

CONGRESS OF THE UNITED STATES
CONGRESSIONAL BUDGET OFFICE

CBO

**Preemptions in
Federal
Legislation in the
111th Congress**

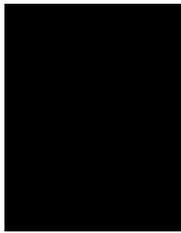


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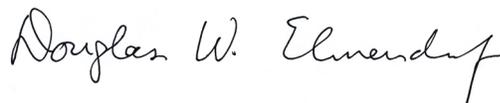


Preface

The Congressional Budget Office (CBO) reviews nearly all legislation approved by authorizing committees of the Congress to identify specific types of requirements known as federal mandates (defined in the Unfunded Mandates Reform Act of 1995) that the legislation would impose on state, local, or tribal governments. Each year, CBO publishes a report that summarizes the mandates that the Congress considered during the previous year. This report is a supplement to that series.

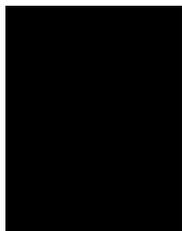
Many intergovernmental mandates take the form of preemptions by the federal government of state, local, or tribal laws and procedures. This CBO report discusses the nature of federal preemptions and identifies preemptive language in legislation considered by the 111th Congress (in 2009 and 2010); it also outlines the policy areas most affected by proposed preemptions during that Congress and identifies preemptions that became law. In addition, the report presents data about preemptions that CBO has identified since 2001, when it published a report about preemptions it had identified in legislation proposed during the 106th Congress.

The report was prepared by J'nell Blanco of CBO's State and Local Government Cost Estimates Unit under the supervision of Leo Lex. Melissa Merrell offered helpful comments, and Burke Doherty, formerly of CBO, provided considerable background research. Leah Mazade edited the report, and Christine Bogusz proofread it. Maureen Costantino took the cover photo, and she and Jeanine Rees prepared the report for publication. Monte Ruffin produced the printed copies, and Linda Schimmel handled the print distribution. An electronic version of the report is available on CBO's Web site (www.cbo.gov).



Douglas W. Elmendorf
Director

June 2011



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Summary

The Unfunded Mandates Reform Act of 1995 (UMRA) requires the Congressional Budget Office (CBO) to review bills approved by Congressional committees and identify federal mandates that the legislation would impose on state, local, or tribal governments. UMRA generally defines such intergovernmental mandates as enforceable duties; CBO interprets that definition as encompassing both positive (required) and negative (prohibited) duties. Some of those intergovernmental mandates take the form of preemptions—typically negative duties that prohibit state, local, or tribal governments from taking some action or that otherwise limit the authority of those governments to apply and enforce their own laws.

UMRA authorizes the use of certain legislative procedures that are designed to make it more difficult for the Congress to pass bills containing intergovernmental mandates without also providing funding to cover the mandates' costs. In most cases, however, such hurdles are not brought into play because many mandates—even those that might significantly affect the ability of state,

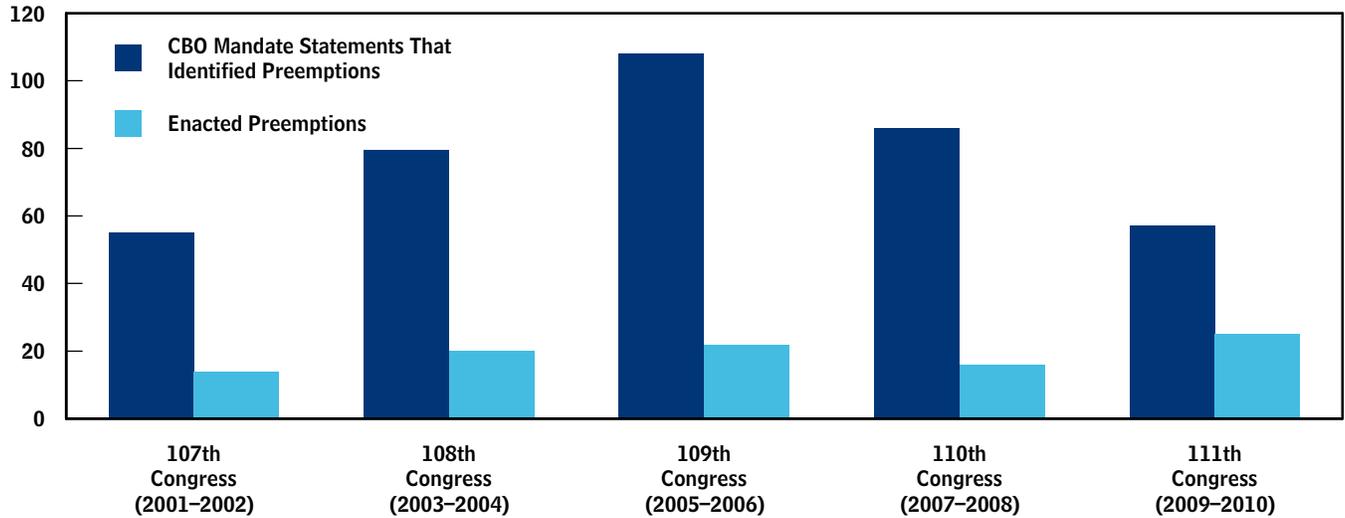
local, or tribal governments to exercise their authority in particular areas—would not impose duties that result in significant additional spending or loss of revenues. Such is the case with most preemptions.

