

INTRODUCTION

As the forty-fourth American President, you will face, among many other challenges, a pressing need for improvement of the administrative process. The American Bar Association's Section of Administrative Law and Regulatory Practice has prepared this report for your consideration, in the hope that we have identified focused, non-partisan strategies for improvement and reassessment. The Section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government attorneys, judges, and law professors. Officials from all three branches of the federal government sit on its Council.

In generating this report, the Section sought at every stage to achieve consensus among the broad range of interests represented in our membership. As a result, we believe the recommendations discussed in the report should have wide support and be susceptible of early acceptance.

RECOMMENDATIONS

Appointment of Your Administration

Perhaps your very first decisions will be to choose the appointees who will people your administration. At the highest level, this requires senatorial confirmation; but many appointments are made by you alone, or by those whom you appoint to high office with senatorial confirmation. These are political judgments at root, yet we believe law plays roles appropriate for us to address here.

First, we urge both you and the Senate to act promptly in this regard. Unfilled vacancies imperil effective administration, as is confirmed by experience with both your predecessors who were not always prompt in sending nominations forward, and a Senate that has not always been prompt in considering nominations once sent. Your primary control over the administrative apparatus resides not in your ability to issue orders or to monitor performance but rather is exercised through your ability to select sound administrators to lead those agencies. That counsels deep and urgent attention to the appointment process on all sides.

Second, we urge you to respect the qualifications Congress has reasonably attached to some offices, as your predecessors have not invariably done. These requirements are often salutary. Congress's practice began with the First Congress, generally motivated by a desire, which Presidents surely share, to have competent, qualified people occupy key positions. The requirements that the Attorney General be a person "learned in the law" and that the Surgeon General be a physician have surely enhanced the stature of their offices, contributing to the respect they have generally enjoyed. The statutory exclusion of active duty personnel from top posts in the Pentagon has surely contributed to the maintenance of the fundamental principle of civilian control over the military.

Congress's choices in this respect have sometimes been more political. As a means of assuring relative balance in the performance of the multi-member authorities it has created, it has often written limitations on party status into the governing statutes, so that no more than a bare ma-

jority may belong to the same party. In other contexts, it has specified representation of particular interests on these bodies. For example, federal statute provides that in making appointments to the Federal Reserve Board, “the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographic divisions of the country.” And at least seven of 25 members of the Architectural and Transportation Barriers Compliance Board must be individuals with disabilities. These judgments, too, serve important ends critical to fully-informed decisions-making, and can be essential to securing the cooperation of disparate interests essential to the success of the governmental program. We urge you to respect them as elements of the laws to whose faithful execution you will have undertaken to see.

We recognize that recent administrations have skirted stated political limitations, and have frequently voiced objections to legislative specification of qualifications for office, both specifications grounded in desirable expertise and those of a more political character, as unconstitutional intrusions into executive prerogatives. Typically they have asserted that such limitations “rule out a large portion of those persons best qualified by experience and knowledge to fill the position,” without necessarily specifying how the restriction in fact does so. While excessive narrowing in relation to responsibility would indeed, in our judgment, appropriately ground such an objection, it is very difficult to characterize the recent statutes provoking these objections in this way. When Congress asks that the head of the Federal Emergency Management Administration be a person with experience in responding to calamitous events or the important Postal Commission officials have experience in the management of large organization, it appears, rather, to have crafted qualifications provisions that reasonably ensure an officeholder’s basic competence or reasonably further other legitimate aims. We urge you to reaffirm our nation’s commitment to legality by honoring the sense as well as the letter of political limitations, and to reconsider the apparent recent approach of categorically opposing the specification of eligibility requirements -- to engage with Congress in discussing proposed eligibility requirements, and to respect those requirements that are statutorily created.

Third, we urge you also to select for office persons imbued with our rule of law culture, who can be relied upon faithfully to pursue the legislative ends Congress has specified, and to respect the framework of law, statutory and regulatory, that they inherit on taking office. A basic feature of our governmental system is that legislation enacted by Congress and rules adopted by an agency remain effective unless they sunset by their own terms, are amended by subsequent legislative action or rulemaking, or are invalidated by the courts. As a result, you and your responsible nominees may find yourselves implementing laws that conflict with your own policy preferences.

