

UNFUNDED MANDATES INFORMATION AND
TRANSPARENCY ACT OF 2011

MAY 16, 2012.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. ISSA, from the Committee on Oversight and Government
Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 373]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom
was referred the bill (H.R. 373) to amend the Unfunded Mandates
Reform Act of 1995 to ensure that actions taken by regulatory
agencies are subject to that Act, and for other purposes, having
considered the same, report favorably thereon with an amendment
and recommend that the bill as amended do pass.

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The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Unfunded Mandates Information and Transparency Act of 2011”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Purpose.
- Sec. 3. Providing for Congressional Budget Office studies on policies involving changes in conditions of grant aid.
- Sec. 4. Clarifying the definition of direct costs to reflect Congressional Budget Office practice.
- Sec. 5. Expanding the scope of reporting requirements to include regulations imposed by independent regulatory agencies.
- Sec. 6. Amendments to replace Office of Management and Budget with Office of Information and Regulatory Affairs.
- Sec. 7. Applying substantive point of order to private sector mandates.
- Sec. 8. Regulatory process and principles.
- Sec. 9. Expanding the scope of statements to accompany significant regulatory actions.
- Sec. 10. Enhanced stakeholder consultation.
- Sec. 11. New authorities and responsibilities for Office of Information and Regulatory Affairs.
- Sec. 12. Retrospective analysis of existing Federal regulations.
- Sec. 13. Expansion of judicial review.

SEC. 2. PURPOSE.

The purpose of this Act is—

- (1) to improve the quality of the deliberations of Congress with respect to proposed Federal mandates by—
 - (A) providing Congress and the public with more complete information about the effects of such mandates; and
 - (B) ensuring that Congress acts on such mandates only after focused deliberation on their effects; and
- (2) to enhance the ability of Congress and the public to identify Federal mandates that may impose undue harm on consumers, workers, employers, small businesses, and State, local, and tribal governments.

SEC. 3. PROVIDING FOR CONGRESSIONAL BUDGET OFFICE STUDIES ON POLICIES INVOLVING CHANGES IN CONDITIONS OF GRANT AID.

Section 202(g) of the Congressional Budget Act of 1974 (2 U.S.C. 602(g)) is amended by adding at the end the following new paragraph:

“(3) **ADDITIONAL STUDIES.**—At the request of any Chairman or ranking member of the minority of a Committee of the Senate or the House of Representatives, the Director shall conduct an assessment comparing the authorized level of funding in a bill or resolution to the prospective costs of carrying out any changes to a condition of Federal assistance being imposed on State, local, or tribal governments participating in the Federal assistance program concerned or, in the case of a bill or joint resolution that authorizes such sums as are necessary, an assessment of an estimated level of funding compared to such costs.”.

SEC. 4. CLARIFYING THE DEFINITION OF DIRECT COSTS TO REFLECT CONGRESSIONAL BUDGET OFFICE PRACTICE.

Section 421(3) of the Congressional Budget Act of 1974 (2 U.S.C. 658(3)(A)(i)) is amended—

- (1) in subparagraph (A)(i), by inserting “incur or” before “be required”; and
- (2) in subparagraph (B), by inserting after “to spend” the following: “or could forgo in profits, including costs passed on to consumers or other entities taking into account, to the extent practicable, behavioral changes,”.

SEC. 5. EXPANDING THE SCOPE OF REPORTING REQUIREMENTS TO INCLUDE REGULATIONS IMPOSED BY INDEPENDENT REGULATORY AGENCIES.

Paragraph (1) of section 421 of the Congressional Budget Act of 1974 (2 U.S.C. 658) is amended by striking “, but does not include independent regulatory agencies”.

SEC. 6. AMENDMENTS TO REPLACE OFFICE OF MANAGEMENT AND BUDGET WITH OFFICE OF INFORMATION AND REGULATORY AFFAIRS.

The Unfunded Mandates Reform Act of 1995 (Public Law 104–4; 2 U.S.C. 1511 et seq.) is amended—

- (1) in section 103(c) (2 U.S.C. 1511(c))—
 - (A) in the subsection heading, by striking “OFFICE OF MANAGEMENT AND BUDGET” and inserting “OFFICE OF INFORMATION AND REGULATORY AFFAIRS”; and

- (B) by striking “Director of the Office of Management and Budget” and inserting “Administrator of the Office of Information and Regulatory Affairs”;
- (2) in section 205(c) (2 U.S.C. 1535(c))—
- (A) in the subsection heading, by striking “OMB”; and
- (B) by striking “Director of the Office of Management and Budget” and inserting “Administrator of the Office of Information and Regulatory Affairs”; and
- (3) in section 206 (2 U.S.C. 1536), by striking “Director of the Office of Management and Budget” and inserting “Administrator of the Office of Information and Regulatory Affairs”.

SEC. 7. APPLYING SUBSTANTIVE POINT OF ORDER TO PRIVATE SECTOR MANDATES.

Section 425(a)(2) of the Congressional Budget Act of 1974 (2 U.S.C. 658d(a)(2)) is amended—

- (1) by striking “Federal intergovernmental mandates” and inserting “Federal mandates”; and
- (2) by inserting “or 424(b)(1)” after “section 424(a)(1)”.

SEC. 8. REGULATORY PROCESS AND PRINCIPLES.

Section 201 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) is amended to read as follows:

“SEC. 201. REGULATORY PROCESS AND PRINCIPLES.

“(a) IN GENERAL.—Each agency shall, unless otherwise expressly prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector (other than to the extent that such regulatory actions incorporate requirements specifically set forth in law) in accordance with the following principles:

“(1) Each agency shall identify the problem that it intends to address (including, if applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

“(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

“(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

“(4) If an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

“(5) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation, unless expressly prohibited by law, only upon a reasoned determination that the benefits of the intended regulation justify its costs.

“(6) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

“(7) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

“(8) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

“(9) Each agency shall tailor its regulations to minimize the costs of the cumulative impact of regulations.

“(10) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

“(b) REGULATORY ACTION DEFINED.—In this section, the term ‘regulatory action’ means any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including advance notices of proposed rulemaking and notices of proposed rulemaking.”.

SEC. 9. EXPANDING THE SCOPE OF STATEMENTS TO ACCOMPANY SIGNIFICANT REGULATORY ACTIONS.

(a) **IN GENERAL.**—Subsection (a) of section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) is amended to read as follows:

“(a) **IN GENERAL.**—Unless otherwise expressly prohibited by law, before promulgating any general notice of proposed rulemaking or any final rule, or within six months after promulgating any final rule that was not preceded by a general notice of proposed rulemaking, if the proposed rulemaking or final rule includes a Federal mandate that may result in an annual effect on State, local, or tribal governments, or to the private sector, in the aggregate of \$100,000,000 or more in any 1 year, the agency shall prepare a written statement containing the following:

“(1) The text of the draft proposed rulemaking or final rule, together with a reasonably detailed description of the need for the proposed rulemaking or final rule and an explanation of how the proposed rulemaking or final rule will meet that need.

“(2) An assessment of the potential costs and benefits of the proposed rulemaking or final rule, including an explanation of the manner in which the proposed rulemaking or final rule is consistent with a statutory requirement and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

“(3) A qualitative and quantitative assessment, including the underlying analysis, of benefits anticipated from the proposed rulemaking or final rule (such as the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias).

“(4) A qualitative and quantitative assessment, including the underlying analysis, of costs anticipated from the proposed rulemaking or final rule (such as the direct costs both to the Government in administering the final rule and to businesses and others in complying with the final rule, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and international competitiveness), health, safety, and the natural environment);

“(5) Estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of—

“(A) the future compliance costs of the Federal mandate; and

“(B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector.

“(6)(A) A detailed description of the extent of the agency’s prior consultation with the private sector and elected representatives (under section 204) of the affected State, local, and tribal governments.

“(B) A detailed summary of the comments and concerns that were presented by the private sector and State, local, or tribal governments either orally or in writing to the agency.

“(C) A detailed summary of the agency’s evaluation of those comments and concerns.

“(7) A detailed summary of how the agency complied with each of the regulatory principles described in section 201.”

(b) **REQUIREMENT FOR DETAILED SUMMARY.**—Subsection (b) of section 202 of such Act is amended by inserting “detailed” before “summary”.

SEC. 10. ENHANCED STAKEHOLDER CONSULTATION.

