CAPITOL RESEARCH

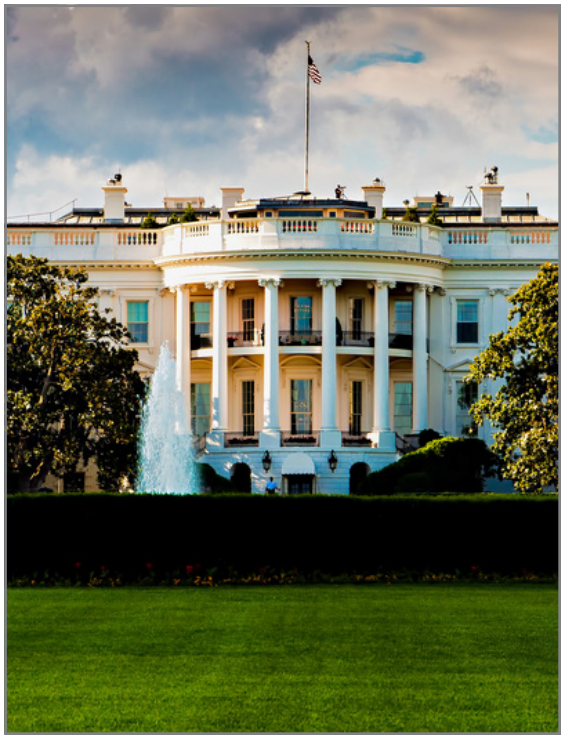
FEDERAL AFFAIRS POLICY

ENSURING FEDERAL CONSULTATION WITH THE STATES

Regulatory reform has been a major theme of President Donald Trump's administration and a longstanding priority of The Council of State Governments. CSG often hears from state leaders that when it comes to Washington, D.C., states are treated like stakeholders rather than partners.

Echoing that point, Tennessee Senate Majority Leader and former CSG National Chair Sen. Mark Norris stated in his testimony last year before the Senate Committee on Environment and Public Works Subcommittee on Superfund, Waste Management, and Regulatory Oversight, "we need to take a closer look at what we call 'consultation' with states."

In the first days of the new administration, the president took several executive actions in fulfillment of his regulatory reform agenda. CSG is closely monitoring these initiatives, and is committed to working with the administration to foster a strong state-federal partnership and ensure that states are fully engaged through the entire federal regulatory process—from initial development of a rule through implementation.



Early Executive Actions

One of Trump's first actions was the issuance of a regulatory freeze memorandum on Jan. 20, 2017, that halted all pending rules, "In order to ensure that the president's appointees or designees have the opportunity to review any new or pending regulations." On Jan. 30, 2017, the president also issued an executive order directing federal agencies to scrap two regulations for every one new regulation created in order to reduce regulatory action and costs. This executive order also established a regulatory budget that allows the president to limit how much is spent on federal rulemaking each year.

On Feb. 24, 2017, Trump issued a second executive order that established task forces at agencies across the federal government to identify regulations that should be repealed or replaced. The executive order builds off of an Obama administration retrospective regulatory review that resulted in an estimated $28 billion in net five-year savings.

On March 1, 2017, Trump issued a third executive order titled, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." In the policy section of this executive order, related to the Clean Water Act, Trump highlighted the fundamental considerations that must be taken into account when promulgating a rule. In this section, he recognizes the need for "minimizing regulatory uncertainty" and "showing due regard for the roles of the Congress and the States under the Constitution."

These actions regarding regulatory reform will have major implications for states. Highlighting the importance of both federalism and cost-benefit analysis opens the door for reforms beneficial to the states in the federal rulemaking process. While these executive orders are important steps toward keeping faith with the established principles of federalism, some policymakers believe Congress should follow suit and consider legislative action to codify processes ensuring adequate state input.

Cass Sunstein, who served as administrator of the Office of Information and Regulatory Affairs for

President Barack Obama wrote, "A thoroughgoing reform effort would require legislative reforms, not merely executive action," and, "Without stronger congressional efforts, any steps from the President will have a limited effect[1]."

What Can Congress Do?

In fulfillment of that objective and consistent with the Statement of Principles on Federalism, CSG has placed a specific emphasis on urging Congress to update the Unfunded Mandates Reform Act, or UMRA, of 1995 to ensure state views are taken into account in the development of proposed regulations and legislation.

The Unfunded Mandates Reform Act defines a federal mandate as any provision in law or regulation that would do any of the following:

- Impose an enforceable duty on state, local or tribal governments or on private-sector entities;
- Reduce or eliminate an authorization of appropriations to cover the costs of complying with existing mandates;
- Increase the stringency of conditions that apply to the provision of funds to state, local or tribal governments through certain large mandatory programs or make cuts in federal funding for those mandatory programs if the affected governments lack the flexibility to alter the programs.

The number and costs of unfunded mandates are striking. The Congressional Budget Office, or CBO, reports that with respect to legislation alone, since 2006, 167 laws were enacted with at least one intergovernmental mandate as defined under the UMRA. Estimates of the total costs of unfunded mandates vary, but are substantial.

Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "federal mandates" that may result in expenditures to state, local and tribal governments. However, unanticipated costs still arise, such as accounting costs and other costs associated with the full expense of regulatory compliance.

To ensure that the purpose of the UMRA is fulfilled, these required written assessments should be rigorously and thoroughly prepared so that all costs are captured accurately.

Susan Dudley, also a former administrator of the Office of Information and Regulatory Affairs and director of the George Washington University Regulatory Studies Center, provided an example in her testimony before the House Committee on Oversight and Government Reform.

