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IS UNCLE SAM STILL PASSING THE BUCK? THE BURDEN OF UNFUNDED MANDATES ON STATE, COUNTY, AND CITY GOVERNMENTS

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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IS UNCLE SAM STILL PASSING THE BUCK? THE BURDEN OF UNFUNDED MANDATES ON STATE, COUNTY, AND CITY GOVERNMENTS

TUESDAY, MARCH 8, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room 2157, Rayburn House Office Building, Hon. Tom Davis (chairman of the committee) presiding.

Present: Representatives Davis, Shays, Mica, Duncan, Turner, Westmoreland, Foxx, Waxman, Van Hollen, and Norton.

Staff present: David Marin, deputy staff director/communications director; Jim Moore, counsel; Robert Borden, counsel/parliamentarian; Rob White, press secretary; Drew Crockett, deputy director of communications; Brian Stout, professional staff member; Teresa Austin, chief clerk; Sarah D'Orsie, deputy clerk; Corinne Zaccagnini, chief information officer; Kristin Amerling, minority deputy chief counsel; Michelle Ash, minority senior legislative counsel; Krisa Boyd, minority counsel; Earley Green, minority chief clerk; and Jean Gosa, minority assistant clerk.

Mr. DAVIS. This meeting will come to order.

I want to welcome everybody to today's hearing on the burden of Federal mandates on State, county, and city governments. This hearing will provide a look back at the Unfunded Mandates Reform Act of 1995—we call it UMRA—a decade after its passage, and begin this committee's work to determine how best to fulfill the promise of UMRA and strengthen the partnership among all levels of Government. The reports, surveys and testimony provided by our witnesses today are going to provide us with a good starting point in this discussion. As we begin, let me say that this issue is of particular importance to me.

As a former county official, I have personally experienced the strain that is often times placed on our localities by overly prescriptive and burdensome mandates from the Federal Government.

Over the last decade, Congress and the rest of the Federal Government have rightfully worked to transfer power out of Washington, DC, down to State and local governments, who can more effectively and efficiently administer many governmental programs. Rooted in the belief that all issues not national in scope are most appropriately and effectively addressed at the levels of government that are closest to the people, UMRA was designed to restore balance to the Federal system. The law accomplishes this goal through

ensuring informed decisions by the Congress and the executive branch about the effects of Federal mandates on other levels of government, as well as the private sector.

While many of the requirements placed on States and localities by the Federal Government are necessary, we need to be reasonable in their application. We also need to view the unfunded mandates issue through a post-September 11 prism, understanding that a lot has changed over the last 4 years. A 21st century homeland security mission requires unprecedented coordination, not only in terms of planning and information management sharing, but also in the dedication of resources. Looking at the world after September 11, it is clear that not every Federal mandate—whether or not it is 100 percent funded—is a bad idea. Citizens expect all governments to take necessary actions to provide for their safety and security, and all governments must share in the costs.

There is no denying States and localities are the backbone of our Nation. They deliver an overwhelming majority of government services, and are primarily responsible for the issues most important to our citizens—from crime prevention to education to transportation to economic development, to name just a few. If the Federal Government is not responsible in the imposition of Federal mandates, we will be heaping additional costs on our State and local governments that will inevitably displace and replace worthy and important State and local programs. It is basically a transfer, if you will, from the Federal income tax, which is progressive, to local property taxes, which are very, very regressive.

There have been signs that UMRA is working. According to CBO, the number of bills containing intergovernmental mandates decreased by one-third between 1996 and 2002. In addition, the GAO has found that only three proposed intergovernmental mandates, as defined by UMRA, with annual costs exceeding the thresholds, that have become law, an increase in the minimum wage in 1996, a change in Federal funding for food stamps in 1997, and an adjustment in premiums for prescription drug coverage in 2003.

Despite the improvements made in the last decade, disagreements between the various levels of government on the definition, the size and the scope of Federal mandates continues and are detrimental to the inter-governmental coordination and cooperation that UMRA was meant to foster. The situation is all the more problematic when the Federal Government is running deficits, eliciting complaints that we are simply shifting tax increases to lower levels of government.

It has become clear to this committee that, while UMRA has been a significant step in the right direction, it has not proven to be a "silver bullet." Indeed, many have begun to express concern that UMRA is not an effective tool in preventing the imposition of unfunded mandates as a result of exclusions in coverage and various loopholes in the law that exists. The fact is, Congress would exempt itself from the laws of gravity if it could. [Laughter.]

Questions and challenges remain, and it is our hope to begin the process of answering some of them today. Our new Subcommittee on Federalism and the Census, ably chaired by Chairman Mike Turner, a former mayor of Dayton, OH, will delve deeper into this topic in the coming months in the hopes of providing proposals to

strengthen UMRA. We are fortunate to have him on this committee. I look forward to working with him as the subcommittee's chairman on this and other issues as we move forward in the 109th Congress.

We have two panels today, with extensive experience working on this important issue, and I look forward to their testimony. I want to especially thank NACo, the National Association of Counties, for their work in putting together a snapshot of the costs of Federal mandates, at our request, which is only a beginning, but it helps to bring home the importance of examining this issue carefully.

For instance, it is estimated that the $40 billion cost estimate reported in the survey only accounts for approximately 5 percent of actual costs stemming from Federal mandates. Imagine if all the counties who responded only provided 5 percent of their federally mandated costs, the $40 billion estimate could rapidly climb to as much as $800 billion, a crippling burden.

I am also particularly pleased that Gerry Connolly, who is the chairman of the Board of Supervisors from Fairfax County, my home county, was able to join us today. I look forward to Gerry's testimony and continuing to work with them on these important issues.

[The prepared statement of Chairman Tom Davis follows:]

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Opening Statement of Chairman Tom Davis
Committee on Government Reform Hearing
"Is Uncle Sam Still Passing the Buck? The Burden of Unfunded Mandates on State, County, and City Governments"
March 8, 2005

Good Afternoon. I would like to welcome everyone to today's hearing on the burden of federal mandates on state, county and city governments. This hearing will provide a look back at the Unfunded Mandates Reform Act of 1995 a decade after its passage, and begin this Committee's work to determine how best to fulfill the promise of UMRA and strengthen the partnership among all levels of government. The reports, surveys and testimony provided by our witnesses today are going to provide us with a good starting point in this important discussion. As we begin, let me also say that this issue is of particular importance to me. As a former county official, I have personally experienced the strain that is oftentimes placed on our localities by overly prescriptive and burdensome mandates from the federal government.

Over the last decade, Congress and the rest of the Federal government have rightfully worked to transfer power out of Washington, D.C. down to state and local governments, who can more effectively and efficiently administer many governmental programs. Rooted in the belief that all issues not national in scope are most appropriately and effectively addressed at the levels of government closest to the people, UMRA was designed to restore balance to the federal system. The law accomplishes this goal through ensuring informed decisions by the Congress and the Executive Branch about the effects of federal mandates on other levels of government and the private sector.

While many of the requirements placed on states and localities by the federal government are necessary, we need to be reasonable in their application. We also need to view the unfunded mandates issue through a post-9/11 prism, understanding that a lot has changed in the past four years. A 21st century homeland security mission requires unprecedented coordination - not only in terms of planning and information sharing, but also in the dedication of resources. Looking at the world after 9/11, it's clear that not every federal mandate - whether or not its 100 percent funded - is a bad idea. Citizens expect all governments to take necessary actions to provide for their safety and security, and all government must share in the costs.

There is no denying States and localities are the backbone of our nation. They deliver an overwhelming majority of government services, and are primarily responsible for the issues most important to our citizens - from crime prevention to education to transportation to economic development, to name a few. If the federal government is not responsible in the imposition of federal mandates, we will be heaping additional costs upon our state and local governments that will inevitably displace and replace worthy and important state and local programs.

There have been signs that UMRA is working. According to CBO, the number of bills containing intergovernmental mandates decreased by one-third between 1996 and 2002. In addition, GAO has found that only three proposed intergovernmental mandates, as defined by UMRA, with annual costs exceeding the threshold have become law – an increase in the minimum wage in 1996, a change in federal funding for food stamps in 1997, and an adjustment in premiums for prescription drug coverage in 2003.

Despite the improvements made in the last decade, disagreements between the various levels of governments on the definition, size and scope of federal mandates continue and are detrimental to the intergovernmental coordination and cooperation that UMRA was meant to foster. The situation is all the more problematic when the federal government is running deficits, eliciting complaints that we are simply shifting tax increases to lower levels of government.

It has become clear to this Committee that, while UMRA has been a significant step in the right direction, it has not proven to be a "silver bullet." Indeed, many have begun to express concern that UMRA is not an effective tool in preventing the imposition of unfunded mandates as a result of exclusions in coverage and various loopholes that exist in the law. The fact is, Congress would exempt itself from the laws of gravity if it could. Questions and challenges remain, and it is our hope to begin the process of answering some of them today. Our new Subcommittee on Federalism and the Census, ably chaired by Chairman Mike Turner, a former Mayor of Dayton, will delve deeper into this topic in the coming months in the hopes of providing proposals to strengthen UMRA. We are fortunate to have him on this Committee and I look forward to seeing his Subcommittee's work on this and other issues as we move forward in the 109th Congress.

Today we have two panels with extensive experience working on this important issue, and I look forward to their testimony today. I want to especially thank NACo for their work in putting together a snapshot of the costs of federal mandates at my request, which is only a beginning, but it helps to bring home the importance in examining this issue closely. For instance, it is estimated that the $40 billion cost estimate reported in the survey only accounts for approximately five percent of actual costs stemming from federal mandates. Imagine that if all the counties who responded only provided 5 percent of their federally mandated costs - the $40 billion estimate could rapidly climb to as much as $800 billion, a crippling burden. I am also particularly pleased that Gerry Connolly, Chairman of the Board of Supervisors from Fairfax County, was able to join us today. I look forward to your testimony and to continuing to work with you on this issue.

Mr. DAVIS. I would now like to recognize the distinguished ranking member, Mr. Waxman, for an opening statement.

Mr. WAXMAN. Thank you very much, Mr. Chairman.

This year is the 10th anniversary of the passage of the Unfunded Mandates Reform Act [UMRA]. And it is amazing what a difference 10 years can make.

Ten years ago, the Republicans had just taken control of the Congress, and we were debating the Contract with America. One of the fundamental planks of the contract was the idea that Washington should respect States' rights.

In this committee, we heard speech after speech about how State and local governments were closer to the people and should have the freedom to design their own solutions to local problems. There was a lot of merit in those speeches. In our Federal system, State and local governments have enormous responsibilities. And our system of government depends on vibrant State and local institutions.

Yet now, just 10 years later, all this seems to be forgotten. Now that Republican leaders are entrenched in the White House and Congress, deference to States has been replaced with a "Washington knows best" mentality.

Congress has passed environmental laws curbing the authority of States to regulate major sources of local pollution. The House has repeatedly passed energy legislation that strips States of authority over their coastlines, the siting of power lines, and hydropower projects. Just last month, the Congress passed legislation that told State courts that they could no longer hear certain types of class actions.

The track record on budget issues is the same. We push responsibilities on the States and then we cut funding. The President's latest budget is particularly bad for State and local governments. Important programs such as Medicaid and Community Block Grants are facing major cuts.

The topic of today's hearing is unfunded mandates, and these too are growing. The No Child Left Behind Act is one prominent example. It imposes new mandates on States, but the President's budget does not provide adequate funding. As a result, State legislatures now are considering opting out of the No Child Left Behind program, including the State legislature in the chairman's home State of Virginia.

Just last month, the House passed the REAL ID Act. This law preempts State authority to determine who should get drivers' licenses. It also imposes new Federal standards for the issuance of drivers' licenses. The National Governors Association and the Association of Motor Vehicle Administrators recently wrote, "The cost of implementing such standards and verification procedures for the 220 million drivers' licenses issued by States represents a massive unfunded Federal mandate."

The Congress also is forcing costs onto the local governments in more creative ways. One example is MTBE, which oil companies use as an additive to gasoline. When MTBE leaks from tanks, it contaminates water supplies. Local governments have successfully sued the oil companies to pay for the clean-up costs. Yet House Republicans leaders want to pass legislation that would protect the oil

companies and shift clean-up costs to the local taxpayers by preempting these lawsuits.

Local government organizations, many of whom are represented here today, recently wrote to Members of Congress stating, "The liability waiver amounts to a massive unfunded mandate on local governments and ratepayers." And I would like to enter that letter into the record at this time.

Mr. DAVIS. Without objection, the letter will be entered into the record.

[The information referred to follows:]

National League of Cities
The U.S. Conference of Mayors
National Association of Counties
National Association of Towns and Townships
American Water Works Association
Association of Metropolitan Water Agencies
National Water Resources Association
Association of California Water Agencies
Western Coalition of Arid States
American Public Works Association

February 7, 2005

KEEP MTBE OUT OF THE ENERGY BILL

Dear Member of Congress:

The undersigned organizations – representing thousands of mayors, city council members, county officials, town and township officials, drinking water systems and public works departments – reiterate our strong opposition to providing product liability immunity to the producers of MTBE in energy legislation or in any other legislation.

The liability waiver amounts to a **massive unfunded mandate** on local governments and ratepayers.

MTBE producers, according to documents in recent litigation, put this contaminant into commerce knowing it could **contaminate drinking water supplies**. Under the MTBE product liability waiver, these producers would remain unaccountable.

Thousands of water sources have been contaminated, and as MTBE spreads, more and more communities will be forced to shut down wells or undertake a costly cleanup program.

Here are some important facts to remember:

1. **MTBE was never mandated**; Oil producers have used MTBE in gasoline since the late 1970's, prior to the Clean Air Act oxygenate requirements that took effect in 1995. MTBE was not a mandated oxygenate and other oxygenates were available. Congress is not obligated to provide the producers "safe harbor" for their choice.

2. Experts conservatively estimate that **cleanup will cost at least $29 billion.**

3. The liability waiver would **retroactively block hundreds of communities' legitimate suits** that have been filed already and could preempt hundreds more, leaving communities with a $29 billion unfunded mandate from Congress.

4. The Leaking Underground Storage Tank (LUST) fund was not intended to address the overwhelming amount of contamination communities are experiencing. Even if the LUST fund were amended to address the massive cleanup, the fund would need about $29 billion. Moreover, **taxpayers should not pay for MTBE cleanup.**

Members of Congress, stop any attempts to enact the MTBE liability waiver in energy legislation or in any other legislation.

Sincerely,

Donald J. Borut, Executive Director
National League of Cities

Tom Cochran, Executive Director
The U.S. Conference of Mayors

Larry Naake, Executive Director
National Association of Counties

Allen R. Frischkorn Jr., Executive Director
National Association of Towns and Townships

Diane VanDe Hei, Executive Director
Association of Metropolitan Water Agencies

Jack Hoffbuhr, Executive Director
American Water Works Association

Steve Hall, Executive Director
Association of California Water Agencies

Peter B. King, Executive Director
American Public Works Association

Larry Libeu, President
Western Coalition of Arid States

Thomas F. Donnelly, Executive VP
National Water Resources Association

Mr. WAXMAN. I want to be clear that there are times when Federal standards are important. Air pollution is a good example. What happens in Las Vegas may stay in Las Vegas, but what is emitted in Ohio certainly does not stay in Ohio. Uniform Federal standards are essential to set a level playing field to protect residents in downwind States.

Good judgment is needed, as well as healthy respect for the prerogatives of States. And too often, this is exactly what seems to be missing in Washington. Just because one party in Washington controls the Government and has the power to impose its will does not make it right.

I look forward to the hearing today on unfunded mandates. I thank the witnesses for coming and I look forward to their testimony.

[The prepared statement of Hon. Henry A. Waxman follows:]

Statement of Rep. Henry A. Waxman, Ranking Minority Member
Committee on Government Reform
Hearing on
"Is Uncle Sam Still Passing the Buck? The Burden of Unfunded Mandates on State, County, and City Governments"

Tuesday, March 8, 2005

This year is the 10th anniversary of the passage of the Unfunded Mandates Reform Act (UMRA). And it is amazing what a difference ten years can make.

Ten years ago, the Republicans had just taken control of the Congress, and we were debating the Contract with America. One of the fundamental planks of the contract was the idea that Washington should respect state rights.

In this Committee, we heard speech after speech about how state and local governments were closer to the people and should have the freedom to design their own solutions to local problems.

There was a lot of merit in those speeches. In our federal system, state and local governments have enormous responsibilities. And our system of government depends on vibrant state and local institutions.

Yet now – just ten years later – all this seems to be forgotten. Now that Republican leaders are entrenched in the White House and Congress, deference to states has been replaced with a "Washington knows best" mentality.

Congress has passed environmental laws curbing the authority of states to regulate major sources of local pollution. The House has repeatedly passed energy legislation that strips states of authority over their coastlines, the siting of power lines, and hydropower projects. Just last month, the Congress passed legislation that told state courts that they could no longer hear certain types of class actions.

The track record on budget issues is the same. We push responsibilities on the states and then we cut funding. The President's latest budget is particularly bad for state and local governments. Important programs such as Medicaid and Community Block Grants are facing major cuts.

The topic of today's hearing is unfunded mandates, and these too are growing. The No Child Left Behind Act is one prominent example. It imposes many new mandates on states, but the President's budget does not provide adequate funding. As a result, state legislatures now are considering opting out of the No Child Left Behind program, including the state legislature in the Chairman's home State of Virginia.

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Local government organizations, many who are represented here today, recently wrote to members of Congress stating, "The liability waiver amounts to a massive unfunded mandate on local governments and ratepayers." I would like to enter that letter into the record at this time.

I want to be clear that there are times when federal standards are important. Air pollution is a good example. What happens in Las Vegas may stay in Las Vegas, but what is emitted in Ohio certainly does not stay in Ohio. Uniform federal standards are essential to set a level playing field and protect residents in downwind states.

Good judgment is needed, as well as a healthy respect for the prerogative of states. And too often, this is exactly what seems to be missing in Washington. Just because one party in Washington controls the government and has the power to impose its will does not make it right.

I look forward to the hearing today on unfunded mandates. I thank the witnesses for coming and I look forward to their testimony.

Mr. DAVIS. Thank you very much. I turn for an opening statement to the gentleman, the chairman of the subcommittee, the gentleman from Ohio, Mr. Turner.

Mr. TURNER. Thank you, Mr. Chairman.

Chairman Davis, I would like to thank you for reviving what has been and continues to be an important subject, the issue of unfunded Federal mandates. As a former mayor, I lived with the impact of Federal mandates and, yes, from a purely financial standpoint, they were a burden. However, I also recognize that mandates do serve a purpose. And although there is a cost associated with these mandates, there is likely a corresponding benefit as well. The question usually comes down to, does the cost of the mandate outweigh the benefit, and if so, what can we do to reduce the burden on our local and State governments?

This is an issue of jurisdiction, and protecting the authority and control of State and local governments. In addition to the tax burden that these mandates represent, State and local governments face reduced resources for basic services, community priorities and economic development initiatives. At the root of the unfunded mandate debate is the fact that the ultimate responsible party is the taxpayer. Whether those taxes are paid to the State, the city or the Federal Government matters little. What matters to that individual taxpayer is that they can identify the government ultimately making the decision to tax and hold them responsible for that decision.

On this 10th anniversary of the Unfunded Mandates Reform Act of 1995, it is fitting that we again ask ourselves what we do when the Federal Government passes along mandates and how we can lessen that burden.

Chairman Davis, in organizing the Federalism and the Census Subcommittee, has charged us with working to improve communication between State and local stakeholders so that these issues are better understood on the Federal level.

Mr. Chairman, thank you for your leadership, and the opportunity to keep this issue in the forefront.

Mr. DAVIS. Thank you very much.

Any other Members wish to make opening statements?

Thank you. Then Members will have 7 days to submit opening statements for the record.

On our first panel we have Dr. John Graham, the Administrator of the Office of Information and Regulatory Affairs [OIRA], within the office of OMB, charged with reviewing agency regulations containing Federal mandates. Joining Dr. Graham is the Director of the Congressional Budget Office, Mr. Douglas Holtz-Eakin, whose office plays a vital role, under Title I of UMRA, in assessing Federal mandates contained in legislation being considered by congressional committees.

As you know, it is our policy to swear you in before you testify. If you would rise with me and raise your right hands.

[Witnesses sworn.]

Mr. DAVIS. Thank you very much for being with us today. Your entire statement and reports are in the record.

Dr. Graham, we will start with you, and thank you for being with us.

STATEMENTS OF JOHN D. GRAHAM, Ph.D., ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET; AND DOUGLAS HOLTZ-EAKIN, DIRECTOR, CONGRESSIONAL BUDGET OFFICE

STATEMENT OF JOHN D. GRAHAM

Mr. GRAHAM. Thank you, Mr. Chairman and members of the committee.

No topic is more worthy of continued discussion and dialog than the topic of unfunded mandates.

Let me just summarize my testimony briefly so we can get to the questions and dialog, and summarize it by reminding us, conceptually, what are the options available to us when we face a potential unfunded mandate.

One option is to rescind or to block the unfunded mandate. Rescind it if it is currently in place or block it if it is about to be imposed. And conceptually, that is certainly a possibility.

However, we need to keep in mind that some of these unfunded mandates are rooted in the laws that Congress has passed, and those may be difficult to remove. Or, in some cases, we may have unfunded mandates that have such a strong justification that we want to move forward and enforce those, even if they are not fully funded. An example would be civil rights laws, where the Federal Government takes a stance that certain expenditures will be taken, and the Federal Government does not necessarily provide funds for those.

A second conceptual solution would be to fund the unfunded mandate at the Federal level. And as you can imagine, that particular solution draws the attention of the Office of Management and Budget and other Federal policymakers concerned about the deficit and Federal spending. But it is, conceptually, definitely one of the options that has to be considered, and it needs to be part of the dialog.

Option three, fund the unfunded mandate at the State and local level or in the private sector. And while some of us in the Federal Government may like this outcome, you will hear plenty of discussion this afternoon about people who are having difficulty with that approach to this problem. But, conceptually, it is one of the possibilities, it has to be considered.

A fourth option is to modify the unfunded mandate, to reduce its costs, to make it more flexible, or to provide some arrangement so that it is a more practical approach to addressing public need. This particular approach, modify the unfunded mandate, is one that we at the Office of Management and Budget frequently engage in when we deal with Federal agencies that are developing regulations. We ask questions like: Is there a less costly way to achieve this public objective? Have you analyzed the costs of the alternative ways of addressing this public objective, and at a minimum, made sure that this information is available?

So each of these four are possibilities for addressing concerns about unfunded mandates.

My staff has looked back over the last 10 years to try to learn what has, in fact, changed in the way the Federal Government reviews regulations as a result of the Unfunded Mandates Act. And

it turns out, if you look at Title II of the act carefully, which is the analytic requirements for regulations, we would argue that the Executive order requirements that were already in place at the time, put into effect by President Clinton, actually mirror pretty closely what was put in the statute. So, from a standpoint of analytic requirements, it is not obvious to us that a lot changed as a result of the Unfunded Mandates Act.

However, we do believe the consultation, requirements that there be consultation by the Federal regulators with State and local authorities before they impose unfunded mandates, has been a subject of more attention, and we at OMB are trying to give that consultation requirement more life as we review regulations.

We certainly agree with the general principles of the Unfunded Mandates Act, that cost and benefit information about regulations should be made available to regulators and the public, and used whenever possible in the development of regulations.

So, in summary, it is an excellent topic for a discussion. None of the answers are particularly easy. The one that we have found, in practice, the most constructive is option four in the four I gave you, which is find ways to achieve the goals of the mandate in a less costly way.

Thank you very much.

[The prepared statement of Mr. Graham follows:]

STATEMENT OF JOHN D. GRAHAM, PH.D.
ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES
BEFORE THE
COMMITTEE ON GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES
March 8, 2005

Good afternoon, Mr. Chairman, and Members of this Committee. I am John D. Graham, Ph.D., Administrator, Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget. I appreciate this opportunity to testify before you today on the Unfunded Mandates Reform Act of 1995 (the Act).

As you know, an important reason for the enactment of the Act was to ensure that Congress and the Executive Branch better understand and consider the impacts of laws and regulations on our intergovernmental partners. This Administration is firmly supportive of the principles behind the Act. In fact, we have worked to increase the opportunities for our intergovernmental partners to participate fully in the regulatory process.

OIRA plays a role in the implementation of Title II of the Act, which addresses the Executive Branch. Title II begins with a general directive for agencies to assess, unless otherwise prohibited by law, the effects of their rules on other levels of government and on the private sector. Title II also describes specific analyses and consultations that

agencies must undertake for rules that result in expenditures of $100 million in any year (adjusted annually for inflation) by State, local, and tribal governments in the aggregate, or by the private sector. Such rules must be accompanied by written statements that describe in detail the required analyses. The analyses are to include consideration of a reasonable number of alternatives and, except in certain circumstances, the selection from among them of the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule." This analytic approach is at the heart of OIRA's role in the implementation of the Act, as it is generally consistent with our own regulatory review requirements under Presidential Executive Order 12866 (1993). When reviewing regulatory actions from Federal agencies, we work to ensure that the rulemaking complies with the Act's consultation and analysis requirements. However, in keeping with the spirit of the Act, we work with agencies to reduce regulatory burden, regardless of whether the expenditures imposed by a particular regulatory action rise to the Act's threshold.

The Act also directs OMB to send copies of required agency analyses to the Congressional Budget Office (CBO), and to submit an annual report to Congress on agency compliance with Title II. Our 2004 submission to CBO covered rules that met the $100 million threshold from 2002 through 2003. It contained rules from the Departments of Agriculture, Energy, Health and Human Services, Justice, Labor and Transportation, and the Environmental Protection Agency. All were private sector mandates.

In our 2004 Report to Congress, we determined that, in Fiscal Year 2003, Federal agencies issued 17 rules that were subject to the Act because they require expenditures in any year by State, local, and tribal governments, in the aggregate, or by the private-sector, of at least $100 million in any one year (adjusted annually for inflation).

The Department of Agriculture issued one proposed rule, the Department of Health and Human Services issued five proposed rules and three final rules, the Department of Justice issued one proposed rule, the Department of Transportation issued two proposed and two final rules, and the Environmental Protection Agency issued six proposed and two final rules. There were no rules meeting the Act's threshold based on their estimated impact on State, local, or tribal governments, in the aggregate. All of the rules (both proposed and final) were covered by the Act because of anticipated expenditures by the private sector.

However, we recognize that State, local, and tribal governments are often burdened by Federal regulation, either through direct requirements to incur costs or through a loss of flexibility to perform their government functions. Our intergovernmental partners play a vital role in the provision of government services. They have the major role in providing domestic public services, such as public education, law enforcement, road building and maintenance, water supply, and sewage treatment. However, over the past two decades, State, local, and tribal governments increasingly have expressed concerns about the difficulty of complying with Federal mandates without additional Federal resources.

The Act requires agencies to "develop an effective process" for obtaining "meaningful and timely input" from State, local, and tribal governments in developing rules with significant intergovernmental mandates. The Bush Administration has worked to involve State and local governments earlier in the rulemaking process so that the consultation envisioned by the Act is meaningful.

As a result, the scope of consultation activities undertaken by Federal departments such as Homeland Security, Agriculture, Commerce, Education, Health and Human Services, Interior, Justice, Labor, Transportation, and the Environmental Protection Agency demonstrate this Administration's commitment to building strong relationships with our intergovernmental partners based upon the constitutional principles of federalism embodied in the Act. Federal agencies are actively consulting with State, local, and tribal governments to ensure that regulatory activities are consistent with the requirements of the Act. This year's report shows an increased level of engagement, as several agencies have begun major consultation initiatives.

Federal agencies are striving to increase flexibility in the implementation of programs by issuing regulations that allow for alternative compliance approaches. For example, in the Food Stamp High Performance Bonus Final Rule, USDA sets goals for improved performance in administering the program but doesn't mandate how States must achieve them. Instead, the rule creates awards for the best and most improved performers in a few separate areas.

A new proposal from HHS on the Child Care and Development Fund (CCDF) would revise the program regulations to permit States to designate multiple public and/or private entities as eligible to receive private donations that may be certified as child care expenditures for purposes of receiving Federal CCDF matching funds. This increased flexibility will allow States to decrease their own contributions to CCDF by leveraging local resources.

Additionally, OMB has developed guidelines to assist Federal agencies in complying with the Act that are based upon the following general principles:

- intergovernmental consultations should take place as early as possible, beginning before issuance of a proposed rule and continuing through the final rule stage, and be integrated explicitly into the rulemaking process;
- agencies should consult with a wide variety of State, local, and tribal officials;
- agencies should estimate direct costs and benefits to assist with these consultations;
- the scope of consultation should reflect the cost and significance of the mandate being considered;
- effective consultation requires trust and significant and sustained attention so that all who participate can enjoy frank discussion and focus on key priorities; and
- agencies should seek out State, local, and tribal views on costs, benefits, risks, and alternative methods of compliance, and whether the Federal rule will harmonize with and not duplicate similar laws in other levels of government.

Although much has been done to effectively implement the Act, more work remains in order to ensure that State, local, and tribal governments truly feel like intergovernmental partners in the rulemaking process. I look forward to working with Congress toward this important goal. That concludes my prepared testimony. If you have any questions, I would be happy to answer them.

Mr. DAVIS. Thank you very much.

Mr. Holtz-Eakin, thank you for being with us.

STATEMENT OF DOUGLAS HOLTZ-EAKIN

Mr. HOLTZ-EAKIN. Chairman Davis, Mr. Waxman, members of the committee, the Congressional Budget Office is pleased to be able to be here today. We have submitted testimony for the record and as well recently released a report on our activities during the year 2004 under UMRA. That report is the larger document out of which my comments will be drawn.

Since 1996, Congress has attempted to recognize the costs of mandates as imposed on State and local governments and on the private sector in the course of the budget process. In the testimony that we have provided to you and in the screens, what I thought I would do is begin first by reviewing some of the key facts out of those reports.

CBO has over the course of the 9-years reviewed over 5,000 bills as a part of this process. There are slightly more in the way of reviews on inter-governmental and private sector mandates, but in total there is a large experience in the operation of UMRA.

Next slide. Among the key features that comes out is that relatively few bills actually have mandates. Over 85 percent contain no mandate whatsoever. About 10 percent of bills on both the private sector and the inter-governmental side, have a mandate which lies below the threshold as specified in the law. $15 million for inter-governmental mandates, $100 million for the private sector originally, those are indexed for inflation. And somewhere between 1 and 3 percent of the mandates exceeded the threshold, had bills, had mandates that exceeded the threshold.

Next slide. To our eye at least, there has been relatively little trend through time. In both the costs of inter-governmental mandates, those which do and do not exceed the threshold, and also—next slide—in the private sector, performance since 1996 has been pretty uniform Congress by Congress, a relatively small fraction take this feature. And finally, if one looks at the actual experience of bills with substantial mandates, very few are enacted. Only five bills with substantial inter-governmental mandates have been enacted. Twenty-six private sector mandates have been enacted, reflecting the relatively low threshold for private sector mandate.

This performance reflects the design of UMRA under which a mandate occurs when there is an enforceable duty to compel or prohibit an action when there is a new condition or reduction in financial aid and if no flexibility is given to offset that reduction in a mandatory program, or if there is a reduction in funding for an existing mandate. And very importantly, some things are not considered mandates. There are specific exclusions for activities in the area of national security, constitutional rights, such as voting, and in parts of the Social Security system.

And also, a mandate cannot exist under UMRA if it is a condition of Federal aid. A grant program of that type is quite common.

Where Congress goes next in considering the recognition of the costs of mandates and the budget process will be a topic of great interest. One possibility would be to simply clarify some of the issues in UMRA which the CBO has struggled with over the years.

For example, is the extension of an existing mandate a mandate in and of itself, and does the threshold apply to new costs or total costs under that mandate? Or alternatively, are indirect costs imposed by a mandate appropriate for calculation in contributing toward the threshold?

Alternatively, it is possibly to extend UMRA either by modifying the thresholds in some way so as to include or exclude more bills. To alter the legislative features of UMRA, increase points of order, impose a point of order for private sector mandates, have a higher threshold for overriding a point of order, and an inter-governmental mandate.

Or finally, it would be possibly to extend the scope of mandates by limiting the exclusions or otherwise redefining a mandate under UMRA. In any event, the CBO has been pleased to work with this committee and the Congress in general in the pursuit of the recognition of these costs, and I look forward to your questions.

[NOTE.—The CBO Report entitled, "March 2005, A Review of CBO's Activities in 2004 Under the Unfunded Mandates Reform Act," may be found in committee files.]

[The prepared statement of Mr. Holtz-Eakin follows:]

CBO TESTIMONY

Statement of
Douglas Holtz-Eakin
Director

A Review of CBO's Activities Under the Unfunded Mandates Reform Act

before the
Committee on Government Reform
U.S. House of Representatives

March 8, 2005

This document is embargoed until 2 p.m. (EST), Tuesday, March 8, 2005. The contents may not be published, transmitted, or otherwise communicated by any print, broadcast, or electronic media before that time.

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

Mr. Chairman and Members of the Committee, I am pleased to be here today to discuss the Unfunded Mandates Reform Act of 1995 (UMRA) and the role of the Congressional Budget Office (CBO) in implementing that legislation. CBO's review of its activities in 2004 under that law was released a week ago, and last month the agency published an issue brief that focused specifically on intergovernmental mandates. My statement this afternoon will summarize those reports' major conclusions, highlighting in particular those aspects of UMRA that pertain to intergovernmental mandates.

The federal government sometimes requires state, local, and tribal governments and the private sector to expend resources to achieve certain goals. In 1993, for example, the National Voter Registration Act required states to simplify and expand the procedures for registering citizens to vote. Since that time, states have spent millions of dollars to comply with those requirements.

Similarly, the federal government sometimes prohibits state and local governments from engaging in activities that generate income. In 2004, for example, the Internet Tax Nondiscrimination Act temporarily prohibited states from imposing taxes on various forms of Internet access. That preemption, CBO estimates, will result in losses of revenue by state and local governments totaling more than $325 million through 2007.

UMRA focuses attention on the costs of such federal mandates. In particular, UMRA was intended to promote informed decisions by the Congress about the appropriateness of federal mandates and about the desirability of providing financial assistance for the costs of intergovernmental mandates.

