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H. R. 50

[Report No. 115–447]

IN THE SENATE OF THE UNITED STATES

JULY 16, 2018

Received; read twice and referred to the Committee on Homeland Security and
Governmental Affairs

DECEMBER 19, 2018

Reported by Mr. JOHNSON, with amendments

[Omit the part struck through and insert the part printed in *italic*]

AN ACT

To provide for additional safeguards with respect to imposing
Federal mandates, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Unfunded Mandates
5 Information and Transparency Act of ~~2017~~ 2018”.

6 **SEC. 2. ~~PURPOSE~~ PURPOSES.**

7 The ~~purpose~~ *purposes* of this Act ~~is~~ *are*—

(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, private property owners, 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, *to the extent practicable*, conduct an assessment comparing the au-

1 thorized level of funding in a bill or resolution to the
 2 prospective costs of carrying out any changes to a
 3 condition of Federal assistance being imposed on
 4 State, local, or tribal governments participating in
 5 the Federal assistance program concerned or, in the
 6 case of a bill or joint resolution that authorizes such
 7 sums as are necessary, an assessment of an esti-
 8 mated level of funding compared to such costs.”.

9 **SEC. 4. CLARIFYING THE DEFINITION OF DIRECT COSTS TO**
 10 **REFLECT CONGRESSIONAL BUDGET OFFICE**
 11 **PRACTICE.**

12 Section 421(3) of the Congressional Budget Act of
 13 1974 (2 U.S.C. 658(3) ~~(A)(i)~~) is amended—

14 (1) in subparagraph (A)(i), by inserting “incur
 15 or” before “be required”; and

16 (2) in subparagraph (B), by inserting after “to
 17 spend” the following: “or could forgo in profits, in-
 18 cluding costs passed on to consumers or other enti-
 19 ties taking into account, to the extent practicable,
 20 behavioral changes,”.

21 **SEC. 5. EXPANDING THE SCOPE OF REPORTING REQUIRE-**
 22 **MENTS TO INCLUDE REGULATIONS IMPOSED**
 23 **BY INDEPENDENT REGULATORY AGENCIES.**

24 ~~Paragraph (1) of section 421~~ *Section 421(1)* of the
 25 Congressional Budget Act of 1974 (2 U.S.C. 658 (1)) is

1 amended by striking “, but does not include independent
 2 regulatory agencies” and inserting “, except it does not
 3 include the Board of Governors of the Federal Reserve
 4 System, the Federal Open Market Committee, or the *Bu-*
 5 *reau of Consumer Financial Protection Bureau*”.

6 **SEC. 6. AMENDMENTS TO REPLACE OFFICE OF MANAGE-**
 7 **MENT AND BUDGET WITH OFFICE OF INFOR-**
 8 **MATION AND REGULATORY AFFAIRS.**

9 The Unfunded Mandates Reform Act of 1995 (~~Pub-~~
 10 ~~lie Law 104-4~~; 2 U.S.C. ~~1511~~ 1501 et seq.) is amended—

11 (1) in section 103(c) (2 U.S.C. 1511(c))—

12 (A) in the subsection heading, by striking
 13 “OFFICE OF MANAGEMENT AND BUDGET” and
 14 inserting “OFFICE OF INFORMATION AND REG-
 15 ULATORY AFFAIRS”; and

16 (B) by striking “Director of the Office of
 17 Management and Budget” and inserting “Ad-
 18 ministrator of the Office of Information and
 19 Regulatory Affairs”;

20 (2) in section 205(c) (2 U.S.C. 1535(c))—

21 (A) in the subsection heading, by striking
 22 “OMB”; and

23 (B) by striking “Director of the Office of
 24 Management and Budget” and inserting “Ad-

1 ministrator of the Office of Information and
2 Regulatory Affairs”; and

3 (3) in section 206 (2 U.S.C. 1536), by striking
4 “Director of the Office of Management and Budget”
5 and inserting “Administrator of the Office of Infor-
6 mation and Regulatory Affairs”.

7 **SEC. 7. APPLYING SUBSTANTIVE POINT OF ORDER TO PRI-**
8 **VATE SECTOR MANDATES.**

9 Section 425(a)(2) of the Congressional Budget Act
10 of 1974 (2 U.S.C. 658d(a)(2)) is amended, *in the matter*
11 *preceding subparagraph (A)*—

12 (1) by striking “Federal intergovernmental
13 mandates” and inserting “Federal mandates”; and

14 (2) by inserting “or 424(b)(1)” after “section
15 424(a)(1)”.

