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FEDERALISM - EXECUTIVE ORDER
POTTS & FEDERALISM

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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

August 5, 1999

EXECUTIVE ORDER 13132

FEDERALISM

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to guarantee the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution, to ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act, it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that 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.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1); other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "State and local officials" means elected officials of State and local governments or their representative national organizations.

Sec. 2. Fundamental Federalism Principles. In formulating and implementing policies that have federalism implications, agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.

(b) The people of the States created the national government and delegated to it enumerated governmental powers. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is inherent in the very structure of the Constitution and is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions

in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) The Framers recognized that the States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy.

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues. One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems.

(g) Acts of the national government -- whether legislative, executive, or judicial in nature -- that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of -- and should encourage opportunities for -- individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.

Sec. 3. Federalism Policymaking Criteria. In addition to adhering to the fundamental federalism principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There shall be strict adherence to constitutional principles. Agencies shall closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action. To the extent practicable, State and local officials shall be consulted before any such action is implemented. Executive Order 12372 of July 14, 1982 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.

(c) With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have

federalism implications, agencies shall:

(1) encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States;

(2) where possible, defer to the States to establish standards;

(3) in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority; and

(4) where national standards are required by Federal statutes, consult with appropriate State and local officials in developing those standards.

Sec. 4. Special Requirements for Preemption. Agencies, in taking action that preempts State law, shall act in strict accordance with governing law.

(a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rulemaking only when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) When an agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict.

(e) When an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.

Sec. 5. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would:

(a) directly regulate the States in ways that would either interfere with functions essential to the States' separate and independent existence or be inconsistent with the fundamental federalism principles in section 2;

(b) attach to Federal grants conditions that are not reasonably related to the purpose of the grant; or

(c) preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Sec. 6. Consultation.

(a) Each agency shall 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. Within 90 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order and that designated official shall submit to the Office of Management and Budget a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the State and local governments in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with State and local officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and

(C) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications and that preempts State law, unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with State and local officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their

concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State

and local officials have been met; and

(3) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials.

Sec. 7. Increasing Flexibility for State and Local Waivers.

(a) Agencies shall review the processes under which State and local governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by a State for a waiver of statutory or regulatory requirements in connection with any program administered by that agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the State or local level in cases in which the proposed waiver is consistent with applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. If the application for a waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 8. Accountability.

(a) In transmitting any draft final regulation that has federalism implications to the Office of Management and Budget pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has federalism implications to the Office of Management and Budget, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order, the Director of the Office of Management and Budget and the Assistant to the President for Intergovernmental Affairs shall confer with State and local officials to ensure that this order is being properly and effectively implemented.

Sec. 9. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 10. General Provisions.

(a) This order shall supplement but not supersede the requirements contained in Executive Order 12372 ("Intergovernmental Review of Federal Programs"), Executive Order 12866 ("Regulatory Planning and Review"), Executive Order 12988 ("Civil Justice Reform"), and OMB Circular A-19.

(b) Executive Order 12612 ("Federalism"), Executive Order 12875 ("Enhancing the Intergovernmental Partnership"), Executive Order 13083 ("Federalism"), and Executive Order 13095 ("Suspension of Executive

Order 13083") are revoked.

(c) This order shall be effective 90 days after the date of this order.

Sec. 11. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

WILLIAM J. CLINTON

THE WHITE HOUSE,
August 4, 1999.

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THE WHITE HOUSE

Office of the Press Secretary

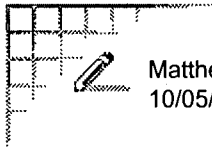
For Immediate Release

August 5, 1999

STATEMENT BY THE PRESIDENT

As a former Governor, I know how important it is for the American people that the Federal government and State and local governments work together as partners. The executive order on federalism I signed will strengthen our partnership with State and local governments and ensure that executive branch agencies are able to do their work on behalf of the American people. I want to thank the representatives of State and local governments who worked with my administration in developing an executive order that enables us to better serve all of the American people.

