United States Department of Labor

PRELIMINARY PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES

May 2011

I. Executive Summary of Preliminary Plan and Compliance with Executive Order 13563

The Department of Labor (Department) recognizes the importance of having a formalized system for routine regulatory review and is committed to complying with Executive Order (E.O.) 13563, "Improving Regulation and Regulatory Review" (76 FR 3821). When drafting a rule it is difficult to be certain of its potential costs and benefits. It is often only after a rule takes effect that an accurate assessment of its impact can be made. The Department's Preliminary Plan for Retrospective Regulatory Review is designed to create a framework for the schedule and method for reviewing its significant rules and determining whether they are obsolete, unnecessary, unjustified, excessively burdensome, counterproductive or duplicative of other Federal regulations. With this plan the Department intends to facilitate the identification of rules that warrant repeal, modification, strengthening, or modernization. The Department intends for this plan to work in conjunction with its existing protocols for compliance with Section 610 of the Regulatory Flexibility Act (5 U.S.C. 610), which requires Federal agencies to review regulations that have a significant economic impact on a substantial number of small entities within 10 years of their adoption as final rules.

II. Scope of Plan

This Preliminary Plan describes activities of the following Department agencies, with respect to their existing regulations: Employee Benefits Security Administration (EBSA), Employment and Training Administration (ETA), Mine Safety and Health Administration (MSHA), Office of Federal Contract Compliance Programs (OFCCP), Office of Labor-Management Standards (OLMS), Occupational Safety and Health Administration (OSHA), Office of Workers' Compensation Programs (OWCP), Wage and Hour Division (WHD), and Veterans' Employment and Training Service (VETS).

III. Public Access and Participation

a. Pre-Publication Preliminary Plan Development

On March 16, 2011, the Department launched an interactive website (www.dol.gov/regulations/regreview.htm) to seek public input on the development of the

Preliminary Plan. The website provided a forum in which the public could provide suggestions both on methods for conducting the Department's retrospective review of regulations and on candidate regulations.

On March 21, 2011, the Department published a Request for Information (RFI) in the Federal Register seeking public input to inform development of its Preliminary Plan and providing an opportunity for the public to identify potential regulations to be reviewed (http://www.gpo.gov/fdsys/pkg/FR-2011-03-21/pdf/2011-6576.pdf). The notice requested the public to provide input using the Department's interactive website created specifically for this purpose.

On April 1, 2011, the Department extended the comment period for the RFI to allow an additional eight days for public comment.

In addition to the Federal Register notice, the Department engaged in a variety of activities to reach out to the public. The Deputy Secretary of Labor (Deputy Secretary) announced the launch of the website at a meeting before the U.S. Chamber of Commerce. In addition, the Department's outreach offices, including the Office of Public Engagement and Center for Faith-Based and Neighborhood Partnerships, coordinated efforts to ensure the full range of Department stakeholders were aware of the opportunity and mechanism for providing comments. Specifically, the Department reached out via customized emails and phone calls to leaders at national labor unions; national and regional worker centered organizations; and national and regional faith-based, community, and civil rights advocacy organizations to inform them of the website and to provide brief instructions for how and when to use the site. The outreach effort encouraged national organizations to publicize the opportunity for public comment with their local affiliates, chapters, and networks, thus multiplying outreach capacity.

Further outreach activities were conducted by the Department's Office of Public Affairs, which publicized the opportunity to provide input by issuing a news release, using social media tools and repeatedly highlighting the opportunity in the Department's external electronic newsletter.

The questions on the website were:

- What process should be used to prioritize existing regulations for retrospective review?
- What data or indicators suggest that the estimated costs and benefits of a regulation should be reviewed?
- What strategies exist for increasing the flexibility of regulations?
- How should the department capture changes in firm and market behavior in response to a regulation?
- What regulations should be reviewed due to conflicts or inconsistencies among its agencies or with other federal agencies?
- What regulations could achieve the intended result using less costly methods, technology, or innovative techniques?

- How can DOL best assure that its regulations are guided by objective scientific evidence?
- What DOL regulations, guidance, or interpretations should be considered for review, expansion or modification?

The Department's public engagement efforts resulted in over 940 users registering with the website to provide input and view comments on the Department's regulations. A total of 113 individual recommendations were submitted, and the public provided written feedback on approximately 15% of these recommendations. Registered users cast over 1,440 votes on the recommendations, with the overwhelming majority voting in favor of their peers' submissions.

Public input was primarily aimed at identifying Department regulations, guidance, or interpretations that should be considered for review, expansion or modification. Commenters provided input on a range of Department regulatory activities, with EBSA, WHD, OSHA and ETA regulations receiving the most comments and votes.

Among the popular EBSA topics were electronic disclosure of materials required by the Employee Retirement Income Security Act of 1974 (ERISA) and revising/streamlining notice requirements. Many of the industry commenters suggested that EBSA consider revising its current electronic disclosure standards to facilitate electronic disclosure as a primary mode of communication with plan participants and beneficiaries. Commenters also expressed an interest in having ERISA statutory and regulatory notice requirements streamlined to allow for more consolidated dissemination of various required notices.

WHD commenters were largely interested in Davis-Bacon and Family and Medical Leave Act (FMLA) issues. Davis-Bacon commenters suggested that the Department give more weight to input from contractors when setting the wage rates for contract employees and consider more employer education in lieu of increased enforcement. FMLA commenters expressed a desire to see the regulations amended to account for foreseeable, but unscheduled, intermittent absences.

