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Date Printed: Dec 30, 2010 11:13

PAPER NUMBER:	LTR-10-0549	LOGGING DATE:	12/29/2010
ACTION OFFICE:	OGC		
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AFFILIATION:	ACUS		
ADDRESSEE:	Members of the Adm Conference		
SUBJECT:	Final version of ACUS recommendation 2010-1		
ACTION:	Information		
DISTRIBUTION:	RF		
LETTER DATE:	12/27/2010		
ACKNOWLEDGED	No		
SPECIAL HANDLING:			
NOTES:			
FILE LOCATION:	ADAMS		
DATE DUE:		DATE SIGNED:	



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MEMORANDUM

December 27, 2010

From: Paul R. Verkuil
Chairman

To: Members of the Administrative Conference

Subject: Final Version of ACUS Recommendation 2010-1

Thank you all once again for your consideration and discussion of ACUS Recommendation 2010-1 at our plenary session. Your attention and interest helped make the recommendation, and the plenary as a whole, a great success.

As you will recall, the Assembly made one amendment to the recommendation. In addition, our discussion at the plenary session contemplated that some minor details of the recommendation would be delegated to the "committee on style." That work has now been completed, and the final version of the recommendation is attached. The recommendation will be published in this form in the Federal Register.

Here are the changes that were made to the recommendation (or contemplated but not made), starting with the version that was presented to the membership at the plenary session.

1. The words "authority and" were inserted in paragraph 4 of the recommendation, before the word "basis" in the second sentence. This change was adopted as an amendment by vote of the membership at the plenary session.

2. At the plenary, some members raised the issue that paragraph 10 of the recommendation, read literally, could appear to call for inclusion of the full text of Executive Order 13132 in Circular A-4. This paragraph has been clarified by the addition of the words "reference to" after "include."

3. In footnote 17, which is part of the preamble, and then again in paragraph 5(d) of the recommendation, the acronym "NPRM" appears without explanation. This has been changed to "notice of proposed rulemaking" in both places.

4. The citation format for prior ACUS recommendations was made uniform in footnotes 4, 20, and 21.

5. There was some suggestion at the plenary that the word "law," somewhere in the recommendation, should be changed to "statutory and common law," to clarify that both are included. This was left as it is. As was mentioned at the plenary, the word "law" is broad enough to encompass both statutory and common law. Also, such a change might leave some doubt as to whether other state law (e.g., regulations) is included.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

6. At the plenary, a member raised the point that different parts of the recommendation refer to those to be contacted and consulted using different language:

- Section 2(b) refers to "state and local governments"
- Sections 5(a), (b), and (c) refer to "representatives of state interests"
- Section 5(d) refers to "state and local government officials"
- Section 6 refers to "organizations and state and local regulatory bodies and officials"

After consideration, the phrases used in both section 2(b) and 5(d) were changed to "state and local officials." This tracks the language used in Executive Order 13132.

The other language has been left as is. The language in Section 6 is intended to suggest that agencies establish contact with particular, relevant state and local bodies—e.g., state departments of environmental protection for environmental regulations, state transportation departments for transportation regulations, and so on. This intention would not be captured by reference to the more general "officials" or "representatives of state interests."

The language "representatives of state interests" has also been retained. The suggestion that this language conveys a slightly broader meaning than "state and local officials" is correct—there is some scope for agencies to reach out to others who are not necessarily state and local officials but who are representatives of state interests. A more detailed, clarifying definition of the phrase "representatives of state interests" was not included, because (a) adding a clarifying definition would be rather a big change to make, and (b) leaving the phrase undefined gives agencies the flexibility to identify the "representatives of state interests" in a manner appropriate for the particular circumstances.

With those changes, the recommendation is now final and will be published in the Federal Register.



Administrative Conference Recommendation 2010-1

Agency Procedures for Considering Preemption of State Law

Adopted December 9, 2010

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 (the "Order"),³ is still in effect today, and is an amended version of President Reagan's Executive Order on Federalism, Executive Order 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 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 and to prepare a federalism impact statement ("FIS").⁹

Individual agencies are responsible for implementing Executive Order 13132, and the Office of Information and Regulatory Affairs ("OIRA"), located within the Office of Management and Budget ("OMB"), has issued procedural guidelines on "what agencies should

¹ Exec. Order No. 13132, § 1(c).

