

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

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March 2005

# UNFUNDED MANDATES

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



G A O

Accountability \* Integrity \* Reliability

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

## Why GAO Did This Study

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

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

GAO makes no recommendations in this report.

[www.gao.gov/cgi-bin/getrpt?GAO-05-454](http://www.gao.gov/cgi-bin/getrpt?GAO-05-454).

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

## UNFUNDED MANDATES

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

#### What GAO Found

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

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

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

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United States Government Accountability Office  
Washington, D.C. 20548

March 31, 2005

The Honorable George V. Voinovich  
Chairman  
Subcommittee on Oversight of Government Management,  
the Federal Workforce and the District of Columbia  
Committee on Homeland Security and Governmental Affairs  
United States Senate

Dear Mr. Chairman,

Many federal programs and initiatives, in areas ranging from homeland security to health care and environmental protection, involve shared responsibilities—and benefits—for the federal government, state, local and tribal governments, and the private sector. To aid in the implementation of these programs and initiatives, and to share their costs, federal statutes and regulations often require nonfederal parties to expend their resources in support of certain national goals. For example, the Pipeline Safety Improvement Act of 2002 included intergovernmental and private sector mandates that, among other things, required operators of natural gas and hazardous-liquid pipelines to adhere to minimum safety standards, create an employee qualification program and conduct facility risk analysis.<sup>1</sup> Similarly, the Environmental Protection Agency issued regulations in 2001 setting new enforceable standards for the maximum level of arsenic in drinking water that affected both publicly-owned and privately-owned water systems.<sup>2</sup>

Determining the appropriate balance of fiscal responsibility between the federal government, state, local and tribal governments, and the private sector in carrying out these federal mandates is a constant challenge. As the budgets of federal, state, and local governments become more constrained, balancing the costs of legislative actions with increasingly limited fiscal resources has brought this debate to the forefront. As we move forward into the 21st Century, we have observed that the federal government will be pressed by its own long-term fiscal challenges to

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<sup>1</sup> Pub. L. No. 107-355.

<sup>2</sup> “National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring,” 66 Fed. Reg. 6976 (Jan. 22, 2001).

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engage in a serious reexamination of what the government does, how it does business and how it finances its priorities. Such a reexamination can also usefully consider how responsibilities should be allocated and shared across state and local governments as well.<sup>3</sup>

As we rethink the federal role, many in the state and local governments and business sectors would view unfunded mandates as among the areas warranting serious reconsideration. The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to address concerns about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided federal funding to cover the costs.<sup>4</sup> UMRA generates information about the nature and size of potential federal mandates on other levels of government and the private sector to assist Congress and agency decision makers in their consideration of proposed legislation and regulations. However, it does not preclude the enactment of such mandates. As we approach the 10-year anniversary of the enactment of UMRA, questions about the effectiveness of this legislation have been raised by affected parties.

In May 2004, at your request, we reported on the identification of federal mandates in federal statutes and rules under UMRA. On the basis of our review of the act's provisions, and an analysis of statutes enacted and final rules published during 2001 and 2002, we noted that UMRA appears to have indirectly discouraged or limited mandates in some cases. Our report, however, also raised questions about the various types of mandates that are not covered by the act but may have potentially significant fiscal impacts on affected parties.<sup>5</sup> Similarly, the Congressional Budget Office (CBO), which plays an important role in implementing UMRA provisions regarding statutory mandates, has reported on the narrow scope of the act's coverage and difficulties in implementing UMRA.<sup>6</sup> Nonfederal observers, including parties affected by federal mandates, also increasingly have expressed

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<sup>3</sup> GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington, D.C.: February 2005).

<sup>4</sup> Pub. L. No. 104-4, 2 U.S.C. §§658-658g, 1501-71.

<sup>5</sup> GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637 (Washington, D.C.: May 12, 2004).

<sup>6</sup> CBO is charged with estimating the costs of intergovernmental and private sector mandates in certain legislation.

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concerns about the fiscal burdens of federal mandates and the difficulty of accurately assessing the true impact of mandates.

You asked GAO to provide more information and analysis regarding these and other issues related to federal mandates. Specifically, you asked us to consult with a diverse group of knowledgeable parties familiar with the act and to report their views with regard to (1) the significant strengths and weaknesses of UMRA as the framework for addressing federal mandates issues, including why the parties believed the issues they identified were significant, and (2) potential options suggested for reinforcing the strengths or addressing the weaknesses.<sup>7</sup> This report discusses those objectives for each of the broad themes that emerged from our consultations with the parties. Specifically, this report focuses on (a) UMRA coverage, (b) enforcement, (c) other UMRA issues, including the use and usefulness of the information generated under the act, UMRA's analytic framework, and consultations with state, local and tribal governments, and (d) broader issues involving federal mandates, including the design and funding of federal mandates and evaluating those mandates. As requested we also report for each of those themes, to the extent possible, on the level of agreement or disagreement among the parties concerning the perceived strengths and weaknesses and the suggested options for reinforcing the strengths or addressing the weaknesses. We also provide observations on the broader implications of the unfunded mandates issues raised by our sources for the allocation of financial responsibilities in our intergovernmental system.

To address the objectives, we used a two-step data collection process to obtain input on UMRA and federal mandates' issues and options from a diverse and extensive set of organizations and individuals that were knowledgeable about federal mandates and UMRA.<sup>8</sup> First, we obtained feedback from participating parties about UMRA strengths and weaknesses and options using a structured data collection approach. We analyzed the information obtained from those parties and organized it into broad themes. Second, we supplemented our initial round of information collection with a symposium on federal mandate issues held at GAO on

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<sup>7</sup> Throughout this report, we simply use the term "issues" when referring to strengths and weaknesses in the aggregate.

<sup>8</sup> In all, there were 52 organizations and individuals responding to our request for views, and they are referred to collectively as "parties" throughout this report.

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January 26, 2005.<sup>9</sup> The purpose of this symposium was to have a more in-depth discussion about the issues most frequently raised during our initial data collection effort. The three themes discussed at the symposium were coverage, enforcement, and funding and design. Twenty-six individuals representing all five sectors attended.

For purposes of structuring our examination of agreement or disagreement in the views of participating parties on specific issues and options, we classified each participating party into one of five sectors—academic scholars and think tanks (20 parties), business (5 parties), federal (10 parties including executive and legislative branch agencies), public interest advocacy group (6 parties), and state and local governments (11 parties).<sup>10</sup> Although most of the parties providing input represented a larger set of organizations within their related sector, the information gathered represents just the views of those parties who chose to participate in this review. As such, the information provides only a rough gauge as to the prevalence of opinion about a given issue or option or the extent to which there is agreement among and within particular sectors. We conducted our review from August 2004 through February 2005 in Washington, D.C., in accordance with generally accepted government auditing standards. (Appendix I provides a more detailed description of our objectives, scope, and methodology. Appendices II and III identify, respectively, the parties who contributed to our review and those who participated in the symposium. Appendix IV, which is available as an electronic supplement, provides a comprehensive list of the comments and suggested options provided by the parties.)

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<sup>9</sup> Forty-nine of the 52 parties provided responses in the initial data collection effort and the three other parties who were unable to participate in the first round of data collection were able to participate in the subsequent symposium.

<sup>10</sup> Despite our efforts to solicit a comparable level of input from the different sectors, fewer identified parties from some sectors chose to participate in our review than others. However, some parties who chose not to participate recommended contacts whom we classified in another sector, which allowed us to partially mitigate the extent of non-participation. For example, business associations recommended parties in the academic/think tank sector as persons knowledgeable about private sector perspectives on mandates issues.

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## Results in Brief

Parties from the five sectors—academic/think tank, public interest advocacy, business, federal, and state and local governments—identified a number of issues about UMRA and its implementation that warrant examination. Issues involving UMRA's coverage were the most frequently raised, by the parties we contacted. Parties across most sectors thought UMRA's narrow coverage was a significant weakness that should be addressed. Many suggested broadening UMRA's coverage including reconsidering UMRA's definitions, exclusions, and exemptions such as conditions of federal financial assistance and preemptions of state and local authority. However, a few parties, primarily from the public interest advocacy sector, said many of the exclusions were important and that the act's narrow coverage should be maintained or reinforced by adding exclusions for mandates regarding health and environmental protection. Two suggestions—excluding private sector mandates and excluding civil rights-related mandates—were strongly opposed by parties from several sectors.

