

GAO

Report to the Chairman, Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Committee on Homeland Security and Governmental Affairs, U.S. Senate

March 2005

UNFUNDED MANDATES

Views Vary About
Reform Act's
Strengths,
Weaknesses, and
Options for
Improvement
(Appendix IV,
E-Supplement)



G A O

Accountability * Integrity * Reliability

Parties' Feedback on UMRA and Federal Mandates

This is appendix IV of our report, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, (GAO-05-454). To return to the full report click on the following link: <http://www.gao.gov/cgi-bin/getrpt?GAO-05-454>.

During this review, we solicited information from knowledgeable sources regarding issues associated with UMRA, and federal mandates in general, and options to address those issues. Table 2 below presents those parties' detailed responses. To facilitate open and candid discussions during our review and associated symposium, we have not identified the specific sources of the information we received.

To provide a framework for presenting and analyzing the considerable amount of information conveyed by the sources, we itemized the parties' responses, as much as possible, into a set of discrete separable points and then assigned each item to broad themes. In some instances, if a party's comments were part of a more lengthy discussion addressing a larger issue, we kept the material together to avoid losing the context of the input. Our coding into themes was not intended to be precise or to limit suggested options to only certain topics, but simply to help group together items that included input relevant to a given topic. In some cases, individual items were assigned to more than one thematic category and may be repeated throughout this document. The following are the themes and their related codes used in the tables:

A. Items containing input on UMRA

- A1. Uses and usefulness of information generated under UMRA
- A2. Coverage of UMRA
- A3. Enforcement of UMRA
- A4. UMRA Analytic Framework
- A5. UMRA consultations
- A6. Other items regarding UMRA

B. Items containing input on federal mandates and programs in general

- B1. Design and funding of federal mandate programs
- B2. Evaluation and research needs regarding federal mandates
- B3. Other general items

Where possible, we also included a code within the column containing the strengths and weaknesses identified by the parties to indicate whether the

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

issue raised was considered a strength [S] or a weakness [W] of UMRA or federal mandates in general.

Table 2: Knowledgeable Parties' Responses Regarding Umra and Federal Mandates

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
1	UMRA has been successful in bringing attention to the fiscal effects of federal legislation on state and local governments, improving federal accountability, and enhancing consultation. [S]	UMRA raises awareness of the problem of unfunded and under-funded federal mandates. UMRA fosters a more balanced state-federal partnership.		A1 A5
2	Unfunded and underfunded federal mandates continue to pose an undue burden on state and local governments. 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. [W]	These actions have resulted in substantial costs to state and local governments, and collectively, have eroded state legislators' control over their own states' budgets.	Ensure sufficient 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 states, states should be absolved of their legal responsibility to provide services to entitled individuals and fulfill other federal mandates. A promising approach is the "trigger" mechanism that delays the testing requirement contained in the Elementary and Secondary Reauthorization Act of 2001 (P.L. 107-110) for any year in which the federal government does not meet its stated funding commitment. Any proposal that places a cap or enforces a ceiling [on the cost of federal participation in any entitlement or mandatory spending program] should be accompanied by statutory offsets that reduce state spending, administrative duties, or both. Enact legislation that 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. Restrict the preemption of state laws.	A6 B2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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3	Passage of the State Flexibility Clarification Act of 1999 (P.L. 106-141) [an amendment to UMRA] [S]	Expanded the requirement for cost estimates and mandate statements for legislation that caps federal funding for large entitlement grant programs without providing offsetting state flexibility.	Any proposal that places a cap or enforces a ceiling [on the cost of federal participation in any entitlement or mandatory spending program] should be accompanied by statutory offsets that reduce state spending, administrative duties, or both.	B2
4	Title I of UMRA has been successful in reducing the number of unfunded mandates passed by the Congress. Further, the unfunded mandate point of order and other procedural mechanisms contained in UMRA have proven to be effective without impeding the legislative process. [S]	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 government or lower its cost.		A1 A3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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5	Many unfunded mandates are not subject to UMRA's procedural tools because they do not meet the strict definition under UMRA. [W]	Excluding such legislation from the requirements of UMRA precludes an official accounting of the costs proposed under such legislation.	<p>Modify the existing exclusions under § 4 of UMRA.</p> <p>Expand 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.</p> <p>Expand the definition of mandates to include new conditions of federal funding for existing federal grants and programs, including costs not previously identified.</p> <p>Expand 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.</p> <p>Expand the definition of mandates to include those that fail to exceed the statutory threshold only because they do not affect all states.</p> <p>Revision of the definitions of mandates to include indirect costs, or other provisions of the law, to capture and more accurately reflect the true costs to state governments of particular federal actions.</p> <p>Require that mandate statements accompany appropriations bills.</p> <p>CBO, within its resources, endeavors to provide information on the costs of mandates outside of UMRA's strict definition. The Joint Committee on Taxation, responsible for performing costs estimates of tax legislation, should provide similar additional information.</p>	A2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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6	Title II 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. [W]		Improve 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.	A1 A3 A5
7	Most federal programs (such as No Child Left Behind, IDEA, and Head Start) have not been fully funded. [W]	This leaves state and local governments, and the non-profit community that directly provides some of the services, with financial difficulties.	There should be money to support federal mandates, but federal programs and standards should not be contingent on being fully funded by the federal government.	B1 B2
8	Federal regulatory preemptions, and a shift away from deference to state and local standards, are a general concern. Federal rules that preempt or restrict the public disclosure of information are a particular issue of concern. [W]	The preemption issue is part of the overall debate about the role of government. Restricting disclosure of information that state and local governments have may hinder efforts to monitor compliance with regulatory requirements.	Federal regulatory standards should set a "floor" of protections [that everyone must meet]. But state and local governments should be able to set standards that exceed the federal floor [i.e., that are more stringent or are more protective], if they wish.	B1 B4
9	There is some anecdotal evidence that consultations are a concern. In particular, there are questions about whether federal agencies do an adequate job of complying with the UMRA requirements. [W]			A5
10	UMRA's definition of a mandate leaves out many significant federal actions that restrict the actions of state and local governments. In particular, the grant-in-aid loophole [i.e., the definitional exception for conditions of federal financial assistance] is a significant concern. [W]	Federal actions that steer policies nationwide can leave little room for state and local government policy-making. CBO's information on impacts of federal mandates tends to focus on short-term and financial costs. The "authority costs" of mandates do not draw as much attention.	It is important to go beyond the narrow framework of UMRA and, in a broader systemic sense, look at the "authority costs," not just the fiscal costs, of federal actions. It would be helpful to amend UMRA to adjust the provisions dealing with mandates linked to grant funds. Also, the thresholds could be indexed to inflation.	A2
11	Various knowledgeable parties do not normally recognize the benefits of federal mandates. [W]	There may be an intergovernmental consequence, but it is obvious that there are beneficial impacts from federal mandates.	Conduct research on a sample of a few mandates and measure the positive effects from the mandates.	B3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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12	Research on the cumulative fiscal impact of mandates is needed. [W]		It would be helpful to have a truly careful and comprehensive study of the cumulative fiscal impact of mandates, based on a careful analysis of budgets in a selection of state and local governments.	B3
13	Evaluations of the outcomes of mandates are needed. [W]	The performance costs of federal mandates are being given more attention than the outcomes of the mandates. This approach to policy direction does not work well with federal mandates, because not all the costs are covered.	It is pertinent to focus on measuring objectives or performance afterwards. Also, because federal mandates are not conducive to the same kind of decision making provisions as other government programs, a sunset provision may be needed to create a rigorous approach for evaluating these federal programs.	B1 B3
14	Lack of coverage under UMRA is a major concern. The act currently leaves too many federal actions exempt that have huge consequences. "We shouldn't have UMRA if there are huge areas not covered." [W]	Often, state and local officials raise concerns and questions about the fiscal and other consequences of federal actions, but discover that the federal actions were exempt from UMRA; so detailed estimates of the potential consequences were not available. As a result, the act does little to decrease the burden on state and local governments.	UMRA needs some dramatic strengthening. Any potential amendment or change to strengthen UMRA's coverage would be an improvement. Even if it is considered going to far to extend the reach of UMRA's enforcement mechanisms (e.g., legislative points of order) to the areas currently exempt from the act, it would be beneficial if there was a requirement to at least provide information on their potential effects.	A2
15	The cumulative effect of mandates has not been recognized as an important issue. [W]	The total effects of many smaller mandates can be dramatic.	[Study the cumulative effect of mandates.]	B3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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16	<p>The main issue is broader than just UMRA. States need a way to address the imbalance between mandate costs and available revenues.</p> <p>Also, constituents [beneficiaries] of federal programs don't view these programs as voluntary (so states can't realistically treat participation in the programs as voluntary). [W]</p>	<p>Federal funding is not keeping up with the growth in the costs imposed on states. Because growth in state revenues is hindered by limitations such as tax caps, and the level of federal assistance is not keeping up with actual costs of these programs, the unfunded mandates are growing faster than state revenues can increase.</p> <p>The federal government imposes rules on states and establishes formulas for providing assistance, but demographic shifts over the years make those original assumptions and formulas out of date.</p>	<p>Something bigger than just amending UMRA is needed to address this policy issue.</p> <p>Question whether an entitlement approach and model for federal funding (as with the Medicaid program) makes sense as public policy for providing federal assistance. An eligibility-based system becomes an entitlement program under which costs are hard to control. In contrast, a block grant model lets states experiment with flexible approaches and cap some costs. However, it is questionable whether there would ever be a way to modify the federal model for these programs so they weren't entitlements.</p>	<p>B1 B2 B4</p>
17	<p>The one significant strength of UMRA is that it forces people to think about these issues, but one of the significant weaknesses is that they don't have to think about them enough. [S] [W]</p>			<p>A1</p>
18	<p>The real inherent dilemma is the incentives that are part of the current federal mandate process for the federal government to "over leverage" federal funds—to use its funding contribution (sometimes relatively small as a percentage of the total program costs) to attach conditions in return for the funding. In addition, Congress can add other conditions or place more requirements that were not in the original mandate. [W]</p>	<p>The federal funding is contingent on states' compliance with federal conditions, which creates an unfair level of federal control. States may not oppose the goals of the federal programs, but the additional costs to states interfere with other state priorities for use of their resources.</p> <p>Most of the things that annoy states, they don't have to do [i.e., participation is voluntary]. But if the states want the federal money, Congress can attach conditions that are exempt from UMRA's coverage, and it is not very costly for Congress to do this. Due to the financial incentives, states become tied in to these programs, which may have well-organized constituencies, so they do not realistically have the option of not participating and dropping the programs within their jurisdictions.</p>	<p>This dilemma can't be solved by just another federal statute or amendment to UMRA. Discipline is the only real solution to curbing the practice of Congress adding, and often changing, lots of conditions that come with federal programs and funding.</p> <p>Changing UMRA's provisions to eliminate definitional exceptions (e.g., for conditions of federal financial assistance and voluntary programs) might make the identification of mandates less meaningful. The more red flags run up, the less important the red flag becomes. Further, the actions that trigger UMRA only require a notification of the fiscal impact on state, local, and tribal governments. It does not decrease the number of federal mandates that are placed on states, or even eliminate the ones that are currently being enacted. Therefore, broader coverage of UMRA may not be the solution.</p>	<p>A2 B1</p>