Since UMRA took effect in 1996, the Congress has enacted few federal mandates that impose significant costs. Although the Congress has rarely used the law's explicit enforcement mechanisms when considering bills, it has changed several pieces of legislation before enactment to either eliminate mandates or lower their costs.

Some public officials have concerns, however, about the kinds of legislative provisions that are covered and about how the law defines mandates, particularly as they relate to other levels of government. UMRA's application is limited in three ways:

- The law does not apply to certain broad policy areas, such as national security, constitutional rights (including voting rights), and parts of the Social Security program;
- New conditions imposed on federal grant programs are not considered mandates in most cases; and
- The law focuses on mandates with costs above a specified level, so UMRA's enforcement mechanisms do not affect many preemptions of state and local authority.

As a result, some federal requirements that state and local officials view as burdensome to their jurisdictions are not considered unfunded mandates under UMRA. Those requirements include, for example, provisions of the No Child Left Behind Act, the Individuals with Disabilities Education Act, the Help America Vote Act, and the State Criminal Alien Assistance Program, as well as many changes to the Medicaid program.

The Definition of a Federal Mandate

According to UMRA, a federal mandate can take several forms: an enforceable duty, certain changes in large entitlement grant programs, or a reduction in federal funding for an existing mandate.

- *An enforceable duty.* Any provision in legislation, statute, or regulation that would compel or explicitly prohibit action on the part of state, local, or tribal governments or the private sector is a mandate unless that duty is imposed as a condition for receiving federal aid or arises from participating in a voluntary federal program.
- *Certain changes in large entitlement programs.* In the case of some large entitlement programs (those that provide $500 million or more annually to state, local, or tribal governments), a new condition on or a reduction in federal financial assistance can be a mandate—but only if states lack the flexibility to offset the new costs or the loss of federal funding with reductions elsewhere in the program.

- *A reduction in federal funding for an existing mandate.* A provision to reduce or eliminate the amount of federal funding authorized to cover the costs of an existing mandate would itself be considered a mandate under UMRA.

UMRA's Requirements

Title I of UMRA requires CBO to prepare mandate statements for bills that are approved by authorizing committees. In those statements, CBO must address whether the direct costs of federal mandates in a bill would be greater than the thresholds established in the law and identify any funding that the bill would provide to cover those costs. In 2004, the period covered by CBO's recent report, those thresholds, which are adjusted annually for inflation, were $60 million for intergovernmental mandates and $120 million for mandates imposed on the private sector. (This year, they are $62 million and $123 million, respectively.) If CBO cannot estimate the cost of a mandate, its statement must indicate that such an estimate is not feasible and explain why.

UMRA also established procedural rules for both the House and the Senate that enforce the law's requirements under title I. The rules are designed to make it more difficult for the Congress to consider legislation unless it has some information about any mandates that the legislation contains. Such rules are generally enforced through the use of points of order. Thus, a point of order can be raised in the House or Senate against the consideration of legislation if the committee reporting a bill has not published a statement by CBO on intergovernmental and private-sector mandates. In addition, Members of Congress may raise a point of order against legislation that creates an intergovernmental mandate with costs above the threshold specified in UMRA unless the legislation authorizes or provides funding to cover those costs. Although such procedural requirements do not preclude the Congress from passing bills that contain mandates, they may establish additional steps and possible hurdles that can help focus policymakers' deliberations on unfunded mandates.

Trends in Federal Mandates Since UMRA's Enactment

CBO has been reviewing bills according to the provisions of UMRA for nine years. Most of the legislation that the Congress considered during that time did not contain federal mandates as UMRA defines them. Of the roughly 5,200 bills and other legislative proposals that CBO reviewed between 1996 and 2004 (mostly when they were reported out of committee), 617, or 12 percent, contained intergovernmental mandates, and 732, or 14 percent, contained private-sector mandates (see Table 1). Those percentages have varied only slightly from one Congress to another.

Most of the mandates that CBO examined would not have imposed costs higher than the thresholds set by UMRA. About 1 percent of the bills that CBO reviewed had intergovernmental mandates whose costs exceeded the threshold established in the law, and another 1 percent had costs that could not be estimated. For private-sector mandates, about 3 percent of the bills had mandates whose costs were above the statutory threshold, and another 2 percent had mandates whose private-sector costs could not be estimated.

In the past nine years, policymakers enacted five intergovernmental mandates whose costs, in CBO's estimation, were above the UMRA threshold:

- An increase in the minimum wage (Public Law [P.L.] 104-188, enacted in 1996). CBO estimated that the required increase would cost state and local governments (as employers) more than $1 billion during the first five years that it was in effect.

- A reduction in federal funding to administer the Food Stamp program (P.L. 105-185, enacted in 1998). That funding cut costs the states between $200 million and $300 million a year, in CBO's estimation.

- A preemption of state taxes on premiums for certain prescription drug plans (P.L. 108-173, enacted in 2003). Under that preemption, states will lose about $70 million in revenues in 2006 (the first year in which the mandate will be in effect), increasing to about $95 million in 2010, CBO estimates.

- A temporary preemption of state authority to tax certain Internet services and transactions (P.L. 108-435, enacted in 2004). That preemption (which lasts until 2007) will result in revenue losses to state and local governments totaling at least $325 million through 2007, according to CBO's estimates.

Table 1.

Number of CBO's Mandate Statements for Bills, Proposed Amendments, and Conference Reports, 1996 to 2004

	1996[a]	1997	1998	1999	2000	2001	2002	2003	2004	Total, 1996-2004
Intergovernmental Mandates										
Total Number of Statements Transmitted	718	521	541	573	706	389	649	615	557	5,269
Number of Statements That Identified Mandates	69	64	64	81	77	50	60	86	66	617
Mandates whose costs would exceed the threshold[b]	11	8	6	4	3	4	6	7	9	58
Mandates whose costs could not be determined to exceed the threshold	6	7	7	0	1	3	5	5	2	36
Private-Sector Mandates										
Total Number of Statements Transmitted	673	498	525	556	697	389	645	613	555	5,151
Number of Statements That Identified Mandates	91	65	75	105	86	66	73	100	71	732
Mandates whose costs would exceed the threshold[b]	38	18	18	20	6	18	19	24	14	175
Mandates whose costs could not be determined to exceed the threshold	2	5	9	13	7	8	14	18	10	86

Source: Congressional Budget Office.

Notes: The numbers in this table represent official mandate statements transmitted to the Congress by CBO. CBO prepared more intergovernmental mandate statements than private-sector mandate statements because in some cases it was asked to review a specific bill, amendment, or conference report solely for intergovernmental mandates. (In those cases, no private-sector analysis was transmitted to the requesting Member or Committee.) CBO also completed a number of preliminary reviews and informal estimates for other legislative proposals, which are not included in this table.

Mandate statements may cover more than one mandate. Also, because the same mandate sometimes appears in multiple bills, CBO may address a single mandate in more than one statement.

a. CBO began preparing mandate statements in January 1996 in the middle of the 104th Congress. The figures for 1996 reflect bills on the calendar in January of that year and bills reported by authorizing committees thereafter.

b. In 1996, the thresholds, which are adjusted annually for inflation, were $50 million for intergovernmental mandates and $100 million for private-sector mandates. They rose to $60 million and $120 million, respectively, in 2004.

- A requirement that state and local governments meet certain standards for issuing driver's licenses, identification cards, and vital-statistics documents (P.L. 108-458, enacted in 2004). CBO estimates that state and local government will have to spend more than $100 million over the 2005-2009 period to comply with those standards and that the costs in a least one year of the next five will exceed the UMRA threshold. The act authorizes the appropriation of funds to provide grants to state and local governments to pay for those costs.

During the past nine years, the Congress has considered and enacted more legislation that contained private-sector mandates than legislation containing intergovernmental mandates. Twenty-six private-sector mandates whose costs CBO determined to be higher than the statutory threshold have been enacted since 1996:

- Eight revenue-raising provisions in the tax code, which require individuals or firms to pay more in taxes;

- Five mandates that affect health insurance—requirements for portability of insurance coverage, minimum time for maternity stays, changes in Medicare coverage, and parity in insurance coverage providing mental health and other medical benefits, as well as various requirements that apply to drug manufacturers;
- Five mandates that affect specific industries—telecommunications reform, changes in milk pricing, country-of-origin labels for certain foods, a new safety requirement for automobiles, and new requirements for credit agencies, lenders, and merchants that handle credit transactions;
- Four mandates involving fees—specifically, a fee on manufacturers and importers of tobacco products, increases in existing fees and new fees for certain patent and trademark services, new filing fees for H-1B visas, and a fee on airline travel to fund airport security;
- Two mandates—one increasing the minimum wage and the other raising federal employees' contributions for retirement—that affect a worker's take-home pay; and
- One mandate that imposes new requirements on sponsors of immigrants and one that changes procedures for collecting and using campaign contributions.

Legislation That Is Not Subject to UMRA

In enacting UMRA, the Congress recognized that instances might arise in which budgetary considerations—such as who would bear the costs of legislation—should not be part of the debate about a legislative proposal. For that reason, not all legislation is subject to UMRA's requirements. The law excludes from a review for possible mandates any legislation that:

- Enforces the constitutional rights of individuals,
- Establishes or enforces statutory rights that prohibit discrimination,
- Provides emergency aid at the request of another level of government,
- Requires compliance with accounting and auditing procedures for grants,
- Is necessary for national security or the ratification of a treaty, or
- Relates to title II of Social Security (Old-Age, Survivors, and Disability Insurance benefits).

About 2 percent of the bills that CBO reviews each year contain provisions that fit within those exclusions. Most such provisions involve national security, constitutional rights, or Social Security and would not impose substantial costs, in CBO's estimation.

One exception to that general rule, however, was the Help America Vote Act (P.L. 107-252, enacted in 2002). That law, which concerned the constitutional rights of citizens to vote, imposed costly requirements on state and local governments. However, because of UMRA's exclusions, CBO did not identify those requirements as mandates or estimate their costs as part of its review, and the requirements were not subject to a point of order. P.L. 107-252 authorized appropriations to help states carry out the requirements, and $3.1 billion has been appropriated for that purpose.

Federally Imposed Costs That Are Not Considered Mandates Under UMRA

Certain types of federal requirements and programs, including some that state and local governments find onerous or not adequately funded, do not fall within UMRA's definition of a mandate. In particular, conditions for obtaining most federal grants—even new conditions on existing grant programs—are generally not considered mandates under the law. And although UMRA contains a special provision for large entitlement programs (such as Medicaid and Temporary Assistance for Needy Families) under which grant conditions or reductions in funding could be considered mandates, that provision has applied to few of the legislative changes to those programs. Provisions for similar "carve-outs" of programs affecting private-sector entities are not found in UMRA.

Grant Conditions

According to UMRA, the conditions attached to most forms of federal aid (including most grant programs) are not mandates. Yet complying with such conditions can sometimes be burdensome. In particular, states consider

new conditions on existing grant programs to be duties not unlike mandates. Two often-cited examples of such conditions are the requirements for receiving federal funding under the No Child Left Behind Act and the Individuals with Disabilities Education Act. Those laws require school districts to undertake many activities—including, respectively, designing and implementing statewide achievement tests and preparing individualized education plans for disabled children—but only if they wish to receive certain federal education grant funds. The federal assistance that states receive if they comply is substantial: the federal government appropriated about $36 billion in 2005 for elementary and secondary education programs, most of it authorized under those two laws.

CBO has identified hundreds of bills that would impose requirements on state, local, or tribal governments if they chose to accept federal assistance. In most cases, however, such associated costs would not be significant, according to CBO's estimates, or would be covered if the federal funding authorized in the bills was appropriated.

UMRA's Special Rule for Large Entitlement Programs

Although conditions for receiving federal grants are generally not mandates under UMRA, the law makes an exception for some large grant programs. Federal entitlement programs that provide $500 million or more annually to state, local, or tribal governments receive unique treatment under UMRA. Specifically, any legislative proposal that would increase the stringency of conditions for, or cap or decrease federal financial assistance under, such programs would be a mandate if those governments lacked the authority to offset the new costs by amending their responsibilities for financing and carrying out those programs.

That special definition of a mandate currently applies to nine programs: Medicaid; Temporary Assistance for Needy Families; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Payments for Job Opportunities and Basic Skills; and Child Support Enforcement.

CBO has reviewed scores of proposals that affect those large grant programs since UMRA was enacted. In most cases, CBO concluded that even if new conditions or reductions in federal financial assistance imposed significant costs, state or local governments generally had enough flexibility to offset those costs by changing either benefit levels or enrollment requirements. In 1997, for example, upon reviewing the President's proposal for a cap on federal Medicaid spending per beneficiary, CBO determined that it did not contain a mandate as defined in UMRA. Although the main effect of that proposal was to limit the federal government's financial responsibility under Medicaid, CBO determined that the cap did not constitute a mandate because states had the flexibility to offset the loss of federal funds by making programmatic changes. For example, they could eliminate or reduce some optional services (such as prescription drugs or dental services) or choose not to serve some optional beneficiaries (such as the medically needy or children or pregnant women) who had family income above certain levels. Those options give states substantial flexibility: some estimates indicate that more than half of Medicaid spending by the states is for optional services or optional categories of beneficiaries. That flexibility varies by state, and such changes often are politically unpalatable or would run counter to other policy goals. Nevertheless, the additional costs resulting from federal actions—though quite real—could be offset by changes in state or local policies.

UMRA's Treatment of Preemptions of State and Local Law

In its mandate statements for bills, CBO identifies explicit preemptions of state law as intergovernmental mandates; over the past nine years, about half of the intergovernmental mandates that CBO identified were such preemptions. However, mandates whose total direct costs are below the statutory threshold—which is usually the case with preemptions of state law—are not subject to the point of order under UMRA that relates to the threshold, even if those mandates may restrict state and local authority. As a result, the legislative hurdles set up by UMRA have not greatly affected the consideration or enactment of such preemptions. (The only exceptions involved preemptions that would significantly affect states' taxing authority, such as those in the Internet Tax Freedom Act of 1997 and the Medicare Prescription Drug and Modernization Act of 2003.)

Proposals to Expand UMRA

The Unfunded Mandates Reform Act has increased both the demand for and the supply of information regarding

the costs of federal mandates. Moreover, that information has played a role in Congressional debate about several issues over the past nine years. In many of those cases (such as requirements that driver's licenses show Social Security numbers, a moratorium on certain taxes on Internet services, the preemption of state security fees, and requirements in the farm bill affecting the contents of milk), the information provided by CBO under UMRA played a role in the Congress's decisions to reduce costs.

To date, lawmakers have made only one, relatively minor, change to UMRA. The State Flexibility Clarification Act of 1999 (P.L. 106-141) requires authorizing committees and CBO to provide more information in committee reports and mandate statements for legislation that would affect the large entitlement grant programs discussed above. In general, that requirement for additional information applies to few bills and has affected no legislation reported by authorizing committees since the requirement was enacted.

Since UMRA's enactment, lawmakers and other interested parties have proposed several additional ways to expand or change title I. Most proposals seek to increase the types of bills that would be subject to UMRA's cost-estimating and point-of-order provisions. One proposal would build on UMRA's perceived success in focusing Congressional attention on unfunded intergovernmental mandates by expanding the law to allow for a point of order against bills that contain private-sector mandates with costs over the statutory threshold. (The law currently allows such a point of order for intergovernmental mandates.) That kind of expansion could establish an additional hurdle for private-sector mandates and could increase the demand for additional information about their costs.

Another proposal would expand UMRA's definition of a mandate so that a change to an entitlement program that imposed new conditions on states or that decreased federal funding by more than the UMRA threshold would constitute an intergovernmental mandate unless the bill making the change also gave states and localities additional flexibility to offset the new costs. Both of those proposals were included in the Mandates Information Act, which was considered by the 105th and 106th Congresses and introduced in the 107th Congress—but was not enacted.

Other proposals to change or expand UMRA have included broadening the definition of an intergovernmental mandate to include new conditions on any existing grant program; narrowing the exclusions discussed above to apply only to the provisions allowing for a point of order and not to the requirement that CBO provide cost information; and eliminating the threshold so that any mandate—regardless of its costs—could trigger a point of order. Such a change would allow a point of order to be raised whenever the Congress was considering bills that would preempt state and local authority.

Charts Presented at the Hearing

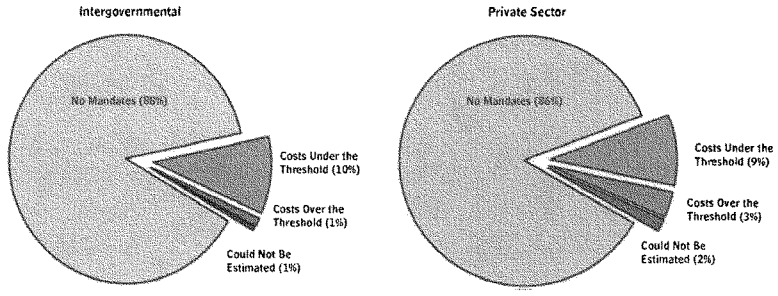
Cumulative Number of CBO Mandate Statements, 1996 to 2004

	Total	Percentage of All Statements	Percentage with Mandates	Annual Average
Intergovernmental Mandates				
Total Statements Transmitted	5,269	100	--	585
Statements Identifying Mandates	617	12	--	69
Costs Over Threshold	58	1	9	6
Costs Undetermined[a]	36	1	6	4
Private-Sector Mandates				
Total Statements Transmitted	5,151	100	--	572
Statements Identifying Mandates	732	14	--	81
Costs Over Threshold	175	3	24	19
Costs Undetermined[a]	86	2	12	10

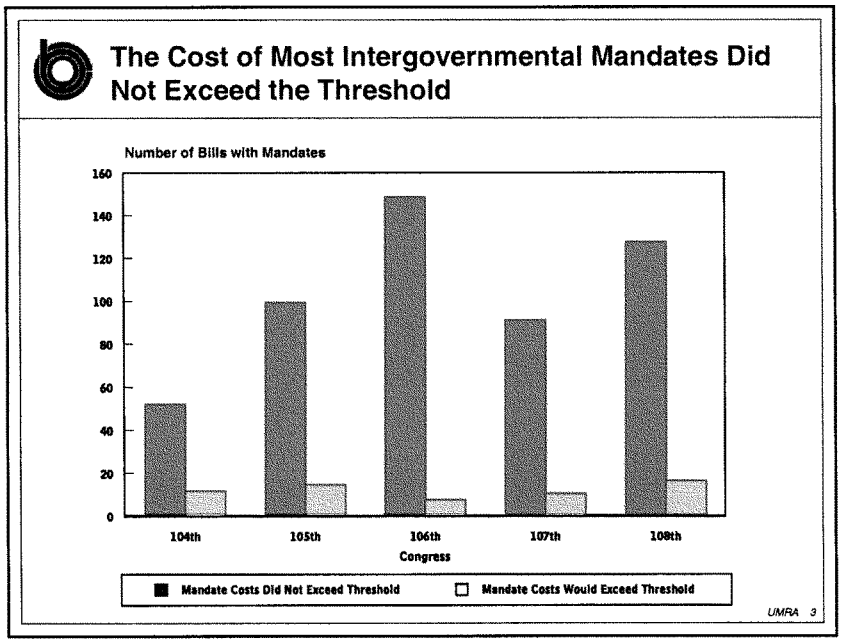
a. Costs could not be determined to exceed threshold.

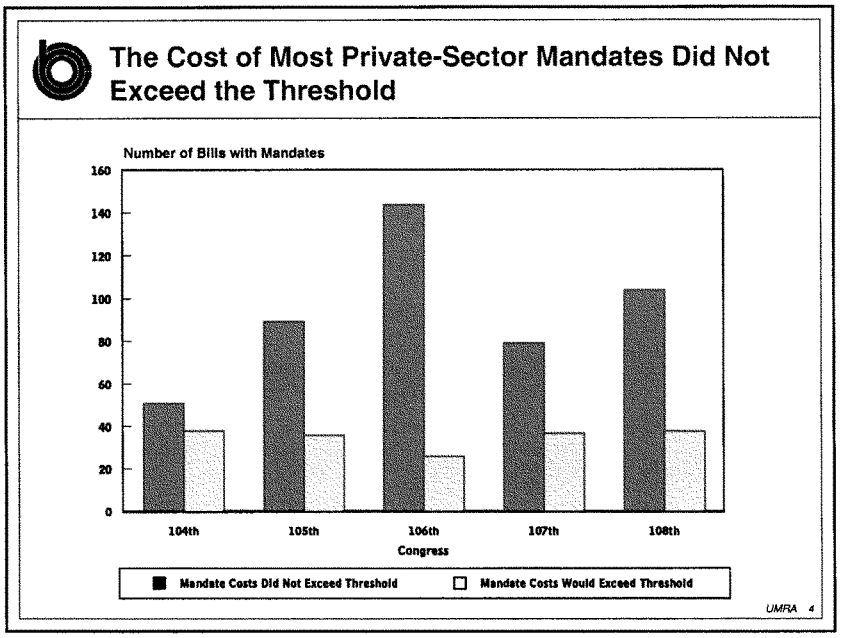
UMRA 1

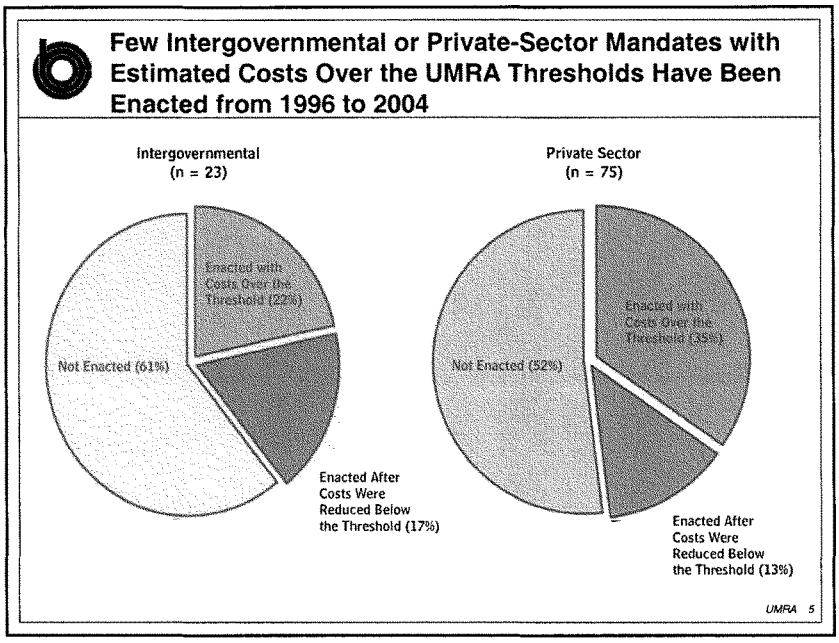
Few of the 5,200+ Bills Reviewed by CBO Contained Either Intergovernmental or Private-Sector Mandates



UMRA 2


The Cost of Most Intergovernmental Mandates Did Not Exceed the Threshold
Number of Bills with Mandates
160
140
120
100
80
60
40
20
0
104th
105th
106th
107th
108th
Congress
Mandate Costs Did Not Exceed Threshold
Mandate Costs Would Exceed Threshold
UMRA 3


The Cost of Most Private-Sector Mandates Did Not Exceed the Threshold
Number of Bills with Mandates
160
140
120
100
80
60
40
20
0
104th
105th
106th
107th
108th
Congress
Mandate Costs Did Not Exceed Threshold
Mandate Costs Would Exceed Threshold
UMRA 4


Few Intergovernmental or Private-Sector Mandates with Estimated Costs Over the UMRA Thresholds Have Been Enacted from 1996 to 2004
Intergovernmental
(n = 23)
Enacted with Costs Over the Threshold (22%)
Not Enacted (61%)
Enacted After Costs Were Reduced Below the Threshold (17%)
Private Sector
(n = 75)
Enacted with Costs Over the Threshold (35%)
Not Enacted (52%)
Enacted After Costs Were Reduced Below the Threshold (13%)
UMRA 5

Mr. DAVIS. Thank you very much.

I am going to start the questioning with Mrs. Foxx.

Mrs. FOXX. Thank you very much, Mr. Chairman.

Dr. Graham, we appreciate your testimony very much. I know you are trying to add value to our work.

Could you tell us what is a common problem you are encountering in working to ensure that the regulations are complied with? What is the biggest obstacle?

Mr. GRAHAM. I think the biggest obstacle we see in addressing the issues around unfunded mandates quite frankly are the actual requirements in statute that Congress has placed on the executive branch with regard to unfunded mandates. And we have to keep in mind that the laws that underpin these unfunded mandates extend back many years, sometimes decades. A lot of them were developed without a clear consideration of how the consequences of them would be financed.

So if the thrust of your question is, what is the biggest problem we commonly face when we are dealing with an agency around what is argued to be an unfunded mandate, it is that we have a law, a statute passed by Congress which is basically forcing an agency to move in a direction that creates that unfunded mandate. There is not necessarily a lot of discretion in the executive branch to handle that.

Where there is discretion to handle it, and oftentimes there is such discretion, we work very hard at OMB with the agencies to try to find ways to reduce the cost of the unfunded mandate while maintaining whatever the public objective is, whether it be civil rights, public health, environment, worker safety or whatever.

Mrs. FOXX. Mr. Chairman, could I do a followup?

Mr. DAVIS. Sure. You can go until your red light is on.

Mrs. FOXX. Have you made any recommendations on ways that those requirements could be modified? Or do you see that as your responsibility?

Mr. GRAHAM. I don't think that we have, and quite frankly, we are very well burdened at OMB just making sure that we keep track for each of these 500 rulemakings a year that we review that agencies are in fact addressing their obligations under the Unfunded Mandates Act and the Executive order. So we have been in the trenches, working hard just making sure that we're trying to get compliance with what we currently have out there.

Mrs. FOXX. One more question, then. Could you, without our creating another agency, which I don't think anybody really wants to do, is there a way that we could deal with that with the problem that you brought up, the requirements themselves, other than doing it on a case by case basis? Is there any other vehicle for taking care of that problem that you know of?

Mr. GRAHAM. I think there are two aspects of the problem. One is the legislative creation of unfunded mandates by the U.S. Congress and the President, because presumably the President signs these laws into enactment. And I think frankly, my colleague Dr. Holtz-Eakin from CBO probably knows better than I do the actual ways in which the Unfunded Mandates Act is actually informing the Congress and how it addresses those issues.

Within the executive branch, in areas where we have discretion in this area, I think one of the things that Congress can do that's very constructive is actually have oversight hearings on specific regulations that involve an unfunded mandate and ask Federal agencies and OMB if you will, what exactly they did in the course of that rulemaking to cushion and keep to a minimum the cost burden of that regulation while still achieving their objective. I think the process of doing that oversight would, I think, offer insight into how to move forward.

Mr. DAVIS. Thank you very much.

Mr. Waxman.

Mr. WAXMAN. The administration, Dr. Graham, claims that it deeply cares about and is concerned about unfunded mandates. But as my opening statement indicated, I do not think it is being supported by the administration's actions, and the energy bill is a good example. The President and Vice President have urged we pass the energy bill.

But I want to talk about one of the provisions mentioned in my opening statement. There is this fuel additive MTBE, it has contaminated groundwater and surface water throughout the Nation. There are internal documents in the oil industry that indicated that in the 1980's, they knew that there was a serious problem MTBE would pose for the Nation's water supplies. They knew about the difficulty communities would face in cleaning up MTBE.

Yet each year they ramped up its use, and by 1990, the industry admits it was using more than 80,000 barrels of MTBE each and every day. Now communities are facing this contamination problem and the cost of cleaning it up, which could cost $29 billion or more in the coming years. The energy bill proposes a solution. But it is a very troubling one. They said, let's protect the oil industry and protect it from having to be responsible.

I indicated, I had a letter opposing this provision from the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, National Association of Towns and Townships, and many water groups. They say this is a massive unfunded mandate on local governments and ratepayers, while oil companies like Exxon Mobile are announcing record setting profits, legislation is pending to shift the cost from the oil companies to the local governments.

So my question for you is, has the administration been silent on this provision, which is a massive unfunded mandate? Does the administration support shifting $29 billion or more in cleanup costs from the oil companies to local governments and ratepayers?

Mr. GRAHAM. As usual, you offer a provocative question. Let me start by saying, there are plenty of unfunded mandates out there. They are the responsibility of both Republican and Democratic administrations. I'm going to go right to your example.

Mr. WAXMAN. No, no, I want an answer. I only have 5 minutes. I want an answer to my question. My question is, what is the administration's position on this particular provision, not that there are other problems in the world.

Mr. GRAHAM. Our position would be that you have given a good example of a mandate by the Congress that was imposed on the executive branch in the Clean Air Act Amendments of 1990. You

have then argued that it has turned out to be an unfunded mandate. But it's a good example of one that is congressionally imposed.

Mr. WAXMAN. You're wrong, because I was involved in that Clean Air Act.

Mr. GRAHAM. It was well known at the time that the most cost effective solution to the mandate was in fact MTBE.

Mr. WAXMAN. We have a problem right now. MTBE is being used around the country. It's contaminated ground water. If you left the law alone, then there would have to be, as in my own city of Santa Monica, the oil companies helping to clean up. If this energy bill is adopted, that would all be shifted.

What is your position on that provision in the energy bill?

Mr. GRAHAM. I would have to get you a written answer to that, frankly, because I don't know exactly what the position is. But I do know it's a good illustration of my general point, the topic of this hearing, which is that congressionally imposed unfunded mandates are a serious problem.

Mr. WAXMAN. Yes, but this is going to be a congressionally funded, unfunded mandate imposed upon the country if the administration supports it, which to me, the rhetoric about opposing unfunded mandates sounds great, but disappointing, however, when you are presented with a very concrete example, and the administration won't give us its opposition to it. That's a lot of money involved.

Now, Dr. Graham, I think everyone agrees that Federal mandates are crucial in setting minimal protections for the health of our citizens. We have the Clean Air Act, we have drinking water laws, Superfund, they have strong, strong public support because no matter where you live in this country, you ought to be able to breathe clean air and drink safe water. But the administration is presiding over a weakening of a lot of these public health and environmental protections. Your office has had a key role in the process.

Specifically, I want to ask you about how EPA has failed to carry out its obligation of the Clean Air Act to control emissions from toxic mercury. Widespread mercury pollution is a serious threat to our children's health and development. Every year 600,000 babies are born in the United States with mercury in their blood above the levels considered safe. EPA is under a court order to approve the deadline to issue a regulation next week to reduce mercury emissions from coal-fired power plants, which are the largest remaining source of mercury emissions in the United States.

Yet EPA's mercury rulemaking today is a travesty of environmental regulation. Just a few weeks ago the Inspector General for EPA issued a scathing report on EPA's mercury rule, saying the resulting weak rule would minimize clean-up costs for the utility industry but sacrifice benefits for public health.

Dr. Graham, even today, we have a report from the Government Accountability Office that finds that EPA distorted an analysis of its mercury proposal in order to make it appear more effective than it is. My question to you is, did your office urge EPA to analyze any mercury control option more stringent than the administration's preferred option?

Mr. GRAHAM. Yes, indeed, we did, sir. And in fact a 70 percent reduction in mercury emissions over the next 15 years would represent a very substantial environmental accomplishment. And also an unfunded mandate.

Mr. WAXMAN. Did you look at an analysis that would have been less controversial than the one that has been proposed, that might have been more stringent in reducing mercury emission levels?

Mr. GRAHAM. Yes, I think that was your previous question, which is yes.

Mr. WAXMAN. Would you provide that for us?

Mr. GRAHAM. As soon as the rulemaking is completed, certainly, sir.

Mr. WAXMAN. Will you ensure that EPA corrects its analysis prior to issuing the final rule?

Mr. GRAHAM. Pardon?

Mr. WAXMAN. Will you ensure that EPA corrects its analysis prior to issuing the final rule?

Mr. GRAHAM. We are in fact engaged in the process of reviewing that final rule right now. We are working as hard as we can.

Mr. WAXMAN. If a corrected analysis supports stronger mercury regulation, will you work to ensure the EPA modifies its proposals accordingly before it is finalized?

Mr. GRAHAM. That is our standard job, and we are doing it on mercury, sir.

Mr. WAXMAN. OK. Thank you, Mr. Chairman.

Mr. DAVIS. Thank you very much.

Mr. Westmoreland.

Mr. WESTMORELAND. Thank you, Mr. Chairman.

Dr. Graham, could you tell me how clean air would have to be before some people would be happy with how clean air needs to be? I mean, I think if you ask everybody in this room who wanted to breathe clean air, I think everybody would raise their hand, or who wanted to drink clean water. I certainly want to drink clean water, I would raise my hand.

But how clean is clean? In Georgia you could drink two liters of our water at a level that they say is bad for you, you could drink two liters a day for 65 years and you would have a better chance of getting struck by lightning than you would of dying from that water. So when you look at the Clean Air Act, or the Clean Water or whatever, is there a cost benefit analysis that's run on it as to how many lives that we're saving trying to get our air to a certain point or our water to a certain point, versus doing other things that may save more lives?

Mr. GRAHAM. The premise of your question, I share the logic behind. We do at OMB insist that agencies provide even for environmental regulations a cost and benefit justification for the particular proposal that they are making.

I think it's oftentimes easy to forge the dramatic progress this country has made over the last 30 or 50 years, both in clean air and in clean water and the continuing progress that is occurring. So I think when you hear the crisis kinds of stories, you have to keep in mind what the actual data say, about what the trend lines are in this country.

There are of course serious public health problems in this country that may even be more serious than some of these environmental issues. You know the administration has bene trying to draw attention to concerns about obesity in this country and its impact on premature death and disease and cost in the health care sector. That's a concrete example of the need to provide that comparative analysis.

Mr. WESTMORELAND. Mr. Chairman, could I have one other question, please?.

Mr. DAVIS. You can keep going until your light turns red. You have 5 minutes.

Mr. WESTMORELAND. Thank you. Dr. Graham, you state that the inter-governmental consultation should take place as early as possible, even before the issuance of a proposed rule, and that these consultations should be integrated explicitly into the rulemaking process of some of these agencies. Do we need as a Congress to put these into statute, these guidelines into statute?

Mr. GRAHAM. I think we already have that in statute, I believe, the requirement for consultation. Though I guess I would have to double check and make sure I stated that correctly. I guess I don't see any evidence yet that there has been widespread non-compliance with the consultation requirement. But if in the process of developing the record of these hearings we do find substantial evidence of that, then either we at OMB need to do our jobs better or we need to consider some form of codification of those guidelines.

