



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committee on Regulation
From: Emily F. Schleicher (DFO)
Date: October 29, 2010
Re: Revised Draft Recommendation

The following draft recommendation is based on the Committee's discussion at its October 19, 2010 public meeting of Professor Catherine Sharkey's report examining agency procedures for determining whether to preempt state law (the "Preemption Report"). In some cases, provisions of the Recommendation have been modified to provide the Committee with several options that members identified as potential points of consensus at the previous meeting. In keeping with the Conference's past practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should feel free to revise it as appropriate. As with the draft recommendation circulated in advance of the October 19, 2010 meeting, this draft is intended to facilitate the Committee's discussion at its November 2, 2010 public meeting, and not to preempt the Committee's discussion and consideration of the proposed recommendations.

Draft Preamble

Presidents Reagan and Clinton both issued executive orders mandating executive branch agencies,¹ and urging independent agencies,² to take certain measures to ensure proper respect for principles of federalism. Executive Order 13132, "Federalism," issued by President Clinton on August 4, 1999 ("Federalism Executive Order" or the "Order"),³ is still in effect today, and is an amended version of President Reagan's Executive Order on Federalism, E.O. 12612.⁴ The Order identifies federalism principles that bear consideration in policymaking and specifies procedures for intergovernmental consultation, emphasizing consultations with State and local governments and enhanced sensitivity to their concerns. The Order requires agencies to have "an accountable process to ensure meaningful and timely input by state and local officials in the

¹ Exec. Order No. 13,132, § 1(c).

² *Id.* at § 9.

³ Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 3 U.S.C. § 301 (2006).

⁴ President Reagan's Executive Order on Federalism adopted, nearly verbatim, ACUS recommendations. *Compare* Exec. Order No. 12,612, 3 C.F.R. 252, §§ 4(d) & (e) (1988), *reprinted in* 5 U.S.C. § 601 (1994), *with* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION NO. 84-5, ¶¶ 4, 5, PREEMPTION OF STATE REGULATION BY FEDERAL AGENCIES (1984).



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development of regulatory policies that have federalism implications.”⁵ The Order requires agencies to “provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings” whenever an agency proposes to preempt State law through adjudication or rulemaking.⁶ It establishes specific procedures for “any regulation that has federalism implications and that preempts state law,”⁷ requiring agencies to consult with state and local officials “early in the process of developing the proposed regulation.”⁸ The Order further requires agencies to provide a federalism impact statement (“FIS”) whenever regulations will preempt state law and have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”⁹

The Office of Information and Regulatory Affairs (“OIRA”), located within the Office of Management and Budget (“OMB”), is responsible for implementing the Federalism Executive Order, and has issued procedural guidelines on “what agencies should do to comply with the Order and how they should document that compliance to OMB.”¹⁰ The Federalism Guidelines provide that each agency and department should designate a federalism official charged with: (1) ensuring that the agency considers federalism principles in its development of regulatory and legislative policies with federalism implications; (2) ensuring that the agency has an accountable process for meaningful and timely intergovernmental consultation in the development of regulatory policies that have federalism implications; and (3) providing certification of compliance to OMB. The federalism official must submit to OMB “a description of the agency’s consultation process,”¹¹ that “indicate[s] how the agency identifies those policies with federalism implications and the procedures the agency will use to ensure meaningful and timely consultation with affected State and local officials.”¹² For any draft final regulation with

⁵ *Id.* at § 6(a). The consultation process must involve “elected officials of State and local governments or their representative national organizations.” *Id.* at §§ 1(d), 6(a).

⁶ *Id.* at § 4(e).

⁷ *Id.* at § 6(c).

⁸ *Id.* at § 6(c)(1).

⁹ *Id.* at § 6(c)(2) (requiring FIS for regulations and orders with “federalism implications and that preempts State law”); *id.* at § 1(a) (defining “federalism implications”).

¹⁰ Memorandum from Jacob J. Lew, Director, Office of Mgmt. & Budget, to the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, Guidance for Implementing E.O. 13132, “Federalism” (Oct. 28, 1999), at 2, available at <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/m00-02.pdf> (last visited October 29, 2010) (“Federalism Guidelines”).

¹¹ Exec. Order No. 13,132, § 6(a); Federalism Guidelines 2.

