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UNFUNDED MANDATES AND REGULATORY OVERREACH

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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UNFUNDED MANDATES AND REGULATORY OVERREACH

WEDNESDAY, FEBRUARY 15, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS, AND PROCUREMENT REFORM,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:32 a.m., in room 2203, Rayburn House Office Building, Hon. James Lankford (chairman of the subcommittee) presiding.

Present: Representatives Lankford, Kelly, Chaffetz, Walberg, Labrador, Meehan, Issa, Connolly, Lynch, Speier, and Cummings.

Staff present: Ali Ahmad, deputy press secretary; Michael R. Bebeau, assistant clerk; Robert Borden, general counsel; Molly Boyl, parliamentarian; John Cuaderes, deputy staff director; Gwen D'Luzansky, assistant clerk; Adam P. Fromm, director of Member liaison and floor operations; Linda Good, chief clerk; Frederick Hill, director of communications; Ryan Little, manager of floor operations; Justin LoFranco, press assistant; Kristina M. Moore, senior counsel; Kristin L. Nelson, professional staff member; Laura L. Rush, deputy chief clerk; Peter Warren, policy director; Krista Boyd, minority counsel; William Miles, minority professional staff member; and Suzanne Sachsman Grooms, minority chief counsel.

Mr. LANKFORD. I'd like to begin this hearing by stating the Oversight and Government Reform Committee's mission statement, is what we will be doing in all of our different committee meetings. We exist to secure two fundamental principles: first, Americans have the right to know that the money in Washington comes from them, that is coming from them to Washington is well spent, and, second, Americans deserve an efficient, effective government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights.

Our solemn responsibility is to hold government accountable to the taxpayers, because taxpayers do have the right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy. This is the mission of the Oversight and Government Reform Committee.

This is the first committee meeting of the Subcommittee on Technology, Information Policy, Intergovernmental Relations, and Procurement Reform. We have an impressively long title, I know, for

everyone. This hearing will focus on unfunded mandates and regulatory overreach.

Since the founding of our Nation, the Federal Government has had to balance its own authority with that of the States, counties, and cities. While each has a unique responsibility to serve their constituents, they also have had to operate within their limitations, both budgetary and statutory. However, lately we have seen where dedicated, and probably well-intentioned, government staff can move from serving people to mandating their preferences and priorities to an agency or legislative body onto people.

In the modern regulatory environment, the probability that the Federal Government will overstep its clearly defined constitutional boundaries to impose its preferences on State and local leaders has become increasingly likely. With apparently little check and balance, Federal regulators can dramatically affect the budgets and staff structure of State and local governments.

Many State and local governments face severe budgetary shortfalls that threaten their ability to perform basic services. Private businesses are struggling against numerous impediments to job creation. Quite frankly, they are all hurting.

The preferences of a regulatory agency should not determine the budget or priorities of a State or local leader. While we are not addressing the issue of private business mandates today, I would also contend there is a significant responsibility of the Federal Government to restrain its regulatory power to areas that are clearly constitutional in scope and that are not redundant of State or local laws, codes or enforcement.

I hear too many stories to recount where a Federal regulation can cost a business millions of dollars, with little or no opportunity of recourse or reversal of the matter.

When the government enacts a statute or issues a regulation mandating that a State or local government, or private sector entity perform certain actions, but fails to provide the funds needed to perform the actions, it has issued an unfunded mandate.

The Unfunded Mandates Reform Act of 1995 [UMRA], as you will probably hear it referred to several times today, was originally enacted to minimize the burden of unfunded mandates. This act sought to limit the growth of unfunded mandates by explicitly defining them and by creating a congressional point of order that could be used to help prevent the enactment of legislation creating them. However, multiple agencies and actions were excluded from UMRA and the definition of an unfunded mandate it established has come under criticism.

This hearing today seeks to determine the effectiveness of UMRA. It is intended to focus on Title II of UMRA, which concerns the unfunded mandates handed down by the executive branch in the form of new rules and regulations.

While the Unfunded Mandates Reform Act has a great name, it has limited reach because of its inapplicability to many regulatory actions. For instance, most rules issued to implement one of the major pieces of legislation enacted last year, the Dodd-Frank Wall Street Reform and Consumer Protection Act, are exempt from UMRA because they will be promulgated by the Securities and Exchange Commission, an independent regulatory agency. Rules

issued by the new Bureau of Consumer Financial Protection created by Dodd-Frank will also be exempt from UMRA.

Today's hearing focuses on local governments. I intend, in a future hearing, to bring in tribal and private sector witnesses to testify about their personal experience with burdensome Federal mandates.

While we will hear today from the mayor of Edmond, OK, I want to myself relate just a couple of anecdotes from my own State to illustrate why I have called this hearing today.

For instance, the city of Bethany, OK spent over a quarter million dollars in 1987 to put in two water wells, only to be required a few years later to take them out by the EPA because of their wastewater levels. Then the EPA changed its wastewater requirements in 2006, costing the city of Bethany over $9 million. The street signs in Bethany also must change to a new type of reflective material to meet new Department of Transportation regulations, costing the city who knows how much yet.

The Oklahoma Department of Transportation has to jump through millions of dollars of hoops to tear down an old bridge and to put up a new bridge in the exact same spot. It has to navigate the Clean Water Act, the National Historic Preservation Act, the Endangered Species Act, the Migratory Bird Treaty Act, and many other Federal laws, while people drive over an old, deteriorating bridge.

What I want to know is whether the Unfunded Mandates Reform Act is of any consequence in terms of limiting the issuance of these sorts of unfunded mandates.

Many observers, such as the Government Accountability Office, have commented on the numerous factors that limit the effectiveness of UMRA in minimizing unfunded mandates. We will hear today from GAO today about these limitations, exemptions and loopholes.

The good news is that knowledgeable parties have also identified potential improvements to UMRA, and we will hear about some of those ideas today as well.

I would like to now recognize my distinguished ranking member, the gentleman from Virginia, Mr. Connolly, for his opening statement.

[The prepared statement of Hon. James Lankford follows:]

Opening Statement of Chairman James Lankford
Unfunded Mandates and Regulatory Overreach (2-15-11)

This is the first meeting of the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform. This hearing will focus on, "Unfunded Mandates and Regulatory Overreach"

Since the founding of our Nation, the federal government has had to balance its own authority with that of the states, counties, and cities. While each has a unique responsibility to serve their constituents, they also have had to operate within their limitations, both budgetary and statutory. However, lately we've seen where dedicated (and probably well-intentioned) government staff can move from serving people to mandating the preferences and priorities of an agency or legislative body onto people.

In the modern regulatory environment, the probability that the federal government will overstep its clearly defined Constitutional boundaries to impose its preferences on state and local leaders has become increasingly likely. With apparently little check and balance, federal regulators can dramatically affect the budgets and staff structure of state and local governments.

Many state and local governments face severe budgetary shortfalls that threaten their ability to perform basic services. Private businesses are struggling against numerous impediments to job creation. They are hurting.

The preferences of a regulatory agency should not determine the budget or priorities of a local or state leader. While we are not addressing the issue of private business mandates today, I would also contend that there is a significant responsibility of the federal government to restrain its regulatory power to areas that are clearly constitutional in scope and are not redundant of state or local laws, codes or enforcement. I hear too many stories to recount where a federal regulation can cost a business millions of dollars, with little or no opportunity for recourse or reversal of the matter.

When the Government enacts a statute or issues a regulation mandating that a state or local government, or private sector entity perform certain actions -- but fails to provide the funds needed to perform the actions – it has issued an unfunded mandate.

The Unfunded Mandates Reform Act of 1995 – or UMRA – was originally enacted to minimize the burden of unfunded mandates. This act sought to limit the growth of unfunded mandates by explicitly defining them, and by creating a Congressional point of order that could be used to help prevent the enactment of legislation creating them. However, multiple agencies and actions were excluded from UMRA, and the definition of an unfunded mandate it established has come under criticism.

This hearing today seeks to determine the effectiveness of UMRA. It is intended to focus on Title II of UMRA, which concerns unfunded mandates handed down by the Executive Branch in the form of new rules and regulations.

While the Unfunded Mandates Reform Act has a great name, it has limited reach because of its inapplicability to many regulatory actions. For instance, most rules issued to implement one of the major pieces of legislation enacted last year, the Dodd-Frank Wall Street Reform and Consumer Protection Act, are exempt from UMRA because they will be promulgated by the Securities and Exchange Commission, an independent regulatory agency. Rules issued by the new Bureau of Consumer Financial Protection created by Dodd-Frank will also be exempt from UMRA.

Today's hearing focuses on local governments. I intend, in a future hearing, to bring in tribal and private sector witnesses to testify about their personal experience with burdensome federal mandates.

While we will hear today from the Mayor of Edmond, Oklahoma, I want to myself relate just a couple of anecdotes from my own State to illustrate why I have called this hearing today.

The city of Bethany, Oklahoma spent over a quarter million dollars in 1987 to put in two water wells, only to be required a few years later to take them out by the EPA because of their waste water levels. Then the EPA changed its waste water requirements in 2006, costing the city of Bethany over $9 million dollars. The street signs in Bethany must change to a new type of reflective material to meet new Department of Transportation regulations costing the city who knows how much. The Oklahoma DOT has to jump through millions of dollars of hoops to tear down an old bridge and put up a new bridge in the exact same spot. It has to navigate the Clean Water Act, the National Historic Preservation Act, the Endangered Species Act, the Migratory Bird Treaty Act, and many other federal laws – while people drive over an old, deteriorating bridge.

What I want to know is whether the Unfunded Mandates Reform Act is of any consequence in terms of limiting the issuance of these sorts of unfunded mandates?

Many observers, such as the Government Accountability Office, have commented on the numerous factors that limit the effectiveness of UMRA in minimizing unfunded mandates. We will hear from GAO today about these limitations, exemptions and loopholes.

The good news is that knowledgeable parties have also identified potential improvements to UMRA. We will hear about some of those ideas today as well.

Mr. CONNOLLY. I thank the chairman, and I want to personally welcome him to Congress and thank him for his graciousness as he and I have tried to manage the transition on this new subcommittee, and I thank him so much for his personal graciousness and commitment to cooperation on a bipartisan basis.

As a former local government official with 14 years of experience in Fairfax County, I appreciate Chairman Lankford's interest in unfunded mandates. Early in my tenure as a supervisor on that board, Congress passed the Unfunded Mandates Reform Act [UMRA], following an outcry by State and local elected officials about unfunded mandates and their burden.

It was a positive step forward, but, as I learned in the subsequent decade, the act, as the chairman just indicated, did not fully stem the tide of unfunded mandates. It was written in a manner that exempted bills that imposed significant costs on localities, such as No Child Left Behind. As has been well documented, the design, testing, and implementation costs of No Child Left Behind increased local educational costs significantly, by hundreds of millions of dollars, in many, many places, including my own county.

I am pleased that Fairfax County Executive Tony Griffin is here today so that he can discuss the continuing impact of Federal unfunded mandates on local governments.

I am concerned, however, that some have conflated mandates with regulation. I recognize that UMRA focuses on both intergovernmental and private sector mandates; however, the focus of our efforts should be on the continued burden that unfunded mandates place on local governments. This was the focus of a series of hearings in 2005 by Congress in this committee in particular, and I remain it should remain that way today.

Despite the technical language of UMRA, I do not consider regulations affecting businesses as unfunded mandates necessarily. As President Obama suggested, regulation should be reviewed for efficacy. But I simply do not believe that mercury, sulfur dioxide, or carbon dioxide restrictions on power plants should be placed in the same box was unfunded Federal mandates on local governments.

When the private sector is engaged in activity that places public health or safety at risk, these actions should be regulated. In fact, carte blanche elimination of regulations could create new costs for local taxpayers. In Fairfax County, for example, most smog forming pollution comes from power plants in the Ohio Valley. Deregulation of pollution from those plants through repeal of the Clean Air Act or otherwise would increase the costs of local government. The public health impact alone would be significant and would result in more hospital emissions, emergency service expenses, and lost workdays due to respiratory illnesses.

Fairfax County and other local jurisdictions would be forced to pay for more bus and transit service, telework coordination and other efforts to reduce vehicular emissions in order to prevent escalating costs of air pollution. It is imperative that our regulatory system prevent companies from passing on those costs of doing business to our local taxpayers.

I would be very apprehensive about any effort to use UMRA as a vehicle for an overall review of the regulatory process as it relates to the private sector. I believe that such a review would run

counter to the original purpose of UMRA. In light of this, I am pleased that we have two witnesses today representing local governments. I thank Chairman Lankford for recognizing the importance of this issue to State and local governments. I believe there are some substantive reforms to prevent unfunded mandates that are worthy of bipartisan examination, as the chairman indicated.

For example, the Tax Prevention and Reconciliation Act of 2005 included an unfunded mandate called for a 3 percent withholding that will impose a cost of more than $70 million for State and local governments, create additional administrative burdens, and reduce competition in contracting. Another Bush era law, the Real ID Act of 2005, could cost States as much $11 billion to fully implement an unfunded mandate.

In addition, we will hear about the impact of the BRAC process on local governments and local communities from Mr. Griffin. Implementation of BRAC recommendations can impose multi-billion dollar transportation and infrastructure obligations on States and localities if BRAC relocations occur in urban areas, such as they do in Fort Belvoir and Quantico in Northern Virginia. Within the context of UMRA, these improvements are considered optional, but only if it is optional for my constituents to go to work.

I support efforts to reform UMRA to take a realistic view of these costs on local governments, but I do not support using UMRA in an attempt to roll back important public health regulations like the Clean Air Act. In addition, I would ask unanimous consent that a letter from the National Association of Counties expressing opposition to unfunded mandates and drastic discretionary spending cuts be placed in the record.

I look forward to working with my chairman, Mr. Lankford, to examine reforms that would ensure UMRA can be used to measure the impacts on legislation like No Child Left Behind, and I look forward to the testimony today. Thank you. I yield back.

[The prepared statement of Hon. Gerald E. Connolly follows:]

Opening Statement of Congressman Gerald E. Connolly

Unfunded Mandates

February 15th, 2011

As a former local government official with 14 years of experience in Fairfax County, I appreciate Chairman Lankford's interest in unfunded mandates. Early in my tenure as a Supervisor, Congress passed the Unfunded Mandates Reform Act following an outcry by state and local elected officials. UMRA was a positive step forward. But, as I learned in the subsequent decade, the Act did not fully stem the tide of unfunded mandates. It was written in a manner that exempted bills that imposed significant costs on localities, such as the No Child Left Behind Act. As has been well documented, the design, testing, and implementation costs of No Child Left Behind increased local educational by hundreds of millions of dollars. I am pleased that Fairfax County Executive Tony Griffin can be here today to discuss the continuing impact of federal unfunded mandates on small governments.

I am concerned, however, that some have conflated unfunded mandates with regulations. I recognize that UMRA focuses on both intergovernmental and private sector mandates. However, the focus of our efforts should be on the continued burden that unfunded mandates place on local governments. This was the focus of a series of hearings in 2005 by Congress, and this Committee in particular, and I believe it should remain that way.