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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19	The consequences of federal mandates are not well understood. [W]		A beneficial option to explore would be to look at one mandate, such as special education, very carefully to get a better understanding of all its consequences.	B3
20	Forcing agencies to think systematically about their rules is a good thing. It is also important to be able to cite UMRA in arguments with agencies. [S]		It is important for Congress to track "unfunded mandates," defined broadly, and for Congress and OMB to develop more expertise on regulations and how to govern them. Congress should have a centralized, objective source of information on regulatory matters. A source of broader independent reviews of the regulatory process is needed. Specifically, Congress should fund the Truth in Regulating Act or something like it to bring together in one spot, and with a public interest perspective, expertise about the regulatory review process. Such an office could do for the regulatory side what CBO does for the legislative side. This information function would be useful to Congress.	A1
21	UMRA doesn't appear to "bind" much, compared to the many significant regulations caught by Executive Order 12866. [W]			A6
22	There is very little activity and attention on private sector mandates under UMRA. [W]	The private sector does not view UMRA as an effective tool.		A6

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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23	A more comprehensive approach to defining and evaluating the results of regulations is needed. [W]	<p>There are many regulatory review requirements and approaches—OIRA's regulatory reviews under E.O. 12866, the Congressional Review Act, the Regulatory Flexibility Act, and UMRA—that all get at the same thing and were enacted for similar reasons.</p> <p>It is questionable how agencies could really “do GPRA” without having this type of information to get at the post-implementation, after-the-fact analysis of what regulations actually accomplished and cost. Agencies and other researchers do few such retrospective looks.</p> <p>Such information would help agencies and other parties to know more about the regulations and perhaps encourage changes in those regulations, if not result in the regulations being pulled back.</p> <p>Also, having such information in hand might help agencies to think about and guide decisions regarding models and approaches to be used in future rules. In the long run, information from retrospective evaluations might change agencies' behaviors. Such evaluative information could make budget information more useful by providing information on what an agency's regulations were actually accomplishing.</p> <p>Retrospective evaluations would be useful because rules can change people's behavior in ways that can't be predicted prior to implementation.</p>	<p>It would be worth taking a step back to (a) define the results we want to get out of federal regulations and (b) implement a comprehensive approach to assess the impacts of those regulations. Ultimately, the analysis addresses a simple question. Either we are getting the results we want or not.</p> <p>Related to this evaluation proposal, there might be room to introduce an approach within UMRA to ensure that such data were available whenever a new mandate is created. If a data base was created to allow future evaluations of the mandate, this might encourage both internal [federal agency] and external parties to complete analyses of the results achieved and check the accuracy of the agency's original benefit-cost analysis. (However, it was also recognized that such a requirement would, in itself, be a mandate and also a data collection subject to approval under the Paperwork Reduction Act.</p>	B3
24	[Other suggestions for amending UMRA] [W]		Congress could include provisions in statutes creating mandates stating that the mandate would not cost state and local governments more than a specified amount—setting a limit on the cost of the mandate to them.	B2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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25	[Other suggestions for amending UMRA] [W]		Including sunset provisions in legislation is an option worth investigating. The provision could call for revisiting a mandate 5 to 10 years after it goes into effect. Such a mechanism would shift the analytical burden of proof to the agencies to show that the mandate was effective. However, businesses had opposed this idea in the past because they thought it might lead to too much uncertainty about regulatory requirements.	B1
26	The primary concerns focus on regulatory mandates, particularly those issued by EPA. EPA's analyses sometimes reflect a poor understanding or lack of knowledge about public utilities and local government functions. [W]	Regulatory impact analyses often exhibit only a cursory understanding of, or totally ignore, the unfunded mandates implications of proposed regulations for public utilities. In particular, when it comes to understanding the differences between investor-owned and publicly-owned utilities, it is sometimes "conceptually difficult for them [the agency] to get it." Sometimes, agency regulators do not realize that some publicly-owned entities are also among the facilities covered under proposed rules. Further, even if recognized as covered, the agency might assume that the consequences for public utilities are the same as those for private utilities.	To agency staff's credit, once they are made aware of these issues and concerns, they are receptive to meeting with the public utilities. It might help to provide more training and education to agencies' regulatory staffs and their contractors who prepare many of the rulemaking studies and materials, such as regulatory impact analyses. Giving these personnel some background about state and local governments and related trade associations could alleviate the need for those governments and associations to educate the regulators about potential consequences to their constituencies after regulations are proposed. Having representatives of these groups come to talk to the agencies' and contractors' staffs would not only provide more insight on potential consequences of federal actions but also increase agency and contractor awareness of these groups as valuable contacts during the rulemaking process.	A5 B3
27	UMRA's definitions and estimation processes need clarification. [W]	It does not appear that agencies are always clear on what an unfunded mandate is or what costs and consequences should be included for purposes of mandate estimation. For example, some costs that the agency might consider minor or indirect, such as paperwork costs associated with regulations, in some cases meet or exceed the total PILOT (payments in lieu of taxes) obligation of a municipal utility.	[Reexamine UMRA's definitions and the exclusion of some types of costs from UMRA estimates.]	A4

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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28	Regional and localized impacts of federal regulatory mandates are not always recognized. [W]	Some regulations can have significant regional or highly localized impacts, but these consequences are not always identified or understood by the regulatory agency. For example, in one EPA rule, the 21 of 66 public utilities that were estimated to be at risk of having to shut down due to the rule were located in Michigan, Ohio, Wisconsin, and western New York. Most regulatory impact analyses, including UMRA estimates, focus on the national impact.	Some agencies, such as the Department of Energy and OMB, have demonstrated that they understand and look for regional and localized consequences of regulations. [Other agencies should do the same.]	B3
29	The potential unfunded mandates implications of homeland security actions are a concern. [W]	There are worries about the potential costs of these rules “coming down the pike” and whether relative risks are being considered when adding new regulatory requirements.	[Homeland security regulations should be covered and that relative risks should be considered when adding new regulatory requirements.]	A2
30	There are too many exceptions in UMRA. In particular, conditions of federal financial assistance are not covered by UMRA but can have big impacts on state governments. The exemption of independent agencies is also a concern. [W]	The many exemptions from UMRA’s coverage are “not in the spirit or intent” of the law. Although these programs don’t technically meet the UMRA definition of a federal mandate, they are perceived as such by state legislatures and agencies. No Child Left Behind and IDEA are among the most important examples. “Arguing the semantics [of the definitions] is an insult.”	Revisit the exceptions. UMRA should cover conditions of federal financial assistance.	A2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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31	<p>Changes in conditions and/or formulas associated with long-term federal grant programs can be a problem.</p> <p>There can also be mismatches between a federal formula and state needs. (For example, the federal formula for providing funding through the Abandoned Mine Reclamation Trust Fund is based on the current level of mining activity, not on the level of need for reclamation.)</p> <p>Congress and federal agencies do not present a viable alternative to accepting federal funding under mandates.</p> <p>Not enough consideration is given to the timing of federal actions and program changes.</p> <p>[W]</p>	<p>States (and the beneficiaries of the federal programs) come to rely on and budget for a given level of federal assistance, so over time participation effectively is no longer really "voluntary." No viable alternative to mandates has been developed that does not cost the state any money.</p> <p>Federal mandates, such as those associated with the seatbelt law and .08 blood alcohol level limit, did not provide any flexibility for the states or take into account the diversity of states and legislative practices. Some federal program changes (e.g., in formulas) can have disproportionate impacts on states.</p> <p>Not all states have the same flexibility to reprogram funds to react to federal changes (for reasons such as short legislative sessions and different budget processes).</p>	<p>Major changes in grant conditions and/or formulas should be treated as new federal requirements, with some recognition of the costs. Perhaps UMRA-like estimates are needed when this happens.</p> <p>Most states have created a budget that is dependent on the federal funding, and measures need to be taken to wean the state system off the federal revenue.</p> <p>There needs to be some recognition that states (and populations served by federal-state programs) are very diverse.</p> <p>[Explore more flexible funding arrangements and requirements.]</p>	<p>A2 A4 B1 B2</p>
32	<p>With regard to the definitions in UMRA, (a) the definitions within the UMRA legislation are not clearly understood or consistently interpreted and (b) the definition of costs in the UMRA legislation only considers direct costs of a mandate.</p> <p>[W]</p>	<p>The definitions are not as clear as one might think. Terms such as "federal mandates" and "enforceable duty" may be interpreted differently by different states (or even entities of the same state government) and federal regulatory agencies.</p> <p>There can be a significant gap between the annual federal funding increases for these programs and the actual costs to states. The federal estimates don't take into account all potential costs of the federal action (e.g., indirect and downstream effects, such as the risk of states being sued for failing to meet adequacy standards). Also, the original federal estimates of the additional costs can be much less than actual costs, again leaving a significant gap that causes states to reprogram funds. There is a fundamental difference between state governments and Congress as to what constitutes a budget gap.</p>	<p>Address what is included in the estimates of impacts. For example, indirect and downstream effects of federal mandates need to be considered as a cost to fairly represent the fiscal impact on the states and local governments.</p>	<p>A2 A4</p>

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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33	<p>Consultation is a missing link. There is an uneven level of quality among federal agencies' outreach and consultation efforts.</p> <p>[W] [S]</p>	<p>Some agencies' efforts are excellent (e.g., the Department of Homeland Security and, in some cases, the Environmental Protection Agency), but others are not. The legislative side works much better than the regulatory side. CBO does a great job on outreach to the state and local groups. CBO organizes regular meetings with representatives of the national state and local organizations.</p> <p>The process at OMB and agencies just focuses on whether a regulation hits the UMRA threshold, but CBO has a more analytical process that is more useful to the state offices.</p>	<p>Consultation needs to be defined more accurately (i.e., what should be considered consultation—just talking to associations or going to actual state officers and agencies?).</p> <p>It would be useful on the regulatory side to have a process similar to what CBO does—regular periodic consultations with the state and local associations on what is coming.</p>	A5
34	<p>The whole concept of “unfunded mandates” does not fit laws that protect these fundamental rights of disabled persons to participate in society. By definition, many of our issues are mandates.</p> <p>The exceptions [exclusions] in UMRA have helped to protect persons with disabilities.</p> <p>[S]</p>	<p>The disability community has been very concerned about UMRA when it was initially enacted and as the unfunded mandates issue continues to be debated, because they see disability issues primarily in civil rights terms.</p> <p>There is a concern that the “unfunded mandates” label just becomes a rallying point for opponents of certain federal laws.</p>	<p>[Retain current exclusions for provisions that enforce Constitutional rights of individuals or that establish or enforce statutory rights that prohibit discrimination.]</p>	A2
35	<p>The federal government should not have to provide the money for fully funding things that are fundamental rights. It is an appropriate role for the federal government to require compliance with certain mandates.</p> <p>[S]</p>	<p>Persons with disabilities are very dependent on entitlements, and it would be a bad precedent if states don't have to do something if there are not enough federal funds.</p>	<p>Compliance [with federal mandates] should not be tied to whether or not there is full federal funding.</p>	B2
36	<p>A potential weakness in analyses and estimates of federal actions is that some analyses are focused on the costs, not also on all the benefits, of such actions.</p> <p>[W]</p>	<p>Many actions addressing disability issues are getting more people involved in society and working. Such actions enhance people's ability to be more productive, but it can be hard to quantify that kind of benefit.</p>		A4 B3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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37	The main issue is the question of how to make federal mandates more effective. [W]	<p>Some federal mandates are inevitable, because the federal government does not have the resources to do everything. For example, in an area such as environmental protection, the federal government has no way to take on a comprehensive program that would enforce federal laws and standards regarding all pollution sources, so states have to take on some of this. Members of the public don't care what level of government does this; they just want these things done.</p> <p>However, the federal government has a "crummy" record of enforcing the law (e.g., deadlines set for states by the Clean Air Act and its amendments have not been enforced).</p>	<p>A first step in getting states to do what laws mandate is simply to report, in a straightforward way, what states are or are not doing (e.g., have a "national scorecard" or central point of contact where one could go to get such information).</p> <p>A second suggestion is that the federal government consider using a "zero-based budgeting" approach to funding for federal mandates. Such an approach would flip the usual arrangement so that states would get no federal funds (e.g., federal highway funds) until they do what is required under federal statutes.</p>	B2 B3
38	I don't believe that genuine federal mandates (as distinct from preemption and funding restrictions) are sufficiently pervasive to constitute a problem that's worth worrying about.	<p>With respect to preemption, the problem is that the federal government preempts too much internal and state legislation (esp. crime—see the medical marijuana question) and not remotely enough state legislation that interferes with interstate commerce and the national economy. This is a substantial problem, and an essentially managerial tool like UMRA cannot tackle it.</p>	<p>Keep the mandate issue separate from the other two issues, which are genuine.</p> <p>I would strongly oppose any extension of UMRA that would even arguably make it harder for Congress or administrative agencies to preempt states.</p> <p>With respect to funding conditions, the most urgent reform is to give states a revenue-neutral way of opting out of federal programs (e.g., NCLB). Here again, I would strongly oppose any UMRA reform that might make it harder for the federal government to attach restrictions to funds. In many of the major programs, and especially Medicaid, the problem is excessive "waiverization," not excessive stringency.</p>	A2 B2 B4

