

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 373
OFFERED BY MR. LANKFORD OF OKLAHOMA**

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

2 (a) **SHORT TITLE.**—This Act may be cited as the
3 “Unfunded Mandates Information and Transparency Act
4 of 2011”.

5 (b) **TABLE OF CONTENTS.**—The table of contents for
6 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Purpose.
- Sec. 3. Expanding the scope of definition of Federal mandates.
- Sec. 4. Applying reporting requirements to policies involving changes in conditions of grant aid.
- Sec. 5. Expanding the scope of legislative reporting requirements to include indirect costs.
- Sec. 6. Expanding the scope of reporting requirements to include regulations imposed by independent regulatory agencies.
- Sec. 7. Amendments to replace Office of Management and Budget with Office of Information and Regulatory Affairs.
- Sec. 8. Applying substantive point of order to private sector mandates and establishing parallel enforcement mechanisms in the House and Senate.
- Sec. 9. Regulatory process and principles.
- Sec. 10. Expanding the scope of statements to accompany significant regulatory actions to include indirect costs and other information.
- Sec. 11. Enhanced stakeholder consultation.
- Sec. 12. New authorities and responsibilities for Office of Information and Regulatory Affairs.
- Sec. 13. Retrospective analysis of existing rules.
- Sec. 14. Expansion of judicial review.

1 **SEC. 2. PURPOSE.**

2 The purpose of this Act is—

3 (1) to improve the quality of the deliberations
4 of Congress with respect to proposed Federal man-
5 dates by—

6 (A) providing Congress and the public with
7 more complete information about the effects of
8 such mandates; and

9 (B) ensuring that Congress acts on such
10 mandates only after focused deliberation on
11 their effects; and

12 (2) to enhance the ability of Congress and the
13 public to identify Federal mandates that may impose
14 undue harm on consumers, workers, employers,
15 small businesses, and State, local, and tribal govern-
16 ments.

17 **SEC. 3. EXPANDING THE SCOPE OF DEFINITION OF FED-**
18 **ERAL MANDATES.**

19 (a) REVISION TO DEFINITION OF FEDERAL INTER-
20 GOVERNMENTAL MANDATE.—Section 421(5)(A)(i) of the
21 Congressional Budget Act of 1974 (2 U.S.C. 658(5)(A)(i))
22 is amended by striking “, except—” and all that follows
23 through “subparagraph (B))”.

24 (b) REVISION TO DEFINITION OF FEDERAL PRIVATE
25 SECTOR MANDATE.—Section 421(7)(A) of such Act (2

1 U.S.C. 658(7)(A)) is amended by striking “except—” and
2 all that follows through “Federal program”.

3 **SEC. 4. APPLYING REPORTING REQUIREMENTS TO POLI-**
4 **CIES INVOLVING CHANGES IN CONDITIONS**
5 **OF GRANT AID.**

6 Section 423(c) of the Congressional Budget Act of
7 1974 (2 U.S.C. 658b(c)) is amended by striking “and”
8 at the end of paragraph (2), by striking the period and
9 inserting “; and” at the end of paragraph (3), and by add-
10 ing at the end the following new paragraph:

11 “(4) an assessment comparing the authorized
12 level of funding in the bill or resolution to the pro-
13 spective costs of carrying out any changes to a con-
14 dition of Federal assistance being imposed on State,
15 local, or tribal governments participating in the Fed-
16 eral assistance program concerned or, in the case of
17 a bill or joint resolution that authorizes such sums
18 as are necessary, an assessment of an estimated
19 level of funding compared to such costs.”.

