



May 20, 2011

Honorable James Lankford
Chairman
Subcommittee on Technology, Information Policy,
Intergovernmental Relations and Procurement Reform
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter is in response to your request that the Congressional Budget Office (CBO) compare the cost estimates prepared by federal agencies for selected regulations that contain federal mandates with any cost estimates that CBO prepared when those mandates were being considered by the Congress. CBO reviewed 13 regulations in all: the 5 listed in your letter dated March 23, 2011, and 8 others identified by your staff (see Attachment 1).

The cost estimates that CBO prepares when mandates are being considered by the Congress typically are not directly comparable to the estimates that federal agencies prepare in the process of developing regulations for implementing those mandates. The lack of comparability arises in part because of the different requirements CBO and federal agencies face under the Unfunded Mandates Reform Act of 1995 (UMRA) and in part because CBO and federal agencies examine mandates at different stages in the legislative and regulatory process. Further, for 5 of the 13 regulations considered here, the statutory authority for those regulations predated UMRA's enactment, so CBO never produced estimates of the costs of those mandates. However, when CBO and the federal agencies issuing regulations reviewed similar mandates, their estimates of costs were generally consistent with each other.

Responsibilities of CBO and Regulatory Agencies Under UMRA

CBO and federal agencies of the executive branch have different roles under UMRA. Titles I and II of the act specify the requirements imposed by that law on CBO and federal agencies to assess the effect of proposed mandates on state, local, and tribal governments and on the private sector. CBO's analysis of mandate costs ends when it determines what the aggregate costs of all the

mandates in a legislative proposal are relative to statutory thresholds established in the act (and described further below). In contrast, analysis of mandate costs by a federal agency begins when it determines that the cost of a mandate in a proposed rule would exceed the statutory threshold. After that determination, a federal agency must prepare a statement that, among other things, provides several measures of the mandate's impact.

Specifically, Title I of UMRA directs CBO to prepare mandate statements for most bills and joint resolutions approved by authorizing committees—that is, relatively early in the legislative process. In its statements, CBO identifies mandates and estimates whether their direct costs *in the aggregate* would be greater than annual thresholds established in UMRA. Those thresholds, which are adjusted annually for inflation, were \$50 million for intergovernmental mandates and \$100 million for private-sector mandates in 1996.¹ CBO measures mandate costs as the direct, incremental costs associated with a new requirement during the first five years the mandate is in effect.

Title II of UMRA requires most federal agencies (other than some independent regulatory agencies) to prepare an analysis of mandates for any notice of proposed rulemaking that is likely to result in a final rule with a mandate that would cost state, local, or tribal governments or the private sector \$100 million or more, adjusted annually for inflation. For a rule that exceeds the cost threshold in any one year, the agency must prepare an analysis of costs that includes an assessment of the anticipated costs and benefits of the mandate and an estimate of the rule's effect on the national economy. The analysis also must identify the legislative authority for the rule and describe the agency's consultation with elected representatives of intergovernmental entities before the rule is promulgated. The laws authorizing such rules have passed through many stages of legislative amendment and approval and may differ significantly from the legislation reviewed by CBO. In addition, agency estimates are made for individual rules and are not necessarily aggregated with other provisions included in the authorizing law.

Factors That Limit Comparisons

Four principal reasons explain why estimating mandate costs when legislation is being considered is different from estimating such costs when regulations are being developed. First, and perhaps most important, CBO's estimates are made on the basis of broad legislative language that often provides only general, nonspecific authority to agencies for issuing regulations in the future. Such authority rarely provides detailed directions to federal agencies, which instead are left to develop and implement statutory requirements. Even when CBO can make reasonable assumptions about the forms that new regulations could take, data about the number of entities affected by a mandate or what specific new activities

¹In 2011 dollars, the annual threshold for intergovernmental mandates is \$71 million; for private-sector mandates, the threshold is \$142 million.

they would undertake often are lacking. As a result, CBO's ability to estimate the incremental costs a mandate would impose beyond the expenditures that mandated entities otherwise would have made is limited.

Second, UMRA directs CBO to prepare mandate statements when committees finish considering legislation (after the markup stage of the legislative process). Changes to legislative provisions after that point can alter the mandates and their resulting costs. Thus, CBO's estimates may be based on provisions other than those enacted, whereas agency estimates reflect enacted language.

Third, CBO evaluates the aggregate cost of *all* mandates in a piece of legislation relative to the annual thresholds established in UMRA. The executive agencies, in contrast, usually estimate the cost of *individual* mandates, so comparisons are difficult at best. In the 110th Congress, for instance, CBO prepared an estimate for a proposal to increase fuel economy standards for vehicles in model years 2011–2030. Two regulations pursuant to the proposal were issued, however, separately covering model year 2011 and model years 2012–2016.

