



## Testimony

Before the Committee on Governmental Affairs  
U.S. Senate

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# FEDERALISM

## Implementation of Executive Order 12612 in the Rulemaking Process

Statement for the Record of L. Nye Stevens  
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General Government Division



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# Federalism: Implementation of Executive Order 12612 in the Rulemaking Process

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Mr. Chairman and Members of the Committee:

I am pleased to provide some preliminary results from our ongoing review of the implementation of Executive Order 12612 on “Federalism,” which was issued by President Reagan in 1987. Although the executive order applies to all covered agencies’ policies that have federalism implications,<sup>1</sup> you asked that we focus on agencies’ compliance with the order’s requirements in the rulemaking process in recent years. Specifically, we are examining (1) how often the preambles to covered agencies’ final rules issued between April 1, 1996, and December 31, 1998, mentioned Executive Order 12612 and how often they indicated that the agencies had conducted federalism assessments under the order; (2) what selected agencies have done to implement the requirements of Executive Order 12612; and (3) what the Office of Management and Budget (OMB) has done to oversee federal agencies’ implementation of Executive Order 12612 in the rulemaking process.

In brief, our preliminary results indicate that federal agencies covered by Executive Order 12612 mentioned the order in about 27 percent of the more than 11,000 final rules they issued between April 1996 and December 1998. The agencies indicated, however, that they had prepared federalism assessments for only five of these rules. Of the 117 major rules issued by these agencies during this period, the preambles indicated that only 1 had a federalism assessment. State and local representatives that we consulted said that certain federal agencies should have done assessments for more of these major rules; however, the agencies said that their rules did not have sufficient federalism implications to trigger the executive order’s requirements. All three of the agencies we visited had some kind of written guidance on the executive order and had designated an official or office responsible for ensuring its implementation.<sup>2</sup> However, the methods the agencies use to determine whether federalism assessments are needed varied among the agencies. OMB officials told us that they have taken no specific actions to implement the executive order, but said the order is considered along with other requirements as part of their regulatory review process under Executive Order 12866.

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<sup>1</sup>It is unclear whether Executive Order 12612 covers regulations and other policies issued by independent regulatory agencies, such as the Federal Communications Commission and the Securities and Exchange Commission. Therefore, we are focusing our review on executive departments and agencies that are not independent regulatory agencies.

<sup>2</sup>As discussed later in this statement, the agencies we visited were those with the most major rules that state and local government representatives believed should have had a federalism assessment.

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## Background

Before discussing our preliminary findings in detail, it will be helpful to review the key features of Executive Order 12612 and some recent initiatives related to federalism. The executive order establishes a set of fundamental principles and criteria that executive departments and agencies should use when formulating and implementing policies that have federalism implications. For example, the executive order says that federal agencies should refrain to the maximum extent possible from establishing uniform, national standards for programs with federalism implications and that, when national standards are required, they should consult with appropriate officials and organizations representing the states in developing those standards. The order says that regulations and other policies have federalism implications if they “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.”

Executive Order 12612 also contains specific requirements for agency implementation and governmentwide coordination and review. For example, the head of each executive department and agency is required to designate an official to be responsible for ensuring the implementation of the order, and for determining which proposed policies have sufficient federalism implications to warrant preparation of a federalism assessment. If an assessment is prepared, it must accompany any proposed or final rule submitted to OMB for review under Executive Order 12866.<sup>3</sup> OMB, in turn, is required to ensure that agencies’ rulemaking actions are consistent with the policies, criteria, and requirements in the federalism executive order.

Although Executive Order 12612 has remained in effect since it was issued in 1987, there have been several other initiatives that were, at least in part, intended to improve the relationship between federal rulemaking agencies and state and local governments. For example, in 1993 President Clinton issued Executive Order 12875 on “Enhancing the Intergovernmental Partnership,” which requires that agencies develop effective processes to permit state and local officials to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates. In 1995, Congress enacted the Unfunded Mandates Reform Act (UMRA), part of which requires agencies to take a number of analytical

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<sup>3</sup>Executive Order 12612 actually refers to rulemaking procedures under Executive Order 12291, which was revoked and replaced by Executive Order 12866 in 1993. Because only “significant” rules are submitted to OMB for review under Executive Order 12866, federalism assessments for nonsignificant rules are not required to be submitted to OMB. For a description of the review process under this order, see *Regulatory Reform: Implementation of the Regulatory Review Executive Order* (GAO/T-96-185, Sept. 25, 1996).

