Post-Hearing Questions for the Record
Submitted to Senator Curt Bramble
President, National Conference of State Legislatures and
Senator, Utah State Senate
From Senator James Lankford

"The Unfunded Mandates Reform Act:
Opportunities for Improvement to Support State and Local Governments"
February 24, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

Defining a Mandate

Question: There are many exceptions to the Unfunded Mandate Reform Act's (UMRA) definition of a mandate. How would you define an intragovernmental mandate? What would that include if we thought about the real-world consequences of federal actions?

- NCSL views mandates more expansively than as defined in UMRA and would include the following in the definition of intergovernmental mandate:
    - a new condition of grant-in-aid for a long-standing program;
    - a reduction in current funds available, the federal match rate or available administrative or programmatic funds to state and local governments for existing programs without a similar reduction in requirements;
    - an extension or expansion of existing or expiring mandates;
    - a requirement that states establish goals to comply with federal statutes or regulations with the caveat that if a state fails to comply they face a loss of federal funds;
    - actions that compel coverage of a certain group of individuals under a current program without providing full or adequate funding for this coverage;
    - the establishment of overly prescriptive regulatory procedures; and
    - intrusion on state sovereignty.

  The real-world consequences of a broader definition would mean that legislation such as No Child Left Behind and the REAL ID Act; changes to the Medicaid program; reductions in funding to the Clean Water and Safe Drinking Water State Revolving Funds; and sanctions for not complying with federal requirements would have been considered intergovernmental mandates and in many cases exceeded the UMRA threshold.

Question: UMRA does not currently require analysis for requirements on state, local, and tribal governments that are part of participation in a voluntary federal program or a condition of federal financial assistance. What are some examples of conditions of federal assistance that state, local, and tribal governments have found burdensome?

- Individuals with Disabilities Education Act (IDEA): Under IDEA, states are partners with the federal government to achieve the national goal to assure that all children with disabilities have access to free appropriate public education and related services designed to meet their unique needs. When IDEA was last authorized in 2004, Congress established a glide path to fund 40 percent of the excess cost of educating a student with special education needs; Congress continues to underfund. Failure by the federal government to provide 40 percent of the funding places significant shortfalls on states. While seen as a "voluntary" program, states are really not in a position to refuse participation in IDEA.

  Medicaid: For large entitlement programs like Medicaid, UMRA defines an increase in the stringency of conditions or a cap on federal funding as an intergovernmental mandate if the affected governments lack authority to offset those costs while continuing to provide required services. However, this is almost never triggered because CBO finds that states have flexibility within the Medicaid program (because of optional services) to offset their financial and programmatic responsibilities to reduce costs. As a result, CBO concludes that the new conditions or resulting costs would not constitute an intergovernmental mandate. A recent example of this is seen in the CBO report on H.R. 3821: Medicaid Directory Caregivers Act. This bill would require state Medicaid agencies to publish, on public websites, a director of certain medical care providers who provided care to Medicaid enrollees in the prior 12 months.

Follow-up: How "voluntary" are some of these programs for state and local governments?

- IDEA and Medicaid are long-standing state-federal programs. This partnership, along with others, are viewed by many as mandatory.

Consultation Practices

Question: As reported in GAO-05-454, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, stakeholders from all sectors told GAO that the application of agency consultation practices with state and local governments were generally viewed as inconsistent. Stakeholders from state and local governments often point to the Congressional Budget Office (CBO) as the model in consultation. CBO only has a small staff conducting this work- what actions could executive agencies take to ensure meaningful consultation?

- Agencies need to take advantage of every opportunity to engage their state and local partners. Despite the fact that Executive Order 13132 requires a federal agency to ensure that it has an accountable process for meaningful and timely intergovernmental consultations in the development of regulatory policies that have federalism implications, opportunities are often missed.

An example is the recent negotiated rulemaking to implement parts of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESSA). The administration failed to include a state legislator in this process. Please see attached March 10, 2016 letter to Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

- NCSL recommends that executive agencies provide a uniform and predictable process to enhance their consultation with state and local governments. One way to do this would be for the agencies to conduct regular (monthly) meetings with the national organizations representing state and local governments. CBO hosts regular meetings with state and local groups. In addition, when allowed, it would be beneficial for the agencies to engage their state and local partners early and often in the regulatory process. We are not stakeholders but partners in implementing and administering these programs.

Question: Much of the discussion in the hearing was on the inadequacy of agency consultation with state and local governments. Other than promising practices implemented by CBO, what are some examples in which intergovernmental consultation has been well done?

- The best example is the outreach from federal agencies during the American Recovery and Reinvestment Act in 2008-2009. OMB and other executive agencies provided weekly/monthly calls to track, provide oversight, and distribute information relating to federal stimulus funds.

Follow up: Do some agencies do a better job than others? Please provide examples.

- NCSL typically has better consultation and communication with agencies where we have a positive relationship with the agencies intergovernmental staff. A recent example would be the outreach, feedback and open line of communication we've had with the Department of Homeland Security on the FEMA disaster deductible.

