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## SENATOR ABRAHAM'S MANDATES INFORMATION ACT: THE WAY TO HELP CONGRESS WORK SMARTER

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Senator Spencer Abraham (R-MI) soon will introduce the Mandates Information Act of 1997 to amend the existing Unfunded Mandates Reform Act (UMRA) of 1995 so that new costs and requirements imposed by Congress on the private sector will be subject to as much careful analysis and deliberation as those mandates affecting state and local governments. The 1995 Act permits House and Senate members to raise a point of order on any bill when its intergovernmental mandates, as estimated by the Congressional Budget Office (CBO), exceed \$50 million in annual cost. Unless waived by a majority vote, a point of order prohibits further floor action on the measure. Although the Unfunded Mandates Reform Act (P.L. 104-4) also directs the CBO to estimate whether a bill's private-sector mandates exceed \$100 million in annual cost, it does not establish a point of order if the mandates exceed that threshold. Senator Abraham's bill would correct this deficiency.

A review of the impact of the Unfunded Mandates Reform Act on new intergovernmental mandates strongly suggests that Congress should give serious consideration to extending the point of order to private-sector mandates. Over the past two years, the UMRA has played a significant, positive role in helping Congress more carefully deliberate and assess (and reassess) the financial impact of new mandates. As a result, Congress has eliminated hundreds of millions of dollars in potential new mandate costs.

Extending the UMRA's point of order to private-sector mandates will put the necessary "teeth" behind the CBO's estimates and put these mandates on equal footing with those affecting state and local governments. The Mandates Information Act would extend the point of order for private-sector mandates that exceed a \$100 million threshold, and it would direct the CBO to inform Members of Congress about the effects of these mandates on consumers, workers, and small businesses. This

bill represents a commonsense improvement to a law that clearly has helped Congress make more informed legislative decisions.

## THE ECONOMIC CONSEQUENCES OF MANDATES

In an era of fiscal budgetary restraint, private-sector mandates represent a politically appealing alternative to new programs and higher direct taxes. Policymakers rationalize the shifting of new burdens to the private sector on the grounds that the incremental costs of each new social program, when dispersed across all industry, will not be so great as to place U.S. companies at a competitive disadvantage. But these mandates really represent a hidden tax, because the costs of implementation are passed on to consumers, employers, employees, and stockholders in the form of higher prices, reduced wages, and lost productivity. Table 1 presents just a small sample of the scope of the already existing federal mandates on employers.

Each separate mandate may be small and appear inconsequential. Taken as a whole, however, mandates and their implementing regulations stretch the ability of firms to adjust and offset their costs. Firms and industries respond to new mandates in ways that are not often obvious. For example:

- The Cable Act of 1992 was supposed to protect consumers by lowering the price of basic cable rates by 17 percent. In reality, the legislative mandates lowered the value of cable TV service and raised its effective price.<sup>1</sup> C-SPAN reports that 4.2 million homes have had their service hours reduced and a few towns have lost C-SPAN entirely.<sup>2</sup> Moreover, by reducing cable industry cash flow, the Cable Act has slowed the investment in new technologies that would improve service.
- Legally mandated benefits, such as family and medical leave and unemployment insurance, are not "free" to the worker, as many policymakers imply. A range of studies indicates that, on aver-

Table 1

### Some Federally Required Burdens on Employers

#### Payroll Taxes

Social Security  
 Medicare  
 Federal Unemployment Insurance  
 State Unemployment Insurance

#### Mandated Benefits

Davis-Bacon Act of 1931 (prevailing wage requirements)  
 Fair Labor Standards Act of 1938 (minimum wage & overtime)  
 Workers' Compensation  
 Equal Pay Act of 1963  
 Service Contract Act of 1965 (prevailing wage requirements)  
 Americans with Disabilities Act of 1990  
 Family and Medical Leave Act of 1993

#### Various Regulations

Title VII of Civil Rights Act of 1964  
 Age Discrimination in Employment Act of 1967  
 Executive Order 11246 (non-discrimination in employment by federal contractors)  
 Occupational Safety and Health Act of 1970  
 Rehabilitation Act of 1973  
 Federal Mine Safety and Health Act of 1977  
 Worker Adjustment and Retraining Notification Act of 1988  
 Migrant and Seasonal Agricultural Worker Protection Act of 1983  
 Immigration Control Act of 1986  
 Employee Polygraph Protection Act of 1988  
 Drug-Free Workplace Act of 1988  
 Various environmental regulations (e.g., Clean Air Act)

Source: *Federal Labor Laws*, West Publishing Company, 1993.