² *Id.* at § 9.

³ Exec. Order No. 13132, 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. 12612, 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).

⁵ Exec. Order No. 13132, § 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 a FIS for any regulation "that has federalism implications and that preempts State law"); *id.* at § 1(a) (defining "federalism implications").



do to comply with the Order and how they should document that compliance to OMB.”¹⁰ These 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 federalism implications submitted for OIRA review under Executive Order 12866, the federalism official must certify that the requirements of Executive Order 13132 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”), provides 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.” 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.”

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.gpo.gov/dpo/foia/2000/05/20000522/000522fed.htm> (last visited October 29, 2010) (“Federalism Guidelines”).

¹¹ Exec. Order No. 13132, § 6(a); Federalism Guidelines 2.

¹² Federalism Guidelines 4-5.

¹³ Exec. Order No. 13132, § 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/dpo/foia/2000/05/20000522/000522fed.htm> (last visited October 29, 2010).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

An empirical evaluation of agency practices reveals that compliance with the preemption provisions of Executive Order 13132 has been inconsistent, although President Obama's Preemption Memorandum 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 requirements of the preemption provisions of Executive Order 13132—including consultation with the states and the requirement for "federalism impact statements"—are sound. But compliance with these provisions 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 1998¹⁵—that included a federalism impact assessment.¹⁶ Case studies of particular rulemaking proceedings have revealed failures to comply with Executive Order 13132.¹⁷ In August 2010, reflecting continued concern with agency practices in this area, the ABA House of Delegates adopted a recommendation developed by the ABA Task Force on Federal Preemption of State Tort Laws, aimed at improving compliance with the preemption provisions of Executive Order 13132.¹⁸

¹⁵ Executive Order 12612 was in effect during this time period.

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 quite 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"). Of course, many rules do not require a federalism impact assessment. The number of rules that *should* have included one is unknown, but the very small number that did suggests that agencies were "not implementing the order as vigorously as they could." GAO report, *supra*, at 13.

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 notice of proposed rulemaking 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 American Bar Association House of Delegates, Resolution 117, available at <http://www.abanet.org/ethics/hod/resolutions/res117.html> (last visited Nov. 2, 2010).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

This Administrative Conference Recommendation is intended to improve agency procedures for implementing the preemption provisions of Executive Order 13132 and to increase transparency regarding internal agency policies and external enforcement mechanisms designed to ensure compliance with those provisions. The goal is not to favor or disfavor preemption, but to improve agency procedures in potentially preemptive rulemakings. The Recommendation 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,¹⁹ 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 preemptive effect. Improved communication on preemption issues would 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 potentially preemptive rulemaking proceedings, for example, by monitoring the Federal Register or using relevant Internet dashboards, such as are available at www.reginfo.gov. Agencies can ensure that these tools are optimally useful to state representatives by clearly posting relevant information on their individual websites and providing appropriate information for inclusion in the semiannual Unified Agenda. 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. Therefore, in crafting this Recommendation, the Conference has remained mindful of the continuing validity of its previous Recommendation aimed at reducing "ossification" of the regulatory process.²⁰ The Conference recognizes, however, that certain principles, including those embodied in the preemption provisions of Executive Order 13132, are sufficiently important to warrant systematic consideration by agencies engaging in rulemaking. The following Recommendation has accordingly been structured both to encourage compliance with existing executive directives and increase the efficiency of internal agency processes designed to ensure such compliance.

¹⁹ 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.

²⁰ *Improving the Environment for Agency Rulemaking*. Recommendation No. 93-4, 1 C.F.R. §§ 305.93-4(II)(A) & (C) (ACUS 1993).



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."²¹

Internal Procedures for Compliance with the Preemption Provisions of Executive Order 13132

2. Agencies that engage in rulemaking proceedings that may have preemptive effect on state law should have internal written guidance to ensure compliance with the preemption provisions of Executive Order 13132, which should describe:
 - a. How the agency determines the need for any preemption;
 - b. How the agency consults with state and local officials concerning preemption; and
 - c. How the agency otherwise ensures compliance with the preemption provisions of Executive Order 13132.
3. Agencies should post their internal guidance for compliance with the preemption provisions of Executive Order 13132 on the Internet or otherwise make publicly available the information contained therein.
4. Agencies should have an oversight procedure to improve agency procedures for implementing the preemption provisions of Executive Order 13132. This procedure should include an internal process for evaluating the authority and basis asserted in support of a preemptive rulemaking. The agency should provide a reasoned basis, with such evidence as may be appropriate, that supports its preemption conclusion.