Mr. WESTMORELAND. Thank you, sir.

Mr. DAVIS. Thank you very much.

Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman, thank you, gentlemen, for your testimony.

I just want to pick up on a point that Mr. Waxman mentioned in his opening statement with respect to some of the education programs, which although they don't come under the strict definition of these unfunded mandates, I think if you talk to people in the States, and I know we're going to have testimony from people representing local jurisdictions and State jurisdictions, and certainly as someone who came from a State legislature, you look at these as mandates from the Federal Government. Specifically, No Child Left Behind, the IDEA special education legislation.

In both cases, I think the Federal Government, on balance, had the right policy, especially with IDEA, ensuring that every child, regardless of his or her disabilities, gets a good education. At the time, with that law as well as No Child Left Behind, the Federal Government made certain commitments.

We talked about what the significance and authorization level is or is not, but I would say that especially with respect to those two programs, the commitments that the Federal Government made, 40 percent funding with respect to special education, and the authorized levels that went back and forth through quite a bit of negotiations between the Congress and the White House were considered by many to be a commitment and obligation made by the Federal Government that is not being met. The most recent budget submitted by the White House with respect to No Child Left Behind is

$12 billion underfunded. Special education is nowhere near the 40 percent commitment that we have made.

When you review these obligations, do you make any assessment as to what impact, whether they should be somehow discussed within the overall umbrella of unfunded mandates or just say, that's kind of too bad and you're on your own?

Mr. GRAHAM. We look hard at the question of the appropriate Federal funding role. Just to get some facts on the table, the actual fiscal year 2006 budget request from the President represents a 46 percent increase for No Child Left Behind programs, compared to 2001. With the money targeted particularly at those programs, with the greatest promise for improving student achievements, such as Title I, Reading First, and the President's High School Intervention Initiative.

Specifically, the total request for No Child Left Behind programs in 2006 is $25.3 billion, an increase of nearly $1 billion or 4 percent over the 2005 level, and nearly $8 billion, or 45 percent over the 2001 level. Now, whether by some people's definition that's fully funded or not funded enough, let there be no mistake about where the President is on this subject of expansion in Federal support for No Child Left Behind.

Mr. VAN HOLLEN. Well, I guess the question is whether the additional funds match the mandates and obligations that were placed on the States. At the time that those decisions were made, the policy committees, Education and the Workforce Committee in the House, the other committees in the Senate and the President in negotiations with the Congress determined that in order to meet the requirements, expectations within No Child Left Behind, the full authorized level would be the amount that people set out as the appropriate amount.

So while there is no doubt there have been increases in funding under the No Child Left Behind bill, the issue when you are discussing unfunded mandates is whether or not the amounts provided are sufficient to match the obligations placed on the States. Clearly there is a big gap between what the White House budget has in it and the amount that the Congress, that was in the bill signed by the White House originally.

I think you will have testimony later, and I don't want to belabor this point, but we are hearing from our constituents who have a much broader definition of unfunded mandates than is suggested in this particular analysis. Those are the unfunded mandates that people are having to struggle with every day at the State and local level. I just think it's important that when we put together our budgets and establish our priorities here in Congress, we do a better job of meeting the promises that we made at the time that we undertook these obligations, imposed these obligations on the State.

Thank you, Mr. Chairman.

Mr. DAVIS. Thank you very much.

The gentleman from Tennessee.

Mr. DUNCAN. Thank you, Mr. Chairman.

Dr. Graham, I was first elected in 1988. Every year, once a year, our Governor for those first 6 or 7 years was a real fine man, Governor McWhorter, a Democrat. He would always start out every

meeting, he would say, please, no more unfunded mandates. And I would sit there and I would think, well, it's your party that's putting all these things on.

Then Speaker Gingrich came in, and he wanted our first hearings in all our committees to be on unfunded mandates, because he wanted this to be a real Republican emphasis. What I'm wondering about, Government, of course, the Federal Government keeps growing and growing and growing and it seems that the rules and regulations and red tape just keep growing.

The National Conference of State Legislatures has gotten us some, they've got three laws that they consider examples of continued unfunded mandates, the American Job Creation Act of 2004, the Individuals with Disabilities Education Act, the Medicare Prescription Drug Improvement and Modernization Act. What I'm wondering, I'm sorry, I just got here just a few minutes ago, and I didn't get to hear your testimony and your answer to previous questions, but are we making any progress on these things? You were just asked about the No Child Left Behind law.

Well, the Democrats always complain about the funding on that. What they don't say is, President Bush has given more money than any president in history, far more, for instance, than President Clinton and so forth. But the fact is, it's such a political thing, if we Republicans said we were going to spend half the Federal budget on education, they'd have to top us. But I do read that some States are wanting to pull out of the No Child Left Behind thing, not because so much of the funding but just because of all the mandates and requirements.

Are you working on that, or what's your response to those States that say it is too burdensome? And are we making progress in other areas on this?

Mr. GRAHAM. I can provide you for the record a variety of detailed ways in which the administration has worked to make the requirements of the No Child Left Behind law more flexible, to leave room for State and local governments to make cost effective choices on a local basis.

The one thing I want to make very clear is, the suggestion that the authorized level for a funding program is necessarily the definition of the mandate about whether it's funded is a very new idea as far as I am concerned. I don't know that there is any, there are very few Federal programs that are literally appropriated at exactly the level they are authorized at. If we are going to call every one of those an unfunded mandate, we'd better get CBO into action and figure out exactly what we have done to the Federal deficit by pulling all these programs up to their authorized level.

The commitment of the President to funding No Child Left Behind is pretty darned clear on the numbers I gave to you. So I think there shouldn't be any question about that.

Mr. DUNCAN. What I was getting at, though, getting away from the issue of funding, and you're exactly right, there is hardly any program that is ever funded to the authorized level. But are we working to try to make sure that these requirements under the No Child Left Behind Law and these other laws are not unduly burdensome? Because that was supposed to be the goal of the un-

funded mandates effort in the first place. Do you think we are making progress in that regard?

Mr. GRAHAM. We are making progress on that. There is, with the Department of Education, a process of negotiated rulemaking, where the various stakeholders that include the State and local representatives work with the legislation as passed and the discretion that's available to it, to achieve the most sensible regulation. So there is progress in that direction. And at the same time, we have been expanding Federal support to make it financially more viable to implement those programs. More flexibility and Federal funding make it a more practical approach.

Mr. DUNCAN. All right, thank you very much.

Mr. DAVIS. Thank you very much.

Mr. Turner.

Mr. TURNER. Thank you, Mr. Chairman.

Our chairman, in working with the National Association of Counties, has taken a lead in trying to get examples of unfunded mandates and a quantification of their impact. As you read the report that we have in the record and listen to the testimony that is going to follow, they have given us a snapshot of several areas in which an unfunded mandate has been identified and its actual costs, or the experiences that these counties are having as a result of that unfunded mandate.

I was wondering to what extent OMB or CBO, in retrospect, looks at the issues of the actual expenditures that local and State governments have when an unfunded mandate is identified, both in items that occurred prior to UMRA, whether or not the annual increase of those mandates exceeds our threshold expectation, whether or not the actual numbers exceed the threshold estimates that we have, because in some instances where you identified the threshold, it's below the number an action can be taken.

The actual experience may be different. Do you look then as to whether or not the actual experience really does fall under the threshold, and also in the areas of the amount of funding. And in part of the testimony you discuss the issue of doing a benefits analysis of a mandate. To what extent retrospectively do we go back and figure out the actual costs that are being expended and whether or not that changes the picture of the cost benefit analysis?

Mr. GRAHAM. I think you asked an excellent question. That is, even if we analyze and project the costs or benefits of these unfunded mandates before they are enacted, what do we actually learn over time about how much they actually cost and what their actual benefits are. I regret to report to you that there are probably over 20,000 Federal regulations, new Federal regulations that have been adopted since 1980 in this country. Most of them have never been looked at to determine what their actual costs were and what their actual benefits were.

There is a small literature in this area that is developing. What it finds is in some cases the costs of regulation proved to be less than expected, but in other cases, they proved to be more than expected. We don't yet have concrete evidence of a pattern across all these regulations that we could give you that would give you a simple result.

Mr. HOLTZ-EAKIN. CBO concentrates under UMRA looking at the prospective costs of mandates and as a result, has no formal responsibility to go back and re-examine the cost of existing mandates. To do so would change dramatically the character of our responsibilities from identifying costs in the budget process to being more of a regulatory budget. It would be quite an undertaking.

Nevertheless, there are circumstances in which the ongoing review of responsibilities does give us indications that things didn't turn out the way we expected. We always try to learn from the experience of previous analyses, and some examples jump to mind. For example, no one anticipated the costs of HIPA to be what they turned out to be. And by staying in consultation with the State and local governments, we have leaned a great deal about the cost of that mandate over time. That informs our future analyses, but is not brought into the process in any formal way.

Mr. TURNER. One of the issues that Mr. Waxman raised touches on the area of economic competitiveness, which is not necessarily an issue that was laid out in the Unfunded Mandates Act. Does OMB undertake any effort in looking at these to measure or consider what the impact might be on local communities and their economic competitiveness?

Mr. GRAHAM. I don't recall there being any formal requirement in either Executive order or in statute that we review regulations for their impact on the competitiveness of a community or an industry or the country as a whole. There is an economic analysis requirement, and cost impact requirement. But it is not focused specifically on the competitiveness question, so you raise a good point.

Mr. TURNER. Thank you. Thank you, Mr. Chairman.

Mr. DAVIS. Thank you very much.

Mr. Holtz-Eakin, I want to commend you and the CBO for the way you handle and administer UMRA. It's clear to me you're not only complying with the letter of the law, you're sincerely working to give Congress a product that assists in our decisionmaking.

Director, in your statement you report that between 1996 and 2004, CBO found 617 legislative proposals containing inter-governmental mandates and 732 proposals containing private sector mandates. The vast majority of these mandates fell beneath the threshold set in UMRA. In spite of this fact, has CBO looked at the aggregate effect of all these mandates?

Mr. HOLTZ-EAKIN. No, we have never undertaken an aggregation exercise, which again would translate this into more of a regulatory budget kind of exercise.

Mr. DAVIS. I wonder if you could go back and have somebody look at these and see what the cumulative effect is. We set a threshold, but I don't think anybody anticipated hundreds of proposals flying under the radar screen that when accumulated could be worse than two or three giant mandates.

Mr. HOLTZ-EAKIN. As a matter of doing the arithmetic, I think that's probably an insurmountable task. In many cases, we don't know the exact dollar figure of the mandate. It's either clearly well above the threshold, or clearly well below. The time necessary to identify the particular dollar figure didn't merit it under the circumstance. We didn't really have that in the records.

Mr. DAVIS. You also pointed out that hundreds of bills impose requirements on inter-governmental partners as a condition for receiving grant money. It's kind of a new unfunded mandate. Is there an aggregate of the cost of these requirements to State and local governments?

Mr. HOLTZ-EAKIN. The CBO hasn't put that together. I know a variety of the interested parties have put together aggregates.

One of the real difficulties there is trying to examine the history and imagine what would have happened in the absence of this legislation, would the State governments themselves, for example, undertake some policy. So trying to figure out the incremental cost of the mandate per se is difficult in looking back.

Mr. DAVIS. In your statement, you give us a working definition of what an unfunded mandate that would be covered under UMRA would look like. I'm looking for a practical example of how CBO decides to call a proposal a covered mandate. For example, let me give you two essentially voluntary acts: No Child Left Behind, which I think a lot of my legislators think is an unfunded mandate; and the driver's license requirement in H.R. 10 last year, which came from this committee. Neither act required a specific State action. Yet one is covered under UMRA and the other one isn't.

Mr. HOLTZ-EAKIN. With respect to the No Child Left Behind, that's clearly a condition of Federal aid, and as a result is not a mandate under the definition by UMRA. The driver's license issue is one where the Federal Government essentially has made it impossible for States to continue under the status quo their own programs of licensing and provide a widely usable driver's license. It would be the case, for example, that driver's license would not allow you to get onto an airplane, you would not be able to use it to get a passport.

Mr. DAVIS. But you could use the driver's license to drive. Fundamentally that's what driver's licenses are for.

Mr. HOLTZ-EAKIN. But effectively as a means of identification, it would no longer be widely acceptable. The enactment of those provisions made it impossible for the States to continue voluntarily with the status quo and have their program continue in its current form.

Mr. DAVIS. I thought a driver's license is to be a driver's license. I guess if you want to call it driver's license and i.d., that would be different.

Mr. HOLTZ-EAKIN. In both H.R. 10 and then more recently in H.R. 418, it was focusing on identification.

Mr. DAVIS. OK. I obviously disagree with you on that, but at least I understand your thinking.

Has OIRA considered scoring agencies' rulemaking processes based on their ability to comply with the mandate in UMRA to analyze alternative rules and select the least costly, most cost effective or least burdensome one?

Mr. HOLTZ-EAKIN. A good question on that. The current Executive order that governs OIRA's rulemakings has language similar to the Unfunded Mandates Act. We already score agencies on their compliance and regulatory analysis with the Executive order requirements. So while technically we may not score agencies exactly

on the Unfunded Mandates Act language, we score them something very similar in Executive Order 12866.

Mr. DAVIS. OK, thank you very much. Mr. Waxman, I will yield, I've got time. I know you had one more question.

Mr. WAXMAN. Yes, Mr. Chairman. I find this all very interesting to find out what is and is not an unfunded mandate. I guess whenever we tell State and local governments we have an offer you can't refuse, it's going to cost you money, I think they look at it as an unfunded mandate.

I want to go back to this MTBE issue, because it's an issue that's now pending before the Congress. I think it's important to look at this issue, because what we have now is a very high cost that's going to be imposed by somebody because of the dangers of use of this chemical additive. Dr. Graham lashed out and said this was a congressionally mandated provision that MTBE use. I think the record would show otherwise. I don't think that's an accurate statement. I know he's taken that position, the API, American Petroleum Institute, took that position as well.

But I have correspondence that I want to make a part of the record with API in 2000. API provided data that shows the oil industry was ramping up its use of MTBE prior to the 1990 amendments. From 1986 to 1990 the oil industry was increasing its use of MTBE on average by more than 2.6 million barrels per year. So before even Congress came to the Clean Air Act amendments or even considered the idea of reformulated gasoline requirements, MTBE was increased in use to the point where the oil industry was using 84,000 to 100,000 barrels every day in the United States by the time the act was even adopted.

If you look at the, according to the API, prior to passage of the 1990 amendments, the oil industry was using some 40 percent of the amount of MTBE that would ultimately be used in 1990. Republicans have acknowledged that Congress never mandated MTBE use. I also want to put in the record a memo from the Oversight and Investigations Subcommittee from 1995, beginning on the bottom of page 8, the memo discusses at some length how the Clean Air does not mandate any specific fuel additive. The memo states: "A major aspect of the debate on the 1990 Clean Air Amendments was the issue of fuel neutrality. In essence, since various fuels and fuel constituents compete for the RFG and alternative fuels market, an effort was made to avoid dictating any particular fuel choice. On this matter, the May 17th, 1900 report of the Committee on Energy and Commerce on H.R. 3030 could not have been more clear."

Dr. Graham, I say this because I'm disappointed you decided to repeat the oil industry argument today that Congress mandated. Congress mandated a fuel neutral provision.

But that really has nothing to do with anything, because the oil companies are using MTBE. We have a problem with the cost of cleaning up the MTBE. The reality is going to be who should pay for that cost. What I want to know is, is the administration going to oppose this imposition on the State and local governments and ratepayers in order to protect the oil companies.

That to me, no matter how you slice it, is an unfunded mandate and in order to live up the rhetoric of not wanting unfunded man-

dates and recognize that this is something that we shouldn't impose on local governments, I would hope the administration would be wiling to put its position where it's rhetoric is and not just side with the oil companies. You said you don't even know if the administration has a position on this issue. It's a huge amount of money. I hope we can get an administration position. And I hope they'll propose it. I know you support the energy bill, but this position should not be supported by the administration.

I look forward to hearing from you further on this.

Mr. GRAHAM. Just to clarify, if it's true that MTBE use was going to increase even without the Clean Air Act requirements, which was the thrust of the first half of what you just presented——

Mr. WAXMAN. That's right.

Mr. GRAHAM [continuing]. Then how is it an unfunded mandate? It would have happened anyway without the Clean Air Act.

Mr. WAXMAN. But the unfunded mandate is what is now in the energy bill, which would say that the oil companies are no longer going to be responsible for——

Mr. GRAHAM. But what I'm saying is, if you take the view that the Clean Air Act requirements didn't stimulate MTBEs——

Mr. WAXMAN. Oh, it stimulated it.

Mr. GRAHAM. Oh, so we are in agreement then that the Clean Air Act was a substantial factor in stimulating the growth of MTBEs——

Mr. WAXMAN. It stimulated a growth of what we already had——

Mr. GRAHAM. Then we're much closer than I thought we were.

Mr. WAXMAN [continuing]. It would have happened anyway, but the reality now——

Mr. GRAHAM. Because if it's going to happen anyway, it's not an unfunded mandate by the Federal Government.

Mr. WAXMAN. That's not the unfunded mandate. The unfunded mandate would be if you excuse the oil companies and make the local governments have to pay for the cost, rather than have the oil companies stand in litigation now and take on those costs.

Mr. GRAHAM. I think that's more of a liability question, not a mandate question.

Mr. WAXMAN. Well, it's a mandate if you excuse them from liability. That's where——

Mr. GRAHAM. I think we understand each other.

Mr. DAVIS. Thank you. I might add, if the energy bill comes to the floor, you could raise a point of order at that point under UMRA and you could force a separate vote under the House rules, Mr. Waxman.

Mr. WAXMAN. Let me ask——

Mr. HOLTZ-EAKIN. Yes, sir, under UMRA it would be an unfunded mandate. There would be a point of order against it on the floor.

Mr. WAXMAN. And that could be waived by the rule adopted by the House?

Mr. DAVIS. No, it probably could not.

Mr. HOLTZ-EAKIN. Under 418, there was a point of order raised against the rule itself, which was lost on the vote.

Mr. DAVIS. You get a separate vote. You are guaranteed a separate vote on that issue.

Mr. HOLTZ-EAKIN. Yes, a separate vote.

Mr. WAXMAN. Well, I hope State and local governments will realize that and come in and press against this as they have in this letter that I read. But I would hope that the administration would not leave them holding the buck for the costs which has resulted from the oil industry turning to MTBE as opposed to any other alternative that they might have chosen in cleaning up the gasoline.

Mr. DAVIS. I want to thank this panel. It has been very, very helpful. We appreciate the work that you have done. I will dismiss you now, and we will take a 5-minute recess as we get our second panel on. Thank you very much.

[Recess.]

Mr. DAVIS. We are ready for our second panel. This is comprised of representatives from State, county and city governance. We have Angelo Kyle, who is the county board chairman from Lake County, IL, working his way up. Nice to see you, met him on Sunday. We also have Mayor Mick Cornett of Oklahoma City, OK, here on behalf of the U.S. Conference of Mayors. Thank you very much, we look forward to your testimony. Mr. Van Hollen, do you have someone you want to introduce on this panel?

Mr. VAN HOLLEN. Yes, thank you. I would like to introduce John Hurson, who is a friend and colleague. We actually ran for the Maryland State Legislature together in the same year, back in 1990. Since then, John was the majority leader in the Maryland House of Delegates. He now chairs the Health and Government Operations Committee and is doing a terrific job as president of the National Conference of State Legislators.

Mr. DAVIS. He didn't serve with Mr. Dennis, too, did he, on our staff? Did he serve with Mr. Dennis?

Mr. VAN HOLLEN. Mr. Dennis, council member Dennis was just before, Senator Dennis was there just before we were.

Mr. DAVIS. OK, good, not corrupted, that's great. [Laughter.]

Mr. VAN HOLLEN. But he did a great job, too.

Mr. DAVIS. Thank you very much.

I am also pleased to introduce someone I alluded to in my opening remarks, the chairman of our county board in Fairfax County, Gerry Connolly. I have always noted with pride that when I was chairman of the county board, Fairfax County was selected the best financially managed county in the country. I was proud of that for years, and now under Mr. Connolly they have obtained the same thing. So I no longer have sole ownership of that.

Gerry, thank you for being here on behalf of NACo. I know that Gerry Hyland, our Mount Vernon supervisor, had hoped to be with us today and his mother has passed away. I hope you will send him all the best wishes from all of us as well. I'm going to start, Mr. Kyle, with you. We will swear everybody in, and then we will go straight down. I think you know the rules. You try to keep it to 5 minutes as best you can. Rise with me and raise your right hands.

[Witnesses sworn.]

Mr. DAVIS. Mr. Kyle, you are on.

STATEMENTS OF ANGELO KYLE, PRESIDENT, NATIONAL ASSOCIATION OF COUNTIES; GERRY CONNOLLY, CHAIRMAN, FAIRFAX COUNTY BOARD OF SUPERVISORS; JOHN HURSON, PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES; AND MICK CORNETT, MAYOR, OKLAHOMA CITY, OK

STATEMENT OF ANGELO KYLE

Mr. KYLE. Thank you, Chairman Davis. Again, we appreciate you making your presentation at our legislative conference just a while ago. To Ranking Member Waxman, also to Congressman Turner, we had an opportunity to testify before his subcommittee on the CDBG block grant. To other members of the Committee on Government Reform, I would like to thank you for this opportunity to participate in the hearing this afternoon. My name is Angelo Kyle, Commissioner of Lake County, that great county in Illinois. I am also proud to serve as president of the National Association of Counties.

As you know, county governments play a vital and growing role in the lives of America's families, bringing crucial services to communities from rural America to our suburbs and central cities. Too often, county governments are viewed as just another interest group in Washington. We are not an interest group. We are elected representatives of the people, serving our role in a partnership with States and the Federal Government.

Too often, the Federal Government decides that it knows best how to handle issues in our communities and dictates a one size fits all approach. County officials resent decisions being taken out of our hands and being made instead by others hundreds and even thousands of miles away in Washington, DC, especially when we have to pay for it.

A decade ago, you and other Members of Congress agreed that the Federal Government should not enact mandates without paying for them. You responded to the outcry from State and local elected officials who were fed up with unfunded Federal mandates by enacting the Unfunded Mandates Reform Act of 1995. Mr. Chairman, you should be proud of your role as a lead sponsor in enacting the Unfunded Mandates Reform Act. The tools that UMRA provides for estimating and highlighting the costs of mandates have largely worked as they were intended.

We have also found that the unfunded mandate point of order is in effect a deterrent. Passage of the Unfunded Mandate Reform Act was a landmark achievement in the history of federalism. But it is not a comprehensive or perfect solution to the problem of unfunded mandates. The Federal Government continues to impose mandates on State and local governments and many of our counties report that the burden is increasing. Counties continue to struggle with mandates that were adopted prior to the passage of the Unfunded Mandates Reform Act, such as the Clean Air Act and the Clean Water Act.

Phase 2 storm water regulations increasingly require counties to monitor and treat runoff from construction sites, car washes and other sources of groundwater pollution. Within the last year, new ozone and fine particle standards have increased the burden on counties for monitoring air quality and addressing sources of pollu-

tion. Regulatory mandates such as these have become more strict and expensive to implement over time, especially for counties with fewer resources.

Another expensive mandate facing counties is the Help America Vote Act. The voters of my county, my county clerk and the U.S. Justice Department will all tell you that Lake County is required to comply with HAVA. Not so, according to UMRA. HAVA is not considered a mandate because it enforces a constitutional right. Mr. Chairman, I believe that every individual has a right to vote and to have that vote counted. I do not agree that those costs are irrelevant within the Federal legislative process. The exclusions for certain kinds of legislation do a great disservice to the transparency in Government and to State, counties and cities throughout the Nation.

Another huge unfunded mandate on counties is uncompensated health care. When a patient enters the hospital, the Federal Government dictates many of the decisions that will be made about his treatment, the services his doctor will perform, the hospital facilities he will use and the products the pharmacist will supply. From the Emergency Medical Treatment and Active Labor Act to eligibility for Medicaid, the Federal Government dictates much of the who, what, when, where and why of providing health care services. Counties shoulder an enormous burden of cost for uncompensated health care. The Federal Government has not only failed to step forward and take responsibility for the plight of the uninsured, it has persisted in shifting the costs to counties.

The answer to the spiraling costs of health care at the Federal Government is not to cut costs at the expense of shifting them onto counties and other local governments, but to engage with us in a process of identifying changes that we can all make together to improve the Nation's health care delivery system.

The message that I want to leave with you is not that counties are unwilling to provide these needed services, but if the Federal Government believes that it knows best how to provide clean water supplies or run county elections or manage county hospitals, then it should at least pay for the mandates that it passes on to county officials. Mr. Chairman, the Nation's county officials look forward to working with you to explore options for strengthening UMRA. We believe that the best approach is to build on its success, and by expanding the current process for attaching cost estimates to proposed mandates.

We also believe that it is time to strengthen the enforcement power of point of order. In so doing, we must find a way in the appropriations process to enforce the creed, no money, no mandate.

Mr. Chairman, that concludes my testimony. I want to thank you for the opportunity to share the views of the National Association of Counties on this important issue and look forward to any questions that you and other members of the committee might have. Thank you.

[The prepared statement of Mr. Kyle follows:]

STATEMENT OF

THE HONORABLE ANGELO KYLE

PRESIDENT
NATIONAL ASSOCIATION OF COUNTIES

ON THE TENTH ANNIVERSARY OF THE
UNFUNDED MANDATES REFORM ACT

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

ON BEHALF OF THE
NATIONAL ASSOCIATION OF COUNTIES

MARCH 8, 2005
WASHINGTON, D.C.

Chairman Davis, Ranking Member Waxman, members of the Committee on Government Reform, I would like to thank you for the opportunity to participate in this hearing.

I am Angelo Kyle, county commissioner from Lake County, Illinois. For the past 15 years, I have served on the Lake County Board representing Waukeegan, Illinois, along the shores of Lake Michigan.

I am also proud to serve as the elected President of the National Association of Counties (NACo).

The National Association of Counties is the only national organization that represents county governments in the United States. From its headquarters on Capitol Hill, NACo is a full service organization that provides legislative advocacy, research, financial products and services, and technical assistance to member counties across the country.

As you know, county governments play a vital and growing role in the lives of America's families, bringing crucial services to communities from rural America to our suburbs and central cities. When Americans need a police officer, a firefighter, or an emergency medical technician, they call upon county government. When Americans commute to work to drive their sons and daughters to school or a soccer game they take county highways and county bridges. When Americans face health emergencies, more often than not, they depend on our county hospitals. When Americans seek fair hearings in our judicial system, they go to county courts. When Americans elect our local, state and federal leaders, county governments oversee the polls to ensure the integrity and fairness of the election. On September 11, 2001, county governments and county workers were the first to respond.

Mr. Chairman, I know you remember well your experience serving as an elected county official. As you know, the job of a county commissioner or supervisor is very much like your own. As elected representatives of the people, we listen to the will of our constituents and do our utmost to provide the services our constituents seek, keep our tax burden low, and chart a prosperous future for our community.

Too often, county governments are viewed as just another interest group in Washington. We are not an interest group. We are elected representatives of the people, partners with the states and the federal government in the American federal system of government. We have a responsibility to ensure that our mutual constituents receive the services that they need - and that they pay for - in a manner that is appropriate to the particular needs of our own communities.

When the federal government decides that it knows best how to handle issues in our own communities and dictates a one-size-fits-all approach, it robs county officials of the ability to do our job. Even if we agree with the goal of a federal mandate – and we often do – we oppose having the authority to decide how best to pursue that goal taken out of our hands and placed in the hands of someone who is hundreds of miles away in Washington, D.C. We particularly object to being required to pay for that mandate.

NACo has long expressed the following views on federal mandates:

1. The federal government should not intrude lightly on authority that has traditionally been placed in the hands of state, county and municipal governments;
2. When the federal government does become involved, county officials must be included in the development of any legislation and in agency rulemaking processes;
3. When a federal mandate is imposed, we must have flexibility at the local level to administer it in a manner that best suits the needs and circumstances of our own community;
4. And most importantly, the federal government should never impose a mandate without paying for it. We believe that you should abide by the credo "No money, no mandate."

A decade ago, you and other members of the Congress agreed that the federal government was intruding in areas of traditional local control; that local officials were not being included in the federal lawmaking and rulemaking processes; and that local officials were being stripped of the flexibility that is so critical to meeting the needs of our mutual constituents. You acknowledged, too, that the federal government was enacting mandates without paying the bill – or even ensuring that the costs were known first. You responded to the call from state and local elected officials who were fed up with unfunded federal mandates and ushered into law the Unfunded Mandates Reform Act of 1995 (UMRA).

Mr. Chairman, I am proud to testify before you today that you have good reason to be proud of your role as a lead sponsor in enacting the Unfunded Mandates Reform Act. Not only did UMRA recognize and denounce the practice of imposing unfunded federal mandates, it amended the very rules of this chamber to create a barrier against the passage of an unfunded mandate without full consideration and an affirmative vote by the Congress. The unfunded mandate point of order has been used in both chambers as an effective deterrent. The mandate cost estimates prepared by the Congressional Budget Office are a useful tool for members of Congress from both chambers to determine the impact of potential mandates on states and local governments. Developing and securing the passage of UMRA was a landmark achievement in the history of federalism.

While the tools that UMRA provides have largely worked as they were intended and been successful, our experience in the past decade has demonstrated that it is not a comprehensive or perfect solution to the problem of unfunded mandates. Not only does the federal government continue to impose mandates on state and local governments, but many of our counties report that the burden is increasing.

First, counties continue to struggle with mandates that were adopted prior to the passage of the Unfunded Mandates Reform Act. Supervisor Hyland will share with you in a moment the results of a new NACo survey on the impact of unfunded mandates on

counties. Many of the mandates that he will describe to you were enacted long before the passage of UMRA. These mandates include the:

- Clean Air Act;
- Clean Water Act;
- Safe Drinking Water Act;
- Resource Conservation and Recovery Act;
- Americans With Disabilities Act; and the
- Endangered Species Act.

In several cases, significant new costs arise through regulatory action. Under the Clean Water Act, one of the largest issues for counties currently is Phase II stormwater regulations. This has caused a huge financial drain on our nation's counties. Counties are increasingly required to monitor and treat runoff from construction sites, car washes, and other sources of groundwater pollution. Counties also face new regulatory mandates under the Clean Air Act. Within the last year, new ozone and fine particle standards have increased the burden on counties for monitoring air quality and addressing sources of pollution. All of these federal requirements have become more strict and expensive to implement, especially for counties with fewer resources.

Another expensive mandate facing counties is the Help America Vote Act (HAVA). Mr. Chairman, if I asked my county clerk whether Lake County is required to comply with the Help America Vote Act, he would say yes. If I asked my constituents whether Lake County is required to comply with the Help America Vote Act, they would say yes. And if I asked the U.S. Department of Justice whether we are required to comply, I am quite certain they would say yes.

UMRA, on the other hand, would say no.

When the Help America Vote Act was considered in the House of Representatives, the report accompanying it should have spelled out, under UMRA, the unfunded mandate implications of the bill. Instead, it stated that the bill did not include a federal mandate. This was not a result of a staff oversight or error. Rather, it was because UMRA specifically excludes from its definition of a mandate any law that would enforce the constitutional rights of individuals.

Mr. Chairman, I agree with the premise that every individual has a right to vote and to have that vote counted. I do not, however, agree that the Help America Vote Act imposed no mandate on state and local governments. I do not agree that those costs are irrelevant within the federal legislative process. The exclusions do a great disservice to transparency in government and to states, counties and cities throughout the nation.

Another example of a mandate that – according to UMRA – is not a mandate is the enormous costs borne by counties for incarceration of criminal illegal aliens. Although counties bear the expense of incarcerating and prosecuting those who commit violations of state or local law, counties have no authority to deport criminal illegal aliens. The

Constitution of the United States specifies that the federal government has exclusive jurisdiction over immigration law. We have no option but to warehouse these individuals at county expense while they await deportation or other federal immigration action.

The State Criminal Alien Assistance Program (SCAAP) provides reimbursement for some – but far from all – of the costs associated with incarcerating illegal immigrants who have committed violations of the law and now reside in our county jails. Historically, states and counties receive less than half of the costs expended in housing undocumented criminal aliens in reimbursement from the SCAAP program.

If the administration's proposal to eliminate funding for SCAAP becomes law, this will not be recognized as a mandate under UMRA either. Although counties would be required to spend billions of dollars more of their own revenues, it would not be considered a mandate because failure to appropriate needed funds is not a mandate under UMRA.

A final unfunded mandate that I would like to identify for you is the burden facing counties for uncompensated health care.

Mr. Chairman, we have an ethical and moral obligation to take care of the sick and the injured within our communities. In that respect, providing health care to our citizens is not a mandate imposed on us by the federal government.

However, when a patient enters the hospital, the federal government dictates many of the decisions that will be made about his treatment, the services his doctor will perform and the products his pharmacist will supply. When our hospital administrators make decisions about the construction and use of their facilities, many of their decisions are dictated by cumbersome Medicaid regulations. From the Emergency Medical Treatment and Active Labor Act to eligibility for Medicaid, the federal government dictates much of the who, what, when, where and why of providing health care services.

Counties shoulder an enormous burden of the costs for uncompensated health care. The federal government has not only failed to step forward and take responsibility for the plight of the uninsured, it has persisted in shifting the costs to counties. The answer to spiraling costs of health care at the federal government is not to cut costs – at the expense of shifting them onto counties and other local governments – but to engage with us in a process of identifying changes that we can all make, together, to improve the nation's health care delivery system.

Mr. Chairman, the nation's county officials look forward to working with you to explore options for strengthening UMRA. We believe that the best approach is to build on its success by expanding the current analysis of the costs of unfunded mandates. At the end of the day, we hope to improve the collection of data on unfunded mandates both during the legislative and rulemaking processes and through retroactive analysis of the impact. We also believe that it is time to strengthen the enforcement power of the point of order. In so doing, we must look beyond mandates imposed as a part of authorizing legislation

and find a mechanism for tying appropriations to the enforceability of a mandate to enforce the credo "no money, no mandate."

