Preliminary ACIR Report - *The Role of Federal Mandates in Intergovernmental Relations* (January 1996)

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The Role of Federal Mandates in Intergovernmental Relations

A Preliminary ACIR Report
For Public Review and Comment

Released: January 1996

Public comment period to end: March 15, 1996
Note: Due to scheduling conflicts, the public comment period was extended until March 29. The public comment period is now over. We thank everyone who responded for their interest and participation, and hope that they will continue to exprpress interest in our report.

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This copy of ACIR's *Draft Report on Unfunded Federal Mandates* has been placed on the Internet for your review and comment.

At present, there are three ways to respond to this report. You can:

1 Send us e-mail at acir@erols.com, either by using your e-mail viewer/editor or by pressing one of the [COMMENT] buttons conveniently located at the end of each section.;
2 Send us your comments via snail mail (US Mail); or
3 Phone in your remarks at (202) 683-5540.

When responding, please give us your name, phone number, and e-mail address, and try to make specific references about the parts of the report to which you are responding.
ACIR will also hold public hearing on March 26, however, the exact date and place are not yet confirmed. Keep watching this WWW site for further details.
Remember!!! - The deadline for public comment is March 29 and we hope to have everyone's comments before then. Thank you for visiting this WWW site, and enjoy the rest of the report.

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PRELIMINARY ACIR REPORT
ON FEDERAL MANDATES
Approved for Public Review and Comment
by the U.S. Advisory Commission on Intergovernmental Relations

January 5, 1996

INTRODUCTION

The *Unfunded Mandates Reform Act of 1995* (P.L. 104-4) represents a bipartisan agreement that something is wrong with

American federalism as it has evolved in recent years. The law directs the Advisory Commission on Intergovernmental Relations (ACIR) "*to investigate and review the role of federal mandates in intergovernmental relations*" and to make recommendations to the President and Congress as to how the federal government should relate to state, local, and tribal governments. In this preliminary report, ACIR proposes for public review and comment recommended changes in federal policies to improve intergovernmental relations while maintaining a commitment to national interests.

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CHANGES IN THE FEDERAL SYSTEM

The mandate issues examined in this report arose because American federalism no longer has clearly defined responsibilities for federal, state, and local governments. One result of this lack of defined roles has been increased federal involvement in activities historically considered to be state and local affairs. Federal involvement usually began with financial aid to achieve national goals. In recent years, federal involvement has taken the form of direct orders to meet federal requirements, often with no federal financial assistance. The extensive and complex nature of this involvement is illustrated by the following examples:

More than 200 separate mandates were identified to ACIR by state and local governments, involving about 170 federal laws reaching into every nook and cranny of state and local activities.

The ACIR report *Federal Court Rulings Involving State, Local, and Tribal Governments: Calendar Year 1994*, identified 3,500 decisions involving state and local governments, relating to more than 100 federal laws.

State and local officials must comply with 33 federal laws to receive non-construction federal grants.

These numbers provide a dramatic picture of the cumulative effects of federal laws on state and local governments. They also confirm the need for better definition of the appropriate working relationships between the partners in the federal system. Relief from existing federal mandates will be especially important if state and local governments are to assume greater responsibilities from federal devolution.

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DETERMINING THE APPROPRIATE FEDERAL ROLE

In *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985), the Supreme Court made it clear that constitutionally the Congress is responsible for determining the precise scope of national authority over state and local governments. The court recognized that clear lines defining the appropriate scope of federal activities could not be drawn and, instead, left it to the political process to determine appropriate governmental roles.

Historically, the political process has determined that some activities are so important to national interests that a federal role is generally accepted as necessary. Among the most obvious is legislation protecting civil rights granted by the Constitution. In an earlier period, the economic emergency of the 1930s produced federal programs to alleviate national economic and social problems. In other instances, national policy is necessary because the problems transcend state lines, such as when dirty air or dirty water from one state intrude on another state. As a result, some federal government mandates on state and local governments are an acceptable feature of the U.S. federal system.

In recent years, however, the Washington tendency has been to treat as a national issue any problem that is emotional, 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 their ability to comply. Such actions, even though they may have broad public support, are damaging to intergovernmental comity. The challenge facing the federal government is to exercise power to resolve national needs while, at the same time, honoring state and local rights to govern their own affairs and set their own budget priorities.

The wide diversity of federal mandates makes it difficult to establish uniform ways to determine whether a mandate is proper or improper from an intergovernmental perspective. Nevertheless, ACIR has been charged with making determinations about existing mandates as they affect state and local governments. In reaching its conclusions, the Commission considered several key questions:

Does the national purpose justify federal intrusion in state or local affairs?

Are the costs of implementing the mandate appropriately shared among governments?

Is maximum flexibility given to state and local governments in implementing the mandate?

Are there changes that can be made in the mandate to relieve intergovernmental tensions while maintaining a commitment to national goals?

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THE ACIR REVIEW OF EXISTING MANDATES

As required by the *Unfunded Mandates Reform Act*, ACIR started its review process by adopting criteria describing mandate issues of significant concern and the types of problems to be analyzed. These criteria were issued on July 6, 1995 (see Appendix B). Information about mandates meeting the criteria were solicited from state and local governments, federal agencies, and the public. ACIR also relied on a variety of efforts by others to help in identifying mandates needing attention:

The National Governors Association requested each governor's office to list the mandates of most concern in their states.

A general appeal was made in the magazines and newsletters of national and state groups representing state and local governments.

A survey of small rural governments was conducted by the National Rural Development Partnership.

Officials attending national and state association meetings were asked to identify troubling mandates.

Information was received from over half the states, eight municipal leagues, four state associations of counties, the national associations representing state and local governments and their officials, and directly from a variety of local government officials.

ACIR selected 14 mandates for analysis. The 14 mandates selected constitute only a small portion of the over 200 identified, but they illustrate the diverse, complex, and troubling challenges that federal mandates pose for the intergovernmental system. *While only 14 mandates are reviewed in this report because of time and resource limitations, the Commission believes that many more of the over 200 mandates identified need to be evaluated. ACIR urges that a review of additional mandates be authorized as soon as possible.*

The selection of the 14 mandates was based on:

(1) The preponderance of communications identifying the mandates as troubling to state and local governments;

(2) The significance and diversity of issues posed for intergovernmental relations; and
(3) The criteria published by the Commission on July 6, 1995.
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BASIS OF RECOMMENDATIONS

In considering its recommendations on the intergovernmental role of federal mandates, the Commission was guided by the published criteria. The criteria defined mandates of significant concern as those that: (1) require state or local governments to expend substantial amounts of their own resources without regard for state and local priorities; (2) abridge historic powers of state and local governments without a clear showing of national need; (3) impose requirements that are difficult or impossible to implement; and (4) are the subject of widespread objections. The 14 mandates subjected to intensive review in this report meet one or more of these criteria.

The criteria also identified a number of specific conditions for which ACIR should make relief recommendations. The specific conditions were: requirements not needing national action or, if needing national action, not federally funded; unnecessarily rigid; unnecessarily complex or prescriptive; unclear goals or standards; contradictory or inconsistent provisions; duplicative provisions; obsolete provisions; lacking in adequate scientific and economic basis; lacking in practical value; or would create undue financial difficulties for the governments.

ACIR recognizes that mandate issues are more than disagreements between political scientists about which government has the *right* to make a decision. Instead, mandate issues relate to the nuts and bolts of government operations that are necessary to provide effective protection and efficient services. This means evaluating how the mandate will affect not only costs but routine government operations as well.

In examining the individual mandates, the Commission considered the fundamental intergovernmental issues associated with the mandate, and did not evaluate the specific mandate requirements. We urge those reviewing these analyses and the accompanying recommendations to give similar attention to the roles of federal, state, and local governments as they relate to the mandate.

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COMMON ISSUES

ACIR's review of existing mandates found a number of common issues that are troubling federal, state, and local government relations. These issues and ACIR's proposed recommendations to address them include:

1. Detailed procedural requirements. State and local governments are not given flexibility to meet national goals in ways that best fit their needs and resources. The imposition of exact standards or detailed requirements, in many instances, merely increases costs and delays achievement of the national goals. *The federal role in implementation should be to provide research and technical advice for those governments that request it, but, in general, state and local governments should be permitted to comply with a mandate in a manner that best suits their particular needs and conditions.*

2. Lack of federal concern about mandate costs. When the federal government imposes costs on another government without providing federal funds, the magnitude of costs is often not considered. If the federal government has no financial obligation, it has little incentive to weigh costs against benefits or to allow state and local governments to determine the least costly alternatives for reaching national goals. *The federal government should assume some share of mandate costs as an incentive to restrain the extent of the mandate and to aid in seeking the least costly alternatives.*

3. Federal failure to recognize state and local governments' public accountability. State governments often are treated as just another interest group, as private entities, or as administrative arms of the federal government, not as sovereign governments with powers derived from the U.S. Constitution. Local governments, despite the important role they play in delivering government services, have been given even less consideration. Non-governmental advocacy groups' views have sometimes been given more attention than those of state and local governments. *Federal laws should recognize that state and local governments are led by elected officials who must account to the voters for their actions, just as the President and Members of Congress.*

4. Lawsuits by individuals against state and local governments to enforce federal mandates. Many federal laws permit individuals or organizations to sue state and local governments over questions of compliance, even though a

federal agency is responsible for enforcement. Federal laws, however, are often written in such broad terms, it is not clear what is required of federal, state, and local officials. In these circumstances, permitting litigation brought by individuals subjects state and local governments to budgetary uncertainties and substantial legal costs. Because the federal agency is not directly involved with the costs and problems of this litigation, it has little incentive to propose amendments that would clarify the law's requirements. *Only the federal agency responsible for enforcement of a law should be permitted to sue state and local governments.*

5. Inability of very small local governments to meet mandate standards and timetables. The requirements for many federal mandates are based on the assumption that all local governments have the financial, administrative, and technical resources that exist in large governments. Many very small local governments have only part-time staffs with little technical capability and very limited resource bases. Extending deadlines or modifying requirements for these small governments may have minimal adverse effects on the achievement of overall national goals but may make it possible for such governments eventually to comply. *Deadlines should be extended and requirements modified for very small local governments.*

6. Lack of coordinated federal policy with no federal agency empowered to make binding decisions about a mandate's requirements. There are mandates that involve several federal agencies. This has resulted in confusion about what the law requires and how state and local governments can know when they are in compliance. In addition to making state and local governments aware of mandate requirements, federal agencies should explain the reasons for the mandate and should assist in taking the actions necessary for implementation. *A single federal agency should be designated to coordinate each mandate's implementation and to make binding decisions about that mandate.*

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SUMMARY OF RECOMMENDATIONS ON INDIVIDUAL MANDATES

ACIR's proposed recommendations for individual mandates can be summarized into three categories.

The Commission finds that the following mandates as they apply to state and local governments do *not* have a sufficient national interest to justify intruding on state and local government abilities to control their own affairs. While the Commission does not take issue with the goals of these mandates, it believes that achieving those goals can be left to elected state and local officials. **Thus, ACIR recommends repealing the provisions in these laws that extend coverage to state and local governments.**

Fair Labor Standards Act
Family and Medical Leave Act
Occupational Safety and Health Act
Drug and Alcohol Testing of Commercial Drivers
Metric Conversion for Plans and Specifications
Medicaid: Boren Amendment
Required Use of Recycled Crumb Rubber

The Commission finds that the following mandates are necessary because national policy goals justify their use. However, the federal share of the costs should be increased or the stringent requirements and deadlines imposed on state and local governments should be relaxed. These mandates impose substantial costs on state and local governments as a result of requirements that are unnecessarily burdensome. **Thus, ACIR recommends retaining these mandates with modifications to accommodate budgetary and administrative constraints on state and local governments.**

The Clean Water Act
Individuals with Disabilities Education Act
Americans with Disabilities Act

The Commission finds the following mandates are related to acceptable national policy goals, but they should be revised to provide greater flexibility in implementation procedures and more participation by state and local governments in development of mandate policies. **Thus, ACIR recommends revising these mandates to provide greater flexibility and increased consultation.**

The Safe Drinking Water Act
Endangered Species Act
The Clean Air Act
Davis-Bacon Related Acts

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SUMMARY OF EACH MANDATE

Listed below are summaries of each mandate reviewed. For each individual mandate, *Appendix A* contains a full description of the requirements imposed, a discussion of its background and history, a listing of the concerns expressed by state and local governments, and recommendation options that were considered.

Fair Labor Standards Act

The *Fair Labor Standards Act* (FLSA) (29 U.S.C. 201, et seq.) establishes minimum standards for wages, overtime compensation, equal pay, recordkeeping, and child labor for nearly every workplace in the United States. In 1974, amendments to the FLSA extended the applicability of the law to the public sector and treated state and local governments as if they were private entities. So, unlike the federal government, a state or local government cannot amend its personnel policies to accommodate situations unique to government employment or to reduce budgets.

Considerable contention has also arisen over the proper implementation of FLSA in the state and local public sector. The overtime pay provisions, in particular, have resulted in substantial litigation, with many state or local employees winning retroactive pay for work deemed by a court to qualify as overtime. The liability for many states and localities is in the millions of dollars and could go much higher. Moreover, even if a state or local government is successful in defending its employment policies as consistent with FLSA, there are often substantial litigation costs.

The employment policies of state and local governments should be set solely by the employment policies of those governments. The public accountability of elected officials and the collective bargaining powers of employee unions will provide adequate protection for workers.

RECOMMENDATION: ***Repeal provisions of FLSA covering state and local government employees.***

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Family and Medical Leave Act

The *Family and Medical Leave Act of 1993* (FMLA) (29 U.S.C. 2601 et seq.) requires employers to provide employees up to 12 weeks of unpaid leave each year to care for a newborn, adopted,

or foster child. Leave also must be granted for care of a seriously ill child, parent, or spouse. In addition, employees may use unpaid family and medical leave for personal illnesses. Medical insurance benefits must be continued during the leave and employees must be reinstated into the same or an equivalent position after leave.

The law forced state and local governments to revise long-standing personnel policies and created unfunded costs related to extending medical insurance coverage to employees on family and medical leave, to temporary hiring of replacement workers, and to additional training and personnel counseling activities. While the law contains special provisions for federal government employees, state and local governments are treated the same as private entities.