During the 111th Congress (2009 and 2010), CBO issued 134 formal mandate statements that identified intergovernmental mandates. Of those, 43 percent identified preemptions—a proportion smaller than that identified in other recent Congresses, when half or more of the mandate statements that CBO issued noted preemptions. However, more preemptions were enacted during the 111th Congress than during other Congresses of the past 10 years (see Summary Figure 1). None of those preemptions, in CBO's estimation, will impose costs exceeding the threshold that UMRA establishes for intergovernmental mandates. That inflation-adjusted marker, which when exceeded permits Members of Congress to invoke rules that may keep legislation from advancing, was \$69 million in 2009 and \$70 million in 2010.

Summary Figure 1.

Identified and Enacted Preemptions, by Congress

(Number)



Source: Congressional Budget Office.

Notes: Preemptions are a type of intergovernmental mandate, which the Unfunded Mandates Reform Act of 1995 (UMRA) defines as an “enforceable duty” that the federal government imposes on state, local, or tribal governments. In CBO’s view, such duties may be positive (requiring some action) or, in the case of preemptions, negative—prohibiting those governments from taking some action or otherwise exerting their authority.

In the formal statements identifying mandates that CBO prepares as required by UMRA, an individual statement may identify more than one preemption. Also, the same preemption may be included in more than one bill and consequently will be identified in more than one mandate statement.



Preemptions in Federal Legislation in the 111th Congress

Some proposed legislation that comes before the Congress would impose requirements—that is, mandates—on state, local, or tribal governments or on the private sector in the form of laws or regulations to achieve national goals. Preemptions are a particular type of mandate that apply to the actions of those other governments. This Congressional Budget Office (CBO) report discusses the nature of federal preemptions and identifies preemptive language in legislation considered by the 111th Congress (in 2009 and 2010); it also presents data about preemptions that CBO has identified in legislation over the 2001–2008 period. In addition, the report outlines the areas of policy that were most affected by proposed preemptions during the 111th Congress and identifies the preemptions that became law.

Identifying Preemptions in the Context of the Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) was enacted in 1995 to ensure that the Congress received information about mandates and their costs before it enacted a piece of legislation. Title 1 of UMRA requires CBO to review bills approved by Congressional committees for the presence of federal mandates applying to other levels of government (intergovernmental mandates) or to the private sector.¹ The law defines such intergovernmental mandates as enforceable duties that the federal government would impose, through laws and regulations, on state, local, or tribal governments. UMRA does not define “enforceable duty,” but CBO interprets the term as encompassing actions that would be either required (positive duties) or prohibited (negative duties). Preemptions typically take the form of negative duties in that they prohibit state, local, or tribal governments from taking some action or otherwise limit the authority of those governments to apply and enforce their own laws.²

In addition to the procedures UMRA established for providing information to the Congress, the law also lays out procedural rules for the House of Representatives and the Senate to encourage Members to take information about such mandates into account when they consider legislation. The rules are enforced through the use of points of order, which make it more difficult for the Congress to pass intergovernmental mandates without providing funding to cover their costs. Those points of order may be raised by a Member against legislation when an intergovernmental mandate is identified with costs estimated to exceed the threshold established in UMRA—\$70 million in 2010, after an adjustment for inflation. (All years referred to in this study are calendar years.) If a point of order is raised under UMRA, each chamber resolves the issue according to its established rules and procedures.

1. CBO prepares mandate statements for bills that are approved by authorizing committees (which have legislative jurisdiction over the establishment, continuation, and operation of federal programs or agencies and the authorization of appropriations for them). In those statements, CBO must identify any mandates in a bill, address whether their direct costs would be greater than the statutory thresholds established in UMRA, and identify any funding that the bill would provide to cover those costs. (The thresholds, which are adjusted each year for inflation, were \$50 million for intergovernmental mandates and \$100 million for private-sector mandates in 1996.) Because preemptions are inherently intergovernmental mandates, this study does not discuss private-sector mandates.
2. For example, the National Defense Authorization Act for Fiscal Year 2010 considered in the 111th Congress (H.R. 2647 and H.R. 5136) would have limited the application of state laws by prohibiting courts from changing child custody orders during a military service member's deployment and from considering the deployment in determining the best interests of the child. CBO viewed that provision as a preemption and therefore an intergovernmental mandate.

Table 1.**Number of CBO Mandate Statements That Identified Intergovernmental Mandates and Preemptions**

	Congress										Total, 2001- 2010
	107th		108th		109th		110th		111th		
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	
Mandate Statements That Identified Intergovernmental Mandates	50	60	86	66	83	88	111	57	70	64	735
Mandate Statements That Identified Preemptions ^a	28	27	41	40	54	54	69	17	37	20	387
Preemptions That Became Law ^b	5	9	8	12	9	13	6	10	8	17	97
Memorandum:											
All Mandate Statements That CBO Transmitted to the Congress	389	649	615	557	500	478	703	679	419	474	5,463

Source: Congressional Budget Office.

Note: Preemptions are a type of intergovernmental mandate, which the Unfunded Mandates Reform Act of 1995 (UMRA) defines as an “enforceable duty” that the federal government imposes on state, local, or tribal governments. In CBO’s view, such duties may be positive (requiring some action) or, in the case of preemptions, negative—prohibiting those governments from taking some action or otherwise exerting their authority.

- The formal statements identifying mandates that CBO prepares as required under UMRA may cover more than one mandate and preemption. Also, because mandates and preemptions sometimes appear in multiple bills, a single mandate and preemption may be addressed in more than one CBO statement. In addition to the formal statements it prepares, CBO completes a number of preliminary reviews and informal estimates for other legislative proposals, which are not included in these figures.
- Includes preemptions that were enacted but that CBO did not review.