The Value of Consulting with State and Local Governments

Question: Consultation is often discussed as merely a required step for agencies as they regulate. Less discussed is the value state, local, and tribal governments provide to federal agency officials as they consider regulating or as they craft new regulations. Could you elaborate on the types of expertise and feedback state, local, and tribal governments can provide to federal agencies as they consider and draft regulations?

- The state legislatures' traditional role—lawmaking, program oversight, the appropriation of funds and information gathering—is critical to the successful implementation of any federal law or regulation. State legislative input will also bring insight to existing state laws and other important information that may prove extremely helpful in developing regulations that will effectively implement federal law, while at the same time avoiding administratively or financially burdensome requirements on states. It is also important for

federal policymakers to understand the potential impact of states' legislative calendars and federal fiscal years on implementation.

Follow up: What are some examples in which your organizations or those you represent have had meaningful input into a federal rule?

- NCSL worked closely with the Department of Homeland Security (DHS) when developing regulations to implement the REAL ID Act of 2005. When the Notice of Proposed Rulemaking was released, the estimated costs to the states was in the range of $11 billion. The final regulation reflected many of the recommendations made by the state groups, resulting in a reduced cost to states in the final rule—$3.9 billion. While this is still considered an unfunded mandate to states, DHS has continued to work with the states during implementation to provide improved flexibility, where authorized. However, this is not the norm. In most cases, our organization submits comments to the agencies, and the final regulatory action rarely reflects our concerns/recommendations.

OMB's Role in Consultation Practices

Question: UMRA's Title II requires agencies to "develop an effective process" for obtaining "meaningful and timely input" from State, local and tribal governments in developing rules that contain significant intergovernmental mandates. Each year, OMB, in an appendix to its annual report, provides descriptions of "selected consultation activities by agencies whose actions affect State, local, and tribal governments." In their *2014 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, OMB reported on examples of consultation activities provided by three agencies. Agencies often counter that they conduct many other types of informal consultation with regulated entities. What others ways have agencies reached out to you and how effective have those mechanisms been?

- The effectiveness of consultation varies by federal agency and in many cases depends on individual relationships between NCSL staff and agency staff. In most cases the notification NCSL receives is either a blast email from the agency announcing the release of a rule or there is the rare occasion where we receive an official letter requesting our input. In most cases the "consultation" feels like the agency is just "checking the box," and not effective as the final regulations/actions usually do not reflect the state concerns/recommendations.

Follow up: How could agency consultation practices be improved and made more transparent?

- We would recommend that consultation with state and local governments be as early as possible and that it be uniform across all federal agencies. The "Big 7" (the national organizations representing state and local governments) developed key principles aimed at improving the regulatory process. Please see attached.

Follow up: What could OMB do to ensure these improvements?

- Over the past 12 months, NCSL has welcomed a dialogue with OMB on smarter regulations and retrospective reviews. The attached principle have been shared with OMB.

Follow up: Does OMB currently have the authority to ensure compliance with its guidelines on consultation?

- Not familiar with all of OMB's authority.

Advanced Warning for New Regulations

Question: At a hearing held by the House Oversight and Government Reform Committee on February 15, 2011 to discuss potential improvements to UMRA, Mayor Patrice Douglas of Edmond, Oklahoma, stated: "Well, we budget out 5 years. Not all cities do that, but we try to look at a 5-year plan. I am not saying that we need 5 years, but we need adequate time to get that rolled into our budget. When these rules come down and you find out that you are going to have to spend $400,000 out of your general fund in the next year, that is a near impossibility for a city the size of mine to do. So I would say take into consideration the fact that we have a 1-year budget cycle, so rules need to accommodate that." How could we better align timelines for implementation of regulations that affect state, local, and tribal governments with the realities of the budget cycles in small governments?

- These timelines, and more specifically the potential costs, are likely to be different depending on the regulation, the geographic region and level of government. The federal agencies need to understand that most state legislatures are not in session all year, some are only in every other year and that in most cases the state fiscal year does not coincide with the federal fiscal year. Timelines could be better aligned if they recognized the state fiscal and legislative calendars. For example, a federal requirement would have to be implemented after at least two legislative session or not before the start of the next state fiscal year.

Measuring the Effects of Federal Funds and Federally-Mandated Requirements

Question: In your testimony, you mentioned that the State of Utah conducted a fiscal "stress test" to assess the effects of federal aid and requirements on the State. Please elaborate on the impetus for this stress test and the results of these efforts.

- Utah has been proactively managing volatility in its own revenue sources for almost a decade. It seems only logical to extend the same techniques to the 30 percent of Utah's operating and capital budget that comes from federal funds. The issue came to a head during the federal government shut-down of 2013 when the state opted to use state resources to operate the five National Parks located in Utah rather than see them shuttered by political inertia. One of the provisions included in Financial Ready Utah creates a Federal Funds Commission to assess the risk of a funding reduction from the federal government and examine how the state budget would react. The Federal Funds

Commission developed an online tool (federalrisk.le.utah.gov) that allows policymakers, citizens, and staff to view pre-determined risk scenarios—like a dollar crash—or build their own scenarios. They can then assess the adequacy of existing risk mitigation tools to address potential federal funds loss. The immediate result of this exercise was to strengthen Utah's federal funds contingency planning by enhancing public education participation (2016 H.B. 329, Fawson), and investing in a new statewide grants management module to integrate federal grants management into Utah's existing statewide accounting system. Utah also began to forecast sustainable versus temporary federal assistance and explicitly match the term of those resources to appropriations so as to maintain structural balance in federally-backed, state-run programs. Other efforts being discussed include establishing a separate rainy day fund into which state dollars would be deposited to address any sudden loss of federal funding.