Leave policies of state or local governments should be determined solely by the employment policies of those governments. The public accountability of elected officials and the collective bargaining powers of employee unions will provide adequate protection for workers.

RECOMMENDATION: ***Repeal the provisions of FMLA that cover state and local government employees.***

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Occupational Safety and Health Act

The *Occupational Safety and Health Act of 1970* (OSHA). (29 U.S.C. 651-678) establishes standards for safe, healthy, and productive work environments. State governments and their political subdivisions, as well as the United States government, are specifically *excluded* from the definition of "an employer" under the act. In the case of state governments and their political subdivisions, OSHA has no requirements unless a state volunteers to participate in the federal program. States that volunteer to administer the federal OSHA program within their jurisdiction are required to extend federal requirements to all public employees in the state.

Twenty-three states have assumed responsibility for operating the federal OSHA program. Two additional states have federally approved OSHA plans only for state and local government employees. Even in the remaining states, however, there may be an impact, or a perception of an impact, because some OSHA requirements are replicated in state laws or are perceived as mandatory even though they are not.

Numerous complaints expressed about OSHA policies in both participating and non-participating states attest to the widespread misunderstanding about the law's coverage and the substantial compliance costs. Making all states, not just the non-participating states, exempt from OSHA would allow all states to set their own health and safety standards, taking into consideration their priorities and budgetary constraints. Such a policy would give states flexibility similar to that given federal agencies.

RECOMMENDATION: ***Repeal the provisions extending OSHA coverage to public employees in participating states.***

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Drug and Alcohol Testing of Commercial Drivers

The *Omnibus Transportation Employee Testing Act of 1991* (P.L. 102-143, Title V) directs the Department of Transportation (DOT) to issue regulations establishing a program which "requires motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for use . . . of alcohol or a controlled substance." The motor carrier requirements cover a substantial number of state and local government employees who have commercial drivers licenses, and require them to undergo random drug and alcohol testing by certain deadlines. The law is inconsistent in that it includes some employees, such as public works drivers, but excludes law enforcement and emergency workers from testing requirements.

Strict drug and alcohol testing requirements for small rural communities and transportation systems with few employees create situations where costs of compliance are disproportionately high relative to potential findings. State and local governments are concerned about drug and alcohol problems and will take their own measures to insure that their drivers are not a threat to public safety.

RECOMMENDATION: ***Repeal provisions making some state and local employees subject to the federal drug and alcohol testing requirements for commercial drivers.***

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Metric Conversion for Plans and Specifications

The *Omnibus Trade and Competitiveness Act of 1988* requires that each federal agency use the metric system of measurement

in its procurement, grants, and other business-related activities, except to the extent that such use is impractical. The act permits the continued use of traditional weights and measures in non-business activities. Based on this law, the Department of Transportation (DOT) requires state and local governments to convert to metric for local construction plans and specifications by October 1, 1996.

The *Unfunded Mandates Reform Act of 1995* specifically requires ACIR to consider requirements that state, local, and tribal governments utilize metric systems of measurement. The principal concern, expressed primarily by local governments, is the requirement to use metric measurements in the design and construction of federally aided projects. While most local governments may be technically able to prepare plans and specifications in metric by the deadline, they cite several problems, including substantial costs. Another problem is that local contractors and suppliers are not used to working with metric measurements. As a result, the potential for mistakes in the bidding and construction process is significantly increased. In addition, metric will create problems for right-of-way acquisitions with property owners, surveyors, and local deed registries.

States have made considerable progress in the transition to metric, but more than 2,200 waivers have been necessary to relieve hardship situations. Despite the waivers, the deadline for conversions will create substantial problems for many local governments without corresponding benefits. Rather than require all states to implement metric requirements on the same timetable, a better approach is to encourage states that are well along on their conversions to continue assisting their local governments with the process. Successful implementation in these states will provide support for others to complete the conversions voluntarily.

RECOMMENDATION: ***Repeal requirements that state and local governments convert to metric on a federal timetable as a condition of receiving federal aid.***

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Medicaid: Boren Amendment

The Boren Amendment requires states to establish reimbursement rates to pay hospitals, nursing facilities, and intermediate care facilities for services provided to persons

eligible for assistance through the Medicaid program. The mandated federal criteria provide that the reimbursement rates must be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards . . . ."

The intent of the Boren Amendment was to give states a means of controlling costs related to reimbursement claims from providers of Medicaid services. Rather than basing reimbursements on a cost-related payment requirement for hospitals and nursing home services, the amendment allows states to pay for services based on a predetermined reimbursement rate, giving states a basis for denying reimbursement for costs determined to be in excess of that necessary to provide "efficiently and economically" delivered services.

Although flexibility was intended, the use of vague and undefined terms in the amendment created problems that were compounded by the federal government's decision not to issue regulations defining the vague terms. To add further confusion, the law, while requiring reimbursement rates to be "determined in accordance with methods and standards developed by the State," also requires the federal government to be satisfied with the state-determined rates. To implement this requirement, the federal government requires state processes for determining rates and the rates themselves to be a part of Medicaid State Plans, subject to approval by the Secretary of Health and Human Services.

The vagueness of the statutory language, combined with the lack of regulatory definitions, has resulted in substantial litigation, with some courts viewing the Boren Amendment as a cost based payment standard in which *all* cost incurred by the providers must be reimbursed. In these instances, states may be liable for significant sums to cover the retroactive rate increases ordered by the court for the group of providers involved in the suit even if their rate schedule was approved by the federal government. In some cases, the additional payments made as a result of a court-ordered retroactive rate increase are not eligible for cost-sharing from the federal government.

Because Medicaid is a state administered program and states

are responsible for the quality and safety of medical services, states should be allowed to conduct reimbursement rate negotiations with Medicaid service providers without preconditions set by federal law. Litigation against states by medical service providers should be limited to matters related solely to the state's own laws and policies.

RECOMMENDATION: ***Repeal the language of the Boren Amendment and insert language making states solely responsible for determining Medicaid reimbursement rates.***

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The Clean Water Act

The *Clean Water Act* requires states to designate the uses of water, develop water quality criteria to protect those uses, monitor the condition of waters, and report on water quality every two years. States may administer a permit program for industrial and municipal pollution discharges and develop programs for the control of pollution from diffuse or nonpoint sources. Local governments are required, either directly by the federal government or indirectly through state implementation of federal laws, to treat sewage to national standards and to control discharges from combined sewers and stormwater drains.

In the *Water Pollution Control Act Amendments of 1972*, Congress provided for a comprehensive national program to protect water quality. Key provisions included national minimum standards for control of pollutants from industrial and municipal sources, additional controls in permits as needed to meet state standards, and significant grant assistance to support construction of municipal sewage treatment facilities. In effect, states and local governments ceded control over water pollution controls to the federal government in return for substantial federal financial aid.

In 1987, the federal government changed the arrangement by a transition from direct grants to capitalization of state loan funds. Loan funds reduce interest costs for some projects, but they still require local governments to pay virtually the entire costs of future pollution control projects. In addition, the 1987 amendments required municipalities to remove harmful amounts of toxins from their sewage and to establish stormwater management programs. A national program originally

supported and encouraged by state and local governments is no longer a balanced partnership to clean up the nation's waterways. Federal requirements, especially those dealing with stormwater drainage, have become increasingly stringent and expensive to implement. At the same time, the federal funding to aid in the cleanup has virtually disappeared.

Fully restoring the successful partnership requires either a return to substantial federal sharing in the costs of clean-up, or a relaxation of inflexible standards and deadlines on state and local governments. If there is not a sufficient national priority to justify federal spending, then state and local governments should be able to use the least costly alternatives and to work within their fiscal constraints. State and local governments traditionally have been concerned about reducing pollution, and they should be given authority to work constructively with federal officials to design realistic programs that can be completed within technical and budgetary constraints.

RECOMMENDATION: ***Either restore direct federal sharing of costs or give state and local governments greater authority to develop their own control methods and timetables for implementing federal standards for clean water.***

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Individuals with Disabilities Education Act

The *Individuals with Disabilities Education Act (IDEA)* (P.L. 101-476) requires local school systems to provide a free appropriate education for children with disabilities. The law provides that federal aid to states for elementary and high school education will be available only after a state has a federally approved plan for educating children with disabilities. In addition, *IDEA* requires participating states to establish specific administrative procedures by which parents or legal guardians may challenge the identification, evaluation, or educational placement of the children. Requirements of the law are conditions of federal assistance or duties arising from participation in this voluntary federal program.

IDEA has provided millions of students with disabilities access to a free and appropriate education, but the law imposes significant costs and administrative burdens on state and local governments. Although the Act currently includes a provision authorizing the federal government to pay up to 40 percent of

services to be provided under the law, only about 8 percent is currently appropriated. The law also limits the flexibility of states and local governments to combine *IDEA* funds with other funding streams to meet the unique needs of their children.

The resolution of disputes under the Act also has become overly litigious and has added to implementation costs. Currently, local agency decisions may be challenged in either state or federal court, and, in some cases, parents bringing actions on behalf of their children may be entitled to reimbursement for their costs, including attorney and court fees. ACIR's *Federal Court Rulings Involving State, Local, and Tribal Governments: Calendar Year 1994* emphasizes the litigious nature of this law.

RECOMMENDATION: ***Either increase federal funding to the 40 percent authorized level or relieve states from prescriptive and costly administrative mandates. Alternative dispute resolution practices should be required, and any court challenge based on the federal law should be brought by state or federal agencies, not by individuals.***

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Americans with Disabilities Act

The *Americans with Disabilities Act of 1990* (ADA) (P.L. 101-336) prohibits discrimination against individuals with disabilities in employment, public services, and public accommodations. Any state or local government policies found to be inconsistent with ADA provisions are to be modified as soon as feasible. Each government program is to be examined for physical barriers to access and for remedial measures that need to be taken.

ADA provides important and necessary social benefits, but it is creating problems for state and local governments because of expensive retrofitting and service delivery requirements, confusing and ambiguous statutory language, and insufficient technical assistance provided by the federal government. Further, virtually no federal funding has been appropriated to cover most state and local compliance costs. With tight budgets and limited time to correct structural obstacles to improve public accommodation, it has been difficult for many governments to implement the extensive changes required. Structural changes to existing buildings to meet "program accessibility" requirements were to be made by January 26, 1995, a deadline

not met by many state and local governments.

Also, the use of the terms "reasonable accommodation," "undue hardship," "readily achievable," and countless other broad expressions in the law has subjected state and local governments to numerous lawsuits over legal interpretations of ADA. The penalties for noncompliance are severe, and legal costs can be substantial.

Federal enforcement of ADA is uncoordinated, with eight federal departments having some enforcement power. The prime responsibility for processing complaints under ADA are the Justice Department and the Equal Employment Opportunity Commission. The Federal Communications Commission manages telecommunications issues. The National Council on Disability is an independent federal agency that identifies emerging issues and recommends disability policy to the President and Congress. The Architectural and Transportation Barriers Compliance Board provides some educational and technical assistance regarding accessibility.

RECOMMENDATION: ***Either provide increased federal funding to state and local governments to assist in compliance, including funding for paratransit, or modify some deadlines and requirements to let state and local governments meet ADA goals in a manner that recognizes state and local technical and budget constraints without abridging the national commitment to the rights of individuals with disabilities. In addition, a single federal ADA enforcement and assistance agency should be designated to coordinate enforcement and technical assistance and legal action against state and local governments should be limited to actions brought by the federal government.***

[COMMENT] [RETURN TO CONTENTS]

The Safe Drinking Water Act

The *Safe Drinking Water Act* (SDWA) regulates drinking water standards for the 58,530 waterworks serving 25 or more persons on a regular basis. It establishes maximum levels for contaminants known to occur in public water systems, establishes wellhead protection programs, certifies and specifies appropriate analytical and treatment techniques, and establishes public notification procedures. It requires drinking water suppliers to assume a wide range of responsibilities,

including monitoring of the water supply.

The safety of drinking water is a public health issue. Prior to 1974, states had responsibility for the safety of drinking water, but they generally relied on standards set by the Public Health Service. Since drinking water endangers not only the residents of a local community and state but also those traveling interstate, the regulation of drinking water may be justified as a national concern. It should be recognized, however, that other vital public health concerns, such as restaurant inspections, are the responsibility of state and local governments.

State and local concerns over the *Safe Drinking Water Act* hinge on what constitutes safe drinking water and how to achieve it in the most cost-effective way. These governments do not object to assuming the costs of providing safe drinking water, but some do object to incurring costs that in their opinion do not improve water quality. The existing law overreached in the standards and compliance requirements it imposed on local water systems. Amendments recently approved by the Senate will repeal some of the most onerous provisions, including mandatory additional tests for contaminants, tests for contaminants not a threat in local areas, and eased provisions for treatment of surface water supplies. The Senate amendment also authorizes funding for state capitalization loan funds to reduce interest costs of compliance. The amendments, however, do not alter intergovernmental relationships in the SWDA.

RECOMMENDATION: ***Enact amendments similar to those approved by the Senate and establish a long-term goal of returning to the states full responsibility for safe drinking water standards.***

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Endangered Species Act

The *Endangered Species Act of 1973 (ESA)* (P.L. 97-304) requires every federal agency to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed threatened and endangered species or the destruction or adverse modification of critical habitat. Under the law, state, local and tribal governments may not obtain a federal permit, license, or grant if the project does not comply with federal standards for protecting endangered species. There is an exemption process allowing consideration of economic factors, but these provisions are rarely utilized.

State and local governments feel they have an inadequate share of decision-making authority in the management and planning decisions affecting the listing of threatened and endangered species. The listing process is rigid and limits state and local flexibility to apply the Act's provisions in their jurisdictions to meet local conditions. There is concern that valuable economic development activities within their boundaries, both public and private, are being impaired by strict federal regulation.

State, local and tribal governments should be full partners with the federal government in the preservation of threatened and endangered species. These governments should be granted shared authority for species protection, as well as flexibility to implement conservation plans for specific species within their boundaries. Broader participation by state, local, and tribal governments will improve the data collection process and allow biological science, economic constraints, and available management resources to be taken into account on a regional basis.