Section 204 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1534) is amended—

(1) in the section heading, by inserting “**AND PRIVATE SECTOR**” before “**INPUT**”;

(2) in subsection (a)—

(A) by inserting “, and impacted parties within the private sector (including small business),” after “on their behalf”;

(B) by striking “Federal intergovernmental mandates” and inserting “Federal mandates”; and

(3) by amending subsection (c) to read as follows:

“(c) **GUIDELINES.**—For appropriate implementation of subsections (a) and (b) consistent with applicable laws and regulations, the following guidelines shall be followed:

“(1) Consultations shall take place as early as possible, before issuance of a notice of proposed rulemaking, continue through the final rule stage, and be integrated explicitly into the rulemaking process.

“(2) Agencies shall consult with a wide variety of State, local, and tribal officials and impacted parties within the private sector (including small businesses). Geographic, political, and other factors that may differentiate varying points of view should be considered.

“(3) Agencies should estimate benefits and costs to assist with these consultations. The scope of the consultation should reflect the cost and significance of the Federal mandate being considered.

“(4) Agencies shall, to the extent practicable—

“(A) seek out the views of State, local, and tribal governments, and impacted parties within the private sector (including small business), on costs, benefits, and risks; and

“(B) solicit ideas about alternative methods of compliance and potential flexibilities, and input on whether the Federal regulation will harmonize with and not duplicate similar laws in other levels of government.

“(5) Consultations shall address the cumulative impact of regulations on the affected entities.

“(6) Agencies may accept electronic submissions of comments by relevant parties but may not use those comments as the sole method of satisfying the guidelines in this subsection.”

SEC. 11. NEW AUTHORITIES AND RESPONSIBILITIES FOR OFFICE OF INFORMATION AND REGULATORY AFFAIRS.

Section 208 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1538) is amended to read as follows:

“SEC. 208. OFFICE OF INFORMATION AND REGULATORY AFFAIRS RESPONSIBILITIES.

“(a) **IN GENERAL.**—The Administrator of the Office of Information and Regulatory Affairs shall provide meaningful guidance and oversight so that each agency’s regulations for which a written statement is required under section 202 are consistent with the principles and requirements of this title, as well as other applicable laws, and do not conflict with the policies or actions of another agency. If the Administrator determines that an agency’s regulations for which a written statement is required under section 202 do not comply with such principles and requirements, are not consistent with other applicable laws, or conflict with the policies or actions of another agency, the Administrator shall identify areas of non-compliance, notify the agency, and request that the agency comply before the agency finalizes the regulation concerned.

“(b) **ANNUAL STATEMENTS TO CONGRESS ON AGENCY COMPLIANCE.**—The Director of the Office of Information and Regulatory Affairs annually shall submit to Congress, including the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives, a written report detailing compliance by each agency with the requirements of this title that relate to regulations for which a written statement is required by section 202, including activities undertaken at the request of the Director to improve compliance, during the preceding reporting period. The report shall also contain an appendix detailing compliance by each agency with section 204.”

SEC. 12. RETROSPECTIVE ANALYSIS OF EXISTING FEDERAL REGULATIONS.

The Unfunded Mandates Reform Act of 1995 (Public Law 104–4; 2 U.S.C. 1511 et seq.) is amended—

(1) by redesignating section 209 as section 210; and

(2) by inserting after section 208 the following new section 209:

“SEC. 209. RETROSPECTIVE ANALYSIS OF EXISTING FEDERAL REGULATIONS.

“(a) **REQUIREMENT.**—At the request of the chairman or ranking minority member of a standing or select committee of the House of Representatives or the Senate, an agency shall conduct a retrospective analysis of an existing Federal regulation promulgated by an agency.

“(b) **REPORT.**—Each agency conducting a retrospective analysis of existing Federal regulations pursuant to subsection (a) shall submit to the chairman of the relevant committee, Congress, and the Comptroller General a report containing, with respect to each Federal regulation covered by the analysis—

“(1) a copy of the Federal regulation;

“(2) the continued need for the Federal regulation;

“(3) the nature of comments or complaints received concerning the Federal regulation from the public since the Federal regulation was promulgated;

“(4) the extent to which the Federal regulation overlaps, duplicates, or conflicts with other Federal regulations, and, to the extent feasible, with State and local governmental rules;

“(5) the degree to which technology, economic conditions, or other factors have changed in the area affected by the Federal regulation;

“(6) a complete analysis of the retrospective direct costs and benefits of the Federal regulation that considers studies done outside the Federal Government (if any) estimating such costs or benefits; and

“(7) any litigation history challenging the Federal regulation.”.

SEC. 13. EXPANSION OF JUDICIAL REVIEW.

Section 401(a) of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1571(a)) is amended—

(1) in paragraphs (1) and (2)(A)—

(A) by striking “sections 202 and 203(a)(1) and (2)” each place it appears and inserting “sections 201, 202, 203(a)(1) and (2), and 205(a) and (b)”;

(B) by striking “only” each place it appears;

(2) in paragraph (2)(B), by striking “section 202” and all that follows through the period at the end and inserting the following: “section 202, prepare the written plan under section 203(a)(1) and (2), or comply with section 205(a) and (b), a court may compel the agency to prepare such written statement, prepare such written plan, or comply with such section.”; and

(3) in paragraph (3), by striking “written statement or plan is required” and all that follows through “shall not” and inserting the following: “written statement under section 202, a written plan under section 203(a)(1) and (2), or compliance with sections 201 and 205(a) and (b) is required, the inadequacy or failure to prepare such statement (including the inadequacy or failure to prepare any estimate, analysis, statement, or description), to prepare such written plan, or to comply with such section may”.

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

The Unfunded Mandates Reform Act (UMRA) of 1995 was enacted to promote informed and deliberate decisions by Congress and Federal agencies concerning the appropriateness of Federal mandates and to “retain competitive balance between the public and private sectors.”¹ In accord with UMRA’s original intent, H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011, aims to improve the quality of Congressional deliberations and to enhance the ability of Congress, Federal agencies, and the public to identify Federal mandates that may impose undue harm on State, local, and tribal governments and the private sector by providing more complete information about the cost of such mandates and by holding Congress and Federal agencies accountable for imposing unfunded mandates.

BACKGROUND AND NEED FOR LEGISLATION

UMRA’s enactment was celebrated as a major legislative accomplishment that would relieve much of the burden placed upon non-federal entities by Congress and Federal agencies through unfunded mandates.² It has become apparent over time, however, that UMRA—despite its good intentions and noble purpose—failed to curtail substantially the imposition of unfunded mandates. The several loopholes, exemptions and exclusions embedded in the law are largely to blame. A 2005 Government Accountability Office (GAO) report found that “[m]ost parties from the state and local governments, Federal, business, and academic/think tank sectors vie[w] UMRA’s narrow coverage as a major weakness that leaves out many Federal actions with potentially significant financial im-

¹ 2 U.S.C. 1501.

² CRS Report.

pacts on nonfederal parties.”³ GAO found that over half of the rules it reviewed did not trigger UMRA but did result in new costs or other negative financial impacts on nonfederal parties that those parties might perceive as unfunded mandates.⁴ Interviewed parties agreed that UMRA’s definitions, as well as exclusions and exemptions in the law that allow Congress and Federal agencies to continue to place burdens upon State, local and tribal governments and private sector entities should be revisited.⁵ Multiple parties also informed GAO that the consultation process between agencies and affected nonfederal entities concerning regulatory mandates was inconsistent and in need of improvement.⁶

In the 1st session of the 112th Congress, the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, chaired by Rep. James Lankford (R-OK), examined the effectiveness of UMRA via three hearings featuring recognized experts on unfunded mandates, as well as representatives of States, localities and the private sector. These witnesses highlighted UMRA’s narrow coverage, exemptions and loopholes as serious flaws, and suggested that legislative remedies to the UMRA statute would make it a more effective instrument to reduce unfunded legislative and regulatory mandates. On February 15, 2011, at a hearing entitled, “Unfunded Mandates and Regulatory Overreach,” the Subcommittee heard testimony from the former Office of Information and Regulatory Affairs (OIRA) Administrator Susan Dudley; GAO Director Denise Fantone; the Mayor of Edmond, Oklahoma, Patrice Douglas; and Fairfax County, Virginia, County Executive, Anthony Griffin. At the hearing, Subcommittee Ranking Minority Member Gerald Connolly (D-VA) recognized that UMRA “did not fully stem the tide of unfunded mandates” because it was “written in a manner that exempted bills that imposed significant costs on localities.”⁷ Full Committee Ranking Minority Member Elijah Cummings (D-MD) asked the Mayor of Edmond, “What can the Federal Government do to help locals to plan better with regard to so-called unfunded mandates?”⁸

On March 30, 2011, at a hearing entitled, “Unfunded Mandates and Regulatory Overreach Part II,” the Subcommittee heard testimony from South Dakota State Senator Joni Cutler; Small Business & Entrepreneurship Council Chief Economist Raymond Keating; and the Founder and CEO of the Small Business Majority, John Arensmeyer. These witnesses testified about the impact of unfunded mandates on states and small businesses and suggested possible reforms to UMRA.