Commenters involved in OSHA issues discussed regulations and standards governing whistleblower protections; employee training; recordkeeping; accident investigations and coordination with EPA. The OSHA item that received the most votes related to whistleblower protections and recommended a series of enhancements to the existing programs, including increasing the filing time, increasing enforcement and making the filing process more user-friendly. Commenters also suggested that, as a result of new scientific research, OSHA should revisit the Permissible Exposure Limits (PELs) set by its current standards.

Finally, several commenters provided input and recommendations pertaining to the ETA foreign labor certification programs, including the basic labor certification process and the L and H visa programs. Some of the recommendations included allowing amendment of the certification forms for typographical errors; permitting re-advertisement of revised vacancy announcements (after a noncompliance determination) without having to re-file

the application; revisiting the requirement for employers to post two Sunday advertisements for vacancies; and expansion of the circumstances that constitute emergency processing.

Some commenters used the website to submit petitions for rulemaking which, in some instances, the Department had considered previously. For example, one organization submitted a petition to make changes to existing regulations that address the administration of the Energy Employees Occupational Illness Compensation Act (EEOICPA), administered by OWCP. This petition had been previously considered and denied by the agency in 2010.

The Department values the public input received as a result of this process and intends to consider this feedback when finalizing its plans for ongoing regulatory review.

b. Post-Publication Preliminary Plan Development

E.O. 13563 emphasizes the value of public participation in the rulemaking process. To promote participation and transparency, the Department will make this Preliminary Plan available to the public within two weeks of its formal submission to the Office of Management and Budget (OMB). The Department will consider publishing its Preliminary Plan in the Federal Register and at www.DOL.gov.

Because members of the public are likely to have useful information and perspectives, the Department will seek public comment on the plan. Within thirty days after publication of the plan, the Department will launch an interactive website to consult with the public concerning the plan and the rules listed for retrospective review.

After receiving public input, the Department will consider how to revise the Preliminary Plan in ways that are responsive to the public input received. The Department aims to finalize the plan within 80 days of publication of the Preliminary Plan and will make the final plan available to the public through publication in the Federal Register and www.DOL.gov.

IV. Current Agency Efforts Already Underway Consistent with E.O. 13563

a. Summary of pre-existing agency efforts already underway to conduct retrospective analysis of existing rules:

The Department continues to emphasize thoughtful review of its regulatory activities. Twice a year, as part of the development of the Semiannual Regulatory Agenda, the Department conducts an agency-by-agency review of its regulations. Part of this process seeks recommendations from staff in each regulatory agency to their respective agency officials identifying which regulations to include on the agenda, including those that should be reconsidered or revised. Agency officials, in consultation with the Office of the Solicitor and the Office of the Assistant Secretary for Policy (OASP), forward these recommendations to the Deputy Secretary. The Deputy Secretary then meets with

leadership from each regulatory agency to discuss candidate regulations, including items recommended for reconsideration or revision. Regulations are then added to the regulatory agenda for next action, or are withdrawn from the preexisting agenda. The Department's Spring 2011 Regulatory Agenda includes 20 regulatory actions which constitute revisions to existing regulations. Two regulatory actions were withdrawn after analysis of responses to RFIs revealed that no further action should be taken at this time.

In conjunction with its semi-annual Regulatory Agenda, in accordance with Section 602 of the Regulatory Flexibility Act (5 U.S.C. 602), the Department is also required to publish a semi-annual Regulatory Flexibility Agenda. Section 602 requires the Department to publish a brief description of any rules that are expected to have a significant economic impact on a substantial number of small entities. This description must include the objectives and legal basis for the rule, a schedule for completing any rulemakings for which a proposed rule has been published and contact information for an agency official knowledgeable about the rulemaking.

As previously indicated, the Department is also required to comply with Section 610 of the Regulatory Flexibility Act (5 U.S.C. 610), which mandates periodic review of all DOL rules that have or will have a significant economic impact upon a substantial number of small entities. These Section 610 reviews are designed to determine whether rules should be continued without change; or amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of small entities.

DOL has completed a number of Section 610 reviews in recent years, including reviews of OSHA's standards on Occupational Exposure to Ethylene Oxide, Grain Handling Facilities, Excavations, and Presence Sense Device Initiation of Mechanical Power Presses, Lead in Construction, Cotton Dust and Methylene Chloride; and EBSA's regulations on Bonding Rules under ERISA, Enforcement Pursuant to ERISA Section 502(b)(1), Civil Penalties under ERISA Section 502(c)(2), Prohibited Transaction Exemption Procedures, Statutory Exemption for Loans to Plan Participants, and Plan Assets – Participant Contributions.

The 610 Review of OSHA's Cotton Dust standard led to the issuance of a direct final rule to revise the standard. This change allows cotton textile mills, many of which are small businesses pursuant to the Small Business Administration's definition, to choose an option that would reduce their costs to comply with the standard. Specifically, this revision adds one additional method of washing cotton to the methods the rule already permits employers to use to achieve partial exemption from the cotton dust standard.

The review of EBSA's Plan Assets – Participant Contributions regulation resulted in a final amendment to the participant contribution regulation establishing a safe harbor under which employers with plans with fewer than 100 participants will be deemed to have made a timely deposit to their plan if participant contributions are deposited within 7 business days. As explained in the preamble to the final rule, the safe harbor will provide employers with increased certainty that their remittance practices, to the extent

that they meet the safe harbor time limits, will be deemed to comply with the regulatory requirement that participant contributions be forwarded to the plan on the earliest date on which they can reasonably be segregated from the employer's general assets. This increased certainty will produce benefits to employers, participants, and beneficiaries by reducing disputes over compliance and allowing easier oversight of remittance practices.

