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IN A HEARING ON THE UNFUNDED MANDATES REFORM ACT: OPPORTUNITIES FOR IMPROVEMENT TO SUPPORT STATE AND LOCAL GOVERNMENTS

BEFORE THE

SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

OF THE

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

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Thank you, Chairman Lankford, Ranking Member Heitkamp, and distinguished members of the Subcommittee on Regulatory Affairs, for the opportunity to testify today on the proposed Unfunded Mandates Information and Transparency Act of 2015.

My name is Richard J. Pierce, Jr. I am Lyle T. Alverson Professor of Law at the George Washington University School of Law and a member of the Administrative Conference of the United States. For 38 years my teaching, research, and scholarly writing has focused on administrative law and government

regulation. I have written 125 articles and 20 books on those subjects. My books and articles have been cited in scores of judicial opinions, including over a dozen opinions of the United States Supreme Court.

I strongly support the Unfunded Mandates Reform Act (UMRA) with respect to its application to state, local, and tribal governments. It is not needed and is duplicative of other requirements in its application to private parties. Every President since President Reagan has issued Executive Orders that direct the Office of information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to review all major rules issued by executive branch agencies to determine whether the benefits of the rule exceed its costs. Major rules are defined as rules that are expected to impose annual costs of $100,000,000 or more. The costs of major rules are usually borne primarily by private parties. I cannot imagine a rule that would fall within the scope of UMRA that would not also fall within the definition of a major rule for purposes of OIRA review. I also have been unable to identify any requirement of UMRA *in its application to private parties* that is not also required by those Executive Orders. In addition, each of the last three Presidents has issued Executive Orders that require agencies to review their existing rules and to rescind or amend any rule that imposes undue burdens on private parties.

Private parties do not need any special or additional means of protecting themselves from mandates imposed on them by major rules. Studies of the notice and comment rulemaking process have consistently found that private parties and their representatives dominate that process both with respect to the comments they submit and the influence of those comments. By contrast, beneficiaries of rules, state governments, local governments and tribal governments file very few meaningful comments and the comments they file have little effect on the final rule the agency adopts.

With one notable exception, I oppose enactment of the proposed Unfunded Mandates Information and Transparency Act because I believe that it is unnecessary and that it would have adverse effects of several types.

I will begin by expressing my strong support for Section 5, "Expanding the Scope of Reporting Requirements to Include Regulations Imposed by Independent Regulatory Agencies." I have long supported OIRA's use of cost-benefit analysis (cba) to review major rules issued by executive branch agencies and I have long urged expansion of the scope of OIRA review to include independent regulatory agencies. I have testified in support of, and sent letters in support of, Senator Portman's Bill, Senate 1607, which would have that effect.

Many studies have found that the most important beneficial effect of OIRA use of cba to review major rules has been to improve significantly the quality of the economic analysis executive branch agencies use in the rule making process. Many studies have also found that the economic analysis used by Independent regulatory agencies is systematically and significantly inferior to the economic analysis used by executive branch agencies. It follows that extension of OIRA use of cba to review major rules to independent agencies would induce them to improve the quality of their economic analysis. Similarly, extension of the Unfunded Mandates Act to independent agencies would have the beneficial effect of increasing their sensitivity to the need to refrain from imposing federal mandates on state, local, and tribal governments without providing them the resources needed to comply with those mandates.

The other provisions of the proposed Act are unnecessary for two reasons. First, the Unfunded Mandates Reform Act is fulfilling its laudable purpose in its present form. It is highly effective in sensitizing both Congress and executive branch agencies with respect to the need to refrain from

imposing federal mandates on state, local, and tribal governments without providing those governments with the resources they require to implement those mandates. Second, many of the provisions of the proposed Act paraphrase existing agency practices and/or requirements that other statutes and Executive Orders have long imposed on agencies. I would include in this category most of the requirements that would be imposed by sections 6, 8 “201 (a)”, 9 “(a)(1-5)”, and 11”(208).”