UMRA establishes various responsibilities and enforcement mechanisms for Congress and federal agencies. While mentioned by far fewer parties than coverage, issues involving compliance with and enforcement of UMRA requirements were the second most frequently cited across all sectors. Generally, the Congressional procedures were viewed as having a greater impact on mandate decision making than those applying to federal agencies. UMRA sets out rules for both the House and Senate that prohibit consideration of mandate legislation unless certain conditions are met. The primary enforcement mechanism for legislative action is the point of order—a procedural mechanism that can be used by a member of Congress to challenge a mandate during the legislative process. Parties from various sectors had mixed views about the deterrent value of the point of order in the enactment of certain mandates, but most suggested maintaining or strengthening it, including a suggestion to increase the number of votes needed to overcome a point of order from a majority to a supermajority. UMRA also sets out requirements that federal agencies prepare written statements that identify, among other things, mandates that exceed UMRA's threshold for regulations. Unlike the Congressional process, however, there is nothing comparable to the point of order to deter agencies from imposing mandates at or above the UMRA threshold. Finally, a few parties commented about the ineffectiveness of UMRA's judicial review provision, which they said does not provide meaningful remedies even if a court determines that federal agencies have not complied with UMRA. Although

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the parties suggested numerous options to strengthen UMRA enforcement, none received broad-based support from parties within and across sectors.

The other themes that received a significant number of comments were the use and usefulness of information (e.g. has it helped decrease the number of mandates?), UMRA's analytic framework, and the agencies' consultation with state, local, and tribal governments. All the sectors provided mixed, but generally positive, comments about the use and usefulness of UMRA information in policy debates. Comments about the information provided by CBO were generally positive and parties from the academic/think tank and state and local governments sectors suggested creating a single entity within the executive branch to determine if there are covered mandates in proposed federal regulations, instead of leaving this determination to the agency alone. Second, parties from all sectors commented about UMRA's analytic framework, including concerns about how UMRA defines costs and the inherent difficulty in estimating certain mandate costs. To address their concerns, some suggested broadening mandate cost estimates to include indirect costs and others suggested including benefits, where possible, along with cost estimates. Lastly, parties from all sectors commented about the inconsistent application of UMRA's consultation requirements by some federal agencies.

In addition to comments provided about UMRA, parties from most sectors raised a number of broader policy issues concerning design and funding of federal mandates and the evaluation of those mandates. While views about the design and funding varied across sectors, most of the comments focused on perceived funding gaps between costs of federal mandates and the amount of funding provided to carry them out. Many observed that there is a lack of evaluation and research on federal mandates and generally agreed that retrospective evaluation of federal mandates was needed to ensure that mandates were achieving their intended goals and to better measure the actual costs incurred by nonfederal entities.

As we move forward, the issue of unfunded mandates raises broader questions about the assignment of fiscal responsibilities within our federal system. Federal and state governments face serious fiscal challenges both in the short and longer term. As we reported in our report on 21st century challenges, the long-term fiscal challenges facing the federal budget and numerous other geopolitical changes challenging the continued relevance of existing programs and priorities warrant a national debate to review what the government does, how it does business, and how it finances its

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priorities.<sup>11</sup> Such a reexamination includes considering how responsibilities for financing public services are allocated and shared across the many nonfederal entities in our system as well.

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## Background

The Unfunded Mandates Reform Act of 1995 was enacted to address concerns expressed about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided funding to cover the costs. Although UMRA was intended to curb the practice of imposing unfunded federal mandates, the act does not prevent Congress or federal agencies from doing so. Instead, it generates information about the potential impacts of mandates proposed in legislation and regulations. In particular, title I of UMRA requires Congressional committees and the Congressional Budget Office (CBO) to identify and provide information on potential federal mandates in certain legislation. Title I also provides opportunities for Members of Congress to raise a point of order when covered mandates are proposed for consideration in the House or Senate. Title II of UMRA requires federal agencies to prepare a written statement identifying the costs and benefits of federal mandates contained in certain regulations and consult with affected parties. It also requires action of the Office of Management and Budget (OMB), including establishing a program to identify and test new ways to reduce reporting and compliance burdens for small governments and annual reporting to Congress on agencies' compliance with UMRA. Title III of UMRA required the Advisory Commission on Intergovernmental Relations to conduct a study reviewing federal mandates.<sup>12</sup> Title IV establishes limited judicial review regarding agencies' compliance with certain provisions of title II of the act.

UMRA generally defines a federal mandate as any provision in legislation, statute, or regulation that would impose an enforceable duty on state, local, or tribal governments (intergovernmental mandates) or the private sector (private sector mandates) or that would reduce or eliminate the funding

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<sup>11</sup> GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington D.C.: February 2005).

<sup>12</sup> This statutory requirement was not completed. Although a preliminary report was completed in January 1996, a final report was not released. Congress terminated funding for the commission in 1996.

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authorized to cover the costs of existing mandates. However, some other definitions, exclusions, and thresholds in the act apply and may vary according to whether the mandate is in legislation or a rule and whether a provision imposes an intergovernmental or private sector mandate. For example, UMRA includes definitional exceptions for enforceable duties that are conditions of federal financial assistance or that arise from participation in a voluntary federal program. UMRA also excludes certain types of provisions, such as any provision that enforces Constitutional rights of individuals, from its application. When, in aggregate, the provisions in proposed legislation or regulations equal or exceed UMRA's thresholds, other provisions and analytical requirements in UMRA apply. For legislation, the thresholds are direct costs (in the first 5 fiscal years that the relevant mandates would be effective) of \$50 million or more for intergovernmental mandates and \$100 million or more for private sector mandates, while the threshold for regulations is expenditures of \$100 million or more in any year.<sup>13</sup>

GAO has issued two previous reports addressing UMRA and federal mandates. In our May 2004 report we provided information and analysis regarding the identification of federal mandates under titles I and II of UMRA.<sup>14</sup> In that report, we described the complex procedures, definitions, and exclusions under UMRA for identifying federal mandates in statutes and rules. For calendar years 2001 and 2002, we also identified those statutes and rules that contained federal mandates under UMRA and provided examples of statutes and rules that were not identified as federal mandates but that affected parties might perceive as “unfunded mandates” and the reasons these statutes and rules were not federal mandates under UMRA. In February 1998, we reported on the implementation of title II.<sup>15</sup> In that report, we found that UMRA appeared to have had little effect on agencies rulemaking and most significant rules promulgated were not subject to title II requirements. Both of these reports had relatively consistent findings—that only a limited number of statutes and rules have been identified as federal mandates under UMRA.

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<sup>13</sup> The dollar thresholds in UMRA are in 1996 dollars and are adjusted annually for inflation.

<sup>14</sup> [GAO-04-637](#).

<sup>15</sup> GAO, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions*, [GAO/GGD-98-30](#) (Washington, D.C.: Feb. 4, 1998).

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## UMRA Coverage

UMRA's coverage, which includes its numerous definitions, exclusions, and exceptions, was the issue most frequently commented on by parties from all five sectors (see table 1).<sup>16</sup> Most parties from the state and local governments, federal, business, and academic/think tank sectors viewed UMRA's narrow coverage as a major weakness that leaves out many federal actions with potentially significant financial impacts on nonfederal parties. Conversely, a few parties, from the public interest sector and academic/think tank sector, considered some of the existing exclusions important or identified UMRA's narrow scope as one of the act's strengths. While there was no clear consensus across sectors on how to address coverage, some suggestions designed to expand UMRA's coverage had support from parties across and within certain sectors.

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**Table 1: UMRA Themes with Highest Frequency of Comments**

<b>Theme</b>	<b>Number of comments provided</b>
<b>Themes focused specifically on UMRA</b>	
Scope of UMRA's coverage of federal actions	52
UMRA enforcement	42
UMRA analytical framework	23
Uses and usefulness of information UMRA generates	25
UMRA consultation requirements	14
<b>Themes focused on federal mandate issues and programs in general</b>	
Design and funding of federal mandates	24
Evaluation and research needs regarding federal mandates	23

Source: GAO.

Note: Comment frequency is provided only as a rough gauge of the relative prevalence of themes addressed by participating parties comments.

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<sup>16</sup> Coverage issues were also raised in other literature regarding federal mandates that we reviewed.

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**Parties from Most Sectors Shared Concerns That UMRA's Coverage Was Too Narrow, but Had Mixed Views on How to Address It**

UMRA does not apply to legislative provisions that cover constitutional rights, discrimination, emergency aid, accounting and auditing procedures for grants, national security, treaty ratification, and certain parts of Social Security.<sup>17</sup> CBO estimates that about 2 percent of the bills that it reviewed from 1996 to 2004 contained provisions that fit within UMRA's exclusions. All sectors other than the public interest advocacy sector said they viewed UMRA's narrow coverage as a significant weakness because it precludes an official accounting of the costs to nonfederal parties associated with many federal actions. This issue was described by one party who noted that any of the exclusions, as well as the exemptions, in UMRA may be justified in isolation, but suggested that it is their cumulative impact that raises concerns.