1 Thomas Hazlett, "Cable: Lower Costs, Lower Quality," *The Wall Street Journal*, July 15, 1995, p. A12. The FCC twice has denied formal staff requests to study the effects of cable rate regulation.  
 2 Tim W. Ferguson, "Viewers Hurt as Cable Gets a Double Dose," *The Wall Street Journal*, June 14, 1994, p. A15.

age, 88 percent of the cost of all employer-paid government-mandated benefit taxes is shifted to workers in the form of reduced cash compensation.<sup>3</sup>

- Over the years, more and more mandates and higher and higher taxes have increased the cost of hiring workers. In 1995, the cost of government-mandated benefits accounted for 8.9 percent of total employer payrolls, up from 6.3 percent in 1971 and 3.5 percent in 1951.<sup>4</sup>
- The recently enacted increase in the minimum wage will cost consumers and workers about \$2.2 billion per year as the cost of entry-level jobs is passed on through higher prices and lower real wages. It also will cause employers to create over 200,000 fewer entry-level jobs each year until 1999.<sup>5</sup>

Regulatory mandates emanating from legislation impose the heaviest burden on small and medium-sized businesses. For firms with fewer than 20 employees, the regulatory costs<sup>6</sup> per employee are estimated to be about \$5,500. For the largest firms (those with more than 500 employees), the cost is about \$3,000 per employee.<sup>7</sup> Unfortunately, Congress has responded to the disproportionate burden on small business by exempting different sizes of companies from different regulatory statutes. The effect of this approach has been to discourage companies that are near an established threshold from hiring new employees.<sup>8</sup>

Over the past 30 years, the cumulative effect of federal mandates has had a significant impact on productivity and take-home pay.<sup>9</sup> Sound policymaking requires that basic information is provided to permit a thorough evaluation of the impact of any new federal mandate under consideration.

## THE SUCCESSES OF THE UNFUNDED MANDATES REFORM ACT OF 1995

In response to the increasingly hostile reaction of states and localities to unchecked and costly federal mandates, Congress passed, and President Clinton signed on March 22, 1995, the Unfunded Mandates Reform Act of 1995. One of the objectives of the act is to give Members of Congress information about the costs of proposed new public- and private-sector mandates so they can deliberate more carefully about them. In doing so, Congress would be less likely to make state and local governments and the private sector pay for programs and projects it refuses to pay for itself.<sup>10</sup> A 1996 report by the Advisory Commission on Intergovernmental Relations noted, on the origins of the act, that the "Washington tendency has been to treat as a national issue any problem that is emo-

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3 The 88 percent figure is based on such analyses as Jonathan Gruber and Alan B. Krueger, "The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers Compensation Insurance," *Tax Policy and Economy* (1991); Jonathan Gruber, "The Incidence of Mandated Maternity Benefits," *American Economic Review*, Vol. 84 (June 1994), pp. 622-641; and Lawrence H. Summers, "Some Simple Economics of Mandated Benefits," *American Economic Review*, Vol. 79, No. 2 (May 1989).

4 U.S. Chamber of Commerce, "Employee Benefits Historical Data," 1982, and "Employee Benefits Survey," 1995.  
5 Mark Wilson, "The Folly of Increasing the Minimum Wage," Heritage Foundation *Background Update* No. 275, April 22, 1996.