RECOMMENDATION: ***Give state and local governments an official role in the management and planning decisions affecting the listing process beyond the traditional consultation and full notice and comment requirements currently in effect. In addition, exemptions to ESA should be applied more extensively to minimize social and economic impact on state, local, and tribal governments of recovery planning and listing procedures.***

[COMMENT] [RETURN TO CONTENTS]

The Clean Air Act

The *Clean Air Act of 1977* (P.L. 95-95) requires states to submit for federal approval a plan for meeting air quality standards established by the federal government. These plans must include emissions limitations and schedules of compliance. The federal government will prepare a plan for any state that fails to comply. The act spells out how to measure different types of pollution, the standards that must be met for each type of pollution, the specific compliance measures that may be taken, and the deadlines for those actions. Some federal financial assistance for planning and implementation is authorized in the law, but each state must provide assurances that "the State or general purpose local governments will have adequate personnel, funding, and authority under state and, as

appropriate, local law to carry out such implementation plan."

The initial demand for federal help in controlling air pollution came from cities that were unable to act effectively on an individual basis. Because the federal government recognized the need to act on regional bases, and in recognition of the federal system as viewed at that time, the states were encouraged by the federal government to assume responsibility for controlling air pollution and were given federal grants to assist in implementing such controls. By 1970, only 21 states had submitted implementation plans, and the federal government decided it was necessary to set standards (including vehicle emissions) and to enforce state implementation.

In 1990, amendments to the law targeted smaller pollution sources, including facilities owned by local governments. Governments in areas with moderate carbon monoxide pollution were required to adopt vehicle inspection and maintenance programs and to use cleaner oxygenated fuels. Areas with moderate ozone pollution were required to set up similar programs and to require use of gasoline-pump devices to capture vapors. Failure to implement these programs can result in the loss of federal highway funds.

As the requirements have become increasingly detailed and specific, states have become implementers of federal laws with less and less discretion over how to implement them and with less federal financial assistance for their administration. As a result, the requirements often do not reflect conditions and citizens' preferences in the state.

RECOMMENDATION: ***Permit states to develop their own ways of meeting federal air quality standards, and eliminate financial aid penalties if states are making good faith efforts to comply.***

[COMMENT] [RETURN TO CONTENTS]

Davis-Bacon Related Acts

The *Davis-Bacon Act* (40 U.S.C. 276a-7) only applies to federal government contracts over $2,000 for construction, alteration, and/or repair work. The law requires such contracts to specify the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. The minimum wages must be based on the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on similar contracts in the city, town,

village, or other civil subdivision of the state in which the work is to be performed.

About 60 other federal laws make compliance with Davis-Bacon provisions a condition-of-aid for grants to state and local governments (e.g., construction programs related to low-income housing, highways, and waste water treatment facilities). Some of the Davis-Bacon related laws contain special exceptions concerning the way in which a grantee must comply with Davis-Bacon requirements, but most of them apply the law without modification. Compliance with the provisions is generally required even if the dollar amount of the federal grant is a minimal share of the total project costs.

State, local, and tribal governments should be able to manage their construction project costs without Davis-Bacon pre-conditions when the major share of the project is being funded by the state or local government. Besides potentially increasing costs, Davis-Bacon requirements impose extensive reporting and recordkeeping that may be especially burdensome for small projects, and may make it difficult for small local businesses to compete.

To protect the national interests, which led to the inclusion of Davis-Bacon compliance requirements in about 60 federal laws, while recognizing state and local concerns, each related act should be amended to limit application of Davis-Bacon provisions to state and local construction projects over a certain dollar level and to projects where federal funding exceeds more than half of the total project costs. For example, a related act could be amended to apply Davis-Bacon provisions only in projects with a total dollar cost in excess of $1 million and in which the federal grant funding for the project exceeded 50% of total project costs.

RECOMMENDATION: ***Amend Davis-Bacon related laws to exempt projects below a larger dollar cost than now prevails and below a certain federal percentage of cost sharing from compliance with Davis-Bacon provisions in state and local construction projects.***

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Required Use of Recycled Crumb Rubber (Repealed)

The requirement for including a percentage of waste-tire (crumb rubber) in asphalt pavement on federally aided highway projects was intrusive and infringed on traditional state-regulated

activities. If states did not comply with the percentages, they were penalized by the withholding of an equivalent percentage of highway funds. The federal intrusion into this area of state operations, along with the withholding of grant money for non-compliance, demonstrate the intergovernmental breakdown surrounding this particular issue.

In addition, the construction industry had concerns about both the integrity of the pavements and the life-cycle maintenance costs of crumb-rubber-mix asphalt. Research has not shown any improved life of asphalt pavements using rubber, while the costs double. This provision mandated a particular engineering approach that is still experimental and has unresolved environmental, health, and safety issues. In a few states, highway projects have failed due to crumb rubber use. In general, most state and local governments and highway user interest groups do not believe there is sufficient benefit in using waste tire rubber in hot-mix asphalt to justify the cost.

RECOMMENDATION: ***The Commission commends the Congress and President for repealing this unwarranted federal mandate.***

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APPENDIX A

Staff Reviews of Mandates

Staff Working Paper

December 1, 1995

FAIR LABOR STANDARDS ACT

Mandate

The *Fair Labor Standards Act* (FLSA) (29 U.S.C. 201, et seq.) establishes minimum standards for wages, overtime compensation, equal pay, recordkeeping, and child labor for nearly every workplace in the United States. In 1974, amendments to the FLSA extended the applicability of the law to the public sector. Under the amendments, state and local governments are subject to the same requirements as private entities. Although state governments may enact their own labor laws for public employees, such laws may be no less stringent than FLSA standards.

Background

The 1974 Amendments were challenged by the National League of Cities in *National League of Cities v. Usery*. In that case, the U. S. Supreme Court ruled that the 10th Amendment to the

Constitution rendered the application of the FLSA's minimum wage and overtime compensation provisions to state and local governments unconstitutional. This ruling was reversed in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority*.

The 1974 Amendments also extended coverage of FLSA to the executive branch of the federal government. Rather than treating the federal government as a private entity, however, the amendments provided independent regulatory and enforcement authority to the Civil Service Commission (now the Office of Personnel Management). The decision to allow the Civil Service Commission to administer FLSA for the executive branch recognizes that federal employment policies are within the purview of the federal legislative process (Title 5 of the United States Code), and can be amended at any time. Coverage under the FLSA was not extended to legislative branch employees until 1995, with an effective date of January 1, 1996. As in the case of the executive branch, the law allows an office within the legislative branch itself to administer FLSA provision for congressional employees.

Considerable confusion has arisen since the *Garcia* decision over the proper implementation of FLSA in the state and local public sector. The overtime pay provisions, in particular, have resulted in substantial litigation, with many state or local employees winning retroactive pay for work deemed by a court to qualify as overtime. The liability for many states and localities is in the millions of dollars and could go much higher. Moreover, even if a state or local government is successful in defending its employment policies as consistent with FLSA, there are often substantial litigation costs.

In an effort to reduce litigation, the Department of Labor (DOL) tries to provide assistance and guidance to state and local governments with respect to their obligations under FLSA. Also, according to a 1989 DOL letter to various governors, the department will not file a suit against a state to enforce compliance without at least 30 days written notice. These DOL actions, however, do not limit an employee's right under section 16(b) of the law to file suit independently against the state on FLSA issues. Individual employees may go to court to seek back wages as well as liquidated damages, attorney fees, and court costs.

In 1992, the Department of Labor acknowledged the public

accountability aspects of state and local governments in its regulations concerning overtime pay, which made an exception to the salary basis test for state and local governments. This exception recognized state constitutional or statutory provisions prohibiting any employee from being paid for time not actually worked, or not covered by some type of paid leave. The regulations have been subject to a number of court suits that have resulted in conflicting opinions.

Concerns

Questions of applicability of FLSA to state and local governments generally are not raised out of dispute with the basic goals of the law. Rather, questions have been raised over the intrusiveness of the federal law into matters that fall exclusively within the jurisdiction of a state or local government (i.e., employment policies for their own employees).

FLSA is considered by many state and local governments to be an unfunded federal mandate because it requires state and local governments to implement some employment policies that would not have been implemented without the federal law. It is also argued that FLSA, in some cases, thwarts a state or local governments' efforts to control its own fiscal condition. In contrast, the federal government can set its own employment policies. The federal government has frequently considered, and sometimes enacted, changes in employment policies to increase or reduce federal spending.

Recommendation Options

1. Delete FLSA provisions extending coverage of the law to state and local government employees. The employment policies of state and local governments would be subject solely to collective bargaining agreements and public accountability in each state. Prior to the 1974 amendments to the FLSA, wages and working conditions for public employees were the responsibility of their respective state and local government jurisdictions.

2. Amend the FLSA to provide state governments with regulatory and enforcement authority similar to that granted to the federal government. State and local employees would continue to be covered by the FLSA, but state governments would be responsible for implementation in the state. In other words, the state governments would be granted authority similar to that given to the Office of Personnel

Management (OPM) or the Congressional Office of Compliance. As in the case of federal agencies, state policies would be required to be consistent with FLSA principles and would still be subject to judicial review. If taken to court, however, states would be defending policy decisions made by the state.

This option grants states more latitude than currently provided to define actions "consistent with" FLSA. For example, state governments may able to enact flexi-time options, such as those offered in federal agencies, and still be "consistent with" the FLSA. The inability of states to enact flexi-time provisions is of particular concern because such a constraint conflicts with the Clean Air Act and other environmental laws that require state and local governments to develop commuter option plans to improve their ambient air quality.

3. Replace the FLSA provision allowing individuals to sue state and local governments over FLSA issues with language restricting FSLA suits to those brought by the federal government as a part of its enforcement responsibilities. To alleviate the current litigious situation, and in recognition of the federal government's FLSA enforcement role, the law could be amended to make the federal government the only party able to bring a suit against a state for non-compliance. The Department of Labor could bring a suit against a state or local government based on its own findings or in response to an individual's complaint. Individuals would still be able to bring a FLSA suit against the federal government.

4. Amend the FLSA to resolve the issues most often subject to intergovernmental controversies. There are instances where state and local costs related to FLSA implementation could be reduced or avoided if a closer working relationship existed between the Department of Labor and state and local governments. In other cases, there are FLSA issues that cannot be resolved without statutory changes. For example, although the department made a change in the salary basis test for public entities to relieve one of the difficult problems facing state and local governments, some courts have not upheld the validity of the regulation. Thus, consideration could be given to making specific changes in the law to alleviate the most troublesome aspects of the law from a state and local government perspective.

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December 1, 1995

FAMILY AND MEDICAL LEAVE ACT

Mandate

The *Family and Medical Leave Act of 1993* (FMLA) (29 U.S.C., 2601 et seq.) requires employers to provide employees up to 12 weeks of unpaid leave each year to care for a newborn, adopted, or foster child. Leave also must be granted for care of a seriously ill child, parent, or spouse. In addition, employees may use unpaid family and medical leave for personal illnesses. Medical insurance benefits must be continued during the leave and employees must be reinstated into the same or an equivalent position after leave.

Background

FMLA was enacted to promote family stability and economic security among working men and women. At the time of enactment, the General Accounting Office (GAO) calculated that the primary costs associated with FMLA would relate to extending medical benefits and hiring and training temporary replacement workers, or other measures taken to maintain an employee's production output during the unpaid leave period. Some cost avoidance was anticipated for employers based on reduced employee turnover rates, anticipated higher productivity, and reduced need for hiring and training permanent replacement workers. It was thought that the cost of implementation would be mitigated by the fact that many employers, including 11 states and the District of Columbia, followed similar practices.

Concerns

State and local governments raise several concerns with the FLSA. First, they argue that the law sometimes contradicts state or local government leave provisions. In fact, rather than exempting jurisdictions that had family and medical leave policies, the federal law preempted those policies, except in the case of more generous benefits. Also, some claim that FMLA compromises collective bargaining negotiations between state and local governments and public employee unions.

A second issue is the inflexibility of the Department of Labor's interpretation of the law. Rather than allowing variable family and medical leave policies that are consistent with FMLA, state and local governments have been required to match the

department's regulations. For example, even though the law does not specify the length of time an employee must return to work to avoid repayment of medical premiums, states are required to abide by the federal regulatory provision that sets the return-to-work period at 30 days. So, if an employee is absent for the allowable 12 weeks, a state may pay 3 months worth of medical premiums and the employee is only required to return to work for 30 days to avoid having to reimburse any portion. Some states have suggested that employees be required to return to work for at least as long as they were absent or 30 days, whichever is greater, to avoid reimbursement charges. Such a policy could be considered consistent with the law but is not allowed under federal regulations.

Finally, FMLA is seen by state and local governments as an unfunded federal mandate because of the cost associated with the extension of medical insurance benefits and other factors. As noted above, these costs were anticipated by GAO prior to the law's enactment. Unanticipated, however, were the reportedly significant costs related to training personnel specialists on the law's provisions and the time spent counseling individual employees. In addition, record-keeping requirements related to tracking of FMLA leave have added costs, especially in cases where both spouses work for the same employer.

Recommendation Options

1. Make no significant changes in the law. FMLA grants a significant benefit to employees struggling to balance family and work responsibilities. The act makes a positive contribution toward the national policy objective of strengthening family stability and improving economic security for working men and women. Thus, it could be argued that the benefits to the nation are worth the costs and that it is the rightful responsibility of employers-public and private-to fund the act's implementation. Nevertheless, some changes in the law could be made to allow for closer conformity between the federal law and state or local policies.

2. Exempt state and local governments from FMLA provisions. The family and medical leave policies of state or local governments would be a matter of concern solely within the respective jurisdictions. This would recognize the public accountability aspects of state and local governments, and it would acknowledge the authority of these governments to

conduct collective bargaining with public employee unions unhindered by federal preconditions.

3. Give state governments independent regulatory and enforcement responsibility for compliance with the law in the public sector. State governments would be granted the same authority as the federal government to set their own family and medical leave policies consistent with FMLA. Currently, the law allows the Office of Personnel Management rather than the Department of Labor to issue regulations and enforce FMLA policies for the executive branch. Likewise, there are special provisions for congressional employees. Such an approach would not exempt a state from complying with the law, but would allow it flexibility to set its own policies consistent with the law. If challenged by an employee, the state would be responsible for the defense of its own policies and not those of the federal government.

