ECONOMIC AND BUDGET ISSUE BRIEF

CBO

A series of issue summaries from the Congressional Budget Office

JANUARY 6, 2005

Identifying Intergovernmental Mandates

The federal government sometimes requires state, local, and tribal governments to expend resources to achieve certain goals.[1] In 1993, for example, the National Voter Registration Act required states to simplify and expand the procedures for registering citizens to vote. Since that time, states have spent millions of dollars to comply with those requirements.

The Unfunded Mandates Reform Act of 1995 (UMRA) focuses attention on the costs of such federal mandates. In particular, UMRA was intended to promote informed decisions by the Congress about the appropriateness of federal mandates on other levels of government and about the desirability of providing financial assistance for the costs of intergovernmental mandates.

Since UMRA took effect in 1996, the Congress has enacted few federal mandates on state and local governments that impose significant costs, as defined by UMRA. Although the Congress has rarely used UMRA's explicit enforcement mechanism when considering bills, it has changed several pieces of legislation before enactment to either eliminate mandates or lower their costs.

Concerns exist, however, about which bills are covered by UMRA and about how the law defines intergovernmental mandates. UMRA's application is limited in three ways:

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

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

What Is an Intergovernmental Mandate?

According to UMRA, an intergovernmental mandate can take several forms:

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

What Does UMRA Require?

Title I of UMRA aims to ensure that the Congress is informed about the potential direct costs of federal mandates before enacting legislation. The law requires the Congressional Budget Office (CBO) to provide statements to Congressional authorizing committees about whether intergovernmental mandates contained in reported bills would impose costs on state, local, or tribal governments. If the estimated direct costs of all mandates in a bill are above a specified threshold in any of the first five fiscal years after the mandates would take effect, CBO must provide an estimate of those costs (if feasible) and an assessment of whether the bill would authorize or otherwise provide funding to cover

1. Similar requirements may apply to private parties. However, this brief focuses exclusively on intergovernmental issues.

the costs of any new federal mandate.[2] The statutory threshold is $50 million (in 1996 dollars), adjusted annually for inflation. For 2004, the threshold was $60 million.

UMRA requires that authorizing committees publish CBO's mandate statements in their reports or in the *Congressional Record* before bills are considered on the floor of the House or Senate. Conference committees are required to ensure "to the greatest extent practicable" that CBO prepares statements for conference agreements or amended bills if they contain mandates not previously considered by either House or if they impose greater direct costs than versions considered earlier.

UMRA prohibits consideration of legislation on the floor of the House or Senate unless certain conditions are met. For all reported legislation, consideration is not "in order" unless the committee has published a CBO mandate statement. The rules also preclude consideration of reported legislation that contains intergovernmental mandates with direct costs above the threshold unless the legislation provides direct spending authority or authorizes sufficient appropriations to cover the costs. To be sufficient, authorized amounts must be specified for each year (up to 10 years) after the effective date of a mandate. The legislation also must provide a way to terminate or scale back the mandate if the federal agency implementing the legislation determines that the appropriated funds are insufficient to cover those costs.

UMRA's rules are not self-enforcing; a Member must raise a point of order to enforce them.[3] If a point of order is raised in the House, the full House must vote on whether to consider the bill. If a point of order is raised in the Senate, the bill may not be considered unless either the Senate waives the point of order or the presiding officer overrules it. Since UMRA took effect, a point of order has been raised a dozen times in the House of Representatives; it has never been raised in the Senate.

How Many Intergovernmental Mandates Has the Congress Considered or Enacted Since UMRA Became Law?

Most of the legislation that the Congress considered in the past nine years contained no intergovernmental mandates as UMRA defines them. Of the more than 4,700 bills and other legislative proposals that CBO reviewed between 1996 and 2004 (mostly when reported out of committee), 12 percent contained such mandates. Most of those mandates—91 percent—would not have imposed costs greater than the threshold set by UMRA.

Five intergovernmental mandates with costs over the UMRA threshold were enacted in the past nine years:

- *An increase in the minimum wage* (Public Law 104-188, enacted in 1996). CBO estimated that the required increase would cost state and local governments (as employers) more than $1 billion during the first five years it was in effect.[4]
- *A reduction in federal funding to administer the Food Stamp program* (P.L. 105-185, enacted in 1998). That funding cut would cost states between $200 million and $300 million a year, CBO estimated.[5]
- *A preemption of state taxes on premiums for certain prescription drug plans* (P.L. 108-173, enacted in 2003). That preemption will result in revenue losses to states of about $70 million in 2006 (the first year in which the mandate will be in effect), increasing to about $95 million in 2010, CBO estimates.[6]
- *A temporary preemption of state authority to tax certain Internet services and transactions* (P.L. 108-435, enacted in 2004). That preemption (which lasts until 2007) will result in revenue losses to state and local governments totaling at least $325 million through 2007, CBO estimates.[7]

2. The law defines direct costs as the incremental amount that mandated entities would have to spend to comply with an enforceable duty, including amounts that states, localities, and tribes would be prohibited from raising in revenues.
3. A point of order is a procedure by which a Representative or Senator questions an action that is being taken, or that is proposed to be taken, as contrary to the rules of the House or Senate.
4. See Congressional Budget Office, *Cost Estimate for H.R. 1227, A Bill to Amend the Portal-to-Portal Act of 1947* (April 3, 1996).
5. See Congressional Budget Office, *Cost Estimate for S. 1150, the Agricultural Research Extension and Education Reform Act of 1997* (September 4, 1997).
6. See Congressional Budget Office, *Cost Estimate for H.R. 1, the Medicare Prescription Drug and Modernization Act of 2003* (July 22, 2003).
7. See Congressional Budget Office, *Cost Estimate for S. 150, the Internet Tax Nondiscrimination Act* (September 9, 2003).