On May 25, 2011, at a hearing entitled, “Unfunded Mandates, Regulatory Burdens and the Role of the Office of Information and Regulatory Affairs,” the Subcommittee heard testimony from current OIRA Administrator Cass Sunstein about the Obama Admin-

³ Government Accountability Office (GAO), *Unfunded Mandates: View Vary about Reform Act’s Strengths, Weaknesses, and Options for Improvement*, GAO-05-454, Mar. 2005.

⁴ GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637 (May 12, 2004).

⁵ *Id.*

⁶ *Id.*

⁷ *Unfunded Mandates and Regulatory Overreach: Hearing before the H. Subc. on Tech., Info. Policy, Intergov. Relations and Procurement Reform of the H. Comm. on Oversight and Govt. Reform*, 112th Congress (2011) (statement of Rep. Gerald Connolly).

⁸ *Unfunded Mandates and Regulatory Overreach: Hearing before the H. Subc. on Tech., Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Govt. Reform*, 112th Congress (2011) (statement of Ranking Member Elijah Cummings).

istration's efforts to reform the regulatory system through executive order. This included what the Obama Administration views as an unprecedented "look back" at regulations to identify those that may be outdated, unnecessary, or duplicative, in order to pave the way for efforts to repeal, modify, or streamline them. Administrator Sunstein also testified about UMRA's applicability to the public and the private sector.

After a thorough examination of UMRA through these hearings, Subcommittee Chairman Lankford held a markup on September 21, 2011, in the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, at which time H.R. 373 was reported with an amendment in the nature of a substitute. The bill was then reported from the full Oversight and Government Reform Committee, with another amendment in the nature of a substitute.

H.R. 373, as amended, enhances UMRA's utility as a tool to promote informed and deliberate decisions by Congress and Federal agencies concerning the appropriateness of Federal mandates. H.R. 373 accomplishes this in multiple ways. To bring awareness to Federal mandates imposed on entities pursuant to a condition of grant aid, H.R. 373 allows a chairman or ranking member of any Congressional committee to request CBO conduct an assessment comparing the authorized level of funding in a bill or resolution to the prospective costs of carrying out any changes to a condition of Federal assistance being imposed on State, local, or tribal governments participating in the Federal assistance program. The National Conference of State Legislatures is among those entities advocating that more light be shed on the cost of implementing assistance programs such as No Child Left Behind programs and the Temporary Assistance for Needy Families Block Grant. Such programs impose significant costs on participating States, but are not considered unfunded mandates under UMRA. H.R. 373 does not expand the definition of what constitutes an unfunded mandate, but it does allow the cost of certain excluded programs to be assessed. This provision was crafted in consultation with the Congressional Budget Office (CBO), which advised the Committee on how best to provide information about conditions of grant aid without overburdening CBO.⁹

The Small Business and Entrepreneurship Council testified that regulatory costs impacting prices, risk-taking, economic growth and employment need to be considered in agency cost estimates.¹⁰ To address this concern, H.R. 373 amends the definition of "direct costs" in UMRA to ensure that Federal agencies are accounting in their UMRA analyses for such costs of Federal mandates as forgone business profits, costs passed onto consumers or other entities, and behavioral changes. CBO has stated that its own UMRA analyses already take these factors into account.

To close one of UMRA's loopholes, H.R. 373 subjects independent regulatory agencies to the statute. These agencies, such as the Consumer Financial Protection Bureau, the Securities Exchange Commission, the National Labor Relations Board, the Consumer Prod-

⁹See CBO letter.

¹⁰*Unfunded Mandates and Regulatory Overreach Part II: Hearing Before the H. Subcomm. on Tech., Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Govt. Reform*, 112th Congress (2011) (testimony of Raymond Keating, Chief Economist, Small Business and Entrepreneurship Council).

uct Safety Commission, and the Federal Communications Commission, can currently impose significant costs and burdensome requirements with little meaningful accountability and oversight.

In subcommittee testimony, former OIRA Administrator Dudley recommended that UMRA be aligned with Executive Order 12866. She opined that the analytical requirements of Executive Order 12866 are a more effective mechanism for holding agencies accountable for the objectives expressed in UMRA.¹¹ Moreover, OIRA Administrator Sunstein wrote in previous scholarship that executive orders are not “sufficient for real change,” and “a thoroughgoing reform effort would require legislative reforms, not merely executive action.”¹² To ensure that agencies regulate responsibly, H.R. 373 codifies most of those regulatory principles outlined in Executive Order 12866, and reaffirmed in Executive Order 13563.

To close another loophole in UMRA, H.R. 373 no longer allows an agency to forgo UMRA analyses simply because the agency publishes a rule without first issuing a notice of proposed rulemaking. GAO has found that nearly half of final rules are not first published in the Federal Register as a notice of proposed rulemaking. This currently qualifies the rules for an automatic UMRA exemption.¹³

To put the private sector on equal footing with the public sector, H.R. 373 requires agencies to consult with regulated private sector entities during the development of significant Federal regulatory mandates. This consultation requirement now applies only with respect to State, local, and tribal governments. Existing OIRA guidelines on agency execution of this requirement are codified in H.R. 373, and OIRA is required to include an Appendix detailing agency consultation activities with State, local, and tribal governments and the private sector in its annual report to Congress on agency compliance with UMRA. This will help remedy what the National Conference of State Legislatures has described as a “haphazard” consultation process.¹⁴ For example, OIRA formerly included in its annual report to Congress an Appendix providing examples of agency consultation with state and local governments.¹⁵ But in recent years it has ceased to provide any evidence concerning how consultation is being carried out.¹⁶ In response to a July 2011 inquiry from the Subcommittee, OIRA conceded it had unilaterally decided to remove the Appendix even though this arguably con-

¹¹ *Unfunded Mandates and Regulatory Overreach: Hearing Before the H. Subcomm. on Tech., Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Govt. Reform*, 112th Congress (2011) (testimony of Susan Dudley, Director, GW Regulatory Studies).

¹² Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

¹³ U.S. General Accountability Office, *Federal Rulemaking: Agencies Often Published Final Action Without Proposed Rules*, August 31, 1998.

¹⁴ National Conference of State Legislatures, *Policy Position on Federal Mandate Relief*, effective through August 2011, available at <http://www.ncsl.org/Default.aspx?TabID=773&tabs=855,20,632#FederalMandate>.

¹⁵ U.S. Office of Mgmt. & Budget, Office of Information and Regulatory Affairs, *2008 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, January 2009.

¹⁶ U.S. Office of Mgmt. & Budget, Office of Information and Regulatory Affairs, *2009, 2010 and 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, 2009, 2010, 2011.

stituted a failure to satisfy its current-law reporting requirements.¹⁷

To ensure that meaningful oversight over unfunded regulatory mandates is enabled and remains consistent with other regulatory oversight, H.R. 373 formally transfers responsibilities from the Director of the Office of Management and Budget (OMB) to the Administrator of the Office of Information and Regulatory Affairs (OIRA). OMB has long delegated its responsibilities under UMRA to OIRA.¹⁸ H.R. 373 would cement that relationship, while also extending OIRA's role beyond certifying and reporting on agency regulatory actions.

