of the plaintiffs in the litigation, and we took the case to the Supreme Court. We won at the U.S. Court of Appeals and lost at the U.S. Supreme Court. They reversed and indicated that there was no cost-benefit requirement in the Clean Air Act. As you know, we worked with you on the amendment at the end, which—and this is a perfect example of how you have to deal with an agency.

Congressman Linder is very familiar, but when this case was at the Supreme Court and this was it literally a stay in the proceedings and the case had not been argued, EPA had decided very early on in the—when the case had just been accepted that they were going to actually, at that time, designate the nonattainment areas prior to a Supreme Court review, and Congressman Linder then got another amendment to the EPA's budget, which prohibited them from designating until the Supreme Court ruled. But the significance of that is, on highway funds, for example, the agency could cutoff the funds.

But, it is far more than highway funds. When you are in nonattainment, you also have to live within certain emission budgets and tradeoffs, and a lot of times you are not able to expand your business if you are in a particular area. Or if you do, you are going to have to have a tradeoff with some other business. So it has tremendous economic consequences and we have been involved in that and we will be involved in the next rulemaking, which is going to have to go on very fairly soon.

Mr. LINDER. Thank you both very much.

Mr. OTTER. Mr. Portman.

Mr. PORTMAN. Thank you, Mr. Otter. I want to thank you, gentlemen, for being here today and for the Chamber's work over the years on this. Having been cosponsor of the Condit bill—the Condit/Portman and having testified in the Senate on this bill in the efforts to try to move the Senate, I would agree with Mr. Linder's analysis, which is, we did not have the enthusiasm over there that we had hoped for, and despite some hearings, we were never able to move it to the floor. I don't know that, with the changes over the last several hours in the Senate, we are going to have any more luck. So keep the pressure on.

I am more optimistic and pleased that the administration is interested in actually implementing Title II in a way many of us hoped it would have been implemented over the last 5 years. And sorry, Mr. Chairman, I couldn't be here this morning for Mr. Daniels' testimony, but I understand that he made a commitment, not only to ensure that Title II is enforced and that 205 is followed, but that he would actually require that there be a statement even in cases where the threshold might not be deemed to be met by the agencies and that he was going to insist that the agencies err on the side of more rather than less information, which I think is a huge step forward. And I just wonder, given your recommendation today of independent analysis by OMB or GAO or some other body.

Then your second point about judicial review, your recommendation in those regards, do you think it is necessary for us to pursue legislation in those two areas at this point, or would you like to wait and see how the new administration, in fact, is going to implement Title II to see whether that, particularly with regard to your first recommendation, might be sufficient?

Mr. HOLMAN. Do you want me to take that? Personally, I was delighted to hear that, and I think that in the short run, that is, you know, very, very encouraging. I am anxious to see that put into place. It falls in the category of Executive order. These things can change. If we were able to put into legislation a fair and honest and informed debate, that is in there for the long haul, and—but we certainly are delighted to hear that the administration is moving in this direction.

Mr. PORTMAN. Mr. Kovacs.

Mr. KOVACS. Well, I would certainly concur with Scott's comments.

Mr. PORTMAN. Well, I appreciate that, and I think in the past we have always worked with OMB and that was sometimes a challenge and this OMB is going to be more interested in pursuing this issue with vigor and may even push us a little bit as a Congress, which I like. I think, Mr. Chairman, this is an issue that the subcommittee might want to take up, and having CBO have that independent analysis of our committee statements of impact on the public sector side and private-sector side has been very helpful, and I want to commend CBO for the work they've done. They had to staff up. As you can imagine, there is a lot of gnashing teeth and nervousness about whether CBO would be able to do this. In fact, on the floor we had a big debate about whether it was even possible for CBO to do it. They indicated they thought they could with some more resources. They had done a stellar job in the Rules Committee.

Mr. Linder has been a champion of this rule and despite the fact that the Rules Committee also had many concerns about how this would tie up the legislative process and turned out Mr. Linder was right. This would work and could work, and I just think it might be appropriate to go back now and see whether an independent third party could also review any agency actions. Judicial review is a very tough issue on the floor. We got into some judicial review as you know. It is more of the process than merits and that is something that I would certainly be vested in taking a look at, trying to expand that judicial review to the actual merits of the analysis. But, again, having an administration to work would you say is going to make a tremendous difference there as well and we look forward to their input also.

Thank you, Mr. Chairman.

Mr. OTTER. Thank you, Mr. Portman, for those final comments, and I certainly would agree, and I appreciate both of you gentlemen for the work that you have done prior to my arrival here, but you can expect an enthusiastic champion at your side from now on, another one from Idaho, I might say.

Gentlemen, you were here during the two previous panels, and I am concerned and still befuddled by the fact that we should be a Nation of laws, and so even though we might enjoy a certain fa-

miliarity and a camaraderie and philosophical attunement with the President and Chief Executive, I would be reticent to—as the Founding Fathers told us not to be, to depend on that.

We can't always expect our champion as—of the Chief Executive order to be in the executive mansion, and so I am more of an enthusiast of being a government of laws as we were intended and not a government of Executive orders. I think we can see in the previous administration how that cannot always serve, although perhaps their best intents, not the Nation as a whole, to the benefit of the Nation as a whole. So I would be more interested in the Chamber with your assets, with your talents and abilities. And the fact that you have had to suffer under a lot of these things, it seems to me that there is no better disciple for reform than one that has had to suffer under and labor under those kinds of rules and regulations.

So, I am in hopes that both of you gentlemen will go back to your organization and the other organizations that you belong to and make no mistake about it. Butch Otter from Idaho and the First Congressional District wants clean air, wants clean water just like everybody else, but when no assessment has been made on what the cost was going to be for arsenic. When there was no assessment made of that, to go from 50 parts per billion to 10 and a comment was made, well, all we want is clean water by one of my colleagues, my freshman colleague. And I believe that as well.

All I am asking is that they understand what that does to us in Idaho. I don't want to affect the clean water that is being turned on by that tap. In fact, I want that for my children and my grandchildren. But, when they voted for that bill, they affected 87,000 miles of streams and stream bank in my district. 119 water districts, the same amount of sewer districts, and they affected lives—the economic and social lives. And I say both economic and social, and perhaps spiritual, of 700,000 people in my district. How did they do that? Because we shut down 23 log mills, and because of that lots of lives were lost. Entire cities were closed down, and people will have to move away. That affected their social life and certainly their spiritual life.

The horror stories go on and on, and I am concerned that unless we actually put something in the law, similar to Mr. Holman, if your machinery—if your pollution abatement equipment wasn't up and operating, you would shut down that entire plant, and until you were given a permit to open that plant back up by some government agent, you wouldn't get to do it.

Quite frankly, I think we need that same kind of responsible deterrent for the government, and the reason for that, I believe, is because it is not Butch Otter who has to go and face the people of the State of Idaho every 2 years who enforce those laws. It is unelected bureaucrats who do not have to stand election, who do not have to go back and ask for their job every 2 years.

I think we need something in the law, and I would certainly appreciate it. I appreciate your testimony here today. But, I would certainly appreciate it if we could get some kind of boilerplate legislation, maybe not this year and maybe not next year, but eventually we will see the wisdom of passing and restraining the government as much as we want to restrain the private property holder.

So with that, unless you gentlemen have further comments, further questions, Mr. Portman, Mr. Linder? Then the committee stands adjourned, and I thank you very much for being here.

[Whereupon, at 12:26 p.m., the subcommittees were adjourned.]

[Additional information submitted for the hearing record follows:]

I

107TH CONGRESS
1ST SESSION

H. R. 54

To improve congressional deliberation on proposed Federal private sector mandates, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 2001

Mr. CONDIT (for himself and Mr. PORTMAN) introduced the following bill; which was referred to the Committee on Rules

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A BILL

To improve congressional deliberation on proposed Federal private sector mandates, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Mandates Information Act of 2001".

SEC. 2. FINDINGS.

Congress finds that—

(1) before acting on proposed private sector mandates, Congress should carefully consider their effects on consumers, workers, and small businesses;

(2) Congress has often acted without adequate information concerning the costs of private sector mandates, instead focusing only on their benefits;

(3) the implementation of the Unfunded Mandates Reform Act of 1995 has resulted in increased awareness of intergovernmental mandates without impacting existing environmental, public health, or safety laws or regulations;

(4) the implementation of this Act will enhance the awareness of prospective mandates on the private sector without adversely affecting the environment, public health, or safety laws or regulations;

(5) the costs of private sector mandates are often borne in part by consumers, in the form of higher prices and reduced availability of goods and services;

(6) the costs of private sector mandates are often borne in part by workers, in the form of lower wages, reduced benefits, and fewer job opportunities; and

(7) the costs of private sector mandates are often borne in part by small businesses, in the form of hiring disincentives and stunted economic growth.

SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to improve the quality of Congress' deliberation with respect to proposed mandates on the private sector, by—

(A) providing Congress with more complete information about the effects of such mandates; and

(B) ensuring that Congress acts on such mandates only after focused deliberation on their effects; and

(2) to enhance the ability of Congress to distinguish between private sector mandates that harm consumers, workers, and small businesses, and mandates that help those groups.

