Federalism: Previous Initiatives Have Little Effect on Agency Rulemaking

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss H.R. 2245, the "Federalism Act of 1999." The bill addresses a number of issues affecting intergovernmental relations, including the use of federal grant funds, legislative requirements, agency rulemaking requirements, and performance measurement for state-administered federal grant programs. My comments are directed to the agency rulemaking and performance measurement requirements.

I will focus most of my comments on two previous executive and legislative branch initiatives that, like section 7 of the bill, were designed to highlight the impact of federal rules on state and local governments. Our past work showed the limited effect of those previous initiatives during the period of our review, which suggests a need for this section of the proposed legislation. I will also point out a few similarities and differences between the bill and these regulatory reform initiatives. Finally, I will briefly comment on the experience of one agency in cooperatively setting the type of goals and performance measures with states in a federal grant program that are contemplated in section 6 of the bill.

Executive Order and UMRA Had Little Effect on Agencies' Rulemaking Actions

During the past 20 years, state, local, and tribal governments as well as businesses have expressed concerns about congressional and regulatory preemption of traditionally nonfederal functions and the costs of complying with federal regulations. The executive and the legislative branch have each attempted to respond to these concerns by issuing executive orders and enacting statutes requiring rulemaking agencies to take certain actions when they issue regulations with federalism or intergovernmental relations effects. Two prime examples of these responses are Executive Order 12612 ("Federalism") and the Unfunded Mandates Reform Act of 1995 (UMRA).

Few Federalism Assessments Prepared Under Executive Order 12612 Between April 1996 and December 1998

Executive Order 12612, issued by President Reagan in 1987, established a set of fundamental principles and criteria for executive departments and agencies to use when formulating and implementing policies that have federalism implications. The executive order says that federal agencies should refrain from establishing uniform, national standards for programs with federalism implications, and 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 agencies. For example, the order requires the head of each agency to designate an official to be responsible for ensuring the implementation of the order. That official is required to determine which proposed policies have sufficient federalism implications to warrant preparation of a "federalism assessment." The assessment must contain certain elements (e.g., identify the extent to which the policy imposes additional costs or burdens on the states) and must accompany any proposed or final rule submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866.[1] OMB, in turn, is required to ensure that agencies' rulemaking actions are consistent with the policies, criteria, and requirements in the federalism executive order.

In May 1998, President Clinton issued Executive Order 13083 ("Federalism"), which was intended to replace both Executive Order 12612 and Executive Order 12875 ("Enhancing the Intergovernmental Partnership").[2] However, in August 1998, President Clinton suspended Executive Order 13083 in response to concerns raised by state and local government representatives and others about both the content of the order and the nonconsultative manner in which it was developed. Therefore, Executive Order 12612 remains in effect.

To determine how Executive Order 12612 had been implemented in recent years, we reviewed (1) how often the preambles to covered agencies' final rules issued between April 1, 1996, and December 31, 1998, mentioned the executive order and how often they indicated the agencies had conducted federalism assessments under the order;[3] (2) what selected agencies have done to implement the requirements of the order; and (3) what OMB has done to oversee federal agencies' implementation of the order in the

[1]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).

[2]Executive Order 12875, among other things, requires federal agencies to "develop an effective process to permit elected officials of state, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

[3]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 focused our review on executive departments and agencies that are not independent regulatory agencies.