Question: Could this method be replicated by other states?

- The tool developed by Utah to allow policymakers and constituents to anticipate and mitigate potential funding reductions is open source and can be modified for any state. However, this type of preemptive budgetary planning is not exclusive to Utah. With data on the amounts of federal money being expended in a state's operating and capital budget, and expertise in time series modeling, any state could manage federal assistance volatility that might result from a federal government shutdown or significant spending reform in Washington, D.C.

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Curtis Bramble
Senate President Pro Tempore
Utah
President, NCSL

Karl Aro
Director of Administration
Department of Legislative Services
Maryland
Staff Chair, NCSL

William T. Pound
Executive Director

March 10, 2016

The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Dear Administrator Shelanski:

Over the past year, the National Conference of State Legislatures (NCSL) has welcomed the dialogue we have had with you and your office on smarter regulations and retrospective review. Key to improving the regulatory process, is early analysis and consultation with state and local leaders, as outlined in principles the Big 7 state and local groups shared with you in December. Last week, Katie Johnson from your office requested some examples of best practices regarding agency consultation with state and local governments. While the groups offered some examples, I have a time sensitive recommendation for your consideration.

Last week the U.S. Department of Education released the list of non-federal negotiators to the rulemaking committee to implement part A of Title I of the Elementary and Secondary Education Act (ESEA) of 1965, as amended by the Every Student Succeeds Act (ESSA). NCSL urges the administration to consider adding an additional negotiator to include a state legislator.

The rulemaking committee, as announced, lacks some extremely valuable expertise from state legislators who will be responsible for implementing the first major change in federal education policy since 2002. The topics of this negotiated rulemaking—student assessments and supplement not supplant requirements—are ones that state legislators will find themselves dealing with as they craft statutes and enact budgets. NCSL submitted the names of two state legislators (brief bios attached) who are not only education policy leaders in their state, but who also had direct experience as educators. To not include a state legislator as a negotiator is an opportunity missed.

Thank you in advance for your consideration of our request and I look forward to hearing from you.

Sincerely,

William T. Pound
Executive Director, NCSL

CC: Jerry Abramson, Deputy Assistant to the President and Director of Intergovernmental Affairs

Denver
7700 East First Place
Denver, Colorado 80230-7143
Phone 303.364.7700 Fax 303.364.7800

Washington
444 North Capitol Street, N.W. Suite 515
Washington, D.C. 20001
Phone 202.624.5400 Fax 202.737.1069

Website www.ncsl.org
Email info@ncsl.org

The Honorable Jacqueline Sly

- South Dakota state representative for eight years; current Chairwoman of House Education Committee, former Vice-Chair of same; Co-Chair of South Dakota Blue Ribbon Task Force on K-12 Education Funding; former teacher for 37 years before running for the legislature; has taught special education, general K-12 education, and alternative middle school education; last four years in the classroom spent as assistant director of STARBASE, a science and math program focused on aviation for students attending schools receiving Title I money; bachelor's degree in Elementary and Secondary Education (with endorsements to teach core areas of subjects at middle school level); master's degree in Curriculum and Development; as an educator, was involved in teacher leadership and professional development for her peers

The Honorable David P. Sokola

- Delaware state senator since 1990; Chairman of the Senate Education Committee; strong advocate for improving school standards and closing the achievement gap; teacher in Delaware Public Schools for three years; has served on the Southern Regional Education Board (SREB), Delaware Foundation for Science, Math & Technology Education; currently serves on SREB Legislative Advisory Council, advising state leaders on ways to improve education; serves as a Steering Committee Member and former Vice-Chair of the Education Commission of the States; recognized by Delaware State Education Association, University of Delaware's College of Education, and others for his work in education policy

Recommended Principles for Regulatory Reform

- Avoid pre-emption of state and local laws.
- Require early analysis and consultation with state and local leaders during the rulemaking process.
- Ensure federal agencies recognize the differences in geography and resources among state and local governments to make certain none are disproportionally affected.
- Communicate proposed rules and regulations clearly and consistently to state and local governments.
- Avoid unfunded mandates—federal programs must not impose unreimbursed costs on state and local governments.
- Provide state and local governments with sufficient time to implement new guidelines or regulations and take into consideration legislative calendars.
- Provide maximum flexibility in the administration and maintenance of federal programs, to ensure that programs do not impose new burdens on state and local budgets.
- Make certain federally mandated administrative requirements are uniform across federal agencies.
- Harmonize federal regulations with current actions at the state and local levels.

Post-Hearing Questions for the Record
Submitted to the Hon. Bryan Desloge
First Vice President, National Association of Counties and
Commissioner, Leon County, Florida
From Senator James Lankford

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Defining a Mandate

Question: There are many exceptions to the Unfunded Mandate Reform Act's (UMRA) definition of a mandate. How would you define an intragovernmental mandate? What would that include if we thought about the real-world consequences of federal actions?