Finally, UMRA directs CBO and federal agencies to identify new mandates relative to current law, which includes federal regulations. Accordingly, when CBO evaluates mandates in legislative provisions, it does so relative to a base case that accounts for existing regulatory actions by federal agencies as well as for regulations that federal agencies plan to issue under their existing authority. Federal agencies identify new mandates when they issue a notice of proposed rulemaking. If a rulemaking process has started and a legislative proposal would direct the agency to issue the same regulation that the agency already plans to issue under its existing statutory authority, CBO would not identify the legislative proposal as the source of a new mandate.

Regulatory Cost Comparisons

CBO could not compare cost estimates for 8 of the 13 regulations under consideration. In five of those cases, CBO did not prepare a mandate cost estimate because the Congress considered the original legislation before UMRA was enacted (see Attachment 2). In one case, CBO did not conduct a mandate analysis because, even though the provisions that granted the regulatory authority to the agency were enacted after UMRA was enacted, the Congress considered the legislative provisions before the effective date of UMRA. For the two remaining regulations, CBO determined that the legislative provisions under consideration by the Congress would not have imposed new mandates because the relevant federal agency was already planning to issue regulations related to those provisions under its existing authority. In contrast, as required under UMRA, the agencies considered the costs of compliance with those eight regulations as mandate costs when the agencies prepared their cost estimates for the regulations.

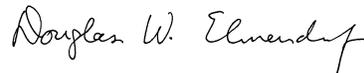
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In response to your request, CBO made a limited comparison of the estimates of mandate costs for the remaining 5 of the 13 regulations specified. In the case of three regulations, CBO's cost estimates generally were consistent with the agencies' estimates. Both CBO and the issuing agencies estimated that the costs of the private-sector mandates in those rules would exceed the UMRA threshold. For the other two regulations, a direct comparison was limited further because of the way costs were estimated. In one case, CBO reported uncertain costs for a mandate because of limited information about future regulatory actions. In the other, CBO estimated the aggregate cost of a group of mandates, and the federal agency estimated the costs of an individual mandate selected from that group. None of the five regulations contained intergovernmental mandates.

I hope this information is useful. If you would like further details, we would be glad to provide them. The primary CBO staff contacts are Amy Petz and Samuel Wice for private-sector mandates and Ryan Miller for intergovernmental mandates.

Sincerely,



Douglas W. Elmendorf
Director

Attachments

cc: Honorable Gerald E. Connolly
Ranking Member, Subcommittee on Technology, Information Policy,
Intergovernmental Relations and Procurement Reform

Honorable Darrell Issa
Chairman, Committee on Oversight and Government Reform

Honorable Elijah Cummings
Ranking Member, Committee on Oversight and Government Reform

Attachment 1
Thirteen Federal Rules Examined

National Highway Traffic Safety Administration (NHTSA): Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011

NHTSA and Environmental Protection Agency (EPA) *Joint Rule*: Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards

EPA: Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program

Department of Agriculture (USDA): Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farmed-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts

Food and Drug Administration (FDA): Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments

EPA: National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants

EPA: Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program

Department of Energy (DOE): Energy Conservation Program: Energy Conservation Standards and Test Procedures for General Service Fluorescent Lamps and Incandescent Reflector Lamps

DOE: Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters

EPA: National Pollutant Discharge Elimination System: Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges

EPA: National Primary Drinking Water Regulations: Long Term 2 Enhanced Surface Water Treatment Rule

EPA: National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring

EPA: National Primary Drinking Water Regulations: Stage 2 Disinfectants and Disinfection Byproducts Rule

Attachment 2
Comparison of Cost Estimates for Mandates as
Prepared by the Congressional Budget Office and by
Federal Agencies in the Executive Branch for
Selected Regulatory Rules

This attachment identifies the mandate analyses prepared by federal agencies for 13 regulations. For five of those regulations, the Congressional Budget Office can make a limited comparison of its analysis with the analyses conducted by issuing agencies. For the remaining eight, no comparison can be made.

Regulations That Are Comparable to Some Degree

CBO was able to make a limited comparison of the cost estimates of the mandates analyses in the following cases:

- Fuel economy standards for passenger cars and light trucks (model year 2011),
- Fuel economy standards for cars and light trucks (model years 2012 through 2016),
- Changes to the renewable fuels standard program,
- Requirements for country-of-origin labeling, and
- Nutrition-labeling requirements for restaurants and retail establishments.