Despite the technical language of UMRA, I do not consider regulations affecting businesses as unfunded mandates. As President Obama has suggested, regulations should be reviewed for efficacy. But, I simply do not believe that mercury, sulfur dioxide, or carbon dioxide restrictions on power plants should be placed in the same box as unfunded federal mandates on local governments. When the private sector is engaged in activity that places public health or safety at risk, these actions should be regulated.

In fact, carte blanche elimination of regulations could create new costs for local taxpayers. In Fairfax County, most smog-forming pollution comes from power plants in the Ohio River Valley. Deregulation of pollution from these plants, through repeal of the Clean Air Act or otherwise, would increase costs for local governments. The public health impact alone would be

significant, and would result in more hospital admissions, emergency services expenses, and lost work days. Fairfax County and other local jurisdictions would be forced to pay for more bus and transit service, telework coordination, and other efforts to reduce vehicular emissions in order to prevent escalating levels of air pollution. It is imperative that our regulatory system prevent companies from passing on the costs of doing business to local taxpayers.

I would be very apprehensive about any effort to use UMRA as a vehicle for an overall review of the regulatory process, as it relates to the private sector. I believe that such a review would run counter to the original purpose behind UMRA. In light of this, I am pleased that we have two witnesses today representing local government. I thank Chairman Lankford for recognizing the importance of this issue for the states and localities. I believe there are some substantive reforms to prevent unfunded mandates that are worthy of bipartisan examination. For example, the "Tax Prevention and Reconciliation Act of 2005" included an unfunded mandate called 3% withholding that will impose a cost of more than $70 million on state and local governments, create additional administrative burdens, and reduce competition in contracting. Another Bush-era law, the Real ID Act of 2005, could cost states as much as $11 billion to fully implement.

In addition, we will hear about the impact of the BRAC process on local communities from Mr. Griffin. Implementation of BRAC recommendations can impose multi-billion dollar transportation and infrastructure obligations on states and localities if BRAC relocations occur in urban areas, as they have in Fort Belvoir and Quantico. Within the context of UMRA, these improvements are considered "optional," but only if it is optional for my constituents to go to work.

I support efforts to reform UMRA to take a realistic view of these costs on local government, but I do not support using UMRA in an attempt to roll back important public health regulations like the Clean Air Act. In addition, I would ask unanimous consent that a letter from the National Association of Counties, expressing opposition to unfunded mandates and drastic discretionary spending cuts, be placed in the record. I look forward to working with Mr. Lankford to examine reforms that would ensure UMRA can be used to measure the impacts of legislation like the No Child Left Behind Act.

Mr. LANKFORD. You are welcome. And I see no issue with receiving by unanimous consent that report.

[The referenced information follows:]

[NOTE.—No Insert/Information Provided.]

Mr. LANKFORD. All other Members have 7 days to submit their opening statements for the record.

Let me recognize our panel and lay some ground rules for the conversation and let you all finally get a chance to be able to talk as well.

Susan Dudley is the director of the George Washington University Regulatory Studies Center. From April 2007 to January 2009, Professor Dudley served as the Presidentially appointed Administrator of the Office of Information and Regulatory Affairs in the U.S. Office of Management and Budget. Thank you for coming.

Mayor Patrice Douglas. Mayor Douglas serves as the mayor of Edmond, OK, a position where she was elected in April 2009. Aside from her mayoral duties, Mayor Douglas has made a career as a community banker and as an attorney. She is a wife and a mom, and she actually does not have an opponent now for her next reelect, so she is able to be here actually fancy free on that one.

Denise Fantone is the Director of Strategic Issues, U.S. Government Accountability Office, where she oversees work on Federal agency budget processes and cross-cutting regulatory issues, including Federal rulemaking. Very glad that you are here today.

And Anthony Griffin, as Mr. Connolly has already recognized, Mr. Griffin is the county executive of Fairfax County, VA, appointed in 1999. Mr. Griffin oversees the operations of all Fairfax County government. Thank you for coming up. You have the shortest drive, I believe, of all of you, but very glad that you are here as well on that.

Let me set some quick ground rules for our hearing. Each of you has been asked to submit a written statement for the record and we have also asked you to prepare an oral statement no longer than 5 minutes so we can allow time for questions and discussions on your statements. You will see on this desk a series of lights that will count down from 5 minutes it will be green, then the lights will change to yellow when you have 1 minute and red when your time has expired and it will be just your opportunity to quickly wrap up.

After all the panel has given their oral statements, each Member present will have 5 minutes to be able to ask questions of the panel. Many Members may have several questions, so it is very important that you answer the questions quickly and concisely. Don't feel you have to give a lengthy answer on that.

Please also forgive the members of this committee if they have to excuse themselves. Most of us have multiple committee assignments this morning and we are juggling concurrent meetings. Your testimony will be recorded completely for review.

Though each Member completely chooses the content of their 5 minutes of questioning, I would ask that Members honor our guests' time and attendance by prioritizing answers and information from them, instead of making speeches during your questioning time. I would also ask Members not to ask a question after their 5 minutes of time has expired. As chairman, I do reserve the

right to remind you that time has expired and ask for proper decorum during our hearing.

If you have been asked a question and you see the red light come on while you are still answering, please feel free to finish up your answer, though, as a guest here of the panel.

All of our panels are bipartisan. There are Members of both parties on this committee. It is our desire to hear the facts so that we can make an informed decision in our Nation's best interest. There are many issues in Congress that are divisive, but most of the issues we deal with in this committee should be very bipartisan.

We are very grateful of the time you have committed to doing your written and oral statements, and the time you have given away from your family for this hearing. May I also say that I understand many or most of you gave up your Valentine evening with your family to travel here to D.C. last night, so please pass on our gratitude to your family and your willingness to share your expertise today.

Do you understand the ground rules of this hearing?

It is the policy of this committee that all witnesses be sworn in before they testify, so would you please raise your right hands?

[Witnesses sworn.]

Mr. LANKFORD. Thank you very much.

We will begin initially with Ms. Dudley, I believe, with your testimony, so we would be very please to receive that now.

STATEMENTS OF SUSAN E. DUDLEY, THE GEORGE WASHINGTON UNIVERSITY REGULATORY STUDIES CENTER; MAYOR PATRICE DOUGLAS, CITY OF EDMOND, OK; DENISE M. FANTONE, DIRECTOR, STRATEGIC ISSUES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE; AND ANTHONY H. GRIFFIN, COUNTY EXECUTIVE, OFFICE OF THE COUNTRY EXECUTIVE, COUNTY OF FAIRFAX, VA

STATEMENT OF SUSAN E. DUDLEY

Ms. DUDLEY. Thank you, Chairman Lankford, Ranking Member Connolly, and members of the committee, for inviting me today. I am Susan Dudley, Director of the George Washington University Regulatory Studies Center and Research Professor of Public Policy at GW. From April 2007 to January 2008, I oversaw the executive branch Regulations of the Federal Government as Administrator of the Office of Information and Regulatory Affairs [OIRA]. The views I express here are my own.

I thought I would use my 5 minutes to summarize why I think UMRA has been less effective than some had hoped at curbing unfunded mandates and to offer some modest proposals.

During my tenure as OIRA Administrator, executive branch agencies issued 108 economically significant final regulations, only 17 of which were classified as unfunded mandates, and not one of those was considered to impose mandates on State, local, and tribal governments. Now, that doesn't mean that no regulations issued during my tenure imposed burdens on other levels of government. Indeed, EPA issued two national ambient air quality standards during that period, and I heard from several States seriously concerned about the cost of implementing them.

They were not classified as unfunded mandates because, one, the cost to States did not meet the UMRA definition of mandate and, two, the Clean Air Act prohibits EPA from considering cost when setting the primary acts. More recent acts for sulfur dioxide have argued further that UMRA is not triggered because it is the Clean Air Act itself that imposes the obligation on States and EPA is merely interpreting those requirements.

Another regulation issued during my tenure that a reasonable person might consider burdensome on States was an HHS rule eliminating reimbursement to States under Medicaid for school-based administration expenditures and certain transportation costs. Despite the elimination of approximately $635 million in Federal funding, the rule was not covered by UMRA because it "did not require States to replace that Federal funding with State funding or take any particular steps."

These illustrations show the limitations of UMRA. Though both UMRA and Executive Order 12866, which governs agency rulemaking, exclude independent agencies and rely on a threshold of $100 million, UMRA covers a fraction of what the Executive order covers, in large part because UMRA applies the $100 million threshold to mandated spending, while the Executive order applies it to affects, and UMRA contains seven additional exemptions, more I think that we will hear about from GAO.

Not only does the Executive order cover more regulations than UMRA, but it provides OMB more authority to hold agencies accountable for conducting analysis and basing regulatory policy on the results of that analysis.

UMRA only requires analysis if an agency "in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material." In contrast, OIRA determines whether a regulation is subject to Executive Order 12866 and whether agencies' regulations and supporting analysis meet the principles of the order.

The Executive order calls for quantitative and qualitative analysis and decision factors that are similar to those contained in UMRA. It emphasizes consultation with other levels of government and States of each agency "shall assess" the effects of Federal regulations on State, local, and tribal governments, and seek to minimize those burdens. As a result, in my experience, the analytical and interagency review requirements of the Executive order provided OIRA a more effective mechanism for holding agencies accountable to the objectives expressed in UMRA, both conducting the analysis to understand the effects of the regulations and in choosing the most cost-effective regulatory approach from alternatives.

Now onto my modest suggestions to address, one, the limited coverage and, two, the lack of accountability. To broaden coverage, Congress could consider aligning on the language with that of Executive Order 12866 and/or extending it to include independent regulatory agencies, which are not currently bound by the Executive order either. To make the executive branch more accountable for the goals of UMRA, Congress could provide OMB oversight authority beyond certifying and reporting on agencies' actions.

Congress might also want to expand judicial review under UMRA so that, for example, an agency's failure to justify not selecting the most cost-effective or least burdensome alternatives could be grounds for staying or invalidating the rule. Congress might even go further, for example, by making compliance with mandates discretionary for State, local, and tribal governments unless funding is provided.

Even without amending the statute, this committee has options for increasing knowledge of the extent of unfunded mandates. Section 103 provides that, at the request of Congress, CBO would compare its Title I estimate of the unfunded mandates of a statute with an agency's Title II estimate of the cost of the regulations implementing that statute.

I am not aware whether Congress has ever made such a request, but it could yield interesting comparisons to inform Congress's deliberations of both future legislation involving unfunded mandates and whether agency implementing regulations are consistent with original congressional intent.

Thank you.

[The prepared statement of Ms. Dudley follows:]

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON DC
REGULATORY STUDIES CENTER

Prepared Statement of

Susan E. Dudley

Director, GW Regulatory Studies Center
Research Professor, Trachtenberg School of Public Policy and Public Administration

Hearing on

"Unfunded Mandates and Regulatory Overreach"

Before the

Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform

Committee on Oversight and Government Reform

U.S. House of Representatives

February 15, 2011

Trachtenberg School of Public Policy & Public Administration 805 21st St., NW, Suite 612, Washington, DC 20052
202-994-7543 · fax 202-994-6792 RegulatoryStudies@gwu.edu · www.RegulatoryStudies.gwu.edu

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

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

Title II of UMRA

Federal Agency Responsibilities

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

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

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

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

[1] The George Washington University Regulatory Studies Center raises awareness of regulations' effects with the goal of improving regulatory policy through research, education, and outreach. This statement reflects my views, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University.

(3) estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of (A) the future compliance costs of the Federal mandate; and (B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector;

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

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

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

OMB Responsibilities under UMRA

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

The Director of OMB has delegated these responsibilities to OIRA, which issued brief guidelines when UMRA became law in March 1995, and references UMRA requirements in Circular A-4, "Regulatory Analysis."[2] OIRA also reports annually to Congress on the new regulations covered

[2] September 17, 2003, available at: http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf

by UMRA. (In recent years these reports have been included in OIRA's annual report to Congress on the benefits and costs of regulation.)[3]

Why UMRA has not been more effective

Despite high expectations when UMRA was enacted (one researcher at the time called the requirement that agencies choose the least burdensome alternative "quite important, perhaps even revolutionary"[4]), most observers have been disappointed.[5] As several reports from the Congressional Research Service (CRS) and Government Accountability Office (GAO) have observed, while UMRA may have improved consultation between federal agencies and other levels of government, it appears to have had little effect on agencies' rulemaking.[6]

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

Limited coverage

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

A recent CRS report documented that between the effective date of UMRA to the end of fiscal year 2009, OMB reviewed 642 final rules with effects (costs or benefits) greater than $100 million. The majority (72 percent) of those rules did not meet UMRA's definition of a mandate. The General Services Administration website, RegInfo.gov, classifies less than 15 percent of the economically significant final regulations issued by executive branch agencies between March 1995 and today as having unfunded mandates on other levels of government or the private sector.[7]

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[3] These annual reports are available at: http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/
[4] Daniel Troy, 49 Admin. L. Rev. 139 1997
[5] GAO 2005
[6] GAO 1998, GAO 2004, GAO 2005, CRS 2010
[7] OMB reviewed 777 regulations between March 22, 1995 and February 9, 2011. Of those, RegInfo identifies 113 of those as imposing unfunded mandates on the private sector, and 20 as imposing unfunded mandates on State, local or tribal governments.

Lack of accountability

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

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

Further, the analytical requirements are similar to those contained in Executive Order 12866, "Regulatory Planning and Review," which has guided executive branch regulatory planning, analysis, and review since 1993.[8] The Act allows agencies to prepare required statements "in conjunction with or as a part of any other statement or analysis, provided that the statement or analysis satisfies the provisions of subsection (a)." OMB Circular A-4 observes, "Your analytical requirements under Executive Order 12866 are similar to the analytical requirements under [UMRA], and thus the same analysis may permit you to comply with both analytical requirements."

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

My Experience with UMRA

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

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

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[8] President Clinton's Executive Order 12866 replaced President Reagan's Executive Order 12291, issued in 1981, which imposed similar analytical and review requirements on new federal regulations.

they imposed on State governments because (1) the costs to States did not fit the definition of "mandate" and (2) the Clean Air Act prohibits EPA from considering costs when setting primary NAAQS.[9] More recent NAAQS for sulfur dioxide have argued further that it is the Clean Air Act itself that "imposes the obligation for States to submit [state implementation plans] to implement the SO2 NAAQS," and that "EPA is merely providing an interpretation of those requirements."[10]

Another regulation issued during my tenure that a reasonable person might consider burdensome on State, local and tribal governments was a Health and Human Services rule eliminating reimbursement to States under Medicaid for school-based administration expenditures and certain transportation costs (CMS-2287-F). Despite the elimination of approximately $635 million in federal funding in the first year following implementation, the rule was not covered by UMRA because it did "not require States to replace that Federal funding with State funding or take any other particular steps."[11]

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

(1) UMRA applies the $100 million threshold to mandated "spending" while Executive Order 12866 applies it to "effects,"

(2) UMRA excludes regulations for which agencies did not issue a proposal,[12] and

(3) UMRA provides seven additional exemptions.