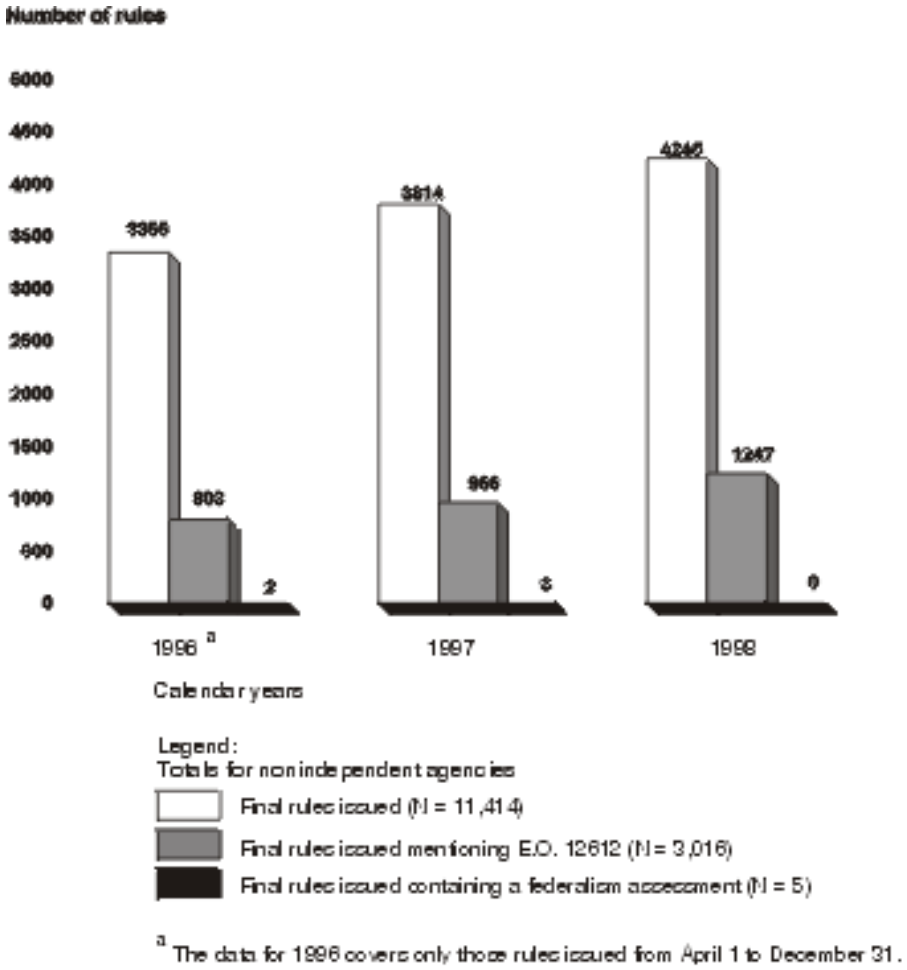
rulemaking process.[4] We focused on the April 1996 through December 1998 time frame because we were able to use our database to identify which rules were "major" under the Small Business Regulatory Enforcement Fairness Act (SBREFA) (e.g., those that have a $100-million impact on the economy). As a result, we cannot comment on rules issued outside of that time frame. Although 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, doing so is a clear indication that the agency was aware of and considered the order's requirements. Also, if an agency prepared a federalism assessment for a final rule, it would be logical for the agency to describe the assessment in the preamble to the rule.

Agencies Prepared Few Federalism Assessments During Review Timeframe

Our work showed that Executive Order 12612 had relatively little visible effect on federal agencies' rulemaking actions during this time frame. To summarize the nearly 3 years of data depicted in figure 1, agencies covered by the order mentioned it in the preambles to about 26 percent of the 11,414 final rules they issued between April 1996 and December 1998.

[4] Federalism: Implementation of Executive Order 12612 in the Rulemaking Process (GAO/T-GGD-99-93, May 5, 1999).