The majority of the Department's recent Section 610 reviews have determined that the regulations do not have a significant impact on a substantial number of small entities within the meaning of Section 610; however, the Department has taken steps to address issues raised by commenters, including revising compliance assistance materials and reconsidering issues raised that affect other regulations. The Department will continue to complete 610 reviews, as required and utilize the results of reviews to enhance regulations, as appropriate.

There also have been extensive initiatives on the part of individual agencies within the Department to maintain a culture of retrospective review and to make deliberate efforts to review the effectiveness of regulations. For example, OSHA's effort to improve standards began in the 1970s, not long after it issued the first set of standards. In 1973, OSHA issued proposals to clarify and update the rules that were initially adopted on May 29, 1971 (36 FR 10466). In 1978, OSHA published a rulemaking titled, "Selected General and Special (Cooperage and Laundry Machinery, and Bakery Equipment) Industry Safety and Health Standards: Revocation" (43 FR 49726, October 24, 1978). Commonly known as the "Standards Deletion Project," this rule revoked hundreds of unnecessary and duplicative requirements in the general industry standards at 29 CFR 1910. Another rulemaking in 1984 titled, "Revocation of Advisory and Repetitive Standards" (49 FR 5318, February 10, 1984) resulted in the removal of many repetitive and unenforceable requirements. These rulemaking actions primarily removed standards that were: not relevant to worker safety (*i.e*., the standards addressed public-safety issues); duplicative of other standards found elsewhere in the general industry standards; considered "nuisance" standards (*i.e.,* having no merit or worker safety or health benefits); or legally unenforceable.

In recent years, MSHA also engaged in a review, which assessed all of the agency's regulations contained in Title 30 of the Code of Federal Regulations. MSHA also conducted a review designed to eliminate the need for mine operators to submit petitions for modification. Both of these projects resulted in changes to regulations which improved regulations and eliminated some burdens for mine operators.

Another example of existing retrospective review actions can be found within OFCCP. When creating its robust 2010 and 2011 regulatory agendas, OFCCP sought public input on the effectiveness of its existing regulations. It also coordinated with various stakeholders within the Department to reasonably ensure that their efforts were appropriately managed, not duplicated, and minimized any burden created for the regulated community. Using a collaborative and cross-cutting process, OFCCP formed a departmental work group that included the Office of the Solicitor, the Women's Bureau, ETA's Office of Apprenticeship and the Office of the Assistant Secretary for Policy.

This group examined the existing construction regulations and identified areas where the regulations are outdated, or should be clarified or strengthened.

Public input on the usefulness of this and other existing OFCCP regulations was gathered through the strategic use of public speaking engagements, Town Hall meetings, Webinars and Web chats or Web Listening Sessions. In FY 2010, more than 2,600 people participated in OFCCP Web Listening Sessions on three existing regulations. Town Hall meetings were held on the usefulness and burden of existing OFCCP regulations in three major U.S. cities: Chicago, San Francisco, and New Orleans. Through these outreach efforts, OFCCP gained insight into the need for regulatory action, including the extent to which existing regulations are ineffective, insufficient, or overly burdensome. As a result, three existing regulations are in various stages of the regulatory process, and OFCCP also has proposed to rescind its "Interpretive Standards for Systemic Compensation Discrimination (Compensation Standards) and Voluntary Guidelines for Self-Evaluation of Compensation Practices (Voluntary Guidelines)."

Another example is EBSA's Regulatory Review Program under which EBSA periodically reviews its regulations to determine whether they need to be modified or updated to take into account technology, industry, economic, compliance and other factors that may adversely affect their continued usefulness, viewed with respect to either costs or benefits.

b. Rules currently under consideration for retrospective analysis:

The Department identified a number of regulations for potential review. Revisions to these regulations are expected to result in reduced burden to the regulated community. Among the items identified are:

Administering Agency	Regulation
EBSA	Abandoned Plan Regulations
	Prohibited Transaction Exemption Procedures
MSHA	Criteria and Procedures for Proposed Assessment of Civil Penalties
	Revising Electrical Product Approval Regulations
OLMS	Labor Organization Officer and Employee Report (Form LM-30)
OSHA	Standards Improvement Project III
	Standards Improvement Project IV
	Hazard Communication
	Safety-case for Oil and Gas

Signature Burden-Reducing Retrospective Review Projects

OSHA

Standards Improvement Project III

OSHA has published an NPRM that continues its efforts to remove or revise duplicative, unnecessary, and inconsistent safety and health standards. This effort builds upon the success of the Standards Improvement Project (SIP) Phase I published on June 18, 1998 and Phase II published on January 5, 2005. OSHA believes that such changes can reduce compliance costs and reduce the paperwork burden associated with a number of its standards.

Standards Improvement Project IV - Construction

OSHA plans to add a new item to its regulatory agenda, Phase IV of the Standards Improvement Project (SIP), which will focus on removing or revising construction industry standards that are: outdated, duplicative, unnecessary, or inconsistent. Previous General Industry SIPs have addressed both safety and health topics. This is the first time the Agency will address its construction standards through this popular project. As an initial step, OSHA will issue a request for information to solicit stakeholder input.