SEC. 4. FEDERAL PRIVATE SECTOR MANDATES.

(a) IN GENERAL.—

(1) ESTIMATES.—Section 424(b) of the Congressional Budget Act of 1974 (2 U.S.C. 658c(b)) is amended by adding at the end the following:

"(4) ESTIMATE OF INDIRECT IMPACTS.—

"(A) IN GENERAL.—In preparing estimates under paragraph (1), the Director shall also estimate, if feasible, the impact (including any disproportionate impact in particular regions or industries) on consumers, workers, and small businesses, of the Federal private sector

mandates in the bill or joint resolution, including—

"(i) an analysis of the effect of the Federal private sector mandates in the bill or joint resolution on consumer prices and on the actual supply of goods and services in consumer markets;

"(ii) an analysis of the effect of the Federal private sector mandates in the bill or joint resolution on worker wages, worker benefits, and employment opportunities; and

"(iii) an analysis of the effect of the Federal private sector mandates in the bill or joint resolution on the hiring practices, expansion, and profitability of businesses with 100 or fewer employees.

"(B) ESTIMATE NOT CONSIDERED IN DETERMINATION.—The estimate prepared under this paragraph shall not be considered in determining whether the direct costs of all Federal private sector mandates in the bill or joint resolution will exceed the threshold specified in paragraph (1).".

(2) POINT OF ORDER.—Section 424(b)(3) of the Congressional Budget Act of 1974 (2 U.S.C. 658c(b)(3)) is amended by adding after the period at the end the following new sentence: "If such determination is made by the Director, a point of order under this part shall lie only under section 425(a)(1) and as if the requirement of section 425(a)(1) had not been met.".

(3) THRESHOLD AMOUNTS.—Section 425(a) of the Congressional Budget Act of 1974 (2 U.S.C. 658d(a)(2)) is amended—

(A) by striking "and" after the semicolon at the end of paragraph (1) and redesignating paragraph (2) as paragraph (3); and

(B) by inserting after paragraph (1) the following new paragraph:

"(2) any bill, joint resolution, amendment, motion, or conference report that would increase the direct costs of Federal private sector mandates (excluding any direct costs that are attributable to revenue resulting from tax or tariff provisions of any such measure if it does not raise net tax and tariff revenues over the 5-fiscal-year period beginning with the first fiscal year such measure affects such reve-

nues) by an amount that causes the thresholds specified in section 424(b)(1) to be exceeded; and"; and

(3) in paragraph (3) (as redesignated), by striking "Federal intergovernmental mandates by an amount that causes the thresholds specified in section 424(a)(1)" and inserting "Federal mandates by an amount that causes the thresholds specified in section 424 (a)(1) or (b)(1)".

(4) APPLICATION RELATING TO APPROPRIATIONS COMMITTEES.—Section 425(c)(1)(B) of the Congressional Budget Act of 1974 (2 U.S.C. 658d(c)(1)(B)) is amended—

(A) in clause (i) by striking "intergovernmental";

(B) in clause (ii) by striking "intergovernmental";

(C) in clause (iii) by striking "intergovernmental"; and

(D) in clause (iv) by striking "intergovernmental".

(5) APPLICATION RELATING TO CONGRESSIONAL BUDGET OFFICE.—Section 427 of the Congressional Budget Act of 1974 (2 U.S.C. 658f) is amended by striking "intergovernmental".

(b) RULES OF THE HOUSE OF REPRESENTATIVES.—Clause 11(b) of rule XVIII of the Rules of the House of Representatives is amended by striking "intergovernmental" and by striking "section 424(a)(1)" and inserting "section 424(a)(1) or (b)(1)".

(c) EXERCISE OF RULEMAKING POWERS.—This section is enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of such House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of each House.

SEC. 5. FEDERAL INTERGOVERNMENTAL MANDATE.

Section 421(5)(B) of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 658(5)(B)) is amended—

(1) by striking "the provision" after "if";

(2) in clause (i)(I) by inserting "the provision" before "would";

(3) in clause (i)(II) by inserting "the provision" before "would"; and

(4) in clause (ii)—

(A) by inserting "that legislation, statute, or regulation does not provide" before "the State"; and

(B) by striking "lack" and inserting "new or expanded".

U.S. House of Representatives
Committee on Rules

Hearings of the
Subcommittee on Rules and Organization of the House

H.R. 350 - Mandates Information Act of 1999

Statement of Maura Kealey, Deputy Director, Public Citizen's Congress Watch

Good afternoon Mr. Chairman and Members of the Committee. I am Maura Kealey, Deputy Director of Public Citizen's Congress Watch. We are a 150,000 member nonprofit organization that advocates for strong, effective public health and safety protections for American consumers. I am also testifying today on behalf of Citizens for Sensible Safeguards, a coalition of more than 300 consumer, public health, environmental protection, and labor groups. We appreciate the consideration which Mr. Condit, sponsor of H.R. 350, the Mandates Information Act of 1999, has shown in meeting with us to listen to our concerns. Nevertheless, we remain strongly opposed to this legislation.

Here's what we think H.R. 350 will do in practice:

- It will allow Members of Congress to hide behind a procedural vote to torpedo vital legislation with strong public support - food safety, clean air and water, minimum wage increase, patients' bill of rights - rather than vote it up or down on its merits. To substitute a proxy vote on an analytical issue for a substantive vote on a policy matter important to the American people is undemocratic.

- It sends a message to the American people that as a matter of principle, Congress cares more about saving private industry money than protecting the public from harm.

H.R. 350 would amend the Unfunded Mandates Relief Act (UMRA) to create a point of order on the House floor against any legislation that imposes annual private sector direct costs of more than $100 million. It would also expand the analysis of federal private sector mandates already required by UMRA to include indirect costs. The Congressional Budget Office (CBO) would be directed to analyze, when applicable, the impact of legislation on consumers, workers and small businesses, including the effect on consumer prices and on the actual supply of goods and services in consumer markets; on worker wages, worker benefits, and employment opportunities; and on the hiring practices, expansion, and profitability of businesses with 100 or fewer employees.

H.R. 350 is based on faulty logic and a false premise.

Faulty logic: it is simply impossible to engage in a meaningful consideration of the costs of proposed legislation separately from discussion of its benefits. It is like basing a discussion of whether Social Security funds should be invested in the stock

market solely on the question of additional risk, without considering the potential of higher returns. Or determining whether a pharmaceutical product should be permitted on the market by evaluating only its negative side effects, without considering its positive benefits. Reasonable people may disagree about whether the cost is worth the benefit, or the potential return justifies the risk, or the help a drug provides outweighs its harm. But strictly as a matter of logic, meaningful debate on any of these questions requires talking about both halves of the equation.

In separating - and elevating - consideration of the private sector costs of legislation but not the benefits, H.R. 350 will create a vehicle to politicize - and polemicize - any issue on the House floor. But not to conduct a reasoned and meaningful debate.

False premise: H.R. 350's proponents have stated that Congress pays insufficient attention to the costs that proposed legislation may impose on the private sector. Evidence to support that premise is nonexistent, because it is not so. Congress is awash in information about the cost of legislation to private industry - some good, much inflated and propagandistic - but there is simply no evidence that Congress acts without giving a great deal of consideration to private industry costs.

Not only does CBO prepare private sector mandate cost statements on all legislation as is required by UMRA. But the many organizations that have testified in support of this legislation, including the Chamber of Commerce and the National Federation of Independent Business, advertise their ability to and effectiveness in bringing their perspective on potential costs of legislation to Congress' attention. That is without even considering the analyses and reports prepared by the Heritage Foundation, American Enterprise Institute, and the Cato Institute - my apologies to the myriad organizations that specialize in trumpeting the high cost of government mandates that I do not have time to mention here.

This record also shows that when proposed legislation or regulation to safeguard the public from environmental or health and safety hazards is considered, the prospective costs projected by industry are often wildly inflated. To mention just three examples:

- At the beginning of the Clean Air Act debate in 1970, Lee Iacocca, then Vice President of Ford Motor Company, proclaimed that the Act "could prevent continued production of automobiles...[and] is a threat to the entire American economy and to every person in America."
- In the 1980s, utilities claimed that acid rain controls would cost $1,500 a ton; the actual figure is about $100.
- In 1992, Texaco's CEO said cleaner gasoline "may cost as much as 25 cents a gallon." The real cost is 3 to 5 cents a gallon.

The General Accounting Office, asked by Senators Stevens, Nickles and Glenn and Representatives Hoekstra and Houghton in 1996 to validate the high costs of private sector mandates on U.S. companies, was unable to do so. With the assistance of business trade associations and the Small Business Administration, GAO conducted extensive outreach to locate companies willing to provide data on their actual costs of compliance with federal mandates. In the resulting report, Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies (GAO/GGD-97-2), the numbers just aren't there - GAO could not find real data from

actual companies in the real world to validate the trade groups' hypothetical projections of high private sector cost burdens from federal mandates.