6 This includes process, social, and economic regulation estimates.

7 Thomas Hopkins, "Regulatory Costs in Profile," Center for the Study of American Business *Policy Study* No. 132, August 1996. The estimates are for 1992 (in 1995 dollars) and include process, social, and economic regulation.

8 Murray Weidenbaum, "Government Regulation and Medium-Sized Businesses," Center for the Study of American Business *Issue Series* 77, March 1996, p. 8.

9 Angela Antonelli and Mark Wilson, "How to Raise Take-Home Pay Without Destroying Jobs," Heritage Foundation *F.Y.I.* No. 102, May 17, 1996.

10 Unfunded federal mandates and highly prescriptive federal programs have forced state and local governments to sacrifice their own programs and priorities in order to comply with standards set by a distant federal government. Governors and mayors have complained for years that the increasing numbers of regulations in such areas as education, environment, and transportation have cost them billions of dollars.

tional, hot and highly visible. Often this has meant passing a federal law that imposes costs and requirements on state and local governments without their consent and without regard for ability to comply."<sup>11</sup>

Beginning on January 1, 1996, the CBO began providing congressional committees with estimates of the direct costs of mandates in bills reported out of committee and, to the extent practicable, for conference agreements.<sup>12</sup> Since that time, the CBO has reviewed more than 400 bills. Because of the CBO's role in estimating the costs of new public- and private-sector mandates, many Members of the 104th Congress and their staffs worked closely with the budget office in the earliest stages of developing legislation. Members did not want to risk being embarrassed by introducing a bill that subsequently would be subject to a point of order (in the case of a public-sector mandate) for having a huge unfunded mandate. There are a number of examples of how these additional consultations and deliberations initially resulted in important policy changes in legislation considered during the 104th Congress.<sup>13</sup>

- **Health care reform.** The CBO performed one of its most complex analyses under the UMRA on health care reform legislation (H.R. 3103), which included provisions to improve insurance portability and to require insurers to cover mental health services the same as they cover acute care services. The CBO estimated that premiums for traditional fee-for-service plans would increase by 5.3 percent because of this provision alone, while managed care plans would see an extra increase of 4 percent.<sup>14</sup> Recognizing that workers and their families, rather than employers, invariably bear the real cost of any mandated benefits, the CBO stated that many employers would respond simply by dropping benefits—or even health insurance altogether—for employees and their families.<sup>15</sup> For employers who retained the congressionally mandated package, the higher costs simply would be passed back to employees in lower wages. This reduction in family income also would mean a reduction in federal tax revenues of approximately \$9.3 billion between 1997 and 2002.<sup>16</sup> Although not subject to a point of order, the mental health coverage parity provisions were eventually dropped. But many of the other requirements of the Kassebaum-Kennedy Health Care Coverage and Affordability Act (P.L. 104-191), including the requirement of health care portability, remained intact.<sup>17</sup> A modified version of the mental health parity provision subsequently was reconsidered and adopted, but the CBO estimates helped to ensure that a more flexible, less costly option was chosen.
- **Immigration.** The benefits of CBO input were evident in the development of the immigration bill. Originally, the Senate bill required that all driver's licenses without valid Social Security numbers would be invalid immediately upon the date of enactment of the law. The CBO estimated that this would cost the states in the range of \$80 million to \$200 million to make the necessary changes to handle the volume of people who would suddenly need to obtain new licenses.<sup>18</sup> This provision was changed in the final legislation to include a 10-year phase-in pe-

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11 Advisory Commission on Intergovernmental Relations, *The Role of Federal Mandates in Intergovernmental Relations*, January 1996, p. 2.

12 The UMRA exempts amendments, conference reports, and bills not passed out of committee from the CBO cost estimate requirement but not from the point of order.

13 Examples in this section are drawn from Angela Antonelli, "Promises Unfulfilled: Unfunded Mandates Reform Act of 1995," *CATO Institute Regulation* No. 2 (1996).

14 Letter from June O'Neill, Director of the Congressional Budget Office, to Senator Nancy Landon Kassebaum (R-KS), April 23, 1996, p. 1.

