

**TESTIMONY OF CASS R. SUNSTEIN
ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS**

**U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM, SUBCOMMITTEE ON TECHNOLOGY, INFORMATION
POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM
MAY 25, 2011**

Mr. Chairman and Members of the Committee:

I am grateful for the opportunity to appear before you today to discuss issues relating to Title II of the Unfunded Mandates Reform Act of 1995 (UMRA).

A central goal of UMRA is, of course, to minimize the imposition of regulatory burdens on State, local, and tribal governments, and to ensure that those burdens are imposed only after careful and informed consideration. In these opening remarks, I will be emphasizing the relationship between this central goal and the goals of two presidential documents from this year: Executive Order 13563, "Improving Regulation and Regulatory Review," and the Presidential Memorandum entitled "Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments." My purpose is to explore how the 1995 statute and the 2011 documents are mutually reinforcing.

As you are aware, Title II of UMRA imposes reporting and consultation requirements with respect to certain rules with mandates that may result in the expenditure of annual costs of \$100 million or more (adjusted for inflation) on State, local, and tribal governments (or on the private sector). Those reporting requirements involve, among other things, an assessment of costs and benefits, as well as an accounting of various potential effects on the economy. In addition, Title II requires agencies to identify and consider alternatives and to select the least costly, most cost-effective, or least burdensome alternative. Notably, UMRA places its principal responsibilities on agencies themselves; for example, section 202(a)(4) provides that, with respect to certain economic effects, agencies must make estimates "if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material." The Office of Management and Budget is directed to provide annual reports to the Congress on new regulations covered by UMRA.

Insofar as UMRA is designed to require certain analyses of the effects of rules and to ensure that costs and burdens are reduced, the Act's goals evidently overlap with those of Executive Order 12866, which was issued in 1993 and has long governed the process of regulatory review. Indeed, Executive Order 12866 contains a number of specific provisions expressly designed to ensure consultation with State, local, and tribal governments, as well as to ensure minimization of burdens on non-federal entities. UMRA and Executive Order 12866 have worked in concert for many years, operating under both Democratic and Republican Administrations. As you are undoubtedly aware, President Obama has recently issued Executive Order 13563, which reaffirms the requirements of Executive Order 12866 and also contains a number of provisions that bear directly on the goals of UMRA. Four provisions deserve particular attention:

- Executive Order 13563 directs that “regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives *among State, local, and tribal officials*, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole” (emphasis added). With this direction, Executive Order 13563 emphasizes the importance of consultation with State, local, and tribal officials.
- Executive Order 13563 states that “[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.” Where appropriate, State, local, and tribal governments may be among those to be consulted.
- Executive Order 13563 directs agencies to select the least burdensome approaches, to minimize cumulative costs, to simplify and harmonize overlapping regulations, and to identify and consider flexible approaches that maintain freedom of choice for the American public. It is clear that these requirements directly bear on rules that affect State, local, and tribal governments.
- Executive Order 13563 requires agencies to review existing significant regulations to see if those rules make sense and continue to be justified. Preliminary plans were submitted to OIRA on May 18. One of the central goals of this “regulatory look-back,” which is ongoing, is to eliminate excessive costs and burdens, including those faced by State, local, and tribal governments.

In all of these ways, there is a direct relationship between Executive Order 13563 and UMRA.¹

While the coverage of Executive Order 13563 is broad, the Presidential Memorandum, “Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments” is specifically focused on State, local, and tribal governments. Drawing attention to requirements that have sometimes been “onerous” and “unnecessary,” the Memorandum seeks to increase flexibility for nonfederal entities. To achieve that goal, the Memorandum directs “the Director of the Office of Management and Budget (OMB) to lead a process, in consultation with State, local, and tribal governments, and agencies, to: (1) provide input to multiple agencies on State-specific, regional, or multistate strategies for eliminating unnecessary administrative, regulatory, and legislative burdens; (2) enable State, local, and tribal governments to request increased flexibility, as appropriate, from multiple agencies simultaneously and receive

¹ In addition, on November 5, 2009, President Obama issued a memorandum directing all federal agencies to develop detailed plans to implement Executive Order 13175, which mandates meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, including regulations. Mandating consultation with tribes on regulatory efforts that affect them further promotes the goals of UMRA.

expeditious and judicious consideration of those requests . . .” The Director of OMB, Jack Lew, issued a memorandum on implementation of these provisions on April 29, 2011.

The Presidential Memorandum also directs agencies to “[w]ork with State, local, and tribal governments to identify the best opportunities to realize efficiency, promote program integrity, and improve program outcomes, including opportunities, consistent with law, that reduce or streamline duplicative paperwork, reporting, and regulatory burdens” Agencies must take action to this effect by August 29, 2011.

It should be clear that UMRA, Executive Order 13563, and the Presidential Memorandum on Administrative Flexibility are mutually reinforcing. The Administration looks forward to working with nonfederal entities, and with this Subcommittee, to promote the shared goals associated with UMRA, Executive Order 13563, and the Presidential Memorandum on Administrative Flexibility.