H.R. 350 would exacerbate the problem of inflated industry cost estimates for federal mandates by requiring CBO to analyze indirect as well as direct costs. This requirement would either result in creating an ambitious new analytical program at CBO or - as would more likely be the case - in reliance on studies completed by others. The further that any economic study gets from known facts, the greater its reliance on speculative assumptions and extrapolations - and the more likely it will provide whoever commissioned it the answer they want to hear. One need only reflect on the "studies" commissioned by business trade groups that forecast massive job losses every time the minimum wage is increased - yet the U.S. has enjoyed record low unemployment rates since the last increase in 1996. Or on last year's self-serving study commissioned by the Health Benefits Coalition, a group representing corporations and health insurers opposed to the Patients' Bill of Rights, which projected that such high indirect costs would result if the legislation to give healthcare consumers a few basic rights passed as to bring about the end of employer-paid health insurance as we know it.

As former CBO Director Robert Reischauer testified (April 1994, before the Senate Committee on Governmental Affairs): "More detail is not necessarily better. Analysis of the effects of legislation by state, locality, or other categories often adds significantly to the preparation time, making it more difficult to meet the normal timetable for Congressional action. Without consuming enormous resources, such detail is unlikely to be very accurate, and it may result in so much data that users would find it overwhelming and undigestible."

More recently, CBO's February 1998 report, An Assessment of the Unfunded Mandates Reform Act in 1997, made the point that the extensive body of scholarly work that is necessary to estimate indirect effects is typically not available for private sector mandates. "CBO knows of no economics literature on the indirect costs of encryption, the air passenger ticket tax, or similar, more narrowly focused, mandates."

Thus H.R. 350's mandate to estimate indirect costs will not provide Congress with more useful information or promote transparency. Instead, it will invite fishing expeditions to attribute projections of consumer price increases, lost wages, jobs and benefits, and small business closures to the enactment of public safeguards for consumers, workers and the environment.

One final point on the false premise underlying H.R. 350. A review of testimony and floor statements in support of previous versions of this bill reveals no actual case - not a single example - of a major private sector mandate that was bundled into a legislative vehicle and passed by Congress without sufficient attention to or consideration of its costs. Thus the available evidence shows that the problem that H.R. 350 is intended to address is simply non-existent.

Where there has been a problem, however, is when public benefits are at stake. There is ample evidence of anti-environmental riders being attached to Appropriations bills or other "must-pass" pieces of legislation. Often this happens with absolutely no debate or consideration by the committee of jurisdiction. Anti-environmental riders

which became law in recent years include measures to increase clear-cut logging in National Forests, cripple protection of endangered species, stall the Superfund program, undermine energy efficiency standards and block the regulation of radioactive contaminants in drinking water.

Public Citizen and Citizens for Sensible Safeguards support the "Defense of the Environment" amendment offered by Mr. Waxman on the House floor when last year's version of H.R. 350 was considered. It would create a point of order against bills that weaken or roll back health, safety or environmental protections. The League of Conservation Voters National Environmental Scorecard identified more than 40 riders that would have weakened public health and public lands protections attached to Appropriations bills in 1998 alone, without proper consideration by Congress.. Based on this 40-0 record - with not a single private sector mandate with more than $100 million in costs so treated - it is clear that the need for the special procedure of a point of order is to defend public health, safety and the environment, not to protect industry from costs.

The bill before you also exempts from the point of order private sector mandates that impose a tax increase if they are offset by tax cuts, even in cases in which one group must pay the increased taxes while a different group gets the benefit of the tax cut. There is no rationale based on fairness rather than ideology for this special treatment of tax cuts - particularly since the "winners and losers" would not necessarily be the same.

I want to note in closing that some proponents of H.R. 350 have argued that the bill really doesn't do much since the point of order it creates can be overridden and the legislation under attack then be considered. Our answer to that is simple: If the bill doesn't do much, why pass it? If it does - don't pass it.

Because this legislation would permit the substitution of an abbreviated debate on a procedural motion for full, democratic consideration of policies critically important to the American people, and because it elevates and exaggerates the issue of industry costs over protecting the public, we urge you to reject H.R. 350. Thank you very much for your attention and consideration.

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105TH CONGRESS
2d Session

SENATE

REPORT
105–299

MANDATES INFORMATION ACT OF 1998

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TOGETHER WITH

MINORITY VIEWS

TO ACCOMPANY

S. 389

TO IMPROVE CONGRESSIONAL DELIBERATION ON PROPOSED FEDERAL PRIVATE SECTOR MANDATES, AND FOR OTHER PURPOSES

SEPTEMBER 2 (legislative day, AUGUST 31), 1998.—Ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
59–010 WASHINGTON : 1998

VII. Minority Views of Senator Glenn

I strongly oppose S. 389—"The Mandates Information Act."

This legislation would expand the underlying points of order in the Unfunded Mandates Reform Act (UMRA)—legislation that I was proud to be the lead Democratic sponsor of here in the Senate—to cover legislation containing private sector mandates in excess of $100 million annually.

UMRA already requires that CBO conduct cost estimates of private sector mandates in excess of $100 million. It is something that they have been doing since 1995 on legislation ranging from Welfare Reform, to the Farm Bill, to Immigration Reform (see attached tables from CBO's testimony before the Committee). However, under S. 389 a point of order would be established to require payment (absent a majority vote waiver) to the private sector for carrying out these mandates. That's a potential budget buster if you look at the cost of these bills. I don't think that's the proper approach.

Here is a sample listing and cost of recent legislation (as scored by CBO) that would be, or would have been, subject to the private sector points of order established under S. 389.

1. Telecommunications Reform—Greater than $7 billion.
2. Airport and Airway Trust Fund—$2.7 billion.
3. Nuclear Waste Policy—$2.3 billion.
4. Welfare Reform—Up to $800 million.
5. Budget Reconciliation: Federal Employee Retirement—$200 million to $600 million.

Let's look at the last example as it cuts close to home for the Governmental Affairs Committee. We are responsible for the law governing the Federal retirement and benefit system. From my long experience on the Committee, I am well aware that during the reconciliation process our Committee must inevitably make changes in law that affect and sometimes cost Federal employees and retirees (or at least some segment of the two). If S. 389 were to be enacted, then I would anticipate we would continually face points of order on Committee-reported reconciliation measures. It would only make more difficult a process that is already complicated. We already know what the costs are from existing law—S. 389 just creates an additional, unneeded procedural barrier.

This same barrier will inevitably be raised during consideration of tax measures, even those that might provide a net tax cut. These proposals almost always have some revenue increase (i.e. "mandate") in them somewhere on some private sector entity or entities. That's usually to offset the reduction in revenues elsewhere (for example: raising corporate tax rates to offset an increase in the standard deduction for individuals).

Proponents of S. 389 might argue that since under UMRA we are supposed to pay for mandates on State and local governments, we should do so also for the private sector. But I think that there is

an important distinction. State and local governments serve the same taxpaying, voting public that elect us here in the Congress, while the private sector is primarily accountable to its shareholders, not the general public. Costs imposed on the private sector fall on private owners; costs imposed on the public sector fall on taxpayers.

The Committee adopted the Chairman's amendment to correct a provision in the bill so that a point of order only lies against "unfunded" private sector mandates and does not cover "funded" private sector mandates. His amendment also includes the Thompson-Glenn technical correction regarding CBO's interpretation of UMRA's application to entitlement programs. The Chairman and I introduced this correction as separate legislation (S. 2068) earlier this year. It has strong support from the Governors and State legislators. So I supported the Chairman's amendment, although ultimately it does not fix the flaws in the underlying bill. My preference would be to separate S. 2068 from the bill and see if it can be passed as a free-standing measure this year.

My colleague from Illinois, Senator Durbin, offered an amendment in markup to subject legislation to a point of order that eases an existing private sector mandate that protects human health and the environment. His aim was try to make it more difficult for Congress to enact anti-environmental riders quietly slipped in as part of large catch-all appropriations, authorization or reconciliation bills. The Natural Resources Defense Council has noted that Congress has enacted 16 such riders in the last year alone, none of which went through the regular authorization process. My view is that if we are going to add private sector point of order protections in S. 389 to the public sector protections existing in UMRA, then out of fairness and equity we should consider similar protections for the environment and public health, especially since these riders have become such a problem in the last couple of years. So I was disappointed when the Durbin amendment was defeated on a party-line vote.

Current law already provides information on the cost of mandates on the private sector. That is sufficient to inform us during debate on legislation without creating a new point of order process as envisioned under S. 389. For that and the above reasons, I oppose this bill and I urge my colleagues to do the same.

JOHN GLENN.