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December 1, 1995

OCCUPATIONAL SAFETY AND HEALTH ACT

Mandate

The *Occupational Safety and Health Act of 1970* (OSHA). (29 U.S.C., 651-678) establishes standards for safe, healthy, and productive work environments. State governments and their political subdivisions, as well as the United States government, are specifically *excluded* from the definition of "an employer" under the act. In the case of state governments and their political subdivisions, OSHA has no requirements unless a state volunteers to participate in the program under the provisions of Section 18 of the law. In the case of the federal government, the law requires the head of each agency to establish and maintain an effective and comprehensive occupational safety and health program "consistent with" the standards promulgated by the Department of Labor (DOL) for non-government workplaces.

If a state does not participate in the federal OSHA program, DOL is responsible for all aspects of the program as it applies to businesses within the state. At the same time, since state and local governments are not considered employers under the law, DOL neither develops nor enforces occupational safety and health standards for employees in state or local government workplaces.

If a state assumes responsibility for development and enforcement of the federal OSHA standards, the law mandates state standards that "are or will be at least as effective" as the DOL standards. Also, to the extent permitted by state constitutions, the federal law requires these states to establish and maintain an effective and comprehensive occupational safety and health program for state and local government employees.

Background

Twenty-three states have assumed responsibility for operating the federal OSHA program (which extends coverage to state and local government employees). Two additional states have federally approved OSHA plans only for state and local government employees (see attached list). The remaining states may have their own occupational safety and health programs covering their state and local government employees and, in some cases, these state efforts may have standards or requirements similar or identical to OSHA.

Even in states not volunteering to participate in the federal OSHA program, there is an impact, or a perception of an impact, as a result of OSHA requirements. Safety and health procedures with the OSHA imprimatur sometimes are perceived as mandatory for the public sector even though there may be no federal law requiring them.

States choose to assume responsibility for the federal OSHA program for a variety of reasons. Some states had occupational safety and health programs before 1970 and wished to continue their role by assuming responsibility for the federal program. Many states desire to maintain closer relationships with businesses and workers on occupational safety and health issues than would be possible a with federally operated program. The states also can deal more appropriately with local conditions when they are responsible for program administration. Several states have been able to commit more resources than the federal government to the program.

OSHA authorizes the Secretary of Labor to provide grants up to 50 percent of costs for administration and enforcement to states that assume responsibility for the federal OSHA program. Although no funding is available for program compliance (e.g., training programs, equipment, or facilities modification), the Department of Labor recently took several steps to improve

OSHA procedures and make the program more effective. The reform initiatives are directed primarily at business, but they also could help situations related to coverage of public employees in states participating in the federal program.

Concerns

First, there is pervasive misunderstanding as to what is a federal mandate and what is a state or local government policy decision.

Second, there is considerable lack of understanding or doubt over the rationale or scientific basis for many of the standards.

Third, the credibility of the program is seriously compromised by the perceived rigidity, complexity, and burdensome nature of the rules and reporting requirements.

Fourth, the perception is that the program has been more focused on punitive measures than compliance assistance.

Fifth, the lack of federal funds for compliance costs creates situations in which state and local priorities are sometimes preempted in order to comply with federal program requirements.

Recommendation Options

1. Make no significant changes in the law. OSHA's protective standards and enforcement program are largely responsible for the 57 percent decline in workplace fatalities over the last 25 years. In Fiscal Year 1995, federal and state OSHA inspections helped make almost 70,000 workplaces safer for nearly four million workers. According to DOL statistics, however, each day more than 6,000 workers still lose time from their job as a result of a work related injury. Besides the personal and family tragedies, job-related injuries cost the economy over $100 billion a year, and occupational illnesses cost many times more. Some statutory changes could be made to relieve the most burdensome aspects of OSHA program operations on state or local governments.

2. Amend OSHA to give participating state governments as much flexibility in regard to public employees as is authorized for federal agencies. The current law allows the heads of federal agencies to develop an occupational safety and health program that is "consistent with" the federal OSHA program for businesses. Arguably, this allows the heads of federal agencies to have occupational safety and health standards that are more *or* less stringent than the standards for

others. Moreover, there is no requirement that programs developed by federal agency heads be approved by the Secretary of Labor.

In contrast, states must establish an occupational safety and health program for their public employees with standards that are "as effective as the standards contained in the approved plan." Furthermore, the standards developed by the states must be submitted to the Secretary of Labor for approval as a part of the state plan process mandated in the law. The requirement that states operating the federal OSHA program have DOL approved occupational safety and health standards for public employees is difficult to defend when public employees in non-participating states are not covered by any federal standards.

3. Delete language in law regarding coverage of public employees. This option would allow all states to establish their own occupational safety and health standards for public employees independent of the federal program. Deletion of the language concerning public employees in states that volunteer to operate the federal OSHA program would treat public employees in those states in a manner consistent with the treatment of public employees in states that do not volunteer to operate OSHA.

STATES WITH APPROVED PLANS
TO OPERATE FEDERAL OSHA PROGRAM

Alaska New York * Arizona North Carolina California Oregon Connecticut * South Carolina Hawaii Tennessee Indiana Utah Iowa Vermont Kentucky Virginia Maryland Washington Michigan Wyoming Minnesota Nevada Puerto Rico New Mexico Virgin Islands

*Plan covers only state and local government

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December 1, 1995

DRUG AND ALCOHOL TESTING REQUIREMENTS OF COMMERCIAL DRIVERS

Mandate

The *Omnibus Transportation Employee Testing Act of 1991* (P.L. 102-143, Title V) requires alcohol and drug testing of safety-sensitive employees in the aviation, motor carrier, railroad, and

mass transit industries. This law amends Sec. 5 (a)(1) of the *Commercial Motor Vehicle Safety Act of 1986* (P.L. 99-570) by directing the Department of Transportation (DOT) to issue regulations establishing a program which "requires motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for use . . . of alcohol or a controlled substance." The motor carrier requirements cover a substantial number of state and local government employees, and require them to undergo random drug and alcohol testing, effective January 1, 1996, for state and local governments with fewer than 50 drivers and January 1, 1995, for governments with more than 50 drivers.

In addition to the testing requirements, the law requires employers to (1) adopt a written policy and testing procedure, (2) provide for random selection by the use of a random number generator, (3) offer supervisory training in reasonable suspicion testing, (4) provide a substance abuse professional or employee assistance program, (5) conduct split sample testing with a laboratory that is certified by the U.S. Health and Human Services Administration (HHS), and (6) provide employees with information about the effects of drugs and alcohol. States and local governments forfeit federal grant money by not complying with the testing requirements.

Background

The law was enacted because alcohol and illegal drug use pose significant dangers to the safety and welfare and some effort must be made to eliminate the abuse of these substances by those individuals involved in the operation of heavy trucks and buses. Citizens depend on these operators to perform in a safe and responsible manner, and the use of alcohol and drugs has been demonstrated to affect the performance of individuals significantly and is a critical factor in transportation accidents.

There are significant safety benefits derived from the alcohol and drug testing policy. These rules help to prevent tragic, costly transportation accidents as well as help to improve worker productivity, decrease health care costs, and reduce worker absences. Despite the costs of testing large numbers of employees, the U.S. DOT believes that potential safety benefits to employees, employers, and the public outweigh the costs.

Issues of Concern

Some local governments believe this mandate is too expensive relative to the potential protection provided. Random testing requirements provide for testing employees on some regular basis, regardless of the probability of detecting a violation. Each year, the number of random alcohol tests conducted by the employer must equal at least 25 percent of all the safety-sensitive employees (50 percent for drug tests). In small rural areas with few employees, only one or two employees may be tested. The costs for the actual test and loss of service to the community can be very expensive and disruptive to operations.

There are several other issues. Rules are inflexible regarding approved testing procedures, devices, and certified personnel. The law also is inconsistent because certain personnel, such as law enforcement officers and emergency response workers, are exempt from drug and alcohol testing requirements, while others must be tested.

State and local governments are required to pay for all related costs including testing, employee time off from work, Medical Review Officer (MRO) costs, legal costs, and medical costs out of their operating assistance block grants, reducing the amount of funding left for other purposes such as paying operator salaries, buying fuel, and other costs of doing business. Federal drug/alcohol testing requirements have also led to additional paperwork and recordkeeping demands. Finally, local governments must transport employees to specialized testing centers or contract for expensive on-site test administration.

Recommendation Options

State and local governments support the concept of removing impaired operators from the nation's highways, but question whether federal requirements imposed on some of their workers is justified, especially in view of their rigid and costly nature. The following are possible alternative recommendations:

1. Retain the requirements under the *Omnibus Transportation Employee Testing Act of 1991* for drug and alcohol testing of state and local government commercial drivers. The purpose of the act, to establish programs designed to help prevent accidents and injuries resulting from misuse of alcohol and controlled substances by drivers of commercial motor vehicles, is reasonable. Local governments that are experiencing unusual problems can work out alternative arrangements.

2. Exempt all state and local employees from federal drug and alcohol testing requirements for commercial drivers, as is now done for some employees. Specifically exempt all state and local employees from application of testing requirements as is now done for emergency service drivers (law enforcement, firefighters, ambulance drivers). Strict drug and alcohol testing requirements for small rural communities and transportation systems with few employees create situations where costs of compliance are high relative to potential findings.

3. Make drug and alcohol testing requirements for state and local government commercial drivers more flexible. The federal government should permit states to design their own programs for identifying and correcting drug and alcohol abuse problems in state and local employees. For example, the *Drug-Free Workplace Act of 1988* (P.L. 100-690) requires only certification by all federal grantees and contractors of a drug free workplace. By using drug-free certification requirements instead of drug/alcohol testing procedures, state and local governments could provide accountability without following detailed prescriptive procedures.

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December 1, 1995

METRIC CONVERSION

Mandate

The *Omnibus Trade and Competitiveness Act of 1988* (P.L. 100-418, section 5164) amended the *Metric Conversion Act of 1975* to, among other things, require that each federal agency use the metric system of measurement in its procurements, grants, and other business-related activities, except to the extent that such use is impractical. The act permits the continued use of traditional weights and measures in non-business activities. Based on this law, the Department of Transportation (DOT) will require metric measurement in plans and specifications for construction work done by state and local governments after October 1, 1996.

Background

The *Unfunded Mandates Reform Act of 1995* requires ACIR to consider requirements that state, local, and tribal governments utilize metric systems of measurement. ACIR received objections from state and local governments to the DOT

requirements to convert their transportation activities to metric measurements.

A review of the findings in the 1988 law provides little support for the DOT requirements. The law makes five findings: (1) world trade is geared towards metric; (2) industry may be at a disadvantage without metric; (3) the simplicity of metric will lead to savings in certain industries; (4) the federal government has a responsibility to assist industry as it "voluntarily converts to the metric system of measurement;" and (5) the metric system will provide advantages for the operation of the federal government. It is clear from the findings in the law that the principal purpose of the law is to facilitate business interests.

The law does not specifically require that state and local governments convert to metric measurements, but the requirement to apply metric measurement to grants indirectly requires their application to federally funded state and local projects. Another provision of the law specifically exempts non-business activities. This provision might provide a basis for exempting state and local governments, but DOT has determined that all transportation projects must comply.

Concerns

The principal concern, expressed primarily by local governments, is the requirement to use metric measurements in the design and construction of federally aided projects. While most local governments may be technically able to prepare plans and specifications in metric by the deadline, they cite several problems, including substantial costs. The largest non-cost problem is that local contractors and suppliers are not used to working with metric measurements. Their employees who prepare bids and who do the construction work are not familiar with metric and do not have metric measures. In addition, metric will create problems for right-of-way acquisitions with property owners, surveyors, and local deed registries.

As a result of these types of problems, local governments may have to convert metric plans and specifications back to English measure for some uses. In addition to the additional costs of preparing plans and specifications in both metric and English measurements, local officials are concerned that the existence of two sets of documents using different numbers creates a significant potential for confusion and mistakes.

Alternatively, local contractors and others who are unfamiliar

with metric may be forced by state and local governments to use only metric measurements on federally funded projects. Such a requirement may reduce the number of bidders on projects. The lack of familiarity with metric measurements by the contractor and employees may also result in errors. This will be true especially if other private and local government projects continue to use English measures.

Recommendation Options

While it is possible that metric requirements for local construction plans and specifications may eventually result in local highway contractors and suppliers converting to metric, these hardly seem the types of businesses that are targeted by the law as deriving benefits from conversion. As a consequence, the Commission believes one of the alternative recommendations below is justified:

1. Leave the law as it is, and rely on federal waivers to ease problems of individual governments. States have made considerable progress in the transition to metric, and any changes now would create more confusion than help. Over 2,200 waivers have been given to relieve hardship situations, and more waivers can be granted if necessary.

2. Amend the law to specify that state and local governments can continue to use traditional weights and measures in federally funded projects. The metric requirements are aimed at business conversions to facilitate international trade. State and local conversions to metric will have only indirect and minor effects on business conversions and international trade. The deadline for conversions will create substantial problems for many local governments without corresponding benefits to them or to the goal of metric conversion.

3. Delegate to states discretion over the extent to which metric conversion should occur in state and local activities and the timetable for implementation. Many states are well along on their conversions and are actively working with local governments to aid them in their conversions. For states with less progress, successful implementation by other states will provide an incentive for them to proceed. There is no reason that all states have to implement on the same timetable.

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December 1, 1995

BOREN AMENDMENT

Mandate

The Boren Amendment, requires states to establish reimbursement rates to pay hospitals, nursing facilities, and intermediate care facilities for services provided to persons eligible for assistance through the Medicaid program. The mandated federal criteria provide that state-determined reimbursement rates be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards . . . ."

Background

The intent of the Boren Amendment was to give states a means of controlling costs related to reimbursement claims from providers of Medicaid services. Rather than basing reimbursements on a cost-related payment requirement for hospitals and nursing home services, the amendment allows states to pay for services based on a predetermined reimbursement rate, giving states a basis for denying reimbursement for costs determined to be in excess of that necessary to provide "efficiently and economically" delivered services.