30-30-30



Matthew L. Bennett
10/05/99 01:33:52 PM

Record Type: Record

To: Jeffrey A. Shesol/WHO/EOP@EOP

cc:

Subject: Executive Order No. 13132, "Federalism" and Upcoming Meetings

The OMB guidance is at the bottom.

----- Forwarded by Matthew L. Bennett/WHO/EOP on 10/05/99 01:29 PM -----



Record Type: Record

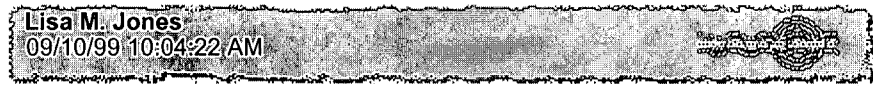
To: Matthew L. Bennett/WHO/EOP@EOP

cc:

Subject: Executive Order No. 13132, "Federalism" and Upcoming Meetings

Here are the folks that received our request for comments. The first list tend to be GCs, and Deputy Secretaries, or equivalent. The second list tend to be the attorneys in the agencies with primary responsibility for agency regulations.

----- Forwarded by Jefferson B. Hill/OMB/EOP on 09/10/99 04:10 PM -----



Record Type: Record

To: See the distribution list at the bottom of this message

cc: See the distribution list at the bottom of this message

Subject: Executive Order No. 13132, "Federalism" and Upcoming Meetings

Please note this same email sent to you yesterday was from Don Arbuckle.

MEMORANDUM FOR THE REGULATORY WORKING GROUP

FROM: Don Arbuckle

SUBJECT: Federalism Executive Order and Upcoming Meetings

Welcome back. A couple of things to start off the policy-making season:

First, attached for your review and comment is a draft of OMB guidance to the agencies on Executive Order 13132, "Federalism." We have discussed this informally with many of your staff, who have been extremely helpful in drafting this guidance. Because E.O. 13132 will soon become effective, we would like to get this guidance out as quickly as possible. Please send your comments to Jeff Hill at jhill@omb.eop.gov (fax: 395-7285) by **COB Friday, September 16, 1999**.

Second, I wanted to inform you that we are postponing next week's Regulatory Working Group meeting until October. In its place, I will hold a preliminary meeting with your staffs (a.k.a. the RWG Seconds) at **2:00 on Tuesday, September 14 in 248 OEOB**. This meeting will focus on possible RWG initiatives and will help ensure that we have a productive meeting in October. (If you have not yet submitted your ideas for RWG initiatives, please do so.) We will follow up with details regarding the October meeting. Please call Lisa Jones at 395-5897 so that we can have your staff members properly cleared into the OEOB.

Thank you.



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Message Copied To:

STAFF DRAFT (September 7, 1999)

SUBJECT: Guidance for Implementing E.O. 13132

President Clinton issued Executive Order No. 13132, "Federalism," on August 4, 1999 (64 Fed. Reg. 43255 (August 10, 1999), the "Order"). The Order emphasizes consultations with State and local governments and enhanced sensitivity to their concerns. It establishes specific requirements that the Federal government must follow as it develops and carries out policy actions that affect State and local government. As the President stated, "[t]he executive order on federalism I signed will strengthen our partnership with State and local governments and ensure that executive branch agencies are able to do their work on behalf of the American people."

*the
EO*

The Order sets forth "Fundamental Federalism Principles" (Sec. 2), "Federalism Policymaking Criteria" (Sec. 3), "Special Requirements for Preemption" (Sec. 4), and "Special Requirements for Legislative Proposals" (Sec. 5). Please read the full text (see Appendix A).

This guidance is directed to procedural requirements -- what agencies should do to comply with the Order and how they should document that compliance to OMB.

1. When does the Order take effect?

E.O. 13132 becomes effective on November 2, 1999 (Sec. 10(c)).

*effective
11/2/99*

2. What agencies does it cover?

E.O. 13132 applies to all Federal agencies, except for the independent regulatory agencies (Sec. 1(c)). It encourages independent regulatory agencies to comply voluntarily with its provisions (Sec. 9). E.O. 13132 adopts the definition of "agency" and "independent regulatory agency" used by the Paperwork Reduction Act of 1995.