Mr. Chairman, that concludes my testimony. I thank you for the opportunity to share the views of the National Association of Counties on this important issue and look forward to any questions that you and other members of the committee may have.

Mr. DAVIS. Thank you very much.

Mr. Connolly, thanks for being with us.

STATEMENT OF GERRY CONNOLLY

Mr. CONNOLLY. Thank you, Mr. Chairman, and I want to thank you for your gracious welcome today. I also want to say a special hello to Chris Van Hollen, with whom I worked in the U.S. Senate a number of years ago. Great to see Chris up at the dais.

My name is Gerry Connolly, and I serve as both the chairman of the Fairfax County Board of Supervisors, and as the president of the Virginia Association of Counties, which of course is an active member in NACo. I want to thank you, Mr. Chairman, for the opportunity to participate today and to testify on the burden of unfunded Federal mandates. On behalf of the county officials throughout Virginia in particular, I want to thank you, Mr. Davis, for your commitment to conduct oversight hearings on the Unfunded Mandates Reform Act.

We also want to applaud your decision to create a new Subcommittee on Federalism and the Census, and particularly your selection of Congressman Michael Turner as its new chairman. We know that he brings much to the role, given his experience as the former mayor of Dayton, OH, like yourself, somebody with a lot of experience in local government who would appreciate the impacts of congressional legislation on local government.

The advisory commission on Inter-Governmental Relations issued a report in 1994, noting that the full cost of federally induced State and local expenditures is unknown in part, because no Government agency or individual has developed a comprehensive tabulation of such costs. Two years later, the commission was disbanded and its information about the lack of comprehensive information on the cost of unfunded mandates is still true today.

I want to say that I think Congressman Waxman put his finger on the definition of unfunded mandates from the point of view of State and local entities. Anything you make us do that you don't fully fund is an unfunded mandate. Anything that is cost offloaded, either by the State or by the Federal Government, on local government, is an unfunded mandate.

The Congressional Budget Office and Federal agencies only estimate the anticipated costs of certain individual mandates. No entity is responsible for reviewing those costs after they've been imposed. Whether you recreate the advisory commission on inter-governmental relations or assign the duty to an existing or new agency, we would respectfully suggest that conducting comprehensive research on unfunded mandates be among the eventual proposals for strengthening UMRA.

Hundreds of Federal laws impose mandates on State and local government. State and local government take different approaches to comply and their expenses may vary widely from month to month and year to year. Once Federal mandates are issued, however, they are accepted as a cost of doing business and become marbled throughout the county or local budget.

However, despite these challenges, NACo agreed last month to conduct a rapid response survey of its members on the cost of 10 selected Federal mandates for the consideration of this committee.

I ask that a copy, Mr. Chairman, of NACo's full report be included in the record of this hearing.

Mr. DAVIS. Without objection, so ordered.

Mr. CONNOLLY. I thank you, sir.

I would like to provide a few examples of the responses we received. Marion County, FL, for example, reported a 1-year cost of more than $59 million from mandates related to the Clean Water Act alone. Given the size of the county population, that's the equivalent of $990.54 tax burden on the typical family of four in that county. In Brevard County, FL, they reported an annual cost associated with the Safe Drinking Water Act, cost taxpayers of that county $418.51 per family of four per year.

In Hillsborough County, FL, they spent a total of $73.08 per family of four to comply with the Americans with Disabilities Act. In Chester County, PA, they spent more than $8 million of local tax revenues on HAVA compliance that Mr. Kyle just referred to, in fiscal year 2004, or $71.79 per family of four. In Kitsap County, WA, they expect to spend $40.23 per family of four in fiscal year 2005 for planning and mitigation related to the Endangered Species Act.

In Gaston County, NC, Mrs. Foxx, they expect to spend $18.03 per family of four to comply with the Health Insurance Portability and Accountability Act in fiscal year 2005. In Lee County, FL, they expect to spend an amazing $315.52 per person, or $1,262.06 per family of four, in uncompensated health care costs in fiscal year 2005. Several counties reported multi-million dollar gaps over the 3-year period.

In Kern County, CA a taxpaying family of four is responsible for an unbelievable $252.42 over 3 years for the costs of incarcerating criminal illegal aliens not reimbursed by the State criminal alien assistance program. While the problem of illegal immigration is generally associated with border counties, residents of Douglas County, NE, pay the equivalent of $75.68 per family of four between fiscal year 2003 and fiscal year 2004 and that problem is only growing.

NACo did not survey the cost of education mandates, because counties in most States are not responsible for funding education. However, the burden of Federal unfunded mandates contained in the No Child Left Behind Act is going to leave local governments the most behind in paying the cost.

My county, as you know, Mr. Chairman, having been chairman of Fairfax County, does have responsibility for funding education. We have spent, so far, $132 million over the last 4 or 5 years in implementing No Child Left Behind, and we have received exactly $9 million from the Federal Government to offset those costs. This amount is likely to double or even triple as benchmarks rise and sanctions increase with respect to full compliance.

Counties participating in the NACo survey were only able to provide costs for an average of about six mandates per county. As you noted, Mr. Chairman, NACo projects that if these costs are typical of other counties, the nationwide costs to counties for just these six would be $40 billion. That's a very conservative estimate.

Fairfax County, for example, has spent more than $540 million to comply with Federal mandates in fiscal year 2004, or approxi-

mately 21 percent of the county's general fund. The Federal Government only reimbursed our county part of that amount, leaving our taxpayers a net bill of $395 million, or 73 percent of the full cost. In particular, our county spent $21 million for mandates in public safety, $72 million in human services, $47 million in employee administration for including FICA and retirement mandates, $125 million related to Metrobus and Metrorail, $72 million for mandates related to wastewater operations, $13.7 million for Clean Air Act compliance, $3.3 million for Resource Conservation and Recovery Act, $2.5 million for ADA and over $1 million for HIPA. Only 5 percent of these costs are captured in the NACo report.

If this is true of other counties' responses to NACo, as you indicated, Mr. Chairman, the full cost to counties across the country could approach $800 billion. Needless to say, the fiscal condition of counties would be worsened if Congress added to this burden by adopting any of the several mandates currently being considered in the 109th Congress. We hope that while you work with NACo to identify and pursue improvements to the Unfunded Mandates Reform Act, the committee will also work to oppose creating new unfunded mandates for counties in this Congress.

That concludes my testimony, Mr. Chairman, and thank you for this opportunity to be with you today.

[NOTE.—The National Association of Counties report entitled, "Unfunded Mandates: A Snapshot Survey, March 2005," may be found in committee files.]

Mr. DAVIS. Thank you very much.

Delegate Hurson, thank you for being with us.

STATEMENT OF JOHN HURSON

Mr. HURSON. Thank you very much.

Chairman Davis, Ranking Member Waxman, my Congressman and former Maryland legislative colleague, Mr. Van Hollen, distinguished members of the Government Reform Committee, I'm John Hurson, president of the National Conference of State Legislatures and a member of the Maryland House of Delegates. I appear before you on behalf of NCSL, a bipartisan organization representing the 50 State legislatures, the 7,000 plus members of those legislatures, and the legislatures of our Nation's commonwealths, territories, possessions and the District of Columbia.

Thank you for the opportunity to testify before you today about the Unfunded Mandates Reform Act of 1995. And thank you, Mr. Chairman, for your efforts and the leadership that helped UMRA become a reality a decade ago.

My presentation today will highlight the effectiveness and the limitations of UMRA, the impact of those limitations on State budgets and the need for substantive and technical changes to UMRA. I would like to request that a copy of NCSL's March 8, 2005 mandate monitor and NCSL's Federal mandate relief policy be submitted for the record.

Mr. DAVIS. Without objection, so ordered.

[NOTE.—The Mandate Monitor, Vol. 2, Issue 1: March 8, 2005, may be found in committee files.]

[The information referred to follows:]

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

BUDGETS AND REVENUE COMMITTEE

FEDERAL MANDATES RELIEF

The growth of federal mandates and other costs that the federal government imposes on states and localities is one of the most serious fiscal issues confronting state and local government officials. NCSL has worked diligently over the past quarter century to restore a balance to the intergovernmental fiscal partnership and raise the awareness of the problem of unfunded and underfunded federal mandates. NCSL applauds the success of the Unfunded Mandate Reform Act of 1995 (UMRA; P.L. 104-4) in bringing attention to the fiscal effects of federal legislation on state and local governments, improving federal accountability and enhancing consultation. However, unfunded and underfunded federal mandates continue to pose an undue burden on state and local governments. NCSL calls upon the federal government to reassess the Unfunded Mandate Reform Act and to broaden its scope and increase its effectiveness.

The manner in which the federal government imposes costly unfunded mandates on state and local governments is multi-faceted, including:

- direct federal orders without sufficient funding to pay for their implementation,
- burdensome conditions on grant assistance,
- cross sanctions and redirection penalties that imperil grant funding in order to regulate and preempt the states actions in both related and unrelated programmatic areas,
- amendments to the tax code that impose direct compliance costs on states or restrict state revenues;
- overly prescriptive regulatory procedures that move beyond the scope of congressional intent.

These actions have resulted in substantial costs to state and local governments, and collectively, have eroded state legislators' control over their own states' budgets. Continued pressure for mandatory federal spending and restrictions on the growth of discretionary spending promote a tendency to seek the accomplishment of national goals through federal mandates on state and local governments.

Therefore, NCSL advocated passage of the bipartisan Unfunded Mandate Reform Act as a first step in eliminating the practice of unfunded federal mandates. UMRA has raised awareness of the problem of unfunded mandates, improved federal accountability, and enhanced consultation between the federal government and states and localities. NCSL also applauded passage of the State Flexibility Clarification Act of 1999 (P.L. 106-141) that expands the requirement for cost estimates and mandate statements for legislation that caps federal funding for large entitlement grant programs without providing offsetting state flexibility. NCSL is encouraged that many federal lawmakers have recognized the difficulties posed by unfunded and underfunded federal mandates and are pursuing means to require that the federal government meet its commitments to the states.

NCSL continues to demand sufficient federal funding for state-federal partnership programs through the mechanism of mandatory spending. If the federal government is unwilling to provide such funding as an entitlement to the states, states should be absolved of their legal responsibility to provide services to entitled individuals and fulfill other federal mandates. A new and promising approach is the "trigger" mechanism that delays the testing requirement contained in the Elementary and Secondary Reauthorization Act of 2001 (Public Law 107-110) for any year in which the federal government does not meet its stated funding commitment.

UMRA fosters a more balanced state-federal partnership by, among other provisions:

- Requiring the Congressional Budget Office to perform intergovernmental cost estimates on federal legislation and instituting a point of order against legislation containing significant intergovernmental federal mandates without corresponding funds,
- Establishing procedures for executive branch agencies in the development of federal regulations, and
- Encouraging consultation between the Congress, the Administration and state and local government officials throughout the federal legislative and regulatory development process.

Title I of UMRA-requiring the Congress to perform cost estimates and providing for a point of order-has been successful in reducing the number of unfunded mandates passed by the Congress. In several instances, the preparation of a CBO cost estimate has prompted members of Congress to rework proposed legislation to remove an unintended effect of legislation on state and local governments or lower its cost. Further, the unfunded mandate point of order and other procedural mechanisms contained in UMRA have proven to be effective without impeding the legislative process. Many unfunded mandates, however, are not subject to these procedural tools because they do not meet the strict definition under UMRA. NCSL appreciates that the Congressional Budget Office State and Local Government Cost Estimates Unit endeavors, within its resources, to provide information on the costs of mandates outside of this strict definition. NCSL encourages the Joint Committee on Taxation, which is responsible for performing cost estimates of tax legislation, to provide similar additional information. Title II-requiring

administrative agencies to consult with state governments and provide for regulatory accountability and reform-has been only marginally effective in reducing costly and administratively cumbersome rules and regulations on states and localities. Further, consultation with state and local governments in the construction of these rules is haphazard.

The experience of state and local governments with the Unfunded Mandate Reform Act warrants further review. There remain gaps in the fiscal protections provided to state and local governments. The law must be refined to provide broader protections to states and localities against the imposition of costly and administratively cumbersome mandates. Specifically, NCSL encourages the federal government to enact reforms that should include:

- Expansion of the definition of an unfunded mandate to include all open-ended entitlements, such as Medicaid, child support and Title 4E (foster care and adoption assistance) and proposals that would put a cap on or enforce a ceiling on the cost of federal participation in any entitlement or mandatory spending program. Further, any proposal that places a cap or enforces a ceiling must be accompanied by statutory offsets that reduce state spending, administrative duties or both.
- Elimination of the existing exclusions under Section 4 of UMRA. The experience of Congress in overcoming an unfunded mandate point of order by majority vote demonstrates that the protections afforded by UMRA will not prevent Congress from exercising its will in important areas such as enforcing constitutional rights or meeting national security needs. However, excluding such legislation from the requirements of UMRA precludes an official accounting of the costs imposed under such legislation.
- Expansion of the definition of mandates to include new conditions of federal funding for existing federal grants and programs, including costs not previously identified.
- Expansion of the definition of mandates to include proposals that would reduce state revenues, especially when changes to the federal tax code are retroactive or otherwise provide states with little or no opportunity to prospectively address the impact of a change in federal law on state revenues.
- Expansion of the definition of mandates to include those that fail to exceed the statutory threshold only because they do not affect all states.
- Revision of the definitions of mandates, direct costs or other provisions of the law to capture and more accurately reflect the true costs to state governments of particular federal actions.
- Requiring that mandate statements accompany appropriations bills.

- Enactment of legislation which would require federal reimbursement, as long as the mandate exists, to state and local governments for costs imposed on them by any new federal mandates.
- Improvement of Title II, including enhanced requirements for federal agencies to consult with state and local governments and the creation of an office within the Office of Management and Budget that is analogous to the State and Local Government Cost Estimates Unit at the Congressional Budget Office.
- Restrictions regarding the preemption of state laws.
- Repeal or modification of certain existing mandates as recommended by other NCSL resolutions.

NCSL will continue to monitor the growth of new federal mandates and call for the continued review of existing mandates for possible repeal or modification.

Expires July 2005

Mr. HURSON. Thank you.

NCSL applauds the success of UMRA and the work of the Congressional Budget Office in particular in bringing attention to the fiscal effects of Federal legislation on State and local governments, improving Federal accountability and enhancing consultation. CBO's recent report identifying but five provisions in law that crossed UMRA's threshold, speaks loudly for its effectiveness. And the hundreds of fiscal analyses completed by CBO show a commitment to carry out the spirit and the letter of the law.

Both of these facts, however, mask some of the statute's shortcomings that NCSL urges you to address. UMRA is limited. As a result, much is slipping under UMRA's radar and intensifying pressures on State budgets. NCSL has identified a $51 billion cost shift in Federal funding to States for fiscal years 2004 and 2005 collectively, 5 percent of States' general revenue funds annually. The cost shift continues and will most likely grow by 20 percent in fiscal year 2006, if Congress adopts the President's budget. This increase to a potential $30 billion doesn't take into account the adoption of proposed changes in Federal Medicaid spending.

Mr. Chairman, legislators view mandates more expansively than UMRA's definition. We believe there are mandates when the Federal Government establishes a new condition of grant and aid, reduces the Federal match rate on administrative funds available without a reduction in requirements, extends or expands existing or expiring mandates, compels coverage of certain populations under a current program without providing full or adequate funding for this coverage, or creates an unfunded national expectation.

To illustrate our concerns, I'd like to provide you with examples of provisions contained in three bills enacted during the 108th Congress that were not considered inter-governmental mandates under UMRA, but did create significant cost shifts to the States. Legislators look at the provision in the American Jobs Creation Act and see an unfunded mandate. They see an excise tax on vaccines as increasing their costs for Medicaid. UMRA doesn't call it a mandate, because it's an indirect cost and not a direct cost.

Legislators view IDEA, which was reauthorized last year, as one of the biggest unfunded mandates of all time. UMRA, though, said IDEA is a grant condition. So States really don't have to participate. They don't, but they do. Any State that refuses to participate in IDEA would almost certainly be sued for violating civil rights.

Legislators consider the requirements to conduct eligibility determinations for the low income subsidy for Medicare Part D to be a mandate. In particular because it's a condition of participation in the Medicaid program. UMRA says it's a mandate only if States lack the flexibility to offset the costs with reduction somewhere else. Well, maybe they do, but given State budgets, we really don't have that flexibility.

We seek your support to strengthen UMRA. This hearing is an excellent start. We suggest that members of this committee sit down with legislators, counties, courts and city officials and other elected officials to develop broader protections under UMRA to States and localities against these cost shifts. Specifically, NCSL encourage the Federal Government to examine the definitions, revisit how it treats entitlement and mandatory spending, establish

greater executive branch consultation, and consider developing a look-back process.

Mr. Chairman, in closing, I would like to add that NCSL remains steadfast in its resolve to work with Federal policymakers to reduce the Federal deficit and to maintain critical programs. Controlling the deficit is a daunting task, involving difficult choices, many of which involve our inter-governmental partnerships. We recognize that the pressure for mandatory Federal spending and restrictions on the growth of discretionary spending promote a tendency to seek the accomplishment of national goals through Federal mandates on State and local governments.

However, NCSL is encouraged that many Federal lawmakers, including yourselves, have recognized the difficulties posed by these cost shifts to States, and we look forward to working with you on these important issues. I thank you for this opportunity to testify and I would be happy to answer any questions.

[The prepared statement of Mr. Hurson follows:]

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

TESTIMONY OF

DELEGATE JOHN HURSON

MARYLAND HOUSE OF DELEGATES

PRESIDENT, NATIONAL CONFERENCE OF STATE LEGISLATURES

ON BEHALF OF THE

NATIONAL CONFERENCE OF STATE LEGISLATURES

REGARDING

UNFUNDED MANDATES REFORM ACT OF 1995

BEFORE THE

GOVERNMENT REFORM COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 8, 2005

Testimony of Delegate John Hurson
March 8, 2005

Chairman Davis, Ranking Member Waxman and distinguished members of the Government Reform Committee, I am John Hurson, President of the National Conference of State Legislatures (NCSL) and a member of the Maryland House of Delegates. I appear before you today on behalf of NCSL, a bi-partisan organization representing the fifty state legislatures and the legislatures of our nation's commonwealths, territories, possessions and the District of Columbia.

Thank you for the opportunity testify before you today about the Unfunded Mandates Reform Act of 1995 (UMRA) and thank you Mr. Chairman for your efforts and leadership that helped UMRA become a reality a decade ago. I underscore the bipartisan and bicameral collaboration that led to its enactment.

My presentation today will highlight the effectiveness and limitations of UMRA, the impact of those limitations on state budgets and the need for substantive and technical changes to UMRA. I request that a copy of NCSL's March 8, 2005 Mandate Monitor and NCSL's Federal Mandate Relief policy be submitted for the record to accompany my testimony.

Mr. Chairman, NCSL continues to applaud, as it did in testimony before this committee in 2001, the success of the Unfunded Mandate Reform Act of 1995 (UMRA; P.L. 104-4) and the Congressional Budget Office in bringing attention to the fiscal effects of federal legislation on state and local governments, improving federal accountability and enhancing consultation. CBO's recent report that identified only 5 laws that crossed UMRA's threshold speaks loudly for its effectiveness. The hundreds of fiscal analyses completed by CBO show a commitment to carry out the spirit and letter of the law. Both

of these facts, however, mask some of the statute's shortcomings that NCSL urges you to address. UMRA's focus is limited. As a result, the federal government continues to effectively shift costs to state and local governments.

NCSL has identified a $51 billion cost shift in federal funding to states for fiscal years 2004 and 2005 collectively and a potential $30 billion cost shift in FY 2006. This does not take into account the adoption of proposed changes in federal Medicaid spending—a proposed net $45 billion reduction in federal spending over 10 years—the potential impact of any federal tax reform that could impose direct compliance costs or even restrict state revenues, or the impact of numerous regulatory mandates or pre-UMRA mandates. (The minimum cost shift for FY 2004 of $25.7 billion represented 5 percent of state general revenue funds. For FY 2005, the percentage impact was essentially the same.)

Mr. Chairman, legislators view mandates more expansively than UMRA's definition. We believe there are mandates when the federal government:

- Establishes a new condition of grant in aid.
- Reduces current funds available, including a reduction in the federal match rate or a reduction in available administrative or programmatic funds, to state and local governments for existing programs without a similar reduction in requirements.
- Extends or expands existing or expiring mandates.
- Establishes goals to comply with federal statutes or regulations with the caveat that if a state fails to comply they face a loss of federal funds.
- Compels coverage of a certain population/age group/other factor under a current program without providing full or adequate funding for this coverage.

- Creates underfunded national expectations, e.g., homeland security.

To illustrate the problem, I would like to provide you examples of provisions contained in 3 bills enacted during the 108th Congress that were not considered intergovernmental mandates under UMRA, but did create a cost shift to the states.

1. On October 22, 2004 President Bush signed H.R. 4520—*the American Jobs Creation Act of 2004*. In its final version, the bill contained a $.75 excise tax on hepatitis A and influenza vaccines sold by manufacturers, producers, or importers thereof. Because Medicaid is a major purchaser of these vaccines, the tax will indirectly increase state spending for the Medicaid program by approximately $90 million over the 2005-2009 period.[1] Indirect costs are not considered mandates under UMRA. Therefore, this provision was not considered an intergovernmental mandate.

2. In 2004, Congress reauthorized the Individuals with Disabilities Education Act (IDEA). Since enacting IDEA in 1975, Congress has never met its commitment to fund 40% of the average per-pupil expenditure (APPE) for children with disabilities. Formally recognizing Congress' responsibility, the IDEA conference committee stated in its 2004 report that, "A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals." As such, the new law establishes a seven-year "glide path" to move the federal government towards funding 40% of the APPE by FY 2011.[2] However, with the ink less than 6 months dry, the federal government is

already $1.8 billion behind for FY 2005 in fulfilling its most recent promise. The authorized level was $12.3 billion and Congress appropriated $10.5 billion.[3] Failure by the federal government to provide 40% APPE places on average an additional $10 billion annually on the back of state budgets. This does not take into account that some research has shown that the cost of educating a child with special needs is twice that of the non-special needs student population. Adjusting for this fact, the gap in funding for IDEA would be more in the range of $30 billion annually. CBO considers any requirements under IDEA as a condition of grant aid. However, states are really not in a position to refuse participation in the grant program. Any state that refused to participate in IDEA would be open for suit in federal court for not complying with civil rights law.

3. CBO determined that the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (P.L. 108-173) contains an intergovernmental mandate as it relates to a preemption of state taxes on premiums for prescription drug coverage. The law also contains a number of other provisions that will increase state expenditures that were not determined to be intergovernmental mandates.. For example, all prices negotiated under the MMA are not included in the calculation of the Medicaid "best price." States will find it more difficult to negotiate supplemental rebates because the dual-eligibles will no longer be a part of their prescription drug portfolio. Indexing the Part B premium will also result in increased state costs and states expect to see increased administrative costs related to the requirement to conduct eligibility determinations for the low-income subsidy for Medicare Part D.

While these are just a few examples how the federal government can shift costs to states outside of the UMRA process, these actions have resulted in substantial costs to state and local governments, and collectively, actions such as these erode state legislators' control over their own states' budgets.

The experience of state and local governments with the Unfunded Mandate Reform Act warrants further review. There remain gaps in the fiscal protections provided to state and local governments. The law must be refined to provide broader protections to states and localities against the imposition of costly and administratively cumbersome mandates. Specifically, NCSL encourages the federal government to enact reforms that should include:

- Expansion of the definition of an unfunded mandate to include all open-ended entitlements, such as Medicaid, child support and Title 4E (foster care and adoption assistance) and proposals that would put a cap on or enforce a ceiling on the cost of federal participation in any entitlement or mandatory spending program. Furthermore, any proposal that places a cap or enforces a ceiling must be accompanied by statutory offsets that reduce state spending, administrative duties or both.
- Elimination of the existing exclusions under Section 4 of UMRA. The experience of Congress in overcoming an unfunded mandate point of order by majority vote demonstrates that the protections afforded by UMRA will not prevent Congress from exercising its will in important areas such as enforcing constitutional rights or meeting national security needs. However, excluding such legislation from the

requirements of UMRA precludes an official accounting of the costs imposed under such legislation.

- Expansion of the definition of mandates to include new conditions of federal funding for existing federal grants and programs, including costs not previously identified.
- Expansion of the definition of mandates to include proposals that would reduce state revenues, especially when changes to the federal tax code are retroactive or otherwise provide states with little or no opportunity to prospectively address the impact of a change in federal law on state revenues.
- Expansion of the definition of mandates to include those that fail to exceed the statutory threshold only because they do not affect all states.
- Revision of the definitions of mandates, direct costs or other provisions of the law to capture and more accurately reflect the true costs to state governments of particular federal actions.
- Enactment of legislation which would require federal reimbursement, as long as the mandate exists, to state and local governments for costs imposed on them by any new federal mandates.
- Improvement of Title II, including enhanced requirements for federal agencies to consult with state and local governments and the creation of an office within the Office of Management and Budget that is analogous to the State and Local Government Cost Estimates Unit at the Congressional Budget Office.

Mr. Chairman, in closing I would like to add that NCSL remains steadfast in its resolve to work with federal policymakers to reduce the federal deficit and to maintain critical programs. Controlling the deficit is a daunting task involving difficult choices, many of which involve our intergovernmental partnerships and some of the areas where the largest cost shift occurs—Medicaid and education. We recognize that the pressure for mandatory federal spending and restrictions on the growth of discretionary spending promote a tendency to seek the accomplishment of national goals through federal mandates on state and local governments. However, NCSL is encouraged that many federal lawmakers have recognized the difficulties posed by the cost shifts to states and we look forward to working with you on this important issue. I thank you for this opportunity to testify and would be happy to answer any questions the committee may have.

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1. Congressional Budget Office, H.R. 4520: *American Jobs Creation Act of 2004,* (Washington, D.C.: CBO, August 2, 2004).
2. Tetreault, Yvette; Federal Funds Information for States; *Issue Brief 04-57: IDEA Reauthorization; (Washington, D.C.: FFIS, December 8, 2004).*
3. Ibid.

Mr. DAVIS. Thank you very much.

Mayor Cornett, thank you for being with us.

STATEMENT OF MICK CORNETT

Mayor CORNETT. Thank you, Mr. Chairman, members of the committee. I appreciate the opportunity to be here today to speak to you. I am Mick Cornett, I am the mayor of Oklahoma City, the 29th largest city in the United States. I am here on behalf of mayors across the country at the requests of the U.S. Conference of Mayors. I serve on the Urban Economic Policy Committee for the U.S. Conference of Mayors.

The message I want to leave with members of this committee today is that we wholeheartedly support UMRA. The good news is that Members of Congress, as well as the public and the press, are being notified about mandates before a vote takes place. Most importantly, we believe they act to establish a mechanism for holding members more accountable for how they vote on unfunded mandates.

Unfortunately, there are still some loopholes in the act that are allowing some mandates to move unchecked through the legislative process. The Federal Government is also finding more creative ways to shift the cost of Federal programs to State and local governments. We are in favor of strengthening UMRA to close up the loopholes and shut down these Federal cost shifts.

Mr. Chairman, I have been notified by members of the Conference staff of the critical leadership role that you played in the passage of UMRA. I understand you were the chairman of the board of Fairfax County, you were one of the key leaders of the National Association of Counties Unfunded Mandates Task Force, which played an important role in urging the passage of this legislation. I also understand that as a newly elected Member of Congress in 1995, you were one of the key co-sponsors of UMRA. On behalf of the Nation's mayors, I not only commend you for your past leadership but also for your continued commitment and outstanding support for State and local governments in the fight against unfunded mandates.

Mr. Chairman, it is easy to understand why so many in Washington can get hooked on sponsoring unfunded mandates. It's a way of addressing national problems, but it offers them the best of both worlds. Congress can take credit for solving the problems and then send the bill to State and local governments. They never have to face the angry voters, as we do, to explain why there is a need to cut services or increase taxes to offset the cost of the mandates.

Let me take some time to share a couple of examples of how these mandates are directly affecting Oklahoma City and my citizens. In our efforts to provide safer water, citizens often do not perceive the benefits of our capital improvements. They only see the added burden of the higher utility bills. Before I continue, I want to point out that as manger of a nationally acclaimed publicly owned water supply system, Oklahoma City does support public health protection that is based on sound science.

Nevertheless, when the cost of passing new Federal mandates are included in our utility rates, the economic rates are greater on the low and moderate income customers. In 1996, when Congress

passed additional amendments to the Safe Drinking Water Act, the process the EPA uses to develop drinking water standards accelerated, but no Federal money was sent to assist us in implementing these new regulations.

Although Oklahoma City is blessed with one of the best raw water supplies in the Nation, it still must make substantial changes to its treatment processes, to remove an additional 25 to 35 percent of total organic carbon. Oklahoma City is now constructing over $10 million in improvements to its water treatment plants and will require an additional $1.5 million annually in operating costs, just to meet the newest regulations for total organic carbon removal.

Another Federal mandate the mayors feel strongly about is the Individuals with Disabilities Education Act, which was authorized in 2004. A commitment was made in the reauthorization to create a glide path to fully fund IDEA by 2011. However, including the President's increase for fiscal year 2006 in his proposed budget, appropriations for IDEA would still be $3.6 billion below what the reauthorization calls for in the glide path. This is a good example of not an unfunded mandate, but an underfunded mandate.

In closing, Mr. Chairman, we believe we have made a lot of progress with UMRA. However, we believe the law needs to be strengthened to capture those mandates that are falling through the cracks and other Federal actions that continue to impose huge financial burdens on State and local governments. Mr. Chairman, members of the committee, cities across the United States are hurting. Let me give you an example. Our personnel costs, and remember, as a city government, we are largely driven by personnel costs, our personnel costs are rising at the rate of about 6 percent a year. There is no way that our sales tax and property taxes are going to increase to cover that amount.

As a result, we are forced to lower expectations, forced to lower the services that we deliver. This year, in our 2006 budget, we are going to lower our services to our citizens 1½ percent. And this is a good year. We are in an economic boom time right now in Oklahoma City, but we cannot keep up as long as we have unfunded and underfunded mandates and at the same time, continual erosion of our tax base.

I understand we are at the bottom of the food chain a lot of times when it comes to funding. But cities across the United States should not feel compelled to hire lawyers and lobbyists to protect themselves from their own legislatures at the State level and their own legislatures at the Federal level. That is what is happening.

I appreciate the opportunity you have given me to address the committee on UMRA. I look forward to working with you on other inter-governmental relationships at the State level and the Federal level. I have great respect for the work that you all accomplish here in Washington. Thank you for having me here today.

[The prepared statement of Mayor Cornett follows:]

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Mayor of Sugar Land
BOB YOUNG
Mayor of Augusta, GA
SHELIA YOUNG
Mayor of San Leandro
Executive Director:
TOM COCHRAN

Statement of

The Honorable Mick Cornett
Mayor of Oklahoma City

on behalf of

The United States Conference of Mayors

before

The United States House of Representatives
Committee on Government Reform

regarding

The Unfunded Mandates Reform Act of 1995 (UMRA)

Rayburn House Office Building, Room 2154
Washington, D.C.

Tuesday, March 8, 2005
2:00 p.m.

Thank you Mr. Chairman. First let me commend you and all of the members of this committee for inviting us to participate in this important hearing. I am Mick Cornett, Mayor of Oklahoma City and a member of the U.S. Conference of Mayors Urban Economic Policy Committee. I am pleased to appear today to offer comments on behalf of the nation's mayors on the Unfunded Mandates Reform Act of 1995.

Today marks the ten-year anniversary of a rally held on the steps of the Capitol, where mayors and county leaders teamed up with the key sponsors of UMRA to urge final passage. After several years of educating our citizens and the press about the adverse impact of unfunded mandates, we were finally able to convince the overwhelming majority of members in both chambers to support the legislation. Soon after the rally the bill was signed into law on March 22, 1995. Reflecting back on the time leading up to this event, there is no doubt why this legislation became a top legislative priority of just about every city, county and state in the nation. The number and the cost of unfunded mandates reached a boiling point with mayors a long time ago. Each time a new unfunded mandate is imposed on local governments, it means we have to make the tough choices of raising taxes or cutting back on services.

Mr. Chairman, it's easy to understand why so many in Washington get hooked on passing mandates. If you have a bright idea that you can take credit for, and then force someone else to pay for it, you have the best of both worlds. You can face the voters and tell them about the problems you solved while we're forced to explain why we've increased taxes or cut back on services.

While mayors and other state and local leaders acknowledge the good intentions behind many mandates, we are almost unanimous in our belief that federal mandates should be supported by federal funds. Congress and federal agencies must realize that local governments are not equipped to fund an infinite number of mandates, and at the same time adequately fund education, public safety, homeland security, transportation and other critical public services that we're expected to provide.

The message I want to leave with members of this committee is that mayors wholeheartedly support UMRA. We believe it is serving a very valuable purpose. It is notifying members about mandates included in proposed legislation, and most importantly it is holding members more accountable for imposing new mandates on state and local governments. Now, I don't want to leave you with the impression that the law is perfect. It is not. There are loopholes in the act that are allowing mandates to move through the legislative process unchecked. And the federal government is finding more ways to shift costs to state and local governments. We are in favor of strengthening UMRA to close up these loopholes and curtail these federal cost shifts.

Mayors have long supported strong legislation in this area. In 1993, the Conference and other national groups representing state and local governments joined forces and developed a national strategy to stop unfunded mandates. We first educated the American people and the press to help them better understand that unfunded mandates shift the costs of federal programs to state and local governments. We told them that unfunded federal mandates drive up their state and local taxes and undermine our ability at the local level to provide critical public services. As

a result of our efforts, a massive grassroots campaign evolved which generated enormous support for our efforts and led to the passage of UMRA.

Mr. Chairman I have been informed by Conference staff of the critical leadership role you played in the passage of UMRA. First, as an elected county executive from Fairfax County, Virginia, you were one of the key leaders of the National Association of Counties Unfunded Mandates Task Force which was a powerful force in generating local support. Second, I am told as a newly elected freshman member of Congress in 1995, you cosponsored UMRA and helped provide leadership in the House to ensure it's passage. On behalf of the nation's mayors I not only commend you for your past leadership but for your continuous commitment and support for state and local governments in the fight against unfunded mandates.