These rulemakings have been successful at reducing the burden to employers without diluting existing protections for employees. To date OSHA estimates that the SIPs rulemakings have collectively saved employers $63.72 million per year (2010 dollars) (SIP I - $11.69MM; SIP II - $7.03MM; and SIP III - $45MM). In previous rulemakings, OSHA's modifications included eliminating outdated record-storage and transfer requirements, removing redundant written training-certification requirements, and updating acceptable consensus standard alternatives. OSHA anticipates that benefits to general industry will also be realized through updating construction standards. As SIP IV is a new project, it is impossible to project the estimated burden reduction at this time.

Hazard Communication/Globally Harmonized System for Classification and Labeling of Chemicals

The proposed modifications in its NPRM concerning the HCS are expected to benefit employers in two primary ways. First, the harmonization of hazard classifications, safety data sheet (SDSs) formats, and warning labels will also yield substantial savings to businesses. On the producer side, fewer different SDSs will have to be produced for affected chemicals, and many SDSs will be able to be produced at lower cost due to harmonization and standardization. Second, for users, OSHA expects that they will see reductions in operating costs due to the decreased number of SDSs, the standardization of SDSs that will make it easier to locate information and determine handling requirements, and other factors related to simplification and uniformity that will improve workplace efficiency. Finally, OSHA estimates that the revisions to the HCS will result in reductions in the cost of training employees on the HCS in future periods because standardized SDS and label formats will reduce the amount of time needed to familiarize

employees with the HCS and fewer systems will have to be taught since all producers will be using the same system.

OSHA's preliminary estimate is that establishing a harmonized system for the classification and labeling of chemicals will create a substantial annualized savings for employers ranging from $585 million to $798.4 million. The majority of these benefits will be realized through increases in productivity for health and safety managers as well as for logistics personnel with savings ranging from $472 million to $569 million. Simplifying requirements for hazard communication training are estimated to provide savings up to $285.2 million. Additionally, establishing uniform safety data sheets and labels will save between $16 million and $32.2 million.

MSHA

Revising Electrical Product Approval Regulations

Aside from minor modifications, the existing regulations have been unchanged since 1968. As technology has progressed, it has become more difficult for manufacturers of electrical products to easily understand how to comply with existing rules for obtaining MSHA approvals. MSHA plans to propose revisions to improve the efficiency of the approval process, recognize new technology, add quality assurance provisions, incorporate existing approval policies into MSHA regulations, clarify existing policies and procedures, and reorganize portions of the approval regulations. MSHA anticipates that this streamlining and updating effort would make the process easier for manufacturers and others submitting products for approval. This effort will enhance the ability of regulated entities to understand and compile the information MSHA will need and to submit applications that require fewer requests for supplemental information from MSHA. Improved initial application submissions would result in fewer submissions returned to the applicant, fewer e-mails and phone calls between MSHA and the applicant, fewer test failures, and shorter time for MSHA actions. In addition, communications and tracking systems, as well as proximity detection systems, could be approved more quickly than they currently are. MSHA preliminary estimates that this proposed rule would result in a 20 percent reduction in letters and emails from applicants, a 20 percent reduction in submissions returned to the applicant, and a similar reduction in Agency processing time. The proposed rule would reduce and improve both manufacturer and MSHA efficiency, including quality of work actions, related to approval of electrical products for use in underground mines. MSHA anticipates that this 20% reduction could result in a $500,000 - $1.0 million savings to equipment manufacturers.

EBSA

Amendment of Abandoned Plan Program

In 2006, the Department published a regulation that facilitates the termination and winding up of 401(k)-type retirement plans that have been abandoned by their plan sponsors. The regulation establishes a streamlined program under which plans are terminated with very limited involvement of EBSA enforcement offices. EBSA now has more than 4 years of experience with this program and believes certain changes would improve the overall efficiency of the program and increase it usage.

EBSA plans to propose revisions to reflect recent changes in the US Bankruptcy Code that would expand the program to include plans of businesses in liquidation proceedings. The Department believes that this expansion has the potential to substantially reduce burdens on these plans and bankruptcy trustees. Plans of businesses in liquidation currently do not have the option of using the streamlined termination and winding-up procedures under the program. This is true even though bankruptcy trustees, pursuant to the Bankruptcy Code, can have a legal duty to administer the plan. Thus, bankruptcy trustees, who often are unfamiliar with applicable fiduciary requirements and plan-termination procedures, presently have little in the way of a blueprint or guide for efficiently terminating and winding up such plans. Expanding the program to cover these plans will allow the responsible bankruptcy trustees to use the streamlined termination process to better discharge its obligations under the law. The use of streamlined procedures will reduce the amount of time and effort it ordinarily would take to terminate and wind up such plans. The expansion also will eliminate government filings ordinarily required of terminating plans. Participation in the program will reduce the overall cost of terminating and winding such plans, which will result in larger benefit distributions to participants and beneficiaries in such plans.

EBSA preliminarily estimates that approximately 165 additional plans will benefit from the amended abandoned plans regulation and accompanying class exemption. EBSA expects that the cost burden reduction that will result from this initiative will be approximately $1.12 million.

Please note that this preliminary estimate only reflects short-term burden reduction costs for bankruptcy trustees to terminate abandoned plans under the rule. EBSA expects substantial benefits will accrue to participants and beneficiaries covered by abandoned plans, because their account balances will be maximized for two primary reasons. First, prompt, efficient termination of these abandoned plans will eliminate future administrative expenses charged to the plans that otherwise would diminish plan assets. Second, by following the specific standards and procedures set forth in the rule, the Department expects that overall plan termination costs will be reduced due to increased efficiency.