16 **SEC. 8. REGULATORY PROCESS AND PRINCIPLES.**

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

19 **“SEC. 201. REGULATORY PROCESS AND PRINCIPLES.**

20 “(a) IN GENERAL.—Each agency shall, unless other-
21 wise expressly prohibited by law, assess the effects of Fed-
22 eral regulatory actions on State, local, and tribal govern-
23 ments and the private sector (other than to the extent that
24 such regulatory actions incorporate requirements specifi-

1 cally set forth in law) in accordance with the following
2 principles:

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

8 “(2) Each agency shall examine whether exist-
9 ing regulations (or other law) have created, or con-
10 tributed to, the problem that a new regulation is in-
11 tended to correct and whether those regulations (or
12 other law) should be modified to achieve the in-
13 tended goal of regulation more effectively.

14 “(3) Each agency shall identify and assess
15 available alternatives to direct regulation, including
16 providing economic incentives to encourage the de-
17 sired behavior, such as user fees or marketable per-
18 mits, or providing information upon which choices
19 can be made by the public.

20 “(4) If an agency determines that a regulation
21 is the best available method of achieving the regu-
22 latory objective, it shall design its regulations in the
23 most cost-effective manner to achieve the regulatory
24 objective. In doing so, each agency shall consider in-
25 centives for innovation, consistency, predictability,

1 the costs of enforcement and compliance (to the gov-
2 ernment, regulated entities, and the public), flexi-
3 bility, distributive impacts, and equity.

4 “(5) Each agency shall assess both the costs
5 and the benefits of the intended regulation and, rec-
6 ognizing that some costs and benefits are difficult to
7 quantify, propose or adopt a regulation, unless ex-
8 pressly prohibited by law, only upon a reasoned de-
9 termination that the benefits of the intended regula-
10 tion justify its costs.

11 “(6) Each agency shall base its decisions on the
12 best reasonably obtainable scientific, technical, eco-
13 nomic, and other information concerning the need
14 for, and consequences of, the intended regulation.

15 “(7) Each agency shall identify and assess al-
16 ternative forms of regulation and shall, to the extent
17 feasible, specify performance objectives, rather than
18 specifying the behavior or manner of compliance
19 that regulated entities must adopt.

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

23 “(9) Each agency shall tailor its regulations to
24 minimize the costs of the cumulative impact of regu-
25 lations.

1 “(10) Each agency shall draft its regulations to
 2 be simple and easy to understand, with the goal of
 3 minimizing the potential for uncertainty and litiga-
 4 tion arising from such uncertainty.

5 “(b) REGULATORY ACTION DEFINED.—In this sec-
 6 tion, the term ‘regulatory action’ means any substantive
 7 action by an agency (normally published in the Federal
 8 Register) that promulgates or is expected to lead to the
 9 promulgation of a final rule or regulation, including ad-
 10 vance notices of proposed rulemaking and notices of pro-
 11 posed rulemaking.”.

12 **SEC. 9. EXPANDING THE SCOPE OF STATEMENTS TO AC-**
 13 **COMPANY SIGNIFICANT REGULATORY AC-**
 14 **TIONS.**

15 (a) IN GENERAL.—~~Subsection (a) of section 202~~ *Sec-*
 16 *tion 202(a)* of the Unfunded Mandates Reform Act of
 17 1995 (2 U.S.C. 1532 *(a)*) is amended to read as follows:

18 “(a) IN GENERAL.—Unless otherwise expressly pro-
 19 hibited by law, before promulgating any general notice of
 20 proposed rulemaking or any final rule, or within ~~six~~ 6
 21 months after promulgating any final rule that was not pre-
 22 ceded by a general notice of proposed rulemaking, if the
 23 proposed rulemaking or final rule includes a Federal man-
 24 date that may result in an annual effect on State, local,
 25 or tribal governments, or to the private sector, in the ag-

1 gregate of \$100,000,000 or more in any 1 year, the agency
2 shall prepare a written statement containing the following:

3 “(1) The text of the draft proposed rulemaking
4 or final rule, together with a reasonably detailed de-
5 scription of the need for the proposed rulemaking or
6 final rule and an explanation of how the proposed
7 rulemaking or final rule will meet that need.

