

116TH CONGRESS
2D SESSION

S. 4077

To amend the Unfunded Mandates Reform Act of 1995 to provide for regulatory impact analyses for certain rules, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 25, 2020

Mr. PORTMAN (for himself, Mrs. FISCHER, 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 amend the Unfunded Mandates Reform Act of 1995 to provide for regulatory impact analyses for certain rules, 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 Accountability and Transparency Act”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) The public has a right to know the benefits
9 and costs of regulation. Effective regulatory pro-

grams provide important benefits to the public, including protecting the environment, worker safety, and human health. Regulations also impose significant costs on individuals, employers, and State, local, and Tribal governments, diverting resources from other important priorities.

(2) Better regulatory analysis and review should improve the quality of agency decisions, increasing the benefits and reducing unwarranted costs of regulation.

(3) Disclosure and scrutiny of key information underlying agency decisions should make the Federal Government more accountable to the public it serves.

SEC. 3. REGULATORY IMPACT ANALYSES FOR CERTAIN RULES.

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

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

(2) in section 3 (2 U.S.C. 1502)—

(A) in paragraph (1), by striking “and” at the end;

(B) in paragraph (2), by striking the period at the end and inserting “and”; and

1 (C) by adding at the end the following:

2 “(3) the term ‘major rule’ means a rule, as de-
3 fined in section 551 of title 5, United States Code,
4 that the Administrator of the Office of Information
5 and Regulatory Affairs determines is likely to
6 cause—

7 “(A) an annual effect on the economy of
8 \$100,000,000 or more, adjusted once every 5
9 years to reflect increases in the Consumer Price
10 Index for All Urban Consumers, as published
11 by the Bureau of Labor Statistics of the De-
12 partment of Labor;

13 “(B) a major increase in costs or prices for
14 consumers, individual industries, Federal,
15 State, local, or Tribal government agencies, or
16 geographic regions; or

17 “(C) significant adverse effects on competi-
18 tion, employment, investment, productivity, in-
19 novation, public health and safety, or the ability
20 of United States-based enterprises to compete
21 with foreign-based enterprises in domestic and
22 export markets.”; and

23 (3) in section 202 (2 U.S.C. 1532)—

24 (A) by striking the section heading and in-
25 serting the following:

1 **“SEC. 202. REGULATORY IMPACT ANALYSES FOR CERTAIN**
 2 **RULES.”;**

3 (B) by redesignating subsections (b) and
 4 (c) as subsections (d) and (e), respectively;

5 (C) by striking subsection (a) and insert-
 6 ing the following:

7 “(a) DEFINITION OF COST.—In this section, the term
 8 ‘cost’ means the cost of compliance and any reasonably
 9 foreseeable indirect costs, including revenues lost, as a re-
 10 sult of a major rule of an agency that is subject to this
 11 section.

12 “(b) REGULATORY IMPACT ANALYSES.—

13 “(1) REQUIREMENT.—Before promulgating any
 14 proposed or final major rule, the agency promul-
 15 gating the major rule shall prepare and publish in
 16 the Federal Register an initial and final regulatory
 17 impact analysis with respect to the major rule.

18 “(2) INITIAL REGULATORY IMPACT ANALYSIS.—
 19 An initial regulatory impact analysis required under
 20 paragraph (1) shall—

21 “(A) accompany the notice of proposed
 22 rulemaking with respect to the major rule that
 23 is the subject of the analysis; and

24 “(B) be open to public comment.

25 “(3) FINAL REGULATORY IMPACT ANALYSIS.—
 26 A final regulatory impact analysis required under

1 paragraph (1) shall accompany the final major rule
2 that is the subject of the analysis.