Some parties from the business, academic/think tank, public interest advocacy, and state and local governments sectors made general comments on the clarity of certain UMRA definitions and exemptions and whether this results in different interpretations across agencies. One party who said UMRA's coverage was narrow often cited UMRA's definitional exceptions for mandates, including conditions of federal financial assistance (such as grant programs) or that arise from participation in voluntary federal programs, saying some laws enacted under these exceptions imposed significant mandates. A prominent example of a grant condition excluded from UMRA cited by parties in the state and local government sector is the No Child Left Behind Act of 2001, which places various requirements on states and localities, including that their schools measure the progress of students through annual tests based on challenging academic standards and that teachers are highly qualified as defined in the act. Other parties commented about various other definitional issues involving the exclusion of certain types of costs (indirect costs) and UMRA's cost thresholds for legislative and regulatory mandates, which result in excluding many federal actions that may significantly impact nonfederal entities.<sup>18</sup>

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<sup>17</sup> UMRA contains additional definitional exceptions, exclusions, or other restrictions applicable to the identification of federal mandates in legislation and 14 such restrictions applicable to the identification of federal mandates in rules. Often, more than one of these applicable restrictions applies. See [GAO-04-637](#).

<sup>18</sup> We discuss cost definitions and cost thresholds in greater detail in the analytic framework section of this report.

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Other parties cited the general exclusions for appropriations and other legislation not covered by the act and for rules issued by independent regulatory agencies, which are also not covered by UMRA. CBO estimates that 5 of the 8 laws containing federal mandates (as defined by UMRA) that it did not review before enactment, were appropriations acts.<sup>19</sup> A few parties from academic/think tank and state and local government sectors commented about UMRA's lack of coverage for certain tax legislation that may reduce state or local revenues. Even though federal tax changes may have direct implications for state tax revenue for the majority of states whose income tax is directly linked to the federal tax base, these impacts are not considered as mandates under UMRA because states have the option of decoupling their tax systems from federal law. Finally, parties from the state and local government sector also identified concerns about gaps in UMRA's coverage of federal preemption of state and local authority.<sup>20</sup> Although some preemptions are covered by UMRA such as those that preempt state or local revenue raising authority, they are covered only for legislative actions and not for federal regulations. According to CBO's 2005 report on unfunded mandates, "Over half of the intergovernmental mandates for which CBO provided estimates were preemptions of state and local authority."<sup>21</sup>

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<sup>19</sup> CBO, *A Review of CBO's Activities in 2004 Under the Unfunded Mandates Reform Act* (Washington D.C.: March 8, 2005).

<sup>20</sup> Preemption refers to the power of the federal government to enact statutes that override state laws. This power derives from the supremacy clause of the United States Constitution, which states that "The Laws of the United States...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. For example, the Internet Tax Freedom Act prohibits states from enacting a tax on internet access or multiple or discriminatory taxes on electronic commerce between October 1998 and November 2004 and preempts any state or local laws enacted during this period. Pub. L. No. 105-277, Div. C, Tit. XI, § 1101 (1998) (amended 2004). Title I of UMRA only applies to legislation that prohibits states from raising revenue, such as the Internet Tax Freedom Act. 2 U.S.C. § 658(3)(A)(i). Other preemptions of states' regulatory authority are not subject to UMRA's enforcement scheme.

<sup>21</sup> CBO's March 2005 UMRA report.

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Despite the widespread view in several sectors that UMRA's narrow coverage leaves out federal actions with potentially significant impacts on nonfederal entities, there was less agreement by parties about how to address this issue. The options ranged from general to specific but those most frequently suggested were:

- Generally revisit, amend, or modify the definitions, exceptions, and exclusions under UMRA and expand its coverage.
- Clarify UMRA's definitions and ensure their consistent implementation across agencies to ensure that all covered provisions are being included.
- Change the cost thresholds and/or definitions that trigger UMRA by for example lowering the threshold for legislative or executive reviews and expanding cost definitions from beyond direct to cover indirect costs as well.
- Eliminate or amend the definitional exceptions for conditions of federal financial assistance or that arise from participation in voluntary federal programs.
- Expand UMRA coverage to all preemptions of state and local laws and regulations, including those nonfiscal preemptions of state and local authority.

The level of agreement for each suggested option varied across sectors. The first option came from parties in every sector except public interest advocacy. Although parties representing businesses did not comment on preemption during our data collection, the business sector has generally been in favor of federal preemptions for reasons such as standardizing regulation across state and local jurisdictions. (See appendix V for a more complete list of suggested options by theme.)

The results of our January symposium confirmed support for generally revisiting and expanding UMRA coverage. See appendix VI for a list of the symposium results. The symposium participants also raised a cautionary note about potential consequences of some of the suggested options. For example, if UMRA coverage were expanded by changing exclusions and limitations or lowering or eliminating UMRA thresholds or including regulations issued by independent agencies, the workloads of CBO and the regulatory agencies would increase substantially.

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Another issue raised by a few parties that evoked some reaction at the symposium was whether private sector mandates should be included in UMRA. Some parties, from the federal agency, academic/think tank and public interest advocacy sectors, questioned whether private sector mandates should be included in UMRA. According to one party, the inclusion of the private sector seems contrary to the intent of the action, which they viewed to be intergovernmental mandates. Parties from the state and local government and academic/think tank sectors indicated during our symposium that they would not support dropping private sector mandates from UMRA. They pointed out, for example, that intergovernmental and private sector mandates can be interrelated, in particular that businesses, which can be affected by private sector mandates, are a key revenue source for state and local governments.

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**Some in the Academic/Think Tank and Public Interest Advocacy Sectors View UMRA's Coverage as a Strength and Take Issue with Certain Recommendations to Expand or Change Coverage**

Contrary to the view that UMRA's coverage was too narrow, some parties from academic/think tank and public interest advocacy sectors viewed UMRA's narrow scope as one of its primary strengths. Rather than expanding UMRA's coverage, these parties said that it should be kept narrow. One party expressed concern that eliminating any of UMRA's exceptions and exclusions might make the identification of mandates less meaningful, saying, "The more red flags run up, the less important the red flag becomes." Between 1996 and 2004, CBO reports that of the 5,269 intergovernmental statements, 617 had mandates; of the 5,151 private sector statements, 732 had mandates.<sup>22</sup> Of the mandates identified by CBO, 9 percent of the intergovernmental mandates and 24 percent of private sector mandates had costs that would exceed the thresholds.

Specifically, these parties argued in favor of maintaining UMRA's exclusions or expanding them to include federal actions regarding public health, safety, environmental protection, workers' rights, and the disabled. Unlike the parties that viewed UMRA's exclusions as too expansive, some

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<sup>22</sup> According to CBO's 2005 report, The numbers represent official mandate statements transmitted to congress by CBO. CBO prepared more intergovernmental mandate statements than private-sector mandate statements because in some cases it was asked to review a specific bill, amendment, or conference report solely for intergovernmental mandates. These numbers also exclude preliminary reviews and informal estimates for other legislative proposals. Finally, mandate statements may cover more than one mandate. Similarly, CBO may address a single mandate in more than one statement.

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parties from the public interest advocacy sector and the academic/think tank sector focused on the importance of the existing exclusions, particularly those dealing with constitutional and statutory rights, such as those barring discrimination against various groups.<sup>23</sup> During our January symposium, parties from multiple sectors took issue with any suggestion that the constitutional and statutory rights exclusions in UMRA be repealed. One party stated that the concept of unfunded mandates should not apply to laws intended to protect such fundamental rights. Another party suggested that the narrow scope of UMRA was generally useful, noting that, “One of the strengths of UMRA has been that it doesn’t try to be more ambitious than it needs to be.” Conversely, parties from most sectors opposed further limiting UMRA’s coverage.

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## UMRA Enforcement

Enforcement of UMRA’s provisions was the second most frequently cited issue but with far fewer parties from each sector commenting. Parties across and within sectors had differing views on both the mechanisms provided in the law itself and the level of effort exercised by those responsible for implementing the provisions. With regard to Congressional procedures, some parties observed that the opportunity provided for lawmakers to raise a point of order had a deterrent effect, while others described it as ineffective or underutilized. With regard to federal regulations, some questioned the agencies’ compliance with the provisions of the act. Finally, parties had mixed views about the judicial review provision under title IV, which provides limited remedies against agencies that fail to prepare UMRA statements, among other things. Parties from various sectors also suggested options to strengthen the issues raised about UMRA enforcement, but none was suggested by parties from a majority of sectors.