Updated Policies to Ensure Timely Consultation with State and Local Interests Concerning Preemption

5. Agencies should have a consultation process that contains elements such as the following:
 - a. Agencies should use an updated contact list for representatives of state interests, including but not limited to the "Big Seven." The Administrative Conference will maintain such a list for use by agencies.
 - b. Agencies should maintain some form of regularized personal contact in order to build relationships with representatives of state interests.

²¹ *Preemption of State Regulation by Federal Agencies*, Recommendation No. 84-5, 1 C.F.R. s 305.84-5 (ACUS 1984).



- c. Agencies should disclose to the public when they meet with the representatives of state interests in the course of rulemaking proceedings that may preempt state law. The disclosure should include the identity of the organization(s) or institution(s) that participate and the subject matter of the discussion.
 - d. Agencies should reach out to appropriate state and local officials early in the process when they are considering preemptive rules. Such outreach should, to the extent practicable, precede issuance of the notice of proposed rulemaking.
- 6. Agencies should establish contact with organizations and state and local regulatory bodies and officials that have relevant substantive expertise or jurisdiction.
- 7. Agencies should adopt, as one component of their notice practice, a procedure for notifying state attorneys general when they are considering rules that may have preemptive effect. This may be achieved via direct communication with state attorneys general and by contacting an appropriate representative organization such as, for example, the National Association of Attorneys General.

Actions by OIRA/OMB to Improve the Process

- 8. OIRA/OMB should request agencies to post on their open government websites a summary of the agencies' responses to the directive contained in the Preemption Memorandum to conduct a 10-year retrospective review of preemptive rulemaking.
- 9. OIRA/OMB should update its Federalism Guidelines with respect to preemption.
- 10. OIRA should include reference to Executive Order 13132 in Circular A-4.²²

²² OFFICE OF INFO. & REGULATORY AFFAIRS, CIRCULAR A-4 ON REGULATORY ANALYSIS (2003), *available at* <http://www.e-regs.gov/regs/docs/REGANALYSIS.pdf> (last visited October 15, 2010).

Received: from mail1.nrc.gov (148.184.176.41) by TWMS01.nrc.gov
(148.184.200.145) with Microsoft SMTP Server id 8.2.247.2; Mon, 27 Dec 2010
16:43:59 -0500

X-Ironport-ID: mail1

X-SBRS: None

X-MID: 28651197

X-fn: Final Recommendation.pdf, Distribution Memo for Membership 12-27-2010.pdf

X-IronPort-AV: E=Sophos;i="4.60,236,1291611600";
d="pdf?scan'208,217";a="28651197"

Received: from mail.acus.gov (HELO ACUS-MAIL.local.acus.gov) ([66.208.24.43])
by mail1.nrc.gov with ESMTP; 27 Dec 2010 16:41:25 -0500

Received: from ACUS-MAIL.local.acus.gov ([192.168.150.200]) by
ACUS-MAIL.local.acus.gov ([192.168.150.200]) with mapi; Mon, 27 Dec 2010
16:44:27 -0500

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Subject: ACUS Recommendation 2010-1

Thread-Topic: ACUS Recommendation 2010-1

Thread-Index: AcumDcY/2KICp4iBRQWvMCsl0c1qFwAACwhQ

Date: Mon, 27 Dec 2010 21:44:25 +0000

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X-MS-TNEF-Correlator:

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Sandy Joosten

From: Paul R. Verkuil [PVerkuil@acus.gov]
Sent: Monday, December 27, 2010 4:44 PM
To: Jonathan Siegel; Shawne McGibbon; Michael McCarthy
Cc: Paul R. Verkuil; Sherland Peterson
Subject: ACUS Recommendation 2010-1
Attachments: Final Recommendation.pdf; Distribution Memo for Membership 12-27-2010.pdf

Dear Members and Fellows of the Administrative Conference:

I am forwarding the final version of the recommendation adopted at the plenary session earlier this month, along with a memo explaining the changes from the draft.

Best wishes for the New Year.

Sincerely,

Paul R. Verkuil