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
39	<p>One of UMRA's strengths is that its provisions apply to some federal laws that restrict the ability of states to collect revenues.</p> <p>A greater weakness is that the federal tax actions with the biggest effects on states' and localities' revenue collections have escaped UMRA review. [S] [W]</p>	<p>Preventing states from collecting taxes is exactly equivalent to an unfunded mandate. Because they must balance their budgets, states must raise other taxes, or shift funds from other programs, in order to make up for the lost revenue resulting from federal actions, just as they would have to raise taxes or shift funds from elsewhere to pay for unfunded mandates.</p> <p>Because of the way state and federal tax codes are tied together, the major federal tax cuts passed in 2001, 2002, and 2003 are costing state governments more than \$2 billion a year in lost tax revenue. None of these laws triggered UMRA review. Of the revenue actually lost by states under federal actions in the last several years, only a small portion was deemed a "mandate" under UMRA.</p> <p>Policymakers are concerned about the implications of federal tax actions on states, particular when states are facing difficulty balancing their budgets. With an expansion of its capacity in this area, CBO could make an important positive contribution to federal tax debates.</p> <p>Failure to include these federal actions under UMRA gives a misleading impression of the size and nature of the "unfunded mandates" issue. A major goal of UMRA is to draw attention to the fiscal impact of federal decisions on states. A \$2- billion-plus loss of revenue for states is every bit as significant as a comparably sized increase in mandated expenditures. By minimizing this aspect of federal policy, UMRA distorts the policy debate.</p>	<p>UMRA should be broadened to include all federal tax actions that reduce state revenue.</p> <p>There are some obstacles to changing UMRA in this manner. For instance, CBO would need greater capacity to conduct analyses of the impact of federal tax changes on states. Cooperation with the Joint Committee on Taxation and an expansion of CBO's own capacity might be needed. A decision would also need to be made whether an UMRA estimate of such changes would take into account the prospect that some states would decouple, or whether it would assume that all states would conform to the change. Either approach would be preferable to the current failure to acknowledge such costs entirely.</p>	A2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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		<p>When policymakers have information on the impact of federal tax changes on state, they can choose to act on that information. The dividend tax reduction was enacted as a rate change, rather than a partial exclusion, because some policymakers were using information about the estimated impact on state revenues and wanted to avoid that impact.</p> <p>There is an important state-federal policy interest in a shared definition of income, of taxable estates, and other items for tax administration purposes. By piggybacking on the federal code, states essentially adopt federal definitions of income, expenses, and other items. Yet it is this same link that results in revenue loss to states when federal taxes are changes in particular ways. It is sometimes argued that federal policymakers need not take into account the effect of federal tax actions if states have the option to "decouple." Decoupling has its own negative consequences. Moreover, there are times when decoupling is simply not feasible for states.</p>		
40	<p>Full and accurate public information about federal initiatives is of critical importance. We are all better off if information on the expected consequences of federal actions is required. The most important point is to clarify in advance what consequences they will have. [W] [S]</p>			A1
41	<p>The most salutary aspect of UMRA is that it places in statute some of the expectations for analysis of federal actions that were also put in Executive Order 12866 [on regulatory planning and review]. [S]</p>	<p>It is a real strength of UMRA that it provides a statutory basis for requiring consideration and analysis of the consequences of federal actions, because an executive order can always be amended or eliminated at the discretion of an administration.</p>		A6

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
42	The second major strength of UMRA is that it reaches beyond regulation and into legislation as well. [S]			A2
43	There are a lot of gaps and exclusions in UMRA that walled off examination of some federal actions. [W]	The exclusion for independent agencies created a significant weakness in UMRA. If states are offered financial help by the federal government, but that help comes with strings attached, those requirements shouldn't be excluded from review under UMRA.	Some of these exclusions and exemptions may be justified, but they merit a closer look to see if all of them are still justified. In particular, the following exclusions and exceptions should be candidates for elimination or amendment: • Independent agencies – There should at least be a very careful look at the justification for excluding independent agencies from UMRA's coverage. • Conditions of federal financial assistance.	A2
44	It is not clear that the Joint Committee on Taxation does as much regarding potential mandates in revenue legislation as CBO does in its mandate estimates for other legislation. [W]	A huge array of mandated costs is associated with tax legislation. The more spotlights that can shine on these actions, the better.	UMRA needs to include a clearer obligation and authority to review tax legislation. If this review function were to be beefed up, it doesn't matter who does it, just that it is done.	A2 A6
45	The discrepancy in title II focusing on just expenditures, rather than economic effects, for purposes of triggering UMRA's cost threshold [while title I focuses on direct costs] needs to be emphasized. A full accounting of the effects and consequences of regulations would be useful, [but] title II's limited definition does not do this. [W]	Economic effects of that magnitude [\$100 million in any year, adjusted for inflation] are every bit as relevant as direct expenditures at that level.	Congress should change the language of UMRA [to use estimates of the direct economic effects of regulations, not just expenditures, for purposes of triggering UMRA's cost threshold]. In contrast with some other observers and commenters, I am okay with UMRA's definition being limited to the direct effects of the federal action, rather than also attempting to include indirect effects.	A4

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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46	UMRA includes limits on analytical requirements if costs are difficult to estimate. [W]	A continuing problem, one common with any statute or executive order, is that there will be cases in which it is alleged that costs cannot be estimated.	It should not be so easy to dispense with estimates. In any change to UMRA's language, there should not be an expectation that you only do the analysis if estimates can be done with precision or certainty. Rough ballpark estimates are also useful. Further, a periodic reckoning regarding the estimates and the effects of federal mandates is needed. There should be an audit, preferably an independent analysis, of what the actual experience has been regarding federal mandates that have been enacted.	A4 B3
47	On the margin, the act has forced Congress to open its eyes about the impacts of federal actions on state and local governments. However, in the last few years, state and local government officials sense that the federal government is making policy with little attention to the fiscal implications on lower levels of government. [W] [S]		There may be a need to "toughen up" UMRA. Making the "roar" of UMRA a little bigger might at least increase attention to these issues. However, it is not certain one could get Congress to pay more attention legislatively, nor can you legislate Congress from imposing mandates. In short, it is not certain that there are any procedural fixes that could address the problem of unfunded mandates.	A1 A3
48	When state and local officials think of unfunded mandates, they often think of the big-ticket items, but questions about the potential effects of such items are not always answered by UMRA because they are considered voluntary programs or conditions of federal assistance. [W]	The example of NCLB illustrates something that is not a mandate, in terms of UMRA, although it is perceived as such by state and local officials. In effect, most state and local governments can't turn down the federal funding available, so the federal conditions attached to the funding are not viewed as voluntary. The federal government often does something that affects the revenue side of state and local governments and that worsens the structural side of their finances.	[Implies consideration of including conditions of federal financial assistance and voluntary programs under UMRA's coverage.] It is not enough to just focus on federal appropriations. One approach to restructuring UMRA could be to have a broader focus to capture revenue effects of federal actions.	A2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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49	<p>Federal mandates raise a whole set of difficult conceptual problems.</p> <p>It is sometimes difficult to single out the additional cost associated with mandates.</p> <p>[W]</p>	<p>Methodologies for figuring out the funding gaps associated with mandates are all over the place. For example, some estimates are based on a comparison of authorized versus appropriated amounts for programs. What are the true costs? In the absence of an independent objective examination of the impacts of mandates, lots of people are making big charges about the size of the funding gaps.</p>	<p>It is definitely worth pursuing an evaluation of the effectiveness of mandates to improve our knowledge about the true costs and effects of federal mandates. Such evaluations shouldn't necessarily be the domain of one agency. Among appropriate parties to be involved in such evaluations are GAO, CRS, and National Science Foundation funding of research on the issue.</p> <p>GAO's report on UMRA should try to bring a little more clarity to the mandates issue. It would be valuable to discuss conceptually what an unfunded mandate is and identify the associated federalism issues.</p>	B3
50	<p>UMRA emerges from the materials as a rather toothless statute. This is particularly true when it is compared to other legislative efforts to curb alleged regulatory shortcomings or burdens.</p> <p>[W]</p>	<p>The legislation relies on an implicit, and naïve, assumption that some degree of transparency or sunshine will be sufficient to cause legislators and rule makers to restrain costs of this sort. Add to this the numerous exemptions from the legislative provisions and the result is anything but a formidable obstacle to a proposed government action with a powerful supporting constituency.</p>	<p>There appears to have been an obvious choice by the drafters of UMRA to eschew the use of certain devices that have been used in other major statutes with similar intent to structure or constrain the decisions of agencies, for example:</p> <ul style="list-style-type: none"> • PRA requirements to obtain clearance for new requirements and draw down on an information collection budget; • Various statutes focusing on the protection of small business have substantial outreach and "tiering" requirements; • NEPA provisions for a finding of "no significant impact" or, alternatively, an environmental impact statement developed using procedural devices that ensure public participation at various stages. 	A3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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51	<p>The structure of exemptions and exceptions preempt consideration of a wide range of potentially significant costs. Of these, the exclusion of indirect costs, broadly defined, is likely the most significant. [W]</p>	<p>The exemption of “indirect” effects is worrisome. From a structural perspective, it appears to invite broad and vague initial statements of policy—be it in statute or rule—followed by subsequent actions that are more specific but crafted to individually cost less than the minimum amount to trigger UMRA. And, obviously, for those affected a loss of business or income is just as damaging as a direct compliance cost.</p>	<p>[Implies a suggestion to address the structure of exemptions and exceptions, in particular the exclusion of indirect costs.]</p> <p>On the regulatory side, in those cases when a formal cost-benefit analysis is conducted, the analytical and threshold issues should be resolved. Thresholds are obviously needed so that legislative and regulatory attention can be allocated rationally. However, it might be useful to at least consider a more sophisticated “tiered” approach in which agencies are required to at least reveal the existence of unfunded mandates at lower levels without anything other than an expectation that the public can comment on them during the rulemaking phase.</p>	A2 A4
52	<p>The serial actions of the Congress and the regulatory bodies also weaken the legislative scheme. [W]</p>	<p>CBO has stated that a prominent reason they are unable to estimate costs of mandates is because the costs depend on future regulations.</p> <p>Rulemaking agencies have a number of ways to inform themselves about costs associated with new regulations, including input from the public during the “notice and comment” stage of the process. However, GAO’s report on UMRA reveals that 25 of the 65 rules [with new requirements on nonfederal parties that might be perceived as “unfunded mandates”] that GAO studied were issued with no prior notice. Based on this one data point, one could hypothesize that not only is UMRA ineffective in capturing very large categories of unfunded costs, it may be having the unintended consequence of inducing agencies to avoid public participation in rulemaking.</p> <p>However, unlikely that effect might be, it is not implausible that legislation that likely meets the UMRA standards of impact (but CBO cannot estimate) is turned over to agencies. They then issue rules in “bite sized” packages that individually fly below the radar.</p>	<p>APA notice and comment rulemaking requirements would appear to allow public involvement in the UMRA-related issues in all rulemakings, but these are frail tools if the type of rulemaking is avoided by agencies or if the public is given little or no information on which to base their comments.</p>	B4