Other Burden-Reducing Retrospective Review Projects

EBSA

Prohibited Transaction Exemption Procedures

In issuing an NPRM, EBSA has determined that this 20-year old procedural rule governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of ERISA, the Internal Revenue Code, and the Federal Employees' Retirement System Act can be significantly improved to promote the efficiency, integrity and transparency of this process. The proposed regulation will update the procedure to reflect changes in the Department’s exemption practices since the

current procedure was implemented in 1990. The proposed procedure should facilitate the consideration of all exemption applications by clarifying the types of information and documentation generally required for a complete filing. It also will reduce burdens by affording expanded opportunities for the electronic submission of information and comments relating to an exemption (i.e., applicants may electronically submit their exemption applications and interested persons commenting on a proposed exemption may electronically submit their comments).

MSHA

Criteria and Procedures for Proposed Assessment of Civil Penalties

MSHA plans to propose a revised process for proposing civil penalties. Congress intended that the imposition of civil penalties would induce mine operators to be proactive in their approach to mine safety and health, and take necessary action to prevent safety and health hazards before they occur. MSHA believes that the procedures can be revised to improve the efficiency of the Agency's efforts and to facilitate the resolution of enforcement issues. The proposed efficiencies of this rule may reduce burden by facilitating the assessment of civil penalties and the resolution of enforcement issues.

OLMS

Labor Organization Officer and Employee Report (Form LM-30)

In issuing an NPRM, the Department stated an intent to review questions of law and policy related to changes made to the Form LM-30 in 2007. The Form LM-30 (Labor Organization Officer and Employee Report) is required by the Labor-Management Reporting and Disclosure Act (LMRDA). The proposed revision would simplify the Form LM-30, reducing the number of pages from nine to two. Also, under the proposed rule, labor organization stewards will not have to complete the form and bona fide loans will not have to be reported.

OSHA

Safety-case for Oil and Gas

OSHA is studying the potential benefits and challenges of reforms to the Agency's approach for assessing oil and gas sector safety. Specifically, this project would assess the effectiveness of using a strategy referred to internationally as a safety-case approach. In consultation with the public and regulated community, OSHA plans to assess the costs, benefits, timelines, and challenges of incorporating aspects of a safety-case approach into its oil and gas sector safety regulations.

V. Elements of Preliminary Plan/Compliance with E.O. 13563

a. Development of a strong, ongoing culture of retrospective analysis:

In order to enrich the current culture of retrospective analysis, the Department will use its existing Regulatory Council, which includes cross-agency leadership, to promote methods for conducting and enhancing retrospective reviews. These measures may

include the development of best practices for regulatory design and composition that facilitate evaluation of their consequences and promote retrospective analysis. To the extent consistent with law, the Department may give careful consideration to how best to promote empirical testing of the effects of rules both in advance and retrospectively.

In addition, during semiannual regulatory agenda planning periods, Department leadership will continue to ask agency officials to review existing regulations to determine whether items are candidates for retrospective review. The regulatory agenda planning process already emphasizes identification of candidates for review under Section 610 of the Regulatory Flexibility Act. DOL leadership will expand this process to incorporate identification of candidates for review under E.O. 13563. The Department also leverages the expertise of its Chief Evaluation Officer and uses evaluations of its programs to support the examination of current and proposed regulations.

Strengthening the culture of retrospective analysis may also include specific consideration of resource allocation for the Department's regulatory agencies. Management and budgeting discussions may consider the alignment of retrospective review within the Department's regulatory priorities.

b. Prioritization. Factors and processes that will be used in setting priorities:

The Department's agencies are charged with a wide variety of responsibilities related to protecting the health, safety, security, and equity of American workers. Because both the statutory authorities and, in many instances, the entities that the Department's agencies regulate are distinct, the factors and processes used to prioritize regulations for review will depend, to a certain extent, on the regulatory responsibilities of the particular agency. Also, many of the Department's agencies administer and enforce regulations related to various worker protections, while other agencies use regulations to administer programs, defined by Congress in statute, and only apply to grantees or sub-grantees. As a result of these differences, and differences in the availability of resources, not all factors and processes for prioritization of regulatory review will apply equally to each regulatory agency. Agencies may consider a variety of factors and processes, including:

Stakeholder input. Stakeholder input is a factor used by many of the Department's agencies to identify candidates for regulatory review. Agencies use a variety of methods to obtain stakeholder input. Recent examples of such public engagement include Webinars and Town Hall and stakeholder meetings held by OFCCP and ETA. In addition, OLMS, VETS and OSHA have published RFIs that were designed to solicit public perspectives on how regulations can be strengthened to better protect workers while minimizing burdens on the regulated community.

In addition, some Department agencies have Federal Advisory Committee Act-sanctioned Advisory Boards, which also provide valuable input on the regulatory process from key stakeholder populations. For example, EBSA has been helped in its reform efforts by the Department's ERISA Advisory Council.

In addition to the broad public participation solicited from online or published requests, Department agencies also meet face-to-face with their stakeholders. Through these interactions, agencies can gain significant feedback on regulations, and whether regulations are working or are in need of revision. For example, OSHA has held meetings with stakeholders to solicit ideas for revising its regulations. Stakeholders have submitted petitions for rulemaking to MSHA. Front-line staff in regional and district offices often receive direct input from stakeholders charged with administering programs governed by, or work in a context governed by regulations. These staff may make recommendations to senior management.