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## Mixed Views About the Usefulness and Need to Change Point of Order Mechanism

One of the primary tools used to enforce UMRA requirements in title I is the point of order—a parliamentary term used by a member of Congress in committee or on the floor of either chamber of Congress to raise an objection about proceeding to vote when a rule of procedure has been or will be violated. Once raised, an UMRA point of order prevents legislative

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<sup>23</sup> UMRA does not apply to any provision in legislation or rules that enforces Constitutional rights of individuals or establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.

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action on a covered mandate unless overcome by a majority. The point of order, which provides members of Congress the opportunity to raise challenges to hinder the passage of legislative provisions containing an unfunded intergovernmental mandate, was the most frequently cited enforcement issue with varying views about its effectiveness.

Those representing state and local government and federal agency sectors said that the point of order should be retained because it has been successful in reducing the number of unfunded mandates by acting as a deterrent to their enactment, without greatly impeding the process. One party commented that the threat of a point of order against a legislative proposal has caused members and staff to rethink and revise many proposals that would have likely imposed unfunded federal mandates on the states in excess of the threshold set in the law. This is consistent with the information presented in our May 2004 report on UMRA, which quoted the Chairman of the House Rules Committee as saying that UMRA “has changed the way that prospective legislation is drafted...” We also reported that “although points of order are rarely used, they may be perceived as an unattractive consequence of including a mandate above cost thresholds in proposed legislation.”<sup>24</sup>

Conversely, parties primarily from academic/think tank, business, and federal sectors did not believe the point of order has been effective in preventing or deterring the enactment of mandates. Moreover, others commented about its infrequent use. In the last 10 years, at least 13 points of order under UMRA were raised in the House of Representatives and none in the Senate. Only 1 of the 13, regarding a proposed minimum wage increase as part of the Contract with America Advancement Act in 1996, resulted in the House voting to reject consideration of a proposed provision.

Some parties said the point of order needs to be strengthened by making it more difficult to defeat. One suggested revision was to require a three-fifths vote in Congress, rather than a simple majority, to overturn a point of order. This change was believed to strengthen the “institutional salience of UMRA” and to ensure that no mandate under UMRA could be enacted if it was supported only by a simple majority. On March 17, 2005 the Senate approved the fiscal year 2006 budget, which included a provision that would increase to 60 the number of votes needed to overturn an UMRA

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<sup>24</sup> [GAO-04-637](#).

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point of order in the Senate. As of March 28, the fiscal year 2006 budget was in conference negotiations with the House of Representatives.

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### Parties Question Agencies' Compliance with UMRA, But Cited Solutions Lacked Broad-Based Support

Commenting parties from state and local government, business, and federal agency sectors questioned some federal agencies' compliance with UMRA requirements and the effectiveness of enforcement mechanisms to address this perceived noncompliance. They mentioned the failure of some agencies to consult with state, local and tribal governments when developing regulations that may have a significant impact on nonfederal entities, which is discussed later in the report. Likewise, at least one party of the business, federal, and state and local government sectors each expressed concerns about the lack of accurate and complete information provided by federal agencies, which are responsible for determining whether a rule includes a mandate and whether it exceeds UMRA's thresholds.

The perceived lack of compliance with certain UMRA requirements generated several suggested changes to UMRA to address this problem. The only suggestion that had support across parties from multiple sectors, however, was to create a new office within OMB to calculate the cost estimates for federal mandates in regulations. They suggested that this office have responsibilities similar to the State and Local Government Cost Estimates Unit at CBO. However, the parties did not specify whether the office should exist as an office within OMB's Office of Information and Regulatory Affairs or exist separately.

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### Parties Who Find Judicial Review Provision Too Limited Support Revision

A few parties from the federal and academic/think tank sectors commented that UMRA's judicial review provision does not provide meaningful relief or remedies if federal agencies have not complied with the requirements of UMRA because of its limited focus. In general, title IV subjects to judicial review any agency compliance or noncompliance with certain provision in the act. Specifically, the judicial review is limited to requirements that pertain to preparing UMRA statements and developing federal plans for mandates that may significantly impact small governments. However, if a court finds that an agency has not prepared a written statement or developed a plan for one of its rules, the court can order the agency to do the analysis and include it in the regulatory docket for that rule but the court may not block or invalidate the rule.

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The few parties commenting about judicial review suggested expanding it to provide more opportunities for judicial challenges and more effective remedies when noncompliance of the act's requirements occur. However, one party from the public interest advocacy sector said that a benefit of the existing judicial review is that the remedy for noncompliance is to provide the required statement versus impeding the regulatory process. Similarly, when this issue was discussed at the symposium, a few parties primarily from the academic/think tank and public interest advocacy sectors said that efforts to limit or stop implementation of mandates through legal action might be unwarranted, because as noted earlier, UMRA was not intended to preclude the enactment of federal mandates. They were concerned about legal actions being used to slow down the regulatory process through litigation.

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### Parties Across All Sectors Raise Other Issues, But Little or No Consensus Emerges

Parties from all sectors also raised a number of issues about the use and usefulness of UMRA information (e.g., has it helped decrease the number of mandates?), UMRA's analytic framework, and federal agency consultations with state, local, and tribal governments, but there was no consensus in their views about how these issues should be addressed. The parties provided mixed but generally positive views about the use and usefulness of UMRA information; the only option that attracted multiple supporters was a suggestion for a more centralized approach for generating information within the executive branch. Parties also provided a number of comments about the UMRA provisions that establish the analytic framework for cost estimates, which generated a few suggested options. UMRA's consultation provision generated the fewest comments, which focused primarily on a general concern about a perceived lack of consistency across agencies when consulting with state and local governments.

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### Parties in Most Sectors Had Mixed but Generally Positive Views About the Usefulness of Information Generated under UMRA and Suggested Few Changes

Parties from all sectors commented about the use and usefulness of information generated by UMRA. While most of the comments about information generated under title I were positive, some parties raised concerns about the quality and usefulness of some of the information and suggested improvements. While many of the comments were about UMRA information in general, most of the positive comments from a majority of the sectors were specific to the usefulness of information generated under title I by CBO in particular. For example, one party, who characterized UMRA as a success, credited the act with bringing unfunded mandates to

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the forefront of Congressional debates and slowing down the enactment of new unfunded mandates. Parties from several sectors praised the value and quality of CBO's analyses of mandates and the attention that CBO's cost estimates under UMRA bring to the fiscal effects of federal legislation.

However, some parties from academic/think tank, public interest advocacy, and state and local governments sectors had more mixed views about the usefulness of information generated under UMRA. One party characterized the information as "marginally effective" in reducing costly and cumbersome rules and a few parties shared similar views about legislative mandates. Specifically, some of these parties commented that while the information may increase awareness of unfunded or under funded mandates, UMRA has been less successful in actually changing legislation to reduce the number of mandates.

The parties from various sectors suggested several options to improve the use and usefulness of information under UMRA, but there was no agreement across or within sectors on any particular option. Only the suggestion to provide for a centralized review of regulatory mandates was suggested by more than two parties. (As discussed previously, this was also suggested as a way to improve UMRA enforcement.)

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## Parties Cite UMRA's Analytic Constraints

Parties from all sectors agreed that UMRA's provisions work to constrain the analysis of mandate costs, which may impact the quality of the estimates. For example, parties from the academic/think tank, federal, and state and local governments sectors commented that the act excludes the consideration of the indirect costs of mandates, which can be significant for regulated entities. Moreover, others commented that certain definitions under UMRA are not clearly understood or easily interpreted, which can impact estimates. For example, some parties said that terms such as "federal mandates" and "enforceable duty" are not clearly defined and thus open to interpretation by the agencies.

Others noted that there can be differences in the cost analyses for legislative and regulatory mandates in areas such as making determinations about whether a mandate exceeds UMRA cost thresholds when ranges are used. For example, CBO has developed its own criteria for applying the act and has extended its general practice of providing point estimates for mandates rather than ranges when possible, as it does for its federal budget estimates. The federal agencies are left to their own discretion in deciding whether to use estimate ranges for costs and how to apply them to the

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threshold. In one case, which we observed in a prior report, the U.S. Department of Agriculture (USDA) appeared to have developed a range of costs associated with implementing its rule on retained water in raw meat and poultry products. However, USDA provided only a lower bound estimate of \$110 million, but did not quantify median or upper bound cost estimates. Because the lower bound was so close to the inflation adjusted threshold of \$113 million, it is reasonable to assume that the median or upper bound estimate would have exceeded the threshold and been a mandate under UMRA.

