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CBO Explains Its Principles for Identifying Mandates in Legislation

In cost estimates, the Congressional Budget Office provides information to the Congress about the effects of legislation on the federal budget. As required by the Unfunded Mandates Reform Act of 1995 (UMRA), the agency also examines some of the effects of federal legislation on state, local, and tribal governments and on private-sector entities by identifying what that act defines as mandates.

In general, mandates require a nonfederal entity to take an action or comply with a prohibition. The federal minimum wage is an example of such a mandate on public and private-sector employers, who are required by federal law to pay a minimum hourly amount to certain employees. As defined in UMRA, the direct costs of that mandate are the additional amounts paid by employers. (The question of who ultimately bears those costs is more complicated and beyond the scope of UMRA.)

UMRA aims to ensure that the Congress receives information about the presence and potential costs to nonfederal entities of federal mandates as it considers proposed legislation. CBO, through its Public and Private Mandates Unit, provides such information to the Congress. To promote a thorough understanding of the agency's analyses, this primer describes the principles that CBO follows to identify mandates in legislation.

Notes: This document is one in a series of primers explaining various elements of CBO's work to support the budget process and to help the Congress make budget and economic policy. This and other primers in the series are available at www.cbo.gov/topics/budget/budget-concepts-and-process.

For an explanation of key terms used throughout this primer, see Congressional Budget Office, *Common Budgetary Terms Explained* (December 2021), www.cbo.gov/publication/57420; for detailed definitions, see CBO's *Glossary* at www.cbo.gov/publication/42904.

Contents

What Is a Mandate?

UMRA specifies that a mandate is an *enforceable duty* imposed on a state, local, or tribal government—called an intergovernmental mandate—or on a private entity. (UMRA defines private entities as all people and nongovernmental entities in the United States, including individuals, partnerships, associations, corporations, and educational and nonprofit institutions.) Such a duty is considered to be a mandate even if the legislation would provide funding to cover some or all of the costs of carrying it out (see Box 1). A duty is not considered to be a mandate if it is a condition of federal assistance or arises from participation in a voluntary federal program (such as paying fees for grazing livestock on federal lands).

CBO interprets the term "enforceable" broadly. That is, the agency considers any duty to be enforceable—a legal requirement—even if the legislation contains no explicit enforcement mechanism.

Additionally, *preemptions* of state, local, or tribal laws impose mandates. A preemption occurs when federal legislation supersedes the existing law of a lower level of government or limits such a government's authority to act.

UMRA further refines the definition of "mandate" by including special instructions for changes to large entitlement grant programs (such as Medicaid), which the law defines as those that provide $500 million or more annually to nonfederal governments under entitlement authority.[1] For those programs, UMRA defines as a mandate any provision that would increase the stringency of conditions for such federal aid or that would reduce the federal government's responsibility to provide that funding if the nonfederal governments could not respond by amending their financial or programmatic responsibilities.

CBO applies those instructions by assessing whether state, local, and tribal governments have the flexibility to administer the affected programs and whether the proposed duty would require those governments to spend additional funds of their own. If the affected governments could not offset the cost of the new requirement by altering their administration of the program, then the new provision would be a mandate.

UMRA also specifies that a mandate would be imposed by any legislation that would reduce the amount authorized to be appropriated for the following: financial assistance to entities complying with existing mandates; control of U.S. borders; or reimbursement to state, local, or tribal governments for certain immigration-related costs.

What Is CBO's Role?

CBO identifies mandates and includes estimates of their costs in the agency's published cost estimates and other publications—most often for bills that have been approved by an authorizing committee (see Box 2). (The staff of the Joint Committee on Taxation examines tax provisions of legislation to identify federal mandates and then estimates their costs. CBO's mandate statements incorporate such information.) However, the agency also prepares mandate statements for significant legislation that does not pass through a committee or at the request of committee leaders and, occasionally, other Members of Congress.

Over the years, CBO has developed a set of "mandate principles" to guide the execution of its responsibilities under UMRA. Those principles entail standardizing the agency's identification of mandates and the process for estimating their costs.

1. Entitlement programs are those for which the federal government has a legal obligation to make payments to people, groups of people, businesses, units of government, or similar entities that meet the eligibility criteria set in law.

Box 1.

Does CBO Consider Only Unfunded Mandates?

Although the title of the Unfunded Mandates Reform Act refers specifically to unfunded mandates, the law is not limited to unfunded mandates, and questions of funding are only a small part of the Congressional Budget Office's work.

Generally, CBO asks three questions when analyzing mandates in a legislative proposal.

- **First, does the legislation impose a mandate?** The principles described here guide CBO's identification of mandates. CBO identifies what action is required or prohibited by the legislation and which entities are covered by that requirement or prohibition.
- **Second, what is the aggregate cost to all mandated entities of complying with the mandate?** Using appropriate data and information from covered entities, CBO estimates the aggregate cost to state, local, and tribal entities or to the private sector of complying with the mandate.
- **Third, does the legislation include funding to offset or mitigate that cost?** If the legislation provides funding to cover some or all of the costs of carrying out the mandate, CBO reduces the estimated net cost of the mandate to the affected parties. However, such an offset to costs can occur only if the funds accrue to entities that are covered by the mandates in the legislation. Funds that accrue to a third party do not offset the cost of the mandate.

Thus, the distinction between funded and unfunded mandates arises only at the end of CBO's process. In other words, CBO identifies mandates without regard to funding. The difference between unfunded mandates and funded mandates is in the cost to the covered entities rather than in the underlying mandatory duty. Nearly all the mandates that CBO has identified since the Unfunded Mandates Reform Act was enacted have been unfunded.