20 **SEC. 5. EXPANDING THE SCOPE OF LEGISLATIVE REPORT-**
21 **ING REQUIREMENTS TO INCLUDE INDIRECT**
22 **COSTS.**

23 (a) **EXPANSION OF DUTIES OF CONGRESSIONAL**
24 **COMMITTEES.**—Section 423(c) of the Congressional

1 Budget Act of 1974 (2 U.S.C. 658b(c)) (as amended by
2 section 4) is further amended—

3 (1) in its side heading, by inserting “and Other
4 Costs” after “Mandates”; and

5 (2) by striking “and” at the end of paragraph
6 (3), by striking the period and inserting “; and” at
7 the end of paragraph (4), and by adding at the end
8 the following new paragraph:

9 “(5) an identification and description of any
10 reasonably foreseeable indirect costs to State, local,
11 or tribal governments, or to the private sector, in-
12 curred as a result of implementing any Federal man-
13 date in the bill or joint resolution.”.

14 (b) EXPANSION OF DUTIES OF DIRECTOR OF CON-
15 GRESSIONAL BUDGET OFFICE.—Section 424 of the Con-
16 gressional Budget Act of 1974 is amended by adding at
17 the end the following new subsection:

18 “(e) INDIRECT COSTS.—For any bill or joint resolu-
19 tion of a public character reported by any committee of
20 authorization of the Senate or the House of Representa-
21 tives which includes any Federal mandate, the Director
22 of the Congressional Budget Office shall prepare and sub-
23 mit to the committee a statement, for display purposes
24 only, of the reasonably foreseeable indirect costs of such
25 mandate in the fiscal year in which such Federal mandate

1 in the bill or joint resolution (or in any necessary imple-
2 menting regulation) would first be effective or in any of
3 the 4 fiscal years following such fiscal year, and briefly
4 explain the estimate.”.

5 (c) DEFINITION.—Section 421 of the Congressional
6 Budget Act of 1974 (2 U.S.C. 658) is amended by redesi-
7 gnating paragraphs (10) through (13) as paragraphs (11)
8 through (14), respectively, and by adding after paragraph
9 (9) the following new paragraph:

10 “(10) REASONABLY FORESEEABLE INDIRECT
11 COSTS.—The term ‘reasonably foreseeable indirect
12 costs’, with respect to a Federal mandate—

13 “(A) means costs to the affected entities
14 resulting from the implementation of the man-
15 date, other than the direct costs incurred by
16 such entities to carry out the mandate; and

17 “(B) includes lost income and secondary
18 monetary costs resulting from the mandate.”.

19 **SEC. 6. EXPANDING THE SCOPE OF REPORTING REQUIRE-**
20 **MENTS TO INCLUDE REGULATIONS IMPOSED**
21 **BY INDEPENDENT REGULATORY AGENCIES.**

22 Paragraph (1) of section 421 of the Congressional
23 Budget Act of 1974 (2 U.S.C. 658) is amended by striking
24 “, but does not include independent regulatory agencies”.

1 **SEC. 7. AMENDMENTS TO REPLACE OFFICE OF MANAGE-**
2 **MENT AND BUDGET WITH OFFICE OF INFOR-**
3 **MATION AND REGULATORY AFFAIRS.**

4 The Unfunded Mandates Reform Act of 1995 (Public
5 Law 104–4; 2 U.S.C. 1511 et seq.) is amended—

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

7 (A) in the subsection heading, by striking
8 “OFFICE OF MANAGEMENT AND BUDGET” and
9 inserting “OFFICE OF INFORMATION AND REG-
10 ULATORY AFFAIRS”; and

11 (B) by striking “Director of the Office of
12 Management and Budget” and inserting “Ad-
13 ministrator of the Office of Information and
14 Regulatory Affairs”;

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

16 (A) in the subsection heading, by striking
17 “OMB”; and

18 (B) by striking “Director of the Office of
19 Management and Budget” and inserting “Ad-
20 ministrator of the Office of Information and
21 Regulatory Affairs”; and

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

1 **SEC. 8. APPLYING SUBSTANTIVE POINT OF ORDER TO PRI-**
2 **VATE SECTOR MANDATES AND ESTAB-**
3 **LISHING PARALLEL ENFORCEMENT MECHA-**
4 **NISMS IN THE HOUSE AND SENATE.**

