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before the
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
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Good afternoon, Mr. Chairman and members of the Committee. Thank you for inviting me to appear before you today.

At the outset, on behalf of the President, I want to emphasize our commitment to the principles of federalism and our respect for the Tenth Amendment to the Constitution. Mr. Chairman, as you rightly have pointed out, Athe national government has limited powers@ and, generally, Agovernment closest to the people works best.@ President Clinton has actively encouraged intergovernmental consultation in his issuance of Executive Orders 12866 and 12875 and his support for and signing of the Unfunded Mandates Reform Act.

You have asked me to discuss S. 1214, the AFederalism Accountability Act of 1999.@ This bill seeks to promote the integrity and effectiveness of our Federal system of government. It would do so in four ways B

- having committee and conference reports contain an explicit statement on the extent to which the bill preempts State or local law;

- stating rules of construction regarding the preemption of State and local government authority by Federal laws and regulations;

- calling for extensive consultation with State, local, and tribal officials and their representatives, and the preparation by agencies of federalism assessments for their rules; and

- establishing an information collection system to monitor Federal statutory, regulatory, and judicial preemption.

S. 1214 clearly represents a serious effort to guide relations between the Federal government and state and local governments. We respect and support that effort. S. 1214 also avoids a number of problems present in its House counterpart, H.R. 2245. We are pleased at that. We do have concerns, however, that in its current form S. 1214 could have unintended consequences. These may include burdening agency efforts to protect safety, health, and the environment by imposing new administrative requirements on their activities and by encouraging additional litigation. The Administration believes that these aspects depart from the approach adopted in the Unfunded Mandates Reform Act, which it supported and is implementing. We believe that S. 1214 needs some revision if it is to accomplish its goal effectively. We would welcome the opportunity to work with you and your staff in this regard.

The Department of Justice will be discussing the Administration=s concerns with Section 6, ARules of Construction Relating to Preemption.@ My testimony will focus on the Administration=s views on Section 7, AAgency Federalism Assessments.@ We do see a need for clarification and have some other drafting comments that we would like to share with you and your staff at a later point. They are not part of my testimony today.

Our primary concerns with Section 7 revolve around the interaction between its creation of a series of new rulemaking requirements and the potential for harmful litigation arising from them.

Section 7 would require each rulemaking agency to designate a special federalism officer to serve as a liaison to State and local officials and their designated representatives. Section 7(b) would require each rulemaking agency, early in the process of developing a rule, to Aconsult with, and provide an opportunity for meaningful participation@ by public officials of potentially affected governments. These are defined to include State, local, and tribal elected officials and their representative organizations. Section 7(c) would require rulemaking agencies, when publishing any proposed, interim final, or final rule which the federalism official identified as having a federalism impact, to publish in the Federal Register a formal federalism assessment. Each of these federalism assessments would involve four mandatory components: identifying Athe extent to which the rule preempts State or local government law,@ analyzing the extent to which the rule regulates Ain an area of traditional State authority@ and the degree Ato which State or local authority will be maintained,@ describing the measures the agency took Ato minimize the impact on State and local governments,@ and describing the extent and nature of the agency=s prior consultations with public officials and Athe extent to which those concerns have been met.@

These new requirements may not be unreasonable in themselves. As now written, however, S. 1214 raises the risk that agencies could face litigation on each subcomponent of these requirements. The resultant need to document formally each and every aspect of an agency=s compliance with them could involve a significant new administrative burden. This is particularly true for agencies who are trying to implement laws and protect public health, safety, and the environment with limited resources. Even if the agency has acted in good faith, litigation can cause delays and drain scarce resources. To avoid such excessive litigation, the Administration feels that S. 1214 should include a statutory bar to judicial review of agency compliance with its provisions.

Here are practical implications in this regard. The intergovernmental consultation process described in Section 7 must take place before the rulemaking is first published in the Federal Register. We agree that such a process can be beneficial. Currently, as encouraged by E.O. 12875 and the Unfunded Mandates Reform Act, agencies reach out to State, local, and tribal governments and their representatives on a regular basis to hear their concerns and discuss important rulemakings. These discussions typically proceed in a spirit of intergovernmental partnership, often informally, after reasonable efforts to reach those most likely to be interested. Thus, as a general matter, we believe agencies already carry out consultations as envisioned in Section 7 and do so in a meaningful way.

Our concern here revolves around increasing the potential for litigation. If we make these collegial, informal discussions subject to the possibility of judicial review, it would change the whole dynamic. Rather than discussing matters openly in a spirit of partnership, some agencies could resort to check-lists B building up a record that proves that each step has been carried out. There would be internal agency monitoring to ensure that the check-lists are complete and an emphasis on objective documentation that could be used in court. Instead of working to improve their rules, agencies might shift their focus to improving their litigation position.

This will divert scarce resources. Agencies would feel compelled to prove that each step has been carried out fully, even if the particular rulemaking does not have the scope and importance to warrant such extensive administrative effort. Instead of tailoring their informal prepublication discussions as the circumstances of the rulemaking warrant, agencies would feel a need to create a prerulemaking record as formal and objectively documented as their counsel deems necessary to withstand a court challenge. It is not at all clear that this will lead to better rules, despite the good intentions embodied in Section 7.

How might this play out? Here is an example. Section 7 directs each agency to Aprovide an opportunity for meaningful participation by public officials of governments that may potentially be affected.@ We agree that agencies should do so. But allowing judicial review of agency compliance with this provision would permit potential litigants to ask a Federal judge to decide a wide variety of new issues. How much notice is legally adequate to Aprovide an opportunity?@ How much outreach effort does an agency have to make to seek Ameaningful participation?@ If an agency conducts extensive consultations with some of the Big 7, can others of the Big 7 litigate their failing to be included? What about individual State or local governments that do not agree with positions taken by the Big 7? Do they each need to be invited to participate? What kind of objectively documented finding does a Afederalism official@ have to make to determine that a rulemaking does not have Aa federalism impact,@and thus does not require a Afederalism assessment?@ The agencies would have to consider, plan for, and determine how to resolve questions like these. This would take time. It also might keep them from even more important tasks, like paperwork reduction initiatives, the review and revision of outdated and burdensome existing rules, and the conversion of rules into plain language.

For that matter, each agency would have to do more than just ensure that all of those who were supposed to be notified and consulted were satisfied with the agency=s compliance with Section 7. Others with an interest in the rulemaking itself B including various special interests B could potentially challenge the rulemaking because they were not satisfied with that compliance. They might even do so just to hamstring the agency and slow down its regulatory efforts. Agencies would thus have an even broader group to consider when designing a consultation effort.

We all know what road is paved with good intentions. While we respect the careful thought and sincere concern underlying S. 1214, we believe that it requires some changes to avoid unintended, adverse consequences. We would be pleased o work with you and your staff on these issues.

Thank you for the opportunity to appear before you today. I would be happy to answer any questions you may have.

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