- *A requirement that state and local governments meet certain standards for issuing driver's licenses, identification cards, and vital-statistics documents* (P.L.108-458, enacted in 2004). CBO estimates that state and local governments will have to spend more than $60 million in at least one of the next five years to meet those standards.[8] The law authorizes the appropriation of funds to help governments comply with its mandates.

Which Legislation Is Not Subject to UMRA?

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

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

About 2 percent of the bills that CBO reviews each year contain provisions that fit within those exclusions. Most of the excluded provisions involve national security or Social Security and would not impose costly requirements.

One exception was the Help America Vote Act (P.L.107-252, enacted in 2002). That law—which concerned the constitutional rights of citizens to vote—imposed costly requirements on state and local entities. However, because of UMRA's exclusions, CBO did not identify those requirements as mandates or estimate their costs as part of its review, and the requirements were not subject to a point of order.[9] The enacted version of the act authorized appropriations to help states carry out the requirements, and $3.1 billion has been appropriated for that purpose.

What Kinds of Federally Imposed Costs Are Not Considered Mandates Under UMRA?

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

Grant Conditions

According to UMRA, the conditions attached to most forms of federal aid (including most grant programs) are not mandates. Yet complying with such conditions can sometimes be burdensome. In particular, states consider new conditions on existing grant programs to be duties not unlike mandates.[10] Two often-cited examples of such conditions are the requirements for receiving federal funding under the No Child Left Behind Act and the Individuals with Disabilities Education Act. Those laws require school districts to undertake many activities —including, respectively, designing and implementing statewide achievement tests and preparing individualized education plans for disabled children—but only if they wish to receive certain federal education grant funds. The federal assistance that states receive if they comply is substantial: the federal government appropriated about $34 billion in 2004 for elementary and second-

8. See Congressional Budget Office, *Cost Estimate for H.R. 10, the 9/11 Recommendations Implementation Act* (October 5, 2004).

9. In a separate review of the Martin Luther King Jr. Voting Rights Act of 2001 (the House version of the Help America Vote Act), CBO estimated that the costs to state and local governments of complying with the major requirements of title I of the act would range from $1.7 billion to $3.5 billion over a five-year period. See Congressional Budget Office, *Analysis of the Effects on State and Local Governments of H.R. 3295, the Martin Luther King Jr. Voting Rights Act of 2001, as Passed by the Senate* (September 27, 2002).

10. See, for example, the *Mandate Monitor*, published periodically by the National Conference of State Legislatures. The April 30, 2004, issue (vol. 1, no. 2) states that "NCSL uses a definition of 'unfunded mandate' that is broader than the one included in the Unfunded Mandates Reform Act of 1995."

ary education programs, most of it authorized under those two laws.

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

Special Rule for Large Entitlement Programs

Although conditions for receiving federal grants are generally not mandates under UMRA, the law makes an exception for some large grant programs. Federal entitlement programs that provide $500 million or more annually to state, local, or tribal governments receive unique treatment under UMRA. Specifically, any legislative proposal that would increase the stringency of conditions for or cap or decrease federal financial assistance under such programs would be a mandate if those governments lacked the authority to offset the new costs by amending their financial or programmatic responsibilities under the program. In general, that special definition of a mandate affects nine programs: Medicaid; Temporary Assistance for Needy Families; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Payments for Job Opportunities and Basic Skills; and Child Support Enforcement.

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

The Congress has considered, but has not enacted, legislation to change the definition of an intergovernmental mandate as it relates to large grant programs. Under those proposals, a change to an entitlement program that imposed new conditions on states or decreased federal funding by more than the UMRA threshold would constitute an intergovernmental mandate unless the bill making the change also gave states and localities new flexibility in the program to offset the new costs. Under that definition, the fact that states have significant flexibility under current law to reduce or eliminate optional services in most of those programs would not be considered in determining whether the proposed change was a new mandate.

How Does UMRA Treat Preemptions of State and Local Law?

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

This policy brief was prepared by Theresa A. Gullo of CBO's Budget Analysis Division. Annual reviews of CBO's activities under UMRA and related publications—such as *Preemptions in Federal Legislation in the 106th Congress* (June 2001) and *The Safe Drinking Water Act: A Case Study of an Unfunded Federal Mandate* (September 1995)—are available at www. cbo.gov/Pubs.cfm, under the category Intergovernmental Relations.