15 *Ibid.*

16 *Ibid.*

17 For a broader discussion of the Kassebaum-Kennedy bill, see Robert E. Moffit, "What to Do About the Kassebaum-Kennedy Bill," *Heritage Foundation Issue Bulletin* No. 226, June 5, 1996.

riod, allowing states to renew licenses whenever they normally would come up for renewal. This lowered the costs to states to around \$20 million. A similarly structured provision to standardize all birth certificates also was changed to allow for a gradual phase-in period.

- **Agriculture.** The House version of the farm bill contained provisions that would require milk sold for fluid uses to contain greater amounts of nonfat solids than currently required and lock in higher fluid milk prices under the archaic Milk Marketing Order System. The CBO estimated the direct costs of this provision on dairy processors and manufacturers would fall somewhere between \$800 million and \$1 billion annually.<sup>19</sup> The final farm bill did not contain the higher fluid milk standards, and the CBO's estimates were used to help make the case for their elimination.
- **Minimum wage.** The CBO estimated the cost of the Senate proposal to increase the minimum wage in two annual steps from \$4.25 to \$5.15 per hour. The private-sector costs were estimated to be in the range of \$2 billion to \$4 billion between 1997 and 2000.<sup>20</sup> The costs to state and local government were in the range of \$180 million to \$300 million between 1997 and 2000.<sup>21</sup> Because proposals to raise the minimum wage were politically very popular, a point of order based on the public-sector costs did little to stop the legislation because it had overwhelming support. Nevertheless, the CBO's estimates certainly helped to highlight for the public the significant costs of raising the minimum wage, and the need to override a point of order to enact the proposal meant that Members would be subject to a recorded vote on the question of an unfunded mandate.

As these examples illustrate, Congress initially appeared to deliberate as carefully about private-sector mandates as it did about public-sector mandates.

## **THE BACKTRACKING: A WEAKENING OF WILL IN THE 104th CONGRESS**

Unfortunately, by the end of the 104th Congress, Members had become much more willing to accept costly new private-sector mandates. The will of Congress to carry out the spirit and intent of the act appeared to be weakening. Although Congress and the American people had rejected two years earlier the wholesale attempt by the Clinton Administration to have the government dictate what kind of health care Americans should get and how much they should pay for it, Members began—measure by measure, benefit by benefit—to federalize and standardize private health insurance toward the end of the 104th Congress. They were laying the foundation for the kind of Clinton-style health care system, replete with new bureaucracy and federal regulatory controls, that they once had opposed steadfastly.<sup>22</sup>

- For example, the 104th Congress adopted an amendment offered by Senator Bill Bradley (D-NJ) to the FY 1997 Veterans Administration and Housing and Urban Development (VA-HUD) appropriations bill that requires insurers to cover a mother and newborn for at least two nights

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18 Letter from June O'Neill, Director of the Congressional Budget Office, to Senator Orrin Hatch (R-UT), April 12, 1996, p. 24.

19 See John Frydenlund, "How the Proposed Dairy 'Reform' Will Impose Heavy Costs on Americans," Heritage Foundation *Executive Memorandum* No. 448, February 26, 1996, p. 1.

20 Letter from June O'Neill, Director of the Congressional Budget Office, to Senator Nancy Landon Kassebaum (R-KS), March 25, 1996, p. 5.

21 *Ibid.*, p. 2.

22 The following discussion of health benefit mandates is excerpted from Carrie Gavora, "Why Congress Should Not Impose Mandates on Private Health Insurance," Heritage Foundation *Executive Memorandum* No. 462, September 18, 1996; and Carrie Gavora, "Why Congress Should Stop Federalizing Private Health Insurance," Heritage Foundation *Background Update* No. 280, September 26, 1996.