¹² Federalism Guidelines 4-5.



federalism implications submitted for OIRA review under Executive Order 12866, the federalism official must certify that the requirements of the Federalism Executive Order concerning both the evaluation of federalism policies and consultation have been met in a meaningful and timely manner.¹³

President Obama's official policy on preemption, articulated in a May 20, 2009 presidential "Memorandum for Heads of Executive Departments and Agencies" ("Preemption Memorandum"), reinforces the importance of agency compliance with the Federalism Executive Order. The Preemption Memorandum takes the position that "[p]reemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption."¹⁴ It specifically admonishes department and agency heads to cease the practice of including preemption statements in the preamble to a regulation without including it in the codified regulation. And it further directs agencies to include preemption provisions in codified regulations only to the extent "justified under legal principles governing preemption, including the principles outlined in Executive Order 13132," the Federalism Executive Order. Finally, the Preemption Memorandum requests that agencies conduct a 10-year retrospective review of regulations including preemption statements, whether in the preamble or the codified regulation, "in order to decide whether such statements or provisions are justified under applicable legal principles governing preemption."

Evaluation of Agency Compliance with Executive Directives

An empirical evaluation of agency practices reveals that compliance with the Federalism Executive Order has been inconsistent, although the Preemption Memo has effectuated a meaningful shift in preemption policies within a number of agencies. This evaluation was based on statistical analysis of agency rulemaking practices, on particular examples of agency rulemakings, on recent interviews with officials at the National Highway Traffic Safety Administration ("NHTSA"), Food and Drug Administration ("FDA"), Office of the Comptroller of the Currency ("OCC"), Consumer Product Safety Commission ("CPSC"), Federal Trade Commission ("FTC"), and Environmental Protection Agency ("EPA"), and on consideration of legislative changes to statutes relevant to agency preemption and an independent review of the agencies' respective rulemaking dockets and intervention in litigation.

There appears to be consensus that the procedural requirements of the Federalism Executive Order—including consultation with the states and the requirement for "federalism

¹³ Exec. Order No. 13,132, § 8(a).

¹⁴ Memorandum for the Heads of Executive Departments and agencies (May 20, 2009), 74 Fed. Reg. 24,693, 24,693-94 (May 22, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-05-22/pdf/E9-12250.pdf#page=1> (last visited October 29, 2010).



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impact statements”—are sound. But compliance with the Federalism Executive Order has been inconsistent, and difficulties have persisted across administrations of both political parties. A 1999 GAO Report identified only five rules—out of a total of 11,000 issued from April 1996 to December 1998, while the Reagan-era Federalism Executive Order (E.O. 12612) was in effect¹⁵—that included a federalism impact assessment.¹⁶ Case studies of particular rulemaking proceedings have revealed failures to comply with the Clinton-Era Federalism Executive Order.¹⁷

This Administrative Conference Recommendation is intended to encourage compliance with executive directives on federalism and preemption and to increase transparency regarding internal agency policies and external enforcement mechanisms designed to ensure compliance with the Federalism Executive Order. It is also intended to facilitate federal agency consultation with state representatives, such as the “Big Seven,” a group of nonpartisan, non-profit organizations composed of state and local government officials,¹⁸ and, conversely, to facilitate state officials’ awareness of and responsiveness to, opportunities to consult with federal officials and to comment in regulatory proceedings that may have federalism implications. Finally, this Recommendation is aimed at both executive branch and independent agencies that engage in preemptive rulemaking, with the recognition that the executive directives described above bind the former and urge voluntarily compliance by the latter.

The Conference recognizes the danger of encumbering the rulemaking process with too many formal requirements. At the same time, the Conference recognizes that certain principles, including the principles of federalism identified in the Federalism Executive Order, are

¹⁵ Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987).

¹⁶ U.S. GENERAL ACCOUNTING OFFICE, GAO/T-GGD-99-93, IMPLEMENTATION OF EXECUTIVE ORDER 12612 IN THE RULEMAKING PROCESS I (1999). The exact number of federalism impact assessments during this period is in some doubt but appears to be very small. See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 784 n.192 (2004) (reporting identification of 9 federalism impact assessments from the fourth quarter of 1998); see also *id.* at 783-84 (demonstrating that federalism impact statements are relatively rare and of “poor quality”).

¹⁷ See Catherine M. Sharkey, *Federalism Accountability: “Agency Forcing” Measures*, 58 DUKE L.J. 2125, 2131-439 (2009) (analyzing several rulemaking proceedings in which an agency’s NPRM stated that a rule would have no federalism impact, but in which the agency stated that the final rule had preemptive effect, in some cases without preparing a federalism impact statement or consulting with state officials); see also Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. L. REV. 695, 719 (2008) (reporting results from a further, 2006 study of preemptive rules, which disclosed that, out of six preemptive rulemakings studied, only three contained federalism impact analysis, and only one of the analyses “went beyond stating either that the agency concluded that it possessed statutory authority to preempt or that the document had been made available for comment, including to state officials”).