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and procedural steps during the rulemaking process for certain rules that involve a mandate.

On May 14, 1998, President Clinton issued Executive Order 13083 on “Federalism,” which was intended to replace both Executive Order 12612 and Executive Order 12875. The new executive order was to take effect in mid-August 1998, and would have made a number of changes to the specific requirements in Executive Order 12612. For example, agencies would no longer have been required to designate an official to ensure implementation of federalism requirements, and would not have been required to prepare federalism assessments for regulations and other policies with federalism implications. However, the President suspended Executive Order 13083 before it became effective in response to concerns raised by the National Governors’ Association and other interested parties.<sup>4</sup> Many of the commentators objected to the new order because they believed it expanded the federal government’s authority to make national policies and standards. There was also criticism that the new order was issued without consulting affected state and local government representatives. With the suspension of Executive Order 13083, Executive Order 12612 remains the primary presidential directive to federal agencies on how they are to develop and implement regulations that have federalism implications.

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## Few Rules Address Executive Order 12612 Requirements

Executive Order 12612 does not require agencies to mention the order in the preamble to their final rules or to note in those preambles whether a federalism assessment was prepared. Therefore, our review of the rule preambles does not show whether agencies considered the executive order or whether the agencies prepared federalism assessments. However, mentioning the executive order in the preamble to a final rule is a clear indication that the agency was aware of and considered its requirements in some way. Also, if an agency prepared a federalism assessment for a final rule, the agency is likely to describe the assessment in the preamble to the rule.

To determine how often agencies have mentioned Executive Order 12612 and federalism assessments in the preambles to their rules, we examined all final rules issued by the covered agencies between April 1996 and December 1998, and all rules issued during this period that were considered “major” rules under the congressional review requirements in the Small Business Regulatory Enforcement and Fairness Act (SBREFA). We selected this time period because it allowed us to use our existing

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<sup>4</sup>Executive Order 13083 was suspended by Executive Order 13095 on August 5, 1998.

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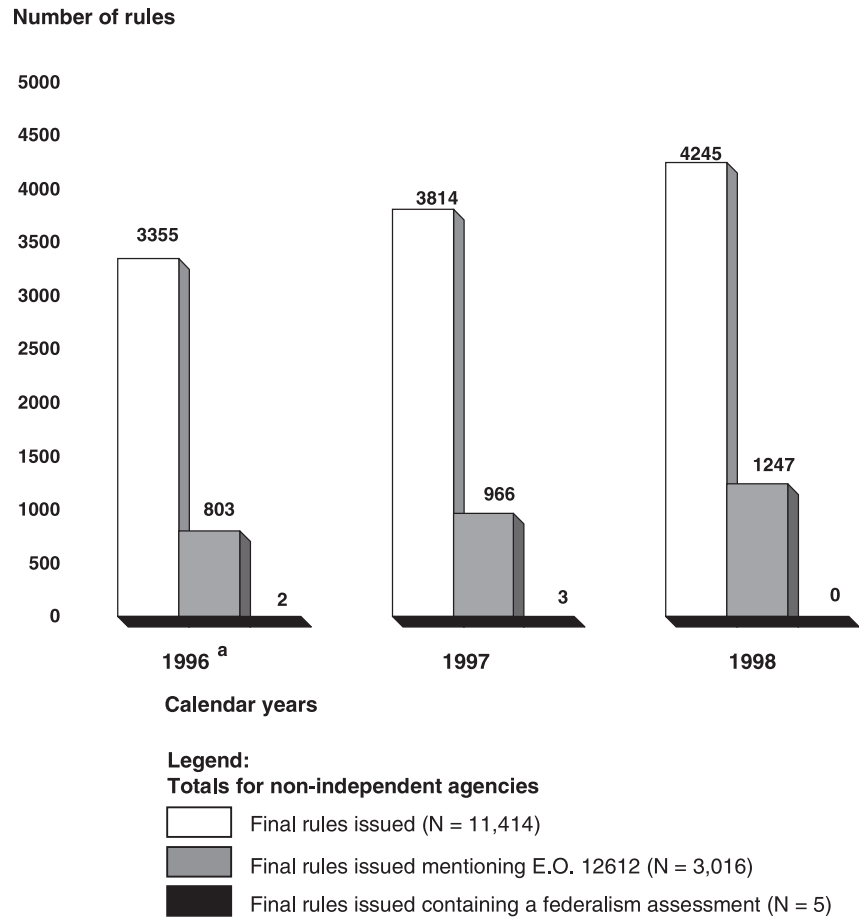
database of major rules issued since the passage of the SBREFA. SBREFA defines a rule as “major” if the Administrator of OMB’s Office of Information and Regulatory Affairs concludes that the rule is likely to result in (1) an annual effect on the economy of \$100 million or more; (2) an increase in costs or prices; or (3) significant adverse effects on (among other things) competition, employment, investment, or productivity.