To ensure that agencies continue the “look back” process, H.R. 373 also allows a chairman or ranking member of any congressional committee to request any agency conduct a retrospective analysis of an existing Federal regulatory mandate. This provision aims to educate Congress about the impact of a rule after it has been in effect. It will incentivize agencies to perform a proper analysis when first proposing regulations. In testimony before the Subcommittee, GAO testified that parties they interviewed advocated for an evaluation of existing rules to better assess the effectiveness of UMRA.¹⁹ The Small Business and Entrepreneurship Council's testimony also supported an after-the-fact evaluation of the effectiveness and the true cost of existing regulations and mandates.²⁰ President Obama himself has stated that each agency, “should periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.”²¹

To enhance accountability, H.R. 373 extends judicial review to the selection of the least costly/least burdensome regulatory alternative, and to the principles of Executive Order 12866. In her testimony, former OIRA Administrator Dudley advocated for expanding judicial review in this way to give agencies a greater incentive to carefully consider the “least costly, most cost-effective or least burdensome alternative” when regulating.²² Further, the Small Business and Entrepreneurship Council testified that the current judicial review provision included in UMRA “lacks teeth” and “offers no real incentives to challenge agencies or for agencies to deal more

¹⁷ Cass Sunstein email response to Chairman Lankford (July 22, 2011).

¹⁸ *Unfunded Mandates and Regulatory Overreach: Hearing Before the H. Subcomm. on Tech., Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Govt. Reform*, 112th Congress (2011) (testimony of Susan Dudley, Director, GW Regulatory Studies).

¹⁹ *Unfunded Mandates and Regulatory Overreach: Hearing Before the H. Subc. on Tech., Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Govt. Reform*, 112th Congress (2011) (testimony of Denise Fantone, Government Accountability Office).

²⁰ *Unfunded Mandates and Regulatory Overreach Part II: Hearing Before the H. Subc. on Tech., Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Govt. Reform*, 112th Congress (2011) (testimony of Raymond Keating, Chief Economist, Small Business and Entrepreneurship Council).

²¹ See, Cass Sunstein, Memo for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies re. Executive Order 13563, “Improving Regulation and Regulatory Review” (February 2, 2011).

²² *Unfunded Mandates and Regulatory Overreach: Hearing Before the H. Subc. on Tech., Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Govt. Reform*, 112th Congress (2011) (testimony of Susan Dudley, Director, GW Regulatory Studies).

legitimately with UMRA requirements.”²³ Moreover, current OIRA Administrator Sunstein wrote in previous scholarship that materials generated under executive order should be subject to judicial review to the extent that they are relevant to an agency’s decision under the relevant statute. He noted this would only “slightly comprom[ise] the interests of the Executive in favor of the interests of the public as a whole.”²⁴

In sum, H.R. 373 draws on the Subcommittee’s examination of UMRA and makes reforms addressing key deficiencies in the law identified by experts and regulated entities.

LEGISLATIVE HISTORY

H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011, was introduced on January 20, 2011, by Rep. Virginia Foxx (R–NC) and referred to the Committee on Oversight and Government Reform, and subsequently, the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform. The bill was also referred to the Committee on Rules, the Committee on the Budget and the Committee on the Judiciary. On September 21, 2011, the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform marked up H.R. 373. Chairman James Lankford (R–OK) offered an amendment in the nature of a substitute that was reported favorably by a voice vote. The bill, as amended, was agreed to by a recorded vote of 5 Ayes and 4 Nays. Voting Aye: Reps. James Lankford (R–OK), Mike Kelly (R–PA), Jason Chaffetz (R–UT), Raul Labrador (R–ID), and Patrick Meehan (R–PA). Voting Nay: Reps. Gerald Connolly (D–VA), Christopher Murphy (D–CT), Stephen Lynch (D–MA), and Elijah Cummings (D–MD).

Prior to the 112th Congress, similar bills to H.R. 373 were introduced to reform UMRA. In the 110th Congress, Rep. Foxx introduced H.R. 6964, the Unfunded Mandates Information and Transparency Act of 2008, to subject more unfunded mandates to UMRA and enhance reporting requirements. In the 111th Congress, Representative Foxx and Representative Scott Garrett (R–NJ) introduced H.R. 2255, the Unfunded Mandates Information and Transparency Act of 2009, and H.R. 5818, the Mandate Prevention Act of 2010. H.R. 2255 was a reintroduction of H.R. 6964, and H.R. 5818 allowed a point of order to be raised if a private sector mandate exceeded the UMRA threshold.

SECTION-BY-SECTION

Section 1. Short title; Table of Contents

States that the Act may be cited as the “Unfunded Mandates Information and Transparency Act of 2011.”

Section 2. Purpose

The purpose of this legislation is to improve the quality of deliberations of Congress with respect to Federal mandates and to en-

²³ *Unfunded Mandates and Regulatory Overreach Part II: Hearing Before the H. Subc. on Tech., Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Govt. Reform*, 112th Congress (2011) (testimony of Raymond Keating, Chief Economist, Small Business and Entrepreneurship Council).

²⁴ Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

hance the ability of Congress and the public to identify Federal mandates that may impose undue harm on consumers, workers, employers, small businesses, and State, local, and tribal governments by providing Congress and the public more complete information about the cost of such mandates.

Section 3. Providing for Congressional Budget Office studies on policies involving changes in conditions of grant aid

This section allows a committee chairman or ranking member to request that the Congressional Budget Office (CBO) perform an assessment comparing the authorized level of funding in a bill or resolution to the prospective costs of carrying out any changes to a condition of Federal assistance being imposed on State, local, or tribal governments participating in the Federal assistance program concerned.

Section 4. Clarifying the definition of direct costs to reflect Congressional Budget Office practice

This section amends the definition of “direct costs” to codify current CBO practice and ensures that Federal agencies account for the costs of Federal mandates, such as forgone business profits, costs passed onto consumers and other entities, and behavioral changes.

Section 5: Expanding the scope of reporting requirements to include regulations imposed by independent regulatory agencies

This section requires independent regulatory agencies to comply with UMRA.

Section 6: Amendments to replace Office of Management and Budget with Office of Information and Regulatory Affairs

This section transfers authorities from the Director of the Office of Management and Budget (OMB) to the Administrator of the Office of Information and Regulatory Affairs (OIRA) to ensure that agencies adhere to UMRA requirements.

Section 7: Applying substantive point of order to private sector mandates

This section allows a point of order to be raised if a private sector legislative mandate exceeds the UMRA threshold (\$142 million).

Section 8: Regulatory process and principles

This section clarifies that agencies must conduct UMRA analyses unless a law “expressly” prohibits them from doing so. It also requires agencies to adhere to the principles of regulation from Section 1 of Executive Order 12866, reaffirmed in Executive Order 13563, when conducting regulatory actions. The definition of “regulatory action” is added and defined as “any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including advance notices of proposed rulemaking and notices of proposed rulemaking.”

Section 9. Expanding the scope of statements to accompany significant regulatory actions

This section requires Federal agencies to measure a proposed rule's annual effect on the economy—not only “expenditures,” as is currently required. This language aligns UMRA with Executive Order 12866 and requires agencies to assess such costs imposed by regulatory mandates as forgone profits, costs passed onto consumers and other entities, and behavioral changes.

It also closes the loophole allowing agencies to forgo UMRA analyses of a rule for which no notice of proposed rulemaking (NPRM) is issued. If no NPRM is issued, the agency must conduct an UMRA analysis before promulgating any final rule or within six months after promulgating a final rule.

It also further aligns UMRA with Executive Order 12866 by removing the words “adjusted annually for inflation” when determining the threshold for UMRA analysis, and by adopting cost-benefit analysis requirements.

It also requires that the descriptions and summaries an agency must complete under UMRA be “detailed.”

Section 10. Enhanced stakeholder consultation

This section extends to the private sector the current requirement that agencies receive meaningful and timely input in the development of regulatory mandates from state, local, and tribal governments. It also adopts guidelines, based on current OIRA policies, instructing agencies how to execute this requirement.

Section 11. New authorities and responsibilities for Office of Information and Regulatory Affairs

This section gives OIRA oversight responsibility to determine whether agencies have drafted regulations consistent with the regulatory principles this bill adopts, and whether cost analyses performed are adequate. If OIRA determines the agency has not met these requirements, OIRA is to notify the agency and request compliance before a regulation is finalized.

This section also requires agencies to include in their annual reports to Congress an appendix detailing their UMRA consultation activities with State, local, and tribal governments and the private sector.

Section 12. Retrospective analysis of existing Federal regulations

This section requires Federal agencies to conduct a retrospective analysis of an existing Federal regulation at the request of a committee chairman or ranking minority member. The retrospective analysis shall be submitted to the requesting member and to Congress. It is to include: a copy of the Federal regulation; the continued need for the Federal regulation; the nature and comments or complaints received concerning the Federal regulation; an explanation of the extent to which the mandate may duplicate another Federal regulation; a description of the degree to which technology or economic conditions have changed in the area affecting the Federal regulation; an analysis of the retrospective costs and benefits of the Federal regulation that considers studies done outside the government; and a history of legal challenges to the Federal regulation.