*all
agencies*

3. What is the role of an agency federalism official and which agencies must have them?

The federalism official has principal responsibility for the agency's implementation of the Order (Sec. 6(a)). Each federalism official must:

*Federalism
officials
must:*

- ensure that the agency considers federalism principles in its development of regulatory policies with federalism implications;
- ensure that the agency has an accountable process to ensure meaningful and timely intergovernmental consultation in the development of regulatory policies that have

STAFF DRAFT (September 7, 1999)

federalism implications; and

provide certifications of compliance to OMB.

Each separate agency and department must have a federalism official (Sec. 6(a)). The federalism official may designate staff to assist in the performance of these duties.

4. When does an agency need to designate its federalism official?

Each agency should do so as soon as possible, preferably before November 2, 1999, the Order's effective date. No later than January 31, 2000, the head of each agency must designate the agency federalism official, and that official must submit to OMB a description of the agency's consultation process. Each federalism official should promptly notify _____ in the Office of Information and Regulatory Affairs (OIRA) (395-xxxx and e-mail address) of this designation.

5. To what does the Order apply?

Section 2 sets forth "Fundamental Federalism Principles" to guide agencies in formulating and implementing their policies. Section 3 sets forth "Federalism Policymaking Criteria" to which agencies must adhere "to the extent permitted by law." These federalism principles and criteria apply only to "regulations, legislative comments or proposed legislation, and other policy statements or actions" that 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" (Sec. 1(a)).

6. What are the Order's preemption requirements?

Under Section 4, "Special Requirements for Preemption," agencies must act in strict accordance with governing law in taking action that preempts State law. Agencies must:

- construe Federal statutes to preempt State law only where the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statutes or there is other clear evidence to conclude that Congress intended the agency to have the authority to preempt State law;
- restrict regulatory preemption of State law to the minimum level necessary;
- consult, to the extent practicable, with State and local officials if the agency foresees the

defer to states

consult w/ state

STAFF DRAFT (September 7, 1999)

possibility of a conflict between State law and Federally protected interests; and

provide all affected State and local officials notice and an opportunity to participate in the proceedings when an agency proposes to preempt State law through agency adjudication (for example, a regulatory permitting process) or a rulemaking,

The Order also establishes a process to ensure that agencies consider the "Special Requirements for Preemption" in Section 4. For any draft final regulation with federalism implications that is submitted for OIRA review under E.O. 12866, the Federalism Official must certify that the requirements of E.O. 13132 concerning both the evaluation of Federalism policies and consultation have been met in a meaningful and timely manner (Sec. 8(a)).

OIRA will require such certifications beginning on November 2, 1999, for all draft final rules submitted for OIRA review under E.O. 12866. (See Appendix B for a recommended certification format.) We understand that a final rule to be submitted for review beginning on November 2, 1999, may have been promulgated as a Notice of Proposed Rulemaking (NPRM) prior to August 4, 1999 (the date E.O. 13132 was signed). To the extent, for example, that the intergovernmental consultation process had not occurred as called for by E.O. 13132, the certification should so state. Agencies must publish a copy or summary of the certification in the preamble to the final rule.

7. What does the Order require concerning agency development of proposed legislation?

Under Section 5, "Special Requirements for Legislative Proposals," agencies must not submit to the Congress legislation that:

- would directly regulate the States in ways that would interfere with functions essential to the States' separate existence;
- attach to Federal grants conditions that are not reasonably related to the purpose of the grant; or
- otherwise preempt State law, unless such preemption is consistent with the federalism policies stated in Sections 2 and 3 of the Order (see Question 6, above).

The Order establishes a process to assure that agencies consider the "Special Requirements for Legislation" stated in Section 5. In transmitting for OMB clearance proposed legislation with federalism implications, the federalism official must certify that the "Special Requirements for Legislative Proposals" set forth in Section 5 have been met (Sec. 8(b)). The

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Legislative Reference Division will require such certifications beginning on November 2, 1999, for all proposed legislation submitted for OMB review. (See Appendix C for a recommended certification format.)