Answer: The National Association of Counties (NACo) believes that the current definition of an intragovernmental mandate is too narrow because of the number of exceptions that apply. NACo would support broadening the definition through a process that begins with a careful reexamination of the current exceptions under UMRA. We believe this evaluation is necessary to demonstrate what the exceptions' fiscal and operational impact is on state and local governments, which could lead to a more practical definition of intragovernmental mandate.

Question: UMRA does not currently require analysis for requirements on state, local, and tribal governments that are part of participation in a voluntary federal program or a condition of federal financial assistance. What are some examples of conditions of federal assistance that state, local, and tribal governments have found burdensome?

> **Follow-up:** How "voluntary" are some of these programs for state and local governments?

Answer: NACo agrees that some attention should be focused on the costs of conditions of federal assistance and how their impacts could be addressed. It would also be useful to gather and provide as much information as possible on the front end, on the costs of participation in federal programs. To that end, we would suggest requiring cost estimates on conditions of federal assistance, while maintaining their exemption from UMRA's enforcement provisions. With this more complete cost information, a state or local government could make more informed decisions about whether to participate in the federal program under consideration.

Proponents for excluding analysis of these programs under UMRA argue state or local governments could just choose not to participate. The sheer scale and significance of some local challenges are truly national in scope, and are essentially impossible to address with only local resources. Under these circumstances the cost of conditions of participation are essentially mandatory and should be calculated and reported for the benefit of policy makers and the public.

Consultation Practices

Question: As reported in GAO-05-454, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, stakeholders from all sectors told GAO that the application of agency consultation practices with state and local governments were generally viewed as inconsistent. Stakeholders from state and local governments often point to the Congressional Budget Office (CBO) as the model in consultation. CBO only has a small staff conducting this work- what actions could executive agencies take to ensure meaningful consultation?

Answer: NACo believes that meaningful consultation first requires that executive agencies recognize state and local governments as intergovernmental partners. As noted in our testimony, counties implement federal policies and regulations at the local level. In fact, in some cases we are co-regulators. However, all too often we are treated as mere stakeholders rather than as true intergovernmental partners. Meaningful consultation would mean that the federal agencies should engage their state and local government partners as early in the process as possible, ideally long before a rule is drafted. That engagement should continue throughout the entire rulemaking lifecycle.

But the engagement should not be limited to the rulemaking process. We would also urge executive agencies to establish regular meetings with state and local governments and their national associations throughout each year. We believe that regular communication is a fundamental way to establish and build the relationships that should serve as the foundation of a true intergovernmental partnership.

CBO is certainly a good example for consultation. CBO invites the representatives of state and local governments together on a regular basis to meet with CBO staff to discuss laws they are (or will be) analyzing under UMRA. This has kept the lines of communication open and laid the groundwork for constructive intergovernmental engagement over time, without unduly imposing on the agency's limited resources.

Question: Much of the discussion in the hearing was on the inadequacy of agency consultation with state and local governments. Other than promising practices implemented by CBO, what are some examples in which intergovernmental consultation has been well done?

Follow up: Do some agencies do a better job than others? Please provide examples.

Answer: NACo can point to a number of promising examples of good intergovernmental agency consultation. Recently, for example, after the Federal Emergency Management Agency (FEMA) released an Advanced Notice of Proposed Rule Making (ANPRM) on a "disaster deductible" on January 20, 2016, NACo and its partner state and local organizations were almost immediately engaged by FEMA to better understand the proposal. Between the release of the ANPRM and the comment deadline on March 21, NACo met with FEMA officials at length on two separate occasions to discuss the proposal. On each occasion, we were encouraged both by FEMA's willingness to discuss the potential impacts of a "disaster deductible" and by their understanding

of specific potential impacts on counties. In fact, on an occasion when NACo staff visited the FEMA offices to discuss matters unrelated to the proposal, FEMA staffers working on the proposal came by to provide friendly reminders about the comment deadline. In its official comments to FEMA, NACo commended the agency for its effective intergovernmental engagement throughout the comment period on the ANPRM.

Less recently, but still noteworthy as a good model of intergovernmental consultation, was the efforts of the Department of Energy (DOE) during the rollout of the Energy Efficiency and Conservation Block Grant (EECBG) Program. While the rollout was complicated, DOE's intergovernmental consultation was appropriate and meaningful, with the agency maintaining a level of constant communication with counties and NACo by hosting regular calls and meetings with program staff at the agency. NACo was able to ask questions when we felt information was lacking and if one of our counties was having an issue, we could raise it with DOE staff who were able to address it in real-time. DOE was able to acquire constant feedback in order to monitor how the program was being implemented on the ground and an early warning system for emerging implementation challenges.

Even when an agency conducts appropriate and meaningful intergovernmental consultation, it is often not institutionalized and consistent. For example the U.S. Department of Transportation (DOT) developed its legislative proposal to reauthorize the Moving Ahead for Progress in the 21st Century Act (MAP-21), without any effort to consult counties to seek input or ideas for reforms despite having common goals to address national transportation needs or the fact that counties own and maintain almost 45 percent of the nation's road miles. Counties were only approached after the reauthorization proposal was complete. However, with the recent passage of the Fixing America's Surface Transportation Act (FAST Act) DOT has already invited counties to participate in several dialogues on implementation of different provisions in the bill with the goal of seeking county feedback and identifying concerns.