Again, thank you for holding this hearing. After ten years, it is a good time for Congress to examine UMRA to see if it's achieving its legislative goal. While we believe the law has made it a big difference in keeping members informed and, to some degree, in reducing the number of mandates, as I stated earlier, there are still loopholes that allow Congress and federal agencies to continue shifting the cost of federal actions to state and local governments. Recent studies conducted by the Government Accounting Office, Office of Management and Budget and the National Conference of State Legislatures all support this conclusion.

Positive Effects of UMRA

There is no question that UMRA has made a huge difference in making members of Congress, as well as federal departments and agencies, aware of the impact of unfunded mandates on state and local governments. Having a legislative and administrative procedure in place that requires the Congressional Budget Office and the Office of Management and Budget to examine new legislative and regulatory proposals, and notify members of Congress when there is a mandate that is likely to impose excessive cost on state and local governments, is a significant achievement. The information reported by these agencies is also available to the public and the press. As a result, all members of Congress know we will be able to hold them accountable for their vote on bills containing mandates.

The GAO report concluded that there is evidence that UMRA has had a discouraging effect on the enactment of unfunded mandates and it may have helped reduce the costs of some mandates. In examining 377 statutes approved during 2001 and 2002, the report found that only 5 contained costly mandates, and all of these were mandates imposed on the private sector. In comparison the report states that between 1996 and 2000, the Congressional Budget Office identified a total of 18 costly mandates that were enacted. Two were imposed on state and local governments and 16 on the private sector. In its conclusion, the report states that since 1996 only 3 statutes have been enacted that impose excessive cost on state and local governments.

UMRA's Flaws

Mr. Chairman, while mayors across the nation are pleased to have UMRA in place, we are still concerned about the rising costs of mandates and other federal actions not covered by the

law. We believe the time has come to consider changes in the statute that will close the loopholes and expand its scope to cover other federal actions that continue to shift huge financial burdens to state and local governments. These loopholes and federal actions are eroding our limited local resources and making it more difficult for us to provide the services that our citizens expect. Every dollar we're forced to spend on a federal mandate is one less dollar available at the local level to fight crime, improve education, expand transportation and modernize our aging infrastructure.

Under UMRA the Congressional Budget is not required to conduct an automatic review of mandates contained in appropriation bills or mandates added to a statute after CBO's review. In 2001 and 2002, seven bills containing mandates were enacted without a CBO review because they were either included in appropriations bills or in authorizing bills not reported by authorizing committees. Another three statutes were enacted in 2002 that contained mandates not reviewed by CBO prior to enactment because they were added after CBO's review.

Also, statutes that provide grant assistance to state and local governments are not covered by UMRA although in some instances they may include significant financial impacts on state and local governments. The No Child Left Behind Act, the Homeland Security Act and the Help America Vote Act were all cited as examples of statutes that provide grant assistance but impose various costly requirements on state and local governments.

Examples of How Unfunded Mandates Affect Cities

Let me provide you a few examples of some costly mandates we're faced with in Oklahoma City. However, before I do, I want to point out that as the manager of a nationally acclaimed, publicly owned water supply system, Oklahoma City supports public health protection based on sound science. We support efforts to improve drinking water quality for all citizens.

In our efforts to provide safe water, citizens often do not perceive the benefits of our capital improvements, only the added burden of higher utility bills. Unfortunately, new regulations do not come with the funding support necessary to implement them. Consequently local communities are facing millions of dollars worth of cost increases per year just to keep up with federal mandates. When the costs of funding new federal mandates are included in our utility rates, the economic effects are much greater on low- and moderate-income consumers. While Oklahoma City is prospering, 16 percent of our citizens remain at or below the poverty level. This is just one of many critical reasons why mayors believe that when the federal government decides to place new responsibilities on local communities, it should fund the cost of implementing these decisions.

Some of the more costly mandates we're dealing with back home include:

Toxicity Reduction Evaluation Process – For over 14 years, Oklahoma City, along with many other large communities, has been required to perform expensive testing, monitoring and public education programs to encourage citizens to lessen their use of pesticides and to help keep pesticides from entering the local sanitary sewer system. Despite all these years of testing,

monitoring and public education efforts, pesticides remain in the sanitary sewer system flows reaching our wastewater treatment plants. There are many reasons why the wastewater contains pesticides, and none of these reasons are under the control of the local community. Yet, the local community is responsible for eliminating pesticides but powerless to regulate pesticide use nationally. Should the federal government desire to reduce pesticide availability or use, it should do so itself. Should the federal government desire to eliminate pesticides from entering our national waterways, it should also do so itself. However, it is unfair to expect local communities to bear the high costs of this federal initiative.

Drinking Water Regulations – Oklahoma City has a proud record of providing outstanding, safe drinking water to its citizens, and has been nationally recognized for the excellent taste and quality of its drinking water. Yet, in 1996, when Congress passed additional amendments to the Safe Drinking Water Act, the process the EPA uses to develop drinking water standards accelerated but no new federal money was sent to communities to assist in implementing these new regulations.

One example of the EPA requirement for water suppliers is the reduction of total organic carbon of their water based upon the percentage of the water's original content. Although Oklahoma City is blessed with one of the best raw water supplies in the nation, it still must make substantial changes to its treatment processes to remove an additional 25 to 35 percent of total organic carbon. Oklahoma City is now constructing over $10 million dollars in improvements to its water treatment plants and will require an additional $1.5 million dollars annually in operating costs just to meet the newest regulations for total organic carbon removal.

Uniformity/centralization of federal security requirements for municipally operated utilities through Homeland Security Office – We are receiving directions from separate federal agencies with conflicting requirements regarding operations, management, capital improvements, vulnerability assessments, emergency response planning and access to information for our utility facilities. The agencies involved include the EPA, the U.S. Department of the Interior, Bureau of Reclamation and the Federal Energy Regulatory Commission. Further, by protecting the information they receive, these multiple federal agencies are not sharing information regarding their independent efforts on behalf of the facilities we rely on for water supply to our community.

We believe that our security efforts would be significantly enhanced, and much more efficiently and effectively performed, if one federal agency provided oversight of the federal facilities we rely on for water supply (i.e. McGee Creek Reservoir) and directions for performance of vulnerability assessments and emergency planning and response. Further, estimates of the security improvements needed to meet new standards exceed $10 million and will require coordination and new financial and personnel support from many local, state and federal agencies. Centralized federal agency support would significantly enhance all our efforts.

I also want to share with you some of the other unfunded mandates that other cities are concerned with:

Combined Sewer Overflow Control Policy – Probably one of the biggest environmental unfunded mandates is the 1994 Combined Sewer Overflow (CSO) Control Policy. This policy, while admirable and with great public benefit, is a tremendous burden on local governments. EPA estimated in their 2000 Clean Watersheds Needs Survey that Combined Sewer Overflow Correction would cost approximately $50.6 billion.

Let me share with you what that means for individual cities:

- In Holyoke, Massachusets, a former industrial city of about 40,000 people, the city has a sewer system that was created over 125 years ago. Their median income is $32,000. Below the Holyoke Dam, there are more than a hundred combined sewer overflows. The federal government has been pushing eight western Massachusetts communities, including Holyoke, for the past decade to eliminate these CSOs at a collective cost of more than a quarter of a billion dollars. The City of Springfield is facing a total CSO cost of $110 to $140 million. The City of Chicopee is facing a CSO cost of $258 million and the City of Hartford will need over $100 million in funds. Holyoke's estimated cost is between $56 and $78 million. Officials estimate that it will increase every sewer-using customer cost in Holyoke from $200 to $833 (417%) per year to pay this bill.

- The city of Akron, OH is facing a total CSO cost of $384 million.

- Saginaw, Michigan had 36 CSOs which discharged nearly 3 billion gallons of combined sewage each year into the Saginaw River. As of 2001, Saginaw has spent nearly $100 million on capital improvements. These expenditures have resulted in the elimination of 20 out of the 36 CSOs. As you can see, they still have a ways to go.

What has sometimes been difficult to determine is how to separate the cost for complying with the CSO mandate and replacing the aging and crumbling infrastructure that plagues many of our communities. However, the two issues are clearly linked to one another. The U.S. Environmental Protection Agency (EPA) in its Gap Analysis, released in 2002, estimates the capital needed for wastewater infrastructure over the next twenty years will range from $331 billion to $450 billion.

In 1977, federal funding peaked for capital wastewater projects at $14.1 billion which accounted for more than 60% of annual expenditures. At that time local and state contributed approximately $8 billion. Currently local and some state funding accounts for 90% of all capital expenditures for wastewater infrastructure. And while the federal government has contributed only $1.3 billion in the form of state loans (and that dollar figure has been decreasing over the past couple of years), EPA estimates that local and state governments spend over $10 billion each year just on capital expenditures for wastewater.

Please note that this is for wastewater only. The estimated gap for drinking water is from $154 billion to $446 billion, and this does not take into account the costs for compliance with

drinking water standards. We are currently trying to determine that cost as well. Also, you should note that these are just some examples of the environmental costs incurred by local governments.

Individuals with Disabilities Education Act – In the reauthorization of the Individuals with Disabilities Education Act (IDEA) in 2004 a commitment was made to create a glide path to fully fund IDEA by 2011. A total of 97 Senators supported this language and it became part of the reauthorization. Last fiscal year the Omnibus Appropriations Act increased funding for this program by $1 billion.

However, if one were to examine the current level of funding and then add in the President's proposed increase for FY 06, appropriations for IDEA would be $3.6 billion below what the reauthorization calls for in the "glide path." And if we were to compare what full funding should be ($22.6 billion) to the current funding level of $11.1 billion, one would find that full funding was over $11 billion short of the goal.

This is definitely an under-funded mandate. In the original legislation, the Education for All Handicapped Act (P.L. 94-142), the Act stated that the funding goal for the Federal government would be up to 40% of the national average cost to educate a child. It was written as if funding would be a partnership between the federal, state and local governments to provide a free and appropriate education for every special needs child.

No Child Left Behind – The No Child Left Behind Act (P.L. 107-110), which was the name given to the reauthorization of the Elementary and Secondary Education Act in 2002, established a new set of requirements and expectations for states and local education agencies. As a result of these requirements the Act is currently under funded. The costs being incurred by states and local school systems to implement No Child Left Behind (NCLB) and be in compliance with the Act are very significant in a variety of areas including administration, increased salaries for higher qualified teachers, testing costs, remediation, transportation and other items. Even though the legislation provides some funding, it does not fully cover all the costs. At the present time, the appropriation for NCLB is $9 billion less than the authorized level for the Act.

Medicaid Reimbursement for School Children - From the cities and local school system perspective, there is a double standard in Medicaid reimbursement. We feel that schools are placed on a different playing field than medical clinics. In the end this causes cities to pick up the full cost of the medical needs of Medicaid-eligible children.

There is almost a complete failure by the Federal government to cover medical eligible services for Medicaid eligible school children. The practice has been that such costs as physical and occupational therapy and medical equipment (wheelchairs) are not being covered by Medicaid for these school children. This includes both special education and other eligible students. This puts a significant extra burden on the city to provide and fund these services when the obligation and authority for reimbursement is from the Federal government.

Conclusion

During the Conference of Mayors Winter Meeting in Washington in January, Chicago Mayor Richard Daley spoke very passionately about his dislike for unfunded mandates. During our January 18 plenary session he told mayors that mandates "force us to replace our own goals with federal priorities. They tie our hand by forcing us to deal with problems the way Washington wants, rather than the way we feel is best to meet our own local needs."

He called on mayors to join with him in a renewed effort to fight unfunded federal mandates and other federal actions that slip through the cracks of UMRA. He reminded us that state and local governments have many friends in Congress who will go to bat for us on the issue. Mr. Chairman, we're delighted that you and our other friends in the Senate have committed to hold hearings to focus national attention on this critical issue.

To prepare for hearings later this spring, Mayor Daley has ordered members of his cabinet to begin a formal process of collecting and cataloguing mandates in four categories: unfunded regulatory mandates, under funded mandates, unreasonable grant requirements and federal preemptions. He has asked the Conference of Mayors to assist him in gathering similar data from cities across the nation. I am sure you will be hearing a lot from us as we gather information from cities across the nation.

In closing, Mr. Chairman, we believe we've made a lot of progress with UMRA. However, we believe the law needs to be strengthened to capture those mandates that are falling through the cracks and other federal actions that continue to impose huge financial burdens on state and local governments.

Again, thank you for the opportunity to testify. We look forward to working with you and members of the Committee to strengthen UMRA and improve the intergovernmental partnership between the federal, state and local governments.

Mr. DAVIS. Thank you very much, thank all of you very, very much.

Mr. Connolly, let me start with you. I think in the prepared testimony we note that Fairfax County spent $540 million to comply with Federal mandates, $148 million reimbursement. Basically that means a $395 million deficit in terms of what the Federal Government is forcing you to do.

Now, maybe the county would have chosen to do some of these things, maybe they would not have. But these are priorities set from Washington that we tell you you have to pay for. What does $395 million, how many cents of that is a tax rate?

Mr. CONNOLLY. If we divide that by 17.9, this year, that would be——

Mr. DAVIS. I won't ask you to do that.

Mr. CONNOLLY [continuing]. That would be about 20 cents on our tax rate.

Mr. DAVIS. So that's a pretty good—and the tax rate is going down to what this year?

Mr. CONNOLLY. It will go down to at least $1.03 from $1.13.

Mr. DAVIS. So that's almost 20 percent?

Mr. CONNOLLY. Very significant.

Mr. DAVIS. And in local jurisdictions in Virginia, and I don't know what it's like in Oklahoma City or Maryland, or Lake County, IL, property tax is basically it for you. You don't have a lot of options, do you?

Mr. CONNOLLY. No, sir, the only source of revenue that we outright control is the real estate tax rate. All other sources are capped or controlled outright by the State of Virginia.

Mr. DAVIS. What's the story in Illinois, Mr. Kyle? Is it similar?

Mr. KYLE. Yes. We also have tax caps in the State of Illinois, Mr. Chairman.

Mayor CORNETT. Mr. Chairman, most of our money comes from sales tax in the State of Oklahoma. That's how municipalities are largely funded.

Mr. DAVIS. So basically you're moving it from a progressive income tax that the Federal Government paid for to a much more regressive taxation at the local level, which is sales taxes and property taxes, which everybody—similar situation in Maryland?

Mr. HURSON. Yes, it is. We have a fairly progressive income tax structure in Maryland. But at the same time, moving all these costs down to the States, to a situation where we have balanced budget requirements in most of the States, it means that $1 that we're spending on this is going to be taken away from some other program somewhere else.

Mr. DAVIS. OK, thank you very much. I think that puts it in perspective, what we're talking about. I know when I was in local government, we always tended to just put on the bill the Federal Government sent us as just an additional bill, I'm not suggesting you do that. [Laughter.]

But it does bring home. What is the problem with State mandates, Mr. Connolly?

Mr. CONNOLLY. I am so glad you asked, Congressman Davis. [Laughter.]

Mr. DAVIS. This was not rehearsed, by the way.

Mr. CONNOLLY. I would say that the State mandates, for our county including education, would actually exceed the Federal burden. We think that if a State paid its bills or lifted its mandates, we could probably reduce our tax rate another 20 cents or so.

Mr. DAVIS. So if 20 percent of your budget is dictated but unfunded from the Federal Government, another 20—that makes you basically a tax collector.

Mr. CONNOLLY. Yes, in many ways, that's right. [Laughter.]

I can give you even one little example, and I know with respect to Federal incarceration, it does apply to States sometimes. But in the Commonwealth of Virginia, for example, in Fairfax County, for us to incarcerate a prisoner costs $125 a day. And once someone is convicted of a State crime, the State takes its time about picking that prisoner up and taking them to a State penal institution, and meanwhile the State only reimburses us $14 a day. That's called an outright unfunded mandate.

Mr. DAVIS. Pretty good deal.

Mr. Kyle, let me ask, one of the problems with UMRA is that it allows for death by 1,000 cuts. If you are underneath the review threshold, you can have an unfunded mandate, hundreds of them that go down to State and local governments, but they don't total enough, any one by itself, to be subject to the review that we would get under the act.

Should we look at the threshold? Should the law require a review of the compounding cost of multiple mandates on State and local governments?

Mr. KYLE. Yes, most definitely, Mr. Chairman. And to also piggyback on what Mr. Connolly was saying, we reflect some of that also with the Medicaid program through States, where we are required—in Lake County, IL, we run Winchester House, which is primarily a senior facility, a nursing home if you will. With the various cuts in Medicaid, the difference in the funding that Medicaid provides is quite inadequate in what we are able to provide as far as quality health care. So there is a major gap in those services.

However, we are required by law to provide adequate quality health care and medical services to those individuals. So there is a great gap of difference between the appropriations and the budgeted amount.

Mr. DAVIS. Mr. Hurson, let me ask you a question, and you can include your answer to that. Medicaid is just killing the Virginia budget, it's forcing them to force more unfunded mandates on the States as they pay for this, which is probably the largest—it's partially funded, but as you know, the impact on State government, what's happening in Maryland with that?

Mr. HURSON. Medicaid is the Pac-Man of State budgets. It is the thing that is absolutely eating away at every State budget. It is in many States now becoming the largest expense, even over education. A lot that is driving that is mandates from the Federal Government. It is not a program, people act like it's a partnership that we can choose to participate in. Not any more. Medicaid is for many States the sole thing that takes care of many of our uninsured.

So Medicaid is a major expense at the State level. With requirements that we recently got in the Medicare Part D program to fund

a lot of the eligibility determinations for Medicare Part D, that is in and of itself a huge expense for States, that is again an unfunded mandate.

Just to respond quickly to your other question, I would applaud the chairman's call for OMB to really aggregate all of those unfunded mandates that never meet the threshold. Because altogether, they cause enormous impacts upon the States. I think that's an excellent suggestion to try to aggregate all the ones that don't reach up to the threshold, because they have impacts nonetheless, even though they don't pass the threshold.

Mr. DAVIS. Thank you. There was in fact in the Medicare Part C and D that we—there was a huge clawback provision. I don't think Members were even aware of it. I appreciate your raising that.

Mr. HURSON. Right. The clawback provision is the first of its kind, where the States are actually going to be paying for Federal programs.

Mr. DAVIS. It's how we hold the costs down and look tough to our Members trying to sell it.

Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. Thank you all for your testimony. I also want to welcome my old friend Gerry Connolly. As he said, we worked many years together on the Senate Foreign Relations Committee staff. Now he's doing a great job over in Fairfax County.

Let me just ask a question of Mr. Hurson, actually Chairman Davis asked a question regarding Medicaid. My question was, as you probably know, the President has a proposal that is in formation that would essentially result in a $45 billion reduction over 10 years in Medicaid payments to the States. You referenced that in your testimony.

Just taking our State of Maryland as an example, what impact would that have on Maryland budget, the decisions that have to be made in the Maryland legislature?

Mr. HURSON. It's going to have a huge effect, Congressman. Just to give you a small example, one of the things that's in the President's proposal is that they would start limiting what are called sort of indirect governmental transfers. We are facing in our State, in order just to keep our budget balanced, a massive cut in nursing home funding. One of the proposals that's been put on the table by folks prior to the President's proposal was for us to do a provider tax, which 30 other States actually do.

Well, let me tell you, we've taken it off the table as a way to solve this problem, because frankly, because of the President's budget cuts. We see that direction of cutting back on Medicaid a direct impact upon States, where we are going to have to fill in the gaps. We can't leave people who are at 45 percent of the Federal poverty level on eligibility in our State in the streets.

We are going to have to find a way to pay for that out of State dollars.

Mr. VAN HOLLEN. Right. Given the fact, I don't know what the exact percentage is, but a great amount of the Medicaid budget, as we know, goes to people who are in nursing homes, in some cases people who spend down in order to become eligible for Medicaid.

There has been discussion, clearly from the State perspective, I can understand this, about whether or not some of that spending more properly belongs in the Federal Medicare program. Could you comment on that from a policy point of view, not just as cost shifting point of view?

Mr. HURSON. I think the States and the Federal Government at some point have to renegotiate our partnership on health care. Part of that renegotiation is going to be Medicare and Medicaid. But frankly, most of the elderly costs in this country are in the final stages of life, which often are taking place in nursing homes. The theory behind Medicare was that would be a Federal responsibility. Frankly, we all know that in fact, that has shifted to a Medicaid program, where people spend down and now it is frankly a State and Federal partnership. If we are ever going to solve the problem on the elderly in nursing homes, we are going to have to figure out a new relationship between the Federal and State governments. That is just inevitable.

Mr. VAN HOLLEN. Thank you, and thank you, Mr. Chairman. I'm going to apologize, I'm already late to a meeting. Thank you all for your testimony.

Mr. TURNER [presiding]. Thank you, Mr. Van Hollen. We appreciate all your testimony today on this important issue and the insight that you bring to the issue of unfunded mandates.

One of the things we discussed with the last panel was the issue that under UMRA, there of course are estimates as to whether an action meets the threshold and/or whether or not an action would result in moneys that assist in the implementation. But I'm fascinated with the comparison of the actual experience and the estimates. We have the National Associations of Counties' estimation of what the financial impacts are.

And I'm wondering two things. One, do State and local governments have the ability to, on a retrospective basis, quantify the costs associated with complying with the mandates that would be useful information on the Federal level. And two, at this point, do you have a mechanism with which to share that information other than obviously issuing the reports and coming to Congress, is there in the process a—we had the CBO statement of, well, this information is helpful to us as we estimate the future mandates. But are you really consulted, is there an opportunity for you to use information that you learn when a mandate's cost are actually being quantified, so that it will help you in the process in the future.

Mr. KYLE. Thank you, Mr. Chairman. The National Association of Counties selected 30 counties from among those who responded as being representative of an entire Nation demographically, regionally as well as by population. These counties responded to an average of 6 out of 10 mandates which were listed in the survey. Their responses totaled over $1.5 billion, or $137 per person.

Projecting the per capita figure across the entire Nation results in a figure which comes to $40 billion. Since this figure is based on an average of only six mandates per county, the actual costs could very well be a lot higher.

Mr. CONNOLLY. Mr. Turner, if I may, as we entered into the record, the snapshot survey which was generated by your committee, in collaboration with NACo, I would hope working with your

new subcommittee we and other local governments could perhaps be more systematic at collecting data comprehensively about the cost of unfunded mandates. That is going to contribute to the dialog, hopefully, in this body, and in our State legislatures, about the impact of well-intentioned but unfunded mandates on our local taxpayers. Because when the cost burden is shifted, inevitably it filters down to the local government, because at the local government, we don't have a choice. We have to provide the services, we have to meet the mandates.

As Mayor Cornett indicated, we either have to then offset that by cutting other services or raising taxes, neither of which is very palatable to our constituents or to us as policymakers.

Mr. HURSON. Mr. Chairman, you will find on page 5 of our Mandate Monitor a listing of our estimate of what these unfunded mandates have done in terms of the $51 billion figure that we indicated. It's our sense as an organization that CBO works very well with groups like ours to do some estimates on what these mandates cost. And the collaborative process with CBO is working well in terms of that process.

Obviously, that could be enhanced with an equal amount of cooperation with OMB. I think that's something that would be beneficial if we could work cooperatively with CBO and OMB to try to create a three-way discussion, if you will, about where these mandates are leading us and what their impacts are going to be. We do our best in trying to estimate it and CBO has been very helpful.

Mayor CORNETT. We have not actually conducted a study to determine the total cost of the mandates. It's obviously in the billions of dollars. There is little consistency, when you talk about city governments, what's unfunded, what's funded. Sometimes I think some of these matching programs almost become mandates by the time they get to us and our citizens imply to us that they definitely want us to fund it, they don't want to leave money on the table.

My colleague, Mayor Daley of Chicago, is currently starting a grassroots campaign to try to determine a lot of these numbers that we can come up with and perhaps provide a more comprehensive figure for you in the future.

Mr. TURNER. I appreciate your efforts to clarify these, because having served as a mayor, one of the things I'm aware of is that the actual application can be much different than the science of estimating. Also when you get into the process of judicial interpretation of the requirements and how they are imposed, and what ultimately you are required to do. So it's important for us to continue the discussion not only in the process that we currently have, but in the look-back as to how they are being applied to your individual communities.

Ms. Norton.

Ms. NORTON. Thank you very much, Mr. Chairman.

Obviously everyone up here represents the same people you do, and we are inherently sympathetic with your testimony. I am more sympathetic than most, because my city has all of the unfunded mandates that you are talking about and then a colossal one. The District of Columbia is a city that is treated as a State. So the Federal Government claims to be our "State" when it wants to be, but in fact makes us pay for State fundings that would send all of you

under if you had to pay for the State roads and the State costs, for example, of special education, imagine where you would be left.

So obviously I'm very much in sympathy with what you're saying, indeed, I have put into the record a statement indicating that when you have the peculiar unfunded mandates that we have as a city-state plus the unfunded mandates that we've heard about today there is a huge problem. To the credit of the chairman of this committee, and every member of the House of this region who are co-sponsoring a bill to correct the structural imbalance that the District of Columbia labors under because of the unfunded mandate that comes from being a State costs, in hearing your testimony, I can't help but believe I'm hearing you talk back to the Federal Government or at least to our statute, like ships passing in the night.

I think it begins with the UMRA having over-promised. I remember it, I was in Congress when with great fanfare the Contract on America came forward and said, this is the end, we are here now, this is the end of unfunded mandates. Never has a piece of legislation been passed with more tongues in cheeks than this legislation was. We are here, to the credit of the chairman, to discuss what can be done about it.

I have a question about what can be done about it. Because I'm really very doubtful about what can be done about it. All of you and your predecessors have testified that UMRA has done the most to bring these costs to the attention of us all. Hey, really? I don't think that it's mattered that these costs were brought to the attention of us all, if that's what it was meant to do, because I haven't seen a lot of response, if that was the point of the legislation.

There seems to be a problem at two levels. I have a question about where you think the problem is most serious. One has to do with testimony that law is essentially observed in the breach, that we don't even do what we say we would do under the law. The other seems to be a difference between States and local governments on the definition of an unfunded mandate. This is very, very dangerous.

I could see State and local governments actually opposing entire Federal laws that they really are for because they know it would be in the best interest of their people to have it. I can see people saying, let's say we were enacting the Safe Drinking Water Act for the first time saying, oh, no, we don't want it. Whatever happens, let the chips fall where they may, we know that we are going to get all these costs as a result of it. Somehow or the other, we have to come to an understanding.

Mayor Cornett, in your testimony for example, you very honestly bring forward what the GAO has found. The GAO is considered by Members of Congress a very reliable and objective source. You cite that the GAO found that only, that of the bills passed in 2001 and 2002, only five contained costly mandates. And all of these were, the report found that only 5 contained, of the 377 statutes, only 5 contained costly mandates, and all of these were mandates imposed on the private sector. If the chairman was here, I would ask him where is the private sector, because they really have something to complain about, according to the GAO, apparently.

Then they found that in 1996 to 2000, there were 18 costly mandates that the Congressional Budget Office had identified as costly mandates. Two were imposed on State and local governments and 16 on the private sector. Well, you see, I'm confused, when I see the GAO saying this, and even in Mr. Cornett's testimony he goes on to complain about unfunded mandates after citing the GAO findings, are we dealing here with, as I began this question, two ships sailing through the night, that essentially this law does not work because it is not dealing with what you are talking about? Do you accept, in other words, the GAO evaluation that if you look at what the law says, literally, maybe so, but if you look at where the costs really are, we need some change in the law?

Mayor CORNETT. Ms. Norton, I think part of the answer is in the environmental issues, it seems to me that the Federal Government tries to take a cookie cutter approach and pretend that every city's water supply and the source of every city's water supply is similar or exact. And it's not. It forces cities like Oklahoma City, which has a very good water supply, to put in regulations that shouldn't be necessary. Those costs are directly attributed on to our citizens.

I think that's an example of the type of governmental control that is best left to the local government, because they can deal with their specific water needs.

Ms. NORTON. You seem to be making an argument against Federal regulation of water. That's what I fear here. Because I'm not sure you really mean that. I understand what you mean about unfunded mandates. But I'm not sure you would mean that if regulations were required that would make the water for pregnant women safe, for example, that shouldn't be done.

I'm trying to figure out, given what the GAO says, and their word isn't gospel, but given what they say, I'm trying to figure out whether we need to look at a more realistic definition of an unfunded mandate, given the experience we have had with the law or whether you believe that even given the law as it stands, the Congress is imposing on you unfunded mandates.

Mr. CONNOLLY. Ms. Norton, if I may, I take your point. I think UMRA was a good start, because we at least got, in a big way, really, the camel's nose under the tent in the discussion about what about the unfunded mandate here. I think the dilemma is one of intentions versus impacts. Let's stipulate that the intentions are almost always noble, the goals are very desirable. But the analysis feeding those intentions in the legislative process about impacts, what will it cost and who will bear those costs unfortunately is far less perfected than are the intentions.

I think if we can move in an evolutionary way, using UMRA as a baseline and as a start to tighten up a sense of obligation for those who propose with good intentions, all right, but where is your analysis on the impacts, so that we understand what the State of Maryland, the State of Virginia, the State of Oklahoma, the State of Illinois, would have to bear in their localities in order to implement this, and what is our obligation as the Federal Government if we are going to require those noble standards, regulatory intent, whatever it may be. I think that would be a major step in the right direction.

But I think UMRA is a good base from which to build.

Ms. NORTON. So you see us, just to summarize, we started, the first round was to get the costs up front. The second round, or to be using that information to at least close some of the loopholes or narrow the law somewhat, so we see how much of that works, all in an evolutionary way.

Mr. HURSON. I think you put your finger on it. It's the issue of definitions. It's the issue of what is defined as a mandate. That is really the second phase of trying to really move UMRA, I think, in the right direction. This is really about, on so many levels, environment, health care, transportation, the relationship and the partnership between the Federal Government and the State and local governments. Understanding the contract and the partnership between us means understanding the definitions. That's where I think UMRA needs improvement. That is, what is a mandate, what is an unfunded mandate, and understanding—and you said it—definitions is key to that.

Mr. CONNOLLY. Ms. Norton, if I may, I want to go back to Mr. Waxman's definition of an unfunded mandate. While I agree with Mr. Hurson that's important, I don't know that it's rocket science. If there is a new standard, a new regulation or a new metric that I have to meet that you, the Federal Government, require of me, and you don't fully fund the implementation of that, as far as I am concerned the delta between what you fund and what I have to fund is an unfunded mandate.

Mr. KYLE. Also if I might add, Congresswoman Norton, the dilemma, as you so eloquently put it, the loophole that we find here is that most of these mandates were enacted prior to UMRA. The Help America Vote Act, for example, enforces a Constitutional right, so it falls under an explicit exclusion from the definition of a mandate under UMRA. That's the dilemma that we find ourselves in.

Ms. NORTON. I understand what you're saying, given where we are, how dissatisfied you are with the law, it seems to me to go ex post facto, back in fact, to catch up might be impossible. If we could get some tightening going forward, it seems to me we would be making some progress.

Mayor CORNETT. If there is a change in legislation or regulation, if it's your idea, you pay for it, if it's our idea, we pay for it. [Laughter.]

Ms. NORTON. With that, I really ought to go, Mr. Chairman. [Laughter.]

Mr. DAVIS [presiding]. Mr. Shays.

Mr. SHAYS. Thank you, Mr. Chairman. Just one question. When the executive branch comes in and tells us they are reaching out to State, local, county and local governments for rulemaking issues, I wonder if you can share with us instances in which you are aware where agencies are reaching out to State and local governments to consult in early stages of drafting the rules? Can you give me an example or two of where this is happening?

Mr. DAVIS. Would the gentleman yield? Are you asking basically if they have been consulted, or maybe your groups, maybe you can have a minute to confer with groups and see if in fact the executive branch is reaching out.

Mr. SHAYS. So if you don't have an answer now, we would like one for the record.

Mr. KYLE. I can say on behalf of the National Association of Counties, for the most part we have not been consulted in these areas.

Mr. DAVIS. If you're not consulted, you end up paying for it.

Mr. KYLE. Correct.

Mr. DAVIS. If you're not in the room, that's where it ends up going.

Mr. HURSON. On behalf of the State legislatures, I would say that in terms of homeland security, we have had an excellent relationship with that department in terms of them reaching out, in terms of rulemaking. We have had a fairly good situation with DHS and with EPA, at least this is what the staff is telling me, not reaching out to me down in Annapolis, but they are reaching out to the staff here in Washington.

Mr. CONNOLLY. Mr. Shays, I would agree, especially in the homeland security relationship that has, there has been a lot of consultation in part because Congress was wise enough to create a national capital region coordinator who has facilitated a lot of input from us in the National Capital Region. But you know, in other areas, frankly, the relationship is one of regulation, here are the regulations you must comply with. I don't think that the mentality is always very cognizant of, and here are the costs that go along with that regulation. That is your problem. I think that is kind of the mentality that all too often occurs.

If we could shift that mentality, in what your committee is about today, if we could shift that mentality so that there actually is the requirement of the cognizance of the costs, I was saying earlier, I think the game here is intention versus impact. We can stipulate the attorney is almost always noble and good, but the impacts can be quite severe. You are asking local taxpayers all too often to bear that burden of your good intentions.

As the Mayor pointed out, if it's your idea, you pay for it, and if it's our idea we'll pay for it.

Mr. SHAYS. Thank you, Mr. Chairman.

Mayor CORNETT. The EPA has some level of communication with the U.S. Conference of Mayors, and mayors in general. We don't feel like it is enough, we feel like it should be a higher level of communication.

Mr. SHAYS. Thank you.

Mr. DAVIS. Thank you. All that will be part of it as we move to the next stage. This will not be our last hearing on this. I think Mr. Turner has expressed a willingness to try to pursue this at the subcommittee level, and we will at the State level.

This has been very helpful to us and we appreciate all of you coming forward with your testimony today and answering our questions on behalf of each of you and your organizations. We thank you.

Does anybody want to add anything?

Mr. CONNOLLY. Thank you for your leadership, Mr. Davis, in this issue.

Mayor CORNETT. I would also like to thank you, Mr. Davis. The only thing I would add is that these costs are really filtering down

to our citizens in some very basic services that are not being provided at the level they need to be provided. Thank you for your time.

Mr. DAVIS. Thank you very much. Hearing is adjourned.

[Whereupon, at 4:10 p.m., the committee was adjourned.]