Section 13. Expansion of Judicial Review

This section extends judicial review to the selection of the least costly/least burdensome alternative to a regulatory mandate. It also permits a court to stay, enjoin, or invalidate a rule if an agency fails to complete the required UMRA analysis or to adhere to the regulatory principles.

EXPLANATION OF AMENDMENTS

Rep. Lankford offered an amendment in the nature of a substitute, which is described in the forgoing section of this report. The amendment was agreed to by voice vote.

COMMITTEE CONSIDERATION

On November 17, 2011, the Committee met in open session and ordered reported favorably the bill, H.R. 373, as amended, by recorded vote of 22 Ayes to 12 Nays, a quorum being present.

ROLL CALL VOTES

1. Mr. Cummings offered an amendment to the Lankford ANS regarding consultation with private parties. The amendment was defeated by a recorded vote of 10 Ayes to 22 Nays.

Voting Aye: Cummings, Kucinich, Tierney, Clay, Lynch, Cooper, Connolly, Welch, Murphy and Speier.

Voting Nay: Issa, Burton, Mica, Platts, Turner, McHenry, Jordan, Chaffetz, Mack, Walberg, Lankford, Amash, Buerkle, Gosar, Labrador, Meehan, DesJarlais, Gowdy, Ross, Guinta, Farenthold and Kelly.

2. The bill, H.R. 373, as amended, was ordered favorably reported to the House, a quorum being present, by a recorded vote of 22 Ayes to 12 Nays.

Voting Aye: Issa, Burton, Mica, Platts, Turner, McHenry, Jordan, Chaffetz, Mack, Walberg, Lankford, Amash, Buerkle, Gosar, Labrador, Meehan, DesJarlais, Gowdy, Ross, Guinta, Farenthold and Kelly.

Voting Nay: Cummings, Maloney, Kucinich, Tierney, Clay, Lynch, Cooper, Connolly, Davis, Welch, Murphy and Speier.

CORRESPONDENCE

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April 11, 2012

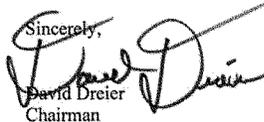
The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On November 17, 2011, the Committee on Oversight and Government Reform ordered H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011, reported to the House. Thank you for consulting with the Committee on Rules with regard to H.R. 373 on those matters within the committee's jurisdiction. I am writing to confirm our mutual understanding with respect to the consideration of H.R. 373.

In the interest of expediting the House's consideration of H.R. 373, I will not request a sequential referral of the bill. However, I do so only with the understanding that this procedural route will not be construed to prejudice the Committee on Rules' jurisdictional interest and prerogatives on this bill or any other similar legislation and will not be considered as precedent for consideration of matters of jurisdictional interest to my Committee in the future.

I respectfully request your support for the appointment of outside conferees from the Committee on Rules should this bill or a similar bill be considered in a conference with the Senate. I also request that you include our exchange of letters on this matter in the Committee Report on H.R. 373 and in the *Congressional Record* during consideration of this bill on the House floor. Thank you for your attention to these matters.

Sincerely,

David Dreier
Chairman

Cc: The Honorable John Boehner
The Honorable Elijah Cummings
The Honorable Louise Slaughter
Mr. Tom Wickham, Parliamentarian

DARRELL E. ISSA, CALIFORNIA
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Congress of the United States
House of Representatives

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May 15, 2012

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JACQUE SPEIER, CALIFORNIA

The Honorable David Dreier
Chairman
Committee on Rules
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter regarding the Committee on Rules' jurisdictional interest in H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011, and your willingness to forego consideration of H.R. 373 by your committee.

I agree that the Rules Committee has a valid jurisdictional interest in certain provisions of H.R. 373 and that the Committee's jurisdiction will not be adversely affected by your decision to not request a sequential referral of H.R. 373. As you have requested, I will support your request for an appropriate appointment of outside conferees from your Committee in the event of a House-Senate conference on this or similar legislation should such a conference be convened.

Finally, I will include a copy of your letter and this response in the Committee Report and in the *Congressional Record* during the floor consideration of this bill. Thank you again for your cooperation.

Sincerely,

Darrell Issa
Chairman

- cc: The Honorable John Boehner, Speaker
- The Honorable Elijah Cummings, Ranking Minority Member
Committee on Oversight and Government Reform
- The Honorable Louise Slaughter, Ranking Minority Member
Committee on Rules
- Mr. Tom Wickham, Parliamentarian

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LINDA T. SANCHEZ, California
(Vacancy)

May 15, 2012

HAND-DELIVERED

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Issa,

On November 17, 2011, the Committee on Oversight and Government Reform ordered H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011, as amended, to be reported favorably to the House. As a result of your having consulted with the Judiciary Committee concerning provisions of the bill that fall within our Rule X jurisdiction, I to agree to discharge the Committee on the Judiciary from further consideration of the bill so that the bill may proceed expeditiously to the House Floor.

The Judiciary Committee takes this action with our mutual understanding that, by foregoing consideration of H.R. 373 at this time, we do not waive any jurisdiction over the subject matter contained in this or similar legislation, and that our committee will be appropriately consulted and involved as the bill or similar legislation moves forward so that we may address any remaining issues that fall within our Rule X jurisdiction. Our committee also reserves the right to seek appointment of an appropriate number of conferees to any House-Senate conference involving this or similar legislation, and requests your support for any such request.

Finally, I would appreciate your response to this letter confirming this understanding with respect to H.R. 373, and would ask that a copy of our exchange of letters on this matter be included in your committee's report on H.R. 373 and/or in the *Congressional Record* during floor consideration thereof.

Sincerely,



Lamar Smith
Chairman

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

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TODD RUSSELL FLATTS, PENNSYLVANIA
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LAWRENCE J. BRADY
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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

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May 15, 2012

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JACKIE SPEER, CALIFORNIA

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter regarding the Committee on the Judiciary's jurisdictional interest in H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011, and your willingness to forego consideration of H.R. 373 by your committee.

I agree that the Judiciary Committee has a valid jurisdictional interest in certain provisions of H.R. 373 and that the Committee's jurisdiction will not be adversely affected by your decision to forego consideration of H.R. 373. As you have requested, I will support your request for an appropriate appointment of outside conferees from your Committee in the event of a House-Senate conference on this or similar legislation should such a conference be convened.

Finally, I will include a copy of your letter and this response in the Committee Report and in the *Congressional Record* during the floor consideration of this bill. Thank you again for your cooperation.

Sincerely,

Darrell Issa
Chairman

- cc: The Honorable John Boehner, Speaker
- The Honorable John Conyers, Chairman
Committee on the Judiciary
- The Honorable Elijah Cummings, Ranking Minority Member
Committee on Oversight and Government Reform
- Mr. Tom Wickham, Parliamentarian

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U.S. House of Representatives
COMMITTEE ON THE BUDGET
Washington, DC 20515

May 15, 2012

The Honorable Darrell E. Issa
Chairman, Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Issa:

I am writing to you concerning H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011. There are certain provisions in the legislation which fall within Rule X jurisdiction of the Committee on the Budget.

In the interest of permitting your committee to proceed expeditiously to floor consideration of this bill, I am willing to waive this committee's right to sequential referral. I do so with the understanding that by waiving consideration of the bill, the Budget Committee does not waive any future jurisdictional claim over the subject matters contained in the bill which fall within its jurisdiction. I request that you urge the Speaker to name members of this committee to any conference committee which is named to consider such provisions.

Please include a copy of this letter and any response in the committee report on H.R. 373 as well as in the Congressional Record during any floor consideration of this bill. Thank you for the cooperative spirit in which you have worked regarding this matter and others between our respective committees.

Sincerely,

Paul Ryan
Chairman

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

DAN BURTON, INDIANA
JOHN L. MICA, FLORIDA
TODD RUSSELL, INDIANA, PENNSYLVANIA
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JACQUE SPICER, CALIFORNIA

The Honorable Paul Ryan
Chairman
Committee on the Budget
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter regarding the Committee on the Budget's jurisdictional interest in H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011, and your willingness to forego consideration of H.R. 373 by your committee.