Ultimately it is hard to identify a single executive agency which consistently models a high standard of meaningful intergovernmental consultation. There are, however, some very encouraging concepts that, if fully implemented, could help improve agency consultation. Specifically, the proposal offered in Section 10 of UMITA and Executive Order 13132 – Federalism. UMITA's Section 10 offers a framework to hold agencies accountable for their consultation and EO 13132 makes the case for enhanced consultation with state and local governments and emphasizes the need for a strong federal, state and local partnership to implement national policies.

The Value of Consulting with State and Local Governments

Question: Consultation is often discussed as merely a required step for agencies as they regulate. Less discussed is the value state, local, and tribal governments provide to federal agency officials as they consider regulating or as they craft new regulations. Could you elaborate on the types of expertise and feedback state, local, and tribal governments can provide to federal agencies as they consider and draft regulations?

Follow up: What are some examples in which your organizations or those you represent have had meaningful input into a federal rule?

Answer: NACo is well suited to offer technical advice about how county governments function, how proposed federal policies may affect the way county governments operate, as well as a wide range of data about county government and counties, in general.

A recent example and good illustration of feedback NACo provided was on the Department of Labor's proposal on overtime pay where they proposed to more than double the current salary threshold for employees who are eligible for overtime pay. While counties do not disagree with the rule's objective, we were able to explain that the draft rule failed to consider the fiscal constraints that exist at the local level if we were compelled to meet the new overtime pay requirements.

For example, county government is not a typical employer because we are also the local authority that provides services to constituents. These local services are generally funded by revenue generated by the assessment of property and sales taxes. State imposed limits on county revenue raising activities combined with limited funding from the federal government for various programs impose difficult budgetary decisions on county elected officials. Compounding the challenge is that our county budgets must be balanced on an annual basis. Any increase in one area, like payroll, will certainly require a decrease in another area, like infrastructure investment.

Furthermore, because our budget cycles are not synchronized with the federal government's or the calendar year, automatic updates to the salary threshold, as proposed in the rule, would be nearly impossible to prepare for since county budgets will have already been submitted and approved well in advance of the new thresholds being calculated and announced.

This information about the statutory and fiscal constraints counties operate under is the type of information that NACo and county governments can provide the agencies in any number of different rulemaking processes. This understanding of county government operations can help agency staff when drafting rules that counties will ultimately be responsible for implementing.

However, it is not just about county budgets. Counties also bring a level of expertise that is the result of being problem solvers at the local level. For example, in our testimony we discussed a county working proactively to bring local stakeholders with real-world local knowledge to the table to craft conservation plans to support the Bi-State Sage-grouse and ultimately prevent it needing to be listed under the Endangered Species Act. This is the type of expertise counties can bring that could assist agencies in writing regulations that are practical to implement on the ground level.

OMB's Role in Consultation Practices

Question: UMRA's Title II requires agencies to "develop an effective process" for obtaining "meaningful and timely input" from State, local and tribal governments in developing rules that contain significant intergovernmental mandates. Each year, OMB, in an appendix to its annual report, provides descriptions of "selected consultation activities by agencies whose actions affect

State, local, and tribal governments." In their *2014 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, OMB reported on examples of consultation activities provided by three agencies. Agencies often counter that they conduct many other types of informal consultation with regulated entities. What others ways have agencies reached out to you and how effective have those mechanisms been?

> **Follow up:** How could agency consultation practices be improved and made more transparent?
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> **Follow up:** What could OMB do to ensure these improvements?
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> **Follow up:** Does OMB currently have the authority to ensure compliance with its guidelines on consultation?

Answer: NACo welcomes any steps to improve the quality and timeliness of intergovernmental consultation – both formal and informal. Notably, informal consultation in the policy development phase of the regulatory process, possibly via phone or e-mail, would be very welcome. From our perspective, this level of informal contact rarely occurs. While the examples identified in the OMB report may be illustrative of how agencies have consulted regulated entities, they are far from the norm.

We would also welcome a more formal, public policy for the consultation process. The lack of a publicly available policy on intergovernmental consultation may partly explain why there appears to be so much inconsistency in how agencies consult local government. Not only does the process differ between agencies, even within an agency, the consultation level for one rule significantly differs from that for another rule.

An example of the approach we could recommend would be the publicly available intergovernmental policies for consultation with tribal governments which several federal agencies have published, including the U.S. Department of Housing and Urban Development, U.S. Department of Labor, U.S. Department of Health and Human Services, General Services Administration, and U.S. Department of Transportation. While counties do not assert the same kind of sovereign status accorded by the U.S. Constitution to Native American tribal governments, we would suggest that we are intergovernmental partners with the agencies and that a publicly available written policy for intergovernmental consultation would promote the kind of timely and meaningful consultation envisioned by UMRA.