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

[10] Final rule available at: http://www.epa.gov/ttn/naaqs/standards/so2/fr/20100622.pdf

[11] Final rule available at: http://www.regulations.gov/#!documentDetail;D=CMS-2007-0251-0001

[12] Only 12 of those 108 regulations were issued without a proposal, so the definition of expenditures and the exemptions appears to explain most of the difference in coverage.

Not only does Executive Order 12866 cover more regulations than UMRA but it provides OMB more authority to hold agencies accountable for conducting analysis and basing regulatory policy on the results of that analysis. UMRA Section 202(a)(4) only requires analysis if an agency "*in its sole discretion* determines that accurate estimates are reasonably feasible and that such effect is relevant and material." (emphasis added)

In contrast, OIRA determines whether a regulation is subject to Executive Order 12866, and whether agencies' regulations and supporting analysis meet the principles expressed in the Order. The Executive Order calls for quantitative and qualitative analysis and decision factors similar to those contained in UMRA, and it also emphasizes consultation with "State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities." It says each agency "*shall* assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives." (emphasis added) In addition OMB has responsibility for ensuring agency compliance with Executive Order 13132, "Federalism."

As a result, in my experience, the analytical and interagency review requirements of Executive Order 12866 provided OIRA a more effective mechanism for holding agencies accountable for the objectives expressed in UMRA (i.e., both conducting analysis to understand the effects of regulations, and choosing the most cost-effective regulatory approach from among alternatives).

Opportunities to further UMRA Objectives

UMRA expresses admirable goals, but its limited coverage and lack of enforcement mechanism limit its effectiveness. To broaden the coverage, Congress could consider aligning UMRA language with that of Executive Orders 12866 and 13132, and/or extending it to include independent regulatory agencies (which are not currently bound by those Executive Orders). To make the executive branch more accountable for the goals of UMRA, Congress could provide OMB oversight authority beyond certifying and reporting on agencies' actions. OMB, with its government-wide perspective and institutional regulatory and budget oversight role, might be in a good position to serve as a check on agencies' analysis and decision-making.

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

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

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

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

Mr. LANKFORD. No, thank you very much. Look forward to your questioning.

Mayor Douglas, thanks for being here. We would very much entertain your oral statement now.

STATEMENT OF MAYOR PATRICE DOUGLAS

Ms. DOUGLAS. Thank you very much, Chairman Lankford, for inviting me. Thank you, Members, for allowing me to be here today. I am Patrice Douglas. I am the mayor of Edmond, OK.

Edmond is just to the north of Oklahoma City and is Oklahoma's sixth large city. We have about 86,000 people, with a school district of 110,000. We cover 90 square miles. We have a general fund budget of about $43 million and our overall budget is about $226 million. Last year, Edmond was named the top place to raise a family by Family Circle magazine. I had to put that in there.

Edmond, as all Oklahoma cities and cities across the Nation, are facing budget decreases. We are a sales tax only city; we are funded only by sales tax and what we make from our utility companies. For the first time in more than two decades, last year we had a 9 percent budget decrease. No living mayor in Edmond had ever faced that issue. We were able to prioritize people, and we didn't have any furloughs or layoffs of police or firefighters. We delayed capital improvement projects, which means roads, bridges, repairs, and we were able to cut expenses.

Other Oklahoma cities didn't fare as well; they cut expenses and had to lay people off and furlough people, fire police and civilian employees. Across the Nation I believe that the picture was worse. And having been at the U.S. Conference of Mayors recently, I heard about mayors who were laying off as many as 30 percent of their work forces. So municipalities are facing severe challenges right now.

I first want to commend those of you who were in Congress and supported UMRA when it was passed. I hope that you continue to support that, but I hope that we can tighten it up. I hope that we can make it more effective for local governments because we are feeling the pressure right now. Every time we have a Federal mandate handed to us, then that is one less thing I can do that my citizens elected me to do, and I am held directly accountable because I grocery shop with those people.

I want to hit on just a few things that we are seeing as overwhelming costs in our budget. First, the recordkeeping that we are required to do for stormwater regulation, I know, is extremely burdensome and is extensive.

I first want to tell you that Edmond is in compliance and we are happy about that. Over the last 5 years we have done what we needed to do, but it has cost us $2 million to do that. So $2 million that I can't spend to fix roads, all to show that I am in compliance, that I was not outside the regulatory guidelines of that.

Second, there are people on this panel who know more about the Clean Air Act than me, but I can tell you that Edmond sits in a greater Oklahoma City region and that we are in compliance, but there is talk about changing the standards. And if they change the standards, we will have some very long, extensive processes and regulations and costs that go along with that.

I would be remiss if I didn't mention health care. We are, right now, in the city of Edmond, reviewing what our options are with regard to health care. We have traditionally covered the benefits for 100 percent of our employees; we have paid their premiums at 100 percent and we have paid dependent coverage at 75 percent.

Our consultants are telling us that we are going to see an almost 20 percent increase in health care costs this year, which amounts to $600,000. Almost 15 percent of that is directly attributable to some of the mandates that came down through the recent Health Care Reform Act, and that is what we are being told.

So we are trying to budget for that. I am not sure how we are going to it. We are just now starting our budgeting process and what I believe is going to happen is we are going to have to consider the options on health care and perhaps lowering the coverage on our employees or raising the premiums or requiring some payback from employees. I am not sure how it is going to end up, but we are facing that.

Last, I would be remiss if I didn't mention the Dodd-Frank act and the concern that we have with an SEC regulation that is being proposed that will affect cities and volunteer boards. I have more than 30 boards and commissions in Edmond with volunteers serving. If this SEC rule is adopted, it is likely that I am going to have many of my volunteers have to be registered through the SEC.

Not only does that probably put a wet blanket on volunteers wanting to volunteer for these boards, but it also causes my employees where I am already short-staffed because I am not filling vacancies, causes them additional work. So the costs I can't determine because the rule hasn't been passed yet, but I urge folks to look really closely at that rule because I do believe it is going to impose some serious requirements on cities.

Thank you.

[The prepared statement of Ms. Douglas follows:]

Testimony of

Patrice Douglas

Mayor, City of Edmond

On Behalf of the City of Edmond, Oklahoma

Before the House Committee on Oversight and Government Reform

Regarding Unfunded Mandates to Municipal Governments

Tuesday, February 15, 2011

The City of Edmond, Oklahoma

P. O. Box 2970

Edmond, OK 73003

www.edmondok.com

Comments of Mayor Patrice Douglas

On Behalf of the City of Edmond

Before the Committee of Oversight and Government Reform

U.S. House of Representatives

February 15, 2011

Thank you Mr. Chairman. I appreciate you and all of the members of this committee for allowing me to participate in this important hearing. I am Patrice Douglas, Mayor of the City of Edmond, Oklahoma, and I am pleased to appear today to offer comments on behalf of the City of Edmond on unfunded mandates and regulatory overreach. I serve on the Board of Directors for the Oklahoma Municipal League, and on the U.S. Conference of Mayors Standing Committees on Energy and Tourism.

I am here at the request of Congressman James Lankford, and have been asked to explain, from the City of Edmond's perspective, about the unfunded mandates we face as we budget in these very difficult economic times. Thank you for holding this hearing and for considering cities like Edmond as you make decisions.

Edmond, Oklahoma – A Brief Description

Edmond borders the north side of Oklahoma City, and is a city of 86,000 people, with our school district encompassing more than 110,000, making Edmond the 6th largest city in Oklahoma. Geographically, we encompass 90 square miles, with 46 miles of that being fully developed. We have seen phenomenal growth in the last decade. Our general fund budget is approximately $46 million dollars, with our entire budget including our utility operations being $223 million dollars.

Edmond, as all Oklahoma cities, is financed predominately by sales tax. Last year, for the first time in at least 20 years, we had a decline in sales tax revenue. Edmond's sales tax revenue declined by 6% , which was 9% below our budget. Many of my sister cities were forced to lay off fire and police personnel, to furlough employees for 7 days or more, and to eliminate any new positions. To some nearby Oklahoma cities, this meant a reduction in workforce of between 5-10% of workforce.

Edmond prioritized people. We did not have layoffs, or furloughs. In this fiscal year, our sales tax revenue has leveled off but has not recovered. To balance our budget, as required by the Oklahoma Constitution, we eliminated pay increases, delayed several infrastructure projects, cut expenses and left vacancies unfilled. The infrastructure projects delayed should be started this year – but our revenue does not currently support moving forward. We have begun the budgeting process for our next fiscal year, and expect to see tougher negotiations with our police, fire and civilian unions.

Unfunded Mandates Reform Act

We commend you for the leadership in passing the UMRA, Unfunded Mandates Reform Act of 1995. Mayors wholeheartedly support this legislation, and urge you to tighten this act further. Each time we face an unfunded mandate, we are forced to choose between raising taxes, cutting services or delaying needed infrastructure projects. Each time we get an unfunded mandate, it requires locally-elected officials to disregard the will of our voters to meet the standards imposed by Congress.

In the 2011 Metro Agenda of the U.S. Conference of Mayors, cities specifically call for new legislation to strengthen the federal-local partnership and further restrict the ability of Congress and the Administration to impose unfunded federal mandates. We also ask Congress and the Administration to determine the cost of current unfunded mandates and to provide a coordinated and national strategy regarding the prioritization and implementation of those mandates given the monetary constraints of local government.

Again, I thank you for your commitment to the UMRA, and encourage you to continue your search for ways to enhance and further the purpose behind this important legislation.

Unfunded Mandates Facing Cities Like Edmond, Oklahoma

1. Stormwater Quality

In 1990 the Environmental Protection Agency promulgated regulations that required water-quality based stormwater programs to address the quality of stormwater runoff from certain industries, construction activities, and municipalities of 100,000 or greater.

"Phase I" regulations were incorporated into the existing National Pollutant Discharge Elimination System (NPDES) permit rules. In 1999 the EPA enacted similar regulations, referred to as "Phase II", affecting municipalities with under 100,000 populations. As a result, the City of Edmond was required to obtain permit coverage under this EPA program through the Oklahoma Department of Environmental Quality (ODEQ).

These "Phase II" municipalities and other entities developed comprehensive Stormwater Management Programs that encompassed six "Minimum Control Measures" best described as six main areas of focus, to address the quality of stormwater runoff being generated from within their boundaries. For the City of Edmond the activities include public education and outreach programs, public participation and involvement, illicit discharge detection, elimination and construction site runoff control, post-construction stormwater management in new development and redevelopment, and pollution prevention for municipal operations.

Extensive record keeping and annual compliance reports are required on the above measures. The City of Edmond has completed its first five year permit cycle and is in full compliance with this unfunded mandate. The operation of this current program costs the City of Edmond approximately $400,000 a year.

The EPA is seeking new approaches to stormwater management that will potentially focus more on reducing the overall volume of water that goes into stormwater pipes by having communities manage rainwater where it lands by increasing permeability to decrease runoff. This could also mean regulatory expansion of the Municipal Separate Storm Sewer System (MS4s). The EPA is seeking preliminary input now and will be proposing new regulations in September of this year with a final proposal set for November of 2012. It is anticipated that this cost will increase significantly due to unknown, but expected, additional requirements that will be included in the new EPA/ODEQ Phase II Permit.

For Edmond, and other cities of similar geographic size, the cost could be extreme, while the benefit would be miniscule. It could cause the redesign of stormwater systems in which cities have invested billions of dollars.

Currently, 38 percent of Oklahoma municipalities are under "consent orders" for their water and/or sewer system violations that are driven largely by new EPA regulations. Consent orders translate into massive mandates on municipalities for expenditures for upgrades and new construction which many communities cannot afford. EPA Region VI estimates that $5.4 Billion dollars will be needed for water and sewer improvements in Oklahoma in the next few years. Many of these are driven by new EPA regulations, and further regulations as suggested for stormwater cannot be shouldered by local governments.

2. Clean Air Act

Ozone is our number one air quality problem in Central Oklahoma, and is an issue of health concern from May to October. Ground level ozone is formed in the summertime by a combination of compounds and chemicals generated by emissions. High ozone levels impact the young and the old, and those with asthma, heart disease and respiratory problems.

Since the issuance of the stricter eight-hour ozone standard in 1997, ozone levels in the greater Oklahoma City metropolitan area have actually declined. Essentially, you can argue that because of this, our air in central Oklahoma has actually become cleaner.

As far as our current emissions inventory, a significant portion of our emissions do come from mobile sources. We are still in full compliance with federal ozone standards, as set by the EPA.

In 2008, as part of a requirement of the Federal Clean Air Act, the EPA reviewed the ozone standard and made it even stricter that the standard introduced in 1997. Despite lowering the standard two years ago, the current administration is considering lowering it again. This edict will likely be announced this summer. Despite the fact that ozone levels have decreased in the past 10 years in central Oklahoma, adherence to the new federal standard will be very difficult, based on our projections from the past three seasons.

The end result would be that our region would be saddled with a "dirty air" designation (non-attainment), along with hundreds of other metropolitan areas. The policy paradox is that we have done everything to keep our air clean, but we still may not be able to maintain our clean air status. Being declared a "dirty air region" would result in an arduous, long process in which we would have to develop an emissions reduction strategy to show that we have the capacity to return our air to "clean air status." It would also reduce central Oklahoma's ability to encourage economic development and jobs, and would be extremely costly to businesses coming to this area.

We do not know what standards will be imposed by the EPA. From past history, we can assume implementation of these new and costly regulations will require enormous time and effort to develop the plan, at an unknown cost to our local governments, our citizens and the economic generators that foster

our way of life. We know that it will make locating business in our regions more difficult and costly, with the bottom lines being less job creation.

3. Health Care Reform

Beginning in 2012, under a little-discussed unfunded mandate of the health care reform legislation, local governments like Edmond will be required to report any payment in excess of $600 for ser ices or merchandise to the Internal Revenue Service on a Form 1099. While the purpose is noble – to collect lost revenue from companies that under-report on tax returns – no serious consideration was given to the accounting and reporting nightmare created by the unfunded mandate. Edmond's accounting and auditing costs have increase by almost 40% in the last nine years with the imposition of additional federal regulation, and we cannot give an accurate estimate of how much this single change will increase our accounting costs, but we do believe it will be significant. Our consultant stated only that it will "lay a heavy burden on employers."

As for the cost of health care for our employees, Edmond is currently in discussion with providers. In past years, Edmond has provided health insurance for employees, and has paid for 75% of dependent coverage. After the passage of the health care reform legislation, our city expects to see an increase of 19.81% ($600,000 in increase), with 14.51% directly attributable to requirements under the new heath care act. We will be required to make other adjustments, which could include a lowering of coverage and increased employee premiums, in order to afford the added expense.