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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53	<p>I could make a final point about post-hoc evaluation of UMRA findings and estimates, but the general condition of program evaluation of this sort by the agencies is such that I'd be spitting in the wind.</p> <p>[W]</p>			A6
54	<p>Public policy issues related to unfunded mandates come in three flavors: (1) constitutional legitimacy, (2) accountability of legislators and regulators, and (3) full and impartial disclosure of mandates' scope and scale of effects.</p> <p>(1) Constitutional legitimacy: UMRA does not address constitutional legitimacy because the law is founded on the premise that congressional authority is without functional limit. That may be convenient, but it does not make the issue go away.</p> <p>(2) Accountability: UMRA includes very limited tools to address accountability, and virtually none of these tools affect regulatory agencies. There is no evidence that UMRA has restrained agencies from imposing unfunded mandates.</p> <p>(3) Full and impartial disclosure of effects: Because UMRA is a charade with respect to addressing accountability, it cannot accomplish full and impartial disclosure of mandates' scope and scale of effects.</p> <p>[W]</p>	<p>UMRA purports to restrain heretofore minimally constrained federal power. It fails because these critical public policy issues have not been addressed.</p>	<p>(1) Constitutional legitimacy: The primary (and heretofore unaddressed) policy issue is, "What principles should guide the federal government's imposition of burdens on the states? Can these principles be articulated into legislation that would lead to consistent legislative and/or regulatory decisions?"</p> <p>(2) Accountability: Before voting on legislation that would impose an unfunded mandate, Congress must have valid and reliable information concerning the likely scope and scale of impacts. Where proposed statutory language is ambiguous or subject to administrative discretion of an executive branch department or agency, estimates should be based on reasonable worst-case assumptions concerning how implementing agencies could actually interpret ambiguous language. Where Congress remains concerned that unfunded mandates could be excessive, it could amend proposed legislation in ways that reduce the reasonable worst-case burden.</p> <p>(3) Full and impartial disclosure of effects: In any case where legislation imposes an unfunded federal mandate, accountability requires that the votes of individual members be accurately recorded. An UMRA amendment intended to enhance accountability must include provisions requiring specific roll call votes.</p>	A3 A4 A6 B4

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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55	<p>Which features of UMRA constitute “strengths” and “weaknesses” depends on what one believes is the law’s purpose. For example, if one believes the law was intended to reduce the scope and scale of unfunded mandates, then the absence of any mechanism to enforce agency compliance constitutes a fatal weakness. However, if one believes that the purpose of the law was to pretend to provide relief without actually doing so, then the absence of such an enforcement mechanism is clearly its chief strength.</p> <p>Whether intended or not, UMRA is in fact hortatory legislation. If Congress had wanted to reduce unfunded federal mandates, it would have included language permitting the states to reject mandates on their own authority, or language permitting them to litigate congressional and/or agency noncompliance with clear statutory criteria. Congress did neither; hence, it is reasonable to infer that it was not serious about reducing mandates.</p> <p>[W] [S]</p>	<p>The effectiveness of legislation cannot be fairly evaluated without first giving serious consideration to its purposes, both stated and unstated.</p> <p>UMRA’s stated purpose was to limit the federal government’s heretofore minimally restrained imposition of unfunded mandates. If these stated purposes are taken seriously, UMRA was designed to fail. If they are not taken seriously, UMRA was designed to succeed.</p>	<p>If Congress is serious about limiting unfunded mandates, it should amend UMRA to:</p> <ol style="list-style-type: none"> 1. ensure full and impartial disclosure of impacts based on reasonable worst-case interpretations of agency discretion; include effective accountability tools, such as genuine judicial review of agency determinations; and impose on itself principled constraints on the exercise of federal power; or 2. empower the states to either reject mandates on their own authority or litigate congressional and/or agency noncompliance with clear statutory criteria. <p>If Congress is not serious about limiting unfunded mandates, no statutory changes are needed. Proposed changes should be screened carefully to ensure that they will have no discernable effect.</p>	<p>A3 A6</p>

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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56	With respect to executive branch decision making, the information currently generated by UMRA is no better than useless and often highly misleading.	Because information about impacts that is currently generated is either useless or misleading, Congress is incapable of using this information to make informed legislative changes.	Research into the scope and scale of unfunded mandates will not be informative unless and until the law has adequate incentives for compliance and accounting.	A1 A4
	[W]		GAO may be able to generate impact estimates, but it is likely to be perceived (especially by the states) as biased because it represents Congress. Therefore, impact estimates must be fully disclosed well in advance of legislative action, reproducible by qualified third parties, and objective in both substance and presentation. (These criteria, and others, already apply to information disseminated by all Executive Branch and independent agencies pursuant to the Federal Data Quality Act. However, because OMB's government-wide implementing guidelines exempt information agencies provide to Congress, GAO has no basis for concluding that agency-supplied estimates satisfy these statutory standards. Congress would have to incorporate within an UMRA amendment language specifically stating that information agencies provide to GAO is covered by the Federal Data Quality Act.)	
57	The effectiveness of federal agencies' consultations with state and local governments cannot be credibly evaluated because UMRA does not provide state and local governments any meaningful tools. [W]	UMRA depends on federal/state consultation to ensure that state and local government concerns are accounted for. State and local governments are subordinate entities in these consultations because they lack the tools to ensure that the federal agencies take their concerns seriously. Consultation is effective only to the extent that federal agencies insist on it, and in those cases UMRA is superfluous.	State and local governmental authority to reject mandates or litigate based on noncompliance with clear statutory criteria [see ID 86 above] would dramatically improve states' ability to ensure that federal agencies take seriously their duty to consult.	A5

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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58	Current law grants agency heads unlimited discretion to certify the absence of significant unfunded mandates, the estimated magnitude of unfunded mandates, and/or the absence of less burdensome alternatives. [W]	UMRA does not impose a significant obstacle to the imposition of unfunded mandates. Even certifications that are ridiculous on their face cannot be challenged under the current law.	A variety of reforms can be imagined that would provide increasing levels of discipline, such as: <ul style="list-style-type: none"> • effectively applying the Federal Data Quality Act to agencies' UMRA analyses, • reassigning the certification functions to an independent entity (e.g., OMB; OMB and GAO combined) or to the states themselves, and • capping the magnitude of actual state and local outlays at a level equal to the Congress's or an agency's prior estimate of those burdens. (Such a reform would eliminate incentives to underestimate impacts. 	A3 B1
59	One of the most important issues is differential costs of complying with any mandate.	If the mandate is not fully funded by the feds...then some states or localities may face higher costs than others of complying. This is not equitable, and is probably inefficient, as well, if it requires diversion of resources from other activities, or higher taxes.	Higher level mandates <u>can</u> be an efficient instrument for overcoming free ridership in the provision of public goods, particularly goods with an important redistributive component. This instrument can be used to put a lower bound on the race to the bottom. It is always better to have more rather than fewer policy instruments. In principle, mandates can act like grants-in-aid, or centralized provision, in that they represent an efficient solution to the problem of coordination among many competing jurisdictions. Hence the complaints of local officials about mandates should not always be taken at face value, in that they may represent an efficient equilibrium.	B1 B4

Appendix IV
Parties' Feedback on UMRA and Federal
Mandates

(Continued From Previous Page)

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60	<p>The more complete and accurate data released to the public because of UMRA is a positive result.</p> <p>The legislative goal of UMRA—to get a better handle on the mandate situation—is laudable. [S]</p>	<p>In general, more information and better information is a good thing.</p>		A1 A6
61	<p>Another strength of UMRA is the section 1503 [2 USC 1503] exclusions. [S]</p>	<p>This section accepts that one of the main roles of the federal government is to provide basic protections in areas such as constitutional and statutory rights. This raises a deeper question of whether there are other activities that are so inherent to the federal government's role that they also need to be off the table.</p>	<p>Congress should reconsider what other things should be added to the list of exclusions.</p> <p>Add exclusions for mandates that ensure levels of public health, safety, and environmental protection.</p>	A2
62	<p>The limited judicial review provision is a strength. [S]</p>	<p>It would be a nightmare if the substance of agencies' regulations were subject to challenge under UMRA. It is fortunate that the remedy if a court finds that an agency did not comply with UMRA's procedures does not impede the regulatory proceedings, but requires agencies to complete the UMRA study. It is a reasonable action towards agencies. This limitation is important because the substantive intent of UMRA could conflict with the substantive effect of the law underlying a regulation. Interposing UMRA regarding the substance of agencies' rules could confuse the application of laws that Congress carefully crafted.</p>		A3
63	<p>The narrow focus of UMRA directs agencies to assess the fiscal impact of actions in isolation. It is looking at only one side of the balance sheet, the costs and funding gaps associated with federal mandates.</p> <p>It is misleading to look only at the costs and only at costs on a mandate-by-mandate basis, in isolation. [W]</p>	<p>Only the costs are being analyzed, and there is no look-back at the benefits. What is also missing by studying only the mandate funding gaps is the big picture of intergovernmental fiscal relations. This is both an empirical and a conceptual problem. The whole purpose of federal revenue collections is redistributive. Looking at costs on a mandate-by-mandate basis ignores other funding coming from the federal government to the state and local governments with no strings attached.</p>	<p>[Implies a suggestion to analyze the benefits, as well as the costs, of mandates and also to examine the fiscal impact on state and local governments in the context of all federal revenues and requirements.]</p>	A1 A4 B3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
64	UMRA could have a subtle “chilling effect” on otherwise legitimate actions. [W]			A6
65	The extra work of cost assessments, which UMRA requires of agencies, is diverting the agencies from performing their principal tasks and takes the agencies’ staff from their duties. [W]	It is not known to what extent this is happening, but the cumulative impacts could be a problem.		A6
66	The inclusion of the private sector within UMRA is another distinct weakness. [W]	This was not an issue covered in the original policy debate over UMRA. What does this have to do with intergovernmental fiscal relief? This is back door regulatory relief.	[Implies reconsidering UMRA’s applicability to private sector mandates.] The real question is whether something is a legitimate regulation. If it is justified, let it be. This is not a cost question.	A2
67	UMRA potentially alters existing statutory regimes. The imposition of cost-benefit analysis on certain existing statutory regimes that explicitly reject the use of cost-benefit analysis—e.g., laws employing technology-based standards—is a concern. [W]	UMRA explicitly requires agencies to consider cost-benefit information that their statutory regulatory authority might not allow them to consider. The same is true for the “least burdensome option” provision. Otherwise, UMRA could amend regulatory statutes in an unconsidered way.	The legislation needs to allow for amendments or flexibilities. Congress should clarify that the least burdensome option should be “the least burdensome option that meets the statutory requirement.” Implicit in this point is another research need, “Has the statute [UMRA} changed agencies’ regulations?”	A6 B3
68	UMRA has mechanisms to improve communications with state, local, and tribal governments, however, it excludes other affected constituencies from its consultation provisions. Further, if you have these intergovernmental consultation communications, they should not be off the record. [W]	This can skew the public policy process. Other parties are relegated to a lesser status.	More parties may need to be covered by the consultation provision (e.g., not just focused on state, local, and tribal governments). Intergovernmental communications should be documented and made part of the rulemaking proceeding while deliberation about the proposal is still going on. If not, the decision making process is opaque.	A5
69	[Re: funding options for mandates.]		There hasn’t been sufficient consideration of user fees. For example, if there is a permitting program that is delegated to the states, the applicants should bear the cost of the permitting process, not the states.	B2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
70	<p>The current UMRA seems to have changed the tone but not the substance of the federal mandate binge.</p> <p>UMRA has improved the tone of many federal efforts, and we are collaborating better. [S] [W]</p>		<p>Each review should result in tangible measurable improvements. That is the only thing likely to have long term results.</p>	<p>A5 A6</p>
71	<p>When the masters of obfuscation get through with a notice it is often difficult to tell what is proposed. [W]</p>		<p>We need a process that will generate and circulate the note with ample time and notice to respond.</p> <p>Notes and notices need to be written in plain English. It would help if the notice and fiscal note required three examples of where and how it would apply in the simplest terms possible.</p>	<p>B4</p>
72	<p>The adoption of UMRA has no doubt brought greater attention to the need to fund federal requirements imposed on state and local governments. However, the measure has been less than successful in its stated purpose since many federal requirements are still not fully funded.</p> <p>The Act has failed to provide additional funding for many federal requirements. Nor has it necessarily resulted in blocking the congressional approval of legislation that is not fully funded. This is a major failure of the UMRA. [S] [W]</p>	<p>Many states, cities and local governments continue to suffer from negative fiscal pressures brought on by federal budget and economic policies that either deny states and cities revenues and/or [do not] fully fund federal programs.</p>	<p>Federal requirements should be fully funded through a combination of sources, including generating additional revenues when needed.</p> <p>It would be useful for the GAO to provide an annual report documenting the total budgetary shortfall of unfunded mandates.</p>	<p>A1 B2</p>
73	<p>While Congress made a number of important changes to UMRA before it was adopted and signed into law, there are still serious flaws with the Act. One of the remaining concerns with the legislation is that it treats most federal requirements in the same manner. [W]</p>	<p>Not all federal requirements are burdensome nor are they necessarily costly. The original Act fails to recognize that some federal laws and requirements are very important to help promote sensible safeguards, fair and consistent treatment, and worthy public policy objectives. Moreover, many of these include fundamental worker protections and benefits.</p>		<p>A6</p>