"Another regulation issued during my tenure that a reasonable person might consider burdensome on states was an HHS rule eliminating reimbursement to states under Medicaid for school-based administration expenditures and certain transportation costs," she said. "Despite the elimination of approximately $635 million in federal funding, the rule was not covered by UMRA because it 'did not require states to replace that federal funding with state funding or take any particular steps.'"

State leaders are challenged to balance budgets, and these difficulties are compounded by unanticipated economic costs as the result of federal mandates. Congress should consider broadening the definition of a mandate under the UMRA, or including a general statement of intent to make it clear that these definitions are meant to cover all costs. Lastly, UMRA analyses should be required for all final rules, including those proposed by the independent agencies, according to CSG's Statement of Principles on Federalism.

"Connecticut ratified the United States' constitution on Jan. 9, 1788," said Bob Godfrey, deputy speaker pro tempore of the Connecticut House of Representatives and co-chair of CSG's Intergovernmental Affairs Committee. "Ever since, the balance between the states and the federal government has been contentious."

"The federal government continues overreaching with laws and regulations that override legitimate state sovereignty of long standing, including our budgets," Godfrey said. "It must respect the policy decisions of states within their own jurisdictions. It must consult with states to ensure state laws are not pre-empted, nor too fiscally onerous. I ask that it reinvigorate the White House Intergovernmental Affairs Office. It should update the Unfunded Mandates Reform Act. It should stop imposing costs on our already hard-pressed state taxpayers, and require the Congressional Budget Office to provide comprehensive analysis of those costs before taking action."

Recently, the Association of Air Pollution Control Agencies, or AAPCA, was awarded a CSG 21st Century Foundation Grant to develop a comprehensive resource for state leaders from all three branches regarding opportunities to engage with federal energy and environmental agencies through Federal Advisory Committees, or FACs. FACs play a critical role in the development of policy, regulation and science at many federal departments and agencies and can help state officials navigate among federal agencies, promote principles of federalism, and provide state officials with a potential "seat at the table" with their federal counterparts in the early stages of regulatory or intergovernmental decision making.

Improving Consultation and Coordination

The consultation process required of federal agencies does not always ensure states can make adjustments to their priorities smoothly and plan ahead. Federal agencies should reach out to appropriate state and local officials early in the process when they are developing rules, ideally before the rule is proposed for public comment, as well as afford the opportunity to submit additional comments after it is proposed.

"Increasingly, Clean Air Act standards implemented by state, local and tribal agencies represent a significant share of federal mandates as well as costs and benefits associated with overall regulation, said Clint Woods, executive director of the Association of Air Pollution Control Agencies—a CSG affiliate. "Despite this fact, many of the most resource-intensive and controversial regulations have not benefitted from early, meaningful coordination with co-regulators, which could be remedied through expanded consultations and expanded participation of state, local and tribal experts on relevant federal advisory committees."

The absence of early consultation results in mandates limiting state and local flexibility to address more pressing local problems like crime and education. States are often forced to retroactively find the money to pay the bills and compensate by foregoing discretionary actions that may be vitally important to their citizens locally. In addition, these mandates may come in a "one size fits all" box that can stifle innovative efforts by states to address problems that involve unique local considerations. An example is the Every Student Succeeds Act's Accountability and State Plans Rule, recently overturned by Congress. The rule addressed a number of issues and had far reaching consequences for state education administrators. CSG's Education and Workforce Development Public Policy Committee expressed concerns that the rule eroded congressional intent to give flexibility back to the states to determine the best educational strategies for each state's students.

"The number of regulations issued by the federal government has increased dramatically in recent years; more often than not, without any involvement from the states," said Tennessee state Sen. Doug Overbey, co-chair of CSG's Intergovernmental Affairs Committee. "When this happens, states are adversely impacted and problems result. Such actions are contrary to the letter and the spirit of the Unfunded Mandates Reform Act and point to the need for reform of the law. An active and lively federalism requires greater interaction and cooperation between federal regulators and states to assure local needs and goals are met rather than frustrated. The current act should be amended to assure federal regulators consult with the states to meet this goal."

Time to Act is Now

There is bipartisan legislation making its way through Congress, H.R. 50, the Unfunded Mandates Information and Transparency Act, sponsored by Rep. Virginia Foxx and Rep. Henry Cuellar that aims to update and strengthen the UMRA to make it a more effective instrument to reduce unfunded legislative and regulatory mandates. Importantly, H.R. 50 addresses the UMRA's narrow coverage, exemptions and loopholes. The legislation has passed the House for the past four sessions of Congress.

In the past year, CSG had the opportunity to chair a coalition of state and local government organizations—also known as the Big 7—and has made updating the UMRA a priority. Along with CSG, the Big 7 organizations include the National Governors Association, National Conference of State Legislatures, National Association of Counties, National League of Cities, U.S. Conference of Mayors and the International City/County Management Association. The Big 7 sent a joint letter to H.R. 50's congressional sponsors applauding their efforts to enact the legislation. In addition to updating the UMRA, the Big 7 coalition has also worked to identify recommendations on how to improve the state-federal regulatory process that do not require legislative action, including: encouraging oversight entities to conduct assessments on agency outreach and coordination with state and local governments, identifying best practices for intergovernmental cooperation, and establishing consistent state-federal advisory committees within federal agencies.

CSG's Statement of Principles on Federalism outlines the organization's desire to limit unnecessary federal intrusions into areas of state responsibility and to foster effective cooperation with the federal government in areas of shared jurisdiction. These principles guide CSG's efforts as they identify common-sense regulatory reforms that balance health and human safety with economic growth while capitalizing on state experience and expertise.

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ENDNOTES

[1] Hahn, Robert W. and Cass R. Sunstein (2002) "A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis," University of Pennsylvania Law Review, 150:1539.