TABLE 3.—REPORTED BILLS WITH PRIVATE-SECTOR MANDATES THAT EXCEED THE STATUTORY THRESHOLD

Topic	Mandate	Bill Number(s)	Estimated annual costs (billions of dollars)	Were indirect effects considered
	104TH CONGRESS, SECOND SESSION			
Amendments to Fair Labor Standards Act	Increase federal minimum wage	H.R. 940; H.R. 1227; H.R. 3265; H.R. 3448; S. 413.	4.0	Yes.
Health Insurance Reform	Health insurance portability	H.R. 3070; H.R. 3103; H.R. 3160; S. 1028.	0.3 to 0.5	Yes.
Health Insurance Reform	Mental health parity in insurance plans	H.R. 3103	9.0 to 15.0	Yes.
Health Insurance Reform	Minimum-length maternity stay	S. 969	0.2	Yes.
Immigration Reform	Requirements on immigrants' sponsors	H.R. 2202; S. 269	Up to 0.6	No.
Welfare Reform	Earned income credit provisions and requirements on immigrants' sponsors.	H.R. 3507; H.R. 3734; S. 1795.	Up to 0.8	No.
Small Business Jobs Protection	Miscellaneous tax provisions	H.R. 3448	0.3 to 1.0	No.
Telecommunications Reform	Interconnection, universal service, and blocking of certain programs	S. 652	Greater than 7.0[1]	Yes.
Farm Bill	Fees and dairy requirements	H.R. 2854	Greater than 0.8	Yes.
Professional Sports Franchises	Requirements on owners and leagues	H.R. 2740	Greater than 0.1	No.
Nuclear Waste Policy	Fees and training requirements	H.R. 1936	Greater than 2.7	No.
Memorandum: Mandates with Uncertain Costs[2]				
Intermodal Transportation	Certification of freight containers	H.R. 4040	n.a.	No.
Invasive Species	Requirements on vessels	H.R. 3217	n.a.	No.
	105TH CONGRESS, FIRST SESSION			
Airport and Airway Trust Fund	Reinstate ticket tax	H.R. 668; S. 279	2.7	No.
Biomedical Research	Prohibit manufacture of certain drugs	Draft bill	0.1 to 0.3	Yes.
Budget Reconciliation: Medicare	Requirements on private health insurance providers	H.R. 2015; S. 947	0.1 to 1.8	No.
Budget Reconciliation: Federal Employee Retirement	Increase required contributions to retirement	H.R. 2015; S. 947	0.2 to 0.6	No.
Budget Reconciliation: Revenue	Several (tax related)	H.R. 2014; S. 949	9.0 to 16.0	No.
Caribbean Trade	Change deduction for accrued severance pay	H.R. 2644	0.1	No.
China MFN	Increase tariff rates	H.J. Res. 79	Greater than 0.1	No.
Education Savings Act and IRS Restructuring and Reform Act	Change deduction for accrued vacation pay	H.R. 2646; H.R. 2676	0.1 to 1.1	No.
Encryption	Allow decryption	H.R. 695	0.2 to 2.0	Yes.
Financial Services Reform	Restrict investment activity of Federal Home Loan Banks	H.R. 10	Greater than 0.1	Yes.
Nuclear Waste Policy	Shift payment of fees	H.R. 1270; S. 104	Greater than 2.3	No.
Memorandum: Mandates with Uncertain Costs[2]				
21st Century Patent System Improvement	Extend surcharge, authorize fee increase	H.R. 400	0.02 to 0.14	No.
Terrorism	Prohibit financial transactions	H.R. 748	n.a.	No.

Worker Paycheck Fairness	Require authorizations and reports	H.R. 1625	n.a.	No.
Nuclear Regulatory Commission	Extend authority to collect fees	H.R. 2015	0 to 0.3	No.
Children's Protection from Violent Programming	Blockable programming, FCC regulations	S. 363	n.a.	No.

Notes.—The mandates in this table are those identified by the Congressional Budget Office when a bill was reported by an authorizing or conference committee. In many cases, more than one formal CBO statement was issued for each mandate topic.

[1] Cumulative costs over five years for universal service.

[2] Under S. 389, if CBO determined that an estimate of mandate costs could not be made, the point of order under section 425(a)(1) of the Unfunded Mandates Reform Act would apply.

n.a.=not applicable; MFN=most favored nation; IRS=Internal Revenue Service; FCC=Federal Communications Commission.

Source: Congressional Budget Office.

VIII. Minority Views of Senator Levin

I voted against S. 389, the Mandates Information Act, because I think it goes too far, sets up false expectations, and sends the wrong message.

The Unfunded Mandates Act which we passed in 1995 established two points of order—one, if the report on a bill or joint resolution reported by a committee does not include a statement of the Director of CBO on the direct costs of Federal mandates (including both intergovernmental and private sector mandates); and two, if any bill or joint resolution, amendment or motion would increase the direct costs of intergovernmental mandates by more than $50 million with no provision for the federal government to pay those costs. It also requires the CBO to estimate the direct costs of a proposed bill or joint resolution on the private sector.

S. 389 would add the requirement that CBO also estimate the indirect costs of a proposed bill or joint resolution on the private sector and it would add two more points of order. First, it would add a point of order to a bill, joint resolution, amendment or motion that would increase the direct costs of a private sector mandate by more than $100 million unless the bill provides money for the increased costs. Second, the law currently allows CBO to state if it is not feasible to make a reasonable estimate of the direct costs of a private sector or intergovernmental mandate. S. 389 would make a bill or joint resolution where CBO could not reasonably estimate the direct cost also subject to a point of order.

That means, that if CBO can't reasonably estimate the cost of a piece of legislation, consideration of that legislation is out of order.

If we look at the way we often write laws, the problems with S. 389 become apparent. Take a statute licensing of deep ocean mining. It requires that each license for such mining contain terms and restrictions established by the agency "to assure protection of the environment." It goes on to say, "The administrator shall require * * * the use of the best available technologies for the protection of safety, health, and the environment. * * *" How is CBO going to be able to reasonably estimate the private sector costs of legislation like that when no one could know at that time what will be required of a licensee; and no one could know what the best available technology will be?

Look at the legislation we passed licensing clinical laboratories. We said nobody can "solicit or accept materials derived from the human body for laboratory examination or other procedure unless there is in effect for the laboratory a certificate issued by the Secretary (of HHS) that"—and then the bill lists a whole number of things that the certificate must require, including accreditation, agreement on inspections, certain ways of operating.

It would be impossible for CBO to guess what HHS is going to require of clinical laboratories based on that legislation at the time

it is passed. HHS couldn't even know at that time. Yet, S. 389 would make that legislation out of order because CBO is unable to reasonably estimate the costs. I don't think that makes sense.

I'm also very concerned that this legislation ignores the benefits side of the equation. The bill demands CBO to estimate the costs of federal mandates, but it doesn't require a statement or estimate by CBO of the benefits. We regulate, hopefully, for a purpose—and a beneficial one. To evaluate the reasonableness of the costs, we need to understand the quantity and quality of the intended benefits. This legislation leaves out that important part of the equation.

Finally, the legislation sends the wrong message. It says legislation our committees believe to be necessary and important are out of order if they don't provide for the payment out of taxpayer funds for costs to be imposed on the private sector. Many times those costs are incurred because the private sector is committing a harmful act. Take a statute that seeks to reduce pollution—pollution from a factory or a mine. This bill creates the presumption that the taxpayer should pay to have the individual or company stop polluting. I don't think the American public thinks that's fair or appropriate. Or look at clinical laboratories. If we require by law clinical laboratories to follow certain basic procedures to guarantee the accuracy of their laboratory tests, this bill suggests that the taxpayer should pay the laboratory to comply with those procedures. I don't agree.

Estimating costs of legislation which is under consideration, where that is feasible and reasonable, makes sense. I also think it makes sense to require that we estimate the benefits of our legislation. It doesn't make sense to make good, meaningful, needed legislation "out of order" just because such legislation imposes a certain level of cost or because it CBO can't estimate the cost.

CARL LEVIN.

IX. Minority Views of Senators Durbin and Akaka

We agree that it is important for Congress to think carefully about the mandates we impose, not only ones that will impact State and local governments but also those that could affect the private sector, both businesses and individuals. However, we have several reservations about the ramifications of the Mandates Information Act, as amended by the Committee, which prevent us from supporting it.

The stated intent of S. 389 is to make Congress more conscientious about cost burdens we seek to place on the private sector. We do not believe that a point of order during Floor debate is necessary to force such an evaluation of costs. The Congressional Budget Office (CBO) is already required by law to identify private sector mandates. As we consider legislation in Committee, we have an opportunity to gain insights and input from experts on the effects of a proposal, allowing us to weigh the pros and cons of a measure and make judgments about whether the benefits to society outweigh the burdens it would impose.

This bill would make Congressional consideration of certain private sector mandates out of order strictly based on the question of whether direct costs exceed $100 million.

We fear that the practical impact of this proposal would be to routinely discourage and effectively preclude enactment of essential laws designed to ensure human health, public and workplace safety, and environmental protections. The public relies upon Congress to protect public health and safety and the environment by imposing fair and appropriate enforceable duties on the entities responsible for inflicting harm upon public health and safety.

However, by allowing a point of order to be raised against any legislation that would impose costs estimated at $100 million or more on the private sector, this bill creates an opportunity for opponents to impede new legislation solely on the basis of its likely fiscal burden, without regard for its public benefits—which may far outweigh the cost element. By invoking this procedural impediment, opponents can effectively subvert enactment of important health and safety protections—without ever having to vote directly against such proposals.