The nature of executive office both justifies and requires a high level of initiative or discretion; we do not intend to counsel a governmental rigidity that ill serves the nation. At the same time, the principle of legislative continuity and indeed, the concept of law itself, impose limits. Statutes usually place decisional authority in those you appoint, acting under your guidance. Their decisions on the merits of matters are subject to judicial review, sometimes exacting. Congressional committees regularly and properly call them for oversight inquiries that may produce political momentum independent of new statutory directives. Supreme Court decision have been emphatic in recognizing the proper sweep of executive discretion in shaping an administration’s

priorities, but they have nonetheless insisted that this discretion does not, cannot reach the effective impoundment of statutory schemes.

Respect for the basic rule of law thus suggests that you should not nominate a person as the head of an agency who is openly hostile to that agency's statutorily-defined mission, or who will ignore (rather than use regular procedures to change) its rules in place. While your and their discretion in executing the laws is broad, it does not extend to an affirmative effort to undermine the laws currently in place by subverting their provisions and undermining the efforts of the civil service employees who were hired to enforce it and who have spent their professional careers doing so. Appointing someone who is hostile to the agency's mission represents a level of partisanship, and disregard for law, that should be avoided in a representative democracy like ours.

Of course this proposition does not impair the efforts you or your administrators may make to change governing law. Where the statutes creating an agency's mission are ambiguous, the agency is free to change course within the area of ambiguity, following the usual procedures of administrative law. Reconsideration and recasting of its statutory framework is a standard part of any agency's role, and often provides a means for it to better achieve its underlying purpose. Similarly, the revisiting of rules in place, following the APA's rulemaking processes, is an appropriate – indeed highly commendable – administrative activity. And you are fully justified in seeking the repeal or revision of major legislation in accordance with your policy preferences, and can justifiably demand that any administrative agency, executive or independent, provide you or your designees with the any information needed to advance that goal. But all such law reform efforts should be undertaken openly and, in the case of statutory revisions, submitted to Congress for enactment.

Oversight and Improvement of the Rulemaking Process

The process of notice-and-comment rulemaking is a cornerstone of the Administrative Procedure Act (APA), the basic charter of federal agency procedure. Overall, the process is considered an efficient and open method of promulgating rules. Today, however, the process is neither as efficient nor as open as it could be. In order to promote these values, while also ensuring that administrative rulemaking serves the priorities of the incoming Administration, we recommend that, upon taking office, you should undertake the following courses of action:

First, you should thoughtfully review the present system of centralized executive oversight of agency rulemaking activities. This system has already evolved under several administrations and is currently embodied in Executive Order 12866, which has been in place during the past two presidential administrations, with limited amendments adopted in 2001 and 2007. The practice of White House oversight and coordination it reflects has longstanding, bipartisan (and Bar Association) support, as an important element in realizing the aims of efficient, coordinated, yet reasonably open administration in a democratic system. Centralized coordination and review can foster these aims.

The current system has two elements, coordination of the overall rulemaking programs of agencies, and review of particular rulemaking proposals. Both elements are sound, but in their details may warrant your thoughtful reconsideration. At the initial stage of setting priorities, it is obvious that your administration has important interests in coordination among agencies, and in securing the priorities of your administration. Here the issues of possible concern are whether, in its details, the current program may tend to defeat the responsibilities of those you will have made directly responsible for agency administration (with the Senate's blessing); and whether additional measures of transparency might be warranted to assure public trust that decisions taken are grounded in proper concerns of public policy. At the following stage, that of reviewing agency efforts in particular rulemakings, the important considerations are those of efficiency, faithfulness to underlying legislative mandate, and, again, political acceptability. A limitation of review to "significant" regulatory actions, administration assiduous to avoid delays, and continuing respect for openness are all important elements in the process of centralized regulatory review.