I agree that the Budget Committee has a valid jurisdictional interest in certain provisions of H.R. 373 and that the Committee's jurisdiction will not be adversely affected by your decision to forego consideration of H.R. 373. As you have requested, I will support your request for an appropriate appointment of outside conferees from your Committee in the event of a House-Senate conference on this or similar legislation should such a conference be convened.

Finally, I will include a copy of your letter and this response in the Committee Report and in the *Congressional Record* during the floor consideration of this bill. Thank you again for your cooperation.

Sincerely,

Darrell Issa
Chairman

- cc: The Honorable John Boehner, Speaker
- The Honorable Chris Van Hollen, Ranking Minority Member
Committee on the Budget
- The Honorable Elijah Cummings, Ranking Minority Member
Committee on Oversight and Government Reform
- Mr. Tom Wickham, Parliamentarian

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill enhances UMRA’s utility as a tool to promote informed and deliberate decisions by Congress and Federal agencies concerning the appropriateness of Federal mandates. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF
THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee’s performance goals and objectives are reflected in the descriptive portions of this report.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported bill include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 373 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 373. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST
ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 373 from the Director of Congressional Budget Office:

MARCH 28, 2012.

Hon. DARRELL ISSA,
*Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lisa Ramirez-Branum.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

*H.R. 373—Unfunded Mandates Information and Transparency Act
of 2011*

Summary: H.R. 373 would amend the Unfunded Mandates Reform Act of 1995 (UMRA) to increase the information available to the Congress and the public with respect to federal mandates contained in proposed legislation and federal regulations. Enacting this legislation would codify in UMRA many practices currently required of most federal agencies when analyzing the impacts of regulations. The bill also would require independent regulatory agencies to perform broad analyses (including costs and benefits) of regulations by requiring those agencies to comply with standards established in UMRA relating to the rule making process.

The legislation would amend the Congressional Budget Act to establish a point of order, which a Member of Congress may raise, against legislation that creates a private-sector mandate with costs above the threshold established in UMRA.²⁵ In addition, the legislation would require CBO to conduct assessments of costs to state, local, and tribal governments resulting from any changes to conditions of certain federal assistance programs.

CBO estimates that the new requirements placed on independent regulatory agencies, such as the Federal Reserve and the Federal Deposit Insurance Corporation (FDIC), would require additional resources to carry out. Net spending by the Federal Reserve is recorded in the federal budget as a change in revenues, and expenses of the FDIC are classified as direct spending; therefore, pay-as-you-go procedures apply. CBO estimates that enacting the legislation would decrease revenues by \$1 million in 2014 and \$9 million over the 2013–2022 period. CBO estimates that enacting H.R. 373

²⁵The intergovernmental and private-sector thresholds established in UMRA were \$50 million and \$100 million, respectively in 1996, adjusted annually for inflation. In 2012, the thresholds are \$73 million for intergovernmental mandates and \$146 million for private-sector mandates.

would result in no net effect on direct spending over the 2014–2022 period because costs incurred by the FDIC would be offset by premiums collected from insured depository institutions. Assuming the appropriation of necessary amounts, the legislation also would have a discretionary cost of \$1 million in 2014 and \$9 million over the 2014–2022 period, CBO estimates.

CBO expects that several independent agencies would increase fees to offset the costs of implementing the additional regulatory activities required by the bill; thus, H.R. 373 would increase the costs of existing mandates on public and private-sector entities that would be required to pay those fees. Based on information from the affected agencies, CBO estimates that the additional costs of those mandates would be small and would fall well below the annual thresholds for intergovernmental and private-sector mandates established in UMRA.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 373 is shown in the following table. The costs of this legislation fall within budget function 370 (advancement of commerce), and other budget functions that contain spending for salaries and expenses.

	By fiscal year, in millions of dollars—												
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2012–2017	2012–2022
	CHANGES IN REVENUES												
Estimated Revenues ^a	0	*	-1	-1	-1	-1	-1	-1	-1	-1	-1	-4	-9
	CHANGES IN SPENDING SUBJECT TO APPROPRIATION												
Estimated Authoriza- tion Level	0	*	1	1	1	1	1	1	1	1	1	4	9
Estimated Outlays	0	*	1	1	1	1	1	1	1	1	1	4	9

Notes: * = less than \$500,000.

CBO estimates that enacting H.R. 373 would result in direct spending costs that total less than \$500,000 annually. Because we expect premiums to increase to cover those costs, on net, over the 2013–2017 and the 2013–22 periods, we estimate that total direct spending costs would not be significant.

^aFor revenues, positive numbers indicate a decrease in the deficit and negative numbers indicate an increase in the deficit.

Basis of estimate: For this estimate, CBO assumes that the legislation will be enacted by the end of 2012, that fees and premiums will be levied to cover the additional administrative costs incurred by some regulatory agencies, that the necessary amounts will be appropriated near the start of each fiscal year, and that spending patterns will follow historical patterns for regulatory analysis activities.

H.R. 373 would amend UMRA to codify certain practices currently required under several executive orders, including Executive Orders 12866 and 13563. (Those instructions require agencies in the executive branch to analyze the impacts of regulations on state, local, and tribal governments and the private sector. For significant rules with an estimated annual effect on the economy of \$100 million or more, agencies must prepare detailed cost-benefit analyses.) The legislation also would codify Executive Order 13579 and remove a provision in current law that exempts independent regulatory agencies, such as the Federal Reserve and the FDIC, from complying with standards established in UMRA relating to the rulemaking process. Based on information from several agencies, CBO expects that the new requirements would increase the workload of independent regulatory agencies, requiring them to devote

more resources to prepare broader analyses of regulations and to support judicial reviews and hearings pertaining to agency regulations.

Direct spending and revenues

Based on information from the Federal Reserve, CBO expects that it would hire additional staff in order to comply with H.R. 373, which would increase operating costs and decrease net earnings. Net earnings of the Federal Reserve are remitted to the Treasury and recorded in the federal budget as revenues. In total, CBO estimates that the legislation would decrease revenues by \$1 million in 2014 and by \$9 million over the 2013–2022 period.

CBO also estimates that the FDIC would incur additional costs totaling less than \$500,000 annually to implement H.R. 373. FDIC has the authority to collect premiums from insured depository institutions to support administrative expenses; therefore, CBO estimates that those increased costs would be offset over the 2013–2017 and 2013–2022 periods.

Spending subject to appropriation

To meet the regulatory standards established in H.R. 373, CBO estimates that at least 12 independent regulatory agencies would face an increased workload and would eventually incur costs of \$1 million annually. We expect that it would take two years to reach that level of effort, resulting in gross costs of \$43 million over the 2013–2022 period. Under current law, four of those agencies, the Federal Energy Regulatory Commission, the Federal Communications Commission, the Nuclear Regulatory Commission, and the Securities and Exchange Commission, are authorized to collect fees sufficient to offset their appropriation each year. CBO assumes that future appropriations would direct agencies to exercise that authority. Thus, CBO estimates that implementing the bill would have a net discretionary cost of \$1 million in 2014 and \$9 million over the 2013–2022 period, subject to the availability of appropriated funds.

Finally, H.R. 373 would require CBO, at the request of any Chairman or Ranking Minority Member of a committee, to conduct an assessment of costs to state, local, and tribal governments resulting from any changes to conditions of federal assistance programs. CBO estimates that the costs to conduct such assessments would not be significant.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in the deficit from changes in revenues that are subject to those pay-as-you-go procedures are shown in the following table.

CBO ESTIMATE OF PAY-AS-YOU-GO EFFECTS FOR H.R. 373, AS ORDERED REPORTED BY THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM ON NOVEMBER 17, 2011

	By fiscal year, in millions of dollars—												2012– 2017	2012– 2022
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022			
	NET INCREASE OR DECREASE (–) IN THE DEFICIT													
Statutory Pay-As-You-Go Impact	0	0	1	1	1	1	1	1	1	1	1	1	4	9

Intergovernmental and private-sector impact: H.R. 373 would increase the costs of existing mandates on public and private entities that are required to pay fees assessed by certain independent agencies. The bill would expand the scope of analyses that independent agencies are required to conduct when they issue regulations. Some of those independent agencies are authorized to collect fees sufficient to offset the cost of their regulatory activities. Because we expect some of those agencies to increase fees to offset the costs of their additional regulatory activities, the bill would increase the costs of existing mandates by requiring public and private entities to pay higher fees. Based on information from the independent agencies, the cost of implementing the additional regulatory activities would not be significant. Therefore, CBO estimates that any additional costs would be small and would fall well below the annual thresholds established in UMRA for intergovernmental and private-sector mandates (\$73 million and \$146 million in 2012 respectively, adjusted annually for inflation).