4. Securities and Exchange Commission (SEC) Proposed Rules

On December 20, the Securities and Exchange Commission (SEC) released new proposed rules to implement the "municipal advisor" registration requirement found in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public-Law 111-203, 124 Stat. 1376 (2010)).

Under the Dodd-Frank law, the registration requirement applies to all municipal advisers who provide advice to "municipal entities" and other borrowers involved in the issuance of municipal securities. The advice may be related to derivatives, guaranteed investment contracts, "investment strategies," or the issuance of municipal securities. It also applies to advisers who solicit business from a state or local government for a third party.

As drafted the rule would exempt municipal elected officials and staff from the registration requirement. Not excluded, however, are appointed volunteer members of local government boards or other citizen volunteers. The rulemaking's reach would thus subject citizen board members and other volunteers to federal SEC fiduciary duty, pay-to-play, and other rules, and reporting requirements.

Many states and cities already have statutory provisions concerning the fiduciary responsibility of volunteer board members of their authorities. In our view, the proposed rule would only serve to micro-manage local governments and impose duplicative redundant regulatory burdens as an answer to unsubstantiated and undefined issues.

Practically for cities, registration with its associated costs and burdensome paperwork requirements will have a chilling effect on local governments' ability obtain the highest quality volunteer participation for their municipal entities. With 30 board, commissions and task forces made up of more than 300 citizen volunteers, our boards and commissions are critical to our city. In Edmond, there are at least three volunteer boards and commissions that would be required to comply with these new regulations. There are several other boards that arguably could fall within this definition.

5. Other Miscellaneous Regulations

Homeland Security Presidential Directive #5, as permitted under legislation creating Homeland Security, requires National Incident Management Training.. In order to receive Homeland Security grants, as well as many other federal grants, cities are required to be NIMS-compliant.

Undisputedly, cities need to be prepared for emergencies. In the last year, Edmond had a 500-year flood, an earthquake, and two blizzards. We prepare and train for such emergencies, and design our cities for the safety of our citizens.

But this training should be determined at a local level, and imposed based on what localities see as necessary.

In salary alone, Edmond's direct cost per year for NIMS training is a minimum of $82,320. This does not include the costs of additional equipment, personnel benefits, the cost of adjustment of work schedules, and delay in necessary city services while employees are training. Edmond's 686 employees must train a minimum of 6 hours per year, for a total of 4116 work hours. We must qualify every year. New training occurs every year, and many are required to take as much as 35 hours. While this direct cost figure may seem low, it equates to at least two full time salaried employees.

Edmond received a small amount of federal dollars for training equipment. It was not sufficient to cover the complete costs of equipment. It did not provide the personnel or resources to complete the training.

Another example of a regulation where benefits do not justify it costs is the cleaning of our city police training gun range. Edmond's gun range, used to train not only our own police officers, but officers from around the state of Oklahoma, must operate under strict restrictions of the EPA to ensure we are handling our explosive material according to Federal standards. Our training must be in strict conformity with federal regulatory guidelines. Edmond completes a remediation process at our gun range every three to five years to remove all lead.

Cities whose police departments maintain gun ranges have been sued for contaminating the ground water by their use of lead bullets. None of these suits thus far have been successful. There is little or no evidence that the lead from bullets at a firing range has ever contaminated the ground water. Nevertheless, in trying to protect Edmond from liability, we engage in a regular program of remediation. While the intention is good, a cost-benefit analysis does not warrant these remediation requirements.

Thank you again for allowing me to share the views of Edmond, Oklahoma. These examples are only a few of what municipalities face on a regular basis that cause strain on resources, and reductions in services. I am honored to have the opportunity, and am appreciative of your time and consideration.

Mr. LANKFORD. Thank you.

Ms. Fantone, we would love to be able to hear your oral statement now.

STATEMENT OF DENISE M. FANTONE

Ms. FANTONE. Good morning, Mr. Chairman, Ranking Member Connolly, and members of the subcommittee. I am pleased to be here to discuss the Unfunded Mandates Reform Act of 1995 as it relates to Federal agency rules. Congress has asked GAO to evaluate UMRA several times and on its 10th anniversary to seek diverse views on UMRA restraints and weaknesses. Drawing on this work, I will describe exceptions and exclusions for identifying Federal mandates, summarize GAO's findings, and also present suggestions made by knowledgeable parties about improvements to the act.

UMRA was enacted to address concerns about Federal mandates that require other levels of government or the private sector to spend resources without providing funding to cover their costs. UMRA does not prevent Federal mandates from going into effect; instead, the act's purpose is to provide information on the costs and benefits of Federal mandates and rules that meet the reporting threshold and to obtain meaningful and timely input from State, local, and tribal governments as rules are developed.

Before any of this happens, however, rules must pass through multiple steps and meet multiple conditions. My statement lists 14 reasons why an agency would not identify its rules as containing a Federal mandate subject to UMRA. Let me give you a few examples.

Rules are not identified as having a mandate if costs are imposed as a condition of Federal assistance or where participating in the Federal program is considered voluntary. Other exclusions are based on the type of agency issuing the rule. UMRA does not apply, as has been said, to independent regulatory agencies, such as the Securities and Exchange Commission. Or another exemption is where the rule starts. It must begin as a proposed rule. There are other exclusions as well, such as rules that involve enforcement of individual rights, national security and emergency activities, or procedures for safeguarding Federal funds.

Given these reasons and others I have not described, it is not surprising that GAO found over the years few rules that trigger UMRA. In 2004, we reviewed all final major and economically significant rules published in 2001 and 2002. Only nine tripped the UMRA requirements. Of the 113 that did not, 65 had new requirements that we determined could impose costs or other impacts on non-Federal parties; 29 appeared significant and little different from the rules identified as Federal mandates. Why didn't these rules trigger UMRA? The most frequent explanations were the financial threshold of $100 million was not met; the rule did not go through the proposed rule stage; participation in the Federal program was considered voluntary; or the rule was issued by an independent regulatory agency. Similar GAO findings before and since raise the question whether UMRA adequately captures regulatory actions that might impose financial burdens on others. The evidence suggests the answer is no.

In 2005, GAO asked a diverse group from academia, advocacy groups, business, Federal agencies, and State and local governments for their views. No one suggested repealing UMRA. They recognized its positive aspects, but found areas that they would like to see fixed.

Two areas in particular are relevant to today's hearing. The most frequent comment across all sectors was about UMRA's coverage. Most, but not all, of UMRA's narrow coverage was a barrier to the act's effectiveness. While there was less agreement on approach, many suggested amending particular exclusions, notably as a condition for Federal assistance or for participation considered voluntary.

Other frequent comments were to lower the cost threshold, which, for regulations, would be the expenditure threshold or to include both direct and indirect costs; and some parties, particularly from the public interest advocacy sector, viewed UMRA's coverage as a strength and wanted to include health and environmental protection.

As for the underlying purpose of UMRA to generate information about the size and nature of Federal mandates, they generally agreed there needed to be more complete estimates, and a frequent suggestion was that agencies evaluate mandates after they had been implemented as a way to better understand actual costs and benefits. Such information could help provide additional accountability and potentially lead to better design and funding decisions.

Thank you very much.

[The prepared statement of Ms. Fantone follows:]

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Technology, Information Policy, Intergovernmental Relations, and Procurement Reform, Committee on Oversight and Government Reform, House of Representatives

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FEDERAL MANDATES

Few Rules Trigger Unfunded Mandates Reform Act

Statement of Denise M. Fantone, Director
Strategic Issues

GAO-11-385T

February 15, 2011

GAO
Accountability • Integrity • Reliability
Highlights

Highlights of GAO-11-385T, a testimony before the Subcommittee on Technology, Information Policy, Intergovernmental Relations, and Procurement Reform, Committee on Oversight and Government Reform, House of Representatives

FEDERAL MANDATES

Few Rules Trigger Unfunded Mandates Reform Act

Why GAO Did This Study

Many federal programs and initiatives involve shared responsibilities—and benefits—for the federal, state, local and tribal governments, and the private sector. Federal statutes and rules often require nonfederal parties to expend their resources in support of certain national goals. The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to address some of the concerns about federal statutes and regulations that require nonfederal parties to expend resources to achieve these goals without being provided funding to cover the costs. UMRA generates information about how these potential federal mandates could affect other levels of government and the private sector as Congress and agency decision makers consider proposed legislation and regulations.

Congress has asked GAO to evaluate the effectiveness of UMRA procedures and requirements several times since it was enacted. Based on that body of work, this testimony focuses on Title II of UMRA regarding federal mandates in rules and
(1) describes the exceptions and exclusions in the act when identifying a federal mandate and
(2) summarizes GAO findings on UMRA's implementation over the years and views of knowledgeable parties on potential improvements.

GAO is not making recommendations in this testimony.

What GAO Found

UMRA's process for identifying whether a rule contains a federal mandate is complex, and there are 14 reasons why a rule would not be identified as containing a federal mandate. These include definitions, exceptions, and exclusions. For example, requirements in rules are not considered federal mandates under UMRA if they (1) arise in a rule issued by an independent regulatory agency, such as the Securities and Exchange Commission, (2) are a condition of receiving federal financial assistance, (3) require compliance with accounting or auditing procedures, or (4) provide for emergency assistance. If UMRA applies, the federal agency is then required to prepare a written statement about the anticipated effects of the mandates contained in the rule and consult with affected parties.

GAO consistently found that agencies' rules seldom triggered UMRA. In 2004 GAO reported that 65 rules, or over half of the 113 final major rules published in calendar years 2001 and 2002 that had not triggered UMRA, had impacts on nonfederal parties that those affected might perceive as unfunded mandates. GAO analyzed each of those rules to identify how it was treated under UMRA's mandate identification process. Among the most common reasons the rules did not trigger UMRA's requirements were that (1) the rule did not meet the UMRA dollar threshold for expenditures, (2) the rule was published in final form without going through the proposed rule stage, (3) participation in the federal program was considered voluntary, and (4) the rule was issued by one of the independent regulatory agencies, which are not covered by the act. It is important to note that GAO also found that the remaining rules that had not triggered UMRA included no new requirements that would impose costs or have a negative financial effect on state, local, and tribal governments or the private sector. These rules often involved payments from the federal government to nonfederal parties.

In 2005, when GAO asked knowledgeable parties from academia, advocacy groups, business, federal agencies, and state and local governments about UMRA, they frequently raised concerns about the act's coverage and the quality of analyses of federal mandates. Their comments suggested that there is merit in considering whether features of the law that determine if a rule includes a federal mandate subject to UMRA need to be retained, modified, or eliminated. Additionally, the parties we spoke with suggested that evaluation of existing rules through retrospective reviews has the potential of being able to better assess the effectiveness of UMRA, among other benefits.

View GAO-11-385T or key components.
For more information, contact Denise M. Fantone at (202) 512-6806 or fantoned@gao.gov.

Mr. Chairman and Members of the Subcommittee:

I am pleased to have the opportunity to discuss the Unfunded Mandates Reform Act of 1995 (UMRA),[1] specifically, at your request, Title II which applies to federal mandates contained in federal agencies' rules. Congress has asked GAO to evaluate the effectiveness of UMRA procedures and requirements several times since it was enacted.[2] In 2004 and 2005, we analyzed the act's procedures for identifying federal mandates in depth, and we also were asked to seek the views of diverse parties familiar with UMRA and report on the most frequently cited targets for improvement.[3] Drawing on that work, my remarks today will (1) describe the exceptions and exclusions for identifying whether a rule contains a federal mandate that triggers UMRA, and (2) summarize GAO findings on UMRA's implementation over the years and the views of knowledgeable parties on ways to improve the act.

My testimony today is based on prior reports and testimonies prepared at the request of Congress since UMRA was enacted. We used multiple methodologies to develop our findings for these reports. To describe the applicable procedures, definitions, and exclusions for identifying federal mandates in rules under UMRA, we reviewed the act, other related guidance documents, and Office of Management and Budget (OMB) reports on the implementation of UMRA. To identify rules that were and were not identified as containing federal mandates under UMRA and analyze the reasons for those determinations, we reviewed major final rules published over various periods of time. We also interviewed a diverse group of parties from the academic, business, federal agency, public interest advocacy, and state and local governments sectors knowledgeable about the implementation of UMRA to obtain their views. We conducted our work for these reports in accordance with generally accepted government auditing standards. A more detailed discussion of scope and methodology is available in each of the reports cited in the related products list.

[1]Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified in scattered sections of Title 2 of the United States Code).

[2]App. I contains the highlights pages from some of GAO's reports and testimonies, and a list of the related GAO products is included at the end of this statement.

[3]GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637 (Washington, D.C.: May 12, 2004) and *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, GAO-05-454 (Washington, D.C.: Mar. 31, 2005).

What we have consistently found is that the complex UMRA process provides many reasons for not identifying a rule as having federal mandates subject to the act and, as a result, federal agencies' rules seldom trigger UMRA's reporting and consultation requirements. Comments we obtained from multiple parties representing different sectors suggested that there is merit in considering whether features of the law that determine if a rule includes a federal mandate subject to UMRA need to be retained, modified, or eliminated. Additionally, the parties we spoke with suggested that evaluation of existing rules through retrospective reviews has the potential of being able to better assess the effectiveness of UMRA, among other benefits.

As we noted in previous reports, many federal programs and initiatives involve shared responsibilities—and benefits—for the federal government, state, local and tribal governments, and the private sector. To aid in the implementation of these programs and initiatives and to share their costs, federal statutes and regulations often require nonfederal parties to expend their resources in support of certain national goals. Nevertheless, Congress and others in the public policy arena have struggled to determine the appropriate balance of fiscal responsibility between the federal government, state, local and tribal governments, and the private sector in carrying out these federal mandates and this continues to be a challenge and source of debate.

UMRA was enacted to address some of the concerns about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided funding to cover the costs. However, the act does not preclude the implementation of such mandates. Rather, UMRA generates information about how these potential federal mandates could affect other levels of government and the private sector as Congress and agency decision makers consider proposed legislation and regulations.[4] For regulatory mandates, UMRA also includes a consultation requirement. Agencies must develop a process to permit elected officers and representatives of state, local, and tribal governments to provide input in the development of regulatory proposals containing significant intergovernmental mandates. The act also requires actions by

[4]The provisions governing potential mandates in legislation appear under Title I of UMRA and those regarding mandates in rules under Title II. UMRA also includes two other titles. Title III of UMRA required the Advisory Commission on Intergovernmental Relations to conduct a study reviewing federal mandates. Title IV establishes limited judicial review under the act.

OMB, including establishing a pilot program to identify and test new ways to reduce reporting and compliance burdens for small governments and annual reporting to Congress on agencies' compliance with UMRA.