8. What does the Order require concerning agency development of regulations?

Section 6 directs 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" (Sec. 6(a)).

Before January 31, 2000, the agency's federalism official must submit to OMB "a description of the agency's consultation process" (Sec. 6(a)). Each federalism official should send these descriptions to _____ in OIRA (395-xxxx and e-mail address). Each description should indicate how the consultation process identifies those policies with federalism implications and the length of time necessary for meaningful consultation with affected State and local governments.

The consultation procedures in Section 6 expand upon the consultation procedures in Section 1 of E.O. 12875 (58 Fed. Reg. 58093 (October 28, 1993)). (E.O. 13132 revokes E.O. 12875.)

Intergovernmental consultation is required in two circumstances -- if a rule has federalism implications, and if a rule imposes unfunded mandates. Specifically, each agency must assure, "to the extent practicable and permitted by law," that its intergovernmental regulatory consultation process includes "any regulation that has federalism implications [meaning, any rule that has "substantial direct effects ... on the States ..."], that imposes substantial direct compliance costs on State and local governments, and that is not required by statute" (Sec. 6(b)). If the Federal government funds the mandate, then the Order does not require the agency to engage in intergovernmental consultation (Sec. 6(b)(1)).

The consultation process must involve "State and local officials" (Sec. 6(a)).

-- E.O. 13132 defines this phrase to mean "elected officials of State and local governments or their representative national organizations" (Sec. 1(d)). We understand that many agencies consult routinely with their professional counterparts in State and local governments (often civil servants, not elected officials). We encourage agencies to continue to work with their professional counterparts. The agencies must add elected State and local government officials and their representative national organizations to the consultation process.

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- E.O. 13132 supplements, but does not supersede the requirements contained in E.O. 12372. “Intergovernmental Review of Federal Programs” (Sec. 3(a)). E.O. 12372 seeks to improve the intergovernmental partnership between the Federal Government and the States. It asks Federal agencies to rely on State and local processes for consultation with elected State and local government officials that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal assistance or direct Federal development. It allows States to design their own review process and calls for Federal agencies to communicate with State officials in the project planning cycle, make efforts to accommodate State concerns, and explain Federal decisions.

Each agency must consult, to the extent practicable and permitted by law, with State and local officials “early in the process of developing the proposed regulation” (Secs. 6(b)(2)(A) & (c)(1)). These consultations should seek comment on the federalism implications or compliance costs as appropriate to the nature of the rulemaking under development. The timing, nature and detail of the consultation involved should also be appropriate to the nature of the regulation involved.

Each agency, before submitting a draft final regulation to OMB for review under E.O. 12866 and prior to promulgation of the regulation in final form, must prepare and place in “a separately identified portion of the preamble to the regulation” a “federalism summary impact statement” (Secs. 6(b)(2)(B) & (c)(2)).

The “federalism summary impact statement” must include —

- “a description of the extent of the agency’s prior consultation with State and local officials,
- “a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and
- “a statement of the extent to which the concerns of State and local officials have been met” (Secs. 6(b)(2)(B) & 6(c)(2)).

To the extent that an agency has carried out intergovernmental consultations prior to publication of the Notice of Proposed Rulemaking (NPRM), we strongly recommend that the agency help State and local governments, and the public as a whole, by including a “federalism summary impact statement” in its preamble to the NPRM.

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When submitting a draft final regulation to OIRA for review, each agency must include a copy of any formal policy-related correspondence from State and local officials, and must upon request make available a copy of any other written communications submitted to the agency by State and local officials (Secs. 6(b)(2)(C) & 6(c)(3)).

9. Will these consultations be subject to the Federal Advisory Committee Act?

No. The exemption to the Federal Advisory Committee Act provided in Section 204(b) of title II of P.L. 104-4, the "Unfunded Mandates Reform Act of 1995" (UMRA), remains in effect. As OMB stated in its guidelines for implementing Section 204(b):

In accordance with the legislative intent, the exemption should be read broadly to facilitate intergovernmental communications on responsibilities or administration.