Advanced Warning for New Regulations

Question: At a hearing held by the House Oversight and Government Reform Committee on February 15, 2011 to discuss potential improvements to UMRA, Mayor Patrice Douglas of Edmond, Oklahoma, stated: "Well, we budget out 5 years. Not all cities do that, but we try to look at a 5-year plan. I am not saying that we need 5 years, but we need adequate time to get that rolled into our budget. When these rules come down and you find out that you are going to have to spend $400,000 out of your general fund in the next year, that is a near impossibility for a city the size of mine to do. So I would say take into consideration the fact that we have a 1-year budget cycle, so rules need to accommodate that." How could we better align timelines for

implementation of regulations that affect state, local, and tribal governments with the realities of the budget cycles in small governments?

Answer: NACo would support changes to the federal regulatory process which would offer more generous lead time before final regulations become effective. This would allow counties, especially small ones, to have time to plan and budget for the costs associated with compliance. Further, utilizing a phased-in approach for the compliance schedule of any regulation would help ease any potential burdens and mitigate the impact of counties having to absorb the entire cost of compliance at once.

On UMITA and Slowing the Regulatory Process

Question: Many arguments against regulatory reform initiatives, including the Unfunded Mandates Information and Transparency Act (UMITA), are that additional analytical requirements might unnecessarily burden or elongate the rulemaking process or cause "ossification" of the regulatory state. Would you agree with that assessment?

Answer: NACo does not agree that a strong intergovernmental consultation process unnecessarily burdens, elongates or causes "ossification" of the regulatory state. On the contrary, as implementers and co-regulators of federal policies at the local level, counties must be involved before, during and after a rule is developed. We believe that this would not burden or elongate the rulemaking process. Rather, we believe this would enhance the rulemaking process by identifying and mitigating potential problems in the early policy development phase of the process.

As it currently stands, our opportunity for input on regulations is all too often limited to the public comment period and even if executive agencies reach out to seek input, more often than not, it is after a rule has been substantially developed. This results in having to revisit issues or raise new ones because agency officials did not adequately consider the perspective of local government, resulting in avoidable conflict. NACo believes that by working together as intergovernmental partners we will increase the likelihood of developing rules that enjoy broad support and can be successfully implemented rather than a rule that is opposed and contested.

Post-Hearing Questions for the Record
Submitted to Dr. Paul Posner
Director, Center for Public Service at George Mason University and
Former Director of Intergovernmental Affairs, U.S. Government Accountability Office
From Senator James Lankford

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Defining a Mandate

Question: There are many exceptions to the Unfunded Mandate Reform Act's (UMRA) definition of a mandate. How would you define an intragovernmental mandate? What would that include if we thought about the real-world consequences of federal actions?

Answer: I would ensure that the definition was inclusive of all important federal cost impacts on state and local governments. This would include not only direct orders as UMRA does but also the following:

Preemptions of state and local authority that increase costs

Significant grant conditions for major programs that make state and local participation, in effect, not voluntary

Crossover sanctions where compliance with federal rules are imposed by sanctioning federal grant funds received by other large programs

Significant changes in the costs of major mandates over time due to changes in requirements, demands or federal funding.

Question: UMRA does not currently require analysis for requirements on state, local, and tribal governments that are part of participation in a voluntary federal program or a condition of federal financial assistance. What are some examples of conditions of federal assistance that state, local, and tribal governments have found burdensome?

Follow-up: How "voluntary" are some of these programs for state and local governments?

Answer: Many major federal grant programs impose significant cost burdens on state and local governments when federal funds fail to fully compensate for major costs. Examples include the IDEA program, education for disabled children. Premised on the promise of providing 40

percent of state and local costs for mandates from federal funds, actual levels of federal assistance now approximate 16 percent. The No Child Left Behind Act is another example. This program imposed major regulations on state and local schools while leaving these jurisdictions with major funding responsibilities that were not covered by federal funds. The Asbestos in Schools Act of 1985 was a case where federal mandates to clean up asbestos were imposed on local schools with federal funds that were perhaps only 10 percent of the total required.

The courts have generally ruled that grants are voluntary and therefore that states and local governments do not warrant additional protections from their impacts. However, state and local officials are under tremendous pressure to accept grants. In effect, grants represent a return on the federal taxes paid by local citizens and the failure to accept grants can be framed as a betrayal of local taxpayers by state or local officials. Often, the failure to accept major grants can become a campaign issue in the next election as a result. Recently, however, greater polarization across states has changed this equation – some conservative governors have gained political credit from their base by using the renunciation of grants like Medicaid expansion as a triumph for ideological purity and state rights.

The Court has occasionally found exceptions to its voluntary principle for rules imposed on grants retroactively some years after states have accepted the federal program. The Court ruled in Pennhurst State School and Hospital v. Halderman (No. 79-1404) that the Congress could not retroactively impose a new bill of rights for mentally retarded persons being treated in state institutions. The Roberts opinion overturning Medicaid expansion under Obamacare also suggested that the imposition of this new mandate was particularly objectionable since it was attached retroactively to states that had become willing partners under a program that was very different before the advent of this new requirement.

Consultation Practices

Question: As reported in GAO-05-454, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, stakeholders from all sectors told GAO that the application of agency consultation practices with state and local governments were generally viewed as inconsistent. Stakeholders from state and local governments often point to the Congressional Budget Office (CBO) as the model in consultation. CBO only has a small staff conducting this work- what actions could executive agencies take to ensure meaningful consultation?