[The prepared statements of Hon. Elijah E. Cummings and Hon. Eleanor Holmes Norton and additional information submitted for the hearing record follow:]

Opening Statement

Representative Elijah E. Cummings, D-Maryland

Hearing on "Is Uncle Sam Still Passing the Buck? The Burden of Unfunded Mandates on State, County, and City Government"

Committee on Government Reform
U.S. House of Representatives
109th Congress

March 8, 2005, at 2 p.m. in 2154 Rayburn

Mr. Chairman,

Thank you for calling this vitally important hearing on unfunded mandates.

As we begin our work in the 109th Congress, one of the most pressing issues before us is the need to better address the problem of the federal government burdening State and local governments with federal mandates, by failing to provide the necessary funding to cover the costs of compliance.

In very real terms, the consequences of the federal government imposing unfunded mandates reverberate all the way to the center of some our nation's most fundamental promises, including educating our children, protecting our right to vote, and securing our homeland.

However, with record deficits, State and local governments often do not have the resources to carry the financial burden that the federal government should be bearing.

To address this problem, Congress passed the Unfunded Mandates Reform Act (UMRA) of 1995. However, in recent years, it has become apparent that the UMRA has some troubling loopholes and fails to address some of the most glaring examples of unfunded mandates.

One in particular, the No Child Left Behind (NCLB) Act, is not considered by the UMRA as a mandate. This is because legislation that requires compliance, as a condition for federal assistance does not fall within the scope of a mandate as defined by the UMRA.

I would argue that by requiring compliance as a condition for federal assistance, NCLB does constitute in itself a de facto federal mandate. Although State and local education entities are not technically required to comply with NCLB, they are in effect compelled to do so.

I say this because if States and local governments choose to opt out of the law, they are forced to give up desperately needed federal education funds.

Just as troubling is the fact that the federal government has failed to provide the necessary funding to State and local entities to meet the administrative and proficiency requirements under NCLB.

The funding shortfall for NCLB in 2005 is approximately $9.4 billion below its authorized level, leaving behind 2.4 million students. With that, some may justifiably question the federal government's commitment to closing the achievement gap, while heaping record accountability requirements on State and local school districts.

We owe these students more than rhetoric, but a tangible opportunity to succeed in life through a quality education.

NCLB is but one of many examples of unfunded mandates; others include HAVA, IDEA, and the Real ID Act, just to name a few.

As such, I believe the definition of a mandate should be expanded in scope and that the UMRA should provide a meaningful recourse to State and local governments when the federal government imposes unreasonable unfunded requirements.

We must also ensure that the federal government respects the authority of State and local governments wherever possible to spend their revenues suited to local needs.

What makes America great is not just its praiseworthy promises, for any nation can pledge even the most laudable ends.

Mr. Chairman, what separates America is that we use our resources to make good on our word to uphold the values we purport to believe, and to advance policy goals that make our nation more equitable, accessible, and just.

I yield back the balance of my time.

ELEANOR HOLMES NORTON
DISTRICT OF COLUMBIA

SELECT COMMITTEE ON HOMELAND SECURITY

SUBCOMMITTEES:
EMERGENCY PREPAREDNESS AND RESPONSE

INTELLIGENCE AND COUNTERTERRORISM

Congress of the United States
House of Representatives
Washington, D.C. 20515

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

SUBCOMMITTEES:
AVIATION

ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND EMERGENCY MANAGEMENT

COMMITTEE ON GOVERNMENT REFORM*

SUBCOMMITTEES:
CIVIL SERVICE AND AGENCY REORGANIZATION

CRIMINAL JUSTICE, DRUG POLICY AND HUMAN RESOURCES

*COVERS D.C. ISSUES

March 8, 2005

Ranking Member Henry A. Waxman
Committee on Government Reform
U.S. House of Representatives
B350-A Rayburn House Office Building
Washington, D.C. 20515

Dear Ranking Member Waxman:

I was not able to attend the House Government Reform Full Committee Hearing entitled, "Is Uncle Sam Still Passing the Buck? A 10-Year Retrospective on the Unfunded Mandates Reform Act of 1995" scheduled for Tuesday, March 8, 2005 at 2 PM because of a members' retreat for the House Committee on Homeland Security. I ask that this letter and the enclosed statement be entered into the record.

Sincerely,

Eleanor Holmes Norton

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ELEANOR HOLMES NORTON
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*COVERS D.C. ISSUES

Statement of Congresswoman Eleanor Holmes Norton at the Committee on Government Reform Oversight Hearing entitled, "Is Uncle Sam Still Passing the Buck? The Burden of Unfunded Mandates on State, County, and City Governments." Tuesday, March 8, 2005 at 2:00 PM

I want to thank Chairman Davis and Ranking Member Waxman for holding today's hearing on unfunded federal mandates. I want to make a particular point about the impact of federal unfunded mandates on the economy of the District of Columbia.

Although it is a major city, the District does not have the financial support of a greater, encompassing state. Instead, the Federal government is the District's state. Nevertheless, the federal government requires the District to perform and pay for functions that in all other jurisdictions are state functions supported by state-wide revenue, without providing the necessary funding to carry out these programs. Because these are indispensable functions, the unfunded mandates on the District are uniquely onerous and have resulted in an annual structural imbalance.

For example, the District was required by federal law to maintain state prison and court systems, including a system that houses felons for the duration of their sentences. The federal government has recognized that these were state functions imposed by federal law on the District without providing the necessary funding to support these functions. When the burden finally resulted in a fiscal crisis in the 1990's, the federal government assumed responsibility for both the prison and court systems and began providing state-like assistance, relieving the District of these unfunded federal mandates. However, many state functions remain as unfunded federal mandates. Among the most costly are special education costs. The District pays both state and local special education costs, including unfunded federally mandated state responsibilities for Medicaid, mental health services, and transportation state costs, all financed in part by local District dollars rather than federal state-like assistance.

To address these unfunded mandates I introduced a bipartisan bill last Congress cosponsored by members of the regional delegation, including Chairman Davis, and we will shortly be reintroducing this bill again this session. I hope that testimony from this hearing will enlighten the Congress about the unfunded mandates that are responsible for the District's structural imbalance and that passage of our bill will be one result.

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TESTIMONY OF GERALD W. HYLAND

FAIRFAX COUNTY BOARD OF SUPERVISORS

MOUNT VERNON DISTRICT

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

ON THE BURDEN ON COUNTIES OF UNFUNDED MANDATES

ON BEHALF OF THE
NATIONAL ASSOCIATION OF COUNTIES

MARCH 8, 2005
WASHINGTON, D.C.

****

March 8, 2005

SUBMITTED BY

Fairfax County Board of Supervisors
Mount Vernon District
2511 Parkers Lane
Alexandria, VA 22306
(703) 780-7518

and

National Association of Counties
440 First Street, N.W.
Washington, D.C. 20001
(202) 393-6226

Mr. Chairman, Ranking Member Waxman, and members of the Committee on Government Reform, thank you for the opportunity to participate in this hearing and to testify on the burden on counties of unfunded mandates. My name is Gerry Hyland. I serve as the Mount Vernon District Supervisor on the Fairfax County Board of Supervisors and am a member of the Board of Directors of the National Association of Counties.

Introduction

Although it does not seem that long to either of us, it has been ten years since you and I celebrated the passage of the Unfunded Mandates Reform Act of 1995. Earlier this year, we discussed the need for a comprehensive discussion on the tenth anniversary of UMRA. We thank you for scheduling this hearing today and for your commitment to use this hearing as the beginning, not the end, of your work on UMRA. We also applaud your decision to appoint a new subcommittee on Federalism and the Census and your selection of Representative Michael Turner as Chairman. We know that he brings much to the role from his experience as the former mayor of Dayton, Ohio, and look forward to working with him.

Among the things that we discussed in our conversation earlier this year, Mr. Chairman, was the need for more information on the impact of unfunded mandates. It is unfortunate that ten years after the enactment of the Unfunded Mandates Reform Act there is no comprehensive study of the costs that federal mandates impose on states, counties and cities across the nation. The role of the Congressional Budget Office is limited to analyzing only a subset of all legislation that contains mandates as it goes through the process of becoming law; federal agencies are only required to estimate the anticipated costs of a subset of significant regulatory actions. No entity is responsible under UMRA for reviewing the costs of federal mandates after they have been imposed. The Advisory Commission on Intergovernmental Relations, before federal funding losses caused it to be disbanded in 1996, issued a report in 1994 noting, "the full cost of federally induced state and local expenditures is unknown, in part because no government agency or individual has developed a comprehensive tabulation of such costs." It further noted, "neither the Congress nor the Executive Branch has devoted the resources necessary to inventory, measure and assess the full universe of federally induced costs." Sadly, this commentary is still true today and, in a poignant demonstration of the lack of resources devoted to this problem, the ACIR itself was unfunded and disbanded in 1996.

Part of the reason that we have no comprehensive picture of the costs of unfunded mandates is that they are very difficult to compile. Hundreds of federal laws impose mandates on state and local government. State and local governments take different approaches in complying with mandates and their expenses may vary widely from month to month and from year to year. Perhaps the most important reason that the costs of unfunded mandates are difficult to estimate is that costs are spread throughout the government budget and are not accounted for separately within the budgets of state and local governments. County payroll records reflect the number of engineers, clerks or caseworkers employed by the county. They do not distinguish between the time these

individuals spend implementing federal mandates and the time spent on activities required by the county Board of Supervisors. Once they are implemented, mandates become accepted as fact and are marbled throughout the state or county budget.

Regardless of these challenges, we all recognize that estimates of the burden on states and local governments are critical to understanding federal mandates. I would suggest that the committee prioritize reinstating the Advisory Commission on Intergovernmental Relations or designating another entity to continue their unfinished work in this area.

In the meantime, it is important that we gather what information we can to better understand the cost burden on states and local governments. For this reason, you and I discussed the need for an inquiry into the current costs that counties are facing to comply with federal mandates. NACo worked with your staff to develop a rapid response survey that was conducted over a recent two-week period. Counties were asked to provide cost estimates for the following federal mandates:

1. Clean Air Act
2. Clean Water Act
3. Drinking Water
4. Resource Conservation and Recovery Act
5. Americans With Disabilities Act
6. Help America Vote Act
7. Endangered Species Act
8. Health Insurance Portability and Accountability Act
9. Uncompensated Health Care
10. Incarceration of Criminal Illegal Aliens

NACo asked county personnel to devote a great deal of time and effort to collecting, analyzing and providing the information for this report. NACo gave them only two weeks to do their work and provided no technical assistance in the effort – and certainly no funding. NACo might even be accused of imposing its own unfunded mandate on counties.

Sixty counties rose to the challenge and estimated the unfunded federal mandate burden for at least a few of the mandates facing their counties. I ask that a copy of NACo's report be included in the record of this hearing and would like to share with you a few of the results.

1. Clean Air Act

   Regulatory mandates under the Clean Air Act are a significant burden for America's counties. Twenty-one counties provided information on costs associated with the Clean Air Act. Colusa County, California, estimated that the three-year cost for their county is roughly $100,000 per year. $100,000 may not seem like much, but in Colusa County, which has a population of less than 20,000, it is the equivalent of a $60.98 tax burden on a family of four.

2. Clean Water Act

   Regulatory mandates associated with the Clean Water Act also pose a burden for counties. Twenty seven counties provided costs for the Clean Water Act. Marion County, Florida, reported a one-year cost of more than $59 million. Given the size of the county population, this is the equivalent of $990.54 for a family of four.

3. Drinking Water

   Counties were asked to provide estimated costs associated with the Safe Drinking Water Act and implementing provisions of the Bioterrorism Act related to securing drinking water supplies. Clark County, Nevada, was among 21 counties that provided estimates; their estimate of $20.5 million per year represents a tax burden equivalent to $156.03 for a family of four.

4. Resource Conservation and Recovery Act

   Counties reported significant costs associated with disposal and collection of solid and hazardous waste, Superfund sites and underground storage tanks. Brevard County, Florida, reported an enormous annual unfunded liability. The estimated cost to the taxpayers of the county each year was $418.51 per family of four.

5. Americans With Disabilities Act

   This question drew the largest number of responses to the survey. Costs ranged widely; the highest was from Hillsborough County, Florida, which is spending $6.5 million each year, or the equivalent of $73.08 per family of four.

6. Help America Vote Act

   Costs for the Help America Vote Act also varied widely. Chester County, Pennsylvania, spent more than $8 million of its local tax revenues on HAVA compliance in FY 2004. Their total three-year cost is the equivalent of $96.42 per family of four.

7. Endangered Species Act

   Twenty counties provided costs for planning and mitigation related to the Endangered Species Act. Kitsap County, Washington, spent more than $1 million annually, or $65.70 per family of four.

8. Health Insurance Portability and Accountability Act

   Thirty four counties provided data for at least one year. The highest reported cost was from Gaston County, North Carolina, which expects to spend $18.03 per family

of four in FY 2005.

9. Uncompensated Health Care

   Uncompensated health care is a tremendous burden on counties. Lee County, Florida, expects to spend an amazing $315.52 per person, or $1,262.06 per family of four, in uncompensated health care costs in FY 2005. Several counties reported multimillion dollar gaps over the three-year period.

10. Incarceration of Criminal Illegal Aliens

    The last mandate that NACo asked counties about was the uncompensated cost for incarceration of criminal illegal aliens not reimbursed by the State Criminal Alien Assistance Program. In Kern County, California, a taxpaying family of four is responsible for an unbelievable $252.42 over three years for the costs of incarcerating criminal illegal aliens. While the problem of illegal immigration is generally associated with border counties, Douglas County, Nebraska, provided figures indicating that between FY 2003 and FY 2004, its residents paid the equivalent of $75.68 per family of four.

NACo did not survey the costs of education mandates because counties in most states are not responsible for funding education. However, I would submit to you that the most burdensome of Federal unfunded mandates, the No Child Left Behind Act (NCLB), is going to leave local governments the most left behind in terms of incurring the cost. The new administrative and fiscal burdens placed on local schools to implement this major expansion of federal authority over state and local education programs is already over $112 million over the last five years. To date Fairfax County has only received $18 million from the Federal Government to offset this cost. This amount is likely to double or even triple as benchmarks raise and sanctions increase.

NACo selected 30 counties from among the responses received as most indicative of the results and most representative of all counties by demographics, by geography and by population. The unfunded costs they reported from their county own revenues are a snapshot of what the costs may be like for many other similar counties. These counties provided information on an average of six mandates for which costs were identifiable within their county budget. The average per capita cost for those six mandates was $137 per person, or $548 for a family of four. NACo estimates that if this per capita cost were averaged across the entire nation, the unfunded burden on counties of this limited glimpse into unfunded mandates would be more than $40 billion. Again, this is for an average of just six mandates for which costs were quantifiable; a comprehensive review would certainly run into the hundreds of billions, if not trillions of dollars.

Fairfax County initiated a program at the end of 2003 to serve as the foundation for analysis and comment on what mandates the County is complying with and how much it is costing the County. In FY 04 Fairfax County spent approximately $543.4 million dollars to comply with Federal mandates. This was approximately 21 percent of

the county's General Fund. After Fairfax County paid $543.3 million dollars, the Federal government only reimbursed $148 million, leaving our taxpayers a bill of $395.3 million, or 73 percent of the cost. I have included some examples of Federal mandates and the net cost to Fairfax County to comply with them:

Major expenditures included:

- $21 million for Public Safety services in the Police, Sheriff and Fire and Rescue Department mandates
- $72 million in Human Services mandates, $129 million with Housing programs
- $47 million in Employee Administration – including FICA and Retirement mandates
- $125 million for mandates related to the operation of Metrobus/Metrorail
- $72 million for mandates related to Wastewater operations
- $13.7 million for the Clean Air Act
- $3.3 million for the Resource Conservation and Recovery Act
- $2.5 million for the Americans with Disabilities Act (ADA)
- Over $1 million for the Health Insurance Portability and Accountability Act (HIPPA)
- $583,612 for the Clean Water Act
- $194,092 for the Help America Vote Act

Of the net $395.3 million figure, we reported only 5% of that total, or less than $22 million, in our response to the NACo survey. Because the survey was limited to ten specific mandates, it did not include the vast majority of the unfunded costs that Fairfax County had identified. If all counties who responded to the NACo survey only provided estimates for 5% of their total federally mandated costs, the $40 billion estimate could rapidly climb to as much as $800 billion.

Mr. Chairman, I would not begin to suggest that Fairfax County is representative of all counties across the nation. Other counties struggle with a different mix of mandates, have proportionately higher or lower burden for safeguarding endangered species, cleaning up Superfund sites or updating their medical billing software or voting equipment. They may have developed different approaches to complying with the same mandates. However, I would consider it likely that many counties shoulder the burden of far more unfunded mandates than they were able to include in this report.

Last year, the Congress added to the burden on counties – particularly our colleagues in rural counties – by imposing new standards for the maintenance and security of vital records as part of the intelligence reform bill. Needless to say, the fiscal condition of counties would be worsened if Congress added to this burden by adopting any of several mandates that are being considered in the 109th Congress. The following are among some of the costly mandates that have been proposed:

- Several bills have been introduced to preempt county taxes on telecommunications services.
- A recent report from the Joint Committee on Taxation suggested bolstering the federal treasury through any of a variety of unfunded mandates on counties, ranging from requiring withholding of nonwage payments to denying the ability to refinance tax-exempt bonds.

- One version of last year's energy bill contained a safe harbor provision for producers of methyl tertiary butyl ether (MTBE). It would have imposed a multi-billion-dollar mandate on counties by preventing them from recouping pollution cleanup costs through legal action.
- The Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act) would compel local governments to enforce federal civil immigration law and withdraw funding for the State Criminal Alien Assistance Program from counties that do not accept this coercion.
- Several bills have been introduced to increase the unfunded mandate burden on counties by imposing a one-size-fits-all mandate that all elections be conducted using specific technology with a voter-verified paper ballot.

We hope that, in addition to working with us to identify possible improvements to UMRA, you will also oppose these and other unfunded mandates on state and local governments in the 109th Congress.

That concludes my testimony. I thank you for the opportunity to discuss this important issue and look forward to any questions that you and other members of the committee may have.

American Petroleum Institute

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Red Cavaney
President

June 21, 2000

The Honorable Henry A. Waxman
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Waxman:

Thank you for your letter of May 31 inquiring about MTBE demand over the 1986-1991 period. Some time was needed to thoroughly assess the data you provided.

We have obtained information from the Energy Information Administration that suggests that the MTBE data in your letter is inclusive of U.S. MTBE exports and also that the 1991 data point is incorrect. Adjusting your data for exports and correcting the 1991 data point gives the following estimates of MTBE demand over the period of interest.[1]

1986	54,400	barrels/day
1987	63,000	barrels/day
1988	68,200	barrels/day
1989	72,800	barrels/day
1990	84,000	barrels/day
1991	104,300	barrels/day

While these estimates appear to be the most accurate data available, they are not officially published statistics, and the amount of uncertainty associated with them is likely to be large.

Based on this data, the average U.S. MTBE demand over the years 1986 -1991 is estimated to be 74,450 barrels per day. According to the USDOE/EIA[2], U.S. MTBE demand in 1998 was roughly 235,000 barrels per day. Hence, it is estimated that MTBE consumption would need to be reduced by 160,550 barrels per day in order to bring consumption down to the average of 1986 -1991 use levels (based on the1998 MTBE demand level).

[1] DeWitt and Company, Houston, TX.
[2] USDOE/ EIA, personal communication.

An equal opportunity employer

For purposes of comparison, the California Air Resources Board[3] (CARB) also estimated MTBE demand over the period in question. Their estimates are as follows:

1986	69,498 barrels/day
1987	73,382 barrels/day
1988	75,636 barrels/day
1989	85,099 barrels/day
1990	100,481 barrels/day
1991	117,977 barrels/day.

The CARB developed these estimates by assuming that U.S. demand equals 90% of capacity.[4] Based on this data, the average U.S. MTBE demand for the years 1986-1991 is estimated to be 87,012 barrels per day. Undertaking the analogous estimation as was done above with the DeWitt data, it is estimated that MTBE consumption would need to be reduced by 147,988 barrels per day in order to bring consumption down to the average of 1986 -1991 use levels.

That the different data sources yield varying estimates of required MTBE reductions reflects, to a certain extent, the uncertainty inherent in the underlying estimates of MTBE demand over the period in question, as was noted above.

Finally, according to the USDOE/EIA[5], California MTBE demand appears to be roughly 103,022 barrels per day.

Should you have further questions, or if I can be of further assistance to you in this matter, please do not hesitate to call.

Sincerely,

Red Cavaney

[3] California Air Resources Board, Stationary Source Division, *An Overview of the Use of Oxygenates in Gasoline*, September 1998, www.ARB.CA.GOV.
[4] The estimates were also adjusted for exports.
[5] USDOE/EIA, personal communication.

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Congress of the United States
House of Representatives
Washington, DC 20515–0529

HENRY A. WAXMAN
29th District, California

Ranking Member
Committee on Government Reform

Member
Committee on Commerce
Democratic Steering Committee

May 31, 2000

Mr. Red Cavaney
President and Chief Executive Officer
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005-4070

Dear Mr. Cavaney:

As you know, Congress may soon consider legislation to significantly reduce production and use of methyl tertiary butyl ether (MTBE). I am writing to request information that will be of great assistance in this effort.

Your work with the Northeast States for Coordinated Air Use Management (NESCAUM) and the American Lung Association (ALA) has resulted in a proposal to reduce current MTBE production and use to the average level of production and use in calendar years 1986 through 1991. Although the government does not appear to maintain official records on the amounts of MTBE used during each of these years, the most accurate data available indicates that levels of MTBE use in the U.S.[1] were as follows:

1986	55,000 barrels/day
1987	65,000 barrels/day
1988	70,000 barrels/day
1989	75,000 barrels/day
1990	86,000 barrels/day
1991	82,000 barrels/day

Based on this information, it would appear that the average MTBE demand for years '86 - '91 is 72,166 barrels/day. In 1998, the U.S. used 285,000 barrels/day.[2] Therefore, the API-NESCAUM-ALA proposal would reduce MTBE production and use by almost 213,000 barrels/day. Over one-half of this amount could be achieved through implementation of

[1] DeWitt & Company, MTBE/Oxygenates/Fuels, October 31, 1996.

[2] Memorandum, Oxygenated Fuels Association, April 2000.

California's ban on MTBE, which would reduce MTBE use by 110,000 barrels/day.[3]

I request that you confirm the accuracy of these numbers, or provide the most accurate numbers available. I appreciate your immediate attention to this important issue.

Sincerely,

Henry A. Waxman
Member of Congress

[3]California Energy Commission, SUPPLY AND COST OF ALTERNATIVES TO MTBE IN GASOLINE, P300-98-013, February 1999.

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U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

June 5, 1995

Memorandum to: Members, Subcommittee on Oversight and Investigations

From: Bob Meyers, Counsel
Stephen Sayle, Counsel

Re: June 7, 1995, Hearing on Implementation of the Reformulated Gasoline Program under Title II of the 1990 Clean Air Act Amendments

On June 7, 1995, the Subcommittee will hold the sixth in a series of oversight hearings regarding implementation of the Clean Air Act Amendments of 1990 (CAAA).

The hearing will examine the Reformulated Gasoline program created by the 1990 CAAA under Title II of the Clean Air Act. A witness list for this hearing is Attachment I.

Summary:

The Reformulated Gasoline program (RFG) was established by the 1990 CAAA. The program was a legislative outgrowth of proposals to mandate alternative fuels and alternative-fueled vehicles as part of the air pollution control strategy of the Clean Air Act.

While substantial gains have been made in controlling pollution from conventionally-fueled vehicles, mobile source emissions can account for over half of volatile organic emissions (VOCs) in some ozone nonattainment areas. Moreover, certain air toxins, most notably benzene, are associated with auto emissions. The RFG program was designed to achieve significant reductions in the emission of both VOCs and air toxins.

In crafting the RFG program, Congress did not specify a precise formula for RFG, but rather established content limits and performance-based goals for the program. Thus, various fuels from different refiners and suppliers may be used as long as they meet statutory and regulatory requirements. These requirements broadly dictate a minimum oxygen requirement, a maximum benzene requirement, and a prohibition on the inclusion of heavy metals and lead. Additionally, RFG must be capable of reducing VOC and toxic emissions by 15% initially and up to 25% by the year 2000.

While an associated oxygenate program for the control of wintertime carbon monoxide (CO) was implemented in 1992, the RFG program was initiated in the nine smoggiest areas of the country starting on January 1, 1995. Additionally, several other areas of the country, most in the Northeast, have "opted in" to the program. Altogether, RFG presently represents about one-third of the domestic gasoline market.

Several issues have been raised with respect to RFG in previous years. In 1994, Congress closely examined the ability of foreign refiners to "qualify" gas as RFG. Concerns have also been expressed regarding the ability of certain fuel types to meet both RFG requirements and other broad public policy goals. Various industries and companies are in direct competition for the RFG and alternative fuels market.

At present, the following main issues have been expressed with respect to RFG:

* Price and Supply. While there were significant questions raised in 1994 regarding the ability of the fuel supply system to bring RFG to market, initial indications are that the supply of RFG has not been problematic. There is some concern, however, respecting increased prices due to RFG with an associated loss in gas mileage.

* "Opt Out." As more fully explained in the body of this memo, some areas of the country which voluntarily "opted in" the RFG program now want to return to conventional fuel supplies. EPA is presently developing a rulemaking to govern this process.

* RFG "Formula". Various arguments have been raised for and against different RFG fuels. Since the program is, in part, "performance-based" different fuels can qualify and be sold as RFG. Some have argued, however, that statutory and regulatory limits on certain RFG constituents unnecessarily restrict the type of fuels that can qualify as RFG.

* Health Effects. A new study has been released regarding consumer complaints of sickness and nausea attributed to the sale of MTBE (a methanol-based oxygenate used in RFG) in Milwaukee this past winter. While the information is not conclusive, the Wisconsin Department of Health has not considered exposure to RFG to be associated with widespread or acute health effects.

* Renewable Oxygenate Requirement. EPA has attempted to require that 30% of the oxygenate used in RFG be based on "renewable fuels." Such fuels are primarily ethanol-based and derived from corn. Despite an adverse court decision in the D.C. Circuit, EPA indicated on June 2, 1995, that it would pursue all legal options to implement a renewable oxygenate requirement as part of the RFG program.

* RFG Performance. In addition to an acknowledged loss in gas mileage (placed at 1-2% by EPA) consumers have complained of performance problems with off-road vehicles and equipment. Since RFG produces a "leaner" fuel, some adjustments may be necessary to certain "two-stroke" engines.

* Phase II standards. Under the statutory provisions of the RFG program, the reduction in VOCs and air toxins attributable to RFG must be substantially increased over gains attributable to the present Phase I program. EPA has discretion not to require a 25% reduction in VOCs and air toxins in the year 2000, but there is a statutory floor of a 20% reduction. Some have questioned the necessity of these provisions.

The June 7, 1995, hearing of the Oversight and Investigations Subcommittee is intended to review the implementation of the RFG program to date as well as examine issues relevant to the future implementation of the program.

General Background and Brief Legislative History:

The specific requirements of the current RFG program, discussed below and contained in Section 211(k) of the CAA, were not an original element of the Bush Administration's 1989 proposal to amend the Clean Air Act. Instead, the current RFG program emerged during House and Senate consideration of the "clean alternative fuels" program.

Under the original proposal, introduced in the House as H.R. 3030 on July 27, 1989, the most polluted metropolitan areas of 250,000 people or more would have been required to participate in the clean alternative fuels program. This program would have required automobile manufacturers to produce, distribute and sell 500,000 alternative-fueled vehicles in 1995, 750,000 such vehicles in 1996 and 1,000,000 vehicles in each year 1997 through 2004.

As the program was originally conceived, "high volume" service stations in the affected areas would have been required to make available at least one alternative fuel for sale. In addition, under the original proposal, the EPA Administrator was authorized to mandate that alternative fuels be sold in "major nationwide transportation corridors."

While reformulated gasoline was specifically mentioned as a possible "clean alternative fuel" under the relevant definitional section of H.R. 3030, its qualification as such would be determined through subsequent EPA regulation. Thus, RFG was first envisioned as only one of several possible clean fuels, specifically to include methanol, ethanol, natural gas, propane and electricity, under a program concentrating on new motor vehicle technology.

During the course of consideration of H.R. 3030, however, different approaches to the original alternative fuels program were suggested by the Bush Administration and affected industries. The focus of the program was substantially changed and the present RFG program emerged as a preferred option to much of the original "clean alternative fuels" proposal.

In essence, under the final RFG program adopted by the House and Senate and signed into law, the mandatory manufacturing and marketing and sale of specific "clean fueled" vehicles was largely scrapped in favor of a program concentrating on fuels used by all current and newly

manufactured vehicles in specific ozone nonattainment areas and areas which "opted in" to the RFG program. Thus, the use of new fuels was substantially expanded from the original concept (from only 1,000,000 vehicles/year to roughly one-third of the entire gasoline market) while the initial burden on automobile manufacturers and retail fuel suppliers was reduced.

(It is important to note, however, that the 1990 Amendments did retain a clean fuels fleet program affecting certain fleets of 10 or more vehicles. In addition, an alternative fuels program affecting federal departments and agencies was included under the Energy Policy Act of 1992. Also, through specific authority contained in the CAAA, California and several other states have pursued low emission and "zero" emission vehicles. These programs, however, are beyond the scope of this memo and the present hearing).

The primary argument in favor of this legislative approach was that RFG would immediately reduce air pollution from motor vehicles while there would be a significant delay in the emission reductions achieved under the original proposal. This delay would be due to the need for significant fleet turnover before substantial emission reductions could be achieved.

Additionally, it was also argued that RFG promised to be less disruptive of the marketplace and affected consumers. It was argued that it was easier to switch fuels with the same relative performance standards and usage then to force consumers to switch vehicles and service stations to install new and potentially expensive fueling equipment.

Basic Statutory Provisions of the RFG Program:

Two separate, but overlapping RFG programs were established under the 1990 CAAA. First, under 211(k)(10)(D), the nine "worst" ozone nonattainment areas with a population over 250,000 were required to participate in the RFG program year round. The goal of this program was to reduce volatile organics, and to a certain extent toxic emissions, from conventionally-fueled motor vehicles operating in the large metropolitan areas of the country most out of compliance with the national ambient air quality standard for ozone. A list of these statutorily-required areas is Attachment II.

Second, under 211(m), an oxygenated fuel program was established for carbon monoxide (CO) nonattainment areas, beginning in 1992. This program specifically sought to reduce wintertime CO, defined as "the portion of the year in which the area is prone to high ambient concentrations of carbon monoxide" as determined by EPA, but not to be less than 4 months per year. In such areas, oxygenated fuels containing at least 2.7 percent oxygen by weight must be sold (RFG areas under 211(k) are only subject to a 2.0 oxygenate by weight requirement unless they are also CO nonattainment areas).

With respect to the specific statutory provisions of the RFG program, the following are the basic requirements created by the 1990 CAAA:

EPA Administration and Coverage:

* Under 211(k)(1), in establishing the RFG program, the EPA Administrator must promulgate regulations to "require the greatest reduction in emissions of ozone forming volatile organic compounds" and toxic air pollutants, "taking into consideration the cost of achieving such emission reductions, any nonair quality and other air-quality related health and environmental impacts and energy requirements . . ."

* Two types of areas are participants in the RFG program. First, "covered areas" under 211(k)(10)(D) are defined as the nine worst ozone nonattainment areas with populations over 250,000. Second, under 211(k)(6), upon application of the governor of a state, any areas classified as marginal, moderate, serious or severe for ozone nonattainment may "opt in" in the RFG program. A list of these "opt-in" areas is included as Attachment III.

* RFG requirements are enforceable by the EPA under 211(k)(5). The EPA may impose sampling, testing and recordkeeping requirements on any refiner, blender, importer or marketer to prevent violations of the program.

RFG Specifications:

* The oxygen content of RFG shall equal or exceed 2.0 percent by weight unless such a requirement would interfere with the attainment of a national primary ambient air quality standard. (211(k)(2)(B)).

* Emissions nitrous oxides (NOx) under the RFG program shall be no greater than emissions from "baseline" (pre-RFG) gasoline unless this is technically infeasible. (211(k)(2)(B)).

* The benzene content of RFG must not exceed 1.0 percent by volume (211(k)(2)(C)) and RFG must not have any heavy metals, including lead or manganese (211(k)(2)(D)) unless this provision is waived by EPA.

RFG Performance Requirements:

* Under 211(k)(3), RFG regulations must either be based on a specified formula or a performance standard, whichever is more stringent. Pursuant to these provisions, in 1991, EPA issued a proposed rule and conducted a regulatory negotiation (Reg.Neg.) to define RFG standards and to further implement the program. This rule, published on February 16, 1994, developed a "simple model" with three methods for establishing a refiner's 1990 baseline.

In essence, the simple model defines a 1990 annual average baseline for different elements of a specific refiner's gasoline. This baseline then serves both to certify that a refiner's product is RFG and to insure that a refiner is not "dumping" non-RFG gas on the market containing elements removed from RFG. The simple model applies to RFG for years 1995, 1996 and 1997. Thereafter, a complex model, based on mathematical parameters, will be in effect.

Under the simple model, the provisions noted above regarding a minimum oxygen content of 2% by weight and no more than 1% benzene content by volume are specified. Additionally, simple model RFG can contain no more than 15% aromatics, must have a lower "reid vapor pressure" (RVP), and cannot increase, with respect to a refiner's 1990 baseline, concentrations of sulfur and olefins or have an increase in its boiling point.

RFG Phase I and Phase II:

* RFG must also meet "performance standards" designed to reduce VOC emissions. Under 211(k)(3)(B), during the high ozone season, aggregate VOC emissions from vehicles using RFG must be 15% below emissions from baseline vehicles. This is known as the "Phase I" RFG standard and is applicable for years 1995-1999.

* For calendar year 2000 and thereafter, RFG-fueled vehicles must meet a 25% VOC reduction standard. This standard, however, can be adjusted down to a minimum 20% VOC reduction by EPA based on technological feasibility and cost considerations. This standard is known as "Phase II."

* RFG must also meet similar performance standards for a reduction in toxic emissions under 211(k)(3)(B)(ii). Again, a Phase I 15% reduction and Phase II 25% reduction is specified.