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**Rule Preambles Frequently Did Not Mention the Order, and Reported Few Federalism Assessments**

To summarize the 3 years of data depicted in figure 1, nonindependent regulatory agencies published 11,414 final rules in the Federal Register between April 1996 and December 1998. The agencies indicated in the preambles that they had conducted federalism assessments for 5 of these 11,414 rules—2 in 1996 and 3 in 1997. In 3,016 rules (26 percent of the total), the agencies stated that no federalism assessment was conducted because the rules did not have federalism implications. Nearly all of these statements were standard, “boilerplate” certifications with little or no discussion of why the rule did not trigger the executive order’s requirements. In the remaining 8,393 rules (74 percent), the agencies did not mention Executive Order 12612.

**Figure 1: Agencies Indicated Only Five Final Rules Issued Between April 1996 and December 1998 Had Federalism Assessments**

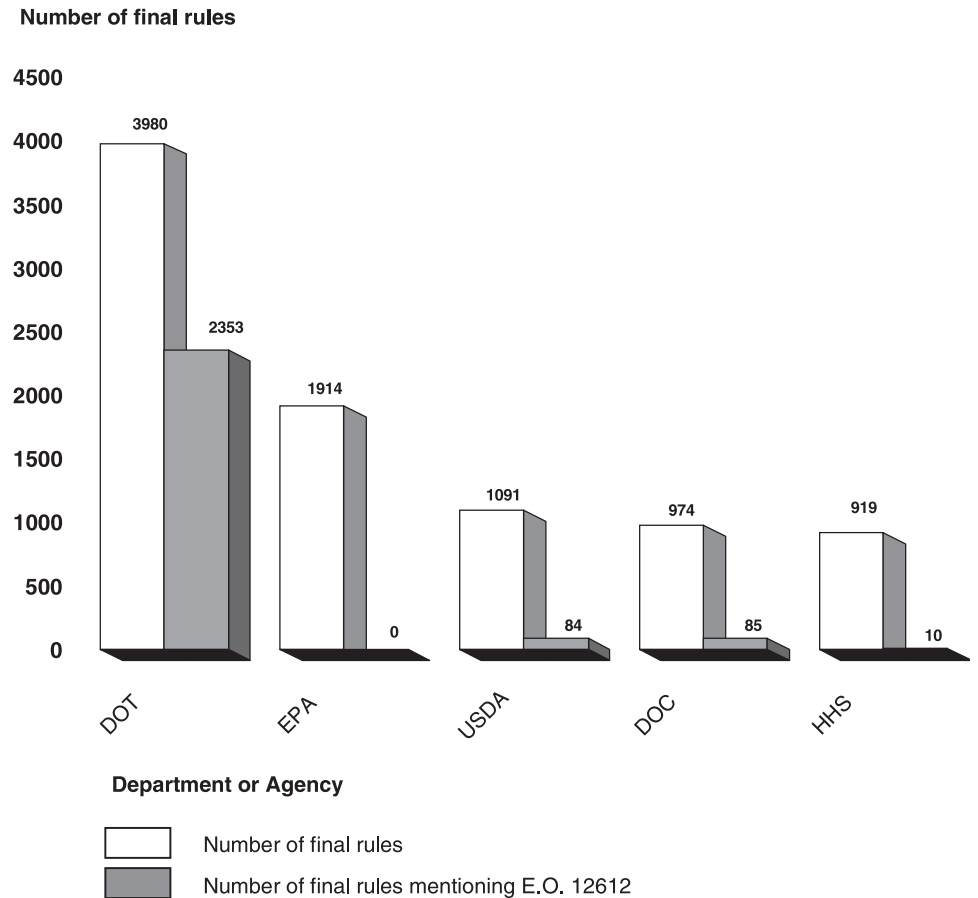


Note: The data for 1996 covers only those rules issued from April 1 to December 31.

Source: [Federal Register](#) and GAO analysis.

Five departments and agencies issued nearly 80 percent of all applicable final rules during this period—the Departments of Transportation (DOT), Agriculture (USDA), Commerce (DOC), and Health and Human Services (HHS), and the Environmental Protection Agency (EPA). As figure 2 shows, these agencies differed substantially in the extent to which they mentioned Executive Order 12612 in the preambles to their final rules. For example, DOT mentioned the executive order in nearly 60 percent of its final rules, whereas EPA did not mention the order in any of the 1,914 final rules it issued between April 1996 and December 1998.

Figure 2: Agencies Differed In Degree to Which They Mentioned Executive Order 12612 in Final Rules Issued Between April 1996 and December 1998



Source: [Federal Register](#) and GAO analysis.

Subsection 6(c) of Executive Order 12612 says that a federalism assessment should (1) contain the designated official’s certification that the regulation or other policy has been assessed in light of the principles, criteria, and requirements in sections 2 through 5 of the order; (2) identify any provision or element of the policy that is inconsistent with those principles, criteria, and requirements; (3) identify the extent