Impact on small businesses. As previously indicated, the Department takes seriously its obligations under section 610 of the Regulatory Flexibility Act (RFA). The RFA requires Federal agencies to review regulations that have a significant economic impact on a substantial number of small entities within 10 years of their adoption as final rules. As a routine part of its regulatory agenda development process, the Department's agencies revisit those final rules that have an impact on small businesses and select, as appropriate, candidates for review under section 610. The Department's Spring 2011 regulatory agenda will include a section 610 review of OSHA's standard on Bloodborne Pathogens. The Department will continue to use section 610 requirements as a factor in its retrospective regulatory review procedures.

Age of the regulation (date promulgated). The age of a regulation can be relevant to prioritizing regulatory review in several ways. Relatively recent regulations may not be ripe for review. Relatively old regulations may be out-of-date and prime candidates for review, particularly if the regulated activity or industry has been affected by technological changes that impact safety or compliance. Similarly, regulations based on or referencing industry consensus standards may not have kept pace with revisions to these consensus standards. As previously indicated, Section 610 of the Regulatory Flexibility Act requires review of rules with a significant economic impact on a substantial number of small entities within ten years of publication. As such, these rules are monitored to ensure that reviews are completed within the required timeframes.

Because regulations that were promulgated prior to 1980 generally were not subjected to an economic analysis, it is often difficult to determine, through retrospective analysis, the current costs and benefits of the regulation compared to what was anticipated. As a result, their review may be more challenging and resource intensive. The lack of previous analysis does not mean that a regulation published before 1980 should not be reviewed, but it does mean that the analysis for these older regulations would require more effort than an analysis of a more recently published regulation, where a baseline analysis exists.

Number of entities/workers affected. Another factor that the Department may consider when prioritizing regulations for review is the number of entities or workers affected by a regulation. The number of workers affected provides a measure of the importance of a regulation. Regulations that affect a larger number of regulated entities or workers may be prioritized as a part of a retrospective review.

Evidence of Non-compliance. Compliance data may also signal a need to review a regulation. Compliance data will be reviewed over time to identify what elements of the standards have been cited most frequently and to determine whether non-compliance is related to confusion regarding how to comply, inability to comply, or willful noncompliance. Administrative data from across the Department will be available through a planned procurement in FY11 that will aid these types of efforts. Compliance data may be analyzed in a number of ways, depending on the regulation. The Department may track the seriousness of the violations and the size or type of regulated entity cited. The citation rates for specific paragraphs or subparagraphs may be analyzed to determine if there are aspects of the regulation that are frequently violated.

Frequent citations for violation of a regulation could indicate that the regulation is difficult to understand, costly to comply with, or viewed by the regulated community as discretionary. One measure of the extent of non-compliance may be the number of violations/citations generated during inspections or investigations. Where there are high-citation frequencies, regulations may merit examination to determine why compliance is poor.

On the other hand, a regulation that has no citations may be one that no longer applies or that regulated entities may follow only as a matter of course. Regulations that are rarely, if ever, cited may merit examination to determine if they are still necessary.

Relationship of Regulations to Accidents, Injuries, Security or Equity. Data concerning accident or injury rates also may indicate regulations that are ripe for review. This analysis may determine the extent to which the standard has been effective in reducing worker injuries, illness, and fatalities. A high number of accidents, fatalities, or injuries may be a symptom of the highly dangerous nature of the industry or activity that is being regulated, or it may also indicate that the regulation is inadequate or that compliance with the regulation is a problem. A regulation may be selected for review to determine whether it is reducing risk, if the risk reduction is sufficient, and, if not, why it is not sufficient. If fatalities or injuries that are associated with a safety or health regulation have decreased significantly, the regulation may be working as intended.

Furthermore, this analysis may require data analysis to link reported injuries, illness, and fatalities to a specific standard. To the extent feasible, accident data over time will be collected and reviewed to determine what, if any, regulatory revisions are necessary. Although it is possible to associate particular standards with accidents, attributing a decline or increase in accidents to a specific standard is more difficult because most accidents involve multiple failures. Consequently, accident data may provide suggestive evidence of effectiveness or ineffectiveness, but are unlikely to support definitive claims in either direction. Associating a regulation with impacts on health effects is even more problematic because of the length of time between exposures and the onset of illness.

Paperwork associated with a regulation. Regulations that impose a high level of recordkeeping or reporting may be candidates for revision if the recordkeeping could be

reduced without compromising worker safety, health or other protections, or affecting the enforceability of the rule and the transparency of compliance. Various agencies within the Department have considered or are considering whether the paperwork burden for certain regulations could be reduced by adding the option for electronic reporting and recordkeeping. For example, several years ago, OSHA's review of the Personal Protective Equipment Standard's paperwork package questioned the practical utility of training certifications in the standard. As a result of OSHA's thorough review of the paperwork package, these paperwork items have been proposed for removal in the OSHA's current Standards Improvement Project (SIP-III) proposed rulemaking. Generally, however, reducing paperwork burden alone would not justify a review unless the burden could be reduced without undermining enforceability. As another example, in January 2010 EBSA converted to an all-electronic annual return/report filing system (EFAST2). EFAST2 was designed to simplify and expedite the submission, receipt, and processing of annual returns/reports (Form 5500), which are required to be filed each year by employee benefit plans subject to reporting requirements under ERISA and the Internal Revenue Code. As a result of EFAST2, the Federal government and public for the first time have real time, online access to financial information about private-sector employee benefit plans.

Petitions for modification or exemption. Certain Department agencies are permitted to consider requests from the regulated community for exemptions from complying with a particular regulation or regulatory requirement. These agencies currently review modification petitions and exemption requests to determine whether regulations should be revisited and/or revised. When conducting such reviews, agencies consider whether the action proposed by the petitioners provides protections that are as effective as the protections afforded to workers under the existing regulation.