Fuel Economy Standards for Passenger Cars and Light Trucks

The Energy Independence and Security Act of 2007 (EISA, Public Law 110-140) requires the National Highway Traffic Safety Administration to issue continuously increasing fuel economy standards, and NHTSA issued two rules governing different model years—one for automobiles and light trucks in model year 2011 and another for those in model years 2012–2016. In the 2011 rule, NHTSA estimated that incremental costs to manufacturers would total \$1.5 billion (in 2007 dollars).² In the rule for model years 2012–2016, NHTSA estimated total private-sector costs of \$51.8 billion (in 2007 dollars).³ NHTSA

² Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011, Final Rule. 74 Fed. Reg. 14196 (March 30, 2009).

³ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, Final Rule. 75 Fed. Reg. 25324 (May 7, 2010). In addition to the fuel economy standards NHTSA issued for model years 2012–2016, as part of a joint rule, the Environmental Protection Agency issued standards for greenhouse gas emissions. EPA's portion of the rule was promulgated pursuant to section 202 of the Clean Air Act. Because the authority in that act was last amended in 1990 (before UMRA took effect in 1996), CBO did not review the original legislation for mandates. Thus, CBO has no basis for conducting a comparison of EPA's analyses of mandates.

determined that neither rule contained intergovernmental mandates.

In 2007, CBO prepared two estimates for H.R. 6, the Energy and Independence Security Act of 2007. CBO estimated that the aggregate costs of all the mandates in the bill would have well exceeded the threshold established in the Unfunded Mandates Reform Act for private-sector mandates.⁴ CBO did not prepare a separate estimate of the costs of the fuel economy standards in the bill. However, it did prepare a separate mandate estimate in 2007 for the fuel economy standards in S. 357, the Ten-in-Ten Fuel Economy Act. That bill contained a mandate similar to the fuel economy requirements in EISA. CBO estimated that the costs of compliance with the standards probably would have exceeded the annual threshold established in UMRA for private-sector mandates in at least one of the first five years that the mandates were in effect.

Changes to the Renewable Fuel Standard Program

In March 2010, the Environmental Protection Agency issued a rule to implement the Renewable Fuel Standard (RFS) program pursuant to the Clean Air Act, as modified by EISA.⁵ The RFS program, as modified, requires that transportation fuel contain a minimum volume of total renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, according to schedules established in EISA. The RFS program also mandates reductions in lifecycle greenhouse gas emissions for those fuels, with some exceptions. EPA estimated that the cost of capital investments to meet the modified RFS would range from \$68.4 billion to \$110.4 billion, relative to the Department of Energy's 2007 reference case. EPA determined that the rule contains no mandates on state, local, or tribal entities.

CBO examined legislative provisions that would modify the RFS program in several bills, including H.R. 6 (the Energy Independence and Security Act of 2007, as passed by the Senate on December 13, 2007) and S. 1321 (the Energy Savings Act of 2007). H.R. 6 contained RFS provisions identical to those in the enacted version, but H.R. 6 also included several other private-sector mandates. CBO estimated that the aggregate costs of the private-sector mandates would well exceed the annual threshold established in UMRA. Because CBO did not prepare individual estimates for each mandate in H.R. 6, it is not possible to compare the RFS provisions specifically.

CBO prepared an estimate of costs for a similar mandate in S. 1321, however. That bill would have required producers and importers of motor vehicle fuel, home heating oil, and boiler fuel to increase the volume of renewable fuel blended into those fuels, according to a schedule in the bill. CBO estimated that the direct costs of meeting those requirements would amount to at least \$1 billion starting in

⁴ UMRA established statutory annual thresholds that were \$50 million for intergovernmental mandates and \$100 million for private-sector mandates in 1996. Those thresholds are adjusted annually for inflation.

⁵ Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, Final Rule. 75 Fed. Reg. 14670 (March 26, 2010).

2009 and would increase in subsequent years. The enacted provisions (upon which the rule is based) apply to transportation fuel and establish minimum volume requirements that generally exceed those in the version of S. 1321 that CBO reviewed.

Requirements for Country-of-Origin Labeling

In January 2009, the Department of Agriculture issued a rule implementing country-of-origin labeling of commodities.⁶ USDA issued the rule pursuant to the Agricultural Marketing Act of 1946, as amended by the Farm Security and Rural Investment Act of 2002; the 2002 Supplemental Appropriations Act; and the Food, Conservation, and Energy Act of 2008. In its regulatory impact analysis, USDA estimated that the labeling requirements would cost growers, producers, processors, wholesalers, and retailers \$2.6 billion in the first year.