5 (a) EXPANSION OF LEGISLATION SUBJECT TO POINT
6 OF ORDER.—Section 425 of the Congressional Budget Act
7 of 1974 (2 U.S.C. 658d) is amended—

8 (1) in subsection (a)(2)—

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

12 (B) by inserting “or 424(b)(1)” after “sec-
13 tion 424(a)(1)”;

14 (2) in subsection (c)(2)—

15 (A) by inserting “OR HOUSE OF REP-
16 RESENTATIVES” after “SENATE” in the side
17 heading; and

18 (B) by inserting “or Member of the House
19 of Representatives” after “any Senator”;

20 (3) by repealing subsection (d) and inserting
21 the following:

22 “(d) DETERMINATIONS OF APPLICABILITY TO PEND-
23 ING LEGISLATION.—For purposes of this section—

24 “(1) in the Senate, the presiding officer of the
25 Senate shall consult with the Committee on Home-
26 land Security and Governmental Affairs; and

1 “(2) in the House of Representatives, the pre-
2 siding officer of the House shall consult with the
3 Committee on Oversight and Government Reform;
4 to the extent practicable, on questions concerning the ap-
5 plicability of this part to a pending bill, joint resolution,
6 amendment, motion, or conference report.”;

7 (4) in subsection (e), by inserting “or the
8 House of Representatives” after “Senate” and by in-
9 serting “of its House” after “Committee on the
10 Budget”.

11 (b) QUESTION OF CONSIDERATION.—Section
12 426(b)(3) of the Congressional Budget Act of 1974 is
13 amended by inserting before the period the following: “un-
14 less, in the case of a reported bill or joint resolution, or
15 a rule or order providing for the consideration of a bill
16 or joint resolution, the statement of the Director under
17 section 425(a)(1) indicates that the direct costs of the
18 mandates in such bill or joint resolution are below the ap-
19 plicable thresholds set forth in section 424”.

20 **SEC. 9. REGULATORY PROCESS AND PRINCIPLES.**

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

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

24 “Each agency shall, unless otherwise expressly pro-
25 hibited by law, assess the effects of Federal regulatory ac-

1 tions on State, local, and tribal governments and the pri-
2 vate sector (other than to the extent that such regulations
3 incorporate requirements specifically set forth in law) in
4 accordance with the following principles:

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

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

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

22 “(4) If an agency determines that a regulation
23 is the best available method of achieving the regu-
24 latory objective, it shall design its regulations in the
25 most cost-effective manner to achieve the regulatory

1 objective. In doing so, each agency shall consider in-
2 centives for innovation, consistency, predictability,
3 the costs of enforcement and compliance (to the gov-
4 ernment, regulated entities, and the public), flexi-
5 bility, distributive impacts, and equity.

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

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

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

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

1 “(9) Each agency shall tailor its regulations to
2 minimize the costs of the cumulative impact of regu-
3 lations.

4 “(10) Each agency shall draft its regulations to
5 be simple and easy to understand, with the goal of
6 minimizing the potential for uncertainty and litiga-
7 tion arising from such uncertainty.”.

8 **SEC. 10. EXPANDING THE SCOPE OF STATEMENTS TO AC-**
9 **COMPANY SIGNIFICANT REGULATORY AC-**
10 **TIONS TO INCLUDE INDIRECT COSTS AND**
11 **OTHER INFORMATION.**

12 (a) IN GENERAL.—Subsection (a) of section 202 of
13 the Unfunded Mandates Reform Act of 1995 (2 U.S.C.
14 1532) is amended to read as follows:

15 “(a) IN GENERAL.—Unless otherwise expressly pro-
16 hibited by law, before promulgating any general notice of
17 proposed rulemaking or any final rule, or within six
18 months after promulgating any final rule that was not pre-
19 ceded by a general notice of proposed rulemaking, if the
20 proposed rulemaking or final rule includes a Federal man-
21 date that may result in direct or reasonably foreseeable
22 indirect costs to State, local, or tribal governments, in the
23 aggregate, or to the private sector, of \$100,000,000 or
24 more in any 1 year, the agency shall prepare a written
25 statement containing the following:

1 “(1) The text of the draft regulatory action, to-
2 gether with a reasonably detailed description of the
3 need for the regulatory action and an explanation of
4 how the regulatory action will meet that need.

