August 29, 2019

The Honorable Gerry Connolly
Chairman
Subcommittee on Government Operations
Committee on Oversight and Reform
House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Mark Meadows
Ranking Member
Subcommittee on Government Operations
Committee on Oversight and Reform
House of Representatives
2105 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Connolly and Ranking Member Meadows:

Western Governors appreciate your continued consideration of ways to strengthen the state-federal relationship, as we recommended in a January 9, 2019 letter to House leadership. An improved state-federal relationship is a principal priority of Western Governors – one that we unfailingly promote in our communications to Congress and the Administration. Our vision of a more functional state-federal paradigm is articulated in WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, which we commend to your attention.

That our system of cooperative federalism is in urgent need of reform is demonstrated by the consistent treatment of states as stakeholders by federal agencies. Improved intergovernmental coordination, communication and consultation promise multiple benefits, not the least of which is more effective, efficient and enduring public policy.

Western Governors support the reestablishment of a forum for meaningful dialogue on intergovernmental issues, such as the Commission on Intergovernmental Relations of the United States (Commission) proposed in H.R. 3883, the Restoring the Partnership Act. The creation of such a forum, however, should not take the place of broader legislative reforms, such as those Western Governors and their partners shared with the Speaker's Task Force on Intergovernmental Affairs in the attached August 3, 2018 letter.

H.R. 3883 would ensure a broad range of state, local and tribal government representation on the Commission by inviting several specified national associations to submit nominations for the President's consideration and selection. Western Governors recognize the difficulty in assuring geographic, political, and governmental balance on the Commission. However, we encourage you to include a mechanism that would allow for the consideration of additional nominees from other national and regional organizations that would advance the Commission's goals of improved "cooperation, coordination, and mutual accountability among all levels of government."

To serve as an effective tool for improved intergovernmental relations, the Commission must have meaningful authority and resources. H.R. 3883 requires Congress to hold hearings on (and federal agencies to respond to) the Commission's recommendations; these provisions are essential to fulfilling the purposes of the Commission. Governors encourage you to authorize specific appropriation levels in the bill to ensure this Commission does not meet the same fate as its predecessor, the Advisory Commission on Intergovernmental Relations.

Western Governors support the bill's clarification that the Commission is not subject to the Federal Advisory Committee Act (FACA). We urge you to exempt from FACA all meetings held exclusively between federal personnel and state elected officials (or their designees) acting in their official capacities or in areas of shared intergovernmental responsibilities or administration. This provision builds on a similar exemption contained in the Unfunded Mandates Reform Act (Pub. L. 104-4) and encourages robust and constructive intergovernmental communication.

Over the last decade, Western Governors have led bipartisan efforts to improve the state-federal relationship. As Governors, we purpose to serve as authentic partners of the federal government and urge your unqualified embrace of this objective.

Sincerely,

Doug Burgum
Governor of North Dakota
Chair, WGA

Kate Brown
Governor of Oregon
Vice Chair, WGA

cc: The Honorable Rob Bishop

Attachments

August 3, 2018

The Honorable Rob Bishop
Chairman
Speaker's Task Force on Intergovernmental Affairs
United States House of Representatives
123 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Bishop:

Our organizations represent Governors, states, state agencies and departments, local governments, and the interests of the West. We share a mission to strengthen the relationship between all levels of government through consultation, communication, coordination, and cooperation.

Congress can play a significant role in improving the state-federal relationship, as a more functional and effective state-federal dynamic will benefit our shared constituents through the production of better, more durable and more legally-defensible policy. We are grateful for your continued leadership with respect to this important objective.

The Western Governors' Association (WGA) recently provided the Task Force with specific recommendations for congressional action. We support congressional discussion and consideration of these potential reforms, which build on the *Principles to Clarify and Strengthen the State-Federal Relationship* that several of our organizations have endorsed.

Our organizations are eager to work with the Task Force on legislation to improve intergovernmental collaboration. Please regard our organizations, Governors, states, and counties as resources as you endeavor to make our nation's government more efficient and responsive to its citizens.