Second, we urge you to take cognizance of the fact that the efficiency of informal rulemaking has been undermined as the process has become laden with multiple requirements for regulatory analysis in statutes and Executive Orders. The addition of too many analytical requirements can detract from the seriousness with which any one is taken, deter the initiation of needed rulemaking, and induce agencies to rely on informal pronouncements that may be issued without public comment procedures but have real-world effects. In 1992, the ABA House of Delegates highlighted these concerns when, at our Section's urging, it unanimously called upon the President and Congress to "exercise restraint in the overall number of required rulemaking impact analyses" and "assess the usefulness of existing and planned impact analyses."

The Section anticipates that the next four years will be a time of legislative as well as executive interest in rulemaking. In your interactions with Congress on these important issues, you and your Administration should work to replace the current patchwork of analytical requirements found in various statutes and Executive Orders with one coordinated statutory structure. This structure should work to relate rulemaking requirements to the importance of a given proceeding. "Rulemaking" is not an undifferentiated process--some rules have major economic or social consequences, while many others are relatively minor in scope and impact. Thus, detailed requirements should be reserved for rules of greatest importance, and uncomplicated procedures should be used for routine matters of less public significance.

While we have long supported regulatory impact analysis and continue to do so, current literature raises useful questions whether its focus should so strongly stress *economic* cost-benefit analysis. The question for consideration is whether other or supplementary approaches will work better in informing decision-makers and citizens about the issues to be resolved.

Third, we urge you to support the use of sound scientific risk assessment in the regulatory process. Many agencies are responsible for regulating risks to health, safety or the environment. Risk assessment is the process they use to gather, analyze, organize and present relevant information to help administrators responsible for managing risk to identify issues that may require regulatory attention, to set priorities, and to select the nature and stringency of an appropriate regulatory response.

In order for these agencies to most effectively implement their missions to reduce risks, they must have a clear vision of the fundamental role that science should play in the regulatory process. That role in turn requires agencies to have adequate expertise in state-of-the-art risk and benefit assessment methods to support optimal decisionmaking.

Our Section has developed a consensus recommendation on the use of risk assessment in the regulatory process, and we reiterate it here. Risk assessment provides an important and essential, if not complete, basis for making regulatory decisions. It should provide scientific estimates and characterizations of the nature and magnitude of risks to human health, safety and the environment, based on a careful analysis of the weight and quality of the scientific evidence, including such site-specific and substance-specific information as may be available, as well as information about the range and likely distribution of risk. Scientific findings and professional judgments embodied in risk assessments should be explicitly distinguished from risk management. It is important to recognize that other relevant considerations, such as economic, social and political factors extrinsic to the assessment, may also be important to and considered by the administrators, who decide regulatory issues on the basis of the full information available to them. To perform its vital information function, the risk assessment process should be kept as free as possible from bias by these kinds of considerations. As the purpose of risk assessment is to gather, analyze, organize and present relevant information for the use of administrators and the public, politicized controls must be avoided.

Risk assessments should explicitly acknowledge and explain the limitations of their methodology, data and assumptions. In particular, agencies should fully disclose qualitative aspects of risk, the reasonable range of uncertainties in the models and data used, and the extent of variability in important parameters, such as exposed populations. Public procedures associated with risk assessments should be conducted through a transparent process that allows all persons and groups interested in the process, including non-experts, to understand and have input into it. The amount of effort that goes into a risk assessment should be proportional to the significance and complexity of the decision, the value of additional information, and the need for expedition. Risk comparisons can be helpful for placing risks in context, but they should be approached with care, particularly when dissimilar risks are involved, and critical features of the compared risks should be fully disclosed.

Peer review of risk analyses may be desirable to improve their quality, transparency and credibility, although the potential for added expense and delay dictates that its use be limited based on the nature, significance and complexity of the risk assessment.

Fourth, we urge you to build further upon your predecessors' efforts to encourage the use of advanced information technology to expand knowledge about, and participation in, agency decisionmaking, including notice-and-comment rulemaking. The development of regulations.gov and the centralized Federal Docket Management System (FDMS) is a promising start. A national blue-ribbon committee under the auspices of the Section is concluding its year-long study