By focusing exclusively on estimated costs, the bill establishes an imbalanced appraisal of legislation. Benefits of proposals are not an element of the equation, and would be largely discounted, if not totally ignored. This could make enacting vital legislation designed to protect public health and safety considerably more difficult. Advancement of a bill could be halted simply because its estimated costs meet a statutory threshold, regardless of the potential public benefits, savings, or necessity.

Furthermore, the cost projections may themselves may prove to be flawed or inflated. The CBO is frequently and necessarily forced

to rely on data and input from the very industries likely to be affected by a proposed directive. It is often impossible to forecast how the private sector will actually respond to a new mandate.

In several instances, it has been demonstrated that original estimates far exceeded the actual costs. For example, the Occupational Safety and Health Administration (OSHA) established a new rule in 1978 to protect workers from exposure to cotton dust which can cause serious respiratory problems. At the time, OSHA estimated that the requirement would cost businesses $700 million per year. But the industry developed new ways to capture cotton dust. Consequently, costs to industry were determined not to be $700 million—but $83 million. That's 88% less than originally anticipated. Similarly, the Environmental Protection Agency promulgated a rule governing the release of benzene from chemical plants. The industry estimated that this rule would cost $350,000 per plant. However, soon after the rule was established, the industry developed new manufacturing processes that eliminated any need for benzene. As a result, the actual cost per plant turned out not to be the projected $350,000, but zero.

Obviously, if the estimated costs are inflated or unreliable, legislation could be blocked that, in reality, would not impose the expected fiscal burden on the private sector or actually even exceed the triggering level under the mandates bill.

We also share the concern that even if CBO is able to obtain independent validation of industry-supplied information, its assumptions and estimates would necessarily be based on broad statutes rather than implementing rules. Many statutes are drafted in general terms, and delegate significant authority to regulators to develop specific implementing rules, given their expertise and the importance of maintaining regulatory flexibility. In its February 1998 report assessing the 1997 impact of the Unfunded Mandates Reform Act of 1995, CBO cited "unknowable future regulations" and "missing information" as among the factors that prevent ascertaining whether costs exceed the threshold.

CBO noted that, particularly for private sector mandates, estimates occasionally could not be made at all or made only on crude assumptions because costs would be affected by specific implementing rules developed after the proposed reform was enacted. For instance, as CBO Deputy Director James Blum explained to this Committee in June, because CBO could not determine what technical and functional regulatory requirements would be established for an encryption bill reported in the House, its cost estimate ranged from $200 million to $2 billion. Similarly, CBO cited examples of its inability to obtain reliable data in preparing its estimates because information in some circumstances simply does not exist.

In addition, we are concerned about the bill's requirement that if CBO cannot, despite its best efforts, reasonably estimate the costs of a mandate and explains its inability to derive a figure, a point of order will still lie against the bill to the same extent as if the reporting Committee failed to include the estimate. This would result even under circumstances in which costs cannot be estimated although they may not actually exceed the threshold $100 million procedural trigger.

The bill requires CBO to specify the reasons why it could not make a reasonable cost estimate, yet those presumably sound and documented explanations would have no bearing on whether a point of order would lie—it would be as automatically available as if CBO did not perform any analysis at all. It is important to consider that in 1997, CBO was unable, due to one or more factors including ambiguous bill language, uncertainty about who is affected, an lack of information, to determine whether direct costs of a particular mandates exceeded the statutory threshold in 12 percent of the 64 intergovernmental mandates identified and 5 percent of the 65 private sector mandates identified.

As noted, S. 389 seeks to provide industry with procedural protections to guard against the establishment of new requirements in the public interest. If enacted, it would likely subject a significant amount of potential legislation that addresses pressing environmental problems to a procedural barricade. At the same time, proposals that seek to remove or weaken existing requirements would not fall within the ambit of such a new private sector mandate point of order or be subject to the same procedural safeguards. For example, repealing the Clean Air Act program which reduces toxic air emissions, or eliminating the Clean Water Act requirements for wastewater treatment plants to treat water prior to discharge into lakes and rivers could occur without open and meaningful consideration and a separate independent vote.

During committee consideration, Senator Durbin offered an amendment to inject some balance into the process and provide the public the same procedural protections as would be available under S. 389 for imposing new costs on the private sector. The Durbin proposal would extend the point of order in the bill to be available against any legislation that would eliminate, prevent the imposition of, prohibit the use of appropriated funds to implement, or make less stringent any Federal private sector mandate established in law or regulation that protects human health, safety, or the environment. It would not prohibit Congress from revising or repealing any environmental, human health, or public safety laws. It would simply ensure a meaningful, focused opportunity to more deliberatively consider provisions that eliminate or roll back existing Federal private sector mandates established in law or regulation that protect human health, safety, or the environment.

For the foregoing reasons, we respectfully oppose the Mandates Information Act as advanced by this Committee. We do not question the intent of the sponsors to provide a more open and deliberative evaluation of the costs of Federal legislation and the impact upon those who will assume such fiscal burdens. However, to the extent that this bill establishes a potentially insurmountable barrier to enacting new or reauthorized requirements that preserve and protect the environment, human health, and public and workplace safety, it is unacceptable.

DICK DURBIN.
DANIEL K. AKAKA.

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

ON

S. 389

TO IMPROVE CONGRESSIONAL DELIBERATION ON PROPOSED FEDERAL PRIVATE SECTOR MANDATES, AND FOR OTHER PURPOSES

JUNE 3, 1998

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LETTER SUBMITTED BY MS. BUCCINO

February 11, 1998

THE HONORABLE PETE DOMENICI
Chairman, Senate Budget Committee
Dirksen 621
Washington, DC 20510

THE HONORABLE FRANK LAUTENBERG
Ranking Member, Senate Budget Committee
Dirksen 634
Washington, DC 20510

Re: S. 389—More Red Tape is the Wrong Way to Go

DEAR SENATORS DOMENICI AND LAUTENBERG: We are writing to strongly oppose a bill, S. 389, now being considered by the Senate Budget Committee. At a time when Congressional leaders are trying to streamline the government, this bill would add more red tape and undermine critical health and safety protections.

We are concerned that the bill's new procedural hurdles would block important health and safety protections. S. 389 would establish a new point of order against considering bills that impose costs exceeding $100 million on the private sector. This new procedural obstacle could impede important legislation such as the proposal to expand the public's right to know about toxics in their communities or efforts to address polluted runoff into our lakes and rivers which has contributed to devastating *pfiesteria* outbreaks in Virginia and Maryland, as well as North Carolina. It could also be used to block future increases in the minimum wage. Members of Congress would have the opportunity to kill important health and safety protections without directly voting against them.

We also oppose the bill's emphasis on costs without any consideration of the benefits. Costs to some are often tremendous benefits to others. Short-term costs often result in tremendous long-term savings. The analysis required by S. 389 fails to address these realities and thus would provide poor data upon which to base legislative decisions.

For these reasons we respectfully urge you not to proceed with action on S. 389.

Sincerely,

William Snape, III, Director Legal Division
Defenders of Wildlife
Washington, DC

Florence and Philip LaRiviere
Citizens Committee to Complete the Refuge
Palo Alto, CA

Charles M. Loveless,
Director of Legislation
American Federation of State, County and Municipal Employees
Washington, DC

Michael McPhail
Alliance for Democracy
Austin, TX

Mary Wells
EarthJustice Legal Defense Fund
Washington, DC

Rob Michaels
Environmental Law and Policy Center
Chicago, IL

Terry Shistgar, Pesticide and Toxics Chair
Kansas Sierra Club

Linda F. Golodner, President
National Consumer League
Washington, DC

Sharon Buccino, Legislative Counsel
Natural Resources Defense Council
Washington, DC

Sharon Newsome,
Director of Environmental and Health Programs
Physicians for Social Responsibility

Stephan Kline, Legislative Counsel
Alliance for Justice
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Susan Pitman
The Chemical Connection,
A Public Health Network of Texans Sensitive to Chemicals
Austin, TX

Adrienne Mitchem
Consumers Union Washington Office

Dr. Fred Fay,
Disability Rights in Voter Empowerment

Steve Cochran, Legislative Director
Environmental Defense Fund
Washington, DC

Jim Mosher, Conservation Director
Izaak Walton League of America

Lana Pollack, President
Michigan Environmental Council

Pat Kenworthy
National Environmental Trust
Washington, DC

Gary Bass, Executive Director
OMB Watch
Washington, DC

Gary A. Patton, General Counsel
Planning and Conservation League
Sacramento, CA

Frank Clemente,
Congress Watch Director
Public Citizen
Washington, DC

David Scott, Conservation Chair
Sierra Club, Ohio Chapter

Tony Young, Senior Policy Associate
United Cerebral Palsy National Office
Washington, DC

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Matt Dietz
Western North Carolina Alliance
Asheville, NC

The Rev. Joseph Parrish, Rector
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Tracy Dobson,
Professor of Fisheries and Wildlife
Michigan State University

Ross M. Donald
Renewable News Network
Needham, MA

Vicki Peal
Safe Tables are Our Priority
Ft. Lauderdale, FL

Richard S. Scobie,
Executive Director
Unitarian Universalist Service Committee

Gary Bryner
Utah County Clean Air Coalition

Tom Throop, Executive Director
Wyoming Outdoor Council
Lander, Wyoming

Laura Punnett, Sc.D., Professor
Department of Work Environment
University of Massachusetts Lowell

Robin Mary Gillespie, MPH
Center for Occupational and Environmental Health
(for identification purposes only)
New York, NY

Ms. BUCCINO. My written testimony explains in detail why NRDC opposes S. 389. I would just like to highlight two points here.