Sincerely,

James Ogsbury
Executive Director
Western Governors' Association

Tommie Cline Martin
President
Western Interstate Region of NACo

Matt Morrison
Executive Director
Pacific NorthWest Economic Region

Dr. Laura Nelson
Chair
Western Interstate Energy Board

Tony Willardson
Executive Director
Western States Water Council

Enclosure: WGA Recommendations for Congress: Process Improvements to Build a Stronger State-Federal Relationship

Recommendations for Congress: Process Improvements to Build a Stronger State-Federal Relationship

The constitutional relationship among sovereign governments, state and national, is inherent in the structure of the Constitution and is formalized and protected by the 10th Amendment.[1] Many statutes expressly recognize state primacy or delegate federal authority to states; and/or require the federal government to consult, coordinate, or cooperate with states on specific issues or actions. Despite this clear and careful balance, the federal government has increasingly infringed on or ignored states' sovereign and co-regulator status. The recommendations for Congress provided below, which build on the principles in WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, will help realign our federalist system, enhancing the U.S. government's service to its citizens at all levels and resulting in better public policy.

Ensure Federalism Principles are Incorporated in Legislative Drafting	
Recommendation	**Rationale**
States are Sovereigns Ensure that states are not treated as equivalent to stakeholders, interested parties, public or private organizations, industry, or the public in legislation or by federal agencies. Rather, states should be treated as sovereign entities and engaged in a government-to-government manner. Amend the House of Representatives Office of Legislative Counsel Guide to Legislative Drafting to add a fourth important convention in Section VII to distinguish states from stakeholders.	Many statutes currently – and inaccurately – include states as stakeholders, interested parties, public or private organizations, industry, or the public ("entities"); treat states as equivalents to these entities; or do not distinguish between states and these entities. States, as sovereigns, are distinguished from other entities by the Constitution, the 10th Amendment, and U.S. Supreme Court cases. As a result, legislative drafters should not include states, state officials, or state agencies in a list with these entities and should always distinguish the treatment of states, state officials, and state agencies.
10th Amendment Amend Clause 7 of Rule XII the Rules of the House of Representatives for the 116th Congress (and Protocol 8, Constitutional Authority Statements), to read: "(c) A bill or joint resolution may not be introduced unless the sponsor has submitted for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution *and an explanation why the bill or joint resolution does not infringe on the rights reserved to the states by the 10th Amendment*."	Pursuant to the Constitution, the powers of the federal government are narrow, enumerated and defined, while the powers of the states are vast and indefinite. The presumption of sovereignty should rest with states and uncertainties regarding federal authority should generally be resolved in favor of state authority and regulation. This requirement will ensure that bill or resolution sponsors carefully consider state authority before proposing legislation.

[1] U.S. CONST., amend. 10; *Alden v. Maine*, 527 U.S. 706, 714 (1999).

Preemption and State Authority Recognize states' sovereign status and authority in legislation. Avoid preemption of state authority in legislation. Ensure legislation grants states the maximum administrative discretion possible and does not create undue burdens on state resources. Explicitly state that preemption is disfavored and require agencies to specify where preemption is warranted. In such cases, agencies must provide affected states notice and an opportunity to participate in proceedings at which the agency must demonstrate the preemption of state authority is needed to accomplish a national purpose.	Our constitutional system encourages a healthy diversity in the public policies adopted by states according to their own conditions, needs, and desires. Effective public policy is achieved when there is competition among states in fashioning different approaches to public policy issues. One-size-fits-all national approaches to public policy problems can inhibit the creation of effective solutions to those problems. In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the federal government should generally be resolved in favor of state authority and regulation. EO 13132 directs agencies to not seek legislation that preempts state law, unless preemption is consistent with the fundamental federalism principles outlined in the EO and is the only method of achieving a clearly legitimate national purpose. The EO also requires agencies to construe preemption narrowly – where it is express, clearly evidenced, or state authority conflicts with federal statutory authority – and to provide notice to states and an opportunity to participate in proceedings where an agency is attempting to preempt state authority. This requirement should be codified with associated accountability measures.
Direct Agencies to Improve the State-Federal Relationship	
Recommendation	**Rationale**
Definitions Define "consultation" to: • Include early, meaningful, substantive, ongoing, government-to-government communication and exchange with states through Governors or their designees. • Require procedures separate from and beyond the stakeholder or public process. • Clarify that notice and comment rulemaking procedures do not satisfy agencies' requirements to consult with states where required by law. Define "policies with federalism implications" to include: federal regulations, proposed federal legislation, policies, rules, non-legislative	Each Executive department and agency should have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state governments as he or she may designate – with early, meaningful and substantive input in the development of regulatory policies that have federalism implications. This includes the development, prioritization, and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets, and strategic planning. Many statutes require federal agencies to consult with states (as well as coordinate or cooperate with states) without defining the term(s). Executive Order 13132, *Federalism* (EO 13132) also does not define consultation. A definition of the term "consultation" would clarify what Congress intended. Even where consultation is statutorily required, agencies often