to which the policy imposes additional costs or burdens on the states; and (4) identify the extent to which the policy would affect the states’ ability to discharge traditional state governmental functions or other aspects of state sovereignty. Of the five rules in which the preambles indicated that a federalism assessment had been prepared, all five contained either these four requirements or a statement indicating that the federalism assessment (located elsewhere in the rulemaking docket) addressed these four



requirements. As table 1 shows, the five rules for which federalism assessments were prepared were issued by four agencies (DOC, DOT, HHS, and the Department of Labor) in either 1996 or 1997.

**Table 1: Four Agencies Issued Five Final Rules With Federalism Assessments Between April 1996 and December 1998**

Department or agency	Date final rule was published	Title
Department of Health and Human Services	Aug. 28, 1996	Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents
Department of Transportation	Dec. 16, 1996	Roadway Worker Protection
Department of Commerce	Jan. 30, 1997	Florida Keys National Marine Sanctuary
	Mar. 28, 1997	Hawaiian Islands Humpback Whale National Marine Sanctuary
Department of Labor	Mar. 31, 1997	(Hazard) Abatement Verification

Source: Federal Register and GAO analysis.

### Only One Federalism Assessment Reported for Major Rules

Many of the final rules that federal agencies issue are administrative or routine in nature, and are therefore unlikely to have significant federalism implications. As a result, it is not particularly surprising that agencies would not prepare federalism assessments for many of those rules. However, rules that are “major” under SBREFA (e.g., those that have a \$100 million impact on the economy) and that involve or affect state and local governments are more likely to have federalism implications that would warrant preparation of an assessment.

Of the 11,414 final rules that nonindependent agencies issued between April 1996 and December 1998, 117 of them were identified as “major” rules by the agencies and OMB. The agencies issuing the rules indicated in the Unified Agenda of Federal Regulatory and Deregulatory Actions<sup>5</sup> that 37 of them would affect state and local governments. The agencies indicated in the preambles to 21 of the rules that the rules would take precedence in the event they conflicted with state or local laws or regulations.