First, we do believe that the new point of order created by the bill is a significant impediment to important health and safety protections. The 1995 Unfunded Mandates Reform Act already requires the collection of information about the costs of private sector mandates. What it does not include is the mechanism to block such proposals, and in our view, the new point of order is not really about making sure that cost arguments are heard but, in fact, making sure that they prevail.

Second, the bill's emphasis on costs alone is inappropriate. S. 389 focuses on only one side of the equation. It requires a calculation of costs to regulated entities without any consideration of benefits. A bill could have benefits that greatly outweigh its costs but still be held up or stopped by the new Congressional procedures.

The cost analysis required by S. 389 would provide a distorted picture of reality and a poor basis upon which to make a legislative decision. Cost analysis of a bill to reduce the use of cancer-causing pesticides, for example, would show a burden on agriculture but

not necessarily the benefits to farm workers and consumers from improved health and lower medical bills.

If the Committee does move forward with this bill, it is essential that it is amended to represent a balanced approach. Recent experience indicates clearly that hidden new mandates are far less of a problem than stealth efforts to weaken health, safety, and environmental protections. Too often, Members of Congress are forced to accept controversial anti-environmental provisions attached often at the last minute to must-pass spending bills and other unrelated widely supported legislation.

Just before the last recess, two riders that undermine a critical air program to protect air quality in the national parks and that promote the use of motorized vehicles in Minnesota's Boundary Waters were inserted into the bill to reauthorize ISTEA. Neither of these riders were considered as part of the House or Senate version, but instead, both were simply added to the bill literally in the dark of night at the conference committee. These attacks on clean air and our national parks will become law, probably, despite lacking the necessary support to move forward on their own.

Looking back at the past year, over 15 riders have become law that weaken protection of our parks, forests, and mineral resources. That is why when the companion bill to S. 389 was considered on the House floor a few weeks ago, Representative Waxman offered his Defense of the Environment amendment. The Waxman amendment would have expanded the bill's approach to create a point of order against provisions that remove, weaken, or prohibit the use of funds to implement mandates established to protect human health, safety, or the environment. A Waxman-type amendment would help ensure that hidden provisions that undermine health, safety, and environmental protections are subject to an open debate and a separate vote.

In conclusion, NRDC urges Members of the Committee to oppose S. 389. We believe a point of order against private sector mandates is unnecessary and would undermine critical health and safety protections. If you do move forward with the bill, changes should be made to ensure a balanced approach. We urge you to adopt the Defense of the Environment amendment. Whatever special procedures are applied to hidden mandates should also be applied to hidden attacks on health, safety, and environmental protections. Thank you.

[The prepared statement of Ms. Buccino follows:]

PREPARED STATEMENT OF MS. BUCCINO

Thank you for inviting the Natural Resources Defense Council (NRDC) to testify today on S. 389, the Mandates Information Act. NRDC is a membership organization, founded in 1970, dedicated to protection of human health and the environment. NRDC now has over 350,000 members from across the country.

We urge members of the Committee to oppose S. 389. We do so because, rather than offering a balanced approach, this bill would skew decision-making based on unreliable estimates of costs at the expense of the public's health and the environment. If this bill is about providing information to improve decision-making as its sponsors have indicated, changes should be made to ensure that Members of Congress have the complete picture. If it is important to have special procedures to expose hidden mandates on the private sector, it is equally important to apply these special procedures to hidden attacks on public health, safety and environmental protections. Representative Waxman offered an amendment in the House, the Defense

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

June 16, 1998

Opposition to S. 389 and H.R. 3534 - the "Costs Count; Benefits Don't" Procedural Roadblock Bills

* **Procedural Roadblock against Public Safeguards:** S. 389, sponsored by Senator Spencer Abraham, and H.R. 3534, sponsored by Representative Gary Condit, would throw a major regulatory roadblock in the way of strong environmental, food safety, public health, and worker health and safety protections.

* **Double Floor Vote:** Any Senator or Representative would be allowed to force a "double Floor vote" on public health and safety safeguards by raising a "point of order" against considering any bill that will cost the private sector $100 million to implement. A separate Floor vote would then be taken on costs alone, allowing environmental, food safety, public health, and worker protections to be killed on a procedural vote rather than voted up or down on their merits.

* **Costs Count; Benefits Don't:** The Procedural Roadblock Bills are based on the faulty premise that health and safety laws impose unfair costs on industry. The Procedural Roadblock bills count industry ***costs*** while ignoring the ***benefits*** of protecting the public from unsafe food, impure water, and public health and environmental hazards.

* **Gaming the Costs:** Industry has a long track record of projecting that it will cost them billions to comply with public safeguards when their actual outlays come in at pennies on the dollar. Robert Reischauer, former director of CBO, called cost estimates of private-sector mandates "impossible in any practical sense" [1994].

* **Safeguards Delayed are Safeguards Denied:** Legislation to safeguard the environment, food safety, public health, or worker health and safety would be slowed and weakened if not completely blocked. How many preventable toxic spills, outbreaks of foodborne illness, or other preventable public hazards would occur in the meantime?

* **New Barrier to Reauthorizations:** Not just new laws, but health, safety and environmental protection laws up for reauthorization will be subjected to the Procedural Roadblock Bill.

Please oppose this costly and burdensome "Special Interest Chokehold" legislation. Don't let the Procedural Roadblock Bill delay, weaken, or block vitally needed public health and safety and environmental protections. More information: Maura Kealey, 546-4996 ext. 371.

Ralph Nader, Founder
215 Pennsylvania Ave SE • Washington, DC 20003 • (202) 546-4996 • www.citizen.org

**Responses to Written Questions from Sharon Buccino,
Natural Resources Defense Council**

From Senator Glenn

1. Do you interpret the provisions of S. 389 to allow a point of order to be raised against legislation containing private sector mandates even if that legislation fully funds those mandates?

   Answer: Yes. Unlike the original Unfunded Mandates Act, S. 389 makes no distinction between unfunded and funded mandates on the private sector.

   If so, do you believe that the point of order should apply in those instances?

   Answer: No. NRDC opposes a point of order against any private sector mandate, funded or unfunded. Whatever merit may support limiting federal interference with state and local autonomy, these arguments simply do not apply to the private sector. Many so-called mandates are actually important public protections. The requirement that companies clean up the waste they generate, for example, does not create new costs. It simply helps to distribute the costs where they belong.

   The very concept of a funded private mandate is probably rather baffling to the much of the American public. Are we as taxpayers supposed to pay companies to clean up the waste they generate? Shouldn't companies incorporate the damage done to the public's health and the environment in the cost of doing business?

2. CBO has been providing private sector cost estimates on legislation for over 2 years now. Has your organization used those estimates as part of any debate or discussion concerning a particular piece of legislation containing private sector mandates?

   Answer: No.

3. What are your views on the Waxman Amendment on environmental riders that was considered by the House during the debate on the Condit-Portman Bill? Please explain.

   Answer: NRDC strongly supported the Waxman Amendment on environmental riders and urges the Committee to adopt a similar amendment. Recent experience indicates clearly that hidden new mandates are far less a problem than stealth efforts to weaken health, safety and environmental protections.

   The Waxman amendment would expand the bill's approach to create a point of order against provisions that remove, weaken, or prohibit the use of funds to implement mandates established to protect human health, safety, or the environment. With increasing frequency, efforts have been made to attach controversial, anti-

environmental riders to unrelated, widely supported legislation. In late May, anti-environmental forces in Congress hijacked the transportation spending bill and inserted riders that undermine a critical air program to protect air quality in National Parks and promote the use of motorized vehicles in remote areas of Minnesota's Boundary Waters Canoe Area. And just weeks earlier, three other environmental assaults affecting the nation's parks, forests and mineral resources were added to the emergency spending bill and became law.

Too often Members of Congress are forced to accept controversial anti-environmental provisions attached, often at the last minute, to must-pass spending bills and other unrelated, widely supported legislation. The two riders added to the transportation bill, for example, were never considered as part of either the House or Senate version, but simply added to the bill literally in the dark of night at the conference committee. These attacks on clean air and our national parks have become law despite lacking the necessary support to move forward on their own. This is an unconscionable subversion of the democratic process. As Representative Vento said during the House debate of the mandates bill, promoting such riders "is bad process, and it translates into bad policy." A Waxman-type amendment would help ensure that these hidden provisions undermining health, safety and environmental protections are subject to an open debate and a separate vote.