CBO reviewed legislative provisions that contained requirements for country-of-origin labeling in legislative precursors to the Farm Security and Rural Investment Act of 2002 and the Food, Conservation, and Energy Act of 2008 in its estimates for S. 1731 (the Agriculture, Conservation, and Rural Enhancement Act of 2001) and H.R. 2419 (the Farm, Nutrition, and Bioenergy Act of 2007).⁷ CBO identified such requirements as mandates but could not estimate their costs because of limited information about the compliance costs for some commodities and because the compliance costs in general would have depended on what standards were set by USDA.

Nutrition-Labeling Requirements for Restaurants and Retail Establishments

In April 2011, the Food and Drug Administration proposed a rule that would establish nutrition-labeling requirements for some chain restaurants and other retail food establishments.⁸ FDA issued the rule pursuant to provisions enacted in the Patient Protection and Affordable Care Act of 2010 (P.L. 111-148). FDA's estimate of initial compliance costs was about \$315 million, with continuing costs of about \$44 million per year.

CBO reviewed legislative proposals that contained the nutrition-labeling requirements in two substitute amendments to the Patient Protection and Affordable Care Act of 2010; one proposed in the Senate on November 18, 2009, and the other incorporating the manager's amendment that was released on December 19, 2009. Those proposals contained provisions for nutrition labeling that are similar to the enacted provisions. CBO estimated that the aggregate cost of the mandates in the two proposals would exceed the annual threshold for

⁶ Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, Final Rule. 74 Fed. Reg. 2658 (January 15, 2009).

⁷ Estimate for a Senate amendment in the nature of a substitute for H.R. 2419.

⁸ Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, Proposed Rule. 76 Fed. Reg. 19192 (April 6, 2011)

private-sector mandates established in UMRA. However, because CBO's estimate was for the aggregate cost of nutrition labeling by restaurants and retail food establishments along with other mandates, it cannot be compared directly with FDA's cost estimate.

Regulations That Cannot Be Compared

For eight of the regulations identified, CBO did not prepare an analysis of mandate costs that can be compared with an agency's analysis (see Table 1). For five regulations, the legislative authority under which they were issued was enacted before the enactment of UMRA so CBO did not prepare a mandate cost estimate. For one, CBO did not conduct a mandates analysis even though the provisions that granted the regulatory authority to the agency were enacted after UMRA was enacted because the Congress considered the legislative provisions before the effective date of UMRA. For the last two, CBO determined that the legislation would not impose a new mandate because the agency planned to issue the regulations under existing statutory authority.

Table 1.**Summary of Regulations with No Comparable CBO Cost Estimate for Mandates**

Regulation	Issuing Agency	Statutory Authority	Reason for Omission
Emissions Standards for Air Pollutants from Cement Manufacturers (75 Fed. Reg. 54970)	EPA	Clean Air Act, as amended in 1990	Statutory authority predates UMRA
Requirements for Persons Renovating Properties Containing Lead-Based Paint (75 Fed. Reg. 24802)	EPA	Toxic Substances Control Act, as amended in 1992	Statutory authority predates UMRA
Energy Conservation Standards for Fluorescent Lamps (74 Fed. Reg. 34080)	DOE	Energy Policy and Conservation Act, as amended in 1992	Statutory authority predates UMRA
Energy Conservation Standards for Various Types of Heating Equipment (75 Fed. Reg. 20112)	DOE	Energy Policy and Conservation Act, as amended in 1987	Statutory authority predates UMRA
Requirements for Storm Water Discharges (64 Fed. Reg. 68722)	EPA	Clean Water Act, as amended in 1987	Statutory authority predates UMRA
Disinfectant Procedures for Surface Water Treatment (71 Fed. Reg. 654)	EPA	Safe Drinking Water Act, as amended in 1996	The Congress considered legislative provisions that required EPA to issue such a rule before UMRA took effect.
Drinking Water Regulations: Arsenic (66 Fed. Reg. 6976)	EPA	Safe Drinking Water Act, as amended in 1986 and 1996	In its estimate for H.R. 3604 (Safe Drinking Water Act Amendments of 1996), CBO determined that EPA already planned to issue the regulations under existing authority
Drinking Water Regulations: Disinfectant Byproducts in Drinking Water (71 Fed. Reg. 388)	EPA	Safe Drinking Water Act, as amended in 1986 and 1996	In its estimate for H.R. 3604 (Safe Drinking Water Act Amendments of 1996), CBO determined that EPA already planned to issue the regulations under existing authority

Source: Congressional Budget Office.

Note: EPA = Environmental Protection Agency; UMRA = Unfunded Mandates Reform Act of 1995; DOE = Department of Energy.