Why a Rule Would Not Be Identified as Containing a Federal Mandate

The UMRA process under Title II focuses first on determining whether a rule contains provisions that would be identified as federal mandates under UMRA and therefore subject to the act's other requirements. This process for the identification and analysis of federal mandates is complex. Federal rules must pass through multiple steps and meet multiple conditions before UMRA requirements apply. These include procedures, definitions, and other categories of exclusions. For example, the provisions in a rule are not considered federal mandates under UMRA if they (1) arise in a rule issued by an independent regulatory agency, such as the Commodity Futures Trading Commission or the Securities and Exchange Commission; (2) are a condition of receiving federal financial assistance; (3) require compliance with accounting or auditing procedures; or (4) provide for emergency assistance. In total, there are 14 reasons why an agency would *not* identify its rule as containing a federal mandate subject to UMRA, as illustrated in table 1.

Table 1: Reasons Why a Rule Would Not Be Identified as Containing a Federal Mandate under UMRA

Exclusions	The rule...
Definition of mandate and exceptions	
1.	Contains no enforceable duty (unavoidable requirement) upon state, local, or tribal governments or upon the private sector
2.	Contains duties that are a condition of federal financial assistance
3.	Involves participation in a voluntary federal program
4.	Is issued by an independent regulatory agency
Procedures	
5.	Does not go through the proposed rule stage[a]
Exclusions	
6.	Enforces constitutional rights of individuals
7.	Enforces rights prohibiting discrimination
8.	Requires compliance with accounting and auditing procedures
9.	Provides for emergency assistance
10.	Is necessary for national security or foreign affairs
11.	Is designated as emergency legislation
12.	Relates to certain programs under the Social Security Act
Threshold	
13.	Requires no *expenditure* of $100 million or more (adjusted for inflation) in any 1 year[b]
Other	
14.	Is subject to a statute that prohibits consideration of costs and benefits

Source: GAO summary of UMRA provisions. For the full text of these provisions, see UMRA, e.g., 2 U.S.C. §§ 658, 1503.

[a]Agencies can publish final regulatory actions without notices of proposed rulemaking using either good cause, categorical, or statute-specific exceptions to the Administrative Procedure Act's notice and comment requirements. See 5.U.S.C. §§ 553(b)(B), 553(d)(3).

[b]The UMRA threshold in Title II is triggered only by direct expenditures, not costs or effects on the economy, as in other rulemaking requirements such as Executive Order 12866. The dollar thresholds in UMRA are in 1996 dollars and are adjusted annually for inflation. For 2011, the threshold is $142 million. The same threshold applies to determining whether a rule includes an intergovernmental mandate or a private sector mandate.

If a rule passes through all of these exceptions and exclusions, UMRA requirements apply. Federal agencies are then required to prepare a written statement about the federal mandates contained in the rule and consult with affected parties. The written statement is to contain

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

2. a qualitative and quantitative assessment of the anticipated costs and benefits of the federal mandate (including those on state, local and tribal governments or the private sector) and the effect of the mandate on health, safety, and the natural environment;
3. estimates by the agency (if reasonably feasible) of future compliance costs of the federal mandate and any disproportionate budgetary effects upon particular regions, governments, types of communities or particular segments of the private sector;
4. estimates of the effect on the national economy; and
5. a description of the extent of the agency's prior consultation with elected representatives of affected state, local, and tribal governments, including a summary of their comments and concerns and the agency's evaluation of those comments and concerns.

For such rules, agencies are also to identify and consider a reasonable number of regulatory alternatives and select the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rules (or explain why that alternative was not selected).

UMRA recognizes that statements prepared in response to other rulemaking statutes and orders may be used to satisfy some or all of UMRA's requirements. For example, agencies could also be required to prepare estimates of a rule's effects or conduct additional consultation and outreach to potentially affected parties in response to requirements such as Executive Order 12866 (on regulatory planning and review), the Regulatory Flexibility Act (regarding effects of rules on small entities) and Executive Order 13132 (on federalism).

Few Rules Trigger UMRA

UMRA's many definitions, exclusions, and exceptions result in many rules that never trigger the act's thresholds and thus not identified as federal mandates. Given all the conditions needed to trigger the act, it is not surprising that our reviews over the years reported that relatively few final rules contained federal mandates subject to UMRA. Although the scope of our reports was limited to rules issued during specific time periods, our findings on the effect and applicability of UMRA have been consistent over time.

Our findings are also generally consistent with OMB's annual reports to Congress on agencies' compliance with UMRA. As illustrated in table 2 below, agencies identified about 13 percent of the 452 major final rules issued in fiscal years 2000 through 2009 as containing federal mandates

under UMRA.[5] Of those that triggered UMRA, the majority of those mandates were on the private sector. OMB's reports identified only 5 final major rules containing intergovernmental mandates that triggered UMRA's requirements during that 10-year period.

Table 2: Number of Final Major Rules That Triggered UMRA, by Fiscal Year

		Final major rules that triggered UMRA	
Fiscal Year	Final major rules[a]	Number	Percentage
2000	31	12	39
2001	87	0	0
2002	31	1	3
2003	37	7	19
2004	45	4	9
2005	45	2	4
2006	28	2	7
2007	40	11	28
2008	42	8	19
2009	66	12	18
Totals	**452**	**59**	**13**

Source: OMB annual reports to Congress on agency compliance with the Unfunded Mandates Reform Act

[a]OMB's reported numbers only include major rules reviewed by OMB under Executive Order 12866; they do not include major rules published by independent regulatory agencies.

In 2004, we reported that 65 rules, or over half of the 113 final major rules published in calendar years 2001 and 2002 that had not triggered UMRA, had impacts that those affected by the rules might perceive as unfunded mandates.[6] We analyzed each of those rules to identify how they were treated under UMRA's mandate identification process. Among the most common reasons the rules did not trigger UMRA were

- the estimated direct expenditures, as defined by UMRA, would not meet the applicable thresholds;
- the rules did not go through the proposed rule stage;
- participation in the federal program was considered voluntary; and

[5]OMB has not yet released a report covering rules issued in fiscal year 2010.

[6]See GAO-04-637.

- the rules were issued by independent regulatory agencies not covered by the act.

Often agencies cited more than one reason, or more than one reason could have applied to a given rule.[7] Some of the rules that had not triggered UMRA appeared to have potentially similar financial impacts on affected nonfederal parties. For example, a rule could reduce industry gross revenues by over $100 million in a single year, and therefore be economically significant, yet not trigger UMRA because it does not require expenditures above UMRA's threshold in any year.

It is important to note that the remaining rules that had not triggered UMRA included no new requirements that would impose costs or have a negative financial effect on state, local, and tribal governments or the private sector. As part of these rules the federal government often provided nonfederal parties with substantial payments, such as loans or Medicare payments.

In 2005, when we obtained the views of a diverse group of parties from academia, advocacy groups, business, federal agencies, and state and local governments about UMRA's strengths and weaknesses, they frequently raised concerns about coverage and the quality of analyses of mandates. UMRA's narrow coverage stood out as the primary issue for most sectors, and one worth revisiting, because it excludes so many actions from coverage and contributes to complaints about unfunded or underfunded mandates. However, a few parties, primarily from the public interest advocacy sector, viewed UMRA's narrow coverage as a strength that should be maintained. In general, the comments we heard raised the question of whether UMRA—given its current procedures, definitions, and exclusions—adequately captures and scrutinizes federal actions that might impose significant financial or other burdens on affected nonfederal parties. The parties suggested that there is merit in considering whether features of UMRA that determine if a rule includes a federal mandate need to be retained, modified, or eliminated.

As for the underlying purpose of UMRA—generating information about the nature and size of federal mandates—the parties we consulted generally agreed there needed to be better evaluation and research on federal

[7]Agencies did not always provide a reason, for example when the rule was published by an independent agency not covered by UMRA. Even for covered agencies, there is no UMRA requirement to identify the reason rules do not contain federal mandates.

mandates and more complete estimates of the cost of mandates on nonfederal entities, both direct and indirect. The parties most frequently suggested that agencies evaluate the effectiveness of mandates after they had been implemented. Representatives of practically every sector indicated that more needed to be done to understand the costs and benefits of federal mandates. In their comments, they suggested that evaluation of existing rules through retrospective reviews has the potential of being able to better assess the effectiveness of UMRA, among other benefits. The two broad categories for potential improvements of the act raised by the parties—addressing coverage and definitional issues as well as more attention to retrospective reviews of existing regulations—have also been highlighted by our broader body of work on other regulatory requirements.[8]

Observations

Our work on federal, state, and local governments' fiscal stresses raises broader questions about the allocation of fiscal responsibilities within our federal system.[9] The federal government partners with state and local governments to achieve national priorities through implementation of a variety of programs. The interconnectedness of intergovernmental programs requires that all levels of government remain aware of, and ready to respond to, fiscal pressures. The combined long-term fiscal challenges further complicate the process of sorting out competing demands for federal funds and other fiscal resources. Actions will be needed by all in coming years, and the challenges cannot simply be shifted from one level of government to another.

[8]See, for example, GAO, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791 (Washington, D.C.: July 16, 2007), and *Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements*, GAO-05-939T (Washington, D.C.: July 27, 2005).

[9]GAO's state and local fiscal model simulations show that state and local governments' long-term fiscal position will steadily decline through 2060 absent policy changes. See GAO, *State and Local Governments: Fiscal Pressures Could Have Implications for Future Delivery of Intergovernmental Programs*, GAO-10-899 (Washington, D.C.: July 30, 2010).

Mr. Chairman, this concludes my prepared statement. I would be pleased to address any questions you or other members of the subcommittee might have.

Contacts and Acknowledgments

For further information, please contact Denise M. Fantone at (202) 512-6806 or fantoned@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals who made key contributions to this testimony include Barbara Lancaster; Andrea Levine; Joseph Santiago; and Jared Sippel.

Appendix I

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Highlights

Highlights of GAO-05-533T, a testimony before the Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia; Committee on Homeland Security and Governmental Affairs, U.S. Senate

April 14, 2005

UNFUNDED MANDATES

Analysis of Reform Act's Coverage and Views on Possible Next Steps

Why GAO Did This Study

The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to address concerns about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided funding to cover the costs. UMRA generates information about the nature and size of potential federal mandates but does not preclude the implementation of such mandates. At various times in UMRA's 10-year history, Congress has considered legislation to amend aspects of the act to address ongoing questions about its effectiveness.

This testimony is based on GAO's reports, *Unfunded Mandates: Analysis of Reform Act Coverage* (GAO-04-637, May 12, 2004) and *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement* (GAO-05-454, March 31, 2005). Specifically, this testimony addresses (1) UMRA's procedures for the identification of federal mandates and GAO's analysis of the implementation of those procedures for statutes enacted and major rules issued in 2001 and 2002, and (2) the views of a diverse group of parties familiar with UMRA on the significant strengths and weaknesses of the act as the framework for addressing mandate issues and potential options for reinforcing the strengths or addressing the weaknesses.

www.gao.gov/cgi-bin/getrpt?GAO-05-533T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Orice M. Williams, (202) 512-5837, williamsoo@gao.gov.

What GAO Found

The identification and analysis of intergovernmental and private sector mandates is a complex process under UMRA. Proposed legislation and regulations are subject to various definitions, exceptions, and exclusions before being identified as containing mandates at or above UMRA's cost thresholds. Also, some legislation and rules may be enacted or issued via procedures that do not trigger UMRA reviews. In 2001 and 2002, 5 of 377 statutes enacted and 9 of 122 major or economically significant final rules issued were identified as containing federal mandates at or above UMRA's thresholds. Despite the determinations under UMRA, at least 43 other statutes and 65 rules resulted in new costs or negative financial consequences that affected nonfederal parties might perceive as unfunded or underfunded federal mandates.

GAO obtained information from 52 knowledgeable parties, who provided a significant number of comments about UMRA, specifically, and federal mandates, generally. Their views often varied across and within the five sectors we identified (academic/think tank, public interest advocacy groups, business, federal agencies, and state and local governments). Overall, the numerous strengths, weaknesses, and options for improvement identified during the review fell into several broad themes, including, among others, UMRA-specific issues such as the act's coverage and enforcement, and more general issues about the design, funding, and evaluation of federal mandates. UMRA's coverage was, by far, the most frequently cited issue by parties from the various sectors. Parties across most sectors said that UMRA's numerous definitions, exclusions, and exceptions leave out many federal actions that might significantly impact nonfederal entities and suggested that they should be revisited. However, a few parties, primarily from the public interest advocacy sector, viewed UMRA's narrow coverage as a strength that should be maintained. Another issue on which the parties had particularly strong views was the perceived need for better evaluation and research of federal mandates and more complete estimates of both the direct and indirect costs of mandates on nonfederal entities. The most frequently suggested option to address these evaluation issues was more post-implementation evaluation of existing mandates or "look backs" at their effectiveness.

Going forward, the issue of unfunded mandates raises broader questions about assigning fiscal responsibilities within our federal system. The long-term fiscal challenges facing the federal and state and local governments and the continued relevance of existing programs and priorities warrant a national debate to review what the government does, how it does business, and how it finances its priorities. Such a reexamination includes considering how responsibilities for financing public services are allocated and shared across the many nonfederal entities in the U.S. system.

United States Government Accountability Office

GAO

Accountability Integrity Reliability

Highlights

Highlights of GAO-05-454, a report to the Chairman, Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Committee on Homeland Security and Governmental Affairs, U.S. Senate

March 2005

UNFUNDED MANDATES

Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement

Why GAO Did This Study

The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to address concerns about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided federal funding to cover the costs. UMRA generates information about the nature and size of potential federal mandates on nonfederal entities to assist Congress and agency decision makers in their consideration of proposed legislation and regulations. However, it does not preclude the implementation of such mandates.

At various times in its 10-year history, Congress has considered legislation to amend various aspects of the act to address ongoing questions about its effectiveness. Most recently, GAO was asked to consult with a diverse group of parties familiar with the act and to report their views on (1) the significant strengths and weaknesses of UMRA as the framework for addressing mandate issues and (2) potential options for reinforcing the strengths or addressing the weaknesses. To address these objectives, we obtained information from 52 organizations and individuals reflecting a diverse range of viewpoints. GAO analyzed the information acquired and organized it into broad themes for analytical and reporting purposes.

GAO makes no recommendations in this report.

www.gao.gov/cgi-bin/getrpt?GAO-05-454.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Orice M. Williams at (202) 512-5837, or williamsoo@gao.gov.

What GAO Found

The parties GAO contacted provided a significant number of comments about UMRA, specifically, and federal mandates, generally. Their views often varied across and within the five sectors we identified (academic/think tank, public interest advocacy, business, federal agencies, and state and local governments). Overall, the numerous strengths, weaknesses and options for improvement identified during the review fell into several broad themes, including UMRA-specific issues such as coverage and enforcement, among others, and more general issues about the design, funding, and evaluation of federal mandates. First, UMRA coverage was, by far, the most frequently cited issue by parties from the various sectors. Parties across most sectors that provided comments said UMRA's numerous definitions, exclusions, and exceptions leave out many federal actions that may significantly impact nonfederal entities and should be revisited. Among the most commonly suggested options were to expand UMRA's coverage to include a broader set of actions by limiting the various exclusions and exceptions and lowering the cost thresholds, which would make more federal actions mandates under UMRA. However, a few parties, primarily from the public interest advocacy sector, viewed UMRA's narrow coverage as a strength that should be maintained.