8 “(2) An assessment of the potential costs and
9 benefits of the proposed rulemaking or final rule, in-
10 cluding an explanation of the manner in which the
11 proposed rulemaking or final rule is consistent with
12 a statutory requirement and avoids undue inter-
13 ference with State, local, and tribal governments in
14 the exercise of their governmental functions.

15 “(3) A qualitative and quantitative assessment,
16 including the underlying analysis, of benefits antici-
17 pated from the proposed rulemaking or final rule
18 (such as the promotion of the efficient functioning of
19 the economy and private markets, the enhancement
20 of health and safety, the protection of the natural
21 environment, and the elimination or reduction of dis-
22 crimination or bias).

23 “(4) A qualitative and quantitative assessment,
24 including the underlying analysis, of costs antici-
25 pated 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~~ *United States* 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

1 and State, local, or tribal governments either orally
 2 or in writing to the agency.

3 “(C) A detailed summary of the agency’s eval-
 4 uation of those comments and concerns.

5 “(7) A detailed summary of how the agency
 6 complied with each of the regulatory principles de-
 7 scribed in section 201.

8 “(8) An assessment of the effects that the pro-
 9 posed rulemaking or final rule are expected to have
 10 on private property owners, including the use and
 11 value of affected property.”.

12 (b) REQUIREMENT FOR DETAILED SUMMARY.—~~Sub-~~
 13 ~~section (b) of section 202 of such Act~~ *Section 202(b) of*
 14 *the Unfunded Mandates Reform Act of 1995 (2 U.S.C.*
 15 *1532(b))* is amended by inserting “detailed” before “sum-
 16 mary”.

17 **SEC. 10. ENHANCED STAKEHOLDER CONSULTATION.**

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

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

22 (2) in subsection (a)—

23 (A) by inserting “, and impacted parties
 24 within the private sector (including small busi-
 25 ness),” after “on their behalf”; and

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

4 (3) by amending subsection (c) to read as fol-
5 lows:

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

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

13 “(2) Agencies shall consult with a wide variety
14 of State, local, and tribal officials and impacted par-
15 ties within the private sector (including small busi-
16 nesses). Geographic, political, and other factors that
17 may differentiate varying points of view should be
18 considered.

19 “(3) Agencies should estimate benefits and
20 costs to assist with these consultations. The scope of
21 the consultation should reflect the cost and signifi-
22 cance of the Federal mandate being considered.

23 “(4) A record of any consultation with any non-
24 Federal party during the development of regulatory
25 proposals containing a significant Federal mandate

1 shall be posted on the website of the agency within
2 five days after the consultation. Any comments sub-
3 mitted by a non-Federal party shall be posted on the
4 website of the agency within five days after the date
5 of submission to the agency.

6 “(5) Agencies shall, to the extent practicable—

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

11 “(B) solicit ideas about alternative meth-
12 ods of compliance and potential flexibilities, and
13 input on whether the Federal regulation will
14 harmonize with and not duplicate similar laws
15 in other levels of government.

16 “(6) Consultations shall address the cumulative
17 impact of regulations on the affected entities.

18 “(7) Agencies may accept electronic submis-
19 sions of comments by relevant parties but may not
20 use those comments as the sole method of satisfying
21 the guidelines in this subsection.”.

1 **SEC. 11. NEW AUTHORITIES AND RESPONSIBILITIES FOR**
 2 **OFFICE OF INFORMATION AND REGULATORY**
 3 **AFFAIRS.**

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

6 **“SEC. 208. OFFICE OF INFORMATION AND REGULATORY AF-**
 7 **FAIRS RESPONSIBILITIES.**

8 “(a) IN GENERAL.—The Administrator of the Office
 9 of Information and Regulatory Affairs shall provide mean-
 10 ingful guidance and oversight so that each agency’s regu-
 11 lations for which a written statement is required under
 12 section 202 are consistent with the principles and require-
 13 ments of this title, as well as other applicable laws, and
 14 do not conflict with the policies or actions of another agen-
 15 cy. If the Administrator determines that an agency’s regu-
 16 lations for which a written statement is required under
 17 section 202 do not comply with such principles and re-
 18 quirements, are not consistent with other applicable laws,
 19 or conflict with the policies or actions of another agency,
 20 the Administrator shall identify areas of non-compliance,
 21 notify the agency, and request that the agency comply be-
 22 fore the agency finalizes the regulation concerned.

