



## **Recommendations for the U.S. Congress to Improve and Build a Stronger State – Federal Relationship**

The Council of State Governments (CSG), which membership includes state and territorial officials across the country through its regional and national offices, embraces the vital importance of our federal system to our nation’s future. Those who drafted our Constitution, its Bill of Rights, and the 13th, 14th, 15th, and 19th amendments, recognized and enshrined vital human and civil rights in this, the supreme law of our land. The diversity of these human rights, policy experimentation and accountable governance, also reserved to the states and the people as expressed in the 10<sup>th</sup> Amendment, has enabled our nation to thrive despite the changing needs of both society and a global economy.

Though the federal government has a vital role to play in advancing national priorities through the enumerated powers to it by the U.S. Constitution, our founders recognized long ago that many of the challenges our citizens face can be best addressed at the state level. As Justice Brandeis observed, a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (*New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932)). Moreover, through their constitutions, as well as their authority to legislate to preserve and protect the health, safety, welfare and morals of their communities, states can provide greater protections of individual rights than those guaranteed by the U.S. Constitution. To this end, CSG recommends the following process improvements to Congress to build a stronger state – federal relationship.

The terms “states” or “state officials” herein are to be interpreted as inclusive of state governors, elected or appointed state agency officials, and state legislators.

### **I. Ensuring that Federalism Principles are Incorporated in Legislative Drafting**

#### **a. *Treating States as Sovereign Entities***

Ensure that states are not treated as equivalent 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.

Many federal statutes currently include states as stakeholders, interested parties, public or private organizations, industry, or the public; treat states as equivalents to these entities; or do not distinguish between states and these entities. States, as sovereign, are distinguished from other entities by the U.S. Constitution, the 10<sup>th</sup> 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.



***b. Preemption and State Authority***

Federal legislation should recognize states' sovereign status and authority, and avoid preemption of state authority. Legislation should grant states the maximum administrative discretion possible and should not create undue burdens on state resources. Furthermore, legislation should 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 states establish different approaches to address 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.

**II. Directing Agencies to Improve the State – Federal Relationship**

***a. Improving the Consultation Process***

Congress should require federal agencies to establish clear and consistent procedures to define “state consultation.” These procedures should include the following:

- Early, meaningful, substantive, ongoing communication and exchange with state officials. 120 days should be the minimum pre-consultation period for proposed federal rules.



- Requirements should be independent from and beyond the stakeholder or public process; and
- Procedures should clarify that notice and comment rulemaking procedures do not satisfy agencies' requirements to consult with states where required by law.
- If a proposed federal rule impacts a majority of states, federal agencies should be required to conduct town hall meetings within each state.
- Standardized lists of state officials should be distributed to all federal agencies.

Define policies with federalism implications to include: federal regulations, proposed federal legislation, policies, rules, non-legislative 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.

***b. 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 state officials of all potentially-affected states of policies with federalism implications within the area affected by the proposed federal action.
- Federal agencies to provide procedures for written response to state officials to provide input prior to a final federal decision.
- Federal agency decision-makers to hold regular, ongoing consultation meetings with state officials 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.

**c. 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 states 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 response to that input, and any written communications submitted by state officials.
- Provide an opportunity for state officials to review agencies' regulatory agendas.

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. Small entities are notified and given an opportunity to comment on the proposed actions.

A similar process should exist for state officials 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.

**d. Non-legislative Rulemaking/Guidance**

Congress should 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. Moreover, agencies should be required 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.

**e. Consistency and Avoidance of Conflicts**

Congress should 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.

**f. 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.



**g. 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 have federalism implications, states are often left out of the process. Involving states in such negotiations would help prevent conflicts from arising as the agencies implement the outcomes of those negotiations.

**h. 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.

**III. Make the Unfunded Mandates Reform Act Relevant**

**a. Reduce UMRA Threshold**

Reduce the threshold for the application of the UMRA to federal intergovernmental mandates to \$50 million. Smaller states with smaller budgets should have a lower threshold.

A federal intergovernmental mandate is defined as a regulation that “would impose an enforceable duty upon State, local, or tribal government” with two exceptions. The application of the UMRA to intergovernmental mandates is limited by the definition of federal mandate and the \$100 million threshold.



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.

Reducing the threshold for federal intergovernmental mandates to \$50 million, or less for smaller states, 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.

**b. State Input and Data**

Require agencies to incorporate state government input and data, including social and economic data, in their qualitative and quantitative assessment of anticipated costs and benefits of qualifying rules under the UMRA.

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.

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.

**c. 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.<sup>13</sup> 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.