5 “(2) An assessment of the potential costs and
6 benefits of the regulatory action, including an expla-
7 nation of the manner in which the regulatory action
8 is consistent with a statutory mandate and avoids
9 undue interference with State, local, and tribal gov-
10 ernments in the exercise of their governmental func-
11 tions.

12 “(3) A qualitative and quantitative assessment,
13 including the underlying analysis, of benefits antici-
14 pated from the regulatory action (such as the pro-
15 motion of the efficient functioning of the economy
16 and private markets, the enhancement of health and
17 safety, the protection of the natural environment,
18 and the elimination or reduction of discrimination or
19 bias).

20 “(4) A qualitative and quantitative assessment,
21 including the underlying analysis, of costs antici-
22 pated from the regulatory action (such as the direct
23 and indirect cost both to the Government in admin-
24 istering the regulation and to businesses and others
25 in complying with the regulation, and any adverse

1 effects on the efficient functioning of the economy,
2 private markets (including productivity, employment,
3 and international competitiveness), health, safety,
4 and the natural environment);

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

8 “(A) the future compliance costs of the
9 Federal mandate; and

10 “(B) any disproportionate budgetary ef-
11 fects of the Federal mandate upon any par-
12 ticular regions of the nation or particular State,
13 local, or tribal governments, urban or rural or
14 other types of communities, or particular seg-
15 ments of the private sector.

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

20 “(B) A detailed summary of the comments and
21 concerns that were presented by the private sector
22 and State, local, or tribal governments either orally
23 or in writing to the agency.

24 “(C) A detailed summary of the agency’s eval-
25 uation of those comments and concerns.

1 “(7) A detailed summary of how the agency
2 complied with each of the regulatory principles de-
3 scribed in section 201.”.

4 (b) REQUIREMENT FOR DETAILED SUMMARY.—Sub-
5 section (b) of section 202 of such Act is amended by in-
6 serting “detailed” before “summary”.

7 **SEC. 11. ENHANCED STAKEHOLDER CONSULTATION.**

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

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

12 (2) in subsection (a)—

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

16 (B) by striking “Federal intergovernmental
17 mandates” and inserting “Federal mandates”;
18 and

19 (3) by amending subsection (c) to read as fol-
20 lows:

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

24 “(1) Consultations shall take place as early as
25 possible, before issuance of a notice of proposed rule-

1 making, continue through the final rule stage, and
2 be integrated explicitly into the rulemaking process.

3 “(2) Agencies shall consult with a wide variety
4 of State, local, and tribal officials and impacted par-
5 ties within the private sector (including small busi-
6 nesses). Geographic, political, and other factors that
7 may differentiate varying points of view should be
8 considered.

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

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

14 “(A) seek out the views of State, local, and
15 tribal governments, and impacted parties within
16 the private sector (including small business), on
17 costs, benefits, and risks; and

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

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

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

5 **SEC. 12. NEW AUTHORITIES AND RESPONSIBILITIES FOR**
6 **OFFICE OF INFORMATION AND REGULATORY**
7 **AFFAIRS.**

8 Section 208 of the Unfunded Mandates Reform Act
9 of 1995 (2 U.S.C. 1538) is amended to read as follows:
10 **“SEC. 208. OFFICE OF INFORMATION AND REGULATORY AF-**
11 **FAIRS RESPONSIBILITIES.**

12 “(a) IN GENERAL.—The Administrator of the Office
13 of Information and Regulatory Affairs shall provide mean-
14 ingful guidance and oversight so that each agency’s regu-
15 lations are consistent with the principles and requirements
16 of this title, as well as other applicable laws, and do not
17 conflict with the policies or actions of another agency. If
18 the Administrator determines that an agency’s regulations
19 do not comply with such principles and requirements, are
20 not consistent with other applicable laws, or conflict with
21 the policies or actions of another agency, the Adminis-
22 trator shall identify areas of non-compliance, notify the
23 agency, and request that the agency comply before the
24 agency finalizes the regulation concerned.

