



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Memorandum

To: Committee on Regulation  
From: Emily F. Schleicher (DFO)  
Date: October 15, 2010  
Re: Summary of Sharkey Report Recommendations

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The following draft recommendation is based on Professor Catherine Sharkey's report examining agency procedures for determining whether to preempt state law (the "Preemption Report"). This draft recommendation is provided primarily as a sample of what an Administrative Conference recommendation might look like. It is intended to facilitate the Committee's discussion at its October 19, 2010 public meeting, and not to preempt the Committee's discussion and consideration of the Preemption Report's analysis or proposed recommendations.

### Draft Recommendation

#### **Published Internal Procedures for Compliance with the Federalism Executive Order**

1. Agencies should develop comprehensive internal guidelines for compliance with the Federalism Executive Order.<sup>1</sup> The guidelines should provide step-by-step direction to agency officials in conducting federalism review under the Federalism Executive Order. EPA's November 2008 "Guidance on Executive Order 13132: Federalism"<sup>2</sup> provides a model of an easy-to follow, comprehensive set of internal guidelines.
2. To reassure state interest stakeholders as well as the public at large that agencies are taking federalism interests and compliance with the Federalism Executive Order seriously, internal guidelines should be made publicly available.
3. 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 systematic scrutiny within the agency.

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<sup>1</sup> See Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 3 U.S.C. § 301 (2006).

<sup>2</sup> See U.S. ENV'T'L PROT. AGENCY, EPA'S ACTION DEVELOPMENT PROCESS: GUIDANCE ON EXECUTIVE ORDER 13132: FEDERALISM (2008).



### **Updated Policies to Ensure Timely Consultation with State and Local Interests**

4. Agencies should compile an updated contact list for reaching out to the “Big Seven,” a group of nonpartisan, non-profit organizations composed of state and local government officials,<sup>3</sup> and also consider establishing some form of regularized personal contact in order to build relationships.
5. Agencies should establish contact with organizations and state and local regulatory bodies and officials that have relevant substantive expertise or jurisdiction.
6. Agencies should adopt, as one component of their notice practice, a procedure for notifying the National Association of Attorneys General (NAAG) when they are considering rules that have federalism implications. Such a procedure could be implemented with little additional cost or effort to the agency and would leverage the specialized knowledge of NAAG members to reach those state and local actors with the greatest interest in the particular federal regulatory proceeding.
7. 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.

### **Improvement of OIRA/OMB Enforcement of the Federalism Executive Order**

8. OIRA/OMB should publish the reports of agency responses to the directive contained in the President’s Preemption Memorandum<sup>4</sup> to conduct a 10-year retrospective review of preemptive rulemaking.
9. OIRA/OMB should update its Federalism Guidelines,<sup>5</sup> which direct agencies to send OMB the name of their designated “federalism official” as well as a “consultation plan” that describes how agencies identify policies with federalism implications and the procedures agencies will use to ensure meaningful and timely consideration. The updated document should include a current list of state consultation groups and their contact information. OIRA/OMB

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<sup>3</sup> 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.

<sup>4</sup> See 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 15, 2010).

<sup>5</sup> See 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 15, 2010).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

should publish the designated federalism officials and consultation plans from each of the agencies, along with the agencies' internal guidelines for compliance with the Federalism Executive Order.

10. OIRA should include review of federalism implications as part of its regulatory review process, i.e., its checklists under the A-4 circular.<sup>6</sup>

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<sup>6</sup> 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](http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf) (last visiting October 15, 2010).