The law is seen by many states as more of a burden than a benefit. One problem is the use of vague, undefined terms to describe the federally mandated criteria for reimbursement rates. Further, the federal government has made a conscious decision not to issue regulations defining the vague terms in the statutory language. Moreover, while the law requires reimbursement rates to be "determined in accordance with methods and standards developed by the State," it also requires the federal government to be satisfied with the state-determined rates. To implement this requirement, the federal government has decided to require state processes for determining rates and the rates themselves to be a part of Medicaid State Plans. These plans are subject to approval by the Secretary of Health and Human Services.

The vagueness of the statutory language, combined with the lack of regulatory definitions, has resulted in substantial litigation,

with some courts viewing the Boren Amendment as a cost based payment standard in which *all* cost incurred by the providers must be reimbursed. In these instances, states may be liable for significant sums to cover the retroactive rate increases ordered by the court for the group of providers involved in the suit. In some cases, the additional payments made as a result of a court-ordered retroactive rate increase are not eligible for cost-sharing from the federal government.

Most of the Boren Amendment litigation, however, does not relate directly to vagueness of the statutory language. Rather, the issue is a state's procedure for determining reimbursement rates. In such cases, if the procedure is ruled by a court to be flawed due to lack of adequate public notice or other factors, a state may be liable for substantial retroactive reimbursements based on a revised rate determination procedure. Again, depending on the situation, the additional payments made as a result of the court order may not be eligible for cost-sharing from the federal government, even though the rate determination methodology was approved as a part of the state's plan for the Medicaid program.

Concerns

Many states feel the Boren Amendment handcuffs their ability to constrain the growth in Medicaid spending during times of fiscal crisis. Requiring that Medicaid reimbursement rates be established within the limits of federally mandated criteria restricts the scope of a state's negotiations with providers of medical and nursing home services. Further, the threat of potential litigation often causes a state to increase rates merely to avoid legal actions. States are concerned about the extensive and expensive work necessary to substantiate compliance with the and to protect against suits by nursing home or hospital providers.

This situation is especially true since the 1990 Supreme Court ruling in *Wilder v. Virginia Hospital Association,* (496 US 498). The Supreme Court declared that medical care providers (instead of Medicaid recipients) are the intended beneficiaries of Boren Amendment. This ruling allows medical facilities and nursing homes to obtain judicial review of state reimbursement rates under the *Civil Rights Act*, Section 1983. In effect, the Court ruling allows hospitals and nursing homes to claim that a state is violating the hospital's civil rights by failing to pay "cost

incurred to provide services."

Recommendation Options

1. Retain current provisions with no significant changes. Retention of a federal government role in the determination of Medicaid reimbursement rates would recognize that the law provides a means for the federal government to assure a minimum level of solvency for providers. This, in turn, gives some assurance of access to medical facilities for low-income persons. Also, in a sense, the Boren Amendment is used as a proxy to assure minimum standards of quality in medical and nursing home services.

While retaining a federal role in rate determinations, some changes could be made to clarify the statutory language to reduce litigation. The federal government's liability for court ordered retroactive rate increases could be specified especially in cases where the state's procedures had been approved by the Department of Health and Human Services (HHS). Besides alleviating state cost liabilities, such specificity may give HHS a greater incentive to continue improving its review practices.

2. Delete the federally mandated criteria and make states solely responsible for Medicaid reimbursement rate determinations. Deleting the federally mandated rate criteria and declaring states solely responsible for establishing Medicaid reimbursement rates would give states greater latitude in negotiations with medical service providers. However, it would also make states responsible for defending their established rates and could make states fully liable for retroactive rate increases.

While this option would clarify intergovernmental lines of accountability for Medicaid rate determinations, it would not necessarily significantly change rates. Under current law, while the federal government is responsible for declaring state determined rates satisfactory, it is not responsible for setting national reimbursement rates. On the other hand, with greater negotiating latitude, some states may be able to institute cost controls over rates of reimbursement as a result of voluntary agreements between states and medical providers. The success of the state governments in controlling costs will depend on their ability to maintain good working relationships with institutional providers and not on conditions or approvals given by the federal government.

3. Limit litigation actions to enforce the Boren Amendment. The number of litigation cases pursued in relation to the Boren Amendment could be reduced if the *Civil Rights Act* provision under which many of the suits are brought were narrowed to exclude institutions, such as hospitals and nursing homes, from being considered individuals under the provisions of Section 1983.

Alternatively, the law could be amended so that the federal government would be the only party eligible to bring suits against states for Boren Amendment violations. In this situation, once the federal government approved a state plan for setting reimbursement rates, any complaints on the rates would have to be brought to the federal government for resolution. A suit against a state would take place only if the federal government determined such action necessary to enforce compliance. On the other hand, individuals could bring suit against the federal government over questions related to the approval of a state's plan.

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CLEAN WATER ACT

Mandate

States are required by the *Clean Water Act* to designate the uses of water, develop water quality criteria to protect those uses, monitor the condition of waters, and report on water quality every two years. States may administer a permit program for industrial and municipal pollution discharges and develop programs for the control of pollution from diffuse or nonpoint sources.

Local governments are required, either directly by the federal government or indirectly through state implementation of federal laws, to treat sewage to national standards and control discharges from combined sewers and stormwater drains.

Background

The *Water Pollution Control Act of 1948* was the first federal recognition of water pollution as a national problem. It provided research and technical assistance to state and local governments, but explicitly preserved and protected "the primary responsibilities and rights of the states in controlling water pollution."

Eight years later in 1956, the condition of the nation's rivers and lakes had not noticeably improved, and in some cases had deteriorated. The *Water Pollution Control Act Amendments of 1956* provided grants to states and interstate agencies for expanded water pollution control projects. While the law reaffirmed the primary responsibility of states over water pollution, it introduced a weak form of federal enforcement through federally called conferences on pollution. These conferences could ultimately lead to federal court actions against individual polluters.

Municipal interest groups continued to press for more federal funding for sewage treatment plants, and they were successful in the *Water Quality Act of 1965* and the *Clean Water Restoration Act of 1966*. In addition to providing $3.55 billion of grant funds, these laws formally established a *national policy for controlling pollution*. The concept of "clean waters" was established as federal policy with the directive that interstate waters would be kept "as clean as possible." Most importantly, the Secretary of HEW was authorized to apply water quality standards to interstate waters and to enforce them if states failed to set their own standards.

In the *Water Pollution Control Act Amendments of 1972*, Congress provided for a comprehensive national program to protect water quality. Key provisions included national minimum standards for control of pollutants from industrial and municipal sources, additional controls in permits as needed to meet state standards, and significant grant assistance to support construction of municipal sewage treatment facilities. In effect, states and local governments ceded control over water pollution controls to the federal government in return for substantial federal financial aid.

In 1987, the federal government changed the arrangement by a transition from direct grants to capitalization of state loan funds. Loan funds reduce interest costs for some projects, but they still require local governments to pay virtually the entire costs of future pollution control projects. In addition, the 1987 amendments required municipalities to remove harmful amounts of toxins from their sewage and to establish stormwater management programs.

Concerns

The principal concerns of state and local governments are that a

national program they originally supported and encouraged is no longer a balanced partnership to clean up the nation's waterways. Federal requirements, especially those dealing with stormwater drainage, have become increasingly stringent and expensive to implement. At the same time, the federal funding to aid in the cleanup has virtually disappeared.

Some state and local governments are particularly troubled by federal requirements for local National Pollutant Discharge Elimination System (NPDES) permits for their stormwater run-off. These permits require compliance with standards that have detailed numerical limits that, in many cases, may not be feasible to attain.

State and local governments also are concerned that many requirements are not based on adequate scientific research and that the law does not require cost-benefit analysis. In the earlier years of this program, the federal government worked closely with state and local officials to set plans, standards, and timetables. Concerns were expressed that this consultation has substantially diminished.

Recommendation Options

The joint federal-state-local efforts to clean-up waterways has been very successful, but since the changes in federal policies in the late 1980s, there have been increasing strains between the governments in this effort. To restore the successful partnership will require either a return to substantial federal sharing in the costs of clean-up, or a relaxing of inflexible imposition of standards and deadlines on state and local governments. Some possible recommendations to achieve this may be:

1. Amend the existing law to relieve some specific problems, but otherwise make no changes in the existing intergovernmental relationship. There are a few specific problems that can be legislatively addressed, but most of the concerns expressed by state and local governments do not require changes in the law. EPA has embarked on efforts to improve communications and understanding by state and local officials, and these efforts should relieve most concerns.

2. Reinstate direct federal sharing of costs, especially in cases of demonstrated local government hardships in financing improvements. While such a proposal may appear unworkable in view of federal budget constraints, the budget constraints on state and local governments are also severe. If

there is a clear national need for additional spending, then the cost of doing so should not be imposed unilaterally on hard-pressed state and local governments.

3. Relax strict requirements and allow state and local governments discretion in developing standards, control methods, and timetables for state and local governments. If there is not a sufficient national priority to justify federal spending, then the requirements should be relaxed. State and local governments have traditionally been concerned about reducing pollution, and they should be trusted to work constructively with federal officials to design realistic programs to continue the progress that has been made.

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INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Mandate

The *Individuals with Disabilities Education Act* (IDEA) P.L. 101-476 (originally the 1975 *Education for All Handicapped Children Act*) requires all local school systems to provide a free appropriate education for children with disabilities. The law provides that federal aid to states for elementary and high school education will be available only after a state has a federally approved plan for educating children with disabilities.

States also are required to incorporate specific equal opportunity guarantees and due process protections into their state education plans. The act specifies that a "free appropriate public education" must be directed at the particular needs of the disabled child through an individualized educational program and requires school districts to educate students with disabilities in the least restrictive environment, to the maximum extent possible with students without disabilities. In addition, IDEA requires all participating states to establish specific administrative procedures by which parents or legal guardians may challenge the identification, evaluation, or educational placement of the children.

Background

Nearly 20 years after *Brown v. Board of Education* declared that equal access and educational opportunities should be bestowed upon children of color, an equally important "right to education" case, *Pennsylvania Association for Retarded Children (PARC) v.*

Pennsylvania [343 F. Supp. 279 (3d Cir. 1972)] opened these equal protection and due process rights to children with disabilities. Congress then passed the *Education for All Handicapped Children Act* in 1975, finding that state and local educational agencies were responsible for educating all students with disabilities, that state and local governments lacked the financial resources to do this, and that the federal government had a national interest to assist in meeting the educational needs of students with disabilities in order to assure equal protection under the law.

The Supreme Court, in 1984, further acknowledged the intergovernmental partnership in the area of special education. *Smith v. Robinson* [468 U.S. 992 (1984)] reiterated that the act was a "comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. . . . The [IDEA] was an attempt to relieve the fiscal burden placed on States and localities by their responsibility to provide education for all handicapped children. . . . The responsibility for providing the required education remains on the States."

Concerns

Since the passage of the original act and its subsequent amendments, state and local education agencies have resisted federal involvement in education, an area normally reserved for state and local authority. Numerous due process hearings in the local and state sector, recurring litigation of special education issues in state and federal courts, and congressional efforts to instill national special education policy on state and local governments indicate turbulence in the original intergovernmental cooperative effort in this area. Despite the success of educating millions of children with disabilities, IDEA creates administrative and financial burdens on state and local governments.

A major concern is the funding responsibilities of the federal and state governments. In 1975, Congress authorized appropriations at the maximum level of 40 percent of the excess costs of special education by 1982, but the federal portion has never exceeded 12 percent. As of Fiscal Year 1995, Congress has appropriated funds for only a maximum of approximately 8 percent of these excess costs. Funding was always an essential component of IDEA; the original intent was to assist states in meeting their

obligations to provide equal protection under the law to students with disabilities. Federal contributions were to help fund state and local provision of special education and related services, as well as personnel preparation, operational research, and instructional media. Without this allocation, state and local governments have become liable for almost all IDEA expenses.

A second problem with IDEA is the funding allocation process. Lack of guidelines in providing and allocating funds, and financial incentives to "label" more students as "special education" students, are driving up the size and cost of the system. Appropriations are allocated to states based on the number of students identified as requiring special education in each state. A state retains a maximum of 25 percent of the federal money and passes the remainder to local education agencies based on the number of students receiving special education. The financial incentives to misidentify and overidentify children as "special" in order to receive more funding for state and local education agencies are costly and may hurt the children through stigmatizing special education labels.

Third, local education agencies are prohibited from combining IDEA funds with other federal funding streams to provide non-categorical support for children with disabilities. Inability to coordinate IDEA funds with other federal education programs reduces state and local flexibility to meet students' needs.

Fourth, the resolution of disputes under IDEA has become overly litigious and adversarial, stemming from the statute's imposition of a legal enforcement mechanism to guarantee children and their parents the education rights outlined in the act. As stated earlier, IDEA directs states to establish explicit administrative procedures for parents or guardians of students with disabilities to dispute the classification, assessment, or educational position of the child. When a local educational agency receives a complaint, the parents or guardian must be given timely, impartial due process hearing. In addition, the complaining party may bring the action in state or federal court if the case is not brought to an administrative conclusion. Recovery of attorney fees if parents prevail adds to the costs of IDEA.

Finally, one of the primary concerns of state and local governments regarding IDEA is the usurpation of the states' authority in the area of education, a traditional domain of the

state and local government. Federal funding for primary and secondary special education programs are contingent on a state's adoption of the provisions outlined in IDEA, allowing the federal government to involve itself in local school issues. IDEA forces states to submit their special education service plans to the federal government for approval, cutting into a policy area in which they may not be best suited to issue specific rules and regulations.

Recommendation Options

1. Retain the provisions of the *Individuals with Disabilities Education Act*, but examine and modify the funding structure. IDEA has allowed millions of students with disabilities access to a free and appropriate public education. The goals, purposes, rights, and protections offered by the act justify its mandate requirements. IDEA should be modified to remove funding provisions that encourage and reward the overclassification and segregation of students with disabilities.

2. Provide funding assistance to state and local governments for compliance. The federal government should increase funding for IDEA. Only about 8 percent of a special education student's cost is repaid by the federal government, well below the 40 percent intended by Congress when the law was enacted. The intergovernmental financial partnership in special education has been weakened by this funding problem. The act should be amended to relax some of the most costly requirements if the federal government fails to meet its funding commitments.