In most cases, however, such points of order are not raised. Many mandates, even those that might significantly affect the ability of state, local, or tribal governments to enact laws or to govern in particular areas, would not impose duties that would result in significant additional spending or losses in revenues. Such is the case with most preemptions, which rarely involve significant costs because they do not require governments to take action that would lead to additional spending. Limits on the authority of those governments to levy and collect taxes or fees are a major exception.

Historical Overview of Mandates and Preemptions Identified by CBO

From 1996 through the end of 2010, CBO prepared about 8,500 mandate statements for various versions of legislation, mostly for bills that authorizing committees had approved for further consideration by the entire House or Senate.³ Of the mandate statements regarding bills that the committees “reported out,” about 13 percent identified at least one intergovernmental mandate,

and 1 percent identified mandates whose total costs would exceed the annual threshold for intergovernmental mandates.

Since 1996, policymakers have enacted only 13 laws that contain intergovernmental mandates with costs above the threshold. Three of those laws contain federal preemptions with costs above the threshold; those preemptions limit the ability of state and local governments to collect taxes.⁴

- Annual reports that list mandates identified in legislation and in public laws are available on CBO’s Web site. For the most recent report, see Congressional Budget Office, *A Review of CBO’s Activities in 2010 Under the Unfunded Mandates Reform Act* (March 2011).
- Two of those laws prohibited states from taxing providers of access to the Internet (Public Laws 108-435 and 110-108), and one preempted state taxes on premiums for certain prescription drug plans (P.L. 108-173). All public laws containing mandates whose costs, in CBO’s estimation, would exceed the thresholds are listed in CBO’s March 2011 report (see footnote 3).

The number of mandate statements that identify preemptions has varied from year to year. From 2001, when CBO last published a report on preemptions, through 2010, the agency issued 735 statements that identified intergovernmental mandates (see Table 1). More than half (387) of those statements identified at least one preemption. The proportion of intergovernmental mandate statements noting preemptions increased slightly from 50 percent in the 107th Congress to 53 percent in the 108th Congress. The proportion rose again to 63 percent in the 109th Congress before dropping to 51 percent in the 110th Congress and to 43 percent in the 111th Congress.

The Legal Interpretation of Preemptions

The legal principle of preemption is based on the Supremacy Clause of the U.S. Constitution, which states that the Constitution and federal laws enacted in accordance with it are superior to any conflicting laws enacted by state, local, or tribal governments.⁵ That principle is designed to resolve conflicts between the laws of various government authorities, each of which may have some jurisdiction in regulating the conduct of individuals or organizations. In the face of such conflicts, the laws of state, local, and tribal governments must yield to those of the federal government.

Preemptions in federal law come in two forms: express and implied. In cases in which laws conflict, courts can invalidate nonfederal laws on the basis of both types of preemptions.

- *Express Preemption.* An express preemption exists when the Congress explicitly precludes states or other governments from exercising authority over a particular area of conduct or type of action. Courts evaluate express preemptions by focusing almost exclusively on the language in a federal statute. In such cases, the courts do not need to infer Congressional intent because that statutory language clearly shows an intent to preempt the authority of other governments.

- *Implied Preemption.* In the absence of explicit language in a federal law that constitutes a preemption of state, local, or tribal laws, the courts examine other evidence—primarily from the statutory context of the provision in question and from legislative history—to determine whether the Congress intended to preempt the states’ or other governments’ authority. In some cases, the evidence may indicate that the Congress intended federal statutes to be the exclusive authority—that is, by the federal government’s “occupying” a particular field of law, in part because of existing regulatory structures.⁶ In other cases, the Congress’s intentions may not be as clear; as a result, if federal and nonfederal laws conflict, under the Supremacy Clause, the federal law overrides those other laws.

Identifying Preemptions Under UMRA

For the purposes of its work under UMRA in identifying intergovernmental mandates, CBO uses the term “preemption” to refer to the explicit exercise of federal authority under the Supremacy Clause—that is, when the federal government expressly preempts or supersedes the authority of other governments in a particular policy area. CBO is not in a position to identify implicit (or “implied”) preemptions because at the legislative stage, attempts to determine interactions between federal legislation and state or other laws are open to significant ambiguity and uncertainty. Rulemaking by federal agencies and decisions by courts—rather than the legislative language that CBO reviews—in many cases determine whether and how federal laws will preempt the authority of other governments. Those activities frequently occur years after CBO has reviewed the legislative proposals.⁷

When reviewing legislation, CBO identifies as a mandate any language that clearly indicates an intention to preempt the laws of other jurisdictions. For example, in the 111th Congress, the American Clean Energy and Security Act of 2009 (H.R. 2454 and H.R. 2998) and the Clean Energy Jobs and American Power Act (S. 1733) would have prohibited states from implementing or enforcing a cap-and-trade program to reduce greenhouse

5. The Supremacy Clause, which appears in Article VI of the U.S. Constitution, states the following: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

6. For example, the federal government’s regulation of aircraft noise in domestic aviation was so pervasive that it left no room for a local ordinance placing a curfew on flights. See *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

7. Title II of UMRA requires federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and to issue statements outlining those effects.

gas emissions. CBO identified that prohibition as a preemption and thus an intergovernmental mandate.

Many provisions of federal law that constitute preemptions are expressed using such terms as “supersede” or “preempt,” or such phrases as “notwithstanding any other law.” Recognizing the explicit nature of such terms, CBO identifies those provisions as preemptions. For example, the Data Breach Notification Act (S. 139) introduced in the 111th Congress asserted that “the provisions of this Act shall supersede any other provision of federal law or any provision of any State” that relates to certain practices to maintain the security of information or to protect personal data from unauthorized access. The bill would have preempted laws in at least 45 states that require companies or government agencies (or both) to disclose breaches of security that involve personal information.