Some parties expressed frustrations with the inherent uncertainties of estimating mandate costs. In particular, some parties commented that cost estimates are sometimes difficult or not feasible to calculate because they rely on future actions. That is, CBO sometimes finds that cost estimates for legislative mandates are difficult or not feasible to prepare, which can happen because CBO's analysis is generally done before bills are approved and regulations needed to implement them have been developed. For example, in 2004, CBO reported that of the 66 intergovernmental mandates, 2 could not be estimated; of the 71 private sector mandates, 10 could not be estimated. In many of these cases, CBO reported that the costs could not be determined because it had no basis for predicting what regulations would be issued to implement them.

The parties offered a variety of suggested options to address their concerns about estimation, but only a few had support across or within the sectors. There was, however, some overlap between options suggested addressing UMRA coverage and enforcement issues and options to address estimation issues. For example, some parties suggested revising UMRA's cost or expenditure definitions and thresholds, including revisiting the exclusion of indirect costs from UMRA estimates, which may affect both the actual estimation process and whether a legislation or regulation will be identified as containing a federal mandate at or above UMRA's thresholds. Parties from several sectors suggested examining or monitoring the implementation of UMRA's estimation process for federal agencies' regulations through an independent agency.

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## Sectors Had Few Comments and Suggested Options Regarding UMRA Consultation Provisions

A few parties had comments regarding UMRA's requirement that federal agencies consult with elected officers of state, local and tribal governments (or their designees) on the development of proposals containing significant intergovernmental mandates. Parties from all five sectors commented on the consultation provisions, and these comments generally focused on the

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quality of consultations across agencies, which was viewed as inconsistent. A few parties commented that UMRA had improved consultation and collaboration between federal agencies and nonfederal levels of government. A few commenters also raised concerns that UMRA's consultation provisions focus on state, local and tribal governments, but exclude other constituencies that might be affected by proposed federal mandates. While several parties primarily from the state and local government sector suggested options for improving consultation, the only one mentioned by more than 2 parties was a suggestion for agencies to replicate CBO's consultation approach for legislative mandates, which some parties characterized as collaborative.

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## Sectors Also Provide More General Concerns About Federal Mandates

Parties from all sectors also raised a number of broader issues about federal mandates—namely, the design and funding and evaluation of federal mandates—and suggested a variety of options.

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## Several Potential Design and Funding Issues Surfaced, But No Options With Broad Appeal to Address Them

Specific comments about the design and funding of federal mandates varied across sectors. Most often, the comments focused on a perceived mismatch between the costs of federal mandates and the amount of federal funding provided to help carry them out. Some parties from several sectors suggested that the problem they are concerned about is not so much unfunded federal mandates as underfunded mandates. When this issue was addressed at the symposium, a few parties pointed out that this issue is broader than UMRA, dealing with such issues as how to address the imbalance between mandate costs and available resources, how to generate the resources to meet these needs, and how to address the incentives for the federal government to “over leverage” federal funds by attaching (and often revising) additional conditions for receiving the funding. Some parties also raised concerns about the varying cost of some mandates across various affected nonfederal entities, mismatches between the funding needs of parties compared to federal formulas, and the effects of the timing of federal actions and program changes on nonfederal parties.

Parties, primarily from the academic/think tank sector, suggested a wide variety of options to address their concerns, but there was no broad support for any option. Parties across four sectors suggested providing waivers or offsets to reduce the costs of the mandates on affected parties

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or “off ramps” to release them of some responsibilities to fulfill the mandates in a given year if the federal government does not provide sufficient funding. However, when this was discussed at the symposium, parties said that compliance with federal mandates should not be made contingent on full federal funding. They said, for example, that it is an appropriate role for the federal government to require compliance with certain mandates even if they are not fully funded. These parties also said that state and local governments do not always comply with mandates under existing laws. Some of the symposium participants also pointed out potential pitfalls of “off ramps” noting that they could actually provide an incentive to under fund mandates and that it might be difficult to manage who would determine that federal funding does not cover the costs of a mandate in a given year and how that determination would be made. During the symposium, the option of building into the design of federal mandates “look back” or sunset provisions that would require retrospective analyses of the mandates’ effectiveness and results was discussed.

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### Most Sectors Commented on Evaluation and Research Needs Regarding Federal Mandates Sectors

About half the parties, representing all sectors except federal agencies, commented on the evaluation of federal mandates and offered suggestions to improve mandates, whether covered by the act or not. This issue received the most focus from parties in the academic/think tank sector, who felt that the evaluation of federal mandates was especially important because there is a lack of information about the effects of federal mandates on affected parties.

Four issues emerged from the comments provided by the various sectors concerning evaluations. First, parties from four of the five sectors commented about the lack of evaluation of the effectiveness (results) of mandates and the implications of mandates, including benefits, non-fiscal effects and costs. According to some parties, if mandate-related evaluations were conducted more often, policy decisions regarding mandates, both specifically and collectively, could meaningfully consider mandate costs, benefits and other relevant factors. Second, they expressed concerns about the accuracy and completeness of mandate cost estimates. This concern was raised primarily by parties in the public interest advocacy and business sectors. While they agreed that estimating costs was difficult, they felt examining the quality of the estimates was necessary. Third, parties primarily from the academic/think tank and state and local governments sectors raised issues about the impacts and costs of federal mandates. They noted that while much attention has been focused on the actual costs of mandates, it is important to consider the broader

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implications of federal mandates on affected nonfederal entities beyond direct costs, including a wide range of issues such as opportunity costs, forgone revenues, shifting priorities, and fiscal trade-offs. Finally, a few parties were concerned about whether some agencies have compromised the effectiveness of certain regulations by designing them to ensure that their costs do not meet or exceed UMRA's cost threshold.

Parties across the sectors suggested that various forms of retrospective analysis are needed for evaluating federal mandates after they are implemented. First, parties in all sectors except the federal sector suggested retrospective analyses on the costs and effectiveness of mandates, including comparing them to the estimates and expected outcomes. Second, parties in the state and local sector suggested conducting retrospective studies on the cumulative costs and effects of mandates—the impact of various related federal actions, which when viewed collectively, may have a substantial impact although any one may not exceed UMRA's thresholds. Third, parties in the academic/think tank sector suggested examining local and regional impacts of mandates. According to one party, mandate costs could have a significant effect on a particular state or region without exceeding UMRA's overall cost threshold. Finally, parties in the academic/think tank sector suggested analyzing the benefits of federal mandates, when appropriate, not just costs.

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## Observations

As Congress begins to reevaluate UMRA on its 10-year anniversary, some of the issues raised by the various sectors we contacted may provide a constructive starting point. While the sectors provided a wide variety of comments, their views were often mixed across and within certain sectors. Given the wide-ranging view of opinions, it will be challenging to find workable solutions that will be broadly supported across sectors that often have differing interests and perspectives.

Although parties from various sectors generally focused on the areas of UMRA and federal mandates that they would like to see fixed, they also recognized positive aspects and benefits of UMRA. In particular, they commented about the attention UMRA brings to potential consequences of federal mandates and how it serves to keep the debate in the spotlight. We also found it notable that no one suggested repealing UMRA. One challenge for Congress and other federal policy makers is to determine which issues and concerns about federal mandates can be best addressed in the context of UMRA and which ones are best considered as part of more expansive policy debates.

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When considering changes to UMRA itself, one issue stood out, UMRA's narrow coverage. This was clearly an issue for certain parties within all sectors based on the comments. The various definitions, exceptions, and exclusions were a source of frustration for many who responded to our review, especially those most affected by federal mandates. Although the parties in most sectors generally agreed that UMRA's coverage should be expanded given its narrow focus, parties in the public interest advocacy sector disagree. Even among those that believe that UMRA's coverage is too narrow, identifying suggested options that had broad-based support was challenging. Most parties simply suggested revisiting, amending, or modifying UMRA to expand coverage. Others provided more specific suggestions, including expanding UMRA to cover conditions of financial assistance, such as grants, and all preemptions of state and local authority. However, certain proposed changes were strongly opposed by certain parties in the public interest advocacy and academic sectors, such as dropping the exclusions for civil rights-related provisions. Likewise, parties from the business and state and local governments sectors opposed any further narrowing of UMRA.

On broader policy issues concerning federal mandates, most parties supported the need for more evaluation and research on federal mandates. More retrospective analysis to ensure that mandates are achieving their desired goals could enable policymakers to better gauge the mandates' benefits and costs, determine whether the mandates are providing the desired and expected results at an acceptable cost and assess any unanticipated effects from the implementation of mandate programs. Such analysis could be done not only for individual mandates but also for the cumulative, aggregate costs and other impacts that major mandates may be having for the budgetary priorities of regulated entities, such as state or local governments. Such information could help provide additional accountability for federal mandates and provide information which could lead to better decisions regarding the design and funding of mandate programs. Some suggested that the design of mandates could incorporate "look back" or sunset provisions that would require retrospective analyses of mandate results periodically.