and assessment of this system; its forthcoming report will contain recommendations for strengthening the current system and moving to the next stage of development. Important as it is to have the technology “right,” it is equally important to develop an administrative culture that embraces it. For instance, the E-Government Act of 2002 requires agencies to make available online all the supporting studies, assessments, and other materials that the agency would normally include in its rulemaking docket, so far as practicable. This *is* now quite practicable, for FDMS is set up to include such materials and to make them available to the public via regulations.gov. Yet most agencies are not posting the materials at all, let alone posting them in good time for rulemaking commenters to read them and include attention to them in their comments. Even submitted comments are not always being posted as quickly and comprehensively as is needed for others to easily read them and have the chance to respond. Your Administration should make a clear commitment aggressively to embrace information technology as a means of promoting transparency and participation in the regulatory decisionmaking process. It should ensure that agencies have the resources and leadership to comply fully with the E-Government Act’s rulemaking requirements, and to explore additional methods for improving public participation and managing regulatory information as new technologies become available.

A related element here is the importance of centralized oversight of the electronic libraries agencies are required to maintain online under the Electronic Freedom of Information Act. Agencies should use these libraries to make available, and readily searchable important, yet often hard-to-find, items such as general statements of policy and interpretive rules. Although the federal APA does not require such rules to be promulgated pursuant to notice-and-comment procedures, it does require that they be published, and OMB Guidance already valuably requires much if not all of this material to be posted on line. Where agencies commendably choose to use notice and comment processes in generating these materials, as existing Executive Orders in some cases require, that process, too, should appear in regulations.gov and the FDMS. And use of electronic dockets and libraries can significantly reduce the cost to government of maintaining both public and institutional libraries, while greatly expanding the practical availability of materials by permitting unlimited sharing.

We encourage you, in continuing to develop electronic government tools, to blend central office coordination and responsibility for government-wide initiatives with encouragements to agency initiative. A centralized office to encourage and monitor best practices relating to agency Internet use will be particularly useful in this regard. Innovative efforts by individual government agencies should be encouraged, and rewarded by periodic assessment of best practices. Some variation in practices will inevitably be needed to accommodate the mission of a given agency, but it is also important, to promote a degree of cross-agency consistency, so that people can more easily find material at any agency site they visit. Through a centralized office, you will be able to encourage minimum standards in the use of advanced technology, while also helping to assure that, as agencies employ electronic means to maintain records, they will take additional steps to provide long-term public access to the information. More comprehensive and specific recommendations in this area will appear in the report of the special blue-ribbon Committee on the Status and Future of Federal e-Rulemaking.

Finally, we urge you to ensure that the scientific and technical expertise of the agencies is adequately funded. When regulatory priorities and programs are grounded in robust scientific and technical analysis, the benefits are enormous; conversely, the risks of debilitated, under-

performing programs are enormous -- indeed, they are increasingly apparent. Over the years, Congressional mandates and regulatory demands on many agencies have grown dramatically, but these demands often have not been matched by adequate funding. The burgeoning growth in scientific techniques and understanding only heightens the hurdles facing the agencies.

Agencies that regulate risks to health, safety and the environment touch the lives, health and well-being of all Americans and have a major impact on the economy and security of our nation. Other countries around the world traditionally have looked to the United States for leadership on scientifically sound, risk-based regulation. Federal agencies will not be able to fulfill their missions if their expertise and organizational structure is weak. Effective regulation and American leadership in the world on regulatory issues surely will not be possible if the agencies cannot even keep pace with scientific advances. Our nation is at risk if the scientific and technical expertise of the agencies is inadequate.

For example, the Food and Drug Administration and the Consumer Products Safety Commission have not been adequately funded to address import safety challenges during a time when international trade has dramatically increased and public confidence has fallen. EPA has not been adequately funded to implement chemicals management initiatives (such as the Montebello Agreement) even as chemicals management policy is changing around the world. The Occupational Safety and Health Administration and Mine Safety and Health Administration have lacked necessary funds for inspectors.

As a particular case, consider a recent report by FDA's Science Board raising alarm that FDA cannot fulfill its mission because its scientific base has eroded, its scientific organizational structure is weak, its scientific workforce does not have sufficient capacity and capability, and its information technology infrastructure is inadequate. A crucial part of the problem is the lack of resources during a time of revolutionary change in science and ever-increasing demands on the agency. The result is reactive priority-setting and a fire-fighting regulatory posture instead of a culture of proactive regulatory science.

