

116TH CONGRESS
2D SESSION

S. 3689

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

IN THE SENATE OF THE UNITED STATES

MAY 12, 2020

Mrs. FISCHER (for herself and Mr. LANKFORD) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

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 2020”.

6 **SEC. 2. PURPOSE.**

7 The purposes of this Act are—

8 (1) to improve the quality of the deliberations
9 of Congress with respect to proposed Federal man-
10 dates by—

1 (A) providing Congress and the public with
2 more complete information about the effects of
3 such mandates; and

4 (B) ensuring that Congress acts on such
5 mandates only after focused deliberation on
6 their effects; and

7 (2) to enhance the ability of Congress and the
8 public to identify Federal mandates that may impose
9 undue harm on consumers, workers, employers,
10 small businesses, private property owners, and State,
11 local, and Tribal governments.

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

15 Section 202(g) of the Congressional Budget Act of
16 1974 (2 U.S.C. 602(g)) is amended by adding at the end
17 the following:

18 “(3) **ADDITIONAL STUDIES.**—At the request of
19 any Chairman or ranking member of the minority of
20 a Committee of the Senate or the House of Rep-
21 resentatives, the Director shall conduct an assess-
22 ment comparing the authorized level of funding in a
23 bill or resolution to the prospective costs of carrying
24 out any changes to a condition of Federal assistance
25 being imposed on State, local, or tribal governments

1 participating in the Federal assistance program con-
2 cerned or, in the case of a bill or joint resolution
3 that authorizes such sums as are necessary, an as-
4 sessment of an estimated level of funding compared
5 to such costs.”.

6 **SEC. 4. CLARIFYING THE DEFINITION OF DIRECT COSTS TO**
7 **REFLECT CONGRESSIONAL BUDGET OFFICE**
8 **PRACTICE.**

9 Section 421(3) of the Congressional Budget Act of
10 1974 (2 U.S.C. 658(3)) is amended—

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

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

18 **SEC. 5. EXPANDING THE SCOPE OF REPORTING REQUIRE-**
19 **MENTS TO INCLUDE REGULATIONS IMPOSED**
20 **BY INDEPENDENT REGULATORY AGENCIES.**

21 Section 421(1) of the Congressional Budget Act of
22 1974 (2 U.S.C. 658(1)) is amended by striking “, but does
23 not include independent regulatory agencies” and insert-
24 ing “, except it does not include the Board of Governors

1 of the Federal Reserve System or the Federal Open Mar-
2 ket Committee”.

3 **SEC. 6. AMENDMENTS TO REPLACE OFFICE OF MANAGE-**
4 **MENT AND BUDGET WITH OFFICE OF INFOR-**
5 **MATION AND REGULATORY AFFAIRS.**

6 The Unfunded Mandates Reform Act of 1995 (2
7 U.S.C. 1501 et seq.) is amended—

8 (1) by striking “tribal” each place that term
9 appears and inserting “Tribal”;

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

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

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

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

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

22 (B) by striking “Director of the Office of
23 Management and Budget” and inserting “Ad-
24 ministrator of the Office of Information and
25 Regulatory Affairs”; and

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

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

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

10 (1) by striking “Federal intergovernmental
11 mandates” and inserting “Federal mandates”; and

12 (2) by inserting “or 424(b)(1)” after “section
13 424(a)(1)”.

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

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

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

18 “(a) IN GENERAL.—Each agency shall, unless other-
19 wise expressly prohibited by law, assess the effects of Fed-
20 eral regulatory actions on State, local, and Tribal govern-
21 ments and the private sector (other than to the extent that
22 such regulatory actions incorporate requirements specifi-
23 cally set forth in law) in accordance with the following
24 principles:

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

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

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

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

1 ernment, regulated entities, and the public), flexi-
2 bility, distributive impacts, and equity.

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

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

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

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

22 “(9) Each agency shall tailor its regulations to
23 minimize the costs of the cumulative impact of regu-
24 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.—Section 202(a) of the Unfunded
16 Mandates Reform Act of 1995 (2 U.S.C. 1532(a)) is
17 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 6 months
21 after promulgating any final rule that was not preceded
22 by a general notice of proposed rulemaking, if the pro-
23 posed rulemaking or final rule includes a Federal mandate
24 that may result in an annual effect on State, local, or
25 Tribal governments, or to the private sector, in the aggre-

1 gate 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

1 (such as the direct costs both to the Government in
2 administering the final rule and to businesses and
3 others in complying with the final rule, and any ad-
4 verse effects on the efficient functioning of the econ-
5 omy, private markets (including productivity, em-
6 ployment, and international competitiveness), health,
7 safety, and the natural environment).

8 “(5) Estimates by the agency, if and to the ex-
9 tent that the agency determines that accurate esti-
10 mates are reasonably feasible, of—

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

13 “(B) any disproportionate budgetary ef-
14 fects of the Federal mandate upon any par-
15 ticular regions of the United States or par-
16 ticular State, local, or tribal governments,
17 urban or rural or other types of communities,
18 or particular segments of the private sector.

19 “(6)(A) A detailed description of the extent of
20 the agency’s prior consultation with the private sec-
21 tor and elected representatives under section 204 of
22 the affected State, local, and Tribal governments.

23 “(B) A detailed summary of the comments and
24 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.—Sec-
13 tion 202(b) of the Unfunded Mandates Reform Act of
14 1995 (2 U.S.C. 1532(b)) is amended by inserting “de-
15 tailed” before “summary”.