Miscellaneous:

* As briefly noted above, the RFG program also contains anti-dumping provisions under 211(k)(8). In essence, the effect of this section is to set standards for non-RFG "conventional" gasoline sold in non-RFG areas of the United States. Broadly, such gasoline cannot exceed refiner-specific limits for VOCs, NO, CO and toxins based on 1990 baseline gasoline.

* RFG emissions, under 211(k)(9) are also calculated on the basis of the entire vehicle. Thus, evaporative, running, and refueling emissions are counted in addition to exhaust emissions. The effect of this section is to highlight the importance of the lower RVP standard. A low RVP means that a fuel is less prone to evaporate and thus less prone to produce "non-exhaust" emissions.

* The statutory deadline for the regulations issued under the RFG program was November 15, 1991. Since this deadline was not met by EPA, a deadline suit was brought by Congressman Waxman. This suit resulted in a consent order specifying final action by September 15, 1993. Regulations respecting RFG were not finalized until mid-1994, however, and portions of EPA's rulemaking are still under litigation.

Program Operation to Date:

Beginning this past January, RFG was sold to consumers in the mandatory and "opt-in" RFG areas. While it is too early to precisely determine all aspects of the program's operation, several issues have either emerged or have not been settled in the transformation of RFG from theory to reality.

Price and Supply Issues:

During oversight hearings held by the Energy and Power Subcommittee on September 29, 1994 (and previous hearings by the Oversight and Investigations Subcommittee on June 22, 1994) concern was expressed regarding the potential for "spot shortages" and price hikes associated with the introduction of RFG into the marketplace. At the time, a common element of complaint was that delayed rulemaking had jeopardized the ability of RFG suppliers to meet December 1, 1995 and January 1, 1995 deadlines to have RFG in supply tanks and available for sale to consumers.

Although anecdotal evidence would seem to indicate that RFG has largely been available since implementation of the program, the effect on gasoline prices in various markets is one of the possible issues of this hearing. In September 1994, EPA predicted that it would cost refiners between 3 and 5 cents per gallon to make RFG (although it noted that pump prices would vary depending on market conditions). Overall, EPA predicted that RFG would cost the average family around $20 per year, in its words, "a small price to pay for cleaner air" ("Reformulated Gasoline: A Major Step Toward Cleaner Air," U.S. EPA, September 1994).

The Department of Energy (DOE) on September 29, 1994, predicted in testimony that the price of RFG would be, on average, about 5 to 7 cents per gallon more expensive than conventional gasoline between 1995 and 1999. A more recent survey by the American Automobile Association of market areas with and without RFG demonstrated a price differential of approximately 4 cents per gallon for the period December 1, 1994 to January 11, 1995.

Whatever the eventual market price of RFG may be, cost has been cited as a reason for the decision of some areas of the country to "opt out" of the RFG program. (A list of all areas presently seeking "opt out" is Attachment IV). Especially in areas where RFG may not be needed for meeting the ozone standards of the CAA, price may be a relevant factor in assessing the operation of the program.

Additionally, price has become an issue in areas which must sell RFG, but which are contiguous with areas that are not required to sell RFG. In such areas, complaints have been heard from retailers who must sell higher priced RFG and who must compete with retailers "just down the road" who do not have to sell RFG.

"Opt Out"

As noted above, RFG presently has both a mandatory market and a voluntary market (in areas that have "opted in" the RFG program). Thus, it is possible that market size may fluctuate for RFG depending on the action of voluntary RFG areas. In theory, at least, the RFG market could become smaller if non-mandatory areas decide to forego participation in the program, possibly raising costs for mandatory RFG areas.

This possibility is somewhat tempered by the CAA benefits conferred by RFG "opt in." For areas seeking to achieve attainment with national ozone standards, RFG offers an initial 15% reduction in VOCs from mobile sources as well as other emission benefits. Thus, RFG can obviate the need for additional CAA emission limits and can offset the need for reductions from stationary sources in a particular area.

In considering the "opt out" question, it is important to recognize that there is a substantial capital investment associated with RFG and that the fuel supply system requires some time to adjust to new fuels.

Overall, the National Petroleum Council has predicted that between 1991 and 2000, refiners will spend about $14 billion to produce cleaner fuels. Some have noted that the "final" cost of RFG, perhaps as much as $30 billion, would exceed the present book value of all U.S. refineries.

EPA is presently developing a rulemaking to govern the transition of an area out of the RFG program and a specific proposal from EPA is predicted in the near future. Possible issues in this proposal are the extent to which the "opt out" provisions are clear and workable for present RFG areas and the time allowed for the market to readjust to conventional fuels.

In this regard, at the beginning of December 1994, the State of Pennsylvania petitioned EPA to remove 28 counties from the RFG program. An Energy Information Administration report, estimated that this market represented about 170 thousand barrels per day, or about 7 percent of the entire U.S. RFG market.

Methanol/Ethanol/MTBE/ETBE:

As noted above, RFG is partly based on a "performance standard," or its ability to achieve certain levels of VOC and air toxins reductions while not exceeding specified parameters of various constituent elements. This structure of the RFG program is far from incidental or coincidental. A major aspect of the debate on the 1990 Clean Air Act Amendments was the issue

of "fuel neutrality." In essence, since various fuels and fuel constituents compete for the RFG and alternative fuels market, an effort was made to avoid dictating any particular fuel choice.

On this matter, the May 17, 1990, report of the Committee on Energy and Commerce on H.R. 3030 could not have been more clear. The Committee stated at the time that, "It is not the Committee's intention to prejudge the emissions reduction potential of any fuel. It is intended that this (clean alternative fuels) be a fuel neutral program. Although some believe that EPA has a strong preference for methanol, the Committee intends no such preference for that or any other fuel. All should compete." (H.Rept. 101-490, p. 284).

As might be expected given the size of the market (roughly one-third of the U.S. gasoline market) with at least the potential for expansion, various industries and companies have competed for production of RFG meeting the Phase I requirements. In general, RFG's requirement for at least 2% oxygenate may be met by the addition of alcohols and ethers. Possible additives thus include ethanol and ethyl tertiary butyl ether (ETBE) made from renewable resources such as corn and methyl tertiary butyl ether (MTBE) made from natural gas and petroleum.

Given the particular chemical properties of each additive, there are noted benefits and detriments to each. Roughly speaking, ethanol contains more oxygen than other additives, thus less ethanol is needed to meet the 2% RFG oxygenate requirement. However, ethanol contains a higher RVP which can increase pollution through evaporation, especially in warmer weather. In addition, ethanol must be shipped by truck, not pipelines, limiting its distribution potential.

Methanol, primarily derived from natural gas, can be used as a primary fuel by motor vehicles which are specifically designed to use this fuel or as an optional fuel by certain flexible-fueled vehicles. For purposes of the RFG program, however, MTBE derived from methanol has been increasingly used as an additive. MTBE production is projected to be around 2.4 billion gallons in 1995.

MTBE as an additive can be blended at the refinery and shipped through pipelines. MTBE also raises octane levels (which are reduced in RFG as aromatics are removed). Thus, MTBE offers some distinct advantages over ethanol.

Critics of MTBE primarily cite potential cost and availability as well as the "non-renewable" nature of the fuel. Spot prices of MTBE rose from 62 cents per gallon in January 1994 to $1.10 per gallon in November, 1994, due to a number of factors. Additionally, in some instances, health effect questions concerning MTBE have been raised (discussed more fully below).

ETBE, as a derivative of ethanol, is also a potential oxygenate for the RFG market. ETBE offers the benefits of a lower RVP than ethanol and the ability to be blended and transported through the pipeline system. Thus, some have claimed that ETBE can "solve" the limitations of ethanol and promote U.S. energy independence.

At present, however, ETBE does not appear to be economically viable in the broad RFG market. Advocates of ETBE argue that the ethanol tax credit (estimated at $500 million per year) should be extended to ETBE. Critics contend that such a subsidy is unwarranted and anticompetitive.

(Note: A fuller discussion of various oxygenate choices can be found in the Energy and Power and Oversight and Investigations hearings cited above as well as the staff memos prepared for these hearings. Both are available through the Commerce Committee. Suffice it to say that the debate over oxygenates has been ongoing for at least the last five years with a number of public policy arguments raised for and against each fuel or additive. It is simply beyond the scope of this memo to fully discuss every pro and con issue with respect to each oxygenate).

Altogether, according to the Energy Information Administration (EIA), demand for oxygenates has been growing steadily over the past few years and will grow considerably in 1995 with the RFG program. The annual demand for MTBE is projected to grow from 320 thousand barrel per day (MBD) to 480 MBD in 1995. In December 1994, the EIA further projected that while ethanol provided about half the MTBE-equivalent oxygenate volume in 1993 and 1994, this percentage would fall to about 40 percent in 1995 due primarily to the difficulty of transporting ethanol to areas such as the Northeast.

Health Effects:

While ethanol, methanol and MTBE have been in use for many years, concerns have arisen regarding the potential health effects of fuel oxygenates. In addition, while ethanol and MTBE may be sold in the same market, most complaints to date have centered on MTBE.

To date, however, health effect claims have not been broadly substantiated. According to a December 1994 EPA report, "concurrent with the start of the federal oxygenated gasoline program in 1992, acute health complaints such as headaches, coughs, and nausea arose. These complaints occurred primarily in Alaska, but were also registered in Montana and New Jersey. Despite over $2 million of scientific studies conducted by EPA and others, the reported symptoms have not been replicated or explained. These studies included both experimental human studies with pure MTBE and larger population studies of MTBE mixed with gasoline."

More recently, in February 1995, similar complaints were received in Milwaukee, Wisconsin, following implementation of the RFG program in that area. EPA responded to the Milwaukee situation in several ways, including establishing an 800 number for complaints, sending technical experts to the area and conducting a town hall meeting with citizens. EPA did not, however, grant a request for temporary suspension of the program.

Most recently, on May 30, 1995, the Wisconsin Department of Health and Social Services issued a final report regarding its investigation of health concerns attributable to RFG. In essence, while the study could not rule out subtle effects or the possibility that some individuals have a greater sensitivity to RFG, according to a State of Wisconsin statement issued in conjunction with the report, the study "does not support the conclusion that exposure to RFG is associated with widespread or serious, acute adverse health effects in Milwaukee . . . people in Milwaukee were more likely to report symptoms if they had a cold or the flu, smoked cigarettes, or were aware of RFG. . ." A copy of the report is Attachment V.

Renewable Oxygenate Requirement (ROR):

On December 27, 1993, EPA issued a notice of proposed rulemaking regarding the establishment of a renewable oxygenate requirement for RFG. In essence, EPA proposed that 30% of the oxygenate requirement of RFG come from renewable sources. While EPA indicated that such oxygenates could come from corn, grain, wood, or organic waste, many critics of the rule considered it to be an ethanol and/or ETBE mandate.

In August, 1994, EPA issued final regulations regarding the renewable oxygenate requirement. The final rule required a 15% renewable oxygenate requirement in the first year of the RFG program, escalating to a 30% requirement in the second and subsequent years of the program. However, the final rule was met with litigation by the American Petroleum Institute (API) and the National Petroleum Refiners Association (NPRA).

On September 13, 1994, the U.S. Court of Appeals for the D.C. Circuit issued a stay of the renewable oxygenate requirement. This stay remained in effect until April 28, 1995, when the court ruled in favor of the API and NPRA.

Although EPA had argued that 211(k)(1) granted the Agency the ability to establish a ROR for RFG to "optimize the resulting impacts on cost, energy requirements, and other health and environmental impacts," a three judge panel of the United States Court of Appeals for the District of Columbia disagreed.

In addressing EPA's authority under 211(k)(1), the Court stated, "We conclude that the plain meaning (of the section) precludes the adoption of RFG rules that are not directed toward the reduction of VOCs and toxins emissions, and, since that statute is unambiguous, EPA improperly interpreted the section as giving it the broader power to adopt the ROR . . . The sole purpose of the RFG program is to reduce air pollution, which it does through specific performance standards for reducing VOCs and toxins emissions. EPA admits that the ROR will not give additional emission reductions for VOCs or toxins . . . and has even conceded that use of ethanol might possibly make air quality worse."

Most recently, EPA has indicated a desire to further pursue the renewable oxygenate requirement through the court system. In a June 2, 1995 letter to Senator Tom Daschle (Attachment VI), EPA has indicated that it will ask the Department of Justice to seek a rehearing

on the ROR. According to Administrator Carol Browner, "We believe that our initial rule was legally sound and defensible, and we will exhaust all of our legal options. . ."

While the legal basis for this new effort is unknown, in the past, EPA has considered that 211(k)(1) provides EPA with discretion to establish "any and all reasonable requirements that are designed to achieve the results stated in the second sentence (of the subsection)." This sentence states that RFG regulations shall require the greatest reductions in VOCs and air toxins achievable through the reformulation of gasoline taking into consideration cost and "any nonair-quality and other air-quality related health and environmental impacts and energy requirements."

Given the past history of litigation on this matter, it is likely that any new EPA/Justice effort with respect to ROR will be contentious.

RFG Performance:

While not entirely quantified, complaints have been registered respecting the performance of RFG as a fuel. Broadly, complaints have arisen regarding RFG gas mileage in automobiles and light-duty trucks and RFG performance, particularly with regard to "two-stroke" engines. Two stroke engines are normally used in off-road vehicles such as snowmobiles and boats and small gasoline-powered equipment such as snow blowers and lawn mowers.

With respect to the first concern, EPA estimated in April 1995, the RFG may result in a 1 to 2 percent reduction in gas mileage in some vehicles. The Agency noted, however, that gas mileage is affected, "to a greater extent - by type of engine, driving habits, weather conditions, and vehicle maintenance." Comprehensive data on mileage must await fuller implementation of the program.

As to the second concern, the Agency has noted that manufacturers of older engines "are concerned that seals and gaskets . . . could experience leakage." Otherwise, the Agency noted that modifications to the air/fuel ratio may be necessary for certain two-stroke engines to ensure that the mix is not "too lean," resulting in engine damage.

Both concerns are real, but must be judged against the relative benefits of the RFG program. Additionally, as EPA has noted with respect to the health effects of RFG, conventional gasoline is not a benign substance, but rather carries with it certain advantages and disadvantages based on its chemical composition.

If you have any questions, please feel free to contact either Bob Meyers or Stephen Sayle of the Committee staff at extension 5-4441.

Attachments

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ATTACHMENT I

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

DATE: Wednesday, June 7, 1995

TIME & PLACE: 10:00 a.m., 2322 Rayburn House Office Building

SUBJECT: The Implementation and Enforcement of the Clean Air Act Amendments of 1990, focusing on Title II, the Reformulated Gasoline Program

WITNESS LIST

Panel I

The Honorable Mary D. Nichols
Assistant Administrator for Air and Radiation
U.S. Environmental Protection Agency
400 M Street, S.W.
Washington, D.C. 20460

Mr. John A. Riggs
Deputy Assistant Secretary for Policy, Planning, and Program Evaluation
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Panel II

Mr. William E. Greehey
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Valero Energy Corporation
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San Antonia, Texas 78292

Mr. Edward Dineen
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Worldwide Co-Products and Raw Materials
ARCO Chemical Company
3801 West Chester Pike
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Mr. Charles J. DiBona
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America Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005

Mr. Urvan R. Sternfels (or designee)
National Petroleum Refiners Association
Suite 1000
1899 L Street, N.W.
Washington, D.C. 20036

ATTACHMENT II

List of Reformulated Gasoline Program Areas

May 4, 1995

Required Areas

Los Angeles - Anaheim - Riverside, CA

- Los Angeles County
- Ventura County
- Orange County
- San Bernadino County (partial)
- Riverside County (partial)

San Diego County, CA

Hartford - New Britain - Middletown - New Haven - Meriden - Waterbury, Connecticut

- Hartford County (partial)
- In Litchfield County (partial)
- In Middlesex County (partial)
- In New London County (partial)
- Tolland County (partial)
- In Middlesex County (partial)
- In New Haven County (partial)

New York - Northern New Jersey - Long Island - Connecticut area

- Fairfield County, CN
- Litchfield County, CN (partial)
- Bergen County, NJ
- Essex County, NJ
- Hudson County, NJ
- Hunterdon County, NJ
- Middlesex County, NJ
- Monmouth County, NJ
- Morris County, NJ
- Ocean County, NJ
- Passaic County, NJ
- Somerset County, NJ
- Sussex County, NJ
- Union County, NJ
- Bronx County, NY
- Kings County, NY
- Nassau County, NY
- New York County, NY
- Queens County, NY
- Richmond County, NY
- Rockland County, NY
- Suffolk County, NY
- Westchester County, NY
- Orange County, NY
- Putnam County, NY

Philadelphia - Wilmington - Trenton - Cecil County, MD area

- New Castle County, DE
- Kent County, DE
- Cecil County, MD
- Burlington County, NJ
- Camden County, NJ
- Cumberland County, NJ
- Gloucester County, NJ
- Mercer County, NJ
- Salem County, NJ
- Bucks County, PA
- Chester County, PA
- Delaware County, PA
- Montgomery County, PA
- Philadelphia County, PA

Chicago - Gary - Lake County, IL - Indiana - Wisconsin area

- Cook County, IL
- Du Page County, IL
- Kane County, IL
- Lake County, IL
- McHenry County, IL
- Will County, IL
- In Grundy County, IL, the townships of Aux Sable and Goose Lake.
- In Kendall County, IL, Oswego township.
- Lake County, IN
- Porter County, IN

Baltimore, MD

- Anne Arundel County
- Baltimore County
- Carroll County
- Harford County
- Howard County
- The City of Baltimore

Houston - Galveston - Brazoria, TX

- Brazoria County
- Fort Bend County
- Galveston County
- Harris County
- Liberty County
- Montgomery County
- Waller County
- Chambers County

Milwaukee - Racine, WI

- Kenosha County
- Milwaukee County
- Ozaukee County
- Racine County
- Washington County
- Waukesha County

ATTACHMENT III

"OPT-IN" AREAS

THE ENTIRE STATE OF CONNECTICUT
(i.e. that portion of the state which is not already cited as required in "required" areas list.)

DELAWARE
Sussex County

KENTUCKY
Boone County
Campbell County
Kenton County
Jefferson County
Bullitt County (partial)
Oldham County (partial)

MAINE
Knox County
Lincoln County
Androscoggin County
Kennebec County
Cumberland County
Sagadahoc County
York County

MARYLAND
Calvert County
Charles County
Frederick County
Montgomery County
Prince Georges County
Queen Anne's County
Kent County

THE ENTIRE STATE OF MASSACHUSETTS

NEW HAMPSHIRE
Hillsborough County
Rockingham County
Merrimack County
Strafford County

NEW JERSEY
Warren County
Atlantic County
Cape May County

NEW YORK
Dutchess County
Essex County (partial)

THE ENTIRE STATE OF RHODE ISLAND

TEXAS
Collin County
Dallas County
Denton County
Tarrant County

VIRGINIA
Alexandria
Arlington County
Fairfax
Fairfax County
Falls Church
Loudoun County
Manassas
Manassas Park
Prince William County
Stafford County
Charles City County
Chesterfield County
Colonial Heights
Hanover County
Henrico County
Hopewell
Richmond
Chesapeake
Hampton
James City County
Newport News
Norfolk
Poquoson
Portsmouth
Suffolk
Virginia Beach
Williamsburg
York County

Washington, D.C.

ATTACHMENT IV

Opt-outs

A proposed rule to remove these areas from the requirements of the reformulated gasoline program will soon be published. A temporary stay of the RFG requirements in these areas is in effect from January 1, 1995 to July 1, 1995 in anticipation of a completed rulemaking to allow opt-out.

MAINE

Bancock and Waldo Counties, ME

PENNSYLVANIA

Allentown, PA - Bethlehem, PA - Easton, PA
- The following Pennsylvania counties:
  1) Carbon County
  2) Lehigh County
  3) Northampton County

Altoona, PA
- The following Pennsylvania counties:
  1) Blair County

Erie, PA
- The following Pennsylvania counties:
  1) Erie County

Harrisburg - Lebanon - Carlisle, PA
- The following Pennsylvania counties:
  1) Cumberland County
  2) Dauphin County
  3) Lebanon County
  4) Perry County

Johnstown, PA
- The following Pennsylvania counties:
  1) Cambria County
  2) Somerset County

Lancaster, PA
- The following Pennsylvania counties:
  1) Lancaster County

Pittsburgh - Beaver Valley, PA
- The following Pennsylvania counties:
  1) Allegheny County
  2) Beaver County
  3) Fayette County
  4) Washington County
  5) Westmoreland County
  6) Armstrong County
  7) Butler County

Reading, PA
- The following Pennsylvania counties:
  1) Berks County

Scranton - Wilkes-Barre, PA
- The following Pennsylvania counties:
  1) Columbia County
  2) Lackawanna County
  3) Luzerne County
  4) Monroe County
  5) Wyoming County

York, PA
- The following Pennsylvania counties:
  1) Adams County
  2) York County

Youngstown, OH - Warren, OH - Sharon, PA*
- The following Pennsylvania counties:
  1) Mercer

* Ohio counties have not opted-in.

NEWYORK

Albany - Schenectady - Troy, NY
- The following New York counties:
  1) Albany County
  2) Greene County
  3) Montgomery County
  4) Rensselear County
  5) Saratoga County
  6) Schenectady County

Jefferson County, NY

Buffalo - Niagara Falls, NY
- The following New York counties:
  1) Erie County
  2) Niagara County

WISCONSIN

The governor of Wisconsin rescinded his request that the following Wisconsin counties be included. Thus, they have not been in the program and will not be in the program in the future:

1) Sheboygan
2) Manitowic
3) Kewaunee

Acknowledgements

This survey was designed and the report prepared by:

Henry A. Anderson, MD
Chief Medical Officer
Bureau of Public Health

Lawrence Hanrahan, PhD
Senior Epidemiologist
Bureau of Public Health

Jay Goldring, PhD
Toxicologist
Bureau of Public Health

Bryan Delaney, PhD
Toxicologist
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The Department of Health and Social Services wishes to recognize the invaluable assistance, technical expertise and professionalism of the University of Wisconsin - Extension Survey Research Laboratory, Madison, WI (WSRL) in implementing this survey. We thank the Wisconsin Department of Natural Resources for conducting the air monitoring studies and providing the results for use in this report. We also wish to recognize the valuable advice provided by the National Center for Environmental Health, Centers for Disease Control and Prevention, and their funding assistance to the Environmental Committee of the Association of State and Territorial Health Officials (ASTHO). We also thank ASTHO for rapidly organizing and convening a peer review group, and we especially wish to thank the peer reviewers for their valuable advice and insight. Funding for the survey was provided by the United States Environmental Protection Agency.

I. Executive Summary

A. Introduction

During hot, humid summers, ozone concentrations in the six-county Milwaukee metropolitan area have exceeded the Federal Ambient Air Quality Standard of 0.12 parts per million (ppm). Exposure to ozone at concentrations exceeding the Federal standard can cause shortness of breath, a condition which may be especially hazardous among asthmatics and the elderly. The U.S. Centers for Disease Control has stated that minorities living in urban areas suffer disproportionately from exposure to ambient air pollutants including ozone. In a 1994 study, the Wisconsin Division of Health found that populations living in areas with high air pollutant concentrations were more likely to have asthma symptoms and be admitted to hospitals with a diagnosis of asthma.

The Clean Air Act Amendments of 1990 mandated that areas in which ozone concentrations consistently exceeded the Federal standard reduce their emissions of ozone precursors. Under the Amendments, by January 1, 1995, gasoline station operators in most urban areas in the US, including the Milwaukee and Chicago metropolitan areas, were required to exclusively sell reformulated gasoline (RFG). The United States Environmental Protection Agency (EPA) has estimated that use of such fuel will reduce emissions of ozone precursors by 15%.

RFG has a distinctly different odor from traditional gasoline. During December, 1994 and the first two weeks of January, 1995 less than 20 calls with questions about RFG were received. Television, radio and newspaper coverage of the issue in mid-January raised public awareness of the reformulated gasoline program and questions about potential health of RFG use increased. In response to public concerns, a television news story announced on Jan. 23 that complaints about the program should be directed to a local telephone number at the Wisconsin Department of Natural Resources Southeastern District Office. On Jan. 30, a toll-free complaint line was established at the U.S. Environmental Protection Agency (USEPA) Region V office in Chicago and by February 20, 1995 over 700 callers had reported health concerns.

At the direction of the Governor, the Wisconsin Division of Health (DOH) issued a public health alert to physicians in early February (Appendix E). In mid-February, after consultation with the Centers for Disease Control and Prevention, other State Health Departments, and USEPA, DOH implemented a public health evaluation protocol to investigate the reported health problems.

B. Methods

1. Air Monitoring Study

The Wisconsin Department of Natural Resources and the United States Environmental Protection Agency (USEPA) initiated a monitoring program to determine the ambient air concentration of reformulated fuel components at different locations within the Milwaukee metropolitan area. The locations selected for monitoring were: (1) University of Wisconsin-Milwaukee campus at WIS-PASMS; (2) zoo interchange at I-94 and highway 45; (3) Bradley Center Parking Ramp

at 5th and Chase; (4) Riley School at 4th and Hayes; (5) A service station with a vapor recovery system using ETBE as its oxygenate in all three fuel grades (Station #1); (6) A service station with a vapor recovery system using ethanol in its lower grades and MTBE in the higher grades (Station #2) (7) A service station with no vapor recovery and using MTBE in all three grades of gasoline (Station @); (8) a station outside the six-county Milwaukee area not using reformulated gasoline (Station $) and (9) at two service stations not using reformulated gasoline, one from Madison and one from Green Bay. At several service stations, gasoline composition was also determined.

2. Composition of Gasoline in Milwaukee and Chicago

In early 1995, The U.S. Environmental Protection Agency analyzed gasoline from areas throughout the United States required to use RFG, including Milwaukee and Chicago. The results of this EPA analysis together with statements from oil company representatives were used to determine potential differences in Milwaukee and Chicago RFG composition. The proportion of stations in Milwaukee using Stage II vapor recovery was also determined.

3. Health Complaints Received by State Health Departments

In February and March, 1995, DOH sent a brief survey to state health departments throughout the U.S. about RFG-related health complaints. The results of this survey are reported in this study.

Analysis of health complaints received by Wisconsin state agencies will be completed at a later date.

4. Random Digit Dial Health Survey

This report describes the results of a survey of 527 Milwaukee metropolitan area residents, 485 Chicago metropolitan area residents and 501 individuals from the remainder of Wisconsin. The respondents were interviewed between February 24, 1995 and March 19, 1995. A total of 29,314 telephone calls were made to complete the 1,513 interviews required.

Using a random digit dial (RDD) process, respondents were randomly selected from five areas: 1) the city of Milwaukee, 2) metropolitan Milwaukee consisting of counties required to use RFG (Kenosha, Racine, Milwaukee, Waukesha, Ozaukee, and Washington Counties), 3) the City of Chicago, 4) metropolitan Chicago consisting of counties required to use RFG (Cook, McHenry, Lake, Dupage, Kane, and Will Counties), and 5) the State of Wisconsin exclusive of areas required to use RFG.

For this report, regions one and two were combined (ie., Milwaukee + metro Milwaukee) as were regions three and four (ie, Chicago + metro Chicago) to yield three regional study areas:

1) the six county, southeastern Wisconsin area with required RFG use (called "Milwaukee" in the report); 2) the northeastern Illinois area of required RFG use (called "Chicago" in the

report); and 3) the state of Wisconsin exclusive of the southeastern non-attainment area (called "Wisconsin" in the report).

The three regions were chosen based on common characteristics of likelihood of "exposure" to reformulated and traditional gasoline:

Wisconsin - A control region with minimal or no use of reformulated gasoline.

Chicago - A region identical to Milwaukee in the required use of reformulated gasoline.

Milwaukee - The region of concern, exclusively using reformulated gasoline.

C. Summary of Results

1. Air Monitoring Study

- Reformulated gasoline components were detected in 24 hour ambient air samples in Milwaukee. The oxygenates MTBE and ETBE ranged from below the limit of detection of .025 parts per billion (ppb) to .85 ppb and .20 ppb respectively.
- Of the measured gasoline components, toluene and benzene were present at the highest concentrations in Milwaukee ambient air. Benzene and toluene were also present in the highest concentrations at service stations in Milwaukee, Madison and Green Bay.
- The highest exposure to gasoline components, including MTBE and ETBE were found during refueling a vehicle.
- Higher concentrations of gasoline components, including MTBE, were measured during refueling at gasoline stations lacking phase II vapor recovery systems.

2. Composition of gasoline sold in Chicago and Milwaukee

- According to a U.S. Environmental Protection Agency survey, confirmed by oil industry representatives, most service stations in Chicago and Milwaukee were selling RFG as of December 1, 1994. By January 1, 1995, a similar proportion (approximately 50%) of RFG sold in the two areas contained MTBE as its oxygenate. In contrast, nearly all gasoline sold in other areas of the U.S. participating in the RFG program contained MTBE as its oxygenate.
- Thirty seven percent of service stations in the Milwaukee area have installed stage II vapor recovery equipment (Wisconsin Department of Natural Resources survey). The proportion of stations in Chicago with such equipment was unavailable.

3. Health Complaints

- Of the 20 responses received from the February, 1995 DOH survey of state health departments, none reported more than 10 health complaints related to RFG during the period November 1, 1994 - February, 1995. In March and April, 1995, 82 complaints were received by health departments in Connecticut and an unspecified number were received in Maine, Massachusetts, New Jersey, and North Carolina.

- Using the same survey questionnaire as the random survey the characteristics of approximately 1,500 Wisconsin callers reporting health complaints are being gathered. Results will be reported after completion of all interviews.

4. Random Digit Dial Health Survey

- An overall response rate of 58% was achieved.

- The sampled populations accurately reflect the known demographic characteristics of the three areas studied. For example, the prevalence estimates of asthma and cigarette smoking closely track other studies of these characteristics in the populations. These findings suggest that the survey participants are representative of the populations.

- In Milwaukee, 23% of the respondents reported experiencing unusual symptoms since November, 1994. Less than 2% of Milwaukee respondents reported their symptoms resulted in an emergency room or physician visit for evaluation.

- In Chicago and Wisconsin, 6% of the respondents reported experiencing unusual symptoms since November, 1994. The proportion in Chicago was not statistically different from that found in Wisconsin.

- Prevalence of each specific symptom in the questionnaire was significantly higher in Milwaukee than in either Chicago or Wisconsin. This higher prevalence was seen for symptoms previously reported as likely related to reformulated gasoline (eg headache, dizziness, nausea) as well as those included because they had never been associated with gasoline exposures (backache, fever). Prevalence was not different between Chicago and Wisconsin for any symptom in the questionnaire.

- There were no statistical differences between Milwaukee, Chicago, or Wisconsin in the prevalence of winter colds or the flu. However, Milwaukee residents who reported experiencing a cold or the flu since November 1994 were more likely to report unusual symptoms than Chicago or Wisconsin residents.

- Individual exposure to specific components of RFG could not be definitively determined. However, an estimate of exposure to one RFG component, MTBE, derived from information about where the individual "usually" purchased gasoline, was not associated

with symptom prevalence in any region. Similarly, self-reports of "usually" purchasing gasoline not labelled ethanol (presumed to contain MTBE or ETBE) were not associated with symptom prevalence.

- Familiarity with MTBE as an RFG additive was reported by 54% of Milwaukee residents, 23% of Chicagoans and 40% of Wisconsinites.

- In Milwaukee and Wisconsin, individuals stating that they had purchased RFG since November 1, 1994 were more likely to report specific "unusual" symptoms than those stating they had not purchased RFG since that date or did not know what type of gasoline they purchased.

- Chicago and Wisconsin residents "noticed an unusual smell associated with the gasoline they purchased" with a similar frequency since November 1, 1994. However, unusual smells associated with gasoline were noted by Milwaukee residents at a greater frequency than the other two areas. Exposure to one RFG component, MTBE, derived from information about where the individual "usually" purchased gasoline, was associated with unusual smells in Chicago (RR 2.6) and Milwaukee (RR 16) compared to Wisconsin (RR 1).

D. Conclusions

- Ambient air monitoring in Milwaukee detected reformulated gasoline components. The levels found were not unusually high and did not exceed any health guidelines. As seen in other studies, refueling a vehicle at a station without stage II vapor recovery equipment resulted in the highest exposure potential.

- Symptom prevalence in Milwaukee differed significantly from both Chicago and Wisconsin. In Milwaukee, people were more likely to report unusual symptoms if they had experienced a cold or the flu, smoked cigarettes, or were aware that they had purchased RFG since November 1, 1994.

- Symptom prevalence in Chicago, an area required to use RFG fuels, was not different from that in Wisconsin, an area not required to use RFG fuels. This finding suggests that factors, other than RFG use, significantly contributed to the differences in symptom prevalence between Milwaukee and the other two areas studied.

- Individual symptoms and symptom patterns attributed to exposure to reformulated gasoline are non-specific and similar to those experienced with common acute and chronic illnesses such as colds, flu and allergies. The fact that every symptom was statistically more prevalent in Milwaukee than the other two areas, including symptoms not associated with gasoline or chemical solvent exposure, suggests that factors, in addition to the introduction of RFG in that city, contributed to the survey responses.

- All three sample areas experienced the same rate of winter colds and flu during the 1994-1995 season (55 - 60%). However, having had a cold or the flu was the strongest predictor of unusual symptoms attributed to gasoline use among the Milwaukee respondents, but it was not a predictor for such symptoms in Chicago or Wisconsin. The most plausible explanation for this finding is that many symptoms reported by Milwaukee residents may have actually been due to colds or flu and not RFG exposure.

- Individuals in Milwaukee and Wisconsin who reported purchasing RFG since November 1, 1994 (question 10 on the survey; see Appendix) were more likely to report specific symptoms than individuals reporting they had not purchased RFG since that date or did not know the type of gasoline they purchased. Since all gasoline purchased in Milwaukee was RFG, this suggests that knowledge about RFG, including the likely awareness of the potential negative effects of reformulated gasoline in Milwaukee and Wisconsin, may have heightened perception of current health status and resulted in the assumption that any health symptoms experienced were unusual and attributable to gasoline exposure.