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As we move forward, the unfunded mandates issue raises broader questions about the assignment of fiscal responsibilities within our federal system. The federal government, as well as states, faces serious fiscal challenges both in the short and longer term. In February 2005, we issued our report on 21st century challenges. Given the long-term fiscal challenges facing the federal budget as well as numerous other geopolitical changes challenging the continued relevance of existing programs and priorities, we called for a national debate to review what the government does, how it does business and how it finances its priorities.<sup>25</sup> Such a reexamination should usefully consider how responsibilities should be allocated and shared across the many nonfederal entities in our system as well.

As we rethink the federal role, many in the state and local or business sector would view unfunded mandates as among the areas warranting serious reconsideration. Unfunded mandates potentially can weaken accountability and remove constraints on decisions by separating the enactment of benefit programs from the responsibility for paying for these programs. Similar objections, however, could also be raised over 100 percent federal financing of intergovernmental programs, since this could vitiate the kind of fiscal incentives necessary to ensure proper stewardship at the state and local level for shared programs.

Reconsideration of responsibilities begins with the observation that most major domestic programs, costs and administrative responsibilities are shared and widely distributed throughout our system. The fiscal burdens of public policies in areas ranging from primary education to homeland security are the joint responsibility of all levels of government and, in some cases, the private sector as well. As we reexamine the federal role in our system, there is a need to sort out how responsibilities for these kinds of programs should be financed in the future. Sorting out fiscal responsibilities involves a variety of considerations. Issues to be considered include the fiscal capacity of various levels of government to finance services from their own resources both now and over the long term as well as the extent to which the benefits of particular programs or services are broadly distributed throughout the nation. Moreover, consideration should also be given to the fiscal capacity of various levels of government and other entities to finance their share of responsibilities in our system, both now and over the longer term.

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<sup>25</sup> [GAO-05-325SP](#).

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The following kinds of questions can be raised as part of this reexamination of fiscal responsibilities

- What governmental activities should fall entirely within the purview of the federal or state/local governments and what activities should be shared responsibilities?
- If the federal government “mandates” activities to be undertaken by state/local governments, under what circumstances is it appropriate for the federal government to finance them and what share of the costs should be borne by federal and nonfederal sources?
- Are the potential revenue sources available to the various level of government adequate to finance their responsibilities?

Because issues involving UMRA and unfunded mandates are part of a broader public policy debate to be had by Congress, we are making no recommendations in this report.

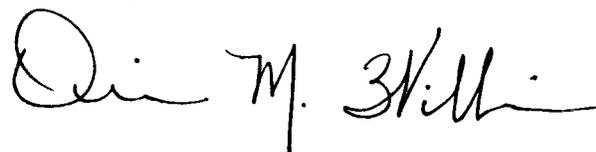
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As agreed with your office, unless you publicly announce the contents of this report earlier, we will not distribute it until 30 days from the date of this letter. We will then send copies of this report to the Ranking Member, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Homeland Security and Governmental Affairs, U.S. Senate; the Chair and Ranking Member of the Government Reform Committee, House of Representatives; the Directors of OMB and CBO and others on request. It will also be available at no charge on GAO’s Web site at <http://www.gao.gov>.

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If you or your staff have any questions concerning this report, please contact me or Tim Bober at (202) 512-6806 or [williamso@gao.gov](mailto:williamso@gao.gov) or [bober@gao.gov](mailto:bober@gao.gov). Key contributors to this report were Tom Beall, Kate Gonzalez, Boris Kachura, Paul Posner, and Michael Rose.

Sincerely yours,

A handwritten signature in black ink that reads "Orice M. Williams". The signature is written in a cursive style with a large initial "O" and a distinct "M" and "W".

Orice M. Williams  
Director  
Strategic Issues

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# Objectives, Scope, and Methodology

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For this report, you asked us to provide more information and analysis regarding the Unfunded Mandates Reform Act of 1995 (UMRA) and federal mandates in general. Specifically, you asked us to consult with a diverse group of knowledgeable parties familiar with the act and to report their views on (1) the significant strengths and weaknesses of UMRA as the framework for addressing federal mandates issues, including why the parties believed the issues they identified were significant, and (2) potential options suggested for reinforcing the strengths or addressing the weaknesses. For both of those central objectives, you also asked that we report, to the extent possible, on level of agreement among the various individuals and organizations, which we refer to as “parties” throughout the report.

To address our objectives, we primarily used a structured data collection approach to obtain feedback from a diverse set of organizations and individuals knowledgeable about the implementation of UMRA and/or federal mandate programs. To identify prospective parties, we first built upon our recognition of knowledgeable parties based on our past work on unfunded mandates by conducting extensive literature reviews on federal mandates issues. Second, as we contacted the individuals, we asked each of them to recommend other knowledgeable parties for us to contact. In total, 52 individuals and organizations participated in the review. (See app. II for the list of organizations and individuals who provided information responding to our research questions.)

The parties provided us their input through a variety of means, including group meetings, individual interviews, and written responses. We sought and obtained viewpoints from organizations and individuals across a broad spectrum of interested communities that we classified into five sectors for purposes of structuring our analyses. These sectors were: academic centers and think tanks; businesses; federal agencies (including executive and legislative branch agencies); public interest advocacy groups; and state and local governments. (For a comprehensive list of their comments and suggested options, see appendix IV, which is available as an electronic supplement to this report.)

We reviewed all the information provided by those various parties and organized it on the basis of the topics they addressed. To facilitate analysis and discussion of the considerable amount of information provided by the sources, we first itemized the input, to the extent possible, into a set of discrete separable points. 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. Next, we identified seven broad topical areas or themes, which we used to classify the specific comments, observations, issues, and options that were provided:

1. uses and usefulness of information UMRA generates,
2. UMRA coverage of federal actions,
3. UMRA enforcement,
4. UMRA's analytic framework,
5. UMRA consultation requirements,
6. design and funding of federal mandates, and
7. evaluation and research needs regarding federal mandates.

These themes were further characterized as falling into one of two sets. The first five themes captured input specifically on UMRA and its provisions, and the remaining two themes captured input that was focused on issues about federal mandates in general.

We then analyzed and independently coded the resulting master table on the parties' input using the themes listed above.<sup>1</sup> Any differences in the coding were discussed and a team consensus code determined. If the party's input touched on more than one theme (for example, options might have been suggested regarding both enforcement of UMRA and how to improve estimates), we assigned multiple codes. Therefore, items with multiple codes are repeated under each relevant theme subsection in this document. This coding into themes was not intended to be precise or to limit suggested options to only certain topics. The coding was simply intended to help group together items that included input relevant to a given topic.

To ensure that our organization and characterization of the information that the parties provided accurately reflected their views, we provided each

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<sup>1</sup> Some of the parties' feedback did not fit within any of the seven more distinct themes. We coded that information as "other".

contributor an opportunity to review our summary of their input. They generally concurred with the accuracy of our characterization of their views and, in a few instances, supplemented or clarified their original comments by providing additional information, which we incorporated into our master list of parties' responses. (Again, see app. IV, which is an electronic supplement for a complete list of the information provided by all of the contributing parties.)

We supplemented the information obtained through this broad data gathering effort with a half-day symposium held at GAO on January 26, 2005, involving 26 experts from across all five sectors. (See app. III for a list of the symposium participants.) The overall objectives of the symposium were to provide an opportunity for the participants from different sectors and viewpoints to engage each other, to discuss in more depth the issues and options previously identified, to identify additional options for augmenting strengths or addressing weaknesses, and to elaborate on the relative priorities of the options suggested. To meet these objectives in the limited time available, the discussions at the symposium were structured to focus mainly on the three themes that appeared to attract the greatest number and/or variety of comments during our initial data collection, as well as to address themes from both the UMRA-specific and general mandate sets: UMRA coverage, UMRA enforcement, and the design and funding of federal mandate programs.<sup>2</sup> To encourage open and candid input from the various parties, we are not attributing any input from either our general data collection effort or the symposium to specific organizations or individuals.

While our initial data collection effort and the symposium collectively yielded information of considerable breadth and depth on UMRA and UMRA-related issues and options, the information we gathered only represents the views of those organizations and individuals who chose to participate in this review. For this reason and related issues, this information provides only a rough gauge as to the prevalence of opinion about given issues or options or the extent to which there is agreement among and within particular sectors about those issues and options. Despite our efforts to solicit a comparable level of input from the different sectors, fewer identified parties from some sectors chose to participate in our review than others. When parties who chose not to participate

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<sup>2</sup> We also provided time for an "open forum" to give participants an opportunity to discuss any other UMRA or mandate-related issues and options they wished to raise.

recommended other contacts that they considered as knowledgeable about UMRA and mandates issues, we sought the participation of the recommended contacts, which allowed us to partially mitigate the extent of non-participation.