Answer: CBO deserves much credit for becoming an honest broker of state and local interests when mandates are considered by the Congress. With a small staff, they have had influence on congressional staff and members that is disproportionate to their size. This occurs because of the threat of the point of order to the proposals of members for smooth passage of their proposals. As a result, CBO's views on intergovernmental costs are much feared by advocates and are solicited by members and staff on a bipartisan basis. CBO needs state and local officials to help them ferret out cost impacts and uses networks of state and local officials to develop their cost estimates.

Agencies have a different environment. They are often besieged by numerous interest groups in addition to those of the states and must pay attention to numerous administrative rules governing regulatory policy development that constrain their ability to enjoy the kind of informal

consultation used by CBO staff. The violation of consultation rules and due process rules by agencies constitutes a matter that can lead to the overturning of regulatory proposals by the courts.

Question: Much of the discussion in the hearing was on the inadequacy of agency consultation with state and local governments. Other than promising practices implemented by CBO, what are some examples in which intergovernmental consultation has been well done?

Follow up: Do some agencies do a better job than others? Please provide examples.

Answer: Federal agencies have an interest to work proactively with state and local governments due to their pivotal role in implementing federal programs in the field. Most domestic programs, in fact, are subject to joint administration by federal, state and local governments which can impart a rooting interest by federal officials on behalf of their state and local partners.

We saw this in the management of the $800 billion Recovery Act in 2009 by the Administration. The Vice President and OMB bent over backwards to engage states and local leaders in supporting the new stimulus, recognizing that state and local governments received the greatest share of the funding to stem the tide of the recession. New processes were created including weekly phone calls with state leaders, periodic White House sessions with governors and mayors and visits to state and local communities by the Vice President and other national officials. State and local officials sought to replicate this model with other federal policy engagements to no avail when federal interests were not well aligned with state and local concerns. For instance, when the prospect of a government shutdown reared its head, state officials sought to gain informal "heads up" from OMB about prospective funding cuts through the consultation channels established by the Recovery Act, only to be rebuffed.

However, this federal partnership interest is often offset by the weight of other interests and priorities within federal agencies. Specifically, federal agencies must pay attention to advocates and beneficiaries of regulatory programs who often take a suspicious and even adversarial view of the states. And they must also work with the White House and other central management overseers who may not share the enthusiasm for state flexibility and control.

Collective Action for State and Local Governments

Question: Your testimony suggested that organizations representing state and local governments often have divided interests- what are some examples in which they have successfully coordinated to have a larger impact?

Answer: Regrettably, I can point to only several examples over the past several decades. In recent years in particular, state organizations have increasingly been sidelined on major intergovernmental issues by the divisive polarization preventing state or local officials from reaching agreement on issues as important to states as health reform and welfare reform.

Nonetheless, victories for state and local collaboration do exist. The passage of UMRA itself must be considered a good case in point where state and local officials came together across party lines to lobby effectively for the new policy passed in 1995. The Recovery Act possibly could constitute another case where state and local governments achieved considerable funding and engagement from both the Congress and the Administration. The recent passage of the 2015 Every Student Succeeds Act constitutes another victory where state groups played a vital role to

reclaim state authority by replacing No Child Left Behind with a more flexible program. The National Governors Association staff said this was the first education program where NGA was able to take a position in 20 years.

On Retrospective Review

Question: In your testimony, you recommended prioritizing retrospective review by portfolio. Would you suggest this be conducted government-wide and if so, by whom?

> **Follow-up:** At the Department of Transportation (DOT), each DOT agency has divided its rules into 10 different groups and analyzes one group each year. Do you think this could be a viable model at the departmental-level across government?

Answer: I suggesting prioritizing retrospective reviews by policy portfolio as an alternative to an across the board requirement for sunset and review. I have testified twice before the Senate Budget Committee in recent weeks about the portfolio review as a way for national officials to periodically take on a policy goal oriented review of major areas in the budget. It seems more productive to encourage a baseline review of an entire policy area, such as low income housing or higher education subsidies, rather than a single tool used to achieve one of these goals. Thus, agencies and committees would be required to review the entire set of tools used to achieve the broad goals in these areas – spending programs, tax expenditures, loans, and regulations. This helps to anchor reviews in national priorities which have the greatest connection with leaders and the American public alike.

Although I am unfamiliar with the DOT process you have described, it appears that this would embody the spirit of what I have in mind in that it anchors regulatory reviews in a policy goal framework. In this way, it might not only encourage a review of the regulations but perhaps encourage a more robust comparison of using regulation vs other tools of government to accomplish federal purposes.

Post-Hearing Questions for the Record
Submitted to Richard J. Pierce, Jr.
Lyle T. Alverson Professor of Law
The George Washington University Law School
From Senator James Lankford

"The Unfunded Mandates Reform Act:
Opportunities for Improvement to Support State and Local Governments"
February 24, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

Defining a Mandate

Question: There are many exceptions to the Unfunded Mandate Reform Act's (UMRA) definition of a mandate. How would you define an intragovernmental mandate? What would that include if we thought about the real-world consequences of federal actions?