For example, under Section 101(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 811(c)), upon receipt of a petition by the operator or the representative of miners, the Secretary of Labor (Secretary) may modify the application of any mandatory safety regulation to a mine if the Secretary determines that an alternative method to regulation exists for achieving the desired result, which also guarantees no less than the same measure of protection afforded the miners of the mine by the regulation. This provision has been used extensively in coal mines to identify safety regulations that can be modified to relieve the burden on mine operators without reducing protection of miners. Similarly, under title I of ERISA, employee benefit plans, employers, and other persons can make petitions or requests for exemptions or modifications from otherwise applicable statutory or regulatory requirements governing employee benefit plans.

Technological advances and new scientific research. Technological advances and new scientific research also may affect prioritization of regulations for review. An agency may become aware of technological innovations that will impact compliance with a regulation or new research may cause an agency to reconsider compliance standards within an existing regulation. For example, recent health studies have caused the Department to reconsider its regulations governing occupational exposure to various substances found in the workplace. The overall goal of these efforts is to examine

different approaches (both regulatory and non-regulatory) that may be used to address exposure issues while ensuring the highest level of worker protection.

Transparency and Clarity. As a part of the Department's efforts to ensure high levels of transparency within its rulemaking processes, agencies will be encouraged to review regulations in order to identify provisions that have proven confusing, inconsistent, or duplicative. For example, OWCP published proposed FECA regulatory revisions (20 CFR Parts 1, 10, and 25) to improve the clarity of that regulation.

Recently, various agencies have undertaken regulatory review projects that are designed to help employers and other regulated entities better understand their obligations, ensure employee safety and health, improve compliance while also reducing compliance costs, or enhance the overall transparency of the regulation. OSHA's Standards Improvement Project (SIP) also removes or revises requirements within rules that are confusing, outdated, duplicative, or inconsistent. OSHA believes that improving these standards helps employers to better understand their obligations, ensure employee safety and health, and improve compliance while also reducing compliance costs. OSHA identifies potential candidates for the SIP based on an internal review of its standards by national office and field staff, suggestions and comments from the public, and recommendations from the Office of Management and Budget.

In another example of prioritizing transparency and clarity in conducting retrospective reviews of regulations, OSHA has undertaken a multi-year effort to update references to numerous consensus standards and industry standards used in its regulations. In general, consensus standards updates are non-controversial and have no additional economic impact beyond what was estimated in the original regulation. Nonetheless, the project shows an on-going commitment to recognizing current technology, procedures and industry practices.

c. Transparency of review.

In order to ensure that the Department's retrospective reviews of regulations are transparent, accessible to the public, and conducted in such a way that outside researchers can replicate any analyses that are conducted, some agencies may publish notices in advance of the review informing the public of their plans to conduct a retrospective review. The semi-annual Regulatory Agenda will also give notice of planned retrospective reviews, including those conducted in accordance with Section 610 of the RFA. Retrospective reviews will be published for public comment. Studies and related scientific research relied on in the evaluation of the regulations will be published as part of the record. Outside researchers, along with other members of the public, would be encouraged to participate in the notice and comment process.

d. Structure and Staffing.

The Department's Deputy Secretary, Seth Harris, is responsible for the regulatory retrospective review process. In addition, the Office of the Assistant Secretary for Policy

facilitates this process by collecting data for preparation of the regulatory agenda and reports to the Deputy Secretary and coordinating the work of the Regulatory Council. These efforts are led by the Assistant Secretary for Policy, supported by the Associate Assistant Secretary for Policy and career staff.

In addition, agency heads are responsible for proposing regulatory priorities, including the selection of regulations for retrospective review, for presentation to the Deputy Secretary. Career staff and contractors support these efforts.

e. Department mechanism for ensuring the independence of regulatory retrospective review process from the offices responsible for writing and implementing regulations:

The Deputy Secretary's responsibility for overseeing the regulatory retrospective review process ensures its independence from offices responsible for writing and implementing regulations. In addition, OASP, which coordinates the preparation of the regulatory agenda and facilitates retrospective review processes, does not have primary responsibility for writing and implementing regulations. Instead, OASP is responsible for monitoring agencies' regulatory production and reporting to the Deputy Secretary.

Although staff within OASP participate occasionally in writing regulations, they report to the Assistant Secretary for Policy rather than officials within the agency primarily responsible for writing the regulation. In addition, their primary responsibility is assessing quality and timeliness rather than drafting of regulatory language or implementing it.

f. Strengthening internal review expertise:

To strengthen internal review expertise, the Department will consider using its existing Regulatory Council to develop a best practice series of retrospective review procedures among the Department's regulatory agencies. Through this best practice series, the Regulatory Council will identify agencies that have developed particularly successful internal processes for prioritizing regulations for retrospective review, designing regulations to facilitate review, reducing burden while meeting Departmental objectives, or developing specific metrics for measuring the effectiveness of regulations. The Regulatory Council may then consider the extent to which these best practices can be modeled and replicated in other agencies in the Department.

In addition, agencies may consider training and consultation with organizations outside of the Department, such as the newly reconstituted Administrative Conference of the United States and the Small Business Administration's Office of Advocacy. Agencies also may consider working with academics to assess the effectiveness of existing regulations and retrospective analysis procedures and funding retrospective analysis through contractors.

g. Plans for retrospective analysis over the next two years, and beyond:

The Department will plan for retrospective analysis at the highest levels of leadership. In addition, the Department is committed to emphasizing the importance of routine regulatory review. This commitment will be filtered down to the agency level during data calls for the Semiannual Regulatory Agenda. The Deputy Secretary will continue to meet with agency heads during the agenda development process to discuss their agenda and plans for reviewing regulations.