3 “(c) CONTENT.—Each initial and final regulatory im-
4 pact analysis prepared and published under subsection (b)
5 shall include, with respect to the major rule that is the
6 subject of the analysis—

7 “(1)(A) an analysis of the anticipated benefits
8 and costs of the major rule, which shall be quan-
9 tified to the extent feasible;

10 “(B) an analysis of the benefits and costs of a
11 reasonable number of regulatory alternatives within
12 the range of the discretion of the agency under the
13 statute authorizing the major rule, including alter-
14 natives that—

15 “(i) require no action by the Federal Gov-
16 ernment; and

17 “(ii)(I) use incentives and market-based
18 means to encourage the desired behavior;

19 “(II) provide information based upon
20 which the public can make choices; or

21 “(III) employ other flexible regulatory op-
22 tions that permit the greatest flexibility in
23 achieving the objectives of the statute author-
24 izing the major rule; and

1 “(C) an explanation of how the major rule com-
2 plies with the requirements of section 205;

3 “(2) an assessment of the extent to which—

4 “(A) the costs to State, local, and Tribal
5 governments may be paid with Federal financial
6 assistance (or otherwise paid for by the Federal
7 Government); and

8 “(B) Federal resources are available to
9 carry out the major rule;

10 “(3) estimates of—

11 “(A) any disproportionate budgetary ef-
12 fects of the major rule upon any particular—

13 “(i) regions of the United States;

14 “(ii) State, local, or Tribal govern-
15 ments;

16 “(iii) types of communities, including
17 urban or rural communities; or

18 “(iv) segments of the private sector;
19 and

20 “(B) the effect of the major rule on job
21 creation or job loss, which shall be quantified to
22 the extent feasible; and

23 “(4)(A) a description of the extent of the prior
24 consultation of the agency under section 204 with

1 elected representatives of each affected State, local,
2 or Tribal government;

3 “(B) a summary of the comments and concerns
4 that were presented to the agency orally or in writ-
5 ing by State, local, or Tribal governments; and

6 “(C) a summary of the evaluation by the agen-
7 cy of the comments and concerns described in sub-
8 paragraph (B).”;

9 (D) in subsection (d), as so redesignated,
10 by striking “a statement under subsection (a) is
11 required, the agency shall include in the pro-
12 mulgation a summary of the information con-
13 tained in the statement” and inserting “an
14 analysis under subsection (b) is required, the
15 agency promulgating the major rule shall in-
16 clude in the promulgation a summary of the in-
17 formation contained in the analysis”; and

18 (E) in subsection (e), as so redesignated,
19 by striking “any statement required under sub-
20 section (a) in conjunction with or as a part of
21 any other statement or analysis, provided that
22 the statement or analysis satisfies the provi-
23 sions of subsection (a)” and inserting “any
24 analysis required under subsection (b) in con-
25 junction with, or as a part of, any other state-

1 ment or analysis if the other statement or anal-
 2 ysis satisfies the requirements of subsections
 3 (b) and (c)’’.

4 **SEC. 4. ENHANCED STAKEHOLDER CONSULTATION.**

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

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

9 (2) in subsection (a)—

10 (A) by inserting “, and impacted parties
 11 within the private sector (including small busi-
 12 nesses),” after “on their behalf”; and

13 (B) by striking “Federal intergovernmental
 14 mandates” and inserting “Federal mandates”;
 15 and

16 (3) by amending subsection (c) to read as fol-
 17 lows:

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

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

1 “(2) Agencies shall consult with a wide variety
2 of State, local, and Tribal officials and impacted
3 parties within the private sector (including small
4 businesses). Geographic, political, and other factors
5 that may differentiate varying points of view should
6 be considered.

7 “(3) Agencies should estimate benefits and
8 costs to assist with these consultations. The scope of
9 the consultation should reflect the cost and signifi-
10 cance of the Federal mandate being considered.

11 “(4) Agencies shall, to the extent practicable—

12 “(A) seek out the views of State, local, and
13 Tribal governments, and impacted parties with-
14 in the private sector (including small busi-
15 nesses), on costs, benefits, and risks; and

16 “(B) solicit ideas about alternative meth-
17 ods of compliance and potential flexibilities, and
18 input on whether the Federal regulation will
19 harmonize with and not duplicate similar laws
20 in other levels of government.