Also, given the variety of methods and sources used to collect the views, we structured our analyses of prevalence and agreement to avoid double counting the same response provided by different representatives of an organization at different points in time. We did this by categorizing the input on an identified issue or option that we received from a specific entity, whether it came from multiple sources or a single source, as the view of a party. To illustrate this categorization process, a reference to “one party” may represent the views of many representatives of a given organization obtained through a number of meetings or interviews, while another such “one party” reference may represent the views of one person through a single written response.<sup>3</sup> Similarly, in examining the comments classified each theme, if the same issue was identified as a strength by one party and a weakness by another party, we counted the comments as applying to the same issue. While these steps help address some of the difficulties in examining the prevalence of views and agreement between parties, it is a very imprecise assessment.

We conducted our review from August 2004 through February 2005 in Washington, D.C., in accordance with generally accepted government auditing standards.

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<sup>3</sup> Unless noted otherwise, our reported “counts” in the body of this report refer to the number of parties who gave a particular response. However, we do report all responses by all representatives of an organization in appendix IV.

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# Parties Providing Input to GAO's Review

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## Organizations

Note: Multiple officials and/or staff members of these organizations may have contributed information for our review.

1. American Association of People with Disabilities (AAPD)
2. American Federation of State, County, and Municipal Employees (AFSCME)
3. American Public Power Association (APPA)
4. The Arc of the United States
5. Association of Metropolitan Sewerage Agencies (AMSA)
6. Center on Budget and Policy Priorities (CBPP)
7. Congressional Budget Office (CBO)
8. Congressional Research Service (CRS)
9. Council of State Governments (CSG)
10. Federal Funds Information for States (FFIS)
11. International City/County Management Association (ICMA)
12. Mercatus Center
13. National Association of Counties (NACO)
14. National Association of Protection and Advocacy Systems (NAPAS)
15. National Association of State Budget Officers (NASBO)
16. National Conference of State Legislatures (NCSL)
17. National Governors Association (NGA)
18. National League of Cities (NLC)

19. Natural Resources Defense Council (NRDC)
20. Office of Advocacy, Small Business Administration
21. Office of Management and Budget (OMB)
22. OMB Watch
23. Regulatory Brown Bag (regulatory staff from the Departments of Justice, Labor, Transportation, and Veterans Affairs, the Environmental Protection Agency, and the Federal Communications Commission)
24. U.S. Chamber of Commerce
25. U.S. Conference of Mayors (USCM)

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## Individuals

1. Bob Adler, University of Utah
2. Katherine Baiker, Dartmouth College
3. Bob Behn, Harvard University
4. Richard Belzer, Regulatory Checkbook
5. Neil Bergsman, State of Maryland (former Maryland Budget Director)
6. Howard Chernick, Hunter College, CUNY
7. Timothy Conlan, George Mason University
8. David Driesen, Syracuse University
9. Michael Greve, American Enterprise Institute
10. Thomas Hopkins, Rochester Institute of Technology
11. Elizabeth Keating, Harvard University
12. Cornelius Kerwin, American University

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**Appendix II**  
**Parties Providing Input to GAO's Review**

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13. John Kincaid, Meyner Center for the Study of State and Local Government
14. Greg Lashutka, Nationwide
15. Bill Leighty, Virginia Governor's Office
16. Mark Ragan, Nelson A. Rockefeller Institute of Government
17. Andrew Reschovsky, University of Wisconsin-Madison
18. Brian Riedl, The Heritage Foundation
19. Stephen Slivinski, Cato Institute
20. Claudio Ternieden, American Association of Airport Executives
21. Jim Tozzi, Center for Regulatory Effectiveness
22. Edward Zelinsky, Cardozo Law School

# Participants in GAO Federal Mandates Symposium, January 26, 2005

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1. Keith Bea, Congressional Research Service
2. Richard Belzer, Regulatory Checkbook
3. Neil Bergsman, State of Maryland
4. Richard Beth, Congressional Research Service
5. Jay Cochran, III, Mercatus Center
6. Timothy Conlan, George Mason University
7. Curtis Copeland, Congressional Research Service
8. David Driesen, Syracuse University
9. Patrice Gordon, Congressional Budget Office
10. Teri Gullo, Congressional Budget Office
11. Thomas Hopkins, Rochester Institute of Technology
12. Cornelius Kerwin, American University
13. Greg Lashutka, Nationwide
14. Iris Lav, Center on Budget and Policy Priorities
15. Bruce Lundegren, U.S. Chamber of Commerce
16. Paul Marchand, The Arc of the United States
17. Alysoun McLaughlin, National Association of Counties
18. Eric Olson, Natural Resources Defense Council
19. Scott Pattison, National Association of State Budget Officers
20. David Quam, National Governors Association
21. Mark Ragan, Nelson A. Rockefeller Institute of Government

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22. Molly Ramsdell, National Conference of State Legislatures
  23. Amy Scott, Council of State Governments
  24. Robert Shull, OMB Watch
  25. Claudio Ternieden, American Association of Airport Executives
  26. Yvette Tetreault, Federal Funds Information for States

# Parties' Feedback on UMRA and Federal Mandates

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This e-supplement is available on our Web site at <http://www.gao.gov/cgi-bin/getrpt?GAO-05-497SP>.

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# Summary of Parties' Suggested Options

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Once the strengths, weaknesses and options were identified and reviewed, GAO developed a thematic framework for classifying and organizing this information.

Below is a summary list of the options provided by participating parties organized by theme. The list of options presented under each theme is intended to be a complete accounting of the suggested options associated with that theme. The lists are not in any particular order and do not to reflect the relative frequency with which participating parties identified the same or similar option. Options appear on these lists if mentioned by even one participating party. See appendix I for further information about the procedures followed in the organization of this information and associated qualifications concerning its use. See appendix IV e-supplement for a detailed listing of options as suggested by participants as part of their response to perceived strengths and weaknesses.

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## 1: Uses and Usefulness of Information UMRA Generates

- Provide for more centralized review of regulatory mandates.
- Analyze benefits, as well as costs, of mandates.
- Apply the Data Quality Act criteria to information generated under UMRA
- Congress should track “unfunded mandates,” defined broadly.
- Congress and OMB should develop more expertise on regulations and how to govern them.
- The most important point is to clarify in advance what consequences federal actions will have.
- Although additional program evaluation of federal mandates would help, this was not the initial intent of UMRA.
- 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.
- It would be useful for the GAO to provide an annual report documenting the total budgetary shortfall of unfunded mandates.

- Make the potentially affected nonfederal parties aware when there is a finding that proposed legislation contains a mandate.
- Enhance the work of CBO's State and Local Government Cost Estimates Unit by providing the unit more timely access to bills and joint resolutions that may impose unfunded federal mandates.

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## 2: UMRA Coverage of Federal Actions

- Generally amend, modify or revisit the definitions, exceptions, and exclusions under UMRA and "close loopholes."
- Eliminate/amend exceptions for conditions of federal financial assistance and participation in voluntary programs.
- Expand UMRA to cover appropriations bills and other legislation currently not covered.
- Expand UMRA to cover changes in conditions of existing programs.
- Cover rules issues by independent agencies.
- Amend UMRA to include federal tax actions that reduce state revenues.
- Amend UMRA to include federal preemptions.
- Amend/eliminate the national security exclusions.
- Amend/eliminate the civil rights exclusions.
- Change cost thresholds and definitions for purposes of identifying mandates that trigger UMRA's threshold.
- 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.
- Expand the definition of mandates to include those that fail to exceed the statutory threshold only because they do not affect all states.

- 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.
- UMRA hasn't been as successful in dealing with previous mandates as in discouraging new mandates, but I am not sure how UMRA could be changed to address that.
- UMRA should authorize CBO to identify and estimate the costs of potential mandates in final agency rules. This would be a purely informational function.
- UMRA should authorize CBO to identify and estimate the costs of potential mandates in U.S. Supreme Court rulings. The information provide by CBO analyses of judicial intergovernmental mandates would allow the Congress to provide compensatory funding to state and local governments and/or to amend statutes that produce unintended judicial mandates.
- Under title II, amend the limitation of UMRA not applying to rules without a notice of proposed rulemaking.
- The Joint Committee on Taxation, responsible for performing costs estimates of tax legislation, should provide additional information on the costs of mandates outside of UMRA's strict definition, as CBO endeavors to do.
- Establish an institutional entity whose responsibilities include analysis of federal policies and actions that affect state and local governments.
- [Require] substantive reporting on legislative, government-sought judicial and regulatory preemptions regardless of cost thresholds.
- Don't expand UMRA's coverage; keep it narrow.
- Retain the current rights exclusions.
- Add new exclusions.
- Drop or differentiate coverage of private sector mandates.