In many such cases, preemptions impose minimal or no pecuniary costs; however, they affect the authority of states and other governments to regulate the conduct of people and organizations in particular contexts. Preemptions that result in little or no cost are found particularly in areas that are generally regulated by state, local, or tribal governments, such as land use, zoning, and family, contract, or tort law.

Some federal preemptions completely override other governments’ authority to promulgate rules or regulations or to enact laws. That type of preemption may be proposed when the Congress determines that, in some area of governance, uniform national regulations are needed; in many instances, the preemption is preceded by the phrase “no state may.” For example, the Calling Card Consumer Protection Act in the 111th Congress (H.R. 3993) would have prohibited states from establishing or continuing to impose requirements on the providers of calling cards to print disclosures on the cards or their packaging unless such requirements were identical to the federal government’s. The prohibition would have preempted existing laws in at least four states and precluded other states from establishing their own regulations.

CBO also views an extension of an expiring preemption as a mandate. For example, the Mandatory Price Reporting Act of 2010 (H.R. 5852 and S. 3656, enacted as Public Law 111-239) extends an existing preemption that prohibits states from establishing or continuing to impose requirements that are inconsistent with those imposed by the Department of Agriculture for reporting information

on sales and purchases (specifically prices and quantities) of livestock and livestock products.

Similarly, CBO considers provisions that expand the scope of existing preemptions to be mandates under UMRA. For instance, the Law Enforcement Officers Safety Act Improvements Act of 2010 (S. 1132, enacted as P.L. 111-272) expanded an existing preemption of state laws that would have prohibited certain police officers from carrying concealed weapons. The provision expanding the preemption authorizes additional types of officers to carry concealed weapons. CBO viewed both the original preemption and the provision that expanded its scope as mandates.

Preemptions Approved by Committees or Enacted in the 111th Congress

The 111th Congress considered relatively few separate preemptions and enacted even fewer. CBO identified preemptions in 57 (43 percent) of the mandate statements it prepared over the 2009–2010 period (see Table 1 on page 2). In some of those statements, CBO noted more than one preemption in a particular bill; it also identified individual preemptions that appeared in multiple bills. Overall, CBO identified 52 separate preemptions during the 111th Congress, 20 of which became law. Five preemptions that became law were not reviewed by CBO during the legislative process.

Few federal preemptions would significantly increase spending by state, local, or tribal governments or lead to a direct loss of revenues. Some preemptions, in fact, could reduce costs for those governments by removing the need for them to exert regulatory oversight and control in certain areas. In the 111th Congress, CBO identified only one preemption whose costs would have exceeded the statutory threshold for intergovernmental mandates. That preemption, which was a provision of the American Clean Energy and Security Act of 2009 (H.R. 2454 and H.R. 2998) and the Clean Energy Jobs and American Power Act (S. 1733), would have prohibited states from regulating cap-and-trade programs to reduce greenhouse gas emissions; it would also have precluded them from collecting revenues from such programs. That legislation did not become law. (For details about the preemptions considered during the 111th Congress, see Table A-1 on page 12.)

Congressional Consideration of Preemptions, by Subject Area

Nearly three-quarters of the preemptions of state, local, or tribal laws or authority that the Congress considered in 2009 and 2010 fell into four main policy areas (see Table 2). Regardless of the category, almost all of the preemptions would have limited the authority of states to regulate. The four categories are:

- *Commerce and Finance.* These 14 preemptions would have limited state laws governing business negotiations, investment products, notifications of security breaches, insurance, and consumer protection.
- *Energy and the Environment.* The 4 preemptions in this category would have limited states' ability to implement cap-and-trade programs or enforce the programs' requirements, regulate the energy efficiency of products, and issue construction permits for electricity transmission projects.
- *Health.* These 13 preemptions would have limited the power of states to regulate health insurance, medical licensing, tobacco products, and the disclosure of nutritional information on food products.
- *Justice.* The 8 preemptions in this category would have restricted state laws governing concealed weapons, background checks for individuals who transport hazardous materials, child custody proceedings involving military personnel, search and seizure, and antitrust actions.

Another 13 preemptions fell into a variety of other categories.

In categorizing bills by subject area, CBO considered the nature of the preemption and not necessarily the subject of the broader bill. In some cases, a preemption could have been placed in two or more categories, but CBO included it in only one—on the basis of the main context of the preemption. Because such distinctions are somewhat arbitrary, CBO's categorizations are intended to illustrate broad fields of preemptive activity rather than definitive classifications of legislation.

Preemptions Enacted by the 111th Congress

During the 111th Congress, 25 preemptions became law. Their subject matter varied widely, including such issues as health insurance, consumer protection, legal rights of action, licensing, concealed weapons, foreign judgments, and safety standards for motor vehicles (see Table 2). CBO reviewed all but 5 of those preemptions before they were enacted.⁸ In CBO's estimation, none of the enacted preemptions will impose significant costs on state, local, or tribal governments.

8. In some instances, CBO does not review a mandate before its enactment—for example, when legislation is not considered by a committee or is amended on the floor or in conference. In addition, CBO does not routinely review appropriation bills—because UMRA does not apply to such bills.