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
74	<p>UMRA's strength is that it attempts to place greater emphasis and encourage debate and consideration of the budgetary consequences of federal legislation.</p> <p>The information generated by UMRA can be helpful in illuminating the underlying budgetary factors. [S]</p>			A1
75	<p>The most pressing question surrounding this debate should never have been whether new laws and requirements are needed or not. The fundamental issue has always been, "How does government generate the resources to meet the vital needs of our communities?" [W]</p>			B1 B4
76	<p>UMRA is not self-enforcing, and it is not directly triggered by legislation/rule that causes a revenue loss of this magnitude. [W]</p>		[Amend UMRA to address the enforcement and triggering issues noted in the strength/weakness column.]	A3
77	<p>The definition/threshold should be changed so that it applies to legislation that would reduce intergovernmental (state or local) revenue by more than \$50 million. [W]</p>		[Amend UMRA to change the definition/threshold as noted in the strength/weakness column.]	A2
78	<p>Just as exclusions were created for constitutional rights, rights that prohibit discrimination, and Social Security, new rights in the areas of worker rights, civil rights, disability and some environmental protections also should be excluded. [W]</p>		[Amend UMRA to expand the exclusions as noted in the strength/weakness column.]	A2
79	<p>The Act fails to create any judicial review of those who might be wronged by the impact of the UMRA. [W]</p>		[Amend the judicial review provisions of UMRA as noted in the strength/weakness column.]	A3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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80	The Act should not require federal agencies to consult with state, local and tribal governments before a regulation is proposed. [W]	This unfairly elevates the position of one particular voice in the debate before opening the regulations to public comments.	[Amend the consultation provisions of UMRA as noted in the strength/weakness column.]	A5
81	Since UMRA took effect, both the amount of information about mandate costs and interest in that information have increased dramatically. In addition, numerous pieces of legislation that originally contained significant unfunded mandates were amended to either eliminate the mandates or lower their costs. In those respects, title I of UMRA has proved to be effective. [S]			A1
82	UMRA defines federal mandates narrowly. The law is further narrowed by its exclusions. [W]	UMRA's "success" is tempered in some observers' view for three main reasons: because conditions for obtaining federal grants are generally not considered to be mandates; because indirect, or secondary costs, are not accounted for in UMRA; and because some bills are specifically excluded from UMRA's requirements. According to the law, the conditions attached to most forms of federal assistance (including most entitlement grant programs) are not mandates. Yet complying with such conditions of aid can sometimes be costly, and states often think of new conditions on existing grant programs as duties not unlike mandates.		A2
83	UMRA focuses on direct costs that entities affected by mandates would bear. [W]	Federal mandates also impose indirect costs, including the effects on prices and wages when the costs of a mandate imposed on one party are passed along to other parties.		A4

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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84	<p>There are several challenges in the UMRA estimation process.</p> <p>Determining what constitutes a mandate can be complicated (e.g., distinctions between what is voluntary and what is mandatory are not always clear).</p> <p>UMRA is unclear about whether a bill's effect on the costs of existing mandates should be counted as a new mandate cost when the bill itself contains no new enforceable duty.</p> <p>Other implementation challenges include determining how many entities would be affected and whether the effects are uniform. It is also sometimes impossible to estimate costs of mandates before the regulations needed to implement them have been developed (although CBO often estimates costs for mandates before rules are promulgated, e.g., if the agencies already have a clear idea of the direction they are likely to take, there is a good "analogous" rule or program on which to base estimates, or if the legislative language is very prescriptive and clear about what the regulated parties must do).</p> <p>[W]</p>			A4
85	<p>The loopholes in the act are a major reason for non-compliance.</p> <p>[W]</p>			A2
86	<p>UMRA provides a statutory basis for requiring agencies to do an analysis similar to that required by Executive Order 12866 (which can be rescinded or amended at the discretion of the President).</p> <p>[S]</p>			A6

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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87	<p>The Unfunded Mandates Reform Act was an important step in restoring greater balance and mutual respect to the federal system. It has raised awareness of the importance of State, local and tribal government and private sector concerns among agency decisionmakers.</p> <p>[S]</p>		<p>Do more to involve State and local governments early in the rulemaking process. Consultation means little if it occurs after the opportunity to improve a rule is passed. Agencies should consult with State and local governments, including their elected officials and Washington representatives, before they have committed to any particular rulemaking alternative.</p> <p>Bring more uniformity to the consultation process to help both agencies and our intergovernmental partners know when, how and with whom to communicate. States and localities should have a clear point of contact in each agency, and agencies must understand that "consultation" means more than making a telephone call the day before a rulemaking action is published in the Federal Register.</p> <p>Enforce the UMRA to ensure that agencies are complying with both the letter and spirit of the law. The Office of Information and Regulatory Affairs should return a rule that is not in compliance with UMRA to the agency from which it came. If an agency is unsure whether a rule contains a significant mandate, it should err on the side of caution and prepare a mandates impact statement prior to issuing the regulation.</p>	<p>A3 A5 A6</p>

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
88	<p>The positive effects of UMRA had on the legislative process and on federalism are often intangible and not easily measured.</p> <p>Title I of the Act has provided a host of intangible benefits to both the Congress and to states and localities—not the least of which is increased communication between members of Congress and their staff with state and local officials and their representative national organizations on issues related to the imposition of unfunded federal mandates. [S]</p>	<p>When UMRA was introduced in 1995, concerns were raised that UMRA would obstruct the legislative process, would impede expeditious movement of legislation and would weaken congressional authority to address pressing concerns. None of these concerns have materialized into real threats to the legislative process.</p>		A6
89	<p>Intergovernmental cost estimates provide powerful information and create awareness of unfunded mandates. The work of CBO's State and Local Government Cost Estimates Unit is laudable. [S]</p>	<p>These estimates have significantly reduced the number of unfunded federal mandates passed by Congress. A score above the threshold defined in the law will often compel a member of Congress to make adjustments in legislation to avoid the appearance of an unfunded federal mandate.</p>	<p>The work of the CBO State and Local Government Cost Estimates Unit would be enhanced by more timely access to bills and joint resolutions that may impose unfunded federal mandates.</p>	A1 A4
90	<p>The true value of the "point of order" is in its role as a deterrent. [S]</p>	<p>Anecdotal evidence of UMRA's deterrent role, particularly threats that a point of order may be raised against legislation, have improved the process of consultation among Congress, CBO and states and localities.</p> <p>The threat of a point of order against a legislative proposal has caused members and staff to rethink and revise many proposals that would have likely imposed unfunded federal mandates on the states in excess of the threshold set in the law.</p>		A3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
91	Broad exceptions and exclusions, as well as interpretations of law, expose state and local government to potentially large unfunded mandates not addressed in UMRA. [W]	The definition of "federal intergovernmental mandate" requires that provisions impose an "enforceable duty" on state and local government. Enforceable duty, however, is not defined under the law. Further, it is rare that interpretations of what constitutes "enforceable duty" err on the side of the state and local government. Thus, many legislative proposals considered by Congress that would impose a cost shift or preemption go unaddressed under UMRA.	It is worthy of our collective attention to assess whether the exclusions were excessive and perhaps necessary.	A2
92	We have three primary concerns related to Title II: 1. Enforcement of Title II has been non-existent 2. Agency consultation with state and local elected officials and their designated representatives is haphazard and inconsistent. 3. Agency compliance in preparing and disseminating federalism assessments is rare. [W]	Title II, regarding Regulatory Accountability and Reform, requires administrative agencies to consult with state and local government officials and their designees and provides for regulatory accountability and reform. It has been only marginally effective in reducing costly and administratively cumbersome regulations on states and counties.	Each of these deficiencies is repairable without further statutory changes.	A3 A5
93	The UMRA reports are the only tangible items that are created from the UMRA legislation. It is a good exercise to report on the direct expenditure impacts. However, the UMRA reports are not beneficial. [S] [W]	The estimates that are provided in these reports are not the information that is needed. The detailed numbers do not convey the same type of message and are not as useful as describing the size of the federal mandate impacts. The problem also lies in the report's public exposure (i.e., not widely read). Also, the public largely ignores the report unless it can help a certain cause politically. State officials are generally aware when a federal mandate is coming and do not need report estimates to become aware of their budget issues created by a federal mandate.		A1

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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94	There is a lack of performance measures built into the UMRA legislation. [W]	Therefore, it is difficult for the public to determine whether the mandate is effective.	Implementing performance measures into federal mandates may be difficult or even impossible. Another possibility is that performance measures could create an added cost. The focus of research should be redirected. The financial cost should not be a measure of what's effective in mandates.	A6
95	There are two flavors of federal mandates. The first category has mandates that require certain actions on the part of state and local governments and are typically recognized under UMRA. The second category includes mandates in which federal funding is conditional upon a state taking certain actions (e.g., conditions on federal highway funds related to state actions on seat belt use or setting blood alcohol limits). Such actions are not covered by UMRA because participation is considered "voluntary." Actions that fall under some of UMRA's exclusions, such as those regarding national security and civil rights, are also things that can have significant consequences for states, but UMRA does not address. [W]	From the receiving end, such federal actions or programs look and feel like mandatory requirements. Unfunded mandates put new demands on state budgets and interpose on states the federal government's priorities for use of the states' resources.	While it is important to advise Congress that there is, for example, a civil rights or homeland security issue involved with a proposed requirement, Congress should still consider the consequences of such actions on lower levels of government.	A2
96	The whole value of the UMRA process is to provide information on mandates. The reporting requirements are a great step forward. [S]	There are not many folks who think you can prohibit unfunded mandates. This is what the federal government does. But UMRA is useful because you can make [Congress and federal agencies] recognize the effects on state and local governments, making sure they are not using mandate authority without thinking about the consequences. UMRA has been an excellent example of how you go about bringing attention to the potential consequences of federal actions.	What effort is made to make the potentially affected nonfederal parties aware when there is a finding that proposed legislation contains a mandate?	A1