in the hospital after a normal birth, and at least four nights after a Cesarean section. Coverage for fewer days would be permissible if agreed to by the attending physician in consultation with the mother. The CBO estimates that Senator Bradley's maternity benefit mandate would cost the federal government alone some \$223 million over four years in increased outlays for Medicaid and the Federal Employees Health Benefits Program and in lost revenues due to lower wages from increased health costs. The CBO also says that the new maternity benefit would increase aggregate premium payments for employee-based and individually purchased health plans by 0.06 percent. In addition to the extra costs for government programs, the CBO estimates that direct private-sector costs would increase by \$180 million in 1998 and by \$220 million in 2001.<sup>23</sup>

- In addition, Congress adopted a mental health "parity" amendment offered by Senators Pete Domenici (R-NM) and Paul Wellstone (D-MN). This amendment is a scaled-down version of the mental health parity provision dropped from the recently enacted Kennedy-Kassebaum health insurance reform bill. According to a CBO analysis conducted on behalf of the Senate Budget Committee, it is estimated that the Domenici-Wellstone mental health parity provision of the VA-HUD appropriations bill would cost the federal government \$590 million in lost revenues between 1997 and 2002 (the provision will sunset in 2001). The intergovernmental mandate would cost just under \$50 million, and the private-sector mandate probably would exceed the threshold.<sup>24</sup> The potential cost was reduced somewhat by a modifying amendment, offered by Senator Phil Gramm (R-TX), stipulating that if a group health policy experienced a premium increase of 1 percent or more in a given year due to this provision, that insurance policy could be exempted from the mandate.<sup>25</sup>

Commenting on these new federal health mandates, *The Washington Post* warned:

Because the estimated cost of these [proposals] is low, the sponsors say the question isn't real, not now at any rate. But sooner or later as Congress yields to the understandable impulses to help people who need it without, of course, appropriating funds, it becomes real....What's troubling about the agreements that have just been reached is not so much what they themselves actually do as what they portend.<sup>26</sup>

## THE 105th CONGRESS: A FLOOD OF NEW MANDATES?

Indeed, the agreements reached at the end of the 104th Congress portend that the 105th Congress is poised to continue down this path in health care reform and other areas. Recent proposals include:

- Senator Ron Wyden (D-OR) and Representative Greg Ganske (R-IA) have expressed their intention to sponsor legislation that would prohibit the contractual restrictions—or "gag clauses"—by which certain health maintenance organizations limit the communications of participating doctors with their patients regarding the patients' condition or treatment options. An earlier attempt in the 104th Congress to attach the proposal to the FY 1997 omnibus appropriations bill failed. A recent study by Multinational Business Services, Inc., a consulting firm, estimated that this bill would require hiring between 3,000 and 7,000 new federal employees to monitor complaints affecting more than 345 million contracts between physicians and HMOs.<sup>27</sup>

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23 Letter from June O'Neill, Director of the Congressional Budget Office, to Senator Nancy Landon Kassebaum (R-KS), July 17, 1996.

24 Memo to congressional staff from Jeff Lemieux, Congressional Budget Office, "Federal Cost Estimate of Amendments 5194 (Domenici) and 5196 (Gramm) to the VA-HUD Appropriations Bill," September 10, 1996.