Second, parties from various sectors also raised a number of issues about federal mandates in general. In particular, they had strong views about the need for better evaluation and research of federal mandates and more complete estimates of both the direct and indirect costs of mandates on nonfederal entities. The most frequently suggested option to address these issues was more post-implementation evaluation of existing mandates or "look backs." Such evaluations of the actual performance of mandates could enable policymakers to better understand mandates' benefits, impacts and costs among other issues. In turn, developing such evaluation information could lead to the adjustment of existing mandate programs in terms of design and/or funding , perhaps resulting in more effective or efficient programs.

Going forward, the issue of unfunded mandates raises broader questions about assigning fiscal responsibilities within our federal system. Federal and state governments face serious fiscal challenges both in the short and longer term. As GAO reported in its February 2005 report entitled *21st Century Challenges: Reexamining the Base of the Federal Government* (GAO-05-325SP), the long-term fiscal challenges facing the federal budget and numerous other geopolitical changes challenging the continued relevance of existing programs and priorities warrant a national debate to review what the government does, how it does business and how it finances its priorities. Such a reexamination includes considering how responsibilities for financing public services are allocated and shared across the many nonfederal entities in the U.S. system as well.

United States Government Accountability Office

GAO

Highlights

Highlights of GAO-05-401T, a statement for the record to the Committee on Government Reform, House of Representatives

March 4, 2005

FEDERAL MANDATES

Identification Process Is Complex and Agency Roles Vary

Why GAO Did This Study

The Unfunded Mandate Reform Act of 1995 (UMRA) was enacted to address concerns expressed by state and local governments about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided funding to cover the costs.

Over the past 10 years, Congress has at various times considered legislation that would amend various aspects of UMRA.

This testimony is based on GAO's report, *Unfunded Mandates: Analysis of Reform Act Coverage* (GAO-04-637, May 12, 2004). Specifically, this testimony addresses (1) the process used to identify federal mandates and what are federal agencies' roles, (2) statutes and rules that contained federal mandates under UMRA, and (3) statutes and rules that were not considered mandates under UMRA but may be perceived to be "unfunded mandates" by certain affected parties.

What GAO Found

GAO found that the identification and analysis of intergovernmental and private sector mandates is a complex process under UMRA. Proposed legislation and regulations are subject to various definitions, exclusions and exceptions before being identified as containing mandates at or above UMRA's cost thresholds. The Congressional Budget Office (CBO) is required to prepare statements identifying and estimating, if feasible, the costs of mandates in legislation. While a point of order can be raised on the floor of the House or Senate against consideration of any UMRA-covered intergovernmental mandate that lacks a CBO estimate or exceeds the cost thresholds, it contains no similar enforcement for private sector mandates. Conversely, federal agencies are required to prepare mandate statements for regulations containing intergovernmental or private sector mandates that would result in expenditures at or above the UMRA threshold. The Office of Information and Regulatory Affairs, within the Office of Management and Budget, is responsible reviewing compliance with UMRA as part of the rule making process.

In 2001 and 2002, 5 of 377 statutes enacted and 9 of 122 major or economically significant rules issued were identified as containing federal mandates at or above UMRA's thresholds. All 5 statutes and 9 rules contained private sector mandates as defined by UMRA. One final rule also contained an intergovernmental mandate.

Despite the determinations under UMRA, at least 43 statutes and 65 rules issued in 2001 and 2002 resulted in new costs or negative financial consequences on nonfederal parties. These parties may perceive such statutes and rules as unfunded or underfunded mandates even though they did not meet UMRA's definition of a federal mandate at or above UMRA's thresholds. For 24 of the statutes and 26 of the rules, CBO or the agencies estimated that the direct costs or expenditures, as defined by UMRA, would not meet or exceed the applicable thresholds. The others were excluded for a variety of reasons stemming from exclusions or exceptions specified by UMRA.

www.gao.gov/cgi-bin/getrpt?GAO-05-401T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Orice M. Williams, 202 512-5837, williamso@gao.gov.

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Highlights

Highlights of GAO-04-637, a report to the Chairman, Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

May 2004

UNFUNDED MANDATES

Analysis of Reform Act Coverage

Why GAO Did This Study

The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to address concerns about federal statutes and rules that require state, local, and tribal governments or the private sector to expend resources to achieve legislative goals. UMRA generates information about the nature and size of potential federal mandates to assist Congress and agency decision makers in their consideration of proposed legislation and rules. However, concerns about actual or perceived federal mandates continue. To provide information and analysis regarding UMRA's implementation, GAO was asked to (1) describe the applicable procedures, definitions, and exclusions under UMRA for identifying federal mandates in statutes and rules, (2) identify statutes and final rules that contained federal mandates under UMRA, and (3) provide examples of statutes and final rules that were not identified as federal mandates, but that affected parties might perceive as "unfunded mandates," and the reasons these statutes and rules were not federal mandates under UMRA. GAO focused on statutes enacted and final rules issued in 2001 and 2002 to address the second and third objectives.

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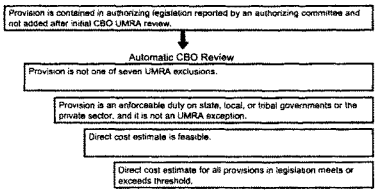
To view the full product, including the scope and methodology, click on the link above. For more information, contact Patricia A. Dalton at (202) 512-6806 or daltonp@gao.gov.

What GAO Found

UMRA generally requires congressional committees and the Congressional Budget Office (CBO) to identify and estimate the costs of federal mandates contained in proposed legislation and federal agencies to do so for federal mandates contained in their rules. Identification of mandates is a complex process with multiple definitions, exclusions, and cost thresholds. Also, some legislation and rules may be enacted or issued via procedures that do not trigger UMRA reviews.

In 2001 and 2002, 5 of 377 statutes enacted and 9 of 122 major or economically significant final rules issued were identified as containing federal mandates at or above UMRA's thresholds. Of the other federal actions in those 2 years, at least 43 statutes and 65 rules contained new requirements on nonfederal parties that might be perceived as "unfunded mandates." For 24 of those statutes and 26 of those rules, CBO or federal agencies had determined that the estimated direct costs or expenditures would not meet or exceed applicable thresholds. For the remaining examples of statues, most often UMRA did not require a CBO review prior to their enactment. The remaining rules most often did not trigger UMRA because they were issued by independent regulatory agencies. Despite the determinations made under UMRA, some statutes and rules not triggering UMRA's thresholds appeared to have potential financial impacts on affected nonfederal parties similar to those of the actions that were identified as containing mandates at or above the act's thresholds.

Proposed Legislation Must Pass Multiple Steps to Be Identified as Containing Federal Mandates at or Above UMRA's Cost Thresholds



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Related GAO Products

Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews. GAO-09-205. Washington, D.C.: April 20, 2009.

Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention. GAO-06-228T. Washington, D.C.: November 1, 2005.

Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements. GAO-05-939T. Washington, D.C.: July 27, 2005.

Unfunded Mandates: Analysis of Reform Act's Coverage and Views on Possible Next Steps. GAO-05-533T. Washington, D.C.: April 14, 2005.

Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement. GAO-05-454. Washington, D.C.: March 31, 2005.

Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement (Appendix IV, E-Supplement). GAO-05-497SP. Washington, D.C.: March 31, 2005.

Federal Mandates: Identification Process Is Complex and Federal Agency Roles Vary. GAO-05-401T. Washington, D.C.: March 8, 2005.

Unfunded Mandates: Analysis of Reform Act Coverage. GAO-04-637. Washington, D.C.: May 12, 2004.

Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions. GAO/GGD-98-30. Washington, D.C.: February 4, 1998.

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Mr. LANKFORD. I thank you. Look forward to getting a chance to ask you some questions related to some of those. Thank you.

Mr. Griffin, thank you for being here.

STATEMENT OF ANTHONY H. GRIFFIN

Mr. GRIFFIN. Good morning, Mr. Chairman, Mr. Ranking Member, and members of the subcommittee. I am Anthony H. Griffin, county executive, Fairfax County, VA, a position that I have had the privilege of holding since January 2000. I appreciate the opportunity to speak to you today on the subject of unfunded mandates. It is a subject that is treated with some sensitivity in how Fairfax County legislates and operates.

When county staff proposes changes to local ordinances or on how it operates, there is a requirement to identify the regulatory and financial impact of such changes as part of the staff report to the board of supervisors. In addition, county staff works in advance with the impacted parties to understand the effects of any changes and to reach a consensus, if possible, on implementation and costs.

The county staff frequently is trying to balance the interests of public safety and quality of life with the immediate concerns of neighborhoods and industry. The process concludes with a public hearing. If staff has done its job well, there are few or no speakers and the decision of the board of supervisors is usually unanimous.

Since local government is the closest to the people, it is ironic that the use of a significant amount of its resources are in fact dictated by the higher levels of government. In fiscal year 2008, the last time Fairfax County analyzed the cost of mandates, it was estimated that the net cost of Federal and State mandates was $751 million out of a $3 billion general fund. Federal mandates accounted for 39 percent of all mandated expenditures, for a net cost to the county of $313 million.

What is more difficult to do with the cost of mandates is to decipher how much a community would pay to implement a mandate, whether it was a mandate or not. In many instances, Fairfax County chooses to exceed State mandates because the mandate is viewed as a minimum as it relates to quality of life. Schools and mental health are examples.

Some Federal mandates are not as apparent as, say, the American Disabilities Act or the Health Insurance Portability and Accountability Act. For example, Fairfax County is trying to mitigate the impacts of decisions made in the last round of the Base Closure and Realignment Act [BRAC], which in most instances relocated Defense employees located near transit to Fort Belvoir, which has no transit and is served by a road system already at capacity.

While the county appreciates the additional 26,000 jobs at Fort Belvoir, it actually tried to limit BRAC-related moves in the National Capital Region because of the negative impact to the transportation system.

The Defense Department provides no money for road improvements external to military installations unless the impacts exceeds the doubling of traffic. Given that the primary roads involved are Interstate 95 and Route 1, no money is forthcoming. The estimate to mitigate the moves to Fort Belvoir are in excess of $800 million, money which neither the State nor the county have.

Unlike the county's process, the Federal Government did not quantify the impacts of the relocation on the host jurisdiction or the region, nor has the Federal Government, in the form of the Defense Department, offered to mitigate the impacts. In fact, access to the proving ground of Fort Belvoir would not have been possible without a significant financial contribution by the county and the State.

In closing, I would note that regulation by all levels of government are necessary to achieve certain minimums and how services and facilities are available to our public. Communication, sensitivity, balance, and identified resources need to be part of the process creating them.

Mr. Chairman, thank you for the privilege to speak. I would be pleased to respond to the committee's questions.

[The prepared statement of Mr Griffin follows:]

County of Fairfax, Virginia

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County

Testimony of

Anthony H. Griffin, County Executive,
Fairfax County, Virginia

Before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform

James Lankford, Chairman

Tuesday, February 15, 2011

Room 2203
Rayburn House Office Building
Washington, DC 20515
9:30 a.m.

Office of the County Executive
12000 Government Center Parkway, Suite 552
Fairfax, VA 22035-0066
703-324-2531, TTY 703-222-5494, Fax 703-324-3956
www.fairfaxcounty.gov

Good afternoon Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee. I am Anthony H. Griffin, County Executive, Fairfax County, Virginia, a position that I have had the privilege of holding since January, 2000.

I appreciate the opportunity to speak to you today on the subject of unfunded mandates. It is a subject that is treated with some sensitivity in how Fairfax County legislates and operates. When County staff proposes changes to local ordinances or in how it operates there is a requirement to identify the regulatory and financial impact of such changes as part of the staff report to the Board of Supervisors. In addition, County staff works in advance with the impacted parties to understand the effects of any changes and to reach a consensus, if possible, on implementation and cost. The County staff frequently is trying to balance the interests of public safety and quality of life with the immediate concerns of neighborhoods and industry. The process concludes with a public hearing. If staff has done its job well, there are few or no speakers and the decision of the Board of Supervisors is usually unanimous.

Since local government is the "closest to the people" it is ironic that the use of a significant amount of its resources are, in fact, dictated by the higher levels of government. In FY 2008, the last time Fairfax County analyzed the cost of mandates, it was estimated that the net cost of Federal and State mandates was $751 million out of a $3 billion general fund. Federal mandates accounted for 39 percent of all mandated expenditures for a net cost to the County of $313 million.

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Some Federal mandates are not as apparent as say the American Disabilities Act (ADA) or the Health Insurance Portability and Accountability Act (HIPAA). For example, Fairfax County is trying to mitigate the impacts of decisions made in the last round of the Base Closure and Realignment Act (BRAC) which in most instances relocated Defense employees located near transit to Fort Belvoir which has no transit and is served by a road system already at capacity. While the County appreciates the additional 26,000 jobs at Fort Belvoir, it actually tried to limit the BRAC related moves in the National Capital Region because of the negative impact to the transportation system. The Defense Department provides no money for road improvements external to the military installations unless the impact exceeds the doubling of traffic. Given that the primary roads involved are I-95 and Route 1, no money is forthcoming. The estimate to mitigate the moves to Fort Belvoir are in excess of $800 million, money which neither the State nor the County have.

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In closing, I would note that regulation by all levels of government are necessary to achieve certain minimums in how services and facilities are available to our public, but communication, sensitivity, balance, and identified resources need to be part of the process creating them.

Mr. Chairman, thank you for the privilege to speak. I will be pleased to respond to the committee's questions.

Mr. LANKFORD. We look forward to that, actually, and we will go back and forth, giving a chance just to ask questions, and we are just looking for your honest answers and just response to it. We will take not only your written testimony, but your oral testimony will be all compiled together in a permanent record.

Let me just bounce a couple questions off you to get us started, then I will have ranking member, Mr. Connolly, be able to ask some questions as well.

Mr. Griffin, define for us in your mind, from the county perspective, what is an unfunded mandate. Now, I know if we ask Ms. Fantone, we would get a very strict, clear defined of what the law says on it. What would your perspective be? How would you define it?

Mr. Griffin. My perspective would be an obligation imposed on the county which the county otherwise would probably have not undertaken on its own.

Mr. LANKFORD. OK. That's great.

Mayor Douglas, the cap is $100 million of effect on that. In the $226 million budget for Edmond, a $100 million burden would be rather large. Is a $25 million burden an unfunded mandate, you would say? Would that have an effect if there was a 10 percent burden on the city of Edmond?

Ms. DOUGLAS. Absolutely. Absolutely.

Mr. LANKFORD. Go ahead and push your mic right there. That's all right.

Ms. DOUGLAS. Absolutely. I need to set up to answer the questions, I guess.

Mr. LANKFORD. Great.