Most of the provisions of the proposed Act would have adverse effects for two reasons. First, every new regulatory statute that Congress enacts, including this proposed statute, raises hundreds of questions that cannot be definitively answered until one or more courts have provided answers to those questions. Every word and phrase in a statute must be definitively defined by the courts. That process takes many decades. During that lengthy period, every firm, individual, and agency that is potentially affected by the statute must live in a legal environment that is plagued by pervasive uncertainty. Uncertainty has many bad effects, including discouragement of the productive investments that are essential to allow the economy to function well.

That lengthy process of judicial interpretation also inevitably yields judicial answers that come as unpleasant surprises to many firms, individuals and institutions, including the Congress that enacted the statute. These adverse effects apply to all of the provisions, including those that paraphrase pre-existing practices or requirements. It is impossible to know the meaning of those provisions until a court interprets each. In some cases, a provision that seems merely to paraphrase a pre-existing requirement will be interpreted by courts to require some practice that differs substantially from the pre-existing practice or requirement that the provision seems to restate with new words and phrases.

The second adverse effect of the proposed Act would be to add mandatory procedures that are unnecessary and burdensome. Many of those new mandatory procedures would have the effect of making the rulemaking process longer and more resource-intensive. There is a large body of scholarly research that documents, and describes the adverse effects of, a phenomenon that is referred to as "ossification" of the rulemaking process. The process of issuing, amending, or repealing a rule has become so long and resource intensive that agencies are unable to issue, amend, or repeal rules in a timely manner. The Supreme Court has held that agencies must use the same burdensome and time-consuming procedures that they are required to use when they issue a rule when they amend or repeal a rule. Many, indeed most, agencies have burdensome rules that have long been obsolete but that the agencies have not been able to amend or repeal because of the "ossification" of the rulemaking process that has resulted from the constantly increasing procedural requirements that Congress and the courts have imposed on agencies. Many of the provisions of the proposed Act would impose new procedural requirements that would cause increases in the ossification of the process of issuing, amending, or repealing rules. Three provisions illustrate this adverse effect.

First, proposed section 8 "201 (b)" would apply the ten procedural requirements imposed by existing section 201(a) to minor and insignificant regulatory actions. The present version of section 202 limits the applicability of the required procedures to "significant regulatory actions," defined as actions that would impose annual costs of $100,000,000 or more. That limit makes sense. The costs of imposing demanding new procedural requirements on agencies when they take minor or insignificant actions is not justified by the costs of complying with the procedures. That is why President Reagan imposed the same limit on the actions that he subjected to OIRA review in Executive Order 11,291. Every President of both political parties has retained the limit that President Reagan announced.

Second, proposed section 9 "(a)" requires an agency to use elaborate procedures to prepare a written statement *before* it issues a notice of proposed rulemaking or a final rule. There is no justification for requiring an agency to commit the significant time and resources required to issue those statements when the agency already issues statements that comply with proposed section 9 "9(a)(1-5)" when it issues its notice of proposed rulemaking and when it issues its final rule.

Third, proposed section 9 "(a)(6)(B and C)"requires an agency to provide a "detailed summary" of the comments submitted to an agency in a significant rulemaking and a "detailed summary" of the agency's evaluation of those comments. That is literally impossible in many significant rulemakings. Thus, for instance, it is hard to imagine how EPA could have summarized in detail the 4.3 million comments it received in the rulemaking that produced the Clean Power Plan. The analogous requirement that courts apply is far more pragmatic: an agency must respond to all "well-supported" critical comments. The well-supported comments typically are a small subset of the total comments. The Administrative Procedure Act requires an agency to include a "concise, general" summary of the comments it received and its response to those comments. Even those "concise, general" statements are typically hundreds of pages long in a major rulemaking. I cannot imagine how long a "detailed summary" would be.

Thank you again for giving me the opportunity to testify on these important matters.