3. Defer implementation decisions to the state and local governments. State and local education agencies are better equipped than the federal government to determine an "appropriate education", and how to specially meet a student's needs through an individualized education program (IEP) that is nondiscriminatory and beneficial. Education policy implementation is a traditional responsibility of state and local governments. The federal government should provide state and local education agencies the flexibility to administer their special education programs in a manner that is effective in their own jurisdiction and good for their own children. The federal Department of Education should retain a formal monitoring presence.

4. Eliminate the statutory right of individuals to bring

court actions or require alternate dispute resolution alternatives before use of due process procedures. IDEA provides a procedural structure for determining how the educational needs of each student should be met by state and local educational agencies. The decisions of the agencies may be challenged in either state or federal court, and in some cases, parents bringing actions on behalf of their children may be entitled to reimbursement for their costs, including attorney and court fees. Alternative dispute resolution practices should be required and any challenge in state or federal court should be brought by state or federal agencies, not by individuals.

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AMERICANS WITH DISABILITIES ACT

Mandate

The *Americans with Disabilities Act of 1990* (ADA) (P.L. 101-336) prohibits discrimination against individuals with disabilities in employment, public services, and public accommodations, and requires state and local governments to ensure that individuals with disabilities are able to participate in the programs and services that they provide. Modifications in policies and practices are required to facilitate participation by individuals with disabilities. The act requires that telecommunications be made available to those with speech and hearing impairments through the use of telecommunication relay services. The law also compels employers to make "reasonable accommodations" for disabled workers, but not changes that would involve "undue hardship." State and local governments are required to make new and renovated facilities accessible to the disabled and to make "readily achievable" changes in existing facilities.

State and local governments have been covered by employment nondiscrimination requirements since January 26, 1992. Structural changes to existing buildings to meet "program accessibility" requirements were to be made by January 26, 1995, a deadline not met by many state and local governments.

Background

The law expanded civil rights protection to about 49 million Americans with mental and physical disabilities. Discrimination against the disabled was prohibited in federally funded activities

by the 1973 *Rehabilitation Act* and in housing by the 1988 *Fair Housing Act*, but the disabled were not among the groups covered by the 1964 *Civil Rights Act*, which prohibited discrimination in employment and public accommodations on the basis of race, sex, religion, or national origin.

ADA requires that state and local governments review all policies, programs, services, and practices to ensure that they do not discriminate against people with disabilities. Procedural requirements established under Section 504 of the Rehabilitation Act are extended to state and local government programs not receiving federal assistance. Any policies found to be inconsistent with ADA provisions are to be modified as soon as feasible. Each program is to be examined for physical barriers to access and remedial steps necessary. Required self-evaluation and transition plans mandate that these governments designate an ADA Coordinator; consult with persons with disabilities; notify the public about ADA; establish an ADA grievance procedure for filing and mediation of informal complaints; establish timelines for modification of policies, programs, services, activities, and facilities; implement the modifications; justify any policies and practices not to be modified; establish a system for evaluation; and maintain the plans on file for public inspection.

State and local governments are required to develop grievance procedures to resolve disputes in a timely and equitable manner. The Department of Justice (DOJ) encourages alternative dispute resolution before any legal procedures are needed (e.g., settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration). Emphasis is on alleviating tensions and grievances before litigation becomes necessary.

ADA is significantly different in its effects than the *Civil Rights Act* because it requires often expensive changes in physical barriers. This difference in the costs of compliance was noted by Senator Tom Harkin, chief sponsor of the ADA, "before the 1964 act if you were black, you couldn't sit at the lunch table, or you had to sit at the back of the bus. All businesses had to do to accommodate was to let them sit wherever they wanted. But disabled people can't even get on the bus, . . . so over time, the impact is greater."

Concerns

The greatest concern with ADA is the cost of compliance. No federal funding has been appropriated to cover most state and local compliance costs. With tight budgets and limited time to correct structural obstacles and to improve public accommodation, it is difficult for these governments to implement the extensive changes required.

Another concern is the use of the terms "reasonable accommodation," "undue hardship," "readily achievable," and countless other broad expressions. The law contains so many vague or overly broad provisions that state and local governments have been subjected to numerous lawsuits over legal interpretations of ADA. ADA provisions are complex, ambiguous, and difficult to interpret and administer, and they may result in unintentional discrimination. The penalties for noncompliance are severe, and legal costs can be substantial.

There are large gaps in information about ADA and the assistance available to comply with it. Some educational and technical resources exist in nonprofit service agencies and private for-profit legal and technical consultants, but obtaining federal technical support has been difficult for small governments. According to the National Council on Disability, without increases in information dissemination and technical assistance strategies, the demand for assistance and guidance will continue to overwhelm government resources. The federal government needs to sponsor and promote dialogue between state and local governments and technical assistance organizations to address and expedite compliance and to reduce the number of complaints that arise under the act.

Federal enforcement of ADA is uncoordinated. Eight federal departments have some enforcement power, including: Agriculture, Education, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, and Transportation. It is the responsibility of these agencies to implement the ADA policies established by the Department of Justice. The prime responsibility for processing complaints under ADA are the Justice Department and the Equal Employment Opportunity Commission. The Federal Communications Commission manages telecommunications issues. The National Council on Disability is an independent federal agency that identifies emerging issues and recommends disability policy to the President and Congress. The

Architectural and Transportation Barriers Compliance Board provides some educational and technical assistance regarding accessibility. In effect, there is not a single, clearly designated, primary regulatory and enforcement agency.

Recommendation Options

In 1989, a year before ADA was enacted, ACIR made several recommendations on disability mandates in its report *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal.* ACIR recommended that "federal, state and local governments work in closer partnership to pursue mandates for removing architectural barriers and enhancing employment opportunities for persons with disabilities." Several of the recommendations in that report are still pertinent. The following possible recommendations for change may reduce the problems of compliance placed on state and local government without abridging the rights of persons with disabilities:

1. Retain the *Americans with Disabilities Act* provisions, but modify implementation elements of the law. ADA presents a social benefit to society through the integration of individuals with disabilities into society. While the basic provisions may be retained, there is a need to examine the implementation components of the act. Implementation problems can be addressed by a better focused federal response, including:

a. Providing increased technical assistance and educational information to state and local governments. The law is in its early stages, and most problems have arisen due to lack of sufficient federal staff and resources to respond to the demand for information. As state and local governments progress in implementing ADA, their questions will become increasingly technical, requiring complex and detailed responses.

b. Providing a fair share of federal funding for retrofitting existing facilities. The federal government should provide funding to state and local governments to assist in compliance with requirements that require extensive retrofitting or additions to existing facilities. Paratransit funding should be retained.

c. Designating a single federal ADA enforcement agency. Federal efforts should be coordinated into one or two agencies to

improve enforcement visibility, educational dissemination, and technical assistance. The lack of a clearly designated and visible ADA enforcement agency with clear and evident compliance standards adds to the confusion. The federal government, through the Department of Justice and/or the Equal Employment Opportunity Commission could be responsible for planning, coordinating and funding accurate ADA information dissemination.

2. Provide flexibility to state and local governments and federal flexibility in the use of federal grants to comply. The law should be modified to change its orientation from rigid requirements toward a focus on goals and goal attainment schedules, allowing state and local governments the opportunity to develop their own means for achieving them. State and local governments have a better understanding of their specific accessibility problems and how to meet, or exceed, ADA goals at lower cost without following strict and rigid provisions.

ADA requirements should be temporarily or permanently suspended, or made voluntary, for communities without the fiscal capacity to comply. Standards of accessibility should be reviewed within distinctive urban and rural communities and counties, and these governments should be allowed voluntary compliance with federal goals. The ADA should take into account individual needs of the state and local governments as well as financial hardship and economic concerns.

Also, the federal government should extend or negotiate timelines for compliance based on mutual agreements between the governmental entities. If longer periods were allowed to comply with the structural modification requirements and the rules for accessibility of services and programs, it would allow opportunity for state and local agencies to spread out the expense.

3. Require that all legal action against state and local governments to enforce ADA be brought only by the U.S. Attorney General. Aggrieved citizens should be able to petition the Attorney General to act. Individuals currently have the option to file suit in federal court to seek remedies including compensatory damages for unlawful and intentional discrimination. These individual lawsuits could be minimized by modifying ADA language to clarify and simplify the goals and methods needed to achieve those goals so there is less left to

judicial interpretation. The ability of individuals to sue state or local governments pursuant to enforcement of broadly worded, vague mandates creates enormous litigation costs and administrative uncertainties for these governments, and should be prohibited. If the Attorney General believes the case has sufficient merit to warrant a court action, it should be brought by the federal government, not by an individual.

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SAFE DRINKING WATER ACT

Mandate

The *Safe Drinking Water Act* (SDWA) regulates drinking water standards for all waterworks serving 25 or more persons on a regular basis. It establishes maximum levels for contaminants known to occur in public water systems, establishes wellhead protection programs, certifies and specifies appropriate analytical and treatment techniques, and establishes public notification procedures. It requires drinking water suppliers to assume a wide range of responsibilities, including monitoring of the water supply.

Background

There are an estimated 58,530 water systems, with more than 25 customers each, providing water to about 219 million people. Approximately 37,425 of these systems are very small and serve less than 500 customers. While 15,740 systems are privately owned, 82 percent of the urban systems are government owned.

The *Safe Drinking Water Act of 1974* directed the Environmental Protection Agency (EPA) to impose standards applicable to all public water systems to protect human health from organic, inorganic, and microbiological contaminants and for turbidity in drinking water. This act was the beginning of direct federal requirements for local drinking water to meet national standards. Prior to 1974, states generally required local water systems to adhere to the U.S. Public Health Service drinking water standards for regulation of water used by interstate carriers.

The direct involvement of the federal government came after a 1969 Public Health Service study noted that many of its drinking water standards were based on insufficient data and did not cover many known contaminants. There were also

concerns that some pollutants in drinking water were linked to cancer. These developments provided a basis for Congress to enact the 1974 law.

In 1986, Congress amended the law to identify 83 specific contaminants for which EPA was to set standards, and it mandated EPA regulations governing filtration for surface water supplies and disinfection for systems using surface or ground water. The law requires that 25 additional new contaminants be regulated every three years. The Congressional Budget Office (CBO) reports that, "$1.4 billion to $2.3 billion per year should be viewed as a range of estimates of the total cost that water systems will bear to comply with SDWA regulations that went beyond pre-SDWA standards." While the Department of Agriculture has provided grants for water supply systems, SDWA provides no compliance grants.

CBO recently examined benefits associated with SDWA, and based on the limited information available, found that the cost per cancer case avoided averaged for all water systems varied between $0.5 million to $4.3 billion, depending on the contaminant. CBO concludes that these high costs relative to benefits mean that states probably would never have undertaken all the required treatments without the federal mandate. The CBO estimates also raise questions about whether the federal government would have imposed the requirements if better information about cost-benefits had been available when the law was enacted.

Concerns

Prior to the imposition of federally mandated requirements, most states were already imposing Public Health Service Standards on local water systems. State and local government comments indicate that they continue to be willing to comply with standards that directly relate to eliminating reasonable health risks. The problems arise because of what are perceived as requirements to test for contaminants or treat surface water in instances where the risks are relatively low and the costs are significant. Because there is no federal participation in the costs, it is felt that requirements are being imposed for a wide variety of risks regardless of cost.

There also are substantial concerns about the lack of recognition in SDWA of the technical problems and high costs faced by small water suppliers. In some instances, tests that have nominal

costs per customer for large systems are extremely costly per customer for small systems and may be beyond their technical capacity to comply. While variances and exemptions are permitted under some circumstances, the procedures required to obtain them may be unworkable.

Concerns also are expressed about being held equally accountable for violations that are genuinely health related and for failure to follow exactly prescribed schedules or testing procedures. States lack flexibility and discretion in implementing the law. Alternative, less expensive technology to address specific risks is not permitted in some instances. Sometimes, the treatment requirements do not relate directly to specific existing and measurable contamination.

Recommendation Options

The safety of drinking water is a public health issue that prior to 1974 was addressed by states relying on standards set by the Public Health Service. Bad drinking water endangers not only the residents of a local community and state, but also those traveling interstate, and thus regulation of drinking water may be justified as a national concern. However, in some other areas of vital public health concerns, such as restaurant inspections, the responsibility is left to state and local governments.

The disagreements over the Safe Drinking Water Act hinge on differences over what constitutes safe drinking water and how to achieve safe drinking water in the most cost-effective way. State and local governments do not object to assuming the costs of providing safe drinking water, but some operators of water systems do object to incurring costs that in their opinion do not improve water quality.

1. Adjust the existing law to meet some of the specific objections. The law is making drinking water safer throughout the country and is not causing unnecessary costs or hardships for most water systems. However, proposed amendments, approved by the Senate, would relieve some of the most onerous provisions, or would delay their implementation until there is a better scientific basis for them. While the existing law overreached in both its standards and compliance requirements, it is basically sound in its approach. By addressing specific problems but leaving the structure of the law intact, there would continue to be federal oversight to insure the safety of drinking water.

2. Return to the issuance of national public health standards for drinking water, but leave the imposition and implementation of those standards to states. The federal government should provide basic standards for healthy drinking water. States should determine how to achieve those standards within their states. The pressure of public opinion would force the states to either comply or prepare a reasonable plan for complying with the national standards. In any event, the standards should be based on performance and not process. If a state is meeting the standards, it should not matter to the federal government how compliance is achieved. The burden of proof should rest with the federal government to determine whether a state is in compliance with national standards.

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ENDANGERED SPECIES ACT

Mandate

The *Endangered Species Act of 1973* (P.L. 97-304) requires every federal agency to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of listed threatened and endangered species or the destruction or adverse modification of critical habitat. The environmentally protective features of this law are activated by a "listing" of an endangered species, which may be based on any one of a number of statutory factors. The "critical habitat" for a listed endangered species is defined to include areas "essential for the conservation of the species," a designation that protects the habitat as well as the species. The critical habitat standards apply to specific areas "which may require special management consideration or protection."

The requirements of the law apply to all state, local, and tribal projects that must obtain one or more federal permits or approvals. Under the law, state, local, and tribal governments may not be able to obtain a federal permit, license, or grant if the project does not comply fully with very specific uniform standards for protecting endangered species. Regulations provide for detailed consultation, conference, and biological assessment procedures. If the Secretary of Interior concludes that a species or its habitat will be jeopardized, the Secretary is to suggest "reasonable and prudent alternatives" to be

implemented by the federal agency or the state/local applicant for a federal license or funding.