How Did CBO Develop Its Mandate Principles?

After UMRA was enacted, CBO established dedicated mandate units and began to develop the principles it uses in its analysis. Those principles are updated as needed.

The principles have been developed in one of three ways:

- Some principles are drawn directly from the text of UMRA, which CBO applies as written in statute. Those principles usually derive from a definition or specific instruction included in UMRA. Two examples are Principle 3, which directs CBO to exclude certain types of provisions from its analysis of mandates, and Principle 5, which establishes special rules for identifying mandates related to certain entitlement programs. In the latter example, UMRA's instructions affect CBO's identification of mandates in programs such as Medicaid and the Supplemental Nutrition Assistance Program.
- Other principles are based on a logical application of UMRA. For example, under Principle 2, CBO would identify a mandate in a bill that grants an exclusive right to one entity to the detriment of another entity (or all other entities) because the conferral of an exclusive right bars others from exercising that right. Such a prohibition would be an enforceable duty—and thus a mandate—and would be akin to a direct legislative prohibition.
- Some principles, such as Principle 9—concerning the creation of a new entity or the privatization of a federal entity—arise from deliberations about unique legislation that is not obviously addressed in UMRA. CBO developed such principles by trying to maintain consistency with other principles and by considering the historical background of UMRA.

CBO periodically revises the principles in a process that includes feedback from its program analysts, the managers of its Budget Analysis Division, and its Office of General Counsel. The revisions are often driven by novel questions about mandates and feedback from Congressional staff.

Box 2.

What Happens When CBO Identifies a Mandate?

When the Congressional Budget Office identifies a mandate in legislation, the agency estimates the cost that covered entities would incur to comply with the requirement. CBO then compares the cost of all the legislation's mandates (whether intergovernmental or private-sector) with annual thresholds established in the Unfunded Mandates Reform Act.

The act set separate thresholds for intergovernmental and private-sector mandates, which are adjusted annually for inflation. In 2023, those thresholds are $99 million and $198 million, respectively. In its mandate statements, CBO describes any mandates in the bill, provides information about their costs, and explains the basis of the estimate.

If the aggregate costs of intergovernmental mandates exceed the applicable threshold in any of the first five years that the mandates are in effect, a parliamentary point of order may be raised against the legislation. No similar procedure exists for private-sector mandates. CBO plays no role in the enforcement of budgetary rules.

What Are CBO's Mandate Principles?

Listed below are the principles that guide CBO's identification of mandates and its estimates of their costs.

Principle 1

A mandate is an enforceable duty that can be imposed on any activity unless that duty is a condition of federal assistance or arises from participation in a voluntary federal program.

- A bill contains a mandate if it would increase the cost of an existing federal mandate by amending the law that contains the mandate.
- Pass-through mandates occur when a bill would require an entity (usually a state), without discretion, to impose a duty on another entity.
- A bill reported by an authorizing committee contains a mandate even if subsequent legislation must be enacted for the mandate to become effective.
- A bill contains a mandate if it would impose an enforceable duty that could be avoided only by opting out, either administratively or through legislation.

Principle 2

A mandate may be a positive or negative duty. Thus, a bill that would prohibit or limit an activity might contain a mandate.

- A bill contains a mandate if it would directly limit (or eliminate) an existing right of action or grounds for recovery, even if other grounds for recovery for the same injury or loss were preserved.
- A bill contains a mandate if it would explicitly indicate that state, local, or tribal laws would not apply, would be superseded, or would be preempted.
- A bill contains a mandate if it would directly grant an exclusive right to one group to the detriment of another group.

Principle 3

Section 4 of UMRA excludes certain legislative provisions—for instance, enforcing the constitutional rights of individuals—from application of the act. To provide the Congress with as much information as possible, exclusions from UMRA should be interpreted narrowly.

Principle 4

A bill that would set conditions for federal assistance or establish a duty arising from participation in a voluntary federal program does not contain a mandate.

- A federal program is considered to be voluntary if it does not rely on the use of sovereign power to accomplish its ends.
- A bill that would reduce federal funding for a voluntary program does not contain a mandate.

Principle 5

A bill that would change certain large entitlement programs contains a mandate only if state, local, or tribal governments lack authority to amend their financial or programmatic responsibilities to continue providing the required services.

Principle 6
A bill contains a mandate if it would reduce an authorization of appropriations in current law that is intended to help fund compliance with an existing mandate.

Principle 7
A bill that would extend a mandate beyond the date it would expire under current law contains a mandate, whether or not the existing mandate has expired.

- A bill that would enact into law the federal government's existing regulatory practice or administrative policy does not contain a mandate if the mandate is already enforced by the federal government.

Principle 8
A bill that would authorize the use of eminent domain to acquire land contains a mandate, even if a fair-market price would be paid for the land.

Principle 9
A bill that would set requirements associated with creating a new entity or privatizing a federal entity does not contain a mandate.

Principle 10
A bill that would provide Congressional consent to an agreement contains a mandate if the proposed legislation goes beyond simple consent and imposes a new enforceable duty.

Principle 11
A provision that would vest new subpoena power in an entity or that would expand the scope of existing subpoena power does not contain a mandate.

Andrew Laughlin prepared this document with guidance from Kathleen FitzGerald, Theresa Gullo, and Leo Lex (formerly of CBO). Kevin Laden of CBO provided comments, as did the staff of the Joint Committee on Taxation.

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CBO seeks feedback to make its work as useful as possible. Please send comments to communications@cbo.gov.