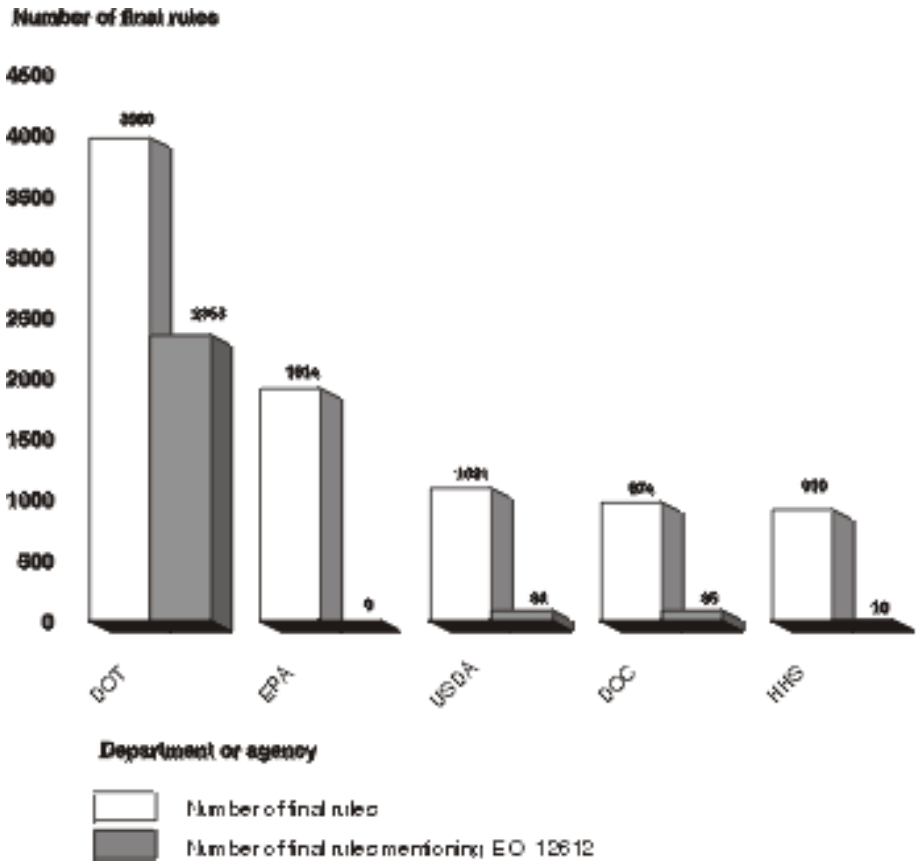
Figure 1: Agencies Indicated Only Five Final Rules Issued Between April 1996 and December 1998 Had Federalism Assessments



Note: The data for 1996 covers only those rules issued from April 1 to December 31.
Source: Federal Register and GAO analysis.

Five agencies issued the bulk of the final rules published during this period—the Departments of Agriculture (USDA), Commerce (DOC), Health and Human Services (HHS), and Transportation (DOT); and the Environmental Protection Agency (EPA). As figure 2 shows, these agencies varied substantially in the degree to which they mentioned the executive order. For example, DOT mentioned the order in nearly 60 percent of its nearly 4,000 final rules, whereas EPA did not mention the order in any of the more than 1,900 rules it issued.

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.

However, mentioning the order in the preamble to a rule does not mean the agency took any substantive action. The agencies usually just 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 fact, the preambles to only 5 of the 11,414 final rules that the agencies issued between April 1996 and December 1998 indicated that a federalism assessment had been done—2 in 1996 and 3 in 1997. Those five rules are listed in table 1.

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

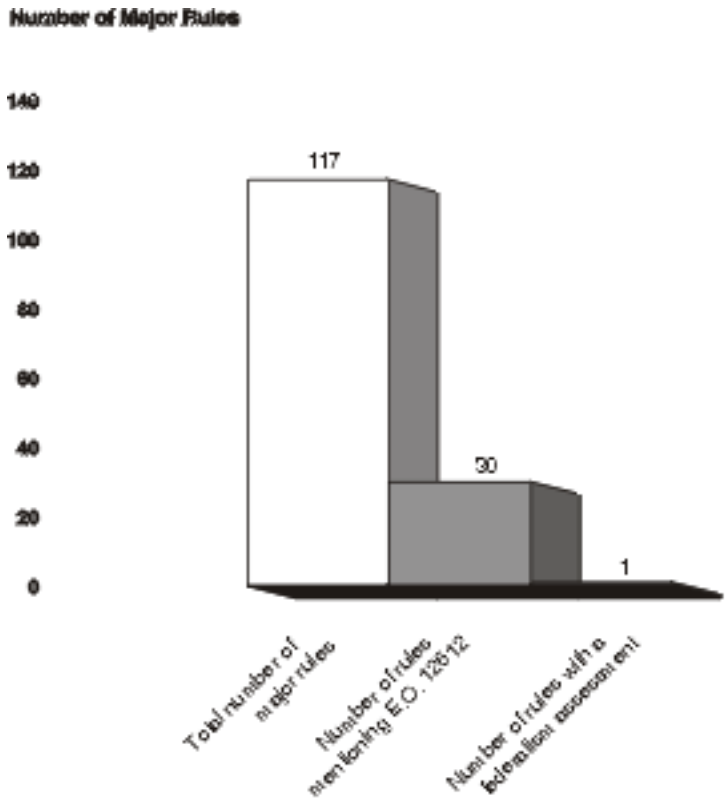
Department or agency	Date final rule was published	Title
Department of Health and Human Services	Aug. 28, 1996	Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents
Department of Transportation	Dec. 16, 1996	Roadway Worker Protection
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.