NRDC urges you to amend S. 389 to expand its point of order procedures to cover both hidden anti-environmental riders as well as hidden mandates. Such an amendment would help stop the current assault on the environment, as well as the assault on the legislative process.

From Senator Cleland

1. Can you provide some examples of health and safety protections that could be delayed or blocked as a result of S. 389?

   Answer: The new point of order created by S. 389 could be used to block pending legislation designed to address critical public health problems. One bill that might be affected is S. 1264, designed to ensure that the meat we eat is free of deadly bacteria. Another example is S. 1323, introduced by Sen. Harkin to address polluted runoff into our lakes and rivers which has contributed to devastating *pfiesteria* outbreaks in Virginia and Maryland, as well as North Carolina. Also, the proposal, H.R. 1636, to expand the public's right to know about toxics in their communities could be affected.

   In addition, S. 389 could have significant impact on existing health and environmental protections. While on its face S. 389 only affects new legislation, many environmental laws require Congressional reauthorization to assure their continued effectiveness. Such reauthorization would be subject to S. 389's requirements.

2. You propose an amendment to apply the point of order to provisions that remove, weaken, or prohibit use of funds to implement mandates established to protect human health, safety or the environment. S. 389 applies the point of order to mandates with an estimated cost of over $100 million to the private sector. Do you mean the amendment should apply to ALL provisions that may affect health, safety, and the environment?

   Answer: Yes, the point of order should apply to all provisions that weaken health, safety or environmental protections. While costs are relatively easy to quantify, the loss of benefits is not. Thus a quantitative threshold like the $100 million threshold is not applicable to provisions that weaken environmental protections. In addition, NRDC believes that Members deserve to know about and have the chance to debate any provisions buried in large, unrelated bills that weaken existing protections that Congress has already enacted into law.

Testimony of

Sharon Buccino
Legislative Counsel

Natural Resources Defense Council

before the

Senate Governmental Affairs Committee

June 3, 1998

Thank you for inviting the Natural Resources Defense Council (NRDC) to testify today on S. 389, the Mandates Information Act. NRDC is a membership organization, founded in 1970, dedicated to protection of human health and the environment. NRDC now has over 350,000 members from across the country.

We urge members of the Committee to oppose S. 389. We do so because, rather than offering a balanced approach, this bill would skew decision-making based on unreliable estimates of costs at the expense of the public's health and the environment. If this bill is about providing information to improve decision-making as its sponsors have indicated, changes should be made to ensure that Members of Congress have the complete picture. If it is important to have special procedures to expose hidden mandates on the private sector, it is equally important to apply these special procedures to hidden attacks on public health, safety and environmental protections. Representative Waxman offered an amendment in the House, the Defense of the Environment amendment, to do just that.

NRDC urges the Committee to adopt this amendment to give S. 389 a more balanced approach.

I will discuss this amendment in more detail, as well as identify NRDC's specific concerns with the underlying bill, but first let us take a look at what we are talking about when we talk about private sector mandates. We are talking about requiring companies that generate hazardous waste to pay the cost of disposing of it. We are talking about requiring companies that discard their waste in the nation's lakes and streams to reduce the toxic and cancer-causing chemicals they release. We are talking about requiring companies to provide the public information about toxics emitted into their communities. We are talking about requiring meat packers to ensure that the meat they sell is safe to eat and not contaminated with deadly bacteria. These are just a few examples of fundamental public health and safety protections that impose costs on the private sector, but which produce tremendous benefits that the public rightly expects as well.

S. 389 is about curtailing such private sector mandates. The bill's text focuses on complicated procedures like points of order, but its real effect will be to strip away fundamental protections that the American public depends on their government to deliver.

I. S. 389's New Procedural Hurdles Would Block Important Health and Safety Protections.

S. 389 would expand to the private sector procedural mechanisms enacted as part of the Unfunded Mandates Reform Act of 1995 (UMRA) that focused on public sector

mandates. The proposed legislation would establish a point of order against considering bills that impose costs exceeding $100 million on the private sector. Under S. 389, a point of order can even be raised against a bill for which the Congressional Budget Office (CBO) has determined that a cost determination is not feasible. At the same time, S. 389 would expand what is required in the CBO analysis to make such analysis practically impossible to complete. Thus, the opportunity exists for any member of the House of Representatives or the Senate to block important new health and safety protections.

Contrary to what some argue, the ability to raise a point of order is a significant impediment to new legislation. If it were not, there would be little interest now in extending the point of order to private sector mandates. The 1995 Unfunded Mandates Act already requires the collection of information about the costs of private sector mandates; what it does not include is a mechanism to block such proposals.

While a simple majority can defeat a point of order, in reality points of order are rarely appealed to the full House or Senate. The 1995 law explicitly provided for a vote on a point of order raised against an unfunded mandate in the House, but no such provision was added for the Senate. Even when a vote occurs, this procedure creates an opportunity for Members of Congress to kill important health and safety protections without directly voting against them. Furthermore, debate on the point of order is limited to ten minutes per side in the House. This means that an opponent of new legislation to improve inspections at meat packing plants, for example, could raise a point of order against the bill and defeat the bill with little discussion of the issue.

Even members of the majority party have criticized the point of order provisions in the bill. At the October hearing on H.R. 1010, the original House companion to S. 389, former Representative Bob Walker (R-PA) testified that "the point of order would put [this bill] into a procedural nightmare" and could cause "legislative gridlock."

Furthermore, the applicability of S. 389 is sweeping. While on its face, S. 389 only appears to affect new legislation, it could have significant impact on existing health and environmental protections. Many environmental laws require Congressional reauthorization to assure their continued effectiveness. Such reauthorization would be subject to S. 389's requirements. S. 389 itself contains no exemptions from its requirements, although presumably the exclusions in the original unfunded mandates law would apply to this bill's expansion of UMRA's requirements. While UMRA contains important exclusions for statutory rights that prohibit discrimination, no exclusion exists for health and environmental protections even though poll after poll demonstrates that such protections are one of the government functions most valued by Americans.

In attempting to minimize the impact of the proposed new point of order, proponents of the bill cite the limited number of times that points of order have been raised under the original Unfunded Mandates Act. In his testimony before the Senate Budget Committee in February, Representative Condit reported that a point of order against mandates on local governments was only raised five times in two years. Such limited examples, however, do not prove the limited impact of the point of order. Instead, they simply

reflect the absence of new proposals to address pressing environmental problems. Unfortunately, the past several years have revealed a greater interest in Congress to roll back health and environmental protections than to strengthen them. In other words, it is not that a point of order lacks the power to stop a proposal from moving forward, but rather there has been nothing to stop.

II. S. 389 Would Inappropriately Elevate Inflated Cost Estimates Above the Public's Health and Safety.

NRDC is not against making the government work better and improving the delivery of services to the public. But that is not what this bill is about.

A. Mandates Frequently Redistribute Costs Where They Belong Rather than Create New Costs.

S. 389 is based on a faulty premise—that industry is being asked to bear unfair and inappropriate costs to deliver safe and healthy living and working environments to Americans. Federal environmental laws have not created new costs, but simply helped to distribute them where they belong. Cleaning up pollution, protecting health, and making workplaces safer has shifted costs from the people who suffered such harms to the enterprises that inflicted them.

Economic theory has long recognized that polluting industries bear only a small fraction of the cost of the damages that they inflict on common resources such as the air we breathe and the water we drink. As Garrett Hardin demonstrated in his now classic essay, "The Tragedy of the Commons," free use of common resources leads to their destruction.

G. Hardin, "Tragedy of the Commons," Science v. 162 (1968), pp. 1243-48. We normally expect people to pay for the resources and commodities they use. They are led thereby to use only the amounts that will yield them marginal benefits that are worth the price. When we are not required to pay for venting fumes into the atmosphere, pouring pollutants into lakes and rivers, or dumping toxic wastes in the ground, we disregard the costs of these activities to society. We clutter the environment with our wastes even though the benefits we enjoy are far less than the cost we impose on others.

This is precisely the problem that many so-called mandates are designed to correct. It is not just a matter of equity—ensuring that those that inflict damage are the ones who pay for it. It is also a question of efficiency. For the market to allocate scarce resources efficiently, the price of a product must reflect its true costs—including not only the raw materials, labor, capital investment, but also the damage done to the environment and our public health.

S. 389 focuses on only one side of the equation. It requires a calculation of costs to regulated entities without any consideration of benefits. A bill could have benefits that greatly outweigh its costs, but still be held up or stopped by the new congressional procedures. The cost analysis required by S. 389 would provide a distorted picture of reality and a poor basis upon which to make legislative decisions. Cost analysis of a bill to reduce the use of cancer-causing pesticides would show a burden on agri-businesses, but not the benefits to farm workers and consumers from improved health and lower medical bills.

In many circumstances, short-term costs often result in tremendous long-term savings. Yet, such reality would not be reflected in S. 389's analysis.