In addition, plans for retrospective analysis will be discussed among agency heads at Departmental management meetings in the context of aligning individual agency efforts with the Department's overall mission and goals. Retrospective review planning and coordination will also occur through meetings of regulatory managers at Regulatory Council meetings.

The Department also intends to evaluate its experience gathering public input on regulatory review through the interactive website and will develop a long-term protocol for accepting and reviewing public comments on regulations that should be reviewed. Once a process is finalized, DOL will use a variety of methods, including Federal Register publication, social networking sites and other targeted messaging systems to inform the public of the opportunity to provide ongoing recommendations.

h. Plans for revisiting and revising rules:

The Department will continue to undertake regulatory review at least twice annually, as part of its development of the Regulatory Agenda (which annually includes the Regulatory Plan). At the agency level, agencies will continue to refine and enhance their existing protocols for review of regulations and the prioritization of those that should be reviewed and updated, reflecting plans to update regulations in the Regulatory Agenda.

In addition, the Department's plans for revisiting and revising rules include consideration of specific comments provided by the public during the development and refinement of this Preliminary Plan. As discussed previously, the Department launched an interactive website to seek public input on processes for conducting retrospective review as well as identification of specific regulations for review. After this Preliminary Plan is published, the Department will provide another opportunity for public participation.

The Department will consider how to incorporate suggestions made during these public comment periods into its review process. In addition, the Department will consider the suggestions made for review of specific regulations.

i. Coordination of rulemaking with other federal agencies that have jurisdiction or similar interests:

Within the Department, regulatory agencies work cooperatively to ensure alignment of rulemaking activities. To the extent possible, agencies use a team model to develop and review regulations of common interest.

Where Department agencies share jurisdiction or regulatory responsibility with Federal agencies outside of the Department, the Department will continue to encourage the establishment and maintenance of strong working relationships between the Department and those sister agencies, both at the staff and senior management levels. These strong working relationships will facilitate the exchange of information in an effort to prevent duplicative and inconsistent standards. The Department will also work with the Office of Management and Budget to make appropriate cross-Departmental connections.

VI. Components of Retrospective Cost-Benefit Analysis

a. Metrics that the Department will use to evaluate regulations after they have been implemented:

The Department may use different metrics that are appropriate to different regulations. For example, some agencies may use metrics based on the costs and benefits anticipated for the regulations to evaluate the effectiveness of the regulation. For example, reductions in the number of fatalities, work days lost, or hours spent on paperwork may be evaluative metrics.

In addition, the Department may continue to consider methods for refining the metrics that it uses and methods for incorporating metrics into the design of regulations to facilitate their retrospective review. The Department will also continue to measure the impact of regulations on small entities as required by the RFA. In addition, the Department will consider the number of workers protected by the rule. As discussed previously, the Department, through the Regulatory Council may consider the development of best practices for metric design.

b. Steps that the Department has taken to ensure that it has the data available with which to conduct a robust retrospective analysis:

The Department collects data that may be useful in facilitating robust retrospective analysis through databases that track compliance rates, as well as injury and illness rates. The enforcement databases are linked to regulations and particular provisions within each regulation. Accident rates are tracked by "type," which indicates the principal "cause" of the injury. For example, data may show the "types" of accidents that were most frequent for workers in a particular industry over the past decade. Accident numbers have trended down over time, but the relationship among types of accidents does not appear to have

changed substantially. Consequently, the data for the most recent year can be used instead of time series data. Because there may be multiple regulations that address types with high accident rates, accident data may be more useful for identifying regulations associated with low accident rates.

The Department may continue to consult with stakeholders, including small businesses, to obtain data to conduct retrospective review. An example of steps taken to ensure data for review is found in OFCCP's efforts to revise regulations to ensure that associated reporting and recordkeeping requirements provide data to review the effectiveness of the regulation as well as compliance rates. As a result, OFCCP is learning more about how the regulated community collects and uses its data, which should allow OFCCP to request data in a way that requires as little effort and analysis by the regulated community as possible, while still allowing OFCCP to perform meaningful analysis. In addition, OFCCP continues to explore analytical and statistical approaches to further refine what data is required and minimize the burden on the regulated community. OFCCP also is exploring ways to use existing data to make the most effective use of its limited human and financial resources.

c. How, if at all, will the agency incorporate experimental designs into retrospective analyses?

The Department is contemplating how to incorporate the use of experimental designs to determine the impact of various regulations. Additionally, non-experimental data analysis can also inform retrospective analyses. For example, in an effort to understand the best methods for ensuring employer compliance with the Department's requirements, the Assistant Secretary for Policy's Chief Evaluation Officer (CEO) is planning an analysis of existing administrative data across several agencies. The analysis will examine the use and impact of civil and monetary penalties (CMPs) and liquidated damages on employer responsiveness to determine if the size or frequency of penalties have an effect. Additionally, CEO is proposing a blanket purchase order to analyze administrative data sets from various agencies to examine topics of interest for the Department, informing future policy and regulation.

VII. Publishing the Agency's Plan Online

The Department will consider publishing its retrospective review plans and available data at www.DOL.gov. If the Department does post plans to the website, the staff from the relevant agency will be assigned to ensure that the plans are updated.