As FDA's Science Board stated, "Inadequately trained scientists are generally risk-averse, and tend to give no decision, a slow decision or, even worse, the wrong decision on regulatory approval or disapproval." Adequate resources are imperative to bolster the agencies' science capacity and capability, to implement cutting-edge approaches to modeling, risk assessment and data analysis, and to bolster agencies' information infrastructure.

Cautionary Considerations

It has long been the Bar Association's position, grounded in the Constitution's designation of our President as the unitary holder of "the executive Power," that your authority as chief executive extends to all the elements of government exercising enforcement and other regulatory authority over the citizenry. As President, your responsibility to "take Care that the Laws be faithfully executed" extends to the Securities & Exchange Commission and the Nuclear Regulatory

Commission as well as to the Departments of Education and Transportation. The steps recommended in the preceding section fall well within that responsibility.

From our Nation's founding, however, there has been controversy whether that responsibility is one of leadership and oversight of elements of government Congress may have empowered to act, or more broadly includes the power actually to direct the outcomes of matters Congress has placed in their hands. Although we are mindful of the temptations any well-intentioned President might have to claim this broader authority, we urge you to accept the understanding that has predominated, and that is reflected in other elements of the Constitution – that when Congress places a duty in the Federal Trade Commission or the Department of the Interior, that placement is an element of the “Law” to whose faithful execution you have undertaken to see.

Of course you may and will consult with agencies of whatever kind about the manner in which they understand and intend to exercise their duties. The general principles underlying Executive Order 12866 on regulatory analysis, for example, are ones that we have long supported. Indeed, we have urged their full application, inter alia, to the independent regulatory commissions, although the current text applies to them only respecting the planning process.. And yours is the office best placed to coordinate matters when, as so often happens, Congress's assignments of responsibility involve not one but two or more agencies with differing general tasks.

Our earnest recommendation, however, is that you make clear at an early point that these are relationships of oversight, and not command – that when Congress has assigned regulatory duties to agencies and not to you, those agencies are the ones ultimately empowered to decide upon and implement the courses of action assigned to them. Of course a President has every right to seek to ensure that his/her appointees act on the basis of the President's general philosophy and approach to government and work in a way that is consistent with the president's team. And should that administration be lax or inattentive to essential matters, you will have many possibilities of response. Recognizing, however, that these possibilities do not include simply imposing the decision you would prefer, is an appropriate acknowledgment where Congress has by law placed the particular duties being exercised. Decisions about regulatory matters often require expertise or professional judgment (e.g., legal, scientific, statistical, technical) on factual inquiries for which agency heads are more appropriately directly responsible. Moreover, complex decisions require more time than you and your limited staff could devote to the issue; accepting the placement of responsibility in the regulator also recognizes where Congress has located resources needed for ultimate decision and action. And, finally, acceptance recognizes, as well, the hazards to our democracy that might arise from the concentration of excessive power over the American economy and people in one place.

The decisions of regulatory agencies are different, in this respect, from those important governmental decisions for which the discretion being exercised is subject only to political controls. Early in our country's history, Chief Justice Marshall remarked in a famous passage *Marbury v. Madison*, the opinion establishing the principles of constitutional review, that for the President's political powers, the acts of the officers Congress provides for (such as the Secretary of State in foreign relations)

“are his acts and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no [judicial] power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. ... [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.” 5 U.S. (1 Cranch 137, 165-66 (1803).

Respecting the decisions taken by regulatory agencies, however, the very legitimacy of the discretion they have been delegated does depend upon the possibility of effective judicial review – a review that for the most significant of judgments made, as in important rulemakings, has been characterized as an appropriate “hard look” at their rationality, qualities of judgment, adherence to legal constraints, etc. In exercising delegated regulatory responsibilities, in other words, for *these* duties prescribed by Congress, regulatory agency officials are *not* “to conform precisely to the will of the President,” but rather are reasonably to exercise the discretion that has been conferred *upon them*. They are *not* “the mere organ by whom [a strictly political judgment] is communicated,” but are themselves the exercisers of a legally bounded judgment whose very legality is dependent upon a court’s assessment that it has been properly done.