B. The Information Required by S. 389 is Unreliable.

Furthermore, the data required by S. 389 is inherently unreliable. Industry has consistently exaggerated the costs of complying with environmental laws. At the beginning of the Clean Air Act debate in 1970, for example, Lee Iacocca, then Vice President of the Ford Motor Company, proclaimed that the Act "could prevent continued production of automobiles . . . [and] is a threat to the entire American economy and to every person in America." Statement by L.A. Iacocca, Executive Vice President, Ford Motor Company, Sept. 9, 1970. Yet, autos are still produced and auto companies continue to profit. Ford Motor Company more than doubled its profits for the first quarter of 1997 compared with a year earlier. "Ford's Earnings Double As Company Slashes Costs," Wall Street Journal, April 17, 1997. Later utility companies complained that the Clean Air Act's acid rain controls would cost $1,500 per ton. "Acid Rain Pollution Credits Are Not Enticing Utilities," New York Times, June 5, 1995. In reality, they cost about $100 per ton. "Heavy Breathing," National Journal, January 4, 1997.

The fact is that new technologies are developed in response to pollution control requirements that dramatically reduce compliance costs. These new technologies in turn generate new profits and jobs for American companies. Such benefits are completely ignored by the analysis that would be required by S. 389. Numerous studies show that

markets for environmental technology and services, both domestic and worldwide, are large and rapidly growing. Estimates of U.S. environmental industry market size range from $65 billion to $170 billion. Hoerner, Miller, Muller, Promoting Growth and Job Creation Through Emerging Environmental Technologies (National Commission for Employment Policy: Washington, DC), April 1995, at 8 n. 15. According to Commerce Department statistics, the U.S. environmental products industry is responsible for over 1.2 million U.S. jobs. U.S. Department of Commerce, Environmental Industry of the United States, September 1997. Moreover, the U.S. environmental products industry is generating a trade surplus of over $1 billion. Office of Technology Assessment, Industry, Technology, and the Environment (November 1993), p. 12.

Again, I want to emphasize this point. S. 389 would lead to worse rather than better legislative decisions. The analysis required by S. 389 would provide only a small and distorted piece of the total picture. Tremendous resources would be devoted to generating reports of limited value. CBO itself has said: "More detail is not necessarily better. Analysis of the effects of legislation by state, locality, or other categories often adds significantly to the preparation time, making it more difficult to meet the normal timetable for Congressional action. Without consuming enormous resources, such detail is unlikely to be very accurate, and it may result in so much data that users would find it overwhelming and undigestible." Statement by Robert D. Reischauer, Director, Congressional Budget Office, testifying before the Senate Committee on Governmental Affairs (April 28, 1994) at 21.

C. The Information Required by S. 389 is Impractical.

Not only is the analysis required of CBO unreliable, it is impractical. One of the issues debated during consideration of the Unfunded Mandates Reform Act of 1995 was how to define costs. Congress made the explicit choice to limit the cost analysis to direct costs—those costs incurred by the regulated entities to comply with the mandate. See 2 U.S.C. §658b(c)(1). Even these direct costs are difficult to calculate accurately. For example, many cost studies do not take into account the cost of activities that would be undertaken even if a federal mandate did not exist. See Senate Committee on Environment and Public Works, Analysis of the Unfunded Mandates Surveys Conducted by the U.S. Conference of Mayors and the National Association of Counties at 16 (1994). In addition, legislation rarely specifies exactly what is required for compliance. Instead, Congress appropriately delegates implementation to the agencies with the expertise to set exact emission limits or identify what is technically possible. Given these circumstances, it is impossible to make realistic cost estimates. How, for example, can CBO calculate the prospective costs of technology-based standards that will take the Environmental Protection Agency years to finalize?

Now, S. 389 would expand the analysis of costs to include certain indirect costs. This raises all kinds of problems. S. 389 would require CBO to provide analysis of, among other things, the effect of private sector mandates on "consumer prices and on the actual supply of goods and services in consumer markets," and the "profitability of businesses with 100 or fewer employees." Section 101(a)(B). CBO itself has said that such indirect

effects are difficult to calculate. In its recent report, An Assessment of the Unfunded Mandates Reform Act in 1997, CBO stated that the extensive body of scholarly work that is necessary to estimate indirect effects is typically not available for private sector mandates. The report states, "CBO knows of no economics literature on the indirect costs of encryption, the air passenger ticket tax, or similar, more narrowly focused, mandates." Congressional Budget Office, An Assessment of the Unfunded Mandates Reform Act in 1997 (February 1998). The Office of Management and Budget (OMB) has also recognized the inherent difficulties in calculating indirect costs accurately. In its September 1997 Report to Congress on the Costs and Benefits of Federal Regulations, OMB limited its analysis to direct cost and benefit estimates because "there is no consensus about or transparent estimate of the indirect costs."

S. 389's emphasis on costs and the requirement to include indirect costs could lead to absurd results. Would CBO, for example, score as costs lost income to cancer specialists from limitations on teen-age smoking even though health care costs are reduced and lives are saved?

So, while S. 389 would make the required cost analysis practically impossible to complete, the bill at the same time creates a new point of order against legislation when CBO has determined that no way exists to estimate the cost. Clearly this provision is more about blocking important legislation than it is about providing information to Congress. If the point of order is an enforcement mechanism to ensure that the required

cost analysis is done, why should a point of order be allowed when despite CBO's best efforts the cost analysis cannot feasibly be done?

III. If S. 389 Moves Forward, Changes Are Essential to Ensure a Balanced Approach.

As written, S. 389 provides incomplete and unreliable information upon which to make decisions. If the Committee moves forward with this legislation, it is essential that it is amended to represent a balanced approach. Recent experience indicates clearly that hidden new mandates are far less a problem than stealth efforts to weaken health, safety and environmental protections. That is why when the companion bill, H.R. 3534, was considered on the House floor a few weeks ago, Representative Waxman offered his Defense of the Environment Amendment. The amendment was supported by the Clinton Administration, as well as by environmental, labor and other public interest groups. While it was narrowly defeated in the House, NRDC hopes the Senate will recognize the importance of such an amendment to enhancing the quality of Congressional decision making and insist such changes be made to the Mandates Information Act.

The Waxman amendment would have expanded the bill's approach to create a point of order against provisions that remove, weaken, or prohibit the use of funds to implement mandates established to protect human health, safety, or the environment. With increasing frequency, efforts have been made to attach controversial, anti-environmental riders to unrelated, widely supported legislation. Just before recess, anti-environmental forces in Congress hijacked the transportation spending bill and inserted riders that

undermine a critical air program to protect air quality in National Parks and promote the use of motorized vehicles in remote areas of Minnesota's Boundary Waters Canoe Area. And just three weeks earlier, three other environmental assaults affecting the nation's parks, forests and mineral resources were added to the emergency spending bill and became law.

Too often Members of Congress are forced to accept controversial anti-environmental provisions attached, often at the last minute, to must-pass spending bills and other unrelated, widely supported legislation. The two riders added to the transportation bill, for example, were never considered as part of either the House or Senate version, but simply added to the bill literally in the dark of night at the conference committee. These attacks on clean air and our national parks will become law despite lacking the necessary support to move forward on their own. This is an unconscionable subversion of the democratic process. As Representative Vento said during the House debate of the mandates bill, promoting such riders "is bad process, and it translates into bad policy." A Waxman-type amendment would help ensure that these hidden provisions undermining health, safety and environmental protections are subject to an open debate and a separate vote.

NRDC urges you to amend S. 389 to expand its point of order procedures to cover both hidden anti-environmental riders as well as hidden mandates. Such an amendment would help stop the current assault on the environment, as well as the assault on the legislative process.

IV. Conclusion

The changes now being considered as part of S. 389 were rejected in 1995 as too extreme and should be rejected again now. While information regarding private sector mandates was required to be collected under the 1995 Act, the enforcement mechanisms designed to make it more difficult to enact legislation containing public sector mandates were not applied to private sector mandates. Congress made the deliberate choice in 1995 not to allow a point of order to be raised against bills containing private sector mandates. As Senator Dorgan acknowledged in his floor statement in support of the bill, "if CBO cannot reasonably make an estimate of a private sector mandate, the bill would create no point of order." Cong. Rec. (March 15, 1995) at S3920.

Whatever merit may support limiting federal interference with state and local autonomy, these arguments simply do not apply to the private sector. In fact, most state and local governments do not support efforts to limit private sector mandates. If the private sector is not paying to clean up its waste, cities and counties are stuck with the contaminated land and increased health costs.

NRDC does not support the expansion of the Unfunded Mandates Reform Act of 1995 to private sector mandates. Again, it is important to remember that what we are talking about when we talk about federal mandates is important health and safety protections that the American public wants and deserves.

In conclusion, NRDC urges members of the Committee to oppose S. 389. We believe a point of order against private sector mandates is unnecessary and would undermine critical health and safety protections. One need only look at campaign contributions and lobby disclosure forms to discover that industry needs no special assistance in getting their case heard. If you do move forward with the bill, changes should be made to ensure a balanced approach. We urge you to adopt the Defense of the Environment amendment. Whatever special procedures are applied to hidden mandates should also be applied to hidden attacks on health, safety and environmental protections.

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