Background

The first endangered species legislation was a 1966 bill that called for saving U.S. wildlife, but provided the federal government little power to do so. Three years later, a new international focus on endangered species looked at the problem of preventing extinction worldwide. During the early 1970s, a new age of environmentalism swept the country, prompting the Congress to pass the *Endangered Species Act of 1973* (ESA), giving the federal government sweeping powers to conserve and recover listed species.

Under ESA, The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service are responsible for reviewing the status of species to see if they warrant listing as either threatened or endangered. The decision is to be based solely on scientific data, not on economic and political factors. These agencies sometimes target federal lands and other public domains, such as state parks, to carry out protection and recovery efforts The federal government also has authority to restrict actions on private property where federal permitting authority applies.

In 1978, the Supreme Court in *Tennessee Valley Authority v. Hill,* (437 U.S. 153), found that the provisions and restrictions in ESA are absolute. The Court found an "explicit congressional decision" to afford "first priority" to saving endangered species, and a "conscious decision" by the Congress to give endangered species priority over the "primary missions" of federal agencies. Shortly after this decision, Congress authorized an exemption from the statutory prohibition if the federal agency or the state or local government can show that the value of the project outweighs the protection of the species, or if modifying or dismantling the project would cause undue social and economic hardship. The Endangered Species Committee is charged with reviewing and acting upon the exemption of ESA Section 7 rules, but has rarely been called on to do so.

Since its inception, ESA has been credited with helping preserve such nationally symbolic animals as the bald eagle and the grizzly bear, but critics charge that federal regulators have gone beyond the original intent of the law, causing widespread economic and social hardship. Supporters of the law assert that

critics ignore the ecological role of the lesser known animals and plants that ESA protects, as well as the medicinal uses of some rare plants on the endangered species list.

Issues of Concern

Sometimes, there is little coordination and agreement between affected governments before or after a species is listed as threatened or endangered, whether the action is of regional or national significance. The Act does not require the federal implementing agencies to identify quickly and clearly activities on state, local, and tribal lands that may be affected by a listing decision. There is little incentive for the Fish and Wildlife and National Marine Fisheries services to discuss options with other federal agencies; state, local, and tribal governments; and private groups before listing is made. Instead, Fish and Wildlife biologists and other federal government employees often make choices for entire regions, favoring the interests of species over the interests of individual state, local, or tribal governments. By contrast, there have been highly successful federal programs involving states in the conservation of game species, specifically the Pittman-Robertson and Dingell-Johnson acts, which direct federal excise taxes to the states in support of game conservation.

From a state and local government perspective, significant development and construction projects are being halted and modified due to findings of "jeopardy" to endangered species and/or their habitats. If consultation or mitigation between the state or local government and FWS does not provide acceptable alternatives, the project may be completely terminated.

The listing process is very rigid and limits the flexibility of state, local and tribal governments to apply the Act's protections selectively where they are most needed. The Fish and Wildlife Service uses the "best available scientific and commercial data" on species, creating a relative standard for data that sometimes is not conclusive, verifiable, or sufficient. Biologists from federal agencies often have the last word on what species is threatened or endangered. State, local, and tribal governments are concerned about the poor condition of scientific peer review and the unrealistic criteria for the recovery of endangered species.

Finally, there is state and local government concern about the encroachment of the federal government's requirements on private property because of the adverse consequences for

valuable economic development activities in their jurisdictions.

Recommendations Options

There is a need to restore an economic and ecological balance under the *Endangered Species Act*. The federal government's powers are broad and discretionary while the rules for state, local, and tribal governments are rigid and inflexible. For the law to work effectively and efficiently, state, local, and tribal governments need incentives to provide habitat for endangered species and the freedom to administer and enforce standards to achieve this goal.

The issue of compromise between economic activity and species conservation needs to be addressed and coordinated. Although the original intent of Congress, according to *Tennessee Valley Authority v. Hill*, was to "halt or reverse the trend toward species extinction, whatever the cost," economic impacts of critical habitat designation and of recovery plans need to be assessed by state, local, and tribal governments. A balance must be struck so that neither conservationists nor developers win all the time, and this balance must be agreed on by all levels of government.

1. Retain the provisions of the *Endangered Species Act,* but improve federal funding allocations and the implementation process. Protecting endangered species is a national priority. It is a task that should be maintained at the national level and placed alongside other basic values such as protecting health, maintaining the nation's defense, and fostering education. Weaknesses in ESA are due to inadequate funding and poor implementation. The federal government should increase actual funding levels significantly to aid state, local, and tribal governments in implementing the *Endangered Species Act.*

2. Amend the *Endangered Species Act* to make state, local, and tribal governments full partners with the federal government in the preservation of endangered species. State, local, and tribal governments should be consulted and have a consent role before a species is listed, and should be included in the management and planning decisions affecting the listing process. These governments should be allowed authority for species protection as well as flexibility in the implementation of conservation plans for specific species within their jurisdictional boundaries. State, local, and tribal representatives should be allowed to advise the Secretary of

Interior on biological, economic, and intergovernmental considerations in conservation matters.

3. Policies of the *Endangered Species Act* should be modified to minimize the social and economic impact on state, local, and tribal governments of recovery planning and listing procedures. If implemented properly, ESA could produce better conservation decisions and cost society less, winning more public support. The goal should be to reduce the likelihood of economic disruption while ensuring species recovery. A range of incentives for conservation agreements needs to be offered to avoid the need for listing. There needs to be greater emphasis on the affects of listing of species and designation of critical habitats on individuals, their communities, and their social and economic futures.

Scientific review procedures for listing and recovery decisions need to be examined and modified to ensure that decisions made under the *Endangered Species Act* represent the best available scientific information, that has been peer reviewed. Broader participation by state, local, and tribal governments will improve the data collection process and allow biological science, economic constraints, sociological factors, and available management resources to be taken into account on a regional basis. This expanded consultation in the scientific review process will distribute decision making responsibility and decrease some of the absolute power of the Fish and Wildlife Service.

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December 1, 1995

CLEAN AIR ACT

Mandate

The *Clean Air Act of 1977* (P.L. 95-95) requires states to submit for federal approval a plan for meeting air quality standards established by the federal government. These plans must include emissions limitations and schedules of compliance. The federal government will prepare a plan for any state that fails to comply. The act spells out how to measure different types of pollution, the standards that must be met for each type of pollution, the specific compliance measures that may be taken, and the deadlines for those actions. Some federal financial assistance for planning and implementation is authorized in the

law, but each state must provide assurances that "the State or general purpose local governments will have adequate personnel, funding, and authority under state and, as appropriate, local law to carry out such implementation plan."

Background

The first national legislation in air pollution came in 1955 as a reaction to killer smogs in Donora, Pennsylvania; New York City; and London, England. Before then, the efforts to control air pollution were made primarily by cities. The first state law was enacted in 1952. Cities experiencing difficulties enforcing local air pollution laws supported national air pollution legislation because local polluting industries threatened to move to other less regulated areas.

The federal government was reluctant to enter the pollution control field because such regulation was seen as protecting the health, safety, and welfare of the people, a proper traditional function for the states under their police powers. The committee report on the 1955 bill noted, "The bill does not propose any exercise of police power by the federal government and no provision in it invades the sovereignty of states, counties, or cities." What it did do was provide for research, training, demonstration projects, and grants-in-aid to local governments.

The *Clean Air Act of 1963*, noting a continued decline in the nation's air quality, signaled the beginning of change in the pattern of federal-state-local relations by authorizing national air quality criteria and permitting federal intervention in the state if the state could not deal appropriately with the problems. It also provided grants to states and recognized their need to develop statewide control laws. With the passage of the *Air Quality Act of 1967*, the transition from local to state responsibility for air pollution control was established. States were required to develop, set, and implement plans to achieve national air quality standards. Increased federal grants accompanied the new requirements.

By 1970, only 21 states had submitted implementation plans, and the federal government decided it was necessary to set standards (including vehicle emissions) and enforce state implementation. Some of these strict requirements were deferred in the 1977 law. Nevertheless, the role of the federal government as principal promoter of strict air pollution standards was firmly established.

The 1990 amendments targeted smaller pollution sources, including facilities owned by local governments. By December 1995, governments in areas with moderate carbon monoxide pollution must adopt vehicle inspection and maintenance programs and require use of cleaner oxygenated fuels. Within another year, areas with moderate ozone pollution must set up similar programs and require use of gasoline-pump devices to capture vapors. Failure to implement these programs can result in the loss of federal highway funds.

Since the 1977 Act, and especially in the 1990 amendments, the requirements have become increasingly detailed and specific, and the role of states has become detailed as the implementer of federal laws with little discretion over them and less federal financial assistance. As early as 1981, ACIR reported "Many state governments have expressed concern over their roles as implementors of federal pollution programs. They complain that such programs have created financial hardship due to inadequate federal funding and administrative involvement."

Concerns

The states have expressed a wide variety of concerns about policies contained in the current *Clean Air Act*. These concerns range from automotive emission controls to retrofitting state air conditioning units, and many of them relate to highly technical provisions and how they will affect the states' ability to implement the requirements. While costs do not seem to be the overriding concern, several states noted that federal aid is totally inadequate in relation to the responsibilities that have been delegated. A basic problem seems to be the extremely detailed and complex requirements that states must enforce, regardless of their technical capabilities or whether they agree with the actions required.

Recommendation Options

The initial demand for federal help in controlling air pollution came from cities that were unable to act effectively on an individual basis. Because the federal government recognized the need to act on regional bases, and in recognition of the federal system as viewed at that time, the states were encouraged by the federal government to assume responsibility for controlling air pollution and were given federal grants to assist in implementing such controls.

However, because it was believed that states were not acting

swiftly or effectively enough, federal laws have become increasingly detailed and prescriptive. This has distorted what started as a partnership into a mandate. There are several possible recommendations that will recognize the need for a federal role, but reduce state and local concerns.

1. Make no changes in the law, but increase federal financial aid and technical assistance, and relax some deadlines. The law has evolved over a number of years and addresses an important national problem. The concerns of state and local governments are primarily with the details of implementing the law and meeting the deadlines, not with the existing premises of the law.

2. Amend the law to provide only performance goals that states are required to meet within reasonable time periods, with federal technical assistance to states. Each state should be permitted to develop its own ways of meeting general standards. The methods chosen should reflect the conditions and the citizen's preferences in the state. Because states often lack technical expertise, the federal government should provide free assistance to any state requesting help.

3. The penalties for failure to comply should be changed to positive incentives to comply. As states increase the effectiveness of their control activities, they should receive increasing amounts of federal financial aid. There should be no reductions in aid for failure to comply.

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December 1, 1995

DAVIS-BACON RELATED ACTS

Mandate

The *Davis-Bacon Act* (40 U.S.C 276a-7) applies to federal government contracts over $2,000 for construction, alteration, and/or repair work. The law requires such contracts to specify the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. The minimum wages must be based on the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on similar contracts in the city, town, village, or other civil subdivision of the state in which the work is to be performed.

About 60 other federal laws make compliance with Davis-Bacon

a condition-of-aid for grants to state and local governments (e.g., construction programs related to low-income housing, highways, and waste water treatment facilities). These laws are known as Davis-Bacon related acts.

Background

The *Davis-Bacon Act* was enacted in 1931 during the Great Depression. The primary purpose was to bring stability to the construction industry and place a floor under downward spiraling wages. It prevented non-local contractors from underbidding local contractors for work on federal public works projects by hiring workers from other areas willing to accept lower wages than those prevailing in the local area. The law is not intended to reduce costs. Instead, Davis-Bacon requirements are meant to guarantee that the federal government's vast purchasing power, coupled with a requirement to award contracts to the lowest bidder, will not undercut construction wages in local labor markets or undermine local economies.

To determine prevailing wages in an area, the Department of Labor (DOL) seeks information from various sources including voluntary responses from local contractors on their wage and benefit rates for various classes of mechanics and laborers. The Department computes either a "majority rate" or a "weighted average rate" for an area. If a single wage and benefit rate is paid to more than 50 percent of the workers in a job category, that rate is used as the prevailing wage for the area. If there is not a standard area wage and benefit rate for more than 50 percent of workers, the prevailing wage will be determined by dividing the hourly wages of all workers in a certain job classification by the number of workers. Although the law allows prevailing wages to be computed for different types of political subdivisions, DOL normally issues the rates on a county basis. A multicounty area can be used if insufficient data are available from the county where the work is to be performed.

The *Davis-Bacon Act* allows the federal government to suspend application of the Act in emergency situations. Most recently, a suspension was made in the aftermath of the 1992 hurricanes in Florida and Hawaii. According to Proclamation 6491 issued by the President on October 14, 1992, the wage rates imposed by Davis-Bacon increased the cost of federal assistance to the disaster areas. Thus, a suspension was ordered to allow greater assistance to the devastated communities within the available

funds and to permit the employment of thousands of additional individuals.

Concerns

Concerns expressed by state, tribal, and local governments include:

(1) Reporting and recordkeeping to document compliance with Davis-Bacon provisions are burdensome and may make it difficult for small businesses to compete.

(2) Some governments report significantly increased costs because the prevailing wage is usually higher than some actual wages paid in the area.

(3) Compliance with Davis-Bacon requirements may divert resources from other needed public works projects.

(4) Davis-Bacon requirements may reduce the hiring of persons with limited experience because contractors who are required to pay the prevailing wage are more likely to choose an experienced worker. Contrary to its original intent, therefore, Davis-Bacon may discourage hiring local persons if the area where the work is to be performed has a heavy concentration of persons with limited experience.

(5) Problems with the DOL method of determining prevailing wages include the voluntary and sporadic nature of the survey and the scarcity of construction project wage and benefit data in some areas. Conducting the survey on a voluntary basis potentially allows union rates to skew the data. The scarcity of data in some areas means that wage rates from distant areas often must be used in small communities with infrequent construction projects.

Recommendation Options

1. Make no significant changes in the current laws. The federal government's purchasing power through direct contracts or through the provision of grants and loans to state, tribal, and local governments is substantial. Thus, there continues to be a need to assure that government requirements for acceptance of the lowest bid are not used to undercut local economies.

