# UNFUNDED MANDATES ACCOUNTABILITY ACT OF 2011

**Senator Rob Portman**

***Key Provisions***

1. **Strengthen Regulatory Impact Analysis Under UMRA.**

   - **Require agencies to assess effect on jobs.** Agencies would for the first time be required specifically to assess the potential impact of any new "major" regulation (rules with an annual effect of $100M or more) on job creation or job loss — and quantify that impact to the extent feasible.

   - **Require consideration of market-based, flexible, and non-governmental alternatives.** UMRA requires agencies to consider "a reasonable number of regulatory alternatives." This bill would go further by specifically requiring agencies to consider reasonable alternatives that require no action by the federal government, use incentives and market-based solutions, and/or "permit the greatest flexibility" in achieving the goals of the statute authorizing the regulation.

2. **Make Least Burdensome Alternative Mandatory, Not Discretionary.** UMRA now states that agencies must select the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule" *unless* the agency head simply provides an explanation. This bill eliminates that excessively broad exception. An agency would be required to follow the least onerous regulatory course to achieve the policy goals set out by Congress. Agencies will, however, continue to have latitude to interpret statutory objectives.

3. **Extend UMRA to Independent Agencies.** This bill would apply the cost-benefit framework of UMRA to independent agencies. There is no basis for distinguishing between executive and independent agencies with respect to cost-benefit analysis of new regulations. Given that rules issued by independent agencies are not reviewed by OMB's Office of Information and Regulatory Affairs, there is an even more compelling need to bring independent agencies within the basic cost-benefit framework created by Congress for executive agencies.

4. **<u>Expand The Category of Rules That Trigger UMRA</u>.**

- **Broaden economic impact definition.** Under current law, UMRA's cost-benefit framework is triggered only by rules that require direct "expenditures" of $100 million or more (indexed for inflation). This focus on expenditures makes sense for intergovernmental mandates, but it excludes a host of compliance costs borne by the private sector. This legislation would revise the economic threshold to include any rule that imposes an "annual effect on the economy" of $100 million or more. This broader scope would capture rules that impose less direct, but no less tangible, costs on employers. It would also better align UMRA with the definition of a "significant regulatory action" contained in President Clinton's Executive Order 12,866 (1993).

- **Broaden procedural reach.** UMRA currently applies only to "general notice[s] of proposed rulemaking," which excludes rules hastily adopted without general notice. This bill would expand UMRA to apply to "any proposed or final rule."

5. **<u>Permit Cost Considerations</u>.** Courts have interpreted a handful of regulatory statutes to prohibit agencies from even considering costs when crafting certain rules. That approach does not accord with economic reality in a world of scarce resources, and it often results in agencies considering cost in an undisclosed, back-of-the-envelope manner. This bill would extend the cost-benefit analysis to any new rule, while still recognizing that an agency can consider only regulatory alternatives "within its discretion under the statute authorizing the rule."

6. **<u>Permit Meaningful Judicial Review</u>.** This bill would permit judicial review of an agency's compliance with UMRA as part of any challenge to the rule brought under the Administrative Procedure Act. Each agency's cost-benefit analysis, as well as its approach to less onerous regulatory alternatives, would be reviewed under the arbitrary and capricious standard. Review would be deferential, but it would require an agency to provide a reasoned explanation of how its adoption of a particular regulatory means is consistent with UMRA. An agency that relies on an irrational or otherwise deficient cost-benefit analysis, or adopts a needlessly burdensome option, would risk remand or vacatur of its regulation.