Table 2.**Separate Preemptions That CBO Identified During the 111th Congress**

Area of Governing Authority Being Preempted	Public Law Number, If Enacted
Commerce and Finance	
Compensation by individuals from entities that issue certain securities (H.R. 788)	
Property and securities law (H.R. 1728)	
Security practices for handling personal information (H.R. 2221)	
Notification of security breaches (H.R. 2221, S. 139)	
Distribution of funds to certain borrowers of federal housing funds (H.R. 2336)	
Public access to information (H.R. 2868—two versions)	
Alternative mortgages and remittances (H.R. 3126)	
Fee increases levied on depository institutions for purposes of ensuring consumer compliance (H.R. 3126, H.R. 4173—two versions)	PL. 111-203 (Dodd-Frank Wall Street Reform and Consumer Protection Act)
Swaps (Exchanges of cash between participants based on rates or indexes, or the performance of assets) (H.R. 3795—two versions)	
Calling card providers (H.R. 3993)	
Licensing fees imposed on brokers and regulation of reinsurers in other states (H.R. 4173—one version, S. 3217)	PL. 111-203 (Dodd-Frank Wall Street Reform and Consumer Protection Act)
Swaps, consumer protection, and insurance (H.R. 4173—three versions, S. 3217)	PL. 111-203 (Dodd-Frank Wall Street Reform and Consumer Protection Act)
Price reporting set by the U.S. Department of Agriculture (H.R. 5852)	PL. 111-239 (Mandatory Price Reporting Act of 2010)
Treatment of personal information (S. 1490)	
Energy and the Environment	
Energy efficiency of various products (H.R. 2454, H.R. 2998, S. 1462)	
Enforcement of cap-and-trade programs to reduce greenhouse gas emissions from 2012 through 2017 (H.R. 2454, H.R. 2998, S. 1733)	
Production and importation of hydrofluorocarbons (H.R. 2454, H.R. 2998, S. 1733)	
Issuance of construction permits for electricity transmission projects (H.R. 2998, S. 1462)	
Health	
State standards for health information (H.R. 1—two versions)	PL. 111-5 (American Recovery and Reinvestment Act of 2009)
Tobacco products (H.R. 1256—three versions, S. 982)	PL. 111-31 (The Family Smoking Prevention and Tobacco Control Act)

Continued

Table 2.

Continued

Separate Preemptions That CBO Identified During the 111th Congress

Area of Governing Authority Being Preempted	Public Law Number, If Enacted
Health (Continued)	
Carriers' verification of the age of individuals who accept deliveries of tobacco (H.R. 1676, S. 1147)	PL. 111-154 (Prevent All Cigarette Trafficking Act of 2009)
Health insurance, risk pools, and payroll standards (H.R. 3590—two versions)	PL. 111-148 (Patient Protection and Affordable Care Act)
Protections for nursing mothers in the workplace (H.R. 3590—two versions)	PL. 111-148 (Patient Protection and Affordable Care Act)
Risk pools for individual or small-group markets as they pertain to "grandfathered" health care plans (H.R. 3590—two versions)	PL. 111-148 (Patient Protection and Affordable Care Act)
Disclosure of nutritional information about food (H.R. 3590—two versions, H.R. 3962—two versions)	PL. 111-148 (Patient Protection and Affordable Care Act)
Licensing of out-of-state health care professionals (H.R. 3590—one version, H.R. 3962—two versions)	PL. 111-148 (Patient Protection and Affordable Care Act)
Requirements to disclose payments or other items of value provided to a physician or teaching hospital by a drug manufacturer (H.R. 3590—two versions, H.R. 3962—two versions)	PL. 111-148 (Patient Protection and Affordable Care Act)
Automatic payroll deductions of employees' contributions to an employment-based health care plan (H.R. 3962—two versions)	
Health insurance coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) program (H.R. 3962—two versions)	
Requirements and standards for health insurance coverage and employment-based health care plans (H.R. 3962—two versions)	
Ability of National Guard health professionals to practice during emergencies or disasters (H.R. 5136, S. 3454)	PL. 111-383 (Ike Skelton National Defense Authorization Act for Fiscal Year 2011)
Justice	
Exemption from state antitrust laws of communications between auto manufacturers and interested parties regarding negotiated plans (H.R. 384)	
Background checks on transporters of hazardous materials (H.R. 2200)	
Child custody proceedings involving military service members (H.R. 2647, H.R. 5136)	
State court activities related to foreign judgments (H.R. 2765—two versions)	PL. 111-223 (Securing the Protection of Our Enduring and Established Constitutional Heritage Act)
Lawsuits against investment managers on the grounds that the managers made investment decisions based on a corporation's political activities (H.R. 4790)	

 Continued

Table 2.

Continued

Separate Preemptions That CBO Identified During the 111th Congress

Area of Governing Authority Being Preempted	Public Law Number, If Enacted
Justice (Continued)	
Search and seizure in some cases (H.R. 5139)	PL. 111-177 (Extending Immunities to the Office of the High Representative and the International Civilian Office in Kosovo Act of 2010)
Concealed weapons (S. 1132)	PL. 111-272 (Law Enforcement Officers Safety Act Improvements Act of 2010)
Civil liability (Immunity granted to the Broadcasting Board of Governors was expanded in some cases) (S. 2971)	
Other	
At-large elections in Utah (H.R. 157)	
Tribal laws against the drilling or use of some water wells (H.R. 1065)	
Insurance law pertaining to foreign insurers (H.R. 2609)	
Safety equipment and management requirements for certain commercial and public vessels (H.R. 2652)	
Public access to information and the security of drinking water (H.R. 3258)	
Distribution of surplus funds from housing projects (H.R. 4868)	
Disclosure of information or records related to electrical infrastructure (H.R. 5026)	
Safety standards for motor vehicles (H.R. 5381, S. 3302)	PL. 111-373 (Pedestrian Safety Enhancement Act of 2010)
Taxation of nonresident military spouses (S. 475)	PL. 111-97 (Military Spouses Residency Relief Act)
Access to the Atlantic Intracoastal Waterway (S. 1194)	
Governance of vessels that transfer oil (S. 1194)	PL. 111-281 (Coast Guard Authorization Act of 2010)
Preferential treatment of veterans in securing transitional housing (S. 3325)	
Public transportation safety (S. 3638)	

 Continued

Table 2.