- Clarify definitions under UMRA and ensure consistency of implementation.

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### 3. UMRA Enforcement

- Maintain the current point of order mechanism.
- Strengthen the point of order mechanism.
- Reconsider the usefulness of the point of order mechanism.
- Require roll call votes for legislation imposing an unfunded federal mandate.
- 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.
- Open the CBO methodology for comment, perhaps through the Federal Register or by requiring an independent examination of the process used by CBO.
- 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.
- It is not certain that fixing or simplifying UMRA's procedures would address the underlying purposes of the act.
- Generally strengthen enforcement of agency compliance with title II.
- Reassign oversight responsibilities for agencies' compliance with title II.
- Apply the Federal Data Quality Act to agencies' UMRA analyses.
- Create more accountable means of estimating mandate costs.
- 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

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State and Local Government Cost Estimates Unit at the Congressional Budget Office.

- Revisit the provisions of title II.
- 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.
- Expand judicial review provisions

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#### 4. UMRA Analytical Framework

- Implement some form of third-party, independent review of the UMRA estimates, data, and processes.
- Revisit the exclusion of indirect costs from UMRA estimates.
- Expand the title II definition to include more than just expenditures for purposes of triggering the UMRA threshold.
- Consider new approaches to address uncertainties in the estimation of potential effects of mandates.
- Analyze the benefits, as well as the costs, of federal mandates in UMRA estimates.
- Examine/monitor the implementation of the UMRA estimation process and mandate determinations by different agencies.
- Amend UMRA so that Federal regulatory agencies would not be allowed to avoid congressional mandates by mischaracterizing the cost of a rulemaking.
- Congress should amend UMRA to lower the fiscal impact threshold for federal agency intergovernmental mandates from \$100 million to \$50 million.
- UMRA estimates should be done on a regional/local level basis also, not just at an aggregate national level.

- Federal agencies should look into the cost-benefit ratio of their mandates.
- Other agencies should consider emulating CBO's approach of more centralized reviews of statutes and direct contacts with state and local governments when preparing estimates.
- Enhance the work of CBO's State and Local Government Cost Estimates Unit by providing more timely access to bills and joint resolutions that may impose unfunded federal mandates.
- Require UMRA-like estimates when major changes in grant conditions and/or formulas occur.
- Clarify what constitutes a mandate and 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.

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## 5. UMRA Consultation Requirements

- Replicate on the regulatory side approaches CBO uses for reviews of statutory mandates.
- Bring more uniformity and consistency to the consultation process.
- Do more to involve State and local governments early in the rulemaking process.
- 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.
- State and local governmental authority to reject mandates or litigate based on noncompliance with clear statutory criteria would dramatically improve states' ability to ensure that federal agencies take seriously their duty to consult.
- 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.

- To avoid elevating the position of one particular voice in the debate, amend the consultation provisions of UMRA so the act does not require federal agencies to consult with state, local and tribal governments before a regulation is proposed.

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## 6. Design and Funding of Federal Mandates

- Ensure sufficient federal funding for mandated services
- Provide state and local governments waivers, offsets, etc.
- Compliance with federal mandates should not be made contingent on full federal funding.
- Cap the costs of mandates on state and local governments.
- Provide more flexibility in the design of mandate programs.
- Design federal mandate programs with sunset provisions.
- Restrict the preemption of state laws.
- Something bigger than just amending UMRA is needed to address this policy issue. 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.
- 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.
- 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.
- The federal government should 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.

- 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.
- Incongruous to require cost-benefit analysis for regulations but only require cost estimate for legislation. Address the incongruity of requiring cost-benefit analysis for regulations but only requiring cost estimates for legislation.
- Cost-effectiveness of UMRA has not been explored. Explore the cost-effectiveness of UMRA.

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## 7. Evaluation and Research Needs Regarding Federal Mandates

- Do retrospective analyses of the costs and/or effects of mandates.
- Do a study/provide data on the cumulative impact of federal mandates.
- Do studies/provide data on the local/regional impacts of mandates.
- Analyze benefits, as well as costs, of federal mandates.
- Federal agencies should look into the cost-benefit ratio of their mandates.
- 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.
- 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).
- 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.

- Do research on whether the statute [UMRA] has changed agencies' regulations.
- Help Congress and the general public to recognize that these numbers [the UMRA estimates] are soft.
- We question 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./

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# Results of Federal Mandates Symposium Balloting Process

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GAO conducted two information collection efforts to arrive at our findings regarding UMRA and federal mandates' strengths, weaknesses and options. The first was an effort focusing on 52 organizations and individuals that are knowledgeable about UMRA and federal mandates. We solicited information from these parties regarding the strengths, weaknesses and options. On the basis of our analysis of the information provided by these parties, we identified seven major themes.

The second information collection effort was a symposium held on January 26, 2005. All the parties we contacted during our initial data collection phase were invited to attend. In addition, we sent each of them a discussion draft presenting all of the issues (strengths and weaknesses) and options suggested to address those issues. The symposium was divided into four sessions with three of the four sessions focused on the themes most frequently cited. Sessions 1 and 2 focused on UMRA-specific themes (coverage and enforcement, respectively), Session 3 dealt with broader federal mandates issues (design and funding), and Session 4 was an open session for other issues that participants wanted to raise.

Each session was opened with a brief overview provided by GAO and was followed by an open discussion among the participants. To obtain a general sense of which suggested options had the greatest or least amount of support among the symposium participants, we used a balloting process at the end of each session. We provided the participants a ballot that was to be completed at the end of each session. Each ballot listed the options suggested for that theme collected during our initial information collection effort. Second, the participants were asked to review the ballot and provide any additional options during the course of the discussion that they wanted to be added to the ballot and considered in the balloting process. At the conclusion of a session, we asked each participant to identify (a) the three options having their greatest support and (b) the three options they could not support.

The results of that balloting for the symposium sessions are presented below. As mentioned previously, all the suggested options on the ballot were provided by the parties we contacted during the initial data collection phase or added by participants during the symposium. In accord with the voting instructions, we present for each session the top three options getting the most votes. These results reflect the views of symposium participants only and are provided to convey a general sense of their preferences. Due to variation in vote tallies for each of these options, these

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results should not be construed as showing options achieving a consensus among symposium participants.

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## Symposium Session 1: UMRA Coverage

Options that participants indicated had their greatest support:

- Generally amend, modify or revisit the definitions, exceptions, and exclusions under UMRA and “close loopholes.”
- Amend UMRA to include federal preemptions.
- Move to definition of whether it will cost state and local governments money to comply-so as to include federal tax changes that affect state revenue system, requirements that are a condition of federal fiscal assistance and similar issues.

Options that participants indicated they could not support:

- Don’t expand UMRA’s coverage; keep it narrow.
- Amend or eliminate the civil rights exclusions in UMRA.
- Add new exclusions for mandates regarding public health, safety, environmental protection, workers’ rights, and disability.

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## Symposium Session 2: UMRA Enforcement

Options that participants indicated had their greatest support:

- Create an office within the OMB that is analogous to the State and Local Government Cost Estimate Unit at CBO.
- Require program legislation to contain mandate cost authorizations; provide that a mandate (including mandate pursuant to regulations) not funded at the authorized level for a fiscal year is held in abeyance unless the funding or obligations are altered to remove the inconsistency.
- Add processes for accounting for cumulative effects of regulatory activities in similar fields, (e.g., environmental regulations) including a requirement to collect data on actual costs.

Options that participants indicated they could not support:

- Maintain the current point of order mechanism (i.e., keep the status quo).
- Empower the states to either reject mandates on their own authority or litigate congressional and/or agency noncompliance with clear statutory criteria.
- Cap 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 to eliminate incentives to underestimate the impacts and provide a level of discipline to determinations of whether proposals contain significant unfunded mandates.

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### Symposium Session 3: Design and Funding of Federal Mandate Programs

Options that participants indicated had their greatest support:

- Restrict the preemption of state laws.
- Consider the effects of the timing of federal actions and program changes on state governments. Recognize that states (and the populations served by federal-state programs) are very diverse.
- Create a mechanism, similar to section 610 of the Regulatory Flexibility Act, where agencies would evaluate the effectiveness of a mandate after a certain period of time (e.g., 5 or 10 years).

Options that participants indicated they could not support:

- 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 or a regulatory "off ramp" when faced with costly mandates.
- Remind states that participation in some of the federal mandate programs is voluntary and, therefore, states can opt out of the programs if participation is considered too costly.

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- The federal government should 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.

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