Many of the final rules that federal agencies issue are administrative or routine in nature, and 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 and that involve or affect state and local governments would seem more likely to have federalism implications that would warrant preparation of an assessment.

However, that does not appear to have been the case. As figure 3 shows, of the 117 major final rules issued by covered agencies between April 1996 and December 1998, the preambles indicated that only 1 had a federalism assessment. The agencies had previously indicated that 37 of these rules would affect state and local governments, and the preambles to 21 of the rules indicated that they would preempt state and local laws in the event of a conflict. At least one of the four state and local government organizations that we consulted during the review said that federal agencies should have done assessments for most of these 117 major rules. In response, the agencies said that their rules did not have sufficient federalism implications to trigger the executive order's requirements.

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



Sources: Federal Register and GAO's major rule database.

EPA Established High Threshold for Federalism Assessments

All three of the agencies we visited during our review (USDA, HHS, and EPA) had some kind of written guidance on the executive order and had designated an official or office responsible for ensuring its implementation.[5] However, the criteria the agencies used to determine whether federalism assessments were needed varied among the agencies. USDA's guidance did not establish any specific criteria, with agency attorneys making their own determinations regarding federalism implications in the context of each rulemaking. HHS' guidance listed four threshold criteria that could be used to determine whether a federalism assessment was required, but said an assessment must be prepared if an

[5]The agencies we visited were those with the most major rules that state and local government representatives believed should have had a federalism assessment.

action would directly create significant effects on states even if the action was mandated by law or the department otherwise had no discretion.

The criteria in EPA's guidance established a high threshold for what constitutes "sufficient" federalism implications—perhaps explaining why none of the agency's more than 1,900 final rules issued during the April 1996 to December 1998 time frame had a federalism assessment. For example, in order for an EPA rule to require an assessment, the agency's guidance said the rule must meet all four of the following criteria:

- have an "institutional" effect on the states, not just a financial effect (regardless of magnitude);
- change significantly the relative roles of federal and state governments in a particular program context, lead to federal control over traditional state responsibilities, or decrease the ability of states to make policy decisions with respect to their own functions;
- affect all or most of the states; and
- have a direct, causal effect on the states (i.e., not a side effect).

At least one of these criteria appeared to go beyond the executive order on which it is based. Although EPA said a rule must affect all or most of the states in order to have sufficient federalism implications to warrant preparation of an assessment, Executive Order 12612 defines "state" to "refer to the States of the United States of America, individually or collectively." (Emphasis added.) EPA's guidance also said that, even if all four of these criteria are met, a rule would not require a federalism assessment if a statute mandates the action or the means to carry it out are implied by statute. 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.

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

OMB officials told us that they had taken little specific action to ensure implementation of the executive order, but said the order is considered along with other requirements as part of the regulatory review process under Executive Order 12866. They said that agencies had 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.

Commenting on the results of our review, the Acting Administrator of OMB's Office of Information and Regulatory Affairs said it was not surprising that agencies were not focused on implementing Executive Order 12612 during the covered time period because they knew that the

order was soon to be revised by Executive Order 13083. However, he also said that Executive Order 12612 had not been implemented to any significant extent by the Reagan Administration "or its successors," suggesting that the lack of implementation was unrelated to any pending revision of the order. In addition, the Acting Administrator said that the primary vehicles for improving federal-state consultation in the past 6 years have been Executive Order 12875 and UMRA. We have not examined the implementation of Executive Order 12875. However, we have examined the implementation of UMRA, and concluded that it has had little effect on agencies' rulemaking activities.

