August 3, 2018

The Honorable Rob Bishop
Chairman
Speaker's Task Force on Intergovernmental Affairs
United States House of Representatives
123 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Bishop:

Our organizations represent Governors, states, state agencies and departments, local governments, and the interests of the West. We share a mission to strengthen the relationship between all levels of government through consultation, communication, coordination, and cooperation.

Congress can play a significant role in improving the state-federal relationship, as a more functional and effective state-federal dynamic will benefit our shared constituents through the production of better, more durable and more legally-defensible policy. We are grateful for your continued leadership with respect to this important objective.

The Western Governors' Association (WGA) recently provided the Task Force with specific recommendations for congressional action. We support congressional discussion and consideration of these potential reforms, which build on the *Principles to Clarify and Strengthen the State-Federal Relationship* that several of our organizations have endorsed.

Our organizations are eager to work with the Task Force on legislation to improve intergovernmental collaboration. Please regard our organizations, Governors, states, and counties as resources as you endeavor to make our nation's government more efficient and responsive to its citizens.

Sincerely,

James Ogsbury
Executive Director
Western Governors' Association

Tommie Cline Martin
President
Western Interstate Region of NACo

Matt Morrison
Executive Director
Pacific NorthWest Economic Region

Dr. Laura Nelson
Chair
Western Interstate Energy Board

Tony Willardson
Executive Director
Western States Water Council

Enclosure: WGA Recommendations for Congress: Process Improvements to Build a Stronger State-Federal Relationship

rules, guidance, directives, programs, reviews, plans, budget proposals, budget processes and strategic planning efforts that have either: (1) substantial direct effects on the states or on their relationship with the federal government; or (2) the distribution of power and responsibilities, between the federal government and state governments.	direct states to comment on their actions through the stakeholder process, in the same manner as a member of the public. Or agencies argue that state consultation can be fulfilled through typical notice-and-comment rulemaking, which would otherwise be required by law, and which does not involve any meaningful government-to-government exchange with states.
Consultation Regulations Require all federal departments and agencies, including independent regulatory agencies, to codify in regulation a clear, consistent, and accountable process for state consultation on policies with federalism implications. Such processes should include a remedy for states where agencies fail to do so. These regulations should also require: • Federal agencies to provide written notification to and an invitation to consult with Governors of all potentially-affected states (or their designees) of policies with federalism implications within the area affected by the proposed federal action. • Federal agencies to provide procedures for written response to Governors' or their designees' input prior to a final federal decision. • Federal agency decision-makers to hold regular, ongoing consultation meetings with Governors or their designees regarding policies with federalism implications.	The principles in EO 13132 are helpful in describing how the relationship between states and the federal government should operate. However, the lack of accountability mechanisms in the EO have resulted in infrequent application of these principles by federal agencies. Requiring and ensuring that federal agencies codify the consultation process in regulation will help improve accountability, but so is providing consequences for the failure to do so. Providing accountability mechanisms on individual actions with federalism implications will further ensure that federal agencies continue to comply with constitutional, statutory, and regulatory requirements.
Rulemaking Prior to promulgation of a rule with federalism implications, require federal agencies to: • Ensure that new funds sufficient to pay the direct costs incurred by the state in complying with the regulation are provided by the federal government; and • Provide OMB with a description of the extent of agency's consultation with states, a summary of their input, the agency's	The Regulatory Flexibility Act (RFA) requires agencies to publish regulatory flexibility agendas in October and April of each year that include: (1) a brief description of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities (which include small businesses, small organizations, and small government jurisdictions); (2) a summary of the objectives and legal basis for the issuance of the rule; and (3) an approximate timeline for the rule.[2] Small entities are notified and given an opportunity to comment on the proposed actions.

[2] 5 U.S.C. §602.