2. Repeal provisions in related acts making compliance with Davis-Bacon a condition-of-aid. Davis-Bacon compliance provisions would no longer be in numerous federal grant and loan programs, but the act would continue to apply to federal government contracts. Under this option laborers and mechanics on state and local projects would be covered by the

same protections as other workers. The same marketplace constraints that control wages and benefits for professions other than construction workers would be in effect, including the FLSA and other laws in effect within the jurisdiction in which the construction project is being performed. At the present time, 31 states have Davis-Bacon type laws.

3. Revise threshold and other provisions in Davis-Bacon related acts to reduce the administrative, recordkeeping, and reporting requirements imposed on small contracts. Unless otherwise specified, the general provisions requiring compliance with Davis-Bacon as a condition of aid seem to take effect even if as little as one dollar of federal money goes into a project costing over $2,000. Raising the dollar threshold that defines applicable contracts would reduce the number of state and local contracts subject to Davis-Bacon while assuring that major contracts for publicly funded construction projects still contain basic Davis-Bacon protections. Other amendments could be made to simplify recordkeeping and reporting requirements. Finally, the related acts could be revised to require a certain percentage of federal funds for a project before compliance with Davis-Bacon is required.

Precedent for such revisions in related acts exists in many laws. For example, some laws change the $2,000 threshold for applicable contracts to another measure (e.g., square footage in a project). Other provisions allow areas to identify the use of federal and non-federal moneys separately in a contract so that non-federal moneys are not subject to Davis-Bacon rules.

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December 1, 1995

RECYCLED CRUMB RUBBER

(Note: Although this provision was repealed before ACIR considered its recommendations, it is still included for consideration because it represents a good example of the type of mandate that needs to be given greater attention by federal officials before enactment.)

Mandate

Section 1038 of the *Intermodal Surface Transportation Efficiency Act of 1991* (ISTEA) (P.L. 102-240) requires states to satisfy a minimum tonnage utilization requirement for asphalt pavement containing recycled rubber on federal-aid projects.

The requirement is 5 percent for 1994, 10 percent for 1995, 15 percent for 1996, and 20 percent thereafter. The Secretary of Transportation (DOT) may waive the penalty for any three-year period on evidence of health, environment, and performance problems associated with asphalt pavements containing rubber. Individual state exceptions can also be made if there is an insufficient supply of scrap tires. The penalty for non-compliance is withholding of highway funds, other than Interstate funds, in an amount related to the noncompliance.

Background

This legislation was born out of a desire to "find a useful home" for whole scrap tires or shredded tire material taken from automobiles, trucks, or other equipment. For 1994 and 1995, Congress suspended application of this requirement. In November 1995, the requirement was permanently repealed.

Concerns

Requirements for asphalt pavement containing recycled rubber has been identified as a major issue by such diverse groups as the National Governors' Association, American Association of State Highway and Transportation Officials, and the National Rural Development Partnership (NRDP), as well as several states. Rubberized asphalt has been shown by some states to cost 50-100 percent more than conventional asphalt mixes. This mandate would increase the cost of highway projects, particularly major rehabilitation jobs.

Other markets for scrap tires exist and there is no need to mandate their use in asphalt. Connecticut operates a tire-to-energy plant, which consumes annually 20-30 times the number of tire carcasses that could be used in pavement; in turn, benefits are accrued from the energy produced. Minnesota recycles most waste tires in other ways and would have to import waste tires from other states to meet the percentage requirements. In Virginia, the requirement will use only 4 percent of the waste tires generated each year.

Recommendation Options

1. Repeal the requirements for the use of crumb rubber in asphalt. Most state and local governments suggest outright repeal of Section 1038 of ISTEA as a primary option. The provisions in Section 1038 appear to have been enacted with inconclusive scientific research of the environmental, safety and health aspects of using crumb rubber in asphalt mix. At the very

least, the federal government should retain the moratorium on implementation until adequate scientific research and pilot projects show that crumb rubber is a feasible and successful product for asphalt pavement use in most conditions and climates or until technical concerns about the integrity of the pavement are alleviated.

2. Provide incentives for utilizing crumb rubber in asphalt rather than penalties. Delete Part (d)(4) regarding "Penalty." There is no reason for major federal highway funds to be withheld. An incentive would better encourage states to seek cost-effective methods for dealing with the environmental problems associated with rubber tire disposal.

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APPENDIX B

ACIR Criteria for Review of Federal Mandates

CRITERIA FOR REVIEW OF FEDERAL MANDATES

by the Advisory Commission on Intergovernmental Relations

Approved by the Advisory Commission on Intergovernmental Relations

June 28, 1995

The Advisory Commission on Intergovernmental Relations (ACIR) is charged in Sec. 302 of the *Unfunded Mandates Reform Act of 1995* (P.L. 104-4, 109 Stat. 67) with investigating and reviewing the role of Federal mandates in intergovernmental relations [Sec. 302(a)(1)] and with making recommendations for improving the operation of mandates [Sec. 302 (a)(3)]. The law defines "Federal mandate" very broadly for the purposes of the ACIR review as "any provision in statute or regulation or any Federal court ruling that imposes an enforceable duty on State, local, or Tribal governments including a condition of Federal assistance or a duty arising from participation in a voluntary Federal program."

For purposes of reviewing the role of Federal mandates under Sec. 302(a)(1), ACIR will take into account the positive attributes of mandates and the rationale for their adoption, as well as the characteristics of mandates that present problems. For purposes of making the recommendations required under Section 302(a)(3)**,**ACIR will select for review only Federal mandates that are generally recognized as creating significant concerns within the intergovernmental system. In accordance with P.L. 104-4, ACIR will give review priority to mandates that

are subject to judicial proceedings in Federal courts.

Prior to making recommendations under Sec. 302(a)(3), the Commission is required to issue criteria. The following criteria will fulfill that requirement.

The Commission will make the final decisions about which mandates it will review and what recommendations it will make. The Commission's decisions will be based on two types of criteria:

(1) those that provide a basis for identifying mandates of significant concern; and

(2) those that provide a basis for formulating recommendations to retain, modify, suspend, or terminate specific mandates that are of concern.

These criteria are intended solely to help the Commission make its recommendations.

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CRITERIA FOR IDENTIFYING MANDATES OF SIGNIFICANT CONCERN

In general, Federal mandates will be selected for intensive review if they have one or more of the following characteristics:

1. The mandate requires State, local, or Tribal governments to expend substantial amounts of their own resources in a manner that significantly distorts their spending priorities. This addresses mandates that require more than incidental amounts of spending. It will not include all Federal mandates that require governments to spend money.

2. The mandate establishes terms or conditions for Federal assistance in a program or activity in which State, local, or Tribal governments have little discretion over whether or not to participate. This will include mandates in entitlements and discretionary programs. It will exclude conditions of grants in small categorical programs that are distributed on the basis of annual or periodic applications and that are received only by a limited number of governments unless the conditions effectively limit access to such programs by small governments.

3. The mandate abridges historic powers of State, local, or Tribal governments, the exercise of which would not adversely affect other jurisdictions. This will include mandates that have an impact on internal State, local, and Tribal government affairs related to issues not widely

acknowledged as being of national concern and for which the absence of the mandate would not create adverse spillover effects. This also will include mandates that abridge the power of State, local, or Tribal governments to impose taxes within the limits of the U.S. Constitution and that provide particular tax treatment to particular classes of taxpayers.

4. The mandate imposes compliance requirements that make it difficult or impossible for State, local, and Tribal governments to implement. Implementation delays, issuance of court orders, or assessment of fines may be indicative of mandate requirements that go beyond State, local, or Tribal fiscal resources, or administrative or technological capacity, after reasonable efforts at compliance have been made**.**

5. The mandate has been the subject of widespread objections and complaints by State, local, and Tribal governments and their representatives. This will include mandates that are based on problems of national scope, but are not Federally funded.

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CRITERIA FOR FORMULATING RECOMMENDATIONS

ACIR will investigate the specific characteristics of each Federal mandate causing significant concern in order to formulate specific recommendations to retain, modify, suspend, or terminate the mandate. In making these recommendations, ACIR also will consider the beneficial and non-beneficial effects of mandates. For purposes of formulating such recommendations, ACIR will focus on specific provisions in laws, regulations, or court orders.

When a mandate affects a State, local, or Tribal program that directly competes with a comparable private sector activity, ACIR will consider the effects of the mandate and the Commission recommendation on both the government and private sector. ACIR also will consider (1) impacts of mandates on working men and women and (2) mandates for utilization of metric systems.

ACIR will investigate each mandate selected for intensive review to determine whether or not they have one or more of the following characteristics that should be considered by ACIR in making its recommendations:

1. Federal Intrusion

Requirements are not based on demonstrated national needs.

Requirements are related to issues not widely recognized as national concerns or as being within the appropriate scope of Federal activities.
Requirements are based on problems of national scope, but which State, local, or Tribal governments have demonstrated ability or willingness to solve effectively, either independently or through voluntary cooperation.
Requirements are based on problems of national scope, but are not Federally funded.
These mandates should be terminated, retained, funded, or modified to express non-binding national guidelines.

2. Unnecessarily Rigid

Provisions do not permit adjustments to the circumstances or needs of individual jurisdictions.
Provisions restrict flexibility to use less costly or less onerous alternative procedures to achieve the goal of the mandate.
Provisions do not allow governments to set implementation or compliance priorities and schedules, taking into account risk analysis, greatest benefit, local capacity, or other factors.
These mandates should be modified to provide options, waivers, or exemptions, or be terminated.

3. Unnecessarily Complex or Prescriptive

Requirements are unnecessarily detailed and difficult to understand.
Provisions are too process-specific rather than results-oriented.
These mandates should be simplified, clarified, or otherwise revised to facilitate understanding and implementation, or be terminated.

4. Unclear Goals or Standards

Goals or standards are too vague, confusing, or poorly written to permit clear or consistent implementation of requirements or measurement of results.
These goals or standards should be rewritten or the mandate should be terminated.

5. Contradictory or Inconsistent

Provisions in one mandate may make it difficult or impossible to comply with other provisions in the same or other Federal, State, local, or Tribal laws.
Requirements use conflicting and confusing definitions and standards.
These mandates should be modified to bring conflicting

requirements into conformance. In some instances, it may be appropriate to terminate one or all of the requirements. Where possible, common definitions and standards should be used, especially in planning and reporting requirements.

6. Duplicative

Provisions in two or more Federal mandates may have the same general goals but require different actions for compliance.

These mandates could be terminated, consolidated, or modified to facilitate compliance.

7. Obsolete

Provisions were enacted when conditions or needs were different or before existing technologies were available.

Provisions have been superseded by later requirements.

These mandates should be modified to reflect current conditions or existing technology. If a mandate is no longer necessary or has been superseded, it should be terminated.

8. Inadequate Scientific and Economic Basis

Provisions were enacted based on inadequate or inconclusive scientific research or knowledge.

Provisions are not based on current, peer-reviewed scientific research, when applicable.

Provisions are not justified by appropriate risk assessment or cost-benefit studies.

These mandates should be terminated or modified to reflect current science. In some cases, suspension of the mandate may be appropriate to provide time for additional research.

9. Lacking in Practical Value

Requirements do not achieve the intended results.

Requirements are perceived by citizens as unnecessary, insignificant, or ineffective, thereby producing credibility problems for governments.

Requirements have high costs relative to the importance of the issue.

These mandates should be evaluated to determine whether or not they are effective. If they cannot be shown to be effective and worthy of public support, they should be terminated. If they are effective, it still may be appropriate to suspended the mandates to allow time for public education and consensus building on their value.

10. Resource Demands Exceed Capacity

Requirements for compliance exceed State, local, and Tribal

governments' fiscal, administrative, and/or technological capacity.

These mandates should be terminated or modified to reduce compliance problems, or assistance could be provided to upgrade capacity. In some instances, compliance schedule extensions or exemptions may be appropriate.

11. Compounds Fiscal Difficulties

Compliance with the requirements of any one mandate or with multiple mandates compounds fiscal difficulties of governmental jurisdictions that are experiencing fiscal stress.

In these situations, certain of the mandates affecting the jurisdictions-exclusive of those that are vital to public health or safety-should be considered for partial or total suspension until the government experiencing fiscal stress is able to comply. The conditions triggering consideration of such suspensions should include:

a. *Governments faced with costs dramatically out of line with their revenue bases, as determined by comparisons with other similar governments that are complying*. This may result from local and Tribal governments experiencing fiscal stress due to depopulation, loss of tax base, or inability to raise matching funds from user fees due to low average household income or small population base; or

b. *Governments that are experiencing severe fiscal distress for reasons not immediately within their control*. There should be some definitive evidence of severe problems, such as State receivership, State declaration of distress, Chapter 9 bankruptcy, or a debt rating below investment grade. This should not include annual budget balancing problems.

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Private Citizens

- Peter Lucas, Boston, MA
- Richard P. Nathan, Albany, NY
- William F. Winter, CHAIRMAN, Jackson, MS

Members of the United States Senate

- Bob Graham, Florida
- Dirk Kempthorne, Idaho
- Craig Thomas, Wyoming

Members of the U.S. House of Representatives
- James P. Moran, Virginia
- Donald M. Payne, New Jersey
- (Vacancy)

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- Carol M. Browner, Administrator,
- U.S. Environmental Protection Agency
- Marcia L. Hale, Assistant to the President
- and Director of Intergovernmental Affairs
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- Gregory Lashutka, Columbus, OH
- Edward G. Rendell, Philadelphia, PA
- Bruce M. Todd, Austin, TX

State Legislators
- Paul Bud Burke, President, Kansas Senate
- Art Hamilton, Minority Leader, Arizona House of Representatives
- Samuel B. Nunez, Jr., President, Louisiana Senate

Elected County Officials
- Randall Franke. Commissioner, Marion County, OR
- John H. Stroger, Jr., Commission President, Cook County, IL
- (Vacancy)

So, what did you think? We'd really like to know.
If you have comments that you would like to make for inclusion in the final version of this document, please send us e-mail at acir@erols.com by March 29. Include your name (optional), your organization (optional), your e-mail address (optional), and your comments, and we will include your remarks in the final report. In your comments, please try to be specific about the part of the document about which you are responding.

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