- Individuals in Chicago and Milwaukee who reported that they had purchased RFG since November 1, 1994 were more likely to report unusual smells from the gasoline than individuals who reported they had not purchased RFG since that date or did not know the type of gasoline they purchased. This finding is consistent with the fact that in chamber tests, many individuals noted that RFG had a different odor than traditional gasoline.

This study is only one step toward understanding the public health consequences of reformulated gasoline use in southeastern Wisconsin. No one study can effectively answer all questions. Each study design has inherent strengths and weaknesses. This study methodology was chosen in order to obtain health status information on the general population as rapidly and as close in time to the initial complaints as possible. It accomplished those goals. However, the study design had limitations which could not be avoided. These included: the subjectivity of self reported symptoms; recall bias of symptoms and type of gasoline use; unavailability of objective, individual exposure measurement data to relate to health outcomes; health outcomes not validated through clinical assessment; cross-sectional nature of the study design. A longer term prospective study design, of the type being discussed by a recently convened USEPA workgroup, which would include serial, objective exposure measurements (blood and breath analyses), unbiased symptom reporting with clinical confirmation, might address the limitations present in a study such as ours.

This study was unable to attribute the increased prevalence of symptoms in Milwaukee to RFG use. It does not rule out subtle effects of RFG exposure, or the possibility that a relatively small number of individuals may have a greater sensitivity to RFG mixtures. Characteristics of those complaining to health agencies are also not analyzed in this study; future comparisons of this population to these randomly selected groups may identify other risk factors that were not apparent here.

B. Recommendations

This study does not support the conclusion that exposure to RFG is associated with widespread or serious, acute, adverse health effects in Milwaukee. However, DHSS recognizes that gasoline vapors contain many compounds known to cause health problems and recommends that exposure to these vapors, whether from traditional or reformulated gasoline, should be avoided.

The study also concluded that the presence of a Stage II vapor recovery system greatly reduces concentrations of gasoline fumes in the vicinity of the pump and station. DHSS recommends that individuals concerned about minimizing RFG exposure and avoiding the potential for gasoline-related health problems patronize stations with such systems.

F. Scientific Peer Review

In order to assure that this report and the survey design and statistical analyses upon which it is based are scientifically sound, the Department of Health and Social Services requested assistance from the Centers for Disease Control and Prevention to conduct a scientific peer review. This was done through the Environment Committee of the Association of State and Territorial Health Officials. Reviewers represented 11 State Health Departments (OH - Chair, CT, IL, IN, LA, MI, MN, NC, ND, NY, TX), 4 universities (Georgetown University, Johns Hopkins University, University of Pittsburgh, University of North Carolina), the Centers for Disease Control (1) and the United States Environmental Protection Agency (1). The reviewers met in Chicago, May 1-2, 1995 and issued six consensus statements. A complete listing of the Peer Reviewers is provided in Appendix D.

G. ASTHO Scientific Peer Review Statements

ATTACHMENT VI

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

June 2, 1995

THE ADMINISTRATOR

The Honorable Tom Daschle
Democratic Leader
United States Senate
Washington, D.C. 20510-7020

Dear Senator Daschle:

Thank you for your recent letter regarding renewable fuels, such as ethanol. We, too, strongly believe that every possible effort should be taken to promote renewable fuels in the nation's gasoline market. Renewable fuels are good for the environment because they burn cleanly, good for the economy because they are domestically produced, and good for all Americans because they promote energy security and independence.

As you know, I was deeply disappointed by the decision last month by the Federal Court of Appeals holding EPA lacked authority to require renewable fuels such as ethanol in reformulated gasoline. However, I am still committed to do everything within EPA's power to promote renewable fuels. We will begin by taking the following three steps.

First, we are asking the Department of Justice to seek a rehearing with the Court of Appeals regarding its decision on our requirement for renewable fuels in reformulated gasoline. We believe that our initial rule was legally sound and defensible, and we will exhaust all our legal options.

Second, I will propose that existing summertime limits on ethanol use be modified to allow Governors to request lifting the so-called "oxygen cap" altogether. We no longer believe there is any good environmental reason for limiting the use of renewables in this manner. This action should immediately expand the market for ethanol.

Third, EPA will work with the states to develop a model gas pump labeling system that states can use to educate consumers about the content of the gasoline they are purchasing. We believe there is a great desire among the public to purchase environmentally beneficial products, such as gasoline containing ethanol.

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Along with these steps, we have carefully evaluated the additional options about which you have inquired. We feel the options listed above have the best prospect for advancing our mutual goals.

President Clinton has long been an advocate of renewable fuels. The Administration's rule for requiring renewables in reformulated gasoline would have boosted demand for corn by 250 million bushels a year. And it would have helped the 54 million Americans who live in cities with smog problems. We hope the actions outlined above will help our efforts to meet demand for cleaner, home-grown energy.

Sincerely,

Carol M. Browner

Carol M. Browner

United States Government Accountability Office

GAO

Testimony

Before the Committee on Government Reform,
House of Representatives

For Release on Delivery
Expected at 2:00 p.m. EST
Tuesday, March 8, 2005

FEDERAL MANDATES

Identification Process Is Complex and Federal Agency Roles Vary

Statement for the Record by Orice M. Williams, Director
Strategic Issues

GAO-05-401T

March 8, 2005

GAO Accountability · Integrity · Reliability

Highlights

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

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.

Mr. Chairman and Members of the Committee:

We are pleased to have the opportunity to comment on federal mandates and the Unfunded Mandates Reform Act of 1995 (UMRA). As you know, 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 providing funding to cover the costs.[1] Many federal statutes and the regulations that implement them, impose requirements on state, local, and tribal governments (intergovernmental mandates) and the private sector (private sector mandates) in order to achieve certain legislative goals. Such statutes and their regulations can provide substantial benefits, as well as impose costs.

Although UMRA was intended to "curb the practice of imposing unfunded Federal mandates,"[2] the act does not prevent Congress or federal agencies from doing so. Rather, UMRA generates information about the nature and size of potential federal mandates on other levels of government and the private sector to assist Congress and agency decision makers in their consideration of proposed legislation and regulations. Title I of UMRA requires congressional committees and the Congressional Budget Office (CBO) to identify and provide information on potential federal mandates in certain legislation. Similarly, Title II of UMRA requires federal agencies to prepare a written statement identifying the costs and benefits of federal mandates contained in certain regulations and consult with affected parties. It also requires action of the Office of Management and Budget (OMB), including establishing a 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.[3]

My statement focuses on titles I and II of the act and provides an overview of the activities of the federal entities charged with carrying out this act. For each title, I will (1) discuss the process used to identify federal

[1]Pub. L. No. 104-4, 2 U.S.C. §§658-658g, 1501-71.

[2]Pub. L. No. 104-4 pmbl. As in the act, we generally refer to the identification of federal mandates, rather than unfunded mandates, in this report.

[3]UMRA also includes two other titles. Title III of UMRA requires the Advisory Commission on Intergovernmental Relations to conduct a study reviewing federal mandates, and title IV establishes limited judicial review under the act.

mandates in statutes and rules, including the role of the federal entities; (2) provide examples of statutes and rules that contained federal mandates under UMRA; and (3) provide examples of statutes and rules that were not considered federal mandates under UMRA, but that affected parties may perceive to be "unfunded mandates." As agreed with the Committee, our statement is based primarily on our May 2004 report, which analyzes UMRA's coverage.[4]

In summary, we reported that the identification and analysis of intergovernmental and private sector mandates is a complex process under UMRA. Proposed legislation and regulations must pass through multiple steps and meet multiple conditions before being identified as containing mandates at or above UMRA's thresholds. Under title I of the act, CBO is required to prepare statements identifying and estimating the costs of mandates in legislation that meets certain criteria to identify whether or not those estimated costs meet or exceed UMRA's cost thresholds. A point of order can be raised on the floor of the House or Senate against consideration of any unfunded intergovernmental mandate exceeding UMRA's cost threshold. However, it contains no similar enforcement mechanism for private sector mandates. Under title II, federal agencies are required to prepare mandate statements for regulations containing intergovernmental or private sector mandates that would meet or exceed the UMRA threshold.

For both legislation and regulations, there are two general ways that provisions would not be identified as federal mandates at or above UMRA's thresholds. First, some legislation and regulations may be enacted or issued via procedures that do not trigger UMRA reviews by CBO or agencies. Second, even if the statute or rule is reviewed, UMRA limits the identification of federal mandates through multiple definitions and exclusions. As we reported, 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. All 5 statutes and 9 rules contained private sector mandates as defined by UMRA. One final rule—an Environmental Protection Agency (EPA) standard on arsenic in drinking water—also contained an intergovernmental mandate.

[4]GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637 (Washington, D.C.: May 12, 2004). We plan to issue a follow-up report in March 2005.

Despite the determinations made under UMRA, some of the statutes and rules that had not triggered UMRA's requirements appeared to have potential financial impacts on affected nonfederal parties similar to those of actions that had been flagged as containing federal mandates at or above UMRA's thresholds. For example, at least 43 statutes and 65 rules issued in 2001 and 2002 resulted in new costs or other negative financial impacts on nonfederal parties that the affected parties might perceive as "unfunded mandates" even though they did not meet UMRA's definition of a mandate. For 24 of the statutes and 26 of the rules, CBO or federal agencies had determined that the estimated direct costs or expenditures, as defined by UMRA, would not meet or exceed the applicable thresholds. For the remaining statutes, UMRA did not require a CBO review prior to final passage most often because the mandates were in appropriations bills, which are not subject to an automatic review by CBO. The remaining rules most often did not trigger UMRA because they were issued by independent regulatory agencies, which are not covered by the act.

Identifying Federal Mandates in Statutes Is Complex

Legislation must go through several steps to be identified as containing a federal mandate. Once mandates are identified based on UMRA's definitions, exclusions, and exceptions, CBO determines whether the mandate meets or exceeds UMRA's cost thresholds. As we reported last year, in 2001 and 2002, CBO identified few statutes containing federal mandates at or above UMRA's cost thresholds. In addition, CBO reports and testimonial evidence indicate that UMRA may indirectly impact the costs of and number of federal mandates enacted at or above UMRA's cost thresholds. However, when asked, some nonfederal parties said they continue to be subject to costs associated with laws containing mandates that do not meet the statutory definition of a mandate at or above UMRA's cost thresholds.

Legislation Must Undergo a Multistep Process to Be Identified as Containing Federal Mandates at or above Applicable Cost Thresholds

UMRA does not require CBO to automatically review every legislative provision; further, the process takes several steps to determine whether a statutory provision would be identified as a federal mandate at or above UMRA's cost thresholds (see fig. 1). Specifically, CBO does not automatically review provisions that are (1) not contained in authorizing

bills or (2) not reported by an authorizing committee.[5] This means that appropriations bills are not automatically subject to CBO review under UMRA. However, CBO told us that it will informally review provisions in appropriations bills and communicate their findings to appropriations committee clerks when CBO finds potential mandates in these bills. Although provisions contained in an authorizing bill are subject to automatic review by CBO, the bill also must be "reported" by that committee.[6]

[5]The Joint Committee on Taxation (JCT), rather than CBO, has jurisdiction over proposed tax legislation and produces revenue estimates for all such legislation considered by either the House or the Senate.

[6]Reported—as opposed to going directly to the full House or Senate or "discharged" by the committee without a vote to send it to the full House or Senate.

Figure 1: The Multistep Process Necessary for CBO to Identify Federal Mandates in Proposed Legislation

Procedures	Yes	No
Is provision contained in authorizing legislation reported by an authorizing committee and not added after initial CBO UMRA review?	Subject to automatic CBO review	Not subject to automatic CBO review

Automatic CBO Review

Exclusions	Yes	No
Is provision not excluded?	CBO analyzes provision based on UMRA's definition	CBO issues UMRA statement stating reason for exclusion and does not make any statement regarding mandates

Definition	Yes	No
Is provision an enforceable duty on state, local, or tribal governments or the private sector, and is it not subject to exceptions?	CBO specifies type of mandate contained in the legislation	CBO issues UMRA statement stating legislation does not contain a mandate under UMRA

Cost estimate	Yes	No
Is cost estimate feasible?	CBO conducts direct cost estimate	CBO issues UMRA statement specifying type of federal mandate contained in the bill and that costs cannot be estimated or are uncertain

Cost threshold	Yes	No
Does direct cost estimate for all provisions in legislation meet or exceed thresholds?	CBO issues UMRA statement specifying type of federal mandate contained in the legislation and that it meets or exceeds the applicable cost threshold	CBO issues UMRA statement specifying type of federal mandate contained in the legislation and that it is below the applicable cost threshold

Source: GAO.

UMRA also does not require an automatic CBO review of provisions added after CBO's initial review. UMRA states, however, that "the committee of conference shall insure to the greatest extent practicable" that CBO prepare statements on amendments offered subsequent to its initial review that contain federal mandates.[7] For example, CBO reported that for 2002,[8] three laws were enacted that contained federal mandates not reviewed by

[7] 2 U.S.C. §658c(d).

[8] U.S. Congressional Budget Office, *A Review of CBO's Activities in 2002 Under the Unfunded Mandates Reform Act* (Washington, D.C.: May 2003).

CBO prior to enactment because they were added after CBO reviewed the legislation. For example, the Terrorism Risk Insurance Act of 2002 includes a provision requiring insurers of commercial property to offer terrorism insurance, which was added to after CBO's UMRA review and thus not identified as a private sector mandate under UMRA prior to enactment.[9]

Once a decision is made about CBO's review, CBO analyzes the provision to determine whether the provision is excluded under UMRA. An exclusion applies to any provision in legislation that

1. enforces Constitutional rights of individuals;
2. establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability;
3. requires compliance with accounting and auditing procedures with respect to grants or other money or property provided by the federal government;
4. provides for emergency assistance or relief at the request of any state, local, or tribal government or any official of a state, local, or tribal government;
5. is necessary for the national security or the ratification or implementation of international treaty obligations;
6. the President designates as emergency legislation and that Congress so designates in statute; or
7. relates to the old age, survivors, and disability insurance program under title II of the Social Security Act (including taxes imposed by sections 3101(a) and 3111(a) of the Internal Revenue Code of 1986 relating to old-age, survivors, and disability insurance).

Next CBO applies UMRA's definition of a federal mandate—a provision that would impose an enforceable duty upon state, local, or tribal governments or upon the private sector. To be identified as a mandate, a provision must

[9]Pub. L. No. 107-297.

meet this definition of a mandate and not be classified as an "exception." Generally, exceptions are defined as enforceable duties that are conditions of federal financial assistance or arise from participation in a voluntary federal program.

Once the provision is identified as a mandate under UMRA, CBO determines whether the cost estimate, if feasible, exceeds the applicable threshold ($50 million for intergovernmental and $100 million for private sector mandates, in any of the first 5 fiscal years during which the mandate would be effective).[10] If CBO determines that a cost estimate is not feasible, CBO specifies the kind of mandate contained in the provision, but reports that the agency cannot estimate the costs. For example, CBO reported that it could not estimate the costs of mandates in nine bills that ultimately were enacted during 2001 and 2002. Common reasons why a cost estimate may not be feasible include (1) the costs depend on future regulations, (2) essential information to determine the scope and impact of the mandate is lacking, (3) it is unclear whom the bill's provisions would affect, and (4) language in UMRA is ambiguous about how to treat extensions of existing mandates.

For intergovernmental mandates that exceed the cost threshold or cost estimates that are not feasible, a point of order is available under UMRA. However, UMRA does not provide for a point of order for private sector mandates. For intergovernmental or private sector mandates below the applicable cost threshold, CBO states in its report that a mandate exists with costs estimated to be below the applicable cost threshold. Although this highlights the provision as a mandate, it does not provide for a point of order under UMRA.

UMRA also contains a mechanism designed to help curtail mandates with insufficient appropriations, but it has never been utilized. UMRA provides language that could be included in legislation that would allow agencies tasked with administering funded mandates to report back to Congress on the sufficiency of those funds.[11] Congress would then have a certain time period to decide whether to continue to enforce the mandate, adopt an alternate plan, or let it expire—meaning the provision comprising the

[10]The dollar thresholds in UMRA are in 1996 dollars and are adjusted annually for inflation.

[11]2 U.S.C. § 658d(a)(2)(B).

mandate would no longer be enforceable. Our January 2004 database search has resulted in no legislation containing this language.[12]

CBO Identified Few Laws in 2001 and 2002 as Containing Federal Mandates at or above UMRA's Cost Threshold, but UMRA May Have an Indirect Effect

Few laws containing federal mandates at or above the cost thresholds were enacted in 2001 and 2002. Further, there is some evidence that the existence of UMRA may have indirectly discouraged the enactment of some federal mandates in proosed legislation and reduced the potential costs of others. Of 377 laws enacted in 2001 and 2002, CBO identified at least 44 containing a federal mandate under UMRA. Of these 44, CBO identified 5 containing mandates at or above the cost thresholds, and all were private sector mandates.[13]

As we previously reported, from 1996 through 2002, only three bills with intergovernmental mandates and 21 private sector mandates with costs over the applicable threshold became law.[14] UMRA may have indirectly discouraged the passage of legislation identified as containing mandates at or above the cost thresholds. Similarly, UMRA may have also aided in lessening the costs of some mandates that were enacted. From 1996 through 2000, CBO identified 59 proposed federal mandates with costs above applicable thresholds. Following CBO's identification, 9 were amended before enactment to reduce their costs below the applicable thresholds and 32 were never enacted. The remaining 18 mandates were enacted with costs above the threshold.

Although CBO has not done an analysis to determine the role of UMRA in reducing the costs of mandates ultimately enacted, it reported that "it was

[12]Search conducted on Lexis on January 22, 2004, for bills and committee reports containing this provision.

[13]At our request, CBO identified examples of statutes enacted in 2001 and 2002 that it believed, based on professional judgment, had potential intergovernmental or private sector impacts but had not been identified as containing mandates at or above UMRA's thresholds. We did not ask CBO to compile a comprehensive list of all statutes enacted that may have included federal mandates.

[14]The three intergovernmental mandates involved the 1996 minimum wage, a reduction in federal funding for food stamps in 1997, and a preemption of state laws on prescription drug premiums in 2003. Of the 21 private sector mandates, 8 involved taxes, 4 concerned health insurance, 4 dealt with regulation of industries, 2 affected workers' take home pay, 1 imposed new requirements on sponsors of immigrants, 1 changed procedures for the collection and use of campaign contributions, and 1 imposed fees on airline travel to fund aviation security.

clear that information provided by CBO played a role in the Congress's decision to lower costs."[15] CBO also testified in July 2003 that "both the amount of information about the cost of federal mandates and Congressional interest in that information have increased considerably. In that respect, title I of UMRA has proved to be effective." Similarly, the Chairman of the House Rules Committee was quoted in 1998 as saying that UMRA "has changed the way that prospective legislation is drafted... Anytime there is a markup [formal committee consideration], this always comes up." Finally, although points of order are rarely used, they may be perceived as an unattractive consequence of including a mandate above UMRA cost thresholds in proposed legislation.

Nonfederal Parties Perceived Some Enacted Provisions to Be Unfunded Mandates

Although CBO's annual reports for 2001 and 2002 showed that most proposed legislation did not contain federal mandates as defined by UMRA,[16] we asked CBO to compile a list of examples from among those laws enacted in 2001 and 2002 that had potential impacts on nonfederal parties but were not identified as containing federal mandates meeting or exceeding UMRA's cost thresholds. We then analyzed these 43 examples to illustrate the application of UMRA's procedures, definitions, and exclusions on legislation that was not identified as containing mandates at or above UMRA's threshold, but might be perceived to be unfunded mandates. We then shared CBO's list of 43 examples with national organizations representing nonfederal levels of government, and they generally agreed that those laws contained provisions their members perceived to be mandates.[17]

As figure 2 shows, for 12 of the 43 examples, an automatic UMRA review was not required for one of the reasons I discussed earlier, such as that they were in an appropriations bill or were not reported by the authorizing committee. Out of the remaining 31 laws that did undergo a cost estimate, 24 were found to contain mandates with costs below applicable thresholds,

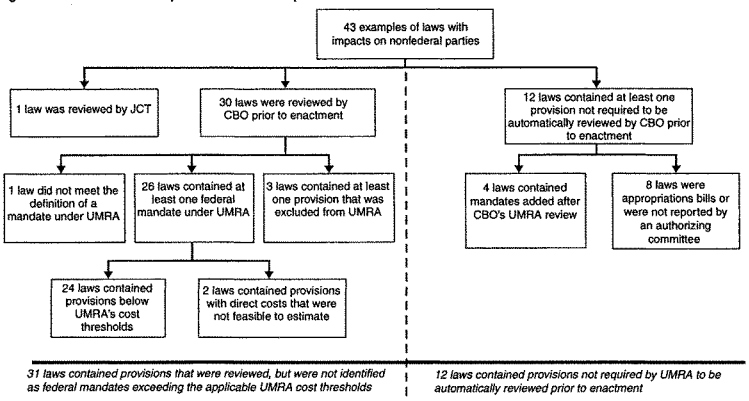
[15]U.S. Congressional Budget Office, *A Review of CBO's Activities in 2002 Under the Unfunded Mandates Reform Act.*

[16]For more detailed information on all legislation from 2001 and 2002 identified by CBO as including federal mandates, see CBO's annual reports on its activities under UMRA (www.cbo.gov).

[17]We also shared this list with organizations representing the private sector, but received no response.

3 contained provisions that were excluded from UMRA coverage, 2 contained provisions with direct costs that were not feasible to estimate, 1 contained a provision that did not meet UMRA's definition of a mandate, and 1 was reviewed by the Joint Committee on Taxation and found not to contain any federal mandates.

Figure 2: How Certain Examples of Laws with Impacts on Nonfederal Parties Were Treated under UMRA



Source: CBO.

Note: The number of laws in any of the categories listed does not necessarily correlate with the magnitude of perceived or actual impact on affected nonfederal parties.

Of the 12 examples of laws with provisions that CBO was not required to review prior to enactment, CBO later determined that 5 contained mandates with direct costs below UMRA's thresholds, 4 contained mandates with direct costs that could not be estimated, 1 was excluded under UMRA because it involved national security, 1 did not meet the definition of a mandate, and 1 had some provisions with costs below the threshold and some provisions excluded because it involved national

security.[18] For example, the Sarbanes-Oxley Act of 2002 contained both intergovernmental and private sector mandates but CBO determined that a cost estimate was not feasible for all mandates. Specifically, CBO estimated the costs of providing notification of blackout periods—specified periods of time when trading securities is prohibited—fell below the UMRA thresholds but provided no quantified estimate, and CBO estimated the cost of running the Public Company Accounting Oversight Board and an associated standard-setting body to be approximately $80 million per year, which would be funded from fees assessed on public companies. However, CBO stated it was uncertain if the rest of the mandates contained in Sarbanes-Oxley exceeded UMRA's cost threshold of $115 million (inflation adjusted).

Identification of Federal Mandates in Rules Is Less Complex Than for Statutes

The process for identifying federal mandates in regulations is less complex than for legislation, but additional restrictions apply to identifying federal mandates. In 2001 and 2002, agencies identified few of the major and economically significant final rules as containing federal mandates as defined by UMRA. Most often, rules with financial effects on nonfederal parties did not trigger UMRA's requirements because they did not require expenditures at or above UMRA's threshold. We also determined that at least 29 rules that did not contain federal mandates defined under UMRA appeared to have significant financial impacts.

UMRA Procedures for Rules Are Less Complex Than for Legislation, but More Restrictions Apply

The process for rules is less complex than for legislation. However, in addition to the definitions and seven general exclusions for legislation, there are four additional restrictions that apply to federal mandates in rules:

[18]Among the four laws containing mandates for which direct costs could not be estimated, some provisions had costs estimated to be below the applicable cost threshold and others had costs that were uncertain.

- UMRA's requirements do not apply to provisions in rules issued by independent regulatory agencies.[19]

- Preparation of an UMRA statement, and related estimate or analysis of the costs and benefits of the rule, is not required if the agency is "otherwise prohibited by law" from considering such an estimate or analysis in adopting the rule.

- The requirement to prepare an UMRA statement generally does not apply to any rule for which the agency does not publish a general notice of proposed rule making in the *Federal Register*.[20]

- UMRA's threshold for federal mandates in rules is limited to *expenditures*, in contrast to title I which refers more broadly to direct costs. Thus, a rule's estimated annual effect might be equal to or greater than $100 million in any year—for example, by reducing revenues or incomes in a particular industry—but not trigger UMRA if the rule does not compel nonfederal parties to spend that amount.

UMRA generally directs agencies to assess the effects of their regulatory actions on other levels of government and the private sector. The agencies only need to identify and prepare written statements on those rules that the agencies have determined include a federal mandate that may result in expenditures by nonfederal parties of $100 million or more (adjusted for inflation) in any year.

Within the OMB, the Office of Information and Regulatory Affairs (OIRA) is responsible for reviewing compliance with UMRA as part of its centralized review of significant regulatory actions published by federal agencies, other than certain independent regulatory agencies. Under Executive Order 12866, which was issued in September 1993, agencies are generally

[19]According to the Paperwork Reduction Act, these include agencies such as the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Trade Commission, the Nuclear Regulatory Commission, the Securities and Exchange Commission, and "any other similar agency designated by statute as a Federal independent regulatory agency or commission," 44 U.S.C. 3502(5).

[20]This means that UMRA does not cover interim final rules and any rules for which the agency claimed a "good cause" or other exemption available under the Administrative Procedure Act of 1946 to issue a final rule without first having to issue a notice of proposed rule making.

required to submit their significant draft rules to OIRA for review before publishing them. In the submission packages for their draft rules, federal agencies are to designate whether they believe the rule may constitute an unfunded mandate under UMRA. According to OIRA representatives, for such rules, consideration of UMRA is then incorporated as part of these regulatory reviews, and draft rules are expected to contain appropriate UMRA statements.[21] The same analysis conducted for Executive Order 12866 may permit agencies to comply with UMRA requirements.[22] UMRA requires agency consultations with state and local governments on certain rules, and this is something that OIRA will look for evidence of when it does its regulatory reviews. UMRA provides OIRA a statutory basis for requiring agencies to do an analysis similar to that required by this. (Unlike laws, however, executive orders can be rescinded or amended at the discretion of the President).

Agencies Identified Few Final Rules Published in 2001 and 2002 as Containing Federal Mandates Because Most Rules Did Not Trigger UMRA's Requirements

Federal agencies identified 9 of the 122 major and/or economically significant final rules that federal agencies published in 2001 or 2002 as containing federal mandates under UMRA (see fig. 3).[23] As we previously reported, the limited number of rules identified as federal mandates during 2001 and 2002 is consistent with the previous findings in our 1998 report on UMRA and in OMB's annual reports on agencies' compliance with title II.[24]

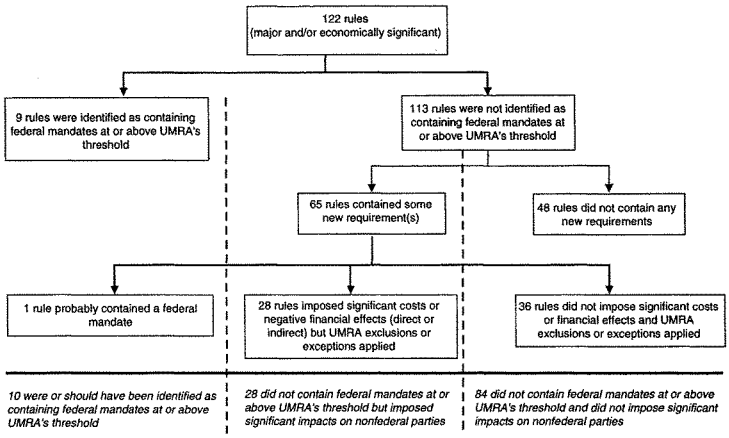
[21]OIRA also checks for related statements and certifications from agencies on the Regulatory Flexibility Act (5 U.S.C. 601-612), which requires agencies to assess the impact of forthcoming regulations on "small entities," and Executive Order 13132, which requires agencies to assess the federalism implications of their regulations, and other requirements that might be triggered by the nature of the draft rule.

[22]As pointed out in our previous report on UMRA (GAO, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions*, GAO/GGD-98-30 (Washington, D.C.: Feb. 4, 1998)), the committee reports for the Senate bill that ultimately resulted in UMRA indicate that Congress was aware that, in many respects, the bill duplicated existing requirements, including those already required under Executive Order 12866.

[23]Although we refer broadly to "final rules," these also included other regulatory actions with legal effect (such as interim rules, temporary rules, and some notices), in contrast to proposed rules that do not have legal effect.

[24]See GAO/GGD-98-30. In addition, OMB produces an annual report regarding progress in regulatory reform in which OMB also examines the costs and benefits of federal regulations and unfunded mandates.

Figure 3: Final Rules Published in 2001 and 2002 That Contained Federal Mandates under UMRA



Source: GAO.

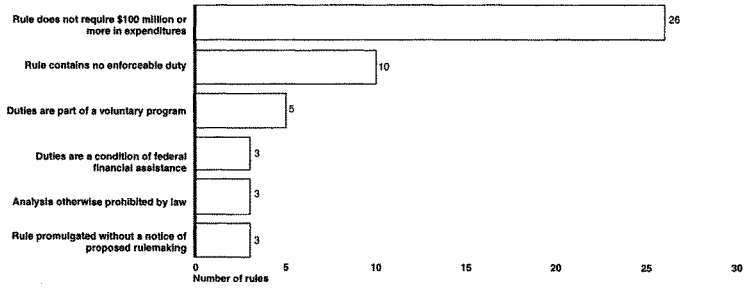
Of the nine rules that agencies identified as containing federal mandates under UMRA, only one included an intergovernmental mandate—EPA's enforceable standard for the level of arsenic in drinking water. The remaining rules imposed private sector mandates ranging from Department of Energy rules that amended energy conservation standards for several categories of consumer products, including clothes washers and heat pumps, to a Department of Transportation rule that established a new federal motor vehicle safety standard requiring tire pressure monitoring systems, controls, and displays.

Of the 113 major and/or economically significant rules in 2001 and 2002 *not* identified as including federal mandates under UMRA, we reported that 48 contained no new requirements that would impose costs or have a negative financial effect on state, local, and tribal governments or the private sector.

Often, these were economically significant or major rules because they involved substantial transfer payments from the federal government to nonfederal parties. For example, the Department of Health and Human Services published a notice updating the Medicare payment system for home health agencies that was estimated to increase federal expenditures to those agencies by $350 million in fiscal year 2002.

In the remaining 65 of 113 rules, we determined that the new requirements would impose costs or result in other negative effects on nonfederal parties. In 41 of the 65 published rules, the agencies cited a variety of reasons that these rules did not trigger UMRA's requirements (see fig. 4). There were 26 rules for which the agencies stated that the rule would not compel expenditures at or above the UMRA threshold and 10 rules for which the agencies stated that rules imposed no enforceable duty. For the remaining 24 rules, the agency did not provide a reason. However, independent regulatory agencies, which are not covered by UMRA, published 12 of these rules, and there is no UMRA requirement for covered agencies to identify the reasons that their rules do not contain federal mandates.

Figure 4: Reasons That Agencies Determined Their Rules Did Not Trigger UMRA's Requirements



Source: GAO.

Note: Agencies cited more than one reason for nine of the rules.

Some Rules That Did Not Trigger UMRA Had Potentially Significant Effects on Nonfederal Parties

At least 29 of the 65 rules with new requirements published in 2001 and 2002 could have imposed significant costs or other financial effects on nonfederal parties. In these 29 rules, we reported that the agencies either explicitly stated that they expected the rule could impose significant costs or published information indicating that the rule could result, directly or indirectly, in financial effects on nonfederal parties at or above the UMRA threshold. For example, more than half of them imposed costs on individuals exceeding $100 million per year, reduced the level of federal payments to nonfederal parties by more than $100 million in a year, or had substantial indirect costs or economic effects on nonfederal parties.

For the remaining 36 of the 65 rules that imposed costs or had other financial effects on nonfederal parties in 2001 and 2002, either the agencies provided no information on the potential costs and economic impacts on nonfederal parties or the costs imposed on them were under the UMRA threshold. For example, a Federal Emergency Management Agency interim final rule on a grant program to assist firefighters included some cost-sharing and other requirements on the part of grantees participating in this voluntary program. In return for cost sharing of $50 million to $55 million per year, grantees could obtain, in aggregate, federal assistance of approximately $345 million. Similarly, the U.S. Department of Agriculture's interim rule on the noninsured crop disaster assistance program imposed new reporting requirements and service fees on producers estimated to cost at least $15 million. But producers were expected to receive about $162 million in benefits.

Even when the requirements of UMRA did not apply, agencies generally provided some quantitative information on the potential costs and benefits of the rule to meet the requirements of Executive Order 12866. Rules published by independent regulatory agencies were the major exception because they are not covered by the executive order. In general, though, the type of information that UMRA was intended to produce was developed and published by the agencies even if they did not identify their rules as federal mandates under UMRA.[25]

In conclusion, UMRA was intended, in part, to provide more information to Congress and agencies when placing federal mandates on nonfederal

[25]One exception might be that OMB's guidance to agencies for regulatory analyses prepared under Executive Order 12866 does not include instructions regarding distributional effects of regulations that are as specific as those called for in UMRA. See 2 U.S.C. §1532(a)(3).

parties by providing more information to help them determine the appropriate balance between desired benefits and associated costs. Based on CBO's experience, there is some evidence that UMRA is in some ways achieving this desired goal. However, UMRA's many definitions, exclusions, and exceptions result in many statutes and rules never triggering UMRA's thresholds, which means they are not identified as federal mandates.

As we reported last year, in 2001 and 2002 many statutes and final rules with potentially significant financial effects on nonfederal parties were enacted or published without being identified as federal mandates at or above UMRA's thresholds. Further, if judged solely by their financial consequences for nonfederal parties, there was little difference between some of these statutes and rules and the ones that had been identified as federal mandates with costs or expenditures exceeding UMRA's thresholds. Although the examples cited in our report were limited to a 2-year period, our findings on the effect and applicability of UMRA are similar to the data reported in our previous reports and those of others on the implementation of UMRA. The findings raise the question of whether UMRA's definitions, exclusions, and exceptions adequately capture and subject to scrutiny federal statutory and regulatory actions that might impose significant financial burdens on affected nonfederal parties.

Mr. Chairman, this completes my prepared statement.

Contacts and Acknowledgments

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