Continued

Separate Preemptions That CBO Identified During the 111th Congress

Memorandum:**Enacted Preemptions That CBO Did Not Review^a**

Antitrust laws	P.L. 111-30 (Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act)
Fees for gift or prepaid cards	P.L. 111-24 (Credit Card Accountability Responsibility and Disclosure Act of 2009)
Claims related to mortgage-backed securities	P.L. 111-22 (Helping Families Save their Homes Act of 2009)
Laws requiring nondepository institutions to charge interest rates of less than 17 percent on loans or other financing transactions	P.L. 111-32 (Supplemental Appropriations Act, 2009)
Laws requiring governmental entities to pay interest rates of less than 17 percent on loans or other financing transactions	P.L. 111-83 (Department of Homeland Security Appropriations Act, 2010)

Source: Congressional Budget Office.

Notes: Preemptions are a type of intergovernmental mandate, which the Unfunded Mandates Reform Act of 1995 defines as an “enforceable duty” that the federal government imposes on state, local, or tribal governments. In CBO’s view, such duties may be positive (requiring some action) or, in the case of preemptions, negative—prohibiting those governments from taking some action or otherwise exerting their authority.

The 111th Congress was in session in 2009 and 2010.

Within each category, preemptions are arranged by bill number. Unless otherwise noted, bill numbers refer to versions of the legislation ordered reported by authorizing committees.

- a. In some instances, CBO does not review a mandate before its enactment—for example, when legislation is not considered by a committee or is amended on the floor or in conference. In addition, CBO does not routinely review appropriation bills—because the Unfunded Mandates Reform Act does not apply to such bills.
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Appendix: Preemptions Reviewed by CBO During the 111th Congress

During the 111th Congress, the Congressional Budget Office prepared 893 mandate statements for legislation pending before the Congress. Of those statements, 134 identified intergovernmental mandates, and 57 contained 52 individual preemptions (5 preemptions

were repeated in multiple bills). Table A-1 contains generally the same information as Table 2 but is arranged according to bill numbers rather than areas of preemption.

Table A-1.

Legislation That Was Reviewed by CBO During the 111th Congress and That Contained Preemptions

Bill Number (Committee or status)	Title of Legislation	Area of Governing Authority Being Preempted
H.R. 1 (Introduced)	American Recovery and Reinvestment Act of 2009	State standards governing health information
H.R. 1	American Recovery and Reinvestment Act of 2009 (Amendment in the nature of a substitute, as introduced by Senators Inouye and Baucus on January 31, 2009)	State standards governing health information
H.R. 157	District of Columbia House Voting Rights Act of 2009	State laws governing at-large elections in Utah
H.R. 384	TARP [Troubled Asset Relief Program] Reform and Accountability Act of 2009	State antitrust laws dealing with communications between auto manufacturers and interested parties regarding negotiated plans
H.R. 788	A bill to provide a safe harbor for mortgage servicers who engage in specified mortgage loan modifications, and for other purposes	State, local, or tribal laws governing compensation to individuals from the entities that issue certain securities
H.R. 1065	White Mountain Apache Tribe Water Rights Quantification Act of 2009	Tribes' objections to the drilling or use of some water wells
H.R. 1256 (As passed by the House)	Family Smoking Prevention and Tobacco Control Act	State laws governing tobacco products
H.R. 1256 (Energy and Commerce)	Family Smoking Prevention and Tobacco Control Act	State laws governing tobacco products
H.R. 1256 (Oversight and Government Reform)	Family Smoking Prevention and Tobacco Control Act	State laws governing tobacco products
H.R. 1676	Prevent All Cigarette Trafficking Act of 2009	State, local, and tribal laws that require common carriers to verify the age of individuals who accept a delivery of tobacco
H.R. 1728	Mortgage Reform and Anti-Predatory Lending Act	State property and securities laws
H.R. 2200	Transportation Security Administration Authorization Act	State and local laws governing background checks on individuals seeking to transport hazardous materials
H.R. 2221	Data Accountability and Trust Act	State laws that impose notification requirements in the event of a security breach State and local laws that require entities to implement security practices for handling personal information

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Table A-1.**Continued**

Legislation That Was Reviewed by CBO During the 111th Congress and That Contained Preemptions

Bill Number (Committee or status)	Title of Legislation	Area of Governing Authority Being Preempted
H.R. 2336	GREEN [Green Resources for Energy Efficient Neighborhoods] Act of 2010	State and local laws that limit the amount of funds that may be distributed to certain borrowers of federal housing funds
H.R. 2454	American Clean Energy and Security Act of 2009	State authority to enforce a cap-and-trade program to reduce greenhouse gas emissions from 2012 through 2017 State laws relating to the energy efficiency of various products State laws relating to the production and importation of hydrofluorocarbons
H.R. 2609	Federal Insurance Office Act of 2009	State insurance laws pertaining to foreign insurers
H.R. 2647	National Defense Authorization Act for Fiscal Year 2010	State laws relating to child custody proceedings involving military service members
H.R. 2652	Maritime Safety Act of 2009	State and local laws governing safety equipment and management requirements of certain commercial and public vessels
H.R. 2765 (House Judiciary)	A bill to amend title 28, United States Code, to prohibit recognition and enforcement of foreign defamation judgments and certain foreign judgments against the providers of interactive computer services	State laws related to foreign judgments
H.R. 2765 (Senate Judiciary)	Securing the Protection of Our Enduring and Established Constitutional Heritage Act	State laws related to foreign judgments
H.R. 2868 (Energy and Commerce)	Chemical Facility Anti-Terrorism Act of 2010	State and local laws related to public access to information
H.R. 2868 (Homeland Security)	Chemical Facility Anti-Terrorism Act of 2010	State and local laws related to public access to information
H.R. 2998	American Clean Energy and Security Act	State authority to enforce a cap-and-trade program to reduce greenhouse gas emissions from 2012 through 2017 State laws governing construction permits (the act would have authorized the Federal Energy Regulatory Commission to issue such permits for transmission projects when a state had earlier rejected a request for one)

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Table A-1.