25 *Ibid.*

26 Editorial, "Congress in a White Coat," *The Washington Post*, September 20, 1996.

- Representatives Rosa DeLauro (D-CT) and Anna Eschoo (D-CA) have introduced a bill (H.R. 164) to require private insurance companies to pay for “minimum” hospital stays of two days for mastectomy and one day for a lymph node removal unless doctor and patient “decide less time is appropriate.” This proposal would put Congress in the position of setting benefits and legislating, in effect, the kinds and conditions—and even the duration—of medical treatments and procedures that must be covered by health insurance policies. This is arguably far beyond Congress’s constitutional authority, and certainly beyond its professional competence.
- Congress is considering proposals to extend health care coverage for children. Senators Edward Kennedy (D-MA) and John Kerry (D-MA) are considering a proposal to provide block grants to states for a health care voucher program. States would be required to contract with a private health insurer to provide a federally approved health benefits package to eligible pregnant women and children. Although the CBO has not prepared a formal cost estimate, the sponsors of the proposal have estimated the cost to the federal government to be in the vicinity of \$25 billion over five years in direct outlays to the states.
- Representative William Clay (D-MO) has introduced a bill (H.R. 109) to expand coverage of the Family and Medical Leave Act (FMLA) to include businesses with 25 or more workers, as well as adding another three working days (24 hours) of leave that can be taken on an intermittent basis for school functions and routine doctor visits. Although such a change is politically appealing, mandating such leave takes away the ability of the employer and employee to craft the benefits package they want. The federal government increasingly is restricting the ability of workers and employers to negotiate the balance between salary and benefits. In the end, employees lose because the mandates will reduce real wages and other benefits. A much better alternative to expansion of the FMLA is the concept of “flex-time.” Senator John Ashcroft (R-MO) has introduced a bill (S. 4) that would enable employers to offer their employees a choice between taking overtime pay as cash or taking extra time off.<sup>28</sup> Employers also could offer paid flexible leave and a biweekly work schedule to their workers similar to those now available to employees of the federal government. Under paid flexible leave, a salaried employee may choose to work additional hours (more than the traditional 40 hours) during one work week in order to use those extra hours to “fill in” for hours in a shorter work week later.
- Representative Luis Gutierrez (D-IL) has introduced a bill (H.R. 182) that would require federal contractors (with contracts over \$10,000) to pay an hourly wage equivalent to the poverty level for a family of four, or \$7.50 per hour (whichever is greater), to all workers. Mandating federal contractors to pay each of their workers at least \$7.50 per hour regardless of the size of their family or the region in which they live will raise the cost of federal contracts—an increase that will be borne by all U.S. taxpayers.

## WHAT THE ABRAHAM BILL WOULD DO

These new mandates are just a handful of the proposals that are being considered or that already have been introduced in the first month of the 105th Congress. Although the CBO currently is required to estimate whether a bill’s private-sector mandates exceed \$100 million, the Unfunded Mandates Reform Act does not allow for a point of order for mandates that meet this threshold.

Senator Abraham’s bill would strengthen the Unfunded Mandates Reform Act to ensure that Congress has the best information possible on the impact of these types of proposed new federal mandates—especially on consumers, workers, and small businesses—by requiring the CBO to provide

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27 Multinational Business Services, Inc., *Regulatory Requirements of H.R. 2976*, p. 23.

28 Representative Cass Ballenger (R-NC) has introduced a similar bill (H.R. 1).

more detailed analyses than it is currently required to provide. Moreover, armed with that information, a Member could raise a point of order on a mandate affecting private individuals and firms—not just government entities, as is the case today. A point of order would require more careful deliberation, and a recorded vote, on the mandate.

## CONCLUSION

Americans are justifiably concerned about the growing attractiveness of using new mandates as a way to expand the size and cost of government. The costs of these mandates are largely hidden. Although the Unfunded Mandates Reform Act does little to address the serious concerns state and local governments and the private sector have about existing mandates,<sup>29</sup> it has been a success in making the costs of proposed new mandates less hidden to Congress and the public. The UMRA has a unique track record of helping Congress make more informed decisions by providing necessary information on the cost of legislation before Members vote. Its passage in 1995 was the beginning of a positive, fundamental change in the scope and nature of federal actions affecting state and local governments and the private sector. But the lack of a point-of-order provision for private-sector mandates blunts its effectiveness.

By adopting Senator Abraham's Mandates Information Act, Congress can reaffirm its commitment to moving forward and doing an even better job than the 104th Congress. Unfortunately, the 105th Congress already is poised to impose new private-sector mandates as alternatives to costly new programs and higher taxes. If Congress fails to take control of the use of both public- and private-sector mandates as a substitute for spending, however, the economic and social benefits of efforts to control federal spending and balance the budget will be diminished significantly.

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29 For a comprehensive review of the requirements of the UMRA, see Antonelli, "Promises Unfulfilled," and Advisory Commission on Intergovernmental Relations, *The Role of Federal Mandates in Intergovernmental Relations*.