UMRA Had Little Effect on Agency Rulemaking

Title II of UMRA is one of Congress' primary efforts to address the effects of federal agencies' rules on state and local governments. Section 202 of the act generally requires federal agencies (other than independent regulatory agencies) to prepare "written statements" containing specific information for any rule for which a notice of proposed rulemaking was published that includes a federal mandate that may result in the expenditure of $100 million or more in any 1 year by state, local, and tribal governments, in the aggregate, or the private sector. UMRA defines a "mandate" to be an "enforceable duty" that is not a condition of federal assistance and does not arise from participation in a voluntary federal program. For rules requiring a written statement, section 205 requires agencies to consider a number of regulatory alternatives and select the one that is the least costly, most cost-effective, or least burdensome and that achieves the purpose of the rule. Other sections of the act focus even more specifically on the interests of state and local representatives. For example, section 203 states that agencies must develop plans to involve small governments in the development of regulatory proposals that have a significant or unique effect on those entities. Section 204 requires agencies to develop processes to consult with representatives of state, local, and tribal governments in the development of regulatory proposals containing "significant [f]ederal intergovernmental mandates."

Last year, we reported that these and other requirements in title II of UMRA appeared to have had only limited direct impact on agencies' rulemaking actions in the first 2 years of the act's implementation.[6] Most of the economically significant rules promulgated during UMRA's first 2 years were not subject to the written statement requirements of title II. Some did not have an associated notice of proposed rulemaking that triggered the act's requirements. Many did not impose an enforceable duty other than as

[6] Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions (GAO/GGD-98-30, Feb. 4, 1998).

a condition of federal financial assistance or as a duty arising from participation in a voluntary program. Other rules did not result in "expenditures" of $100 million. Because no written statement was required for these rules, the requirements in section 205 regarding the identification and selection of regulatory alternatives were not applicable to these rules. Also, title II of UMRA contains exemptions that allowed agencies not to take certain actions if they determined the actions were duplicative or not "reasonably feasible."

Other provisions in title II also had little effect. During the first 2 years of UMRA's implementation, the requirement in section 204 that agencies develop an intergovernmental consultation process appears to have applied to no more than four EPA rules and no rules from other agencies. EPA generally used a consultation process that was in place before UMRA was enacted. Also, section 203 small government plans were not developed for any of the 73 final rules promulgated during this 2-year period. Officials in the four agencies that we contacted said none of their final rules had a significant or unique effect on small governments.

Section 208 of UMRA requires the Director of OMB to submit an annual report to Congress on agency compliance with UMRA. The fourth such report is scheduled to be delivered within the next few weeks. In his third UMRA report published in June 1998, the OMB Director noted that federal agencies had identified only three rules in the more than 3 years since the act was passed that affected the public sector enough to trigger the written statement requirements. Nevertheless, he said federal agencies had embraced the act's "overall philosophy," as evidenced by the range of consultative activities the report described.

Federalism Act Similar to But Different From Previous Initiatives

On its surface, H.R. 2245 contains several provisions that are similar to requirements in both Executive Order 12612 and UMRA. For example, section 7 of the bill would, if enacted, require agencies to publish "federalism impact assessments" that are somewhat similar in content to the federalism assessments in the executive order and the written statements required by UMRA. All of those assessments and statements require agencies to develop estimates of the costs attendant to the implementation of the regulation at issue. Also, both the bill and the executive order require identification of regulatory provisions that preempt state government authority or functions.

As introduced, the bill would require federalism impact assessments for all proposed and final rules. We understand that the bill may be modified to require, for each such rule, that agencies either certify that the rule does

not have federalism implications or prepare a federalism impact assessment. Neither Executive Order 12612 nor UMRA requires agencies to declare whether each of their proposed and final rules has federalism implications. As I noted previously, UMRA does not apply to most economically significant rules, and the executive order does not require agencies to publish the designated officials' federalism determinations.