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
97	The definitions need to be tightened up. [W]		In particular, there is a need to address the civil rights and national security exclusions and the exceptions for requirements that are voluntary or conditions of federal financial assistance.	A2
98	There are other loopholes in the process for requirements that would otherwise be considered mandates. [W]		<p>Examples of loopholes to address include things that get added in conference committee or are added to legislation late in the process. However, these might be "irreparable," and you cannot get around such diversions from the regular legislative process.</p> <p>Another category of federal actions that should be considered mandates, but is not necessarily treated as such under UMRA, concerns tax changes that affect state tax codes.</p>	A2
99	There is a need for information on the effectiveness of mandates. [W]	There might be some public policy goals where a federal intergovernmental mandate is the most efficient way to accomplish the goal. However, it would be valuable, particularly for proponents of particular mandates, to have information on the effectiveness and actual costs of the mandate.	<p>Provide information on the effectiveness and actual costs of the mandates.</p> <p>This evaluation should be done by the federal government, both because the federal government is doing the mandating, but also because of a need for a consistent nationwide look at whether mandates are really accomplishing their purposes and at what costs.</p> <p>One would probably not want to do this for every mandate, but it might be a good idea to focus on two or three big ones every year. For a first cut on which mandates to examine, I recommend looking at the most expensive mandates. I also suggest sending a survey to majority and minority legislative aides and the chiefs of staff of committees to identify the two or three mandates they view as priorities, then also going to nonfederal organizations, such as the National Governors Association and the National Conference of State Legislators.</p>	B3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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100	<p>UMRA is successful at the congressional level. Title I of UMRA has been generally successful.</p> <p>The Act provides members of Congress and the general public with important data concerning the scope and cost of federal mandates. Moreover, Congress imposed discipline on itself by mandating that the House and the Senate examine the costs of potential laws before legislating.</p> <p>Furthermore, point of order procedures ensure that debate in Congress considers the direct costs of any mandate contained in the legislation being considered.</p> <p>[S]</p>			A1 A3
101	<p>The independent CBO review is key to the success of UMRA.</p> <p>[S]</p>	<p>CBO's statements provide advocates and opponents with a nonpartisan, thorough analysis of the potential impacts of legislation.</p>		A1

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
102	<p>Agencies are not held to the same high standards that Congress set for itself.</p> <p>As structured, Title II authorizes an agency to be the final determinator over whether the regulations it proposes are mandates or not, and whether the agency's own analysis adequately describes the costs and impacts of the mandate.</p>	<p>Under this process, Congress, the Administration, and the American people are often deprived of the information needed to ensure that federal agencies regulate in the most cost effective, least burdensome manner.</p> <p>Due to the lack of independent review, an agency may deliberately underestimate the costs of a proposed rule or conclude that UMRA does not apply because of other statutory provisions. In these instances, the agency controls both the information and debate, and its determination is virtually unreviewable.</p> <p>UMRA Section 205 requires that agencies consider many alternatives when proposing regulations. From these alternatives, Section 205 also requires agencies to "select the least costly, most cost-effective or least burdensome alternatives that achieve the objectives of the rule" or explain why more burdensome options are necessary. However, Section 205 is not operative unless an UMRA analysis, as specified in Section 202, is required. Therefore, when agencies circumvent Section 205 by concluding an UMRA analysis is not required for by grossly underestimating the cost, the agency thwarts the intent of Congress.</p>	<p>Federal regulatory agencies should not be allowed to avoid congressional mandates by mischaracterizing the cost of a rulemaking. New provisions should be enacted to address this deficiency.</p> <p>First, Title II should be amended to establish independent analysis of UMRA statements conducted by agencies when considering mandates. An independent body—such as GAO or the Office of Management and Budget—should be charged with reviewing the assumptions and policy decisions contained in the mandates analyses. This will help ensure that mandates to both the public and private sector will be fully considered before regulations are finalized.</p> <p>Second, permit early judicial challenge to an agency's failure to prepare UMRA statements. Section 401 of UMRA states that an agency can be compelled to prepare the necessary statements, but only when the final rule has been promulgated. A rule cannot be stayed, enjoined or invalidated solely because an agency did not prepare an UMRA analysis. For this reason, the rulemaking proceeding is permitted to continue when analysis of the costs involved might otherwise be grounds to terminate the proceeding. By removing this provision and allowing a court to potentially invalidate a rule at an early stage because of a missing or deficient UMRA analysis, regulatory agencies will hopefully be more likely to prepare accurate UMRA statements.</p>	A3 A4
103	<p>UMRA is effective for legislation to which it applies.</p> <p>[S]</p>			A6

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
104	<p>Many federal actions that have significant "cost shifting" implications for state and local governments are not being covered under UMRA because of the definitions, exemptions, exclusions, and thresholds in the act.</p> <p>In particular, the UMRA exceptions for conditions of federal financial assistance and participation in voluntary programs are perceived as significant problems.</p> <p>[W]</p>	<p>There has been broad and growing concern on the part of state and local governments regarding cost shifts [from the federal to state and local governments] occurring because of various federal actions. When the ways these cost shifts were happening were examined, it was often found that the sources were federal actions not covered under UMRA. Because these actions fell outside of the requirements for UMRA reviews, estimates of their potential effects were not prepared.</p> <p>Federal grant conditions are perceived as mandates.</p> <p>The "voluntary participation" exception can be a problem when participation is effectively not perceived as voluntary (e.g., when state and local governments come to depend on certain levels or conditions of federal funding).</p>	<p>Amend the definitions, exemptions, and exclusions in the act. In particular, the following types of federal actions should be treated as mandates covered by UMRA's requirements:</p> <ul style="list-style-type: none"> • Federal grant conditions [i.e., conditions of federal financial assistance] • New mandates added within preexisting programs, which can put governments into a position of having to accept new conditions to keep getting funding • Federal preemptions of state and local laws and regulations • Subsequent changes in the conditions or funding levels of existing federal programs that result in new costs for state and local governments, especially once beneficiaries of the programs come to expect program assistance • Secondary and/or indirect costs, including cost shifts associated with state and local governments having to prove eligibility or compete for grants, or situations where the direct cost is assumed to fall on another actor, but indirectly falls on state and local governments. <p>Revisit the reasons why these limitations were incorporated at the inception of UMRA. Determine whether the original concerns are still valid.</p>	A2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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105	Insufficient information is available on the impacts of federal mandates. [W]	<p>Interested parties are currently lacking a complete set of data on the true costs of federal mandates. In particular:</p> <ul style="list-style-type: none"> • There is little good information about the impacts of mandates on local governments. Most of the information that is available focuses on state-level impacts. • No good data base has been available for tracking estimates of cumulative costs of federal mandates since ACIR. • As UMRA is currently implemented, there is no way to capture “highly focused local costs” that affect one state or region without exceeding the national-level threshold. <p>Also, estimates are not always made available when a determination is made that the costs of mandates will be below UMRA’s thresholds (a “black hole” for information on the costs of mandates).</p>	<p>Good data are needed on</p> <ul style="list-style-type: none"> (a) the impacts of mandates on local governments, (b) the cumulative effects and costs of federal mandates, and (c) highly focused local costs that affect one state or region without exceeding the national-level threshold. <p>Basing such data only on things identified under the current UMRA definitions would be inadequate.</p> <p>Another important component of such data would be including the effects of the many mandates that did not exceed the UMRA thresholds.</p>	B3
106	There is currently no attempt by CBO or regulatory agencies to look back after mandates have been imposed to check whether the initial cost estimates were accurate. [W]		It would be useful to study whether the true costs of mandates were similar to the impacts originally estimated.	B3
107	<p>There are uncertainties and inconsistent judgments in the mandate identification and estimation processes.</p> <p>In particular, some definitions in UMRA are unclear, agencies may apply different interpretations and judgments, and there is uncertainty about how estimators at CBO and other federal agencies handle cost ranges when preparing estimates and making determinations under UMRA. [W]</p>	Federal agencies can apply different judgments or interpretations during the mandate estimation processes that affect determinations of whether or not a change is a mandate.	[Implies examining the mandate identification and cost estimation processes and definitions in UMRA and as implemented by different agencies.]	A2 A4

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
108	<p>Perceptions about the quality of information and consultations on mandates are mixed.</p> <p>CBO's estimates and outreach efforts are generally perceived as good. However, there are some problems when CBO concludes that it can't determine cost estimates for some mandates.</p> <p>Regulatory agencies' analyses are "uneven." The agencies and the Joint Committee on Taxation are not making sufficient efforts to consult with state and local governments about the impacts of proposed mandates. OIRA's outreach also "fades." [S] [W]</p>	<p>The depth and quality of UMRA information and consultations are generally better for legislative mandates than for regulatory mandates.</p> <p>Overall, it is not certain that local government officials who actually have to implement federal mandates are adequately consulted about the possible impacts of such mandates.</p>	<p>CBO's approach of more centralized reviews of statutes and direct contacts with state and local governments when preparing estimates are more effective than the decentralized approaches of other agencies and those agencies' reliance, for consultation purposes, on <i>Federal Register</i> notices with requests for comments.</p>	<p>A1 A4 A5</p>

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
109	UMRA hasn't been a disaster, but is also a "lion without teeth." UMRA does not attract much attention, [S] [W]		<p>There are synergistic effects and benefits to be realized from exploring the joint implementation of the Data Quality Act and UMRA. DQA currently has a higher profile than UMRA, and outside parties view DQA as a useful tool. The data an agency used to make its determination about UMRA's applicability could be challenged under DQA.</p> <p>If agencies had to make their UMRA determinations, and the supporting data and analyses, public before rules are published, this could elevate attention to UMRA earlier in the rulemaking process. Agencies could publish their determinations and identify the availability of supporting data and analyses in <i>Federal Register</i> notices, perhaps as periodic batch notifications.</p> <p>This could be done without legislative action. For example, OMB could revise its guidelines to agencies on the implementation of UMRA to (a) instruct the agencies to publicly announce their UMRA determinations periodically and (b) advise the agencies that those determinations would be subject to DQA petitions.</p>	A1 A3 A6
110	The chances of UMRA's title I provisions working are slim, no matter how the act is crafted, because of the way the legislative process works. [W]	Because there is always some support for proposed legislation, it is difficult to use UMRA's point of order mechanism to block legislation.		A3
111	It is difficult to find a good paper trail to document agencies' UMRA determinations under title II. [W]	In reviewing agencies' rulemaking dockets, it is hard to find much to document the analyses and data that agencies used to certify whether or not their proposed rules triggered UMRA's threshold. It can also be hard to find a paper trail to show that, if a rule did trigger UMRA's threshold, the agency identified and selected regulatory alternatives per UMRA's criteria.	Follow specific rulemakings to monitor the implementation of UMRA and see how agencies treat unfunded mandates issues and make their determinations on whether UMRA applies. This could illustrate how consideration of UMRA can be incorporated during the development of a rule.	A4