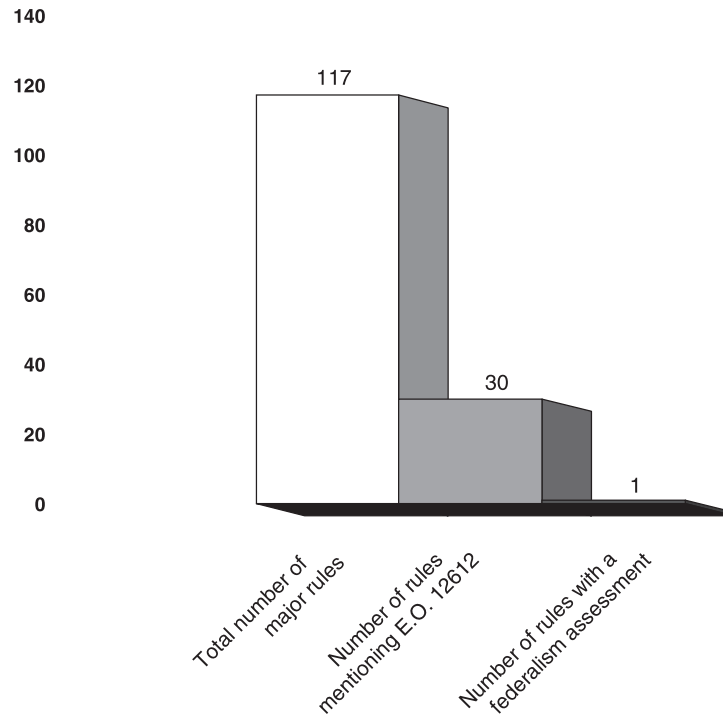
As figure 3 shows, federal agencies covered by Executive Order 12612 mentioned the executive order in the preambles to 30 of the 117 major

<sup>5</sup>The Unified Agenda is issued twice each year by the Regulatory Information Service Center, and is a compendium of executive and independent agencies’ regulatory activities that are being developed, planned for the future, or completed.

rules they issued between April 1996 and December 1998 (about 25 percent of the total). However, only one of these preambles indicated that a federalism assessment had been prepared for the rule—an HHS rule issued in 1996 restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents. The other 29 rule preambles that mentioned the executive order stated that the rules did not have sufficient federalism implications to warrant the preparation of a federalism assessment. Most of these statements were “boilerplate” certifications with little or no explanation of why the executive order’s requirements were not applicable to the rules.

**Figure 3: Only One Major Rule Issued Between April 1996 and December 1998 Had a Federalism Assessment**

Number of Major Rules



Sources: [Federal Register](#) and GAO’s major rule database.

Four agencies issued 87 (75 percent) of the 116 major rules issued during this period without federalism assessments—HHS (30 rules), EPA (21 rules), USDA (18 rules), and the Department of the Interior (18 rules). To determine how affected parties viewed the agencies’ decisions, we asked

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representatives from seven major state and local government interest groups (known as the “Big Seven”) to review descriptions of the 116 rules without federalism assessments and to indicate whether they believed any of the rules should have had an assessment. Four of these organizations provided us with comments on at least some of the rules.<sup>6</sup> At least one of the four organizations indicated that 79 of the 116 rules should have had a federalism assessment. The agencies with the largest number of rules that the four organizations considered in need of assessments were HHS (26 rules), USDA (18 rules), and EPA (10 rules). Two or more of the organizations indicated that 30 of the rules should have had an assessment.

We then contacted officials in each of these three agencies to determine whether federalism assessments had been prepared for these rules (but not mentioned in the preambles to the rules) or why they believed that no assessment was needed. The agencies did not indicate that any other assessments had been prepared, and generally said that their rules did not have sufficient federalism implications to trigger the executive order’s requirements. In some cases, the agencies indicated that they had substantively complied with the executive order by taking other actions to address intergovernmental concerns during the rulemaking process.

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## Selected Agencies Have Taken Some Actions to Implement Executive Order 12612

Federal departments and agencies are primarily responsible for implementing Executive Order 12612. Section 6 of the executive order delineates the agencies’ responsibilities, requiring them to (1) designate an official to be responsible for ensuring implementation of the order, (2) have the designated official determine which proposed regulations have sufficient federalism implications to warrant the preparation of a federalism assessment, and (3) send each federalism assessment to OMB as a part of the regulatory review package sent pursuant to Executive Order 12866. However, Executive Order 12612 provides the agencies with broad discretion to determine how to meet these requirements.

