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116TH CONGRESS
2^D SESSION

S. 4077

[Report No. 116–333]

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, Mr. LANKFORD, and Mr. SCOTT of Florida) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

DECEMBER 16, 2020

Reported by Mr. JOHNSON, with an amendment

[Insert the part printed in *italic*]

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”.

1 **SEC. 2. FINDINGS.**

2 Congress finds the following:

3 (1) The public has a right to know the benefits
4 and costs of regulation. Effective regulatory pro-
5 grams provide important benefits to the public, in-
6 cluding protecting the environment, worker safety,
7 and human health. Regulations also impose signifi-
8 cant costs on individuals, employers, and State,
9 local, and Tribal governments, diverting resources
10 from other important priorities.

11 (2) Better regulatory analysis and review
12 should improve the quality of agency decisions, in-
13 creasing the benefits and reducing unwarranted
14 costs of regulation.

15 (3) Disclosure and scrutiny of key information
16 underlying agency decisions should make the Fed-
17 eral Government more accountable to the public it
18 serves.

19 **SEC. 3. REGULATORY IMPACT ANALYSES FOR CERTAIN**
20 **RULES.**

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

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

25 (2) in section 3 (2 U.S.C. 1502)—

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

3 (B) in paragraph (2), by striking the pe-
4 riod at the end and inserting “; and”; and

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

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

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

17 “(B) a major increase in costs or prices for
18 consumers, individual industries, Federal,
19 State, local, or Tribal government agencies, or
20 geographic regions; or

21 “(C) significant adverse effects on competi-
22 tion, employment, investment, productivity, in-
23 novation, public health and safety, or the ability
24 of United States-based enterprises to compete

1 with foreign-based enterprises in domestic and
2 export markets.”; and

3 (3) in section 202 (2 U.S.C. 1532)—

4 (A) by striking the section heading and in-
5 serting the following:

6 **“SEC. 202. REGULATORY IMPACT ANALYSES FOR CERTAIN**
7 **RULES.”;**

8 (B) by redesignating subsections (b) and
9 (c) as subsections (d) and (e), respectively;

10 (C) by striking subsection (a) and insert-
11 ing the following:

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

17 “(b) REGULATORY IMPACT ANALYSES.—

18 “(1) REQUIREMENT.—Before promulgating any
19 proposed or final major rule, the agency promul-
20 gating the major rule shall prepare and publish in
21 the Federal Register an initial and final regulatory
22 impact analysis with respect to the major rule.

23 “(2) INITIAL REGULATORY IMPACT ANALYSIS.—

24 An initial regulatory impact analysis required under
25 paragraph (1) shall—

1 “(A) accompany the notice of proposed
2 rulemaking with respect to the major rule that
3 is the subject of the analysis; and

4 “(B) be open to public comment.

5 “(3) FINAL REGULATORY IMPACT ANALYSIS.—

6 A final regulatory impact analysis required under
7 paragraph (1) shall accompany the final major rule
8 that is the subject of the analysis.

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

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

16 “(B) an analysis of the benefits and costs of a
17 reasonable number of regulatory alternatives within
18 the range of the discretion of the agency under the
19 statute authorizing the major rule, including alter-
20 natives that—

21 “(i) require no action by the Federal Gov-
22 ernment; and

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

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

3 “(III) employ other flexible regulatory op-
4 tions that permit the greatest flexibility in
5 achieving the objectives of the statute author-
6 izing the major rule; and

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

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

10 “(A) the costs to State, local, and Tribal
11 governments may be paid with Federal financial
12 assistance (or otherwise paid for by the Federal
13 Government); and

14 “(B) Federal resources are available to
15 carry out the major rule;

16 “(3) estimates of—

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

19 “(i) regions of the United States;

20 “(ii) State, local, or Tribal govern-
21 ments;

22 “(iii) types of communities, including
23 urban or rural communities; or

24 “(iv) segments of the private sector;
25 and

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

4 “(4)(A) a description of the extent of the prior
5 consultation of the agency under section 204 with
6 elected representatives of each affected State, local,
7 or Tribal government;

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

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

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

23 (E) in subsection (e), as so redesignated,
24 by striking “any statement required under sub-
25 section (a) in conjunction with or as a part of

1 any other statement or analysis, provided that
2 the statement or analysis satisfies the provi-
3 sions of subsection (a)” and inserting “any
4 analysis required under subsection (b) in con-
5 junction with, or as a part of, any other state-
6 ment or analysis if the other statement or anal-
7 ysis satisfies the requirements of subsections
8 (b) and (c)”.