23 “(b) ANNUAL STATEMENTS TO CONGRESS ON AGEN-
 24 CY COMPLIANCE.—The ~~Director~~ *Administrator* of the Of-
 25 fice of Information and Regulatory Affairs annually shall
 26 submit to Congress, including the Committee on Home-

1 land Security and Governmental Affairs of the Senate and
 2 the Committee on Oversight and Government Reform of
 3 the House of Representatives, a written report detailing
 4 compliance by each agency with the requirements of this
 5 title that relate to regulations for which a written state-
 6 ment is required by section 202, including activities under-
 7 taken at the request of the Director to improve compli-
 8 ance, during the preceding reporting period. The report
 9 shall also contain an appendix detailing compliance by
 10 each agency with section 204.”.

11 **SEC. 12. RETROSPECTIVE ANALYSIS OF EXISTING FEDERAL**
 12 **REGULATIONS.**

13 The Unfunded Mandates Reform Act of 1995 (~~Public~~
 14 ~~Law 104-4~~; 2 U.S.C. ~~1511~~ 1501 et seq.) is amended—

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

16 and

17 (2) by inserting after section 208 the following

18 ~~new section 209~~:

19 **“SEC. 209. RETROSPECTIVE ANALYSIS OF EXISTING FED-**
 20 **ERAL REGULATIONS.**

21 “(a) REQUIREMENT.—At the request of the chairman
 22 or ranking minority member of a standing or select com-
 23 mittee of the House of Representatives or the Senate, an
 24 agency shall conduct a retrospective analysis of an existing
 25 Federal regulation promulgated by an agency.

1 “(b) REPORT.—Each agency conducting a retrospec-
2 tive analysis of existing Federal regulations pursuant to
3 subsection (a) shall submit to the chairman of the relevant
4 committee, Congress, and the Comptroller General *of the*
5 *United States* a report containing, with respect to each
6 Federal regulation covered by the analysis—

7 “(1) a copy of the Federal regulation;

8 “(2) the continued need for the Federal regula-
9 tion;

10 “(3) the nature of comments or complaints re-
11 ceived concerning the Federal regulation from the
12 public since the Federal regulation was promulgated;

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

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

20 “(6) a complete analysis of the retrospective di-
21 rect costs and benefits of the Federal regulation that
22 considers studies done outside the Federal Govern-
23 ment (if any) estimating such costs or benefits; and

24 “(7) any litigation history challenging the Fed-
25 eral regulation.”.

1 **SEC. 13. EXPANSION OF JUDICIAL REVIEW.**

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

4 (1) in paragraphs (1) and (2)(A)—

5 (A) by striking “sections 202 and
6 203(a)(1) and (2)” each place it appears and
7 inserting “sections 201, 202, 203(a)(1) and (2),
8 and 205(a) and (b)”;

9 (B) by striking “only” each place it ap-
10 pears;

11 (2) in paragraph (2)(B), by striking “section
12 202” and all that follows through the period at the
13 end and inserting the following: “section 202, pre-
14 pare the written plan under section 203(a)(1) and
15 (2), or comply with section 205(a) and (b), a court
16 may compel the agency to prepare such written
17 statement, prepare such written plan, or comply with
18 such section.”; and

19 (3) in paragraph (3), by striking “written state-
20 ment or plan is required” and all that follows
21 through “shall not” and inserting the following:
22 “written statement under section 202, a written plan
23 under section 203(a)(1) and (2), or compliance with
24 sections 201 and 205(a) and (b) is required, the in-
25 adequacy or failure to prepare such statement (in-
26 cluding the inadequacy or failure to prepare any es-

1 timate, analysis, statement, or description), to pre-
2 pare such written plan, or to comply with such sec-
3 tion may”.

4 **SEC. 14. REAUTHORIZATION.**

5 Section 109 of the Unfunded Mandates Reform Act
6 of 1995 (2 U.S.C. 1516) is amended to read as follows:

7 **“SEC. 109. AUTHORIZATION OF APPROPRIATIONS.**

8 “There are authorized to be appropriated to the Con-
9 gressional Budget Office \$1,500,000 for each of fiscal
10 years 2018 through 2024 to carry out the provisions of
11 this title.”.

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