

## Summary of Bush Administration Regulations That Preempt State Law (as of January 7, 2009)

This chart lists the federal agencies that attempted to unlawfully preempt state tort law actions, the current status of each proceeding, and the measures needed to address these rules. These rules will need to be addressed by a combination of three actions: (1) January 20, 2009 memo to federal agency heads to stay pending or recently completed rules; (2) revised Executive Order 13132;<sup>1</sup> and (3) re-issuance of a notice of proposed rulemaking.

**(1) Rules requiring Jan. 20, 2009 memo – This will stay all non-final rules and allow the Obama Administration to issue a final rule that repudiates preemption of state tort law.**

### *Food and Drug Administration*

<u>Subject Matter</u>	<u>Citation</u>
Skin bleaching products	71 Fed. Reg. 51146 (2006).
OTC drugs in trial size packages	71 Fed. Reg. 74474 (2006).
OTC analgesics	71 Fed. Reg. 77314 (2006).
Sunscreen products	72 Fed. Reg. 49070 (2007).
Fatty acids	72 Fed. Reg. 66103 (2007).
Pregnancy and lactation labeling	73 Fed. Reg. 30831 (2008).

### *National Highway Traffic Safety Administration*

<u>Subject Matter</u>	<u>Citation</u>
Roof crush resistance <sup>2</sup>	70 Fed. Reg. 49223 (2005); 73 Fed. Reg. 5484 (2008).
Rearview mirrors	70 Fed. Reg. 53753 (2005).
Occupant protection	72 Fed. Reg. 54402 (2007).
Electric-powered vehicles	72 Fed. Reg. 57260 (2007).
Brake hoses	72 Fed. Reg. 57459 (2007).
Platform lifts	72 Fed. Reg. 72326 (2007).
Child restraint systems	73 Fed. Reg. 3901 (2008).
Windshield zone intrusion	73 Fed. Reg. 38372 (2008).
Occupant crash (remove sunset provision)	73 Fed. Reg. 52939 (2008).
Motorcycle brake systems	73 Fed. Reg. 54020 (2008).
Motorcycle helmets	73 Fed. Reg. 57297 (2008).

### *Federal Railroad Administration*

<u>Subject Matter</u>	<u>Citation</u>
Passenger safety equipment standards	72 Fed. Reg. 42016 (2007).
Incident reporting requirements	73 Fed. Reg. 52496 (2008).
Continuous welded rail (inspections)	73 Fed. Reg. 73078 (2008).

<sup>1</sup> However, it is unclear whether courts will rely on a revised Executive Order to undo preemptive regulations.

<sup>2</sup> This rule also may require re-issuance of notice of proposed rulemaking.

*Pipeline Hazardous Materials Safety Administration*

<u>Subject Matter</u>	<u>Citation</u>
Crashworthiness protection of rail cars (joint rule with FRA)	73 Fed. Reg. 17818 (2008).
Enhancing rail transportation security (joint rule with FRA)	73 Fed. Reg. 20752 (2008).

*Department of Homeland Security*

<u>Subject Matter</u>	<u>Citation</u>
Chemical facility anti-terrorism	71 Fed. Reg. 78276 (2006); 72 Fed. Reg. 17688 (2007).

**(2) Rules requiring revised Executive Order 13132 – As explained in Section C of this Notebook, a revised Executive Order on federalism is needed to instruct agencies and courts regarding the Obama Administration’s preemption policies and to set policy where the Bush Administration has promulgated new rules that are now final and that include preemption language in the preamble of the rule. This Executive Order would help to nullify the preemption provisions included in regulatory preambles.**

*Food and Drug Administration*

<u>Subject Matter</u>	<u>Citation</u>
Physician labeling rule	71 Fed. Reg. 3922 (2006).
Noncariogenic sweeteners	71 Fed. Reg. 15559 (2006).
Raw fruits, vegetables, fish	71 Fed. Reg. 42031 (2006).
OTC nasal medication	71 Fed. Reg. 43358 (2006).
Calcium	72 Fed. Reg. 497 (2007); 73 Fed. Reg. 56477 (2008).
Nutrient content claims	72 Fed. Reg. 1455 (2007).
OTC dandruff products	72 Fed. Reg. 9849 (2007).
OTC laxatives	72 Fed. Reg. 14669 (2007).
Dietary sweeteners	72 Fed. Reg. 52783 (2007).
OTC contraceptives	72 Fed. Reg. 71769 (2007).
Skin protectant drug products	73 Fed. Reg. 6014 (2008).
Soluble fiber (coronary heart disease)	73 Fed. Reg. 9938; 73 Fed. Reg. 23947 (2008).
Toll-free number for reporting adverse events on labeling for human drug products	73 Fed. Reg. 63886 (2008).

*National Highway Traffic Safety Administration*

<u>Subject Matter</u>	<u>Citation</u>
Door locks and door retention components	72 Fed. Reg. 5385 (2007).
Electronic stability control	72 Fed. Reg. 17236 (2007); 73 Fed. Reg. 54526 (2008).
Head restraints	72 Fed. Reg. 25483 (2007).
Tire pressure monitoring	72 Fed. Reg. 38017 (2007).
Occupant crash protection	72 Fed. Reg. 40252 (2007).
Side impact protection	72 Fed. Reg. 50900 (2007).

Side impact (electric cars)	72 Fed. Reg. 51908 (2007).
Power-operated windows	73 Fed. Reg. 38338 (2008).
Lamps and reflective devices	72 Fed. Reg. 68234 (2007); 73 Fed. Reg. 50730 (2008).
Occupant crash protection (update to Appendix A)	73 Fed. Reg. 66786 (2008).
School bus passenger seating	72 Fed. Reg. 65509 (2007); 73 Fed. Reg. 62744 (2008).

*Federal Railroad Administration*

<u>Subject Matter</u>	<u>Citation</u>
Railroad operating standards	71 Fed. Reg. 60372 (2006); 73 Fed. Reg. 8441 (2008).
Continuous welded rail	71 Fed. Reg. 59677 (2006).
Electronically controlled pneumatic brakes	72 Fed. Reg. 50820 (2007); 73 Fed. Reg. 61512 (2008).

*Consumer Product Safety Commission*

<u>Subject Matter</u>	<u>Citation</u>
Mattress flammability	70 Fed. Reg. 2470 (2005); 71 Fed. Reg. 13472 (2006).

**(3) Re-issuance of notice of proposed rulemaking – Where the agency’s preemption policy is included in the text of the rule, the agency should withdraw the current rule and re-open the proceeding by issuing a new notice of proposed rulemaking without the preemption language.**

*Food and Drug Administration*

<u>Subject Matter</u>	<u>Citation</u>
Supplemental application labeling rule	73 Fed. Reg. 2848; 73 Fed. Reg. 49603 (2008).

*National Highway Traffic Safety Administration*

<u>Subject Matter</u>	<u>Citation</u>
Designated seating positions	70 Fed. Reg. 36094 (2005); 73 Fed. Reg. 58887 (2008). In the event that the Obama Administration considers this a non-final rule given the pending Petitions for Reconsideration, the Administration can address this rule under Item #1 above.

*Transportation Security Agency*

<u>Subject Matter</u>	<u>Citation</u>
Rail transportation security	71 Fed. Reg. 76852 (2006); 73 Fed. Reg. 72130 (2008).