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

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

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

14 (2) in subsection (a)—

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

18 (B) by striking “Federal intergovernmental
19 mandates” and inserting “Federal mandates”;
20 and

21 (3) by amending subsection (c) to read as fol-
22 lows:

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

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

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

11 “(3) Agencies should estimate benefits and
12 costs to assist with these consultations. The scope of
13 the consultation should reflect the cost and signifi-
14 cance of the Federal mandate being considered.

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

16 “(A) seek out the views of State, local, and
17 Tribal governments, and impacted parties with-
18 in the private sector (including small busi-
19 nesses), on costs, benefits, and risks; and

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

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

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

7 **SEC. 5. MAXIMIZE NET BENEFITS OR PROVIDE EXPLA-**
8 **NATION.**

9 Title II of the Unfunded Mandates Reform Act of
10 1995 (2 U.S.C. 1531 et seq.) is amended by striking sec-
11 tion 205 (2 U.S.C. 1535) and inserting the following:

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

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

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

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

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

4 “(2) the alternative is adopted to—

5 “(A) account for costs or benefits that can-
6 not be quantified, including costs or benefits re-
7 lated to constitutional or civil rights, provided
8 that the agency identifies all such costs and
9 benefits and explains why those costs and bene-
10 fits justify the adoption of the alternative; or

11 “(B) achieve additional benefits or cost re-
12 ductions, provided that the agency—

13 “(i) identifies—

14 “(I) all such additional benefits
15 and the associated costs of those ben-
16 efits; and

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

20 “(ii) explains why—

21 “(I) the additional benefits jus-
22 tify the additional costs; or

23 “(II) the additional cost reduc-
24 tions justify any benefits foregone.”.

1 “(2) notify the agency; and

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

4 “(c) ANNUAL STATEMENTS TO CONGRESS ON AGEN-
5 CY COMPLIANCE.—The Administrator shall submit to
6 Congress, including the Committee on Homeland Security
7 and Governmental Affairs of the Senate and the Com-
8 mittee on Oversight and Reform of the House of Rep-
9 resentatives, an annual written report that, for the 1-year
10 period preceding the report—

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

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

19 **SEC. 7. INITIATION OF RULEMAKING.**

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

22 (1) by redesignating section 209 (2 U.S.C.
23 1531 note) as section 210; and

24 (2) by inserting after section 208 (2 U.S.C.
25 1548) the following:

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

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

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

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

8 “(A) briefly describe the subject and objec-
9 tives of, and the problem to be solved by, the
10 major rule;

11 “(B) refer to the legal authority under
12 which the major rule would be proposed, includ-
13 ing the specific statutory provision that author-
14 izes the rulemaking;

15 “(C) invite interested persons to propose
16 alternatives and other ideas regarding how best
17 to accomplish the objectives of the agency in
18 the most effective manner;

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

21 “(E) appear in the Federal Register not
22 later than 90 days before the date on which the
23 agency publishes a notice of proposed rule-
24 making for the major rule.”.

1 **SEC. 8. INCLUSION OF APPLICATION TO INDEPENDENT**
2 **REGULATORY AGENCIES.**

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

7 (b) EXEMPTION FOR MONETARY POLICY.—The Un-
8 funded Mandates Reform Act of 1995 (2 U.S.C. 1501 et
9 seq.) is amended by inserting after section 5 the following:
10 **“SEC. 6. EXEMPTION FOR MONETARY POLICY.**

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

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

16 Title IV of the Unfunded Mandates Reform Act of
17 1995 is amended by striking section 401 (2 U.S.C. 1571)
18 and inserting the following:

19 **“SEC. 401. JUDICIAL REVIEW.**

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

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

4 “(c) JURISDICTION.—Each court that has jurisdic-
 5 tion to review a rule for compliance with section 553 of
 6 title 5, United States Code, or under any other provision
 7 of law, shall have jurisdiction to review a claim brought
 8 under subsection (a).

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

14 **SEC. 10. APPLYING SUBSTANTIVE POINT OF ORDER TO PRI-**
 15 **VATE SECTOR MANDATES.**

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

18 (1) by striking “Federal intergovernmental
 19 mandates” and inserting “Federal mandates”; and

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

22 **SEC. 11. EFFECTIVE DATE.**

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

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