response to that input, and any written communications submitted by states. Provide an opportunity for Governors or their designees to review agencies' regulatory agendas.	A similar process should exist for Governors and their designees to be consulted on all policies with federalism implications, including all types of guidance documents and expected rulemakings. Involving states at this early stage would facilitate coordinating regulations, maximizing consultation, resolving conflicts, and involving states in regulatory planning.
Non-legislative Rulemaking/Guidance Require agencies to consult with affected states prior to issuing guidance documents with federalism implications – including memoranda, directives, notices, bulletins, manuals, handbooks, opinions, and letters. Require agencies to develop a transparent and accountable process for determining whether a proposed agency action requires notice-and-comment rulemaking procedures prescribed under Section 553 of the Administrative Procedures Act. Require agencies to publish all existing guidance documents at a single location on their agency's website and publish new and rescissions of guidance documents at the same location on the date they are issued.	To be legally binding, agency rules must be promulgated through notice-and-comment rulemaking. Federal agencies often categorize their proposed rules and regulations as "non-legislative," which are not subject to the requirements of the APA for notice-and-comment rulemaking. This practice precludes transparency in the rulemaking process, as well as the opportunity for the public (in which agencies often include state governments) to provide input to the agency in the development and adoption of rules. Federal agencies are currently required to consult on policies with federalism implications, which include guidance, by EO 13132, but this rarely occurs.
Consistency and Avoidance of Conflicts Require federal agencies to: • Make all reasonable efforts to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs; and • Address and resolve all issues and concerns raised by states, unless precluded by federal law.	Federal agencies should have to document specifically how their regulatory actions seek to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs. They should also consider alternatives in NEPA analysis that would resolve any conflicts and the selection of a preferred alternative that eliminates or minimizes conflicts with state plans, policies, and programs for land use planning.
State Data Require agencies to incorporate state and local data and expertise, subject to existing state requirements for data protection and transparency, into their decisions. This data should include scientific, technical, economic, social, and other information on the issue the agency is trying to address.	Congress is currently focused on streamlining many types of agency decisions. Federal agencies often do not utilize state data in their decision-making or evaluate their decisions against an accurate baseline. Requiring agencies to use existing state data where possible will reduce burdens on federal agencies and potential duplication and result in better-informed decisions.

Settlement Negotiations In settlement negotiations impacting policies with federalism implications, require federal agencies to provide notice of the action to affected states, consult with affected states on any negotiations, and seek state concurrence regarding the settlement.	Agencies are often driven by deadlines or requirements established by litigation or adjudication – not statute or regulation. In negotiations regarding litigation or adjudication that has federalism implications, states are often left out of the process. Involving states in such negotiations would prevent conflicts from arising as the agencies implement the outcomes of those negotiations.
Congressional Oversight Establish a Federalism Office within the White House or reestablish the U.S. Advisory Committee on Intergovernmental Relations to ensure federal agencies meet their federalism obligations. Request a report on existing federalism requirements and/or require regular and ongoing reporting on federalism requirements.	Such an office would work solely on federalism issues and ensure adequate oversight over executive agencies and provide advice to the President. A comprehensive analysis of all requirements on federalism currently applicable to federal agencies would help identify gaps and inform legislation. For example, there is little to no information on how often federal agencies perform federalism assessments pursuant to EO 13132. Either the Government Accountability Office or OMB could conduct this analysis.
Eliminate Perceived Barriers to the State-Federal Relationship	
Recommendation	**Rationale**
***Ex Parte* Communications** Require agencies to revise or establish their *ex parte* rules or policies in accordance with current case law, which permits these communications in informal rulemaking proceedings; and/or exempt communications with states and state officials from the definition of *ex parte* communications.	Many federal agencies have adopted policies which restrict communications with non-agency personnel during the rulemaking process. However, there is no statutory authority or other law that prohibits these communications. Many of the federal policies on *ex parte* communication were hastily adopted in response to overly-restrictive federal case law, which was subsequently overturned.[3] A 2014 report by the Administrative Conference of the United States contradicted the restrictive approach taken by agencies upon reviewing relevant statutes and case law.[4] In addition, there are major discrepancies between federal agencies' policies on *ex parte* communications. For example, the Federal Emergency Management Agency (FEMA) has proposed a rule that requires restrictions on *ex parte* communications for the entire development of a rule: from publication of the notice of proposed rulemaking, until issuance of a final action. The FEMA proposed rule exempts tribal consultation from these

[3] *See Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).
[4] Administrative Conference of the United States, Ex Parte Communications in Informal Rulemaking (May 1, 2014).

	restrictions but makes no similar exception for states.[5] In contrast, the Surface Transportation Board has promulgated a final rule that permits *ex parte* communications in informal rulemaking proceedings.[6] Congress could clarify that communications with sovereigns and co-regulators is exempt from the definition of *ex parte* communications. Restrictions on communications with states throughout the rulemaking process have a chilling effect on consultation and coordination with states. This clarification would ensure consistency in the application of *ex parte* communication policies.
Federal Advisory Committee Act (FACA) Exemptions Exempt all meetings held exclusively between federal personnel and non-federal elected officials (or their designees) acting in their official capacities or in areas of shared intergovernmental responsibilities or administration from FACA.	The Unfunded Mandate Reform Act (UMRA) exempts the following intergovernmental communications from FACA: (1) meetings are held exclusively between federal officials and elected officers of state, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and (2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.[7] A similar exemption is not currently contained in FACA, which creates confusion. The rationale for exempting such consultation from FACA in the UMRA extends to state-federal meetings unrelated to federal intergovernmental mandates. An exemption in FACA will encourage intergovernmental communication, which is an essential element of our system of federalism and is often statutorily required.
Freedom of Information Act (FOIA) Create statutory exceptions to FOIA disclosure for state data and analysis in instances where publication of state data provided to federal agencies would be violation of existing state statutes.	FOIA mandates the disclosure of records held by a federal agency, unless the documents fall within enumerated exemptions.[8] Under FOIA, an "agency record" is a record that is (1) either created or obtained by an agency; and (2) under agency control at the time of the FOIA request.[9] FOIA also does not contain an exemption for data that would otherwise be protected under a state open records act. If a state open records act