Preemption of State Law by Agency Action

We recommend that you give attention to agency compliance with Executive Orders 12988 and 13132, both issued by President Clinton and continued by President Bush. The former order, on Civil Justice Reform, requires agencies drafting proposed legislation or proposed regulations to specify in clear language the preemptive effect, if any, to be given to the law or regulation. The latter order, on Federalism, states, among other things, a national policy that “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.” Section 2.(i).

Since the earliest days of the Republic there have been conflicts between federal and state regulation of the same matters. Today, the relationship between federal and state regulation depends greatly on the particular matter being regulated. For example, generally in the environmental, health, and safety field, Congress has provided that federal regulation is a floor below which states cannot go but allowing states to impose stricter standards. This is the characteristic

of the Clean Water Act and the Occupational Safety and Health Act, among other laws. Where different standards applicable to consumer items might interfere with efficient markets, however, Congress has often provided that different state standards are preempted – meaning that federal standards are both the floor and ceiling of all government regulation. This is the characteristic of the Motor Vehicle Safety Act’s standards for auto safety and the Energy Policy Conservation Act’s standards for automobile fuel efficiency. Unfortunately, Congress often does not speak clearly on the subject of preemption, leaving it to agencies in the first instance and the courts ultimately to decide whether a given federal regulation (or deregulation) shall preempt any different state regulation. Moreover, Congress has also not spoken clearly regarding whether state tort law should be treated the same as state positive law for purposes of preemption.

The advisability of a particular federal law or regulation preempting state law, and especially state tort law, is a highly contentious issue, and it is not our purpose to take a side in that debate. Rather, it is our hope that, whatever the policy of your administration, agencies subject to your direction will deal with this issue in a manner that is transparent and open to public participation, particularly the participation of those state entities most directly affected by possible preemption.

Substantively, Executive Order 13132, in effect, creates a presumption against preemption, requiring agencies to interpret federal statutes not to preempt state law unless they expressly provide for it, there is other clear evidence of congressional intent to preempt state law, or there would be a conflict between state and federal law. Moreover, where a statute does not itself preempt state law, the order prohibits agencies from utilizing their general statutory authorization to preempt state law unless “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.” Section 4.(b). Finally, the order requires agencies to restrict preemption to the minimum level necessary to achieve federal objectives. Section 4.(c).

Procedurally, the order requires, as a general matter, that agencies consult with state and local officials before taking action that may affect state or local authorities. *See* Sections 3.(a), (b),(d)(3),(d)(4), 4.(d), (e), 6.(a), (b)(2), (c). In particular, agencies are required to provide notice to and an opportunity for state and local officials to participate in rulemakings or adjudications that propose to preempt state law. In addition, agencies are required 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,” and each agency was required to designate an official with responsibility for implementing the order. *See* Section 6(a).

It is fair to say that while these orders have remained in effect during the Bush administration, and occasionally agencies have paid lip service to them, neither the substance nor the procedures have been strictly followed. While there is no particular magic in the substance or procedure mandated by these orders, it is destructive of the rule of law and the authority of executive orders for orders to go unenforced and observed only in the breach.

Of particular concern to many has been agency statements to the effect that their regulations preempt state tort law, even in the absence of clear statutory language mandating or authorizing such preemption. Again, we do not take a position on the merits of when, if ever, state tort law should be preempted by federal regulations. We do believe, however, that the administration should establish what its position on the subject should be, and that its position should then be communicated to agencies by a public and transparent means.

Consequently, we urge that you address the preemption issue early in your administration to establish a policy for agencies subject to your direction. In this regard, we urge you to make clear the administration's position with respect to the preemption of state tort law by federal regulations. Moreover, we believe that the basic procedural requirements of Executive Orders 12988 and 13132 are sound. Preemption is important enough that state and local officials should be informed of proposed agency actions that may have preemptive effect and should be offered an opportunity to consult with the agencies about those proposed actions. Moreover, an agency should include in any proposed or final rule or order express language regarding what it believes is the preemptive effect of its rule or order and the source of the authority for such preemptive effect. Such clarity and publicity will aid regulated entities, regulatory beneficiaries, state and local officials, as well as courts, in determining the meaning and effect of federal regulations.