Ms. Dudley, tell me a little bit about 12866, that wonderful Executive order that has been out there for us since the 1990's, trying to deal with the unfunded mandates. You made some specific suggestions for that, including aligning UMRA with the 12866, and then you also talked about the independent agencies. Tell me your personal perspective on it. If those were excluded, how would the independent agencies be looped into the unfunded mandates? If this were to be reformed, how do you suggest those get engaged?

Ms. DUDLEY. By covering the independent agencies. There are two parts to it. Executive Order 12866 also does not apply to independent agencies, so simply by covering them, you wouldn't have the advantage of having OMB serving as a check, so Congress would need to do that if OMB didn't. But I do think there are a lot of important regulations that go out as independent agencies.

Mr. LANKFORD. Do you see an issue with those being included in those that are facing accountability of Congress and of the executive? Would it, by nature, violate their independent status to have accountability around them, for instance?

Ms. DUDLEY. I am not a lawyer, although I have pretended to be one on occasion, but, no, from what I understand, it would not violate any constitutional principles to include them.

Mr. LANKFORD. OK. That is terrific. There was a statement you made as well about the Section 103 about Congress requiring information back. It is my understanding that has also not been required as well on that as a followup to saying, OK, this is what you said it would cost; what did it actually cost. That is an inter-

esting determination that we may have to determine as well on finding other regulations and saying how will we process through that with individuals on it.

Then you made a statement as well about the judicial review and determining if things are cost-effective. Tell us about just the inside conversation that may happen saying, OK, is this the most cost-effective way to do this. Is that something that is really discussed often among the agencies?

Ms. DUDLEY. It is. Agencies do take that seriously and OMB takes it seriously. But it is never judicially reviewable, so it is discussed within the executive branch, but there isn't another branch of government that serves the check or a balance.

Mr. LANKFORD. So you are saying if there was an agency that determined it doesn't matter, we want to do it this way, there is no way to really stop them at this point. OK.

Ms. Fantone, let me ask you a quick question as well. Give us an example of a voluntary Federal program. You said that was a major piece of an exception that is sitting out there. What is a good example of a voluntary Federal program?

Ms. FANTONE. Well, oftentimes what we have is the same kind of thing that actually applies with Federal assistance, there is the carrot and the stick. An example would be if you have—and I will use firefighters. Oftentimes we provide technical assistance and there may be some cost-sharing piece of that.

As soon as you have a condition in which you want to get a Federal assistance, or it can also happen with the private sector, you have to commit to making a decision that you are going to go ahead with a program and it will cost you something in return for either Federal assistance or some other largesse from the Federal Government.

Mr. LANKFORD. All right. So if there is any option for them to opt out of it, it is considered a voluntary program, is that what you are saying?

Ms. FANTONE. Yes.

Mr. LANKFORD. OK. That is terrific. But once they take it on, they have to fulfill all those mandates.

Ms. FANTONE. Exactly. I think Ranking Member Connolly, in his opening statement, described a situation where there is a bit of a catch 22.

Mr. LANKFORD. Thank you very much.

I would be very pleased to recognize Ranking Member Connolly for 5 minutes of questioning.

Mr. CONNOLLY. I thank the chairman and, again, welcome to our panelists.

Mayor Douglas, one thing I did not follow. You referred to voluntary boards and commissions, and, of course, we have those in Fairfax County as well.

Ms. DOUGLAS. Right.

Mr. CONNOLLY. I am not aware of the Dodd-Frank legislation affecting any of our boards or commissions in Fairfax. What were you referring to?

Ms. DOUGLAS. There is an SEC proposed rule to carry out some of the language that is in the Dodd-Frank act that talks about municipal advisors, and they are defining municipal advisors as people

who have to be registered through the SEC. The SEC has proposed this rule. I believe lots of cities are coming in and saying—there is a common period going on right now and are saying please don't do that because it is going to hurt our recruitment of volunteer boards if they have to register through the SEC to comply with the Frank-Dodd act.

Mr. CONNOLLY. Presumably, that would affect people who would advise the city or municipality in financial matters.

Ms. DOUGLAS. Correct. But when you look at many of my boards, for example, I have an economic development authority that has bonds that go through it. It still goes to a bond advisor and the opinion registered by my board still has to be approved by another board advisor or somebody who is well versed in that.

Mr. CONNOLLY. Mr. Griffin, do you have a similar situation in Fairfax County?

By the way, I think, Mayor Douglas, you said your population is 86,000?

Ms. DOUGLAS. Yes, sir.

Mr. CONNOLLY. And, of course, Fairfax's population is what?

Mr. GRIFFIN. One million eighty-three thousand as of the Census.

Mr. CONNOLLY. So you have a lot of boards and commissions. Have you had this problem from the Dodd-Frank legislation?

Mr. GRIFFIN. I am not aware of the details. I suspect organizations like our economic development authority may have to be involved, but I think most of our volunteer committees and commissions would not be impacted. I think it relates only to financial.

Mr. CONNOLLY. Yes. I would invite you that, if you have a similar situation, Mayor Douglas, you might submit it for the record.

Mayor Douglas also testified that she has been advised that the health care reform legislation, even though most of the major provisions don't kick in for another 2 years or 3 years, has actually contributed to an increase in her premium cost. Is that the case in Fairfax as well?

Mr. GRIFFIN. Yes. Staff estimate is that our cost to provide health insurance for our employees will increase approximately 4 percent over time to administer the program.

Mr. CONNOLLY. Attributed to that?

Mr. GRIFFIN. Yes, sir.

Mr. CONNOLLY. And what has been the increase in premium costs normally?

Mr. GRIFFIN. I would say over the last 10 years the increase has been about 10 percent a year.

Mr. CONNOLLY. Unrelated to health care reform.

Mr. GRIFFIN. Correct.

Mr. CONNOLLY. Ms. Fantone, an unfunded mandate, how does GAO separate the issue of unfunded mandates from normal regulation? I mean, the minimum wage requirement, in a sense, is an unfunded mandate; it tells people you have to pay this much, you can't pay less per hour.

Presumably, nobody would say that we ought to eliminate that or we ought to fully fund that requirement. This is a societal requirement saying this is what a living and just wage ought to be. We may disagree about what that level ought to be. We might even philosophically disagree about whether it is the role of the Federal

Government to impose it. But there is lots of history suggesting, by and large, the U.S. population agrees there should be such a regulation.

How do we separate that kind of regulatory activity, normal, by the State or Federal Government, versus unfunded mandates? I would put No Child Left Behind or the BRAC process, for example, in the latter category.

Ms. FANTONE. Well, as you point out, this is a decision that is as much a policy and philosophical decision as anything else. I think probably to respond I would like to briefly describe what we did in 2004 when looking at rules that were not classified as Federal mandates.

So we did a variety of different things. First of all, we looked at all of the ones that were unclassified, and that was 113, and then we reviewed the evidence, and the evidence included what statements were available from the agencies themselves that would indicate that there were additional costs, and then we went out and we talked to those that would be affected to see whether we in fact had captured correctly, and that included the Federal agencies that were involved as well as those, again, who were affected; and there was consensus that, in fact, there was additional costs, some of which, 29 in particular, that would be significant.

So it is kind of the Goldilocks complex here, trying to get it just right. It is a difficult thing, but that is how we went about how it in 2004.

Mr. CONNOLLY. My time is up, Mr. Chairman.

Ms. Dudley, I would hope to, in another round, come back to your testimony. Thank you.

Mr. LANKFORD. The Chair would now like to recognize the distinguished gentleman from Pennsylvania, the vice chairman of this committee, Mr. Kelly, for 5 minutes.

Mr. KELLY. Thank you, Mr. Chairman. And also the board, thank you for being here today, because I know you are taking time out of your private lives to come and do this.

My questions are mainly for the mayor, because I also sat on the city council in a very small town, a third class city.

Ms. DOUGLAS. Bless you.

Mr. KELLY. Thank you.

Ms. DOUGLAS. Bless you.

Mr. KELLY. That was after sitting on a school board, so——

Ms. DOUGLAS. Oh, bless you again.

Mr. KELLY. And I think that it would be hard to argue that a lot of these are well-intentioned when they start off. But I would submit that in our little town, 67 cents out of every dollar we bring in in revenue, tax revenue, is already eaten up by public safety and there are so many unfunded mandates that are out there. As a mayor, as you sit there and as you watch what is going on, you are almost afraid to read your next email or open the next piece of mail that comes through because you don't know where it is going to come from or who is going to ask you to participate in something.

So we have these partners that say we need to do this, but they don't bring any money to the table. So if you could tell me—I know we struggle with our budgets every year, trying to meet all these—some of the things that you have to do and some of the services

that have to be cut dramatically just to comply with a mandate, an unfunded mandate.

Ms. DOUGLAS. Well, we have to direct money away from our general fund, which is, like you said, that is my 33 percent that I get to run the rest of city government on, outside of police and fire. So that is what I run my trash collection, I repair my roads, I clean my roads after the recent two blizzards, I repair bridges after a 500-year flood that I had this summer.

So you are exactly right. What we are looking at this year is simply trying to decide whether or not—we are one of the fastest growing communities in Oklahoma, so we are an economic engine for our State; we provide jobs. And what we are looking at right now is deciding between keeping people or building the roads to get economic development to our city, because you have companies that won't locate there unless you can build the roads.

So it is a decision right now for me and my council priorities. We have to prioritize are we going to do the infrastructure projects that we have already delayed, because last year we could not build roads, we couldn't do the repairs we needed and that we had budgeted because we had a 9 percent decrease. So we are making those decisions.

I talk about, in my written testimony, that there is a program called NIMS. Nobody can fight about the fact that homeland security is very important, but Edmond was the eighth safest city in America a couple of years ago; yet, we are spending at least $82,000 and by my estimates that they called me last night, $310,000 to do a training program that we are now having to document we are doing. And we are already one of the safest cities in America. So we are not going to fight against homeland security, but it is $310,000 that comes out of my budget in order to get other Federal grants. It is money that sits out there and says if you don't do this, then you don't get these grants. And it doesn't just apply to homeland security grants, it applies to other grants.

So I think local governments are better at determining what they need, what they need, and we need to be ready, we need to be secure and safe, and my electorate is going to kick me out if we are not.

Mr. KELLY. And I understand that. Also, you know, the determination of whether a regulation or rule is cost-effective, what kind of a formula do you understand that they use to actually determine if it is cost-effective? Is there a real cost-benefit analysis there? I mean, I have never seen it.

Ms. DOUGLAS. I have never seen it.

Mr. KELLY. It usually doesn't make sense to those of us that actually have to pick up the tab on this.

Ms. DOUGLAS. I have never seen it.

Mr. KELLY. OK.

Ms. DOUGLAS. I have never seen it. For many of the regulations that are imposed on the city, I have never seen it.

Mr. KELLY. Very good. Thank you.

That is all, Mr. Chairman.

Mr. LANKFORD. Thank you.

I am honored to be able to recognize the ranking member of the Oversight and Government Reform Committee of a whole. Glad you

are here, Mr. Cummings. I recognize the gentleman from Maryland for 5 minutes.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I congratulate you on your position. I am looking forward to working with you.

First of all, I want to thank the panel for outstanding testimony. As I listened to us, you know, I have stated it: we have a problem here. On the one hand, we have the Federal Government, your representatives, all of us, on the Federal level trying to get certain things done; and then when it is filtered down to you all, then you all are where the rubber meets the road, so then you have all of these issues that you have to deal with. And I just want to ask a few questions with regard to you, Ms. Dudley.

You talked about expanding judicial review. How extensive would that judicial review be? I am just wondering about that.

Ms. DUDLEY. As I say, I am not a lawyer, so I don't have specific advice. I know that is a criticism that I have seen of UMRA, that the courts could only call an agency out for not doing an analysis when it should have done the analysis.

Mr. CUMMINGS. Right.

Ms. DUDLEY. But it can't do more than that.

Mr. CUMMINGS. Well, going to you, Mayor Douglas, certainly, we sympathize with everything you have said. I think your employees are very fortunate to be getting 100 percent of their insurance covered. I mean, I think that is great, and that says a lot for you and your city. But I want to go back to you were talking about spending $2 million on compliance, showing that you complied. I was just wondering, is that to show that you complied or is that actually putting yourself in compliance, or is it a combination of both? Do you understand what I am saying?

Ms. DOUGLAS. To my knowledge, we were in compliance, but I am not going to answer that for certain. What I will tell you is that what this money went for was to implement the minimum control measures with six areas of focus: to address the stormwater runoff quality and to report on it; to address public participation and to report on that; to address public education and outreach and to report on that; to address post-construction stormwater management and report on that; new development, old development, stormwater management; and to file the reports.

So we were in compliance for 5 years. It is apparently a 5-year study. I have been mayor for 2, but it was a 5-year study and over the course of that 5 years it was $2 million.

Mr. CUMMINGS. And it sounds like it was for both, for being in compliance, then making sure you report on compliance, based upon what you just said.

I was just wondering from each of you members can you provide us with suggestions as to how to improve UMRA in order to help State and local governments? I think, as I listened to you, Mayor Douglas, it sounds like, in an effort to plan sometimes, it becomes very difficult if you don't know what is coming down. As a matter of fact, the chairman talked about the case in Oklahoma, your city, I think it was, is that right? Right. OK. So how does it affect planning and what can the Federal Government do to help locals be able to plan better with regard to so-called unfunded mandates?

Ms. DOUGLAS. I believe that I think we can't change the mandates without getting a lot of warning to a municipality, first of all. I think you have to give us warning like you were talking about.

Second, I think that we need to have input on that. We need to have input. Right now the SEC is taking comments on what it is going to cost governments and how many people are going to have to be registered under this new proposed rule. I am glad that they are taking comments, because they are going to hear from me about what it is going to cost me.

I think, as well, that if you have a city that is showing itself to be a quality city in all these regards, I believe that they should I don't want to say have less requirements on them, but I think that it should be understood that this city is already in compliance. The bottom line is every decision that requires me to fund a mandate takes money out of my roads, my bridges, my parks, my infrastructure in my city.

So I think we just need to keep that in mind, realize that the local officials are the ones who are tasked with getting those roads built.

Mr. CUMMINGS. I see my time is up. Thank you, Mr. Chairman.

Mr. LANKFORD. Mr. Cummings, you had asked a question of all of them to be able to determine what their suggestions. Would you like another couple minutes to be able to let the other panelists to be able to answer?

Mr. CUMMINGS. With unanimous consent, Mr. Chairman.

Mr. LANKFORD. I would absolutely give that unanimous consent. You bet.

Mr. CUMMINGS. Thank you.

Mr. LANKFORD. Would any other members like to be able to help answer that question? What the suggestions were, I think was Mr. Cummings' question, what their suggestions were for improving UMRA.

Ms. FANTONE. Going to the work that we did in 2005, we brought in representatives from all sectors that were involved, I would like to be able to respond to some of their comments on what would help. Notably, and I have mentioned two of them already and it has been part of our discussion, about getting it right in terms of what is the right relationship with Federal assistance and how much is involved; also the question of voluntary, is this program really voluntary.