If the bill is modified in this manner, this requirement will be similar to a provision in the Regulatory Flexibility Act of 1980 (RFA), which requires agencies to state whether their rules have a "significant economic impact on a substantial number of small entities." Therefore, the implementation of the RFA may prove instructive as to how this portion of the bill will be implemented. For example, according to the Small Business Administration's (SBA) Office of Advocacy, a perennial problem with the implementation of the RFA has been agencies' use of "boilerplate" certifications indicating that their rules do not have a significant economic impact on a substantial number of small entities. Contributing to this problem is the fact that the RFA does not define the terms "significant economic impact" and "substantial number of small entities," and no federal agency is responsible or authorized to define the terms. As a consequence, different agencies have different interpretations of the statute.[7] We have recommended that Congress consider giving SBA or some other entity the responsibility or authority to define key terms in the act.[8] Therefore, applying the lessons of the RFA to the proposed legislation, Congress may want to carefully define what it believes constitutes "federalism implications" or assign that responsibility to some other entity.

Consultation Enhances Intergovernmental Partnership

Finally, I would like to briefly comment on section 6 of H.R. 2245, which says that federal agencies may not include any agency activity that is a state-administered federal grant program in its annual performance plans developed pursuant to the Government Performance and Results Act of 1993 (Results Act) "unless the performance measures for the activity are determined in cooperation with public officials." The bill defines "public officials" as elected officials of state and local governments, including certain organizations that represent those officials (e.g., the National Governors' Association and the United States Conference of Mayors).

[7] Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments (GAO/HRD-91-16, Jan. 11, 1991).

[8] Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements (GAO/GGD-98-36, Mar. 18, 1998).

The Results Act already requires agencies developing their strategic plans to "solicit and consider the views and suggestions of those entities potentially affected by or interested in the plan." The Senate Governmental Affairs Committee report on the Results Act noted that the strategic plan "is intended to be the principal means for obtaining and reflecting, as appropriate, the views of Congress and those governmental and nongovernmental entities potentially affected by or interested in the agencies' activities."

In that regard, we believe that working with state and local governments or their representative organizations to develop goals and performance measures in federal grant-in-aid programs can strengthen the intergovernmental partnerships embodied in those programs. For example, in 1996, we reported on a joint goal and performance measure-setting effort between the federal Office of Child Support Enforcement (OCSE) and state governments.[9] Initially, the federal-state relationship was not so cooperative. In 1994, OCSE specified the performance levels that states were expected to achieve in such areas as the establishment of paternity and collections of child support. State program officials strongly objected to this federal mandate because they did not have an opportunity to participate in the planning process.

Following these initial planning efforts, OCSE sought to obtain wider participation from program officials at the federal, state, and local government levels. OCSE also established task forces consisting of federal, state, and local officials to help focus management of the program on long-term goals. During the planning process, participants agreed that the national goals and objectives would be based on the collective suggestions of the states and that the plan's final approval would be reached through a consensus. For each goal, the participants identified interim objectives that, if achieved, would represent progress toward the stated goal. At the time of our review, OCSE and the states were also developing performance measures to identify progress toward the goals, and planned to develop performance standards to judge the quality of state performance. They created a Performance Measures Work Group to develop statistical measures for assessing state progress toward achieving national goals and objectives. OCSE also encouraged its regional staff to develop performance agreements with states, specifying both general working relationships between OCSE regional offices and state program officials and performance goals for each state.

[9] Child Support Enforcement: Reorienting Management Toward Achieving Better Program Results (GAO/HEHS/GGD-97-14, Oct. 25, 1996).

Overall, OCSE and most state officials that we contacted said the joint planning process strengthened the federal/state partnership by enabling them to help shape the national program's long-term goals and objectives. State and local government stakeholder involvement has also been important in the development of practical and broadly accepted performance measures in other federal programs, including some block grants.[10] We believe that these kinds of intergovernmental cooperation can serve as models for the kinds of efforts that section 6 of the Federalism Act of 1999 seeks to encourage.

Mr. Chairman, this completes my prepared statement. I would be pleased to answer any questions.

Contacts and Acknowledgment

For future contacts regarding this testimony, please contact L. Nye Stevens at (202) 512-8676 or Curtis Copeland at (202) 512-8101. Individuals making key contributions to this testimony included Elizabeth Powell, Joseph Santiago, and Alan Belkin.

[10] Managing for Results: Measuring Program Results That Are Under Limited Federal Control (GAO/GGD-99-16, Dec. 11, 1998); Grant Programs: Design Features Shape Flexibility, Accountability, and Performance Information (GAO/GGD-98-137, June 22, 1998).