This exemption applies to meetings between Federal officials and employees and State, local, or tribal governments, acting through their elected officers, officials, employees, and Washington representatives, at which "views, information, or advice" are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive order. The scope of meetings covered by the exemption should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus; exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration. ("Guidelines and Instructions for Implementing Section 204, 'State, Local, and Tribal Government Input,' of Title II of Public Law 104-4," OMB Memorandum 95-20 (September 21, 1995), pp. 6-7, 60 Fed. Reg. 50651, 50653 (September 29, 1995); see Delegation of Authority To Issue Guidelines and Instructions to Federal Agencies on Consulting With State, Local, and Tribal Governments, President Clinton's Memorandum to the Director of the Office of Management and Budget (August 25, 1995), 60 Fed. Reg. 45039 (August 29, 1995)).

10. What does the Order provide concerning flexibility for State and local waivers?

The waiver provisions in Section 7 are identical to those stated in Section 2 of E.O. 12875. The Order directs agencies to "review the processes under which State and local governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes" (Sec. 7(a)). It also sets forth the circumstances under which agencies must consider an application by a State for a waiver of statutory or regulatory

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requirements. It encourages flexibility in granting waivers, but does not change applicable Federal waiver review criteria, including the principle of budget neutrality. It also sets a target completion date of 120 days after the filing of a complete waiver application for an agency decision. These provisions apply "only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency" (Sec. 7(d)).

Please note that Section 223, "Rights of Small Entities in Enforcement Actions," of Subtitle B, "Regulatory Enforcement Actions," of P.L. 104-121, the "Small Business Regulatory Enforcement Act of 1996," remains in effect.

11. When will OMB report on agency implementation of this order to State and local officials?

No later than Friday, May 1, 2000, the OMB Director and the Assistant to the President for Intergovernmental Affairs plan to confer with State and local officials to ensure that this Order is being properly and effectively implemented (Sec. 8(c)).

Under UMRA Section 208, OMB must publish an annual report on agency compliance with the requirements of Title II, including agency compliance with Section 204, "State, Local, and Tribal Government Input." Our request next year for a description of your UMRA Section 204 consultations will include a request for a summary of your efforts to comply with this Order as well.

12. With whom should we consult when we have questions concerning E.O. 13132?

If your staff have questions concerning this Order, please contact _____ in OIRA (395-xxxx and e-mail address).

APPENDIX A:

EXECUTIVE ORDER NO. 13132
FEDERALISM

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to guarantee the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution, to ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act, it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that 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.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "State and local officials" means elected officials of State and local governments or their representative national organizations.

Sec. 2. Fundamental Federalism Principles. In formulating and implementing policies that have federalism implications, agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.

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(b) The people of the States created the national government and delegated to it enumerated governmental powers. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is inherent in the very structure of the Constitution and is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) The Framers recognized that the States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy.

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues. One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems.

(g) Acts of the national government -- whether legislative, executive, or judicial in nature -- that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of -- and should encourage opportunities for -- individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.

Sec. 3. Federalism Policymaking Criteria. In addition to adhering to the fundamental federalism principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

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(a) There shall be strict adherence to constitutional principles. Agencies shall closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action. To the extent practicable, State and local officials shall be consulted before any such action is implemented. Executive Order 12372 of July 14, 1982 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.

(c) With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, agencies shall:

(1) encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States;

(2) where possible, defer to the States to establish standards;

(3) in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority; and

(4) where national standards are required by Federal statutes, consult with appropriate State and local officials in developing those standards.

Sec. 4. Special Requirements for Preemption. Agencies, in taking action that preempts State law, shall act in strict accordance with governing law.

(a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some

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other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rulemaking only when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) When an agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict.

(e) When an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.

Sec. 5. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would:

(a) directly regulate the States in ways that would either interfere with functions essential to the States' separate and independent existence or be inconsistent with the fundamental federalism principles in section 2;

(b) attach to Federal grants conditions that are not reasonably related to the purpose of the grant; or

(c) preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Sec. 6. Consultation.