But the other issue is one of threshold. And for rulemaking the threshold is in fact a higher bar because they use expenditures rather than considering that there are other kinds of costs involved in deciding whether something is in fact a Federal mandate. So you have to identify it first. And if you take it off the table because you can't meet the threshold, then you don't have the written analysis, you don't have that discussion.

So if you go with expenditures, and some of the suggestions were to broaden it to conform to other definitions where you include lost revenue, for example, where you include both direct and indirect costs.

Mr. GRIFFIN. In response to your question, I would refer to my testimony. I indicated that dealing with mandates is really a balancing act. My perception is that while it is useful to have a com-

ment period such as has been referred to with the SEC, I think it would be helpful if there could be more in-depth, if you will, a pilot study of what the impact would actually be in a community or in a State before the legislation is finalized. I think too often the legislation is generalized, and impacts are perceived but not actually determined, and I think it would be helpful to have a more in-depth analysis actually at the local and the State level.

Ms. DUDLEY. I will just say I agree with all of those suggestions.

Mr. CUMMINGS. Mr. Chairman, thank you very much.

Mr. LANKFORD. You are welcome.

Pleased to be able to recognize Mr. Labrador from Idaho for 5 minutes.

Mr. LABRADOR. Mr. Chairman, as you know, I am new to this Congress and I don't have a lot of questions. I just want to thank you for being here. It is a little bit dumfounding that we are hearing testimony that we have agencies that determine whether UMRA applies to them or not and we have a bill that is not really being followed. But I am just going to yield the balance of my time to the chairman and he is going to have more questions for you. But I just want to thank you for being here.

Mr. LANKFORD. Thank you very much.

Pleased to be able to recognize Ms. Speier for 5 minutes for questioning.

Ms. SPEIER. Thank you, Mr. Chairman. And thank you to all of the witnesses that are here today.

Mayor Douglas, you indicated that the city pays the entire cost of health care premium for the employees, is that——

Ms. DOUGLAS. The employees currently.

Ms. SPEIER. Which is a very rich program. I mean, I can't imagine many cities or counties or States or Federal Government that could provide 100 percent coverage for the premium. Having said that, you indicated that the increase of 20 percent is due, or at least 15 percent, 14½ percent, is directly attributable to the health care reform law.

Ms. DOUGLAS. Correct.

Ms. SPEIER. I would like to know how you came up with that figure.

Ms. DOUGLAS. Well, I am going to have to refer you to the consultants that we hire to come up with that figure. We hire a group that comes in and evaluates our program where, at the beginning of that.

We, in fact, had the first presentation last week in Edmond. What they have told us their review to us said that it was directly attributable to the fact that we have to begin, since we are a self-funded plan, we have to begin to set money aside for the requirement of covering up to 25, dependents up to the age of 25 or 26, I can't remember, 26, and that we also have to begin to make accommodations for the pre-existing condition requirements that they believe are going to lift the amount of claims that we have in our plan. So they divided it out. We asked specifically for it to be divided out so that we would know what was basically the increase that we would have seen versus the increase that we are seeing now.

Ms. SPEIER. So you are totally self-funded.

Ms. DOUGLAS. We are.

Ms. SPEIER. Which means that you don't have an insurance company that is providing you benefits.

Ms. DOUGLAS. We have a group. We actually do have a group. You have a level of insurance that you cover and then you have the excess——

Ms. SPEIER. You are self-funded for catastrophic.

Ms. DOUGLAS. For a certain amount. Yes, ma'am.

Ms. SPEIER. All right. So you were told, then, that your increases would go up less than 14 percent had health care reform not passed?

Ms. DOUGLAS. Yes.

Ms. SPEIER. How did they come up with that?

Ms. DOUGLAS. Again, I am going to have to refer——

Ms. SPEIER. OK. I don't know that is necessarily all that helpful to us, then.

Let me ask all of you. You know, I worked in local and State government for many years before I came to Congress, so I am real familiar with unfunded mandates, and they have been the bane of my existence for 20 years because it was always the Federal Government imposing a mandate and yet not paying for it. So I don't think it is fair and I would agree with all of you who complain about that. Having said that, first, to be really, I think, productive here, I think we should hone in on the most egregious unfunded mandate that you incur. If you can provide that to us.

Mr. GRIFFIN. Well, in my testimony I refer to the BRAC process and the fact that 26,000 Defense-related employees were transferred to Fort Belvoir from essentially the Metropolitan Washington area, the National Capital Region, and that has imposed a burden on the State and the county primarily to make transportation improvements to provide access to Fort Belvoir because the road system serving Fort Belvoir was already at capacity.

So we are having to make significant new investments to facilitate getting people in and out of the fort, while also maintaining traffic flow past the installation. The primary routes for Fort Belvoir are Interstate 95 and Route 1, and we have no money forthcoming from the Defense Department to mitigate those impacts. And that is not something we were really consulted about; it just happened.

Now, the good news for Fairfax County is it certainly strengthens the county's employment base in that part of the county, and we do appreciate that. But it is offset by a significant taxpayer investment by the locals, in essence, to accommodate that. And that is probably the most egregious recent example that I could give.

Ms. SPEIER. But there was a cost-benefit associated there. It is not like a mandate that is imposed without any benefit.

Mr. GRIFFIN. Well, it is debatable whether there is a benefit or not because, as I indicated, the employees were already in the region. In fact, they were vacating leased office space, which was a benefit to the private sector, and going into space built on Federal facilities. So the county no longer accesses the property tax, if you will, that we benefited from before. So we haven't done a precise cost-benefit, but in the long-term I think there is a benefit, but in the short-term there is a significant cost.

Ms. SPEIER. Anyone else? Yes, Ms. Dudley?

Ms. DUDLEY. Well, I don't represent a State or local government, so I am not sure I would be appropriate, but I thought that the examples in both of our local representatives' testimony provided illustrations of what they thought were the most egregious examples.

Ms. SPEIER. All right, has my time expired?

Mr. LANKFORD. Yes. Thank you.

Mr. Connolly and I are going to do one more set of questions between the two of us, then we are very, very grateful for the time you all have. Let me just followup on a couple of things.

Mayor Douglas, if you would like to submit the statement from the consultant just as background on that, you are welcome to do that and I would be glad to be able to pass it on to Ms. Speier, so we would be able to get the information on that.

Ms. DOUGLAS. Certainly.

Mr. LANKFORD. The question that you had raised on this, mayor, was you need more warning, more advanced information. What is an appropriate amount of time to say if this mandate is coming, 3 months, 6 months, 2 years, 5 years? What would just a ballpark on that?

Ms. DOUGLAS. Well, we budget out 5 years. Not all cities do that, but we try to look at a 5-year plan. I am not saying that we need 5 years, but we need adequate time to get that rolled into our budget. When these rules come down and you find out that you are going to have to spend $400,000 out of your general fund in the next year, that is a near impossibility for a city the size of mine to do. So I would say take into consideration the fact that we have a 1-year budget cycle, so rules need to accommodate that.

I also believe that it is really important to note that what some of the panelists have talked about is direct and indirect costs, and you can't always determine the indirect costs quickly; it takes you a little while to get a handle on what some of those indirect costs are. For example, that NIMS training. It took us a while to get a handle on how much it was going to cost us to comply with the homeland security requirements.

So we thought at first it was going to be a small amount of money and now it has come out to be, in 2 years, $310,000, which is not small to my general fund. So I would urge caution in rules like that. I would urge that you understand that it is local governments that are going to be funding things like that and you look at whether or not you are actually getting a benefit out of them for the costs that it is costing to those of us who are the rubber meeting the road. I liked your phrase.

Mr. LANKFORD. Have to bear the burden.

Ms. Dudley, let me ask you this. There is some concern to say that the input—and Mayor Douglas mentioned it as well—they just want input on it, that an agency could create a rule, seek public comment. Do they have to abide by that public comment? If there were 500 comments all saying this is a bad idea, do they have to respond and say, no, we can do it? Is it typical for them to be responsive on that? What have you experienced?

Ms. DUDLEY. There are several requirements on agencies to respond to public comment. Probably the most important of which is

the Administrative Procedure Act, which does involve judicial review. And if an agency ignored all their comments, the courts would be able to find that it was arbitrary and capricious and could send it back, send the rule back to the agency.

Mr. LANKFORD. How do we get, then, public comment from municipalities to say this is a possible unfunded mandate that is coming down? How do we allow municipalities to do that in a reasonable way?

Ms. DUDLEY. Well, agencies try to notify potentially affected parties as early in the process as possible, and they are required to not only under UMRA, but also under the federalism Executive order. In fact, I am on the Administrative Conference of the United States, and we just came out with new recommendations on Federal preemption and how agencies should spend more time consulting with State, local, and tribal interests before issuing regulations that will have those impacts.

Mr. LANKFORD. Mayor, are you experiencing that? And I could ask the same thing of Mr. Griffin. Do you feel like you are getting—that is the rule. Do you feel like you are getting information to say this is coming, preparatory information?

Ms. DOUGLAS. Well, we were notified. We read articles about the SEC proposal to comply with the Dodd-Frank act. So we read about that. My city treasurer came to me and said, OK, I think this impacts more than just the city treasurer's office. And then there was an article I believe in the Wall Street Journal talking about how it is going to affect volunteer boards, and there were comments from several State-wide treasurers.

Mr. LANKFORD. But that is not actually coming from an official Federal source on that.

Ms. DOUGLAS. That is not actually coming from an official Federal source.

Mr. LANKFORD. Mr. Griffin, have you experienced the Federal Government contacting you and trying to get input and say this is a consideration that is going on?

Mr. GRIFFIN. Generally not. Most of my information comes from my staff, who either read the Federal Register or through professional associations that have notice. Or your Congressman, that is true.

Mr. LANKFORD. Let me ask one more quick statement.

Ms. Dudley, a couple comments have been made about EPA, and I note your comments earlier on that from my wonderful ranking member on it about air quality standards and such. Would that fall under an unfunded mandate as it currently stands now?

Ms. DUDLEY. No.

Mr. LANKFORD. OK. So that is outside of what is—though a city or municipality may have to spend millions of dollars in readjusting that, that would not be considered an unfunded mandate according to law at this point.

Ms. DUDLEY. That is right, for several reasons. That is right.

Mr. LANKFORD. OK. Great. Those are all the questions that I had. I would be glad to be able to yield some time to my ranking member, Mr. Connolly.

Mr. CONNOLLY. Thank you again, Mr. Chairman. Before Mr. Cummings leaves, I do want you all to know that Mr. Cummings

and I practice what we preach. With his leadership, we introduced a bill to regulate, further regulate, frankly, water quality for the Chesapeake Bay in the last Congress, and we created a new standard for local governments in the watershed to have low development impacts, to have one standard that applied to everyone.

But we funded it. We provided a substantial amount of money for local governments to apply for grants to fully comply with the new standard. And ours was the only bill that did that, but because we were sensitive to this very issue, I just thought for the record, Mr. Chairman, we would point out we practice what we preach. And I thank my colleague, Elijah Cummings, for his leadership.

Ms. Dudley, you, in your testimony, talked about, and I certainly am intrigued and would welcome working with my chairman and others on the committee on tightening up UMRA. I am all in favor of it. As somebody with big local government background, it drove me crazy, and I will start with No Child Left Behind. Good intentions. Unfunded. Too rigid. And I fought with the previous administration and their secretary of education very publicly about this issue, so I can't wait to address it in this Congress.

However, you talked about maybe creating a new judicial standard that would make it easier to seek an injunction to stay the implementation of a new regulation. Do you want to just expand on that?

And then I want to follow up, if I may, Mr. Chairman, with Ms. Fantone as a followup to your answer, Ms. Dudley.

Ms. DUDLEY. The reason I suggested that is I was trying to find ways identifying why it has not been more effective, and one of the reasons it hasn't is even when analysis is required, that is all that the act does, is require the analysis. And, as we have discussed, it is a small subset of the rules that a normal person might think is an unfunded mandate that actually gets covered. The analysis, as UMRA states, isn't to say let's not do this regulation, so it is not deregulatory; it is really a transparent accounting of the information that we know about the costs and the benefits.

As Mr. Griffin says, let's do a balancing. So it requires, among the alternatives you look at, look at the costs, look at the benefits, qualitative as well as quantitative, and find that least costly, least burdensome or most cost-effective alternative. There is nothing in the statute that provides any checks and balances on that, either from OMB or from the courts. So that would be a suggestion. Perhaps modest was not right, perhaps it is not a modest suggestion, but would be to allow the courts to say, well, the analysis didn't demonstrate that you have chosen the least costly approach you could.

Mr. CONNOLLY. Right. Let me just ask, though, in the category of perhaps unintended consequences, because everything you just said sounds awfully reasonable to me. Why wouldn't you do that? But in looking at the language of the statute on the books, it expressly provides that an agency's failure to perform any estimate analysis statement or description cannot be used, cannot be used as a basis for delaying or invalidating a rule. So what we just talked about would actually significantly alter the current statutory language on UMRA.

Ms. Fantone, in that report issued 2 years ago, GAO said that, in terms of the average rulemaking, new rule, it takes 4 years. If we were to change the judicial review language in UMRA, what might that 4-year review process now look like?

Ms. FANTONE. You asked me the question that is difficult for me to answer first because, again, I am not a lawyer either, and judicial review is not an area that I feel qualified to talk about. The report you are referring to is a Federal rulemaking report in which we tried to identify how long something takes, what are the resources; and, frankly, we got a very mixed response. A lot of it has to do with the complexity of the rules themselves and to come up with sort of a this is the proper amount of time is not going to be something that I think is a fruitful direction.

I would like to add to some of the comments that have already been made in terms of suggestions of what Congress could revisit, and I think address some of the questions here, which is right now there is an exclusion for those that don't go through proposed rulemaking. So that would be an area to revisit, whether there is opportunities there to get some of the information that would help balance the equation a bit. And then adding to that would be retrospective analysis, which potentially could improve cost-benefit analysis by looking back and seeing, well how well did agencies do in estimating these.

So I am sorry I didn't answer your question directly, but I think these are other things that might assist.

Mr. CONNOLLY. I thank you.

And my time is up. Thank you, Mr. Chairman.

Mr. LANKFORD. Thank you.

And thank you to all of our witnesses for taking time to be able to be here. I want you to know all of this is recorded and written down and is reviewed. In fact, in preparing for this particular hearing, I was going back through the notes from the 2005 and previous hearings where we have been dealing with these issues before. In fact, the ranking member, Mr. Connolly was actually on the other side of this table in 2005. I was going through the notes on that, as a witness there. So these are very important comments. They are held in record and there will be decisions that will be made in future days based on much of the input that you have given. Thank you very much for being here.

With that, the committee stands adjourned.

[Whereupon, at 10:48 a.m., the subcommittee was adjourned.]

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