16 **SEC. 10. ENHANCED STAKEHOLDER CONSULTATION.**

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

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

21 (2) in subsection (a)—

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

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) Agencies shall, to the extent practicable—

24 “(A) seek out the views of State, local, and
25 Tribal governments, and impacted parties with-

1 in the private sector (including small business),
2 on costs, benefits, and risks; and

3 “(B) solicit ideas about alternative meth-
4 ods of compliance and potential flexibilities, and
5 input on whether the Federal regulation will
6 harmonize with and not duplicate similar laws
7 in other levels of government.

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

10 “(6) Agencies may accept electronic submis-
11 sions of comments by relevant parties but may not
12 use those comments as the sole method of satisfying
13 the guidelines in this subsection.”.

14 **SEC. 11. NEW AUTHORITIES AND RESPONSIBILITIES FOR**
15 **OFFICE OF INFORMATION AND REGULATORY**
16 **AFFAIRS.**

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

19 **“SEC. 208. OFFICE OF INFORMATION AND REGULATORY AF-**
20 **FAIRS RESPONSIBILITIES.**

21 “(a) IN GENERAL.—The Administrator of the Office
22 of Information and Regulatory Affairs shall provide mean-
23 ingful guidance and oversight so that each agency’s regu-
24 lations for which a written statement is required under
25 section 202 are consistent with the principles and require-

1 ments of this title, as well as other applicable laws, and
2 do not conflict with the policies or actions of another agen-
3 cy. If the Administrator determines that an agency’s regu-
4 lations for which a written statement is required under
5 section 202 do not comply with such principles and re-
6 quirements, are not consistent with other applicable laws,
7 or conflict with the policies or actions of another agency,
8 the Administrator shall identify areas of non-compliance,
9 notify the agency, and request that the agency comply be-
10 fore the agency finalizes the regulation concerned.

11 “(b) ANNUAL STATEMENTS TO CONGRESS ON AGEN-
12 CY COMPLIANCE.—The Administrator of the Office of In-
13 formation and Regulatory Affairs annually shall submit
14 to Congress, including the Committee on Homeland Secu-
15 rity and Governmental Affairs of the Senate and the Com-
16 mittee on Oversight and Reform of the House of Rep-
17 resentatives, a written report detailing compliance by each
18 agency with the requirements of this title that relate to
19 regulations for which a written statement is required by
20 section 202, including activities undertaken at the request
21 of the Director to improve compliance, during the pre-
22 ceding reporting period. The report shall also contain an
23 appendix detailing compliance by each agency with section
24 204.”.

1 **SEC. 12. RETROSPECTIVE ANALYSIS OF EXISTING FEDERAL**
2 **REGULATIONS.**

3 The Unfunded Mandates Reform Act of 1995 (2
4 U.S.C. 1501 et seq.) is amended—

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

6 and

7 (2) by inserting after section 208 the following:

8 **“SEC. 209. RETROSPECTIVE ANALYSIS OF EXISTING FED-**
9 **ERAL REGULATIONS.**

10 “(a) **REQUIREMENT.**—At the request of the chairman
11 or ranking minority member of a standing or select com-
12 mittee of the House of Representatives or the Senate, an
13 agency shall conduct a retrospective analysis of an existing
14 Federal regulation promulgated by an agency.

15 “(b) **REPORT.**—Each agency conducting a retrospec-
16 tive analysis of existing Federal regulations pursuant to
17 subsection (a) shall submit to the chairman of the relevant
18 committee, Congress, and the Comptroller General of the
19 United States a report containing, with respect to each
20 Federal regulation covered by the analysis—

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

22 “(2) the continued need for the Federal regula-
23 tion;

24 “(3) the nature of comments or complaints re-
25 ceived concerning the Federal regulation from the
26 public since the Federal regulation was promulgated;

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

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

8 “(6) a complete analysis of the retrospective di-
9 rect costs and benefits of the Federal regulation that
10 considers studies done outside the Federal Govern-
11 ment (if any) estimating such costs or benefits; and

12 “(7) any litigation history challenging the Fed-
13 eral regulation.”.

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

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

17 (1) in paragraph (1)—

18 (A) by striking “sections 202 and
19 203(a)(1) and (2)” and inserting “sections 201,
20 202, paragraphs (1) and (2) of section 203(a),
21 and subsections (a) and (b) of section 205”;
22 and

23 (B) by striking “only”;

24 (2) in paragraph (2)—

25 (A) in subparagraph (A)—

1 (i) by striking “sections 202 and
2 203(a)(1) and (2)” and inserting “sections
3 201, 202, paragraphs (1) and (2) of sec-
4 tion 203(a), and subsections (a) and (b) of
5 section 205”; and

6 (ii) by striking “only” each place that
7 term appears; and

8 (B) in subparagraph (B), by striking “sec-
9 tion 202” and all that follows through the pe-
10 riod at the end and inserting the following:
11 “section 202, prepare the written plan under
12 paragraphs (1) and (2) of section 203(a), or
13 comply with subsections (a) and (b) of section
14 205, a court may compel the agency to prepare
15 such written statement, prepare such written
16 plan, or comply with such subsections.”; and

17 (3) in paragraph (3), by striking “written state-
18 ment or plan is required” and all that follows
19 through “shall not” and inserting the following:
20 “written statement under section 202, a written plan
21 under paragraphs (1) and (2) of section 203(a), or
22 compliance with section 201 and subsections (a) and
23 (b) of section 205 is required, the inadequacy or fail-
24 ure to prepare such statement (including the inad-
25 equacy or failure to prepare any estimate, analysis,

- 1 statement, or description), to prepare such written
- 2 plan, or to comply with such sections may”.

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