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Legislation That Was Reviewed by CBO During the 111th Congress and That Contained Preemptions

Bill Number (Committee or status)	Title of Legislation	Area of Governing Authority Being Preempted
H.R. 2998 (Continued)		<p>State laws relating to the energy efficiency of various products</p> <p>State laws relating to the production and importation of hydrofluorocarbons</p>
H.R. 3126	Consumer Financial Protection Agency Act of 2009	<p>State, local, or tribal laws governing alternative mortgages and remittances</p> <p>Increases in the fees states levy on depository institutions for purposes of consumer compliance</p>
H.R. 3258	Drinking Water System Security Act of 2009	<p>State and local laws governing public access to information and drinking water security</p>
H.R. 3590	Patient Protection and Affordable Care Act (Amendment in the nature of a substitute proposed in the Senate on November 18, 2009)	<p>State or local laws that require the disclosure of the nutritional content of food offered for sale by restaurants, retail food establishments, and operators of vending machines if the requirements in those laws are not similar to requirements under the bill</p> <p>State laws governing health insurance, risk pools, and payroll standards</p> <p>State laws that govern protection for nursing mothers in the workplace</p> <p>State and local laws that require manufacturers of a drug, device, or biological/medical item covered by the bill to disclose or report a payment or the transfer of some other item of value to a physician or teaching hospital</p> <p>State laws that govern risk pools for individual or small-group markets as they pertain to “grandfathered” health care plans</p>
H.R. 3590	Patient Protection and Affordable Care Act (Amendment in the nature of a substitute, incorporating the manager’s amendment released on December 19, 2009)	<p>State or local laws that require the disclosure of the nutritional content of food offered for sale by restaurants, retail food establishments, and operators of vending machines if the requirements in those laws are not similar to requirements under the bill</p> <p>State laws governing health insurance, risk pools, and payroll standards</p> <p>State laws that govern protection for nursing mothers in the workplace</p>

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Table A-1.

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Legislation That Was Reviewed by CBO During the 111th Congress and That Contained Preemptions

Bill Number (Committee or status)	Title of Legislation	Area of Governing Authority Being Preempted
H.R. 3590 (Continued)		<p>State and local laws that require manufacturers of a drug, device, or biological/medical item covered by the bill to disclose or report a payment or the transfer of some other item of value to a physician or teaching hospital</p> <p>State licensing laws in cases in which a health care professional is licensed in one state but provides services in another state under a contract or compact with a tribal health program</p> <p>State laws that govern risk pools for individual or small-group markets as they pertain to “grandfathered” health care plans</p>
H.R. 3795 (Agriculture)	Derivative Markets Transparency and Accountability Act of 2009	State laws that affect swaps (exchanges of cash between participants based on rates or indexes, or the performance of assets)
H.R. 3795 (Financial Services)	Over-the-Counter Derivatives Markets Act of 2009	State laws that affect swaps (exchanges of cash between participants based on rates or indexes, or the performance of assets)
H.R. 3962	Affordable Health Care for America Act (Incorporating the manager’s amendment from November 3, 2009)	<p>State and local laws that establish periods for coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) through a state high-risk pool if those laws would limit or prevent access to COBRA coverage because of the extension provided by the bill</p> <p>State laws that prevent the application of requirements and standards established in the bill for health insurance coverage and employment-based health care plans</p> <p>State laws that prevent automatic payroll deductions of employees’ contributions to an employment-based health care plan</p> <p>State or local laws that require the disclosure of the nutritional content of food offered for sale by restaurants, retail food establishments, and operators of vending machines if the requirements in those laws are not similar to requirements under the bill</p> <p>State licensing laws in cases in which a health care professional is licensed in one state but provides services in another state under a contract or compact with a tribal health program</p>

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Table A-1.

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Legislation That Was Reviewed by CBO During the 111th Congress and That Contained Preemptions

Bill Number (Committee or status)	Title of Legislation	Area of Governing Authority Being Preempted
H.R. 3962 (Continued)		State and local laws that require manufacturers of a drug, device, or biological/medical item covered by the bill to disclose or report a payment or the transfer of some other item of value to a physician or teaching hospital
H.R. 3962	Affordable Health Care for America Act (Incorporating the manager’s amendment from November 3, 2009, updated to reflect enactment of H.R. 3548)	<p>State and local laws that establish periods for coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) through a state high-risk pool if those laws would limit or prevent access to COBRA coverage because of the extension provided by the bill</p> <p>State laws that prevent the application of requirements and standards established in the bill for health insurance coverage and employment-based health care plans</p> <p>State laws that prevent automatic payroll deductions of employees’ contributions to an employment-based health care plan</p> <p>State or local laws that require the disclosure of the nutritional content of food offered for sale by restaurants, retail food establishments, and operators of vending machines if the requirements in those laws are not similar to requirements under the bill</p> <p>State licensing laws in cases in which a health care professional is licensed in one state but provides services in another state under a contract or compact with a tribal health program</p> <p>State and local laws that require manufacturers of a drug, device, or biological/medical item covered by the bill to disclose or report a payment or the transfer of some other item of value to a physician or teaching hospital</p>
H.R. 3993	Calling Card Consumer Protection Act	State laws that impose requirements on providers of calling cards
H.R. 4173 (Introduced)	Wall Street Reform and Consumer Protection Act of 2009	<p>State laws that affect swaps (exchanges of cash between participants based on rates or indexes, or the performance of assets), consumer protection, and insurance</p> <p>Increases in the fees states levy on depository institutions for purposes of consumer compliance</p>