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

23 “(6) Agencies may accept electronic submis-
24 sions of comments by relevant parties but may not

1 use those comments as the sole method of satisfying
 2 the guidelines in this subsection.”.

3 **SEC. 5. MAXIMIZE NET BENEFITS OR PROVIDE EXPLA-**
 4 **NATION.**

5 Title II of the Unfunded Mandates Reform Act of
 6 1995 (2 U.S.C. 1531 et seq.) is amended by striking sec-
 7 tion 205 (2 U.S.C. 1535) and inserting the following:

8 **“SEC. 205. MAXIMIZE NET BENEFITS.**

9 “(a) DEFINITION OF COST.—In this section, the term
 10 ‘cost’ has the meaning given the term in section 202(a).

11 “(b) REQUIREMENT.—Before promulgating any pro-
 12 posed or final major rule for which a regulatory impact
 13 analysis is required under section 202, an agency shall
 14 from the alternatives identified and considered under sec-
 15 tion 202(c)(1)(B), select the alternative that maximizes
 16 net benefits, taking into consideration only the costs and
 17 benefits that arise within the scope of the statutory provi-
 18 sion that authorizes the rulemaking.

19 “(c) EXCEPTIONS.—An agency may adopt an alter-
 20 native other than as required under subsection (b) only
 21 if—

22 “(1) the Administrator of the Office of Infor-
 23 mation and Regulatory Affairs approves the adop-
 24 tion by the agency of the alternative; and

25 “(2) the alternative is adopted to—

“(A) account for costs or benefits that cannot be quantified, including costs or benefits related to constitutional or civil rights, provided that the agency identifies all such costs and benefits and explains why those costs and benefits justify the adoption of the alternative; or

“(B) achieve additional benefits or cost reductions, provided that the agency—

“(i) identifies—

“(I) all such additional benefits and the associated costs of those benefits; and

“(II) all such cost reductions and the associated benefits of those cost reductions; and

“(ii) explains why—

“(I) the additional benefits justify the additional costs; or

“(II) the additional cost reductions justify any benefits foregone.”.

SEC. 6. NEW AUTHORITIES AND RESPONSIBILITIES FOR OFFICE OF INFORMATION AND REGULATORY AFFAIRS.

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

1 **“SEC. 208. OFFICE OF INFORMATION AND REGULATORY AF-**
2 **FAIRS RESPONSIBILITIES.**

3 “(a) IN GENERAL.—The Administrator of the Office
4 of Information and Regulatory Affairs (in this section re-
5 ferred to as the ‘Administrator’) shall provide meaningful
6 guidance and oversight so that the major rules of an agen-
7 cy for which a regulatory impact analysis is required under
8 section 202—

9 “(1) are consistent with the principles and re-
10 requirements of this title, as well as other applicable
11 laws; and

12 “(2) and do not conflict with the policies or ac-
13 tions of another agency.

14 “(b) NOTIFICATION.—If the Administrator deter-
15 mines that the major rules of an agency for which a regu-
16 latory impact analysis is required under section 202 do
17 not comply with the principles and requirements of this
18 title, are not consistent with other applicable laws, or con-
19 flict with the policies or actions of another agency, the
20 Administrator shall—

21 “(1) identify areas of noncompliance;

22 “(2) notify the agency; and

23 “(3) request that the agency comply before the
24 agency finalizes the major rule concerned.

25 “(c) ANNUAL STATEMENTS TO CONGRESS ON AGEN-
26 CY COMPLIANCE.—The Administrator shall submit to

1 Congress, including the Committee on Homeland Security
 2 and Governmental Affairs of the Senate and the Com-
 3 mittee on Oversight and Reform of the House of Rep-
 4 resentatives, an annual written report that, for the 1-year
 5 period preceding the report—

6 “(1) details compliance by each agency with the
 7 requirements of this title that relate to major rules
 8 for which a regulatory impact analysis is required by
 9 section 202, including activities undertaken at the
 10 request of the Administrator to improve compliance;
 11 and

12 “(2) contains an appendix detailing compliance
 13 by each agency with section 204.”.