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
112	UMRA provides little meaningful relief or remedy if agencies have not complied with the act's requirements. [W]	The limited enforcement and relief available under UMRA might not make it seem worthwhile for nonfederal parties to challenge agencies' compliance with the act's requirements. In particular, private sector entities view UMRA as something that is very complicated and are not sure what they get out of this.	Use judicial review to challenge agencies' compliance with UMRA requirements and get agencies and OMB to pay more close attention to UMRA. If the current judicial review provisions are perceived to provide insufficient relief, Congress could amend those provisions to provide more redress on the part of a court that found an agency did not do a required UMRA analysis or prepared an incomplete analysis—perhaps allowing the court to defer the effective date of the rule.	A3
113	UMRA's exemptions are confusing. [W]	Although any one [of the exemptions] might make sense in isolation, together they are a big deal.	Independent agencies should be covered by UMRA, and Congress should rewrite the rest of the exemptions in a more condensed form.	A2
114	It is easy to alter a mandate to make it exempt from UMRA. [W]			A2
115	The results of some federal processes are not necessarily regulations, so UMRA does not apply, but those results might have the same effect as regulatory mandates. [W]	A process that results in an unfunded mandate is the same as a rule that is an unfunded mandate. In an information society, processes that result in de facto unfunded mandates are an important issue, and there is a growing number of such non-statutory, non-regulatory actions not covered by UMRA.	Broaden the definitions in UMRA to apply to federal processes that do not result in published rules but have the effect of a mandate. A wider definition of UMRA's applicability is needed to address such processes. Examples include the National Toxicology Program's (NTP) listings on whether individual chemicals are human carcinogens, which can trigger regulatory actions on the part of government agencies, and decisions by the Internet Corporation for Assigned Names and Numbers (ICANN), which can have the effect of regulatory mandates on the private sector.	A2
116	UMRA continues to protect basic civil rights laws. [S]	The three most obvious examples are the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and Section 504 of the Rehabilitation Act of 1973. Other statutes considered civil rights laws and, therefore, exempt from UMRA include the Air Carriers Access Act of 1986, the Fair Housing Act, and the Civil Rights for Institutionalized Persons Act. The assumption is that these are still things that would be excluded under UMRA.	If UMRA were looked at again, it would help to create an actual list of which laws come under the UMRA exclusions, either as part of UMRA or in conference language, to clarify what UMRA does not cover. It might be important to reaffirm what are the civil rights laws that protect persons with disabilities. One would want to do this in a comprehensive way, but this also could open old wounds and debates.	A2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
117	A potential concern regarding the unfunded mandates issue is that future Congresses might revisit some of these [civil rights] laws and programs because of increasing fiscal pressures. [W]	Attacking federal disability entitlements because of their costs might spur new unfunded mandates debates. This might be particularly true of Medicaid. With the impact of tax reform, deficits, and other financial pressures, there is a concern that the federal government might seek to escape from its share of these program costs.		B4
118	Another potential issue for clarification is whether the entitlements aspect is clear in UMRA. [W]		It might help to clarify what is or isn't an entitlement (that should be excluded from UMRA's coverage.)	A2
119	The structure and philosophy of [UMRA] is fundamentally sound, in particular: § 2 – Purposes. § 423 – Duties of the Congressional committees (although § 423(d) is a problem if Congress appropriates "such sums as necessary"). § 425 – Legislation subject to a Point of Order (in particular the language in 425(iii)). § 204 – State, Local and Tribal Government Input (however, this does not seem to work well on the regulatory side) § 205 – Least Burdensome Option or Explanation Required. [S]		These are parts of UMRA that, in particular, should be retained.	A6
120	Another criticism of UMRA is the issue of Congress providing "such sums as necessary" in the authorizing legislation. [W]	This is seen as a problem, because, although CBO may score something as a mandate, they would not consider it unfunded or underfunded because Congress is providing "such sums as necessary." Since appropriations are not subject to CBO review, there is no process or mechanism to make sure Congress actually appropriates "such sums as necessary."	[Implies consideration of a process or mechanism to check whether Congress appropriates "such sums as necessary."]	A6

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
121	The disability community fought hard to keep civil rights laws like ADA out of the UMRA, and we think that was the correct outcome. [S]	<p>Philosophically, we in the disability community do not see civil rights and equal opportunity laws like the Americans with Disabilities Act (ADA) or Part B of the Individuals with Disabilities Education Act (IDEA)...as unfunded federal mandates.</p> <p>Any time you tie basic civil rights protections to a funding stream, you run the risk that the protection will evaporate when the funding doesn't keep pace with the costs of compliance.</p> <p>To lump [the ADA and other disability rights laws] in with economic regulation and other forms of federal mandates is to cheapen the laws and threaten their ongoing impact as a force for equal opportunity and fair play.</p>	[Implies maintaining the current exclusions in UMRA covering civil rights laws.]	A2
122	<p>UMRA's coverage is not casting a broad enough net.</p> <p>With regard to title I, UMRA does not require CBO to review potential mandates in appropriations bills. Also, there may be a disconnect in the funding to cover federal mandates between the amounts in authorizing legislation and what is actually made available through subsequent appropriations.</p> <p>With regard to title II, UMRA leaves out independent regulatory agencies. [W]</p>	<p>Appropriations might have mandates, so this potentially is a big problem.</p> <p>Why does UMRA not apply to rules issued by the independent regulatory agencies? One would expect them to be covered. Also, has research been done to examine whether UMRA's exclusions have created an incentive for any sort of shift in issuing regulatory mandates through independent agencies?</p>	Broaden UMRA's coverage to include appropriations bills and rules issued by independent regulatory agencies.	A2
123	A concern regarding how UMRA's provisions are enforced is the possibility that Congress under utilizes UMRA's point of order mechanism. [W]	Experience in following the federal budget process shows that budget points of order are underutilized. Congress might similarly underutilize the mechanism regarding UMRA.	The mechanism could be more useful if more information about mandates were provided to Congress. In general, however, there might not be a better way to try to enforce UMRA.	A3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
124	More narrowly focused federal mandates tend to be undone and lose effectiveness because of cost shifting done by state and local governments. The federal government is more effective when it uses broader distribution and spending. [W] [S]	<p>Research suggests that narrowly focused and targeted federal mandates do not tend to achieve the desired effects. They may achieve the goal of expanding coverage, but not the goal of expanding the resources available overall to targeted populations (e.g., resources for education programs for poor districts go up, but less money goes to other programs for those districts).</p> <p>The more constraints that the federal government places on its funding to limit how the money is used, the less efficient the effort may be in achieving the federal objectives.</p>	<p>Federal mandates that are broader in scope appear to be more effective. This argues for more flexibility in federal funding.</p> <p>The federal government is in a good position to do broad distribution of resources. It makes sense to raise funds broadly, and, to the extent possible, use revenue sharing.</p>	B1
125	Judicial mandates are essentially unfunded and can impose big costs. [W]	If the mandate is binding, the state will need to shift resources. Empirically, it is hard to figure out the actual cost of a judicial mandate.		B4
126	I am skeptical that disclosure statutes are an adequate response to the mandate problem. [W]	Such statutes rest on the premise that mandate-imposing legislators are unaware of what they are doing and will stop imposing mandates when they are informed. This strikes me as a naïve definition of the problem and explains why historically disclosure statutes have not significantly impeded the adoption of mandates.	[Implies a suggestion to consider a different framework than a disclosure statute to address federal mandate issues.]	B1 B4
127	UMRA has been a great success overall. In particular, it does a good job regarding intergovernmental mandates. The act brought unfunded mandates to the forefront of congressional debates and slowed down the enactment of new unfunded mandates. [S]	The reduced number of new unfunded mandates is the primary evidence of UMRA's record of success. By that standard, the law has been a complete success.		A1 A6
128	One of the strengths of UMRA has been that it doesn't try to be more ambitious than it needs to be. [S]	UMRA is narrow enough now to work. It focuses on new legislation and provides a shield to protect state budgets from federal coercive intrusion. This is the most important thing.	Putting more in the act might make it less effective.	A2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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129	The information generated by CBO, both the estimates on individual legislation and the annual reports on UMRA activities, has been very useful. [S]		Although additional program evaluation of federal mandates would help, this was not the initial intent of UMRA.	A1
130	The act doesn't cover everything it should. The point of order mechanism is generally weak. [W]	The weakness of the point of order mechanism could be a problem if the mood in Congress shifted and new members were more willing to enact additional federal mandates.	To strengthen UMRA and make it more effective: (1) expand UMRA to cover appropriations bills, discharged bills, bills amended later in the legislative process, and emergency spending bills (if there is a way to cover "non-emergency" emergency legislation); and (2) strengthen the point of order mechanism.	A2 A3
131	UMRA hasn't been as successful in dealing with previous mandates as in discouraging new mandates. [W]		I am not sure how UMRA could be changed to address that. Politically, it could be difficult to try to fix pre-1994 mandates. There is a concern that putting more in the act might make it less effective.	A2
132	Among some members of Congress and other parties there is a lack of knowledge and understanding of what an unfunded mandate is, and such misunderstandings can undermine the effectiveness of UMRA. [W]			A6
133	Underfunding of federal mandates is sometimes a problem. [W]		Some of the federal programs that states have identified as unfunded mandates are voluntary, so states can opt out of them. In some ways, states are using UMRA to intrude on the federal budget by trying to bully the federal government into providing more funding to the states.	B2
134	The most significant strengths of UMRA are that it allows CBO to identify potential mandates in bills, it makes such information available to members of Congress and the general public, and it permits a point of order to be raised against an unfunded mandate. [S]			A1 A3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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135	[The accountability of Congress and federal agencies for the fiscal consequences of their decisions could be strengthened.] [W]	<p>[The following were comments on the significance of options proposed in the next column:</p> <p>(re: 3. Conditions of Federal Aid) Strictly speaking, the so-called mandates in statutes such as the No Child Left Behind Act are not mandates. They are conditions of federal aid; any state and local government wishing not to comply can simply refuse the aid. However, because such conditions are most often attached to large aid programs, such as highways, Medicaid, education, and criminal justice, from which state and local governments cannot feasibly withdraw as a practical matter, then these conditions are de facto mandates.</p> <p>(re: 4. Preemptions) There has been an exponential increase in federal preemptions of state and local powers since 1969.</p> <p>(re: 5. National Security/Treaty Exclusion) Mandates related to national security and treaties can have substantial impacts on state and local governments.</p> <p>(re: 6. Rights-Related Exclusions) Some mandates under the three rights-related exclusions in UMRA can have substantial fiscal impacts on state and local governments, especially in their custodial capacities over persons in schools, prisons, mental-health facilities, and the like. Rights are a matter of interpretation, often political interpretation; hence, UMRA should cover these types of bills so that state and local governments are not saddled with the fiscal costs of rights mandates enacted merely by bare majorities in Congress.</p>	<p>Reforms in the UMRA process should be designed to increase the extent to which the Congress and federal agencies are able to be held accountable to taxpayers for the fiscal consequences of their decisions and to increase, as a result, the fiscal responsibility of the Congress and federal agencies. UMRA, thus, should be strengthened in the following ways (listed from more important to less important):</p> <ol style="list-style-type: none"> 1. CBO should be required to identify and review potential mandates in all bills, including appropriations bills, acted upon by Congress. This would provide much more information to members of Congress and the general public and also ensure that no significant unfunded mandates would slip through the legislative process without any possibility for challenge. 2. UMRA should require a three-fifths vote, rather than a simple majority, to overturn a point of order. This change would strengthen the institutional salience of UMRA and ensure that no significant mandate could be passed by a bare simple majority of either house. 3. UMRA should be amended to require CBO to identify and estimate the costs of conditions of federal aid that will require state and local governments to expend \$50 million or more of their own revenues in order to comply with the conditions. 4. UMRA should be amended to require CBO to identify and estimate the costs of federal preemptions that will either cost state and local governments \$50 million or more in lost revenues or require state and local governments to expend \$50 million or more of their own revenues in order to comply with the preemptive statute and also alter their own institutions and processes so as to adjust for the preemption. 	A2 A3 A4 B3