Estimate prepared by: Federal costs: Barbara Edwards, Daniel Hoople, Marin Randall, Lisa Ramirez-Branum, and Susan Willie; Impact on state, local, and tribal governments: Elizabeth Cove Delisle; Impact on the private sector: Marin Randall.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CONGRESSIONAL BUDGET ACT OF 1974

* * * * *

TITLE II—CONGRESSIONAL BUDGET OFFICE

* * * * *

DUTIES AND FUNCTIONS

SEC. 202. (a) * * *

* * * * *

(g) STUDIES.—

(1) * * *

* * * * *

(3) *ADDITIONAL STUDIES.*—At the request of any Chairman or ranking member of the minority of a Committee of the Senate or the House of Representatives, the Director shall conduct an assessment comparing the authorized level of funding in a bill or resolution to the prospective costs of carrying out any changes to a condition of Federal assistance being imposed on State, local, or tribal governments participating in the Federal assistance program concerned or, in the case of a bill or joint resolution that authorizes such sums as are necessary, an assessment of an estimated level of funding compared to such costs.

* * * * *

TITLE IV—ADDITIONAL PROVISIONS TO IMPROVE FISCAL PROCEDURES

* * * * *

PART B—FEDERAL MANDATES

SEC. 421. DEFINITIONS.

For purposes of this part:

(1) **AGENCY.**—The term “agency” has the same meaning as defined in section 551(1) of title 5, United States Code, but does not include independent regulatory agencies].

* * * * *

(3) **DIRECT COSTS.**—The term “direct costs”—

(A)(i) in the case of a Federal intergovernmental mandate, means the aggregate estimated amounts that all State, local, and tribal governments would *incur* or be required to spend or would be prohibited from raising in revenues in order to comply with the Federal intergovernmental mandate; or

* * * * *

(B) in the case of a Federal private sector mandate, means the aggregate estimated amounts that the private sector will be required to spend *or could forgo in profits, including costs passed on to consumers or other entities taking into account, to the extent practicable, behavioral changes*, in order to comply with the Federal private sector mandate;

* * * * *

SEC. 425. LEGISLATION SUBJECT TO POINT OF ORDER.

(a) **IN GENERAL.**—It shall not be in order in the Senate or the House of Representatives to consider—

(1) * * *

(2) any bill, joint resolution, amendment, motion, or conference report that would increase the direct costs of [Federal intergovernmental mandates] *Federal mandates* by an amount that causes the thresholds specified in section 424(a)(1) or 424(b)(1) to be exceeded, unless—

(A) * * *

* * * * *

UNFUNDED MANDATES REFORM ACT OF 1995

* * * * *

**TITLE I—LEGISLATIVE
ACCOUNTABILITY AND REFORM**

* * * * *

SEC. 103. COST OF REGULATIONS.

(a) * * *

* * * * *

(c) COOPERATION OF [OFFICE OF MANAGEMENT AND BUDGET] *OFFICE OF INFORMATION AND REGULATORY AFFAIRS*.—At the request of the Director of the Congressional Budget Office, the [Director of the Office of Management and Budget] *Administrator of the Office of Information and Regulatory Affairs* shall provide data and cost estimates for regulations implementing an Act containing a Federal mandate covered by part B of title IV of the Congressional Budget and Impoundment Control Act of 1974 (as added by section 101 of this Act).

* * * * *

**TITLE II—REGULATORY
ACCOUNTABILITY AND REFORM**

[SEC. 201. REGULATORY PROCESS.

[Each agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).]

SEC. 201. REGULATORY PROCESS AND PRINCIPLES.

(a) *IN GENERAL.*—Each agency shall, unless otherwise expressly prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector (other than to the extent that such regulatory actions incorporate requirements specifically set forth in law) in accordance with the following principles:

(1) *Each agency shall identify the problem that it intends to address (including, if applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.*

(2) *Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.*

(3) *Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.*

(4) *If an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.*

(5) *Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation, unless expressly prohibited by law, only upon a reasoned determination that the benefits of the intended regulation justify its costs.*

(6) *Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.*

(7) *Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.*

(8) *Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.*

(9) *Each agency shall tailor its regulations to minimize the costs of the cumulative impact of regulations.*

(10) *Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.*

(b) **REGULATORY ACTION DEFINED.**—*In this section, the term “regulatory action” means any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including advance notices of proposed rulemaking and notices of proposed rulemaking.*

SEC. 202. STATEMENTS TO ACCOMPANY SIGNIFICANT REGULATORY ACTIONS.

[(a) **IN GENERAL.**—Unless otherwise prohibited by law, before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement containing—

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

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

[(A) an analysis of the extent to which such costs to State, local, and tribal governments may be paid with Federal financial assistance (or otherwise paid for by the Federal Government); and

[(B) the extent to which there are available Federal resources to carry out the intergovernmental mandate;

[(3) estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of—

[(A) the future compliance costs of the Federal mandate; and

[(B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector;

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

[(5)(A) a description of the extent of the agency's prior consultation with elected representatives (under section 204) of the affected State, local, and tribal governments;

[(B) a summary of the comments and concerns that were presented by State, local, or tribal governments either orally or in writing to the agency; and

[(C) a summary of the agency's evaluation of those comments and concerns.]

(a) IN GENERAL.—Unless otherwise expressly prohibited by law, before promulgating any general notice of proposed rulemaking or any final rule, or within six months after promulgating any final rule that was not preceded by a general notice of proposed rulemaking, if the proposed rulemaking or final rule includes a Federal mandate that may result in an annual effect on State, local, or tribal governments, or to the private sector, in the aggregate of \$100,000,000 or more in any 1 year, the agency shall prepare a written statement containing the following:

(1) The text of the draft proposed rulemaking or final rule, together with a reasonably detailed description of the need for the proposed rulemaking or final rule and an explanation of how the proposed rulemaking or final rule will meet that need.

(2) An assessment of the potential costs and benefits of the proposed rulemaking or final rule, including an explanation of the manner in which the proposed rulemaking or final rule is consistent with a statutory requirement and avoids undue inter-

ference with State, local, and tribal governments in the exercise of their governmental functions.

(3) A qualitative and quantitative assessment, including the underlying analysis, of benefits anticipated from the proposed rulemaking or final rule (such as the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias).

(4) A qualitative and quantitative assessment, including the underlying analysis, of costs anticipated from the proposed rulemaking or final rule (such as the direct costs both to the Government in administering the final rule and to businesses and others in complying with the final rule, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and international competitiveness), health, safety, and the natural environment);

(5) Estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible, of—

(A) the future compliance costs of the Federal mandate; and

(B) any disproportionate budgetary effects of the Federal mandate upon any particular regions of the nation or particular State, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector.

(6)(A) A detailed description of the extent of the agency's prior consultation with the private sector and elected representatives (under section 204) of the affected State, local, and tribal governments.

(B) A detailed summary of the comments and concerns that were presented by the private sector and State, local, or tribal governments either orally or in writing to the agency.

(C) A detailed summary of the agency's evaluation of those comments and concerns.

(7) A detailed summary of how the agency complied with each of the regulatory principles described in section 201.

(b) PROMULGATION.—In promulgating a general notice of proposed rulemaking or a final rule for which a statement under subsection (a) is required, the agency shall include in the promulgation a detailed summary of the information contained in the statement.

* * * * *

SEC. 204. STATE, LOCAL, AND TRIBAL GOVERNMENT AND PRIVATE SECTOR INPUT.

(a) IN GENERAL.—Each agency shall, to the extent permitted in law, develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf), and impacted parties within the private sector (including small business), to provide meaningful and timely input in the development of regulatory proposals containing significant [Federal intergovernmental mandates] Federal mandates.

* * * * *

[(c) IMPLEMENTING GUIDELINES.—No later than 6 months after the date of enactment of this Act, the President shall issue guidelines and instructions to Federal agencies for appropriate implementation of subsections (a) and (b) consistent with applicable laws and regulations.]

(c) GUIDELINES.—For appropriate implementation of subsections (a) and (b) consistent with applicable laws and regulations, the following guidelines shall be followed:

(1) Consultations shall take place as early as possible, before issuance of a notice of proposed rulemaking, continue through the final rule stage, and be integrated explicitly into the rule-making process.