[5] Update to FEMA's Regulations on Rulemaking Procedures, 82 FR 26414 (June 7, 2017).
[6] Ex Parte Communications in Informal Rulemaking Proceedings, 83 FR 9222 (March 5, 2018).
[7] 2 U.S.C. §1534(b).
[8] 5 U.S.C. §522.
[9] *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

Investigate and develop solutions for other barriers to state-federal communication presented by FOIA.	prohibits disclosure of certain types of information, that information should not be disclosed except as required by law. There are also concerns that confidentiality agreements between states and federal agencies will not protect state data from disclosure under FOIA. These concerns can prevent states from exchanging valuable state data with federal agencies.
Make the Unfunded Mandates Reform Act (UMRA) Relevant	
Recommendation	**Rationale**
UMRA Threshold Eliminate the $100 million threshold for the application of the UMRA to federal intergovernmental mandates.	Over the past 10 years, only five agency rules have met the threshold of the UMRA for federal mandates that may result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector of $100 million in any one year.[10] A federal mandate is defined as a federal intergovernmental mandate or federal private sector mandate.[11] A federal intergovernmental mandate is defined as a regulation that "would impose an enforceable duty upon State, local, or tribal government" with two exceptions.[12] The application of the UMRA to intergovernmental mandates is limited by the definition of federal mandate and the $100 million threshold. Eliminating the $100 million threshold for federal intergovernmental mandates would require OMB to report to Congress on a greater proportion of federal intergovernmental mandates, providing accountability and requiring agencies to adhere to the UMRA's consultation procedures for more federal intergovernmental mandates.
State Input and Data Require agencies to incorporate state government input and data, including social and economic data, in their qualitative and	Although UMRA currently requires agencies to assess the costs and benefits of a rule to state governments and consult with them on the rule, it does not require agencies to incorporate state input and data into this assessment.

[10] 2017 Draft OMB Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, pp. 36-37.
[11] 2 U.S.C. §1502, incorporating the definitions of 2 U.S.C. §658 by reference.
[12] The definition of "Federal intergovernmental mandate" excludes "a condition of Federal assistance" and "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority" and would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decreases the Federal Government's responsibility to provide funding" in a situation in which the State, local, or tribal governments "lack authority" to adjust accordingly. 2 U.S.C. §658(5).

quantitative assessment of anticipated costs and benefits of qualifying rules under the UMRA.	Adding this requirement will reinforce the need for meaningful consultation, as well as provide more informed assessments with locally-generated data. The UMRA could be amended to require assessments to include state input and data on the costs and benefits of the rule, including social and economic costs.
Consultation on Intergovernmental Mandates Strengthen the consultation requirements for federal intergovernmental mandates.	The current language of the UMRA does not provide a clear standard for what is an "effective process" to permit input from state officials. However, Section 1532 refers to this effective process as consultation.[13] OMB Memorandum M-95-09 specifies that "intergovernmental consultations should take place as early as possible, and be integrated into the ongoing rulemaking process." The UMRA should be amended to specify that an effective process should ensure early, substantive, meaningful, and ongoing consultation with state officials in the development of regulatory proposals containing federal intergovernmental mandates.
Review of Failures to Implement Authorize a court to compel substantive, meaningful consultation with elected officers of state governments if an agency fails to develop or implement the effective process under the UMRA.	A remedy currently exists in the UMRA for an agency's failure to prepare a written statement. However, it does not exist for an agency's failure to allow meaningful input from state governments, despite UMRA's requirement to do so for federal intergovernmental mandates. Providing a remedy for failure to allow meaningful input from states will provide accountability for agencies to make a good faith effort to consult with these governments. The statute's existing limitations on judicial review of the failure to prepare a written statement could extend to the failure to consult.

[13] 2 U.S.C. §1532(a)(5)(A).