rules, guidance, directives, programs, reviews, plans, budget proposals, budget processes and strategic planning efforts that have either: (1) substantial direct effects on the states or on their relationship with the federal government; or (2) the distribution of power and responsibilities, between the federal government and state governments.	direct states to comment on their actions through the stakeholder process, in the same manner as a member of the public. Or agencies argue that state consultation can be fulfilled through typical notice-and-comment rulemaking, which would otherwise be required by law, and which does not involve any meaningful government-to-government exchange with states.
Consultation Regulations Require all federal departments and agencies, including independent regulatory agencies, to codify in regulation a clear, consistent, and accountable process for state consultation on policies with federalism implications. Such processes should include a remedy for states where agencies fail to do so. These regulations should also require: • Federal agencies to provide written notification to and an invitation to consult with Governors of all potentially-affected states (or their designees) of policies with federalism implications within the area affected by the proposed federal action. • Federal agencies to provide procedures for written response to Governors' or their designees' input prior to a final federal decision. • Federal agency decision-makers to hold regular, ongoing consultation meetings with Governors or their designees regarding policies with federalism implications.	The principles in EO 13132 are helpful in describing how the relationship between states and the federal government should operate. However, the lack of accountability mechanisms in the EO have resulted in infrequent application of these principles by federal agencies. Requiring and ensuring that federal agencies codify the consultation process in regulation will help improve accountability, but so is providing consequences for the failure to do so. Providing accountability mechanisms on individual actions with federalism implications will further ensure that federal agencies continue to comply with constitutional, statutory, and regulatory requirements.
Rulemaking Prior to promulgation of a rule with federalism implications, require federal agencies to: • Ensure that new funds sufficient to pay the direct costs incurred by the state in complying with the regulation are provided by the federal government; and • Provide OMB with a description of the extent of agency's consultation with states, a summary of their input, the agency's	The Regulatory Flexibility Act (RFA) requires agencies to publish regulatory flexibility agendas in October and April of each year that include: (1) a brief description of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities (which include small businesses, small organizations, and small government jurisdictions); (2) a summary of the objectives and legal basis for the issuance of the rule; and (3) an approximate timeline for the rule.[2] Small entities are notified and given an opportunity to comment on the proposed actions.

[2] 5 U.S.C. §602.

response to that input, and any written communications submitted by states. Provide an opportunity for Governors or their designees to review agencies' regulatory agendas.	A similar process should exist for Governors and their designees to be consulted on all policies with federalism implications, including all types of guidance documents and expected rulemakings. Involving states at this early stage would facilitate coordinating regulations, maximizing consultation, resolving conflicts, and involving states in regulatory planning.
Non-legislative Rulemaking/Guidance Require agencies to consult with affected states prior to issuing guidance documents with federalism implications – including memoranda, directives, notices, bulletins, manuals, handbooks, opinions, and letters. Require agencies to develop a transparent and accountable process for determining whether a proposed agency action requires notice-and-comment rulemaking procedures prescribed under Section 553 of the Administrative Procedures Act. Require agencies to publish all existing guidance documents at a single location on their agency's website and publish new and rescissions of guidance documents at the same location on the date they are issued.	To be legally binding, agency rules must be promulgated through notice-and-comment rulemaking. Federal agencies often categorize their proposed rules and regulations as "non-legislative," which are not subject to the requirements of the APA for notice-and-comment rulemaking. This practice precludes transparency in the rulemaking process, as well as the opportunity for the public (in which agencies often include state governments) to provide input to the agency in the development and adoption of rules. Federal agencies are currently required to consult on policies with federalism implications, which include guidance, by EO 13132, but this rarely occurs.
Consistency and Avoidance of Conflicts Require federal agencies to: • Make all reasonable efforts to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs; and • Address and resolve all issues and concerns raised by states, unless precluded by federal law.	Federal agencies should have to document specifically how their regulatory actions seek to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs. They should also consider alternatives in NEPA analysis that would resolve any conflicts and the selection of a preferred alternative that eliminates or minimizes conflicts with state plans, policies, and programs for land use planning.
State Data Require agencies to incorporate state and local data and expertise, subject to existing state requirements for data protection and transparency, into their decisions. This data should include scientific, technical, economic, social, and other information on the issue the agency is trying to address.	Congress is currently focused on streamlining many types of agency decisions. Federal agencies often do not utilize state data in their decision-making or evaluate their decisions against an accurate baseline. Requiring agencies to use existing state data where possible will reduce burdens on federal agencies and potential duplication and result in better-informed decisions.