Question: UMRA does not currently require analysis for requirements on state, local, and tribal governments that are part of participation in a voluntary federal program or a condition of federal financial assistance. What are some examples of conditions of federal assistance that state, local, and tribal governments have found burdensome?

> **Follow-up:** How "voluntary" are some of these programs for state and local governments?

Answer: Congress might want to amend section 5(A)(i) of the Unfunded Mandates Reform Act. That section excepts from the definition of mandate "a condition of federal assistance; or, a duty arising from participation in a voluntary Federal program, ..." I agree with the witnesses who described circumstances in which duties or conditions of the type described in section 5(A)(i) have such a powerful coercive effect that they are functionally indistinguishable from mandates. The Supreme Court agreed with that general proposition when it held unconstitutional the Medicare expansion condition contained in the Affordable Care Act. It referred to that condition as an illustration of "when pressure becomes compulsion." NFIB v. Sibelius, 132 S. Ct. 2566, 2601-2606 (2012). I anticipate that Congress will experience difficulty, however, choosing the right language to use in such an amendment. It is challenging to describe the line between permissible conditions on grants or voluntary programs and impermissible compulsion or coercion of states and localities in a way that Congress, agencies, and courts can understand and apply.

Consultation Practices

Question: As reported in GAO-05-454, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, stakeholders from all sectors told GAO that the application of agency consultation practices with state and local governments were

generally viewed as inconsistent. Stakeholders from state and local governments often point to the Congressional Budget Office (CBO) as the model in consultation. CBO only has a small staff conducting this work- what actions could executive agencies take to ensure meaningful consultation?

Question: Much of the discussion in the hearing was on the inadequacy of agency consultation with state and local governments. Other than promising practices implemented by CBO, what are some examples in which intergovernmental consultation has been well done?

Follow up: Do some agencies do a better job than others? Please provide examples.

Answer: I am sure that some agencies do a better job of consultation than others but I do not know enough about the practices of various agencies to know which agencies perform this important function particularly well. You might want to ask CBO, GAO, and/or ACUS to study this question and to identify agencies that do a particularly good job of consulting and the practices they use for that purpose.

Consultation is more difficult for some federal agencies than for others because of the many ways in which state governments are organized. Some states assign some functions to a single agency while other states have multiple agencies with overlapping functions that relate to the functions of a federal agency. In some states, the agencies with overlapping functions are independent of each other and do not coordinate their policies. Thus, for instance, the Clean Power Plan (CPP) that EPA recently issued relates in complicated ways to functions performed by governors, state natural resource agencies, state attorney generals, and state public utility commissions. In some states those institutions differ significantly with respect to their perspectives on the CPP. In some states, one institution is adamantly opposed to the CPP while another institution is actively engaged in planning to implement the CPP.

On Missed Rulemaking Deadlines

Question: In your testimony, you mentioned missed rulemaking deadlines as one indication of the complexity and number of analytical requirements in our current rulemaking process. In fact, agencies often cite good cause due to judicial deadlines. In 2013, GAO's report *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments* found that for 36 of the 123 rules without a NPRM it reviewed, the agency cited good cause "because a law imposed a deadline either requiring the agency to issue a rule or requiring a program to be implemented by a date that agencies claimed would provide insufficient time to provide prior notice and comment." Presently, a rule for which an agency cites good cause and thus does not issue an NPRM would not trigger UMRA's requirements. What argument could be made that regulations that receive the least scrutiny should also not benefit from enhanced consultation?

Answer: You note that some rules are both exempt from notice and comment rulemaking and from UMRA because a statute creates a deadline for issuance of the rule that is inconsistent with

compliance with the notice and comment procedure. That is not a surprise. If Congress considers issuance of a rule so urgent that it exempts the rule from notice and comment I would expect that same sense of urgency to excuse the agency from complying with UMRA.

In recent years, Congress has enacted many statutes that require agencies to issue rules so rapidly that the agency can not comply with either the requirements of notice and comment or the requirements of UMRA. Many scholars have criticized this congressional practice and have urged Congress to impose such short deadlines only in emergency situations. I am among the critics of the increasing tendency of Congress to require agencies to issue rules in unrealistically short periods of time in non-emergency situations.

On ANPRMs

Question: In your testimony, one of your major objections to a requirement for an Advance Notice of Proposed Rulemaking (ANPRM) for major rules was that the courts have typically required Notices of Proposed Rulemaking (NPRMs) to be very well defined when published. We feel that this is an argument for, rather than against, the use of ANPRMs. Because S. 1820 does not require logical outgrowth between the ANPRM and the NPRM, would the use of this mechanism not be beneficial to get early feedback from a wide swath of diverse stakeholders as the rule is being drafted?

Answer: Agencies often choose to issue ANPRMs. The agency that is deciding whether to issue a rule is in the best position to balance the additional time required to issue an ANPRM and to consider responses to the ANPRM against the potential value of adding that potentially long and resource-intensive step to a rulemaking process that is already long and resource-intensive.

I want to thank Chairman Lankford, Ranking Minority Member Heitkamp and the other members of the Subcommittee again for letting me share my views on these important and difficult issues.

Respectfully,

Richard J. Pierce, Jr.