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
136	The whole concept of unfunded mandates has some underlying problems. There is a risk that the rallying cry of "unfunded mandates" could be a wolf in sheep's clothing used to deregulate and undermine fundamental health, safety, and environmental protections. [W]	<p>Anything the government does could be called an unfunded mandate. Taken to extreme, this could be used to dismantle safeguards and basic protections, such as civil rights laws, that are essentially part of the social fabric.</p> <p>This is what regulations do; they require things of people but are not accompanied by significant amounts of money [to pay for the costs of compliance].</p> <p>The federal government is the only entity that is in a position to set minimum standards that everyone must meet and to halt a regulatory race to the bottom by state and local governments. If the unfunded mandates label were used as a banner to try to deregulate a lot of things, it would reduce the federal government's ability to act in this way. If the federal government was less able to set such standards, state and local governments would be under greater pressure to cut costs for regulated entities by loosening regulatory standards to avoid giving their neighbors a competitive advantage. In the long run, this would be harmful to the public protected by the standards.</p>		B4
137	The second issue that is very troubling is the effort of companies and operators to take the mantle of unfunded mandates from the framework of intergovernmental mandates and apply it to private sector mandates. [W]	The UMRA legislation was sold to the public as an accounting of what federal mandates cost state, local, and tribal governments. The inclusion of private sector mandates did not fit conceptually with the intent of the act.	[Implies a suggestion to delete private sector mandates from UMRA.]	A2
138	The constitutional and statutory rights exemptions in UMRA are essential. However, other rights are also important. [S] [W]	It is equally important to be safe and healthy. These protections are legitimately something that it is hard to argue are different from civil rights. Inherently and intellectually, they are the same.	[Implies a suggestion to maintain the existing rights exclusions in UMRA and add exclusions for federal mandates regarding health and safety.]	A2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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139	Another important issue wrapped up in a lot of this debate about mandates is preemption. There is a concern if preemption were brought into or linked to UMRA.	The subject of preemption can emerge in the more general context of environmental federalism issues. Businesses are concerned about being at a competitive disadvantage if their state and local governments have more strict regulations than those applicable to competitors. In this context, there is a concern that federal preemption could be used to prevent state and local governments' regulations from being more stringent than federal standards. This is "a sort of reverse unfunded mandate." Also, it is an interesting juxtaposition and hard to reconcile that the same people who are fighting other federal mandates to preserve states' rights want the federal government to intervene to prevent states from imposing more stringent regulations and standards supported by their citizens.	UMRA is not the thing to address preemption.	A2 A6
140	I have no problem with estimating the costs and benefits of regulations, but it is necessary to recognize the difficulty of coming up with hard numbers (estimates of costs and benefits of federal actions) in advance. The assumption that hard numbers are available is unrealistic. [W]	There are often enormous uncertainties associated with estimates of the impact of proposed legislation. You try to do the best job possible, but it is an inherently flawed assumption to expect hard numbers. People can misunderstand what these numbers are or use them to "deep six" something based on flawed estimates.	To address this issue, there needs to be congressional and general recognition that these numbers are soft.	B3
141	A significant weakness of UMRA is that it primarily focuses on costs of federal requirements, with little or no recognition of the benefits achieved by federal mandates. [W]	There is often a difference between who bears the direct costs of a mandate versus who has negative externalities imposed on them that the federal mandate attempts to address. As a result of its cost focus, UMRA gives a one-sided statement of the legislation, not a balanced discussion of what is being proposed. What would people's reaction be if the legislation only required looking at the benefits side of the equation?	[Implies a suggestion to have the UMRA process focus on benefits as well as costs of potential federal mandates.]	A1 A4

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

ID	Strength or weakness of UMRA as enacted or implemented (or of federal mandates in general)	Why this item is significant	Suggested options (if any) to reinforce strengths or address weaknesses	Theme code(s)
142	Without UMRA you would have more unfunded mandates because, with UMRA, you have "this invisible wall" that people don't want to cross. Absent the point of order enforcement mechanism, people will overlook the significance of the mandate reports. They will not pay attention to the reports without the consequence of a point of order being raised. [S]			A3 A6
143	The point of order mechanism in UMRA is cumbersome and odd. [W]	Trying to restrict the content of legislation through procedure is awkward (not much of a solution). Congress is not likely to use the point of order procedure to challenge provisions.	It is probably imprudent to put procedural restrictions on what can be legislated. Congress will simply find a way to get around it, if members want to. You can't stop a legislature from legislating, so there is no sense expecting the procedural hurdles of UMRA to stop mandates. You ultimately have to rely on a political will to stop unfunded mandates. It is not certain that fixing or simplifying UMRA's procedures would address the underlying purposes of the act.	A3
144	UMRA's current process to identify mandates is flawed because of the things that are not covered. Because of the many available ways that UMRA may not be applicable, the act fails miserably. [W]	The definition of a mandate under UMRA excludes many things of concern to affected parties. There are also other things that would meet UMRA's definition of a mandate but escape scrutiny under UMRA for other reasons, such as not following the regular legislative process.	Tighten the exclusions. Look at the existing loopholes in UMRA and clean them up (e.g., only counting expenditures for purposes of triggering title II and UMRA not applying to rules without a notice of proposed rulemaking).	A2 A4
145	Congress has never used the Byrd amendment provisions in UMRA. The Byrd amendment provisions are not well developed or precise. They are more complicated than they need to be. [W]	You can't fund a mandate through the authorization of a mandate. The Byrd amendment provisions are an attempt to come to grips with this (i.e., the possibility that Congress will not appropriate the funding authorized to pay for a mandate).	Get rid of the Byrd amendment. Simplify it to say that, if in any year a mandate is not funded, then the mandate is abolished. Leave it to Congress to remedy the elimination of a mandate, if it wishes, by re-legislating.	A6

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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146	There are situations when the costs of legislative mandates cannot be estimated at the time of enactment, because they depend on future regulations. [W]		Amend UMRA to include a look-back method. If Congress enacts legislation that has an impact that cannot be calculated at the time of enactment, the provision would automatically sunset unless Congress reconsiders the legislation.	A4 A6
147	Title II only requires agencies to self-certify and to do analyses they are already doing under other requirements. Title II is meaningless given these other requirements, and there is no real sanction on agencies for noncompliance. [W]		Revisit the provisions of title II. Consider moving oversight of title II from OIRA to a congressional committee or some other actor. This would also allow someone to oversee the independent agencies.	A3
148	Title IV (re: judicial review) is practically toothless. [W]		Expand title IV so that someone of the Big 7, for example, could bring suit. Expand it also to cover title I statutes.	A3
149	CBO's estimation methodology of potential mandates costs does not appear to be subject to oversight or challenge. The absence of such oversight, and the omission of other information—in addition to the CBO estimates—that is supposed to be provided by Congressional committees under UMRA's reporting requirements, indicates that the information provided by committees should not be taken at face value. [W]	If the committee report, including the CBO estimate, is of questionable value and use, the requirements in UMRA should be reexamined.	Open the CBO methodology for comment, perhaps through the <i>Federal Register</i> or by requiring an independent examination of the process used by CBO. Put some backbone into the UMRA requirements that committees provide information, e.g., set up a hurdle for consideration of legislation if committees leave out required information.	A3 A4
150	[Funding options for federal mandates.]		As an option for addressing the funding of mandates, consider waivers or swaps. Amend UMRA so that, if a mandate is legislated, then state and local governments gain certain waiver rights.	B2
151	The inclusion of the private sector in UMRA is confusing. [W]	It is not clear why UMRA covers private sector mandates. Their inclusion dilutes the original intent of the statute to address the issue of unfunded mandates, as the concept is generally understood [i.e., to refer to intergovernmental mandates].		A2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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152	UMRA is generally duplicative of everything else the agencies do to analyze their proposed rules. The only thing that is different with UMRA, compared to EO 12866 is that UMRA requires agencies to specifically address their choice of regulatory options. [W]	UMRA is redundant, covering much the same territory as analyses required by EO 12866, the Federalism EO, the Regulatory Flexibility Act, and others. For example, the agencies will look very carefully at the effects of their rules that exercise preemption of state and local authority under the Federalism executive order.		A4
153	UMRA also overlaps the Federalism EO and others regarding its requirements for consultation during the rulemaking process. [W]	In practice, the agencies generally have received no response to consultation letters they sent to potentially affected parties. It is hard to get folks to focus too early in the process, i.e., before the substance of a rule has been proposed for comment. ...The agencies get few or no responses to the information they provide on forthcoming mandates (e.g., through the semi-annual regulatory agenda) and to the opportunities provided to participate in and comment on the rulemaking process.		A5
154	The work of the Congressional Budget Office (CBO) has not obstructed committee action, but rather has served to enhance congressional decision-making through better information. [S]	The very threat of a CBO report has engendered efforts to reach out to state and local leaders before the fact—instead of after. It has changed the nature of our intergovernmental discussion in a very positive way.		A1
155	Exemptions from UMRA are a growing problem. [W]	While UMRA has led to a significant improvement in Congress, its very success has demonstrated areas where the spirit of the law has been circumvented, notwithstanding extraordinary impacts on states.		A2
156	Environmental protection mandates are a significant issue. These rules are causing a big unfunded mandates problem for local agencies. [W]	EPA sometimes has a way of getting around UMRA by claiming that its actions would impose no additional incremental costs on localities, because the state/EPA already regulate in the area. This is an unfair technique, and large implications are being felt by many localities.	Affordability criteria should be considered regarding mandates, and there could be a state regulatory “off ramp” to get waivers when faced with costly mandates. However, the affordability criteria should not be based on EPA’s existing guidance that sets the bar based on a community’s medium household income and ignores poorer segments of the populations and other financial obligations a community faces.	B1 B2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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157	A particular concern is the quality of federal agency cost estimates for proposed mandates. [W]	<p>There are concerns that EPA and its consultants underestimate costs.</p> <p>There is no real consequence if agency estimates undershoot actual costs by a big margin.</p> <p>If the federal agency would only truly look at the costs of mandates, other options and site-specific alternatives might be identified.</p>	<p>There has to be a better way to make the agencies accountable for their cost estimates. A related question is whether the federal agencies that are imposing the mandates should also evaluate the mandates. We advocate third-party review of the benefits of agency mandates, and their cost estimates or some similar mechanism to have someone look at the agencies' mandates, estimates and data.</p> <p>UMRA estimates should be done on a regional/local level basis also, not just at an aggregate national level.</p> <p>Federal agencies are not looking into the cost-benefit ratio of their mandates. When you spend that much money, what do you get from it?</p>	A4 B3
158	Another area of concern is agency efforts at public outreach and consultation regarding mandates. [W]	<p>Although EPA offers opportunities for comments and is willing to meet with state and local officials, it has been very frustrating when the agency disregards the information provided by state and local officials on the potential impacts of mandates.</p> <p>Also, there is no outreach to the public about why these mandates are needed and why the costs are so high. All local agencies will need to raise revenues and raise rates [to address increased federal standards], but the average citizen is not aware that the increase is caused by the federal government. Therefore, the citizens' blame and resentment is directed toward the localities.</p>	<p>Unless there is an environmental emergency, EPA should be required to justify the mandate before it can implement it.</p> <p>EPA should be held accountable for the cost of implementing mandates and then finding they underestimated the benefits to the community. Placing the cost for errors on those that cause them is a way to bring a sense of control and accountability to governmental entities managed by appointed officials.</p>	A5
159	Although UMRA recognizes and brings attention to an important aspect of federal action, there needs to be more than a "check the box" solution to the problem. [S] [W]		Identifying that something is a federal mandate is not enough; give it [UMRA] more teeth.	A6
160	The language and exclusions of UMRA create an illusion that there are not many unfunded mandates occurring. [W]		There are many mandates present that have a significant funding gap, and these should be considered unfunded mandates.	A2

**Appendix IV
Parties' Feedback on UMRA and Federal
Mandates**

(Continued From Previous Page)

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161	UMRA doesn't apply to preexisting legislation (e.g., the Clean Water Act). There is no retroaction application. [W]		A targeted effort to do some look back at prior mandates would be useful.	A6

Source: GAO.