¹⁸ The Big Seven include the Council of State Governments, the National Governors Association, the National Conference of State Legislatures, the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, and the International City/County Management Association.



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sufficiently important to warrant systematic consideration by agencies engaging rulemaking. In crafting this Recommendation, the Conference has remained mindful of the continuing validity of its previous Recommendation aimed at reducing such “ossification” of the regulatory process.¹⁹ The following Recommendation has been accordingly structured to simultaneously encourage compliance with existing executive directives and increase the efficiency of internal agency processes designed to ensure such compliance.

Revised Draft Recommendation

1. The Conference reiterates its previous related recommendation that “Congress should address foreseeable preemption issues clearly and explicitly when it enacts a statute affecting regulation or deregulation of an area of conduct.”²⁰
2. This Recommendation is directed at federal agencies that engage in rulemaking proceedings that may have a preemptive effect on state law.

Internal Procedures for Compliance with the Federalism Executive Order

3. [*Internal Guidelines or Policies—the Recommendation should include one or more of the following:*]
 - a. Agencies should develop internal guidelines for compliance with the Federalism Executive Order.
 - b. Agencies should tailor their internal guidelines to reflect both the likelihood that their rulemakings will have federalism implications and the likely extent of such implications.
 - c. Agencies that currently have internal processes for compliance with the Federalism Executive Order should consolidate existing descriptions of those processes into guidelines.
 - d. The guidelines should provide direction to agency officials in conducting federalism review under the Federalism Executive Order.
4. Internal guidelines for compliance with the Federalism Executive Order should be made publicly available.

¹⁹ *Improving the Environment for Agency Rulemaking*, Recommendation No. 93-4, 1 C.F.R. §§ 305.93-4(II)(A) & (C) (ACUS 1993).

²⁰ *Preemption of State Regulation by Federal Agencies*, Recommendation No. 84-5, 1 C.F.R. s 305.84-5 (ACUS 1984).



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5. Agencies should establish an internal oversight procedure to ensure compliance with the Federalism Executive Order. This procedure should include development of an internal standard for evaluating the evidence asserted in support of a preemptive rulemaking. The agency should provide documented empirical evidence that supports its preemption conclusion and submit the factual predicate to scrutiny within the agency.

Updated Policies to Ensure Timely Consultation with State and Local Interests

6. [*Consultation Processes—the Recommendation should include one or more of the following:*]
 - a. Agencies should compile an updated contact list for reaching out to the representatives of state interests, including but not limited to the “Big Seven.”
 - b. Agencies should consider establishing some form of regularized personal contact in order to build relationships with representatives of state interests, including but not limited to the “Big Seven.”
 - c. Agencies should disclose to the public when they meet with the representatives of state interests. The disclosure should include the date of the meeting, the identity of the organization(s) or institution(s) that participate, and the subject matter of the discussion.
7. Agencies should establish contact with organizations and state and local regulatory bodies and officials that have relevant substantive expertise or jurisdiction.
8. Agencies should adopt, as one component of their notice practice, a procedure for notifying state attorneys general when they are considering rules that have federalism implications. This may be achieved via direct communication with state attorneys general or by contacting an appropriate representative organization such as, for example, NAAG.
9. Agencies should reach out to appropriate state and local government officials early in the process when they are considering rules with federalism implications. Such outreach should, to the extent practicable, precede issuance of the NPRM.
10. Improved communication on preemption and federalism issues would also result if state and local government officials or their representative organizations availed themselves of opportunities to become aware of whether federal agencies are engaging in rulemaking proceedings that have federalism implications, by, for example, monitoring the Federal Register or using relevant Internet dashboards, such as are available at www.regulations.gov.



Improvement of OIRA/OMB Enforcement of the Federalism Executive Order

11. OIRA/OMB should post on its website the reports of agency responses to the directive contained in the President's Preemption Memorandum to conduct a 10-year retrospective review of preemptive rulemaking.
12. OIRA/OMB should update its Federalism Guidelines. The updated document should include a current list of state consultation groups and their contact information. OIRA/OMB should post on its website the list of designated federalism officials and consultation plans from each of the agencies, along with the agencies' internal guidelines for compliance with the Federalism Executive Order.
13. OIRA should include review of federalism implications as part of its regulatory review process, i.e., its checklists under the A-4 circular.²¹

²¹ See OFFICE OF INFO. & REGULATORY AFFAIRS, CIRCULAR A-4 ON REGULATORY ANALYSIS (2003), available at http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf (last visiting October 15, 2010).