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## Agencies Have Written Guidance and Designated Officials or Offices

Each of the three agencies we visited—EPA, HHS, and USDA—has some kind of written guidance on how to implement Executive Order 12612. All three of the agencies’ guidance documents identify a designated official or office responsible for ensuring compliance with the executive order.

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<sup>6</sup>The National Conference of State Legislatures, the Council of State Governments, and the National Association of Counties reviewed all of the rules. The National League of Cities reviewed all of the rules except the EPA rules. The National Governors’ Association, the International City/County Management Association, and the U.S. Conference of Mayors did not provide any assessments of the rules.

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EPA issued its “Guidelines for Implementing Executive Order 12612: Federalism” in June 1988. The guidelines identified the Assistant Administrator of the Office of Policy, Planning, and Evaluation as the designated EPA official for federalism. However, in 1992, the EPA Administrator made the agency’s General Counsel responsible for carrying out the functions of the designated official. The General Counsel was authorized to delegate the authority to the Deputy General Counsel, who could redelegate it to the Associate General Counsel level. EPA officials said that all agency regulations are to be reviewed by the General Counsel before being submitted to OMB and published in the Federal Register.

USDA’s guidance on “Regulatory Decisionmaking Requirements” was last updated in March 1997, and the requirements that are related to Executive Order 12612 are part of that overall guidance. The guidance indicates that the department’s Office of the General Counsel (OGC) is responsible for carrying out the responsibilities of the designated official. For example, it says that OGC will “[r]eview regulations and notices of proposed rulemaking for compliance with Executive Order 12612...and determine whether the preparation of a federalism assessment by an agency is required.” All USDA regulations are to be reviewed centrally by the department’s OGC before being submitted to OMB and published in the Federal Register.

In March 1988, HHS’s Assistant Secretary for Planning and Evaluation (ASPE) issued a memo on “Compliance with Executive Orders on The Family and Federalism.” The memo indicated that the Secretary had assigned the ASPE lead responsibility for guidance, compliance, and technical assistance related to the executive order. HHS officials said that, with the exception of certain delegated regulations issued by the Food and Drug Administration (FDA), the ASPE is responsible for reviewing and clearing all departmental regulations. One facet of the ASPE’s review is to determine whether the rules comply with Executive Order 12612. Many nonmajor FDA regulations (as determined by FDA) are issued directly by the Commissioner without formal departmental review and clearance. For these regulations, HHS officials said that the FDA Commissioner exercises the responsibilities of the designated official under the executive order.

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Criteria for Determining the Need for Federalism Assessments Vary Across the Three Agencies

Section 6 of Executive Order 12612 says that the designated official “shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment.” Two of the three agencies we visited established explicit criteria in their written guidance on Executive Order 12612 to determine whether a rule has significant

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federalism implications. At least one of the agencies' criteria seems to establish a high threshold for preparing an assessment.

USDA's written guidance on Executive Order 12612 does not establish any specific criteria that the department's OGC should use to determine whether a particular rule or other policy has sufficient federalism implications to warrant the preparation of a federalism assessment. Neither has USDA's OGC established any written criteria to guide these determinations. USDA officials said that OGC attorneys make their own determinations regarding federalism implications in the context of each rulemaking action.

The HHS guidance on the executive order lists "threshold criteria" that can be used to determine whether a rule's federalism effects are significant and thus require a federalism assessment. The guidance indicates that a rule should be considered to have significant federalism implications if it (1) has a direct causal effect on the states; (2) primarily relates to the structure and role of states (e.g., not just a reduction in funding of grant programs); (3) has effects within a reasonably foreseeable time frame (e.g., within the next 5 years); and (4) has a significant incremental effect (e.g., requiring states to do something that they are not already doing). The guidance also says that an assessment must be prepared if an action will directly create significant effects on states even if the action is mandated by law or the department otherwise has no discretion. Finally, it says that rules and other policies with either a positive or negative significant effect on the states require a federalism assessment.