Settlement Negotiations In settlement negotiations impacting policies with federalism implications, require federal agencies to provide notice of the action to affected states, consult with affected states on any negotiations, and seek state concurrence regarding the settlement.	Agencies are often driven by deadlines or requirements established by litigation or adjudication – not statute or regulation. In negotiations regarding litigation or adjudication that has federalism implications, states are often left out of the process. Involving states in such negotiations would prevent conflicts from arising as the agencies implement the outcomes of those negotiations.
Congressional Oversight Establish a Federalism Office within the White House or reestablish the U.S. Advisory Committee on Intergovernmental Relations to ensure federal agencies meet their federalism obligations. Request a report on existing federalism requirements and/or require regular and ongoing reporting on federalism requirements.	Such an office would work solely on federalism issues and ensure adequate oversight over executive agencies and provide advice to the President. A comprehensive analysis of all requirements on federalism currently applicable to federal agencies would help identify gaps and inform legislation. For example, there is little to no information on how often federal agencies perform federalism assessments pursuant to EO 13132. Either the Government Accountability Office or OMB could conduct this analysis.
Eliminate Perceived Barriers to the State-Federal Relationship	
Recommendation	**Rationale**
***Ex Parte* Communications** Require agencies to revise or establish their *ex parte* rules or policies in accordance with current case law, which permits these communications in informal rulemaking proceedings; and/or exempt communications with states and state officials from the definition of *ex parte* communications.	Many federal agencies have adopted policies which restrict communications with non-agency personnel during the rulemaking process. However, there is no statutory authority or other law that prohibits these communications. Many of the federal policies on *ex parte* communication were hastily adopted in response to overly-restrictive federal case law, which was subsequently overturned.[3] A 2014 report by the Administrative Conference of the United States contradicted the restrictive approach taken by agencies upon reviewing relevant statutes and case law.[4] In addition, there are major discrepancies between federal agencies' policies on *ex parte* communications. For example, the Federal Emergency Management Agency (FEMA) has proposed a rule that requires restrictions on *ex parte* communications for the entire development of a rule: from publication of the notice of proposed rulemaking, until issuance of a final action. The FEMA proposed rule exempts tribal consultation from these

[3] *See Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).
[4] Administrative Conference of the United States, Ex Parte Communications in Informal Rulemaking (May 1, 2014).

	restrictions but makes no similar exception for states.[5] In contrast, the Surface Transportation Board has promulgated a final rule that permits *ex parte* communications in informal rulemaking proceedings.[6] Congress could clarify that communications with sovereigns and co-regulators is exempt from the definition of *ex parte* communications. Restrictions on communications with states throughout the rulemaking process have a chilling effect on consultation and coordination with states. This clarification would ensure consistency in the application of *ex parte* communication policies.
Federal Advisory Committee Act (FACA) Exemptions Exempt all meetings held exclusively between federal personnel and non-federal elected officials (or their designees) acting in their official capacities or in areas of shared intergovernmental responsibilities or administration from FACA.	The Unfunded Mandate Reform Act (UMRA) exempts the following intergovernmental communications from FACA: (1) meetings are held exclusively between federal officials and elected officers of state, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and (2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.[7] A similar exemption is not currently contained in FACA, which creates confusion. The rationale for exempting such consultation from FACA in the UMRA extends to state-federal meetings unrelated to federal intergovernmental mandates. An exemption in FACA will encourage intergovernmental communication, which is an essential element of our system of federalism and is often statutorily required.
Freedom of Information Act (FOIA) Create statutory exceptions to FOIA disclosure for state data and analysis in instances where publication of state data provided to federal agencies would be violation of existing state statutes.	FOIA mandates the disclosure of records held by a federal agency, unless the documents fall within enumerated exemptions.[8] Under FOIA, an "agency record" is a record that is (1) either created or obtained by an agency; and (2) under agency control at the time of the FOIA request.[9] FOIA also does not contain an exemption for data that would otherwise be protected under a state open records act. If a state open records act