(a) Each agency shall have an accountable process to ensure meaningful and timely

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input by State and local officials in the development of regulatory policies that have federalism implications. Within 90 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order and that designated official shall submit to the Office of Management and Budget a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the State and local governments in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with State and local officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and

(C) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications and that preempts State law, unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with State and local officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a

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description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and

(3) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials.

Sec. 7. Increasing Flexibility for State and Local Waivers.

(a) Agencies shall review the processes under which State and local governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by a State for a waiver of statutory or regulatory requirements in connection with any program administered by that agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the State or local level in cases in which the proposed waiver is consistent with applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. If the application for a waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 8. Accountability.

(a) In transmitting any draft final regulation that has federalism implications to the Office of Management and Budget pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has federalism implications to the Office of Management and Budget, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

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(c) Within 180 days after the effective date of this order, the Director of the Office of Management and Budget and the Assistant to the President for Intergovernmental Affairs shall confer with State and local officials to ensure that this order is being properly and effectively implemented.

Sec. 9. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 10. General Provisions.

(a) This order shall supplement but not supersede the requirements contained in Executive Order 12372 ("Intergovernmental Review of Federal Programs"), Executive Order 12866 ("Regulatory Planning and Review"), Executive Order 12988 ("Civil Justice Reform"), and OMB Circular A-19.

(b) Executive Order 12612 ("Federalism"), Executive Order 12875 ("Enhancing the Intergovernmental Partnership"), Executive Order 13083 ("Federalism"), and Executive Order 13095 ("Suspension of Executive Order 13083") are revoked.

(c) This order shall be effective 90 days after the date of this order.

Sec. 11. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

/s/ WILLIAM J. CLINTON

THE WHITE HOUSE
August 4, 1999

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

August 5, 1999

~~STATEMENT BY THE PRESS SECRETARY~~

~~President Clinton And Vice President Gore
Strengthening The Partnership With State And Local Governments~~

EO
strengthens
partnership

President Clinton has signed an executive order entitled "Federalism" that substantially strengthens the governing partnership between the Administration and state and local governments. The new Executive Order ensures comprehensive consultations and enhanced sensitivity to the concerns of State and local Government by establishing requirements that the Federal government must follow as it develops and carries out policy actions that affect State and local governments.

In a letter to the President from leaders of the seven major intergovernmental organizations, the bipartisan group of state and local officials stated, "The executive order constructively responds to the concerns we raised during these consultations and provides to federal agencies strengthened guidance on the importance of federalism and state and local authority." The officials also expressed appreciation to the President for "consulting extensively" with them prior to issuing the new Federalism executive order.

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consulted w/
them even in
writing the
order

The order directs executive agencies to: (a) closely examine statutory authority supporting any action that would limit the policymaking discretion of state and local governments and carefully assess the necessity for such action; (b) construe Federal statutes to preempt state law only where the exercise of State authority under the Federal statutes or there is other clear evidence to conclude that Congress intended the agency to have the authority to preempt state law; (c) not submit legislation that would directly regulate the States in ways that would interfere with functions essential to the States' separate existence; and (d) not attach to Federal grants conditions that are not reasonably related to the purpose of the grant. At the same time, the Order makes clear that federal action is appropriate in the presence of a problem of national scope or significance.

The order requires each Federal agency to establish an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. It also requires that each agency, within 90 days of the order, designate an official within the agency with principal responsibility for the agency's implementation of the order.

Further, the order requires that, when agencies transmit to the Office of Management and Budget (OMB) proposed legislation or draft final regulations with Federalism implications, they certify that the requirements of the order have been met in a meaningful and timely manner.

The Federalism Executive Order builds upon the Clinton-Gore Administration's strong partnership with state and local governments on issues such as the Unfunded Mandates Reform Act, welfare reform, the

Builds on
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partnership.
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Children's Health Insurance Program, workforce development, and the Clean Water Act, among others. The companion Executive Order on Consultation and Coordination with Indian Tribal Governments (E.O. 13084) will be reviewed and strengthened as well.

*CHIP,
Clean water...*

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