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Table A-1.**Continued**

Legislation That Was Reviewed by CBO During the 111th Congress and That Contained Preemptions

Bill Number (Committee or status)	Title of Legislation	Area of Governing Authority Being Preempted
H.R. 4173 (Rules)	Wall Street Reform and Consumer Protection Act of 2009	State laws that affect swaps (exchanges of cash between participants based on rates or indexes, or the performance of assets), consumer protection, and insurance Increases in the fees states levy on depository institutions for purposes of consumer compliance
H.R. 4173 (As passed by the Senate)	Restoring American Financial Stability Act of 2010	State laws that affect swaps (exchanges of cash between participants based on rates or indexes, or the performance of assets), consumer protection, and insurance States' imposition of certain licensing fees on brokers and their regulation of reinsurers in other states
H.R. 4790	Shareholder Protection Act of 2010	State securities laws that would allow lawsuits against investment managers on the grounds that the managers made investment decisions based on a corporation's political activities
H.R. 4868	Housing Preservation and Tenant Protection Act of 2010	State and local laws that govern how surplus funds from housing projects are distributed to owners of those projects in some cases
H.R. 5026	Grid Reliability and Infrastructure Defense Act	State, local, or tribal laws relating to the disclosure of information or records related to electricity transmission projects
H.R. 5136	National Defense Authorization Act for Fiscal Year 2011	State licensing laws related to the ability of National Guard health professionals to practice during emergencies or disasters State laws relating to child custody proceedings involving military service members
H.R. 5139	Extending Immunities to the Office of the High Representative and the International Civilian Office in Kosovo Act of 2010	State laws governing search and seizure in some cases
H.R. 5381	Motor Vehicle Safety Act of 2010	State laws relating to safety standards for motor vehicles
H.R. 5852	Mandatory Price Reporting Act of 2010	State and local laws that are in addition to or inconsistent with any requirements of the Department of Agriculture's program for price reporting
S. 139	Data Breach Notification Act	State laws that impose notification requirements in the event of a security breach

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Table A-1.

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Legislation That Was Reviewed by CBO During the 111th Congress and That Contained Preemptions

Bill Number (Committee or status)	Title of Legislation	Area of Governing Authority Being Preempted
S. 475	Military Spouses Residency Relief Act	States' collection of taxes from nonresident military spouses
S. 982	Family Smoking Prevention and Tobacco Control Act	State laws governing tobacco products
S. 1132	Law Enforcement Officers Safety Act Improvements Act of 2010	State or local laws prohibiting the carrying of concealed weapons—expansion of an existing mandate
S. 1147	Prevent All Cigarette Trafficking Act of 2009	State, local, and tribal laws that require common carriers to verify the age of individuals who accept a delivery of tobacco
S. 1194	Coast Guard Authorization Act for Fiscal Years 2010 and 2011	State and local laws governing access to the Atlantic Intracoastal Waterway State and local laws governing vessels that transfer oil
S. 1462	American Clean Energy Leadership Act of 2009	State laws governing construction permits (the act would have authorized the Federal Energy Regulatory Commission to issue such permits for transmission projects when a state had earlier rejected a request for one) State laws relating to the energy efficiency of various products
S. 1490	Personal Data Privacy and Security Act of 2009	State laws regarding the treatment of personal information
S. 1733	Clean Energy Jobs and American Power Act	State authority to enforce a cap-and-trade program to reduce greenhouse gas emissions from 2012 through 2017 State laws relating to the production and importation of hydrofluorocarbons
S. 2971	Foreign Relations Authorization Act, Fiscal Years 2010 and 2011	State liability laws in some cases (immunity granted to the Broadcasting Board of Governors was expanded)
S. 3217	Restoring American Financial Stability Act of 2010	State laws that affect swaps (exchanges of cash between participants based on rates or indexes, or the performance of assets), consumer protection, and insurance States' imposition of certain licensing fees on brokers and their regulation of reinsurers in other states
S. 3302	Motor Vehicle Safety Act of 2010	State laws relating to safety standards for motor vehicles
S. 3325	Veterans Telehealth and Other Care Improvements Act of 2010	State laws that prohibit certain transitional housing programs from offering preferential treatment to veterans

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Table A-1.**Continued**

Legislation That Was Reviewed by CBO During the 111th Congress and That Contained Preemptions

Bill Number (Committee or status)	Title of Legislation	Area of Governing Authority Being Preempted
S. 3454	National Defense Authorization Act for Fiscal Year 2011	State licensing laws related to the ability of National Guard health professionals to practice during emergencies or disasters
S. 3638	Public Transportation Safety Act of 2010	State laws related to public transportation safety

Source: Congressional Budget Office.

Notes: Preemptions are a type of intergovernmental mandate, which the Unfunded Mandates Reform Act of 1995 defines as an “enforceable duty” that the federal government imposes on state, local, or tribal governments. In CBO’s view, such duties may be positive (requiring some action) or, in the case of preemptions, negative—prohibiting those governments from taking some action or otherwise exerting their authority.

The 111th Congress was in session in 2009 and 2010.