[5] Update to FEMA's Regulations on Rulemaking Procedures, 82 FR 26414 (June 7, 2017).
[6] Ex Parte Communications in Informal Rulemaking Proceedings, 83 FR 9222 (March 5, 2018).
[7] 2 U.S.C. §1534(b).
[8] 5 U.S.C. §522.
[9] *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

Investigate and develop solutions for other barriers to state-federal communication presented by FOIA.	prohibits disclosure of certain types of information, that information should not be disclosed except as required by law. There are also concerns that confidentiality agreements between states and federal agencies will not protect state data from disclosure under FOIA. These concerns can prevent states from exchanging valuable state data with federal agencies.
Make the Unfunded Mandates Reform Act (UMRA) Relevant	
Recommendation	**Rationale**
UMRA Threshold Eliminate the $100 million threshold for the application of the UMRA to federal intergovernmental mandates.	Over the past 10 years, only five agency rules have met the threshold of the UMRA for federal mandates that may result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector of $100 million in any one year.[10] A federal mandate is defined as a federal intergovernmental mandate or federal private sector mandate.[11] A federal intergovernmental mandate is defined as a regulation that "would impose an enforceable duty upon State, local, or tribal government" with two exceptions.[12] The application of the UMRA to intergovernmental mandates is limited by the definition of federal mandate and the $100 million threshold. Eliminating the $100 million threshold for federal intergovernmental mandates would require OMB to report to Congress on a greater proportion of federal intergovernmental mandates, providing accountability and requiring agencies to adhere to the UMRA's consultation procedures for more federal intergovernmental mandates.
State Input and Data Require agencies to incorporate state government input and data, including social and economic data, in their qualitative and	Although UMRA currently requires agencies to assess the costs and benefits of a rule to state governments and consult with them on the rule, it does not require agencies to incorporate state input and data into this assessment.

[10] 2017 Draft OMB Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, pp. 36-37.
[11] 2 U.S.C. §1502, incorporating the definitions of 2 U.S.C. §658 by reference.
[12] The definition of "Federal intergovernmental mandate" excludes "a condition of Federal assistance" and "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority" and would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decreases the Federal Government's responsibility to provide funding" in a situation in which the State, local, or tribal governments "lack authority" to adjust accordingly. 2 U.S.C. §658(5).

quantitative assessment of anticipated costs and benefits of qualifying rules under the UMRA.	Adding this requirement will reinforce the need for meaningful consultation, as well as provide more informed assessments with locally-generated data. The UMRA could be amended to require assessments to include state input and data on the costs and benefits of the rule, including social and economic costs.
Consultation on Intergovernmental Mandates Strengthen the consultation requirements for federal intergovernmental mandates.	The current language of the UMRA does not provide a clear standard for what is an "effective process" to permit input from state officials. However, Section 1532 refers to this effective process as consultation.[13] OMB Memorandum M-95-09 specifies that "intergovernmental consultations should take place as early as possible, and be integrated into the ongoing rulemaking process." The UMRA should be amended to specify that an effective process should ensure early, substantive, meaningful, and ongoing consultation with state officials in the development of regulatory proposals containing federal intergovernmental mandates.
Review of Failures to Implement Authorize a court to compel substantive, meaningful consultation with elected officers of state governments if an agency fails to develop or implement the effective process under the UMRA.	A remedy currently exists in the UMRA for an agency's failure to prepare a written statement. However, it does not exist for an agency's failure to allow meaningful input from state governments, despite UMRA's requirement to do so for federal intergovernmental mandates. Providing a remedy for failure to allow meaningful input from states will provide accountability for agencies to make a good faith effort to consult with these governments. The statute's existing limitations on judicial review of the failure to prepare a written statement could extend to the failure to consult.

[13] 2 U.S.C. §1532(a)(5)(A).