(2) Agencies shall consult with a wide variety of State, local, and tribal officials and impacted parties within the private sector (including small businesses). Geographic, political, and other factors that may differentiate varying points of view should be considered.

(3) Agencies should estimate benefits and costs to assist with these consultations. The scope of the consultation should reflect the cost and significance of the Federal mandate being considered.

(4) Agencies shall, to the extent practicable—

(A) seek out the views of State, local, and tribal governments, and impacted parties within the private sector (including small business), on costs, benefits, and risks; and

(B) solicit ideas about alternative methods of compliance and potential flexibilities, and input on whether the Federal regulation will harmonize with and not duplicate similar laws in other levels of government.

(5) Consultations shall address the cumulative impact of regulations on the affected entities.

(6) Agencies may accept electronic submissions of comments by relevant parties but may not use those comments as the sole method of satisfying the guidelines in this subsection.

SEC. 205. LEAST BURDENSOME OPTION OR EXPLANATION REQUIRED.

(a) * * *

* * * * *

(c) [OMB] CERTIFICATION.—No later than 1 year after the date of the enactment of this Act, the **[Director of the Office of Management and Budget]** Administrator of the Office of Information and Regulatory Affairs shall certify to Congress, with a written explanation, agency compliance with this section and include in that certification agencies and rulemakings that fail to adequately comply with this section.

SEC. 206. ASSISTANCE TO THE CONGRESSIONAL BUDGET OFFICE.

The **[Director of the Office of Management and Budget]** Administrator of the Office of Information and Regulatory Affairs shall—

(1) * * *

* * * * *

[SEC. 208. ANNUAL STATEMENTS TO CONGRESS ON AGENCY COMPLIANCE.

[No later than 1 year after the effective date of this title and annually thereafter, the Director of the Office of Management and

Budget shall submit to the Congress, including the Committee on Governmental Affairs of the Senate and the Committee on Government Reform and Oversight of the House of Representatives, a written report detailing compliance by each agency during the preceding reporting period with the requirements of this title.】

SEC. 208. OFFICE OF INFORMATION AND REGULATORY AFFAIRS RESPONSIBILITIES.

(a) *IN GENERAL.*—*The Administrator of the Office of Information and Regulatory Affairs shall provide meaningful guidance and oversight so that each agency’s regulations for which a written statement is required under section 202 are consistent with the principles and requirements of this title, as well as other applicable laws, and do not conflict with the policies or actions of another agency. If the Administrator determines that an agency’s regulations for which a written statement is required under section 202 do not comply with such principles and requirements, are not consistent with other applicable laws, or conflict with the policies or actions of another agency, the Administrator shall identify areas of non-compliance, notify the agency, and request that the agency comply before the agency finalizes the regulation concerned.*

(b) *ANNUAL STATEMENTS TO CONGRESS ON AGENCY COMPLIANCE.*—*The Director of the Office of Information and Regulatory Affairs annually shall submit to Congress, including the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives, a written report detailing compliance by each agency with the requirements of this title that relate to regulations for which a written statement is required by section 202, including activities undertaken at the request of the Director to improve compliance, during the preceding reporting period. The report shall also contain an appendix detailing compliance by each agency with section 204.*

SEC. 209. RETROSPECTIVE ANALYSIS OF EXISTING FEDERAL REGULATIONS.

(a) *REQUIREMENT.*—*At the request of the chairman or ranking minority member of a standing or select committee of the House of Representatives or the Senate, an agency shall conduct a retrospective analysis of an existing Federal regulation promulgated by an agency.*

(b) *REPORT.*—*Each agency conducting a retrospective analysis of existing Federal regulations pursuant to subsection (a) shall submit to the chairman of the relevant committee, Congress, and the Comptroller General a report containing, with respect to each Federal regulation covered by the analysis—*

- (1) *a copy of the Federal regulation;*
- (2) *the continued need for the Federal regulation;*
- (3) *the nature of comments or complaints received concerning the Federal regulation from the public since the Federal regulation was promulgated;*
- (4) *the extent to which the Federal regulation overlaps, duplicates, or conflicts with other Federal regulations, and, to the extent feasible, with State and local governmental rules;*
- (5) *the degree to which technology, economic conditions, or other factors have changed in the area affected by the Federal regulation;*

(6) *a complete analysis of the retrospective direct costs and benefits of the Federal regulation that considers studies done outside the Federal Government (if any) estimating such costs or benefits; and*

(7) *any litigation history challenging the Federal regulation.*

SEC. [209.] 210. EFFECTIVE DATE.

This title and the amendments made by this title shall take effect on the date of the enactment of this Act.

* * * * *

TITLE IV—JUDICIAL REVIEW

SEC. 401. JUDICIAL REVIEW.

(a) **AGENCY STATEMENTS ON SIGNIFICANT REGULATORY ACTIONS.**—

(1) **IN GENERAL.**—Compliance or noncompliance by any agency with the provisions of [sections 202 and 203(a)(1) and (2)] *sections 201, 202, 203(a)(1) and (2), and 205(a) and (b)* shall be subject to judicial review [only] in accordance with this section.

(2) **LIMITED REVIEW OF AGENCY COMPLIANCE OR NONCOMPLIANCE.**—(A) Agency compliance or noncompliance with the provisions of [sections 202 and 203(a) (1) and (2)] *sections 201, 202, 203(a)(1) and (2), and 205(a) and (b)* shall be subject to judicial review [only] under section 706(1) of title 5, United States Code, and [only] as provided under subparagraph (B).

(B) If an agency fails to prepare the written statement (including the preparation of the estimates, analyses, statements, or descriptions) under [section 202 or the written plan under section 203(a) (1) and (2), a court may compel the agency to prepare such written statement.] *section 202, prepare the written plan under section 203(a)(1) and (2), or comply with section 205(a) and (b), a court may compel the agency to prepare such written statement, prepare such written plan, or comply with such section.*

(3) **REVIEW OF AGENCY RULES.**—In any judicial review under any other Federal law of an agency rule for which a [written statement or plan is required under sections 202 and 203(a) (1) and (2), the inadequacy or failure to prepare such statement (including the inadequacy or failure to prepare any estimate, analysis, statement or description) or written plan shall not] *written statement under section 202, a written plan under section 203(a)(1) and (2), or compliance with sections 201 and 205(a) and (b) is required, the inadequacy or failure to prepare such statement (including the inadequacy or failure to prepare any estimate, analysis, statement, or description), to prepare such written plan, or to comply with such section may be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule.*

* * * * *

MINORITY VIEWS

H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011, was introduced by Representative Foxx on January 20, 2011. On September 21, 2011, the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform held a business meeting to consider H.R. 373. During the markup, Chairman Lankford offered and the Subcommittee adopted an Amendment in the Nature of a Substitute to expand the Unfunded Mandates Reform Act (UMRA) significantly. H.R. 373 was ordered reported, as amended, to the full Committee on a party-line vote of 5–4.

Democratic Members expressed concern with many provisions in the bill. Agencies already must comply with numerous requirements when issuing regulations and this legislation would add complexity and confusion to the regulatory process.

For example, the bill included a provision that would give corporations and other business interests an opportunity to provide advance comments to a proposed regulation, giving them an unfair advantage in the rulemaking process. Although the minority introduced an amendment that would have provided the same opportunity to all stakeholders, the amendment was not adopted.

The legislation also would require independent agencies to comply with UMRA and would require the Office of Information and Regulatory Affairs (OIRA) to ensure that all agencies are complying with UMRA. Giving OIRA oversight over independent agencies could threaten their independence.

The bill also included a provision that would require agencies to consider only the costs when evaluating whether UMRA applies. Although the minority introduced an amendment that would have required agencies also to examine the potential benefits of a proposed regulation, the amendment was not adopted.

Finally, the bill requires the Congressional Budget Office (CBO) to measure “reasonably foreseeable indirect costs.” This term is poorly defined, and it is unclear how CBO would implement this requirement. During the subcommittee markup, Chairman Lankford and Ranking Member Connolly agreed to send a letter to the Congressional Budget Office (CBO) asking for their views on whether it would be feasible for CBO to implement this provision. CBO responded by outlining their concerns with the bill. The majority then attempted to clarify the definition of direct costs in response to the CBO letter. The majority’s revisions, however, have not adequately addressed the deficiency in the bill.

ELIJAH E. CUMMINGS.

○