The criteria in EPA's guidance are similar to, but also somewhat different from, the HHS criteria. For example, the guidance document says that, even if an action might have substantial federalism effects, it will not require a federalism assessment if a statute mandates the action or the means to carry it out are implied by statute. The EPA guidance also establishes the following four criteria, all of which must be met for the agency to determine that a rule has "substantial federalism effects" and therefore requires a federalism assessment:

- The rule must have an institutional effect on the states, not just a financial effect. The guidance says that the fact "[t]hat an action has a financial effect on States, regardless of magnitude, is not sufficient in itself to trigger a federalism assessment." It also says a rule must "affect the roles and responsibilities of state government to have federalism implications."
- The rule must "change significantly the relative roles of Federal and State governments in a particular program context, lead to Federal control over

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traditional State responsibilities, or decrease the ability of States to make policy decisions with respect to their own functions” in order to have a “substantial” effect.

- The rule must affect all or most states, “not simply one state or a small cluster of States.”
- The rule must have a “direct, causal effect” on the states. If a rule creates federalism effects as a side effect, the guidance says the rule would not trigger the requirement for a federalism assessment.

These criteria seem to establish a high threshold for what constitutes “sufficient” federalism implications to require an assessment. For example, the executive order defines “state” to “refer to the States of the United States of America, individually or collectively.” (Emphasis added.) EPA’s guidance, on the other hand, indicates that federalism assessment should be prepared only if a regulation or other policy affects all or most states. However, EPA’s actions appear to be allowable because the executive order does not define what is meant by “sufficient” federalism implications, leaving that determination up to the agencies.

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## OMB Has Taken Little Specific Action to Ensure Implementation of Executive Order 12612

Section 7 of Executive Order 12612 indicates that, in implementing Executive Order 12866, OMB should, to the extent permitted by law, “take action to ensure that the policies of Executive departments and agencies are consistent with the principles, criteria, and requirements” of the federalism executive order. As noted previously, the order requires agencies to submit federalism assessments (if they were prepared) along with any rules being submitted to OMB for review.

OMB officials told us that reviews of agencies’ actions in the federalism area have been part of the standard regulatory reviews conducted by OMB staff pursuant to Executive Order 12866. They said that agencies have rarely submitted separate federalism assessments to OMB but have addressed federalism considerations, when appropriate, as a part of the cost-benefit analysis and other analytical requirements. These officials also noted that there were few federalism assessments filed with OMB during the Reagan and Bush administrations.

According to agency officials, OMB does not now have, nor did it previously have, a separate oversight program for examining agencies’ adherence to the federalism executive order. OMB has not issued any guidance to the agencies on the implementation of Executive Order 12612. OMB does not maintain a list of the designated agency officials who are responsible for implementation within their agencies. In fact, the White

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House web site indicates that Executive Order 13083 (the suspended Clinton order), not 12612, is the applicable executive order on federalism.<sup>7</sup>

One OMB official told us that Executive Order 12612, Executive Order 12866, Executive Order 12875, and UMRA all substantively address the same idea regarding federalism. They all require that, if a proposed rule is likely to have a significant impact on other levels of government, the impact should be considered in analyzing the costs and benefits of the rule and the agency should consult with appropriate officials at the state and local level.

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## Conclusions

Executive Order 12612 gives agencies substantial discretion to determine which regulations and other policies have “sufficient” federalism implications to warrant preparation of a federalism assessment. Using that discretion, the agencies have prepared federalism assessments for very few rules. One of the agencies we visited had no written criteria to make those determinations. Although the other two agencies had written criteria, they had prepared only one federalism assessment and had mentioned the executive order in only 10 out of nearly 3,000 rules. The two agencies’ criteria were also inconsistent regarding whether statutorily mandated regulations required a federalism assessment. Also, other than including federalism as part of its regulatory reviews, OMB has taken no other specific actions to carry out its responsibility to ensure that agencies’ regulations and other policies are consistent with the executive order.

The fact that agencies have prepared federalism assessments for only 5 of the more than 11,000 final rules issued in recent years suggests that the agencies are not implementing the order as vigorously as they could. We will be exploring the implications of this situation as we complete the work on this issue that you have requested of us.

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<sup>7</sup>The OMB web site does not list executive orders. The White House web site lists only the executive orders issued during the Clinton Administration. It also contains the executive order that suspended Executive Order 13083, but to find it one must enter either the number of the order or the date on which it was issued.

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