14 **SEC. 7. INITIATION OF RULEMAKING.**

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

17 (1) by redesignating section 209 (2 U.S.C.
 18 1531 note) as section 210; and

19 (2) by inserting after section 208 (2 U.S.C.
 20 1548) the following:

21 **“SEC. 209. INITIATION OF RULEMAKING FOR MAJOR RULES.**

22 “When an agency determines to initiate a rulemaking
 23 that may result in a major rule, the agency shall—

24 “(1) establish an electronic docket for that rule-
 25 making, which may have a physical counterpart; and

1 “(2) publish a notice of initiation of rulemaking
2 in the Federal Register, which shall—

3 “(A) briefly describe the subject and objec-
4 tives of, and the problem to be solved by, the
5 major rule;

6 “(B) refer to the legal authority under
7 which the major rule would be proposed, includ-
8 ing the specific statutory provision that author-
9 izes the rulemaking;

10 “(C) invite interested persons to propose
11 alternatives and other ideas regarding how best
12 to accomplish the objectives of the agency in
13 the most effective manner;

14 “(D) indicate how interested persons may
15 submit written material for the docket; and

16 “(E) appear in the Federal Register not
17 later than 90 days before the date on which the
18 agency publishes a notice of proposed rule-
19 making for the major rule.”.

20 **SEC. 8. INCLUSION OF APPLICATION TO INDEPENDENT**
21 **REGULATORY AGENCIES.**

22 (a) IN GENERAL.—Section 421(1) of the Congres-
23 sional Budget Act of 1974 (2 U.S.C. 658(1)) is amended
24 by striking “, but does not include independent regulatory
25 agencies”.

1 (b) EXEMPTION FOR MONETARY POLICY.—The Un-
 2 funded Mandates Reform Act of 1995 (2 U.S.C. 1501 et
 3 seq.) is amended by inserting after section 5 the following:

4 **“SEC. 6. EXEMPTION FOR MONETARY POLICY.**

5 “Nothing in title II, III, or IV shall apply to rules
 6 that concern monetary policy proposed or implemented by
 7 the Board of Governors of the Federal Reserve System
 8 or the Federal Open Market Committee.”.

9 **SEC. 9. JUDICIAL REVIEW.**

10 Title IV of the Unfunded Mandates Reform Act of
 11 1995 is amended by striking section 401 (2 U.S.C. 1571)
 12 and inserting the following:

13 **“SEC. 401. JUDICIAL REVIEW.**

14 “(a) IN GENERAL.—A person that is aggrieved by
 15 final agency action in adopting a major rule that is subject
 16 to section 202 is entitled to judicial review of whether the
 17 agency complied with section 202(b), 202(c)(1), or 205
 18 with respect to the rule.

19 “(b) SCOPE OF REVIEW.—Chapter 7 of title 5,
 20 United States Code, shall govern the scope of judicial re-
 21 view under subsection (a).

22 “(c) JURISDICTION.—Each court that has jurisdic-
 23 tion to review a rule for compliance with section 553 of
 24 title 5, United States Code, or under any other provision

1 of law, shall have jurisdiction to review a claim brought
 2 under subsection (a).

3 “(d) RELIEF AVAILABLE.—In granting relief in an
 4 action under this section, a court shall order the agency
 5 that promulgated the major rule that is under review to
 6 take remedial action consistent with chapter 7 of title 5,
 7 United States Code.”.

8 **SEC. 10. APPLYING SUBSTANTIVE POINT OF ORDER TO PRI-**
 9 **VATE SECTOR MANDATES.**

10 Section 425(a)(2) of the Congressional Budget Act
 11 of 1974 (2 U.S.C. 658d(a)(2)) is amended—

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

14 (2) by striking “section 424(a)(1)” and insert-
 15 ing “subsection (a)(1) or (b)(1) of section 424”.

16 **SEC. 11. EFFECTIVE DATE.**

17 Sections 3, 4, 5, and 7 of this Act and the amend-
 18 ments made by those sections shall take effect on the date
 19 that is 120 days after the date of enactment of this Act.

○