1 “(b) ANNUAL STATEMENTS TO CONGRESS ON AGEN-
2 CY COMPLIANCE.—The Director of the Office of Informa-
3 tion and Regulatory Affairs annually shall submit to Con-
4 gress, including the Committee on Homeland Security and
5 Governmental Affairs of the Senate and the Committee
6 on Oversight and Government Reform of the House of
7 Representatives, a written report detailing compliance
8 with the requirements of this title by each agency, includ-
9 ing activities undertaken at the request of the Director
10 to improve compliance, during the preceding reporting pe-
11 riod. The report shall also contain an appendix detailing
12 compliance by each agency with section 204.”.

13 **SEC. 13. RETROSPECTIVE ANALYSIS OF EXISTING RULES.**

14 The Unfunded Mandates Reform Act of 1995 (Public
15 Law 104–4; 2 U.S.C. 1511 et seq.) is amended—

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

17 and

18 (2) by inserting after section 208 the following

19 new section 209:

20 **“SEC. 209. RETROSPECTIVE ANALYSIS OF EXISTING FED-**
21 **ERAL MANDATES.**

22 “(a) REQUIREMENT.—At the request of the chairman
23 or ranking minority member of a standing or select com-
24 mittee of the House of Representatives or the Senate, an

1 agency shall conduct a retrospective analysis of an existing
2 Federal mandate issued by an agency.

3 “(b) REPORT.—Each agency conducting a retrospec-
4 tive analysis of existing Federal mandates pursuant to
5 subsection (a) shall submit to the chairman of the relevant
6 committee, Congress, and the Comptroller General a re-
7 port containing, with respect to each Federal mandate cov-
8 ered by the analysis—

9 “(1) a copy of the Federal mandate;

10 “(2) the continued need for the Federal man-
11 date;

12 “(3) the nature of comments or complaints re-
13 ceived concerning the Federal mandate from the
14 public since the Federal mandate was promulgated;

15 “(4) the extent to which the Federal mandate
16 overlaps, duplicates, or conflicts with other Federal
17 mandates, and, to the extent feasible, with State and
18 local governmental rules;

19 “(5) the degree to which technology, economic
20 conditions, or other factors have changed in the area
21 affected by the Federal mandate;

22 “(6) a complete analysis of the retrospective
23 costs and benefits of the Federal mandate that con-
24 sider studies done outside the Federal Government
25 (if any) estimating such costs or benefits; and

1 “(7) any litigation history challenging the Fed-
2 eral mandate.”.

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

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

6 (1) in paragraphs (1) and (2)(A)—

7 (A) by striking “sections 202 and
8 203(a)(1) and (2)” each place it appears and
9 inserting “sections 201, 202, 203(a)(1) and (2),
10 and 205(a) and (b)”;

11 (B) by striking “only” each place it ap-
12 pears;

13 (2) in paragraph (2)(B), by striking “section
14 202” and all that follows through the period at the
15 end and inserting the following: “section 202, pre-
16 pare the written plan under section 203(a)(1) and
17 (2), or comply with sections 201 and 205(a) and (b),
18 a court may compel the agency to prepare such writ-
19 ten statement, prepare such written plan, or comply
20 with such section.”; and

21 (3) in paragraph (3), by striking “written state-
22 ment or plan is required” and all that follows
23 through “shall not” and inserting the following:
24 “written statement under section 202, a written plan
25 under section 203(a)(1) and (2), or compliance with

1 sections 201 and 205(a) and (b) is required, the in-
2 adequacy or failure to prepare such statement (in-
3 cluding the inadequacy or failure to prepare any es-
4 timate, analysis, statement, or description